

**DETERMINATION OF INJURY UNDER THE GCC COMMON-LAW ON
ANTIDUMPING, COUNTERVAILING MEASURES AND SAFEGUARD
MEASURES AND ITS RULES OF IMPLEMENTATION**

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ABSTRACT: *Anti-dumping investigations consist of two major stages. The first stage involves identification of whether the product under the investigations is being dumped. Once the investigative authority finds that the product is being dumped, it moves the second phase, injury determination. While significant experience has been gained in the first stage, the second stage came to the scrutiny relatively recently. Indeed, in earlier times the majority of anti-dumping investigations were terminated at the first stage. Only few anti-dumping complaints reached the second stage. However, with the proliferation of anti-dumping investigations in the United States and the EU, many anti-dumping complaints now reach the injury determination stage. Due to this developed many of the concepts of injury determination has been clarified. However, some of them remain vague and ambiguous. The current paper looks at these concepts and attempts to explain them. The vast majority of the existing research on anti-dumping understandably focuses on the US and the EU anti-dumping laws. Recently, scholars began paying more attention to the development of anti-dumping laws in China and India. There is also the research covering anti-dumping legislation in Australia, Canada, Mexico, and Brazil and so on. However, very little research is available on anti-dumping laws of the States belonging to the Gulf Cooperation Council (GCC). There are few works that mention the GCC Common Law on Law on Antidumping, Countervailing Measures and Safeguard Measures and its Rules of Implementation (GCC Common Law). These works, however, do not provide any in-depth analysis of the GCC Common Law provisions. The current paper aims to address the research gap by focusing on injury determination provisions contained in the GCC Common Law.*

KEYWORDS: *Anti-Dumping, Gulf States, Saudi Arabia, WTO*

INTRODUCTION

In 2005, the Kingdom of Saudi Arabia (KSA) became a member of the World Trade Organisation (WTO). By virtue of the membership the Kingdom became bound by the WTO law on dumping; i.e. the Agreement on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures. Prior to the accession to the WTO, Saudi Arabia already had an antidumping legislation entitled 'Protecting and Encouraging National Industries in Saudi Arabia Law'. This law addressed the methods of protecting national industries by using the tariffs and quantitative restrictions against imports of goods that might have negative influence on the Saudi market. The accession to the WTO meant that Saudi Arabia should adapt its law to be compatible with the WTO agreements. The adaption came in the form of the GCC Common Law on Antidumping, Countervailing Measures and Safeguards Measures and Its Rules of

Implementation (GCC Common Law). The KSA implemented this law by passing Royal Decree No 30 on 14 June 2006.

In a word, one may observe that the WTO-consistent anti-dumping legislation is a new experience for the KSA and for the GCC in general. The GCC and the KSA are notoriously inexperienced when it comes to anti-dumping measures. Kazzi observes that up to date no GCC state filed a request for consultation in the WTO in general and regarding dumping in particular (Kazzi, 2014). The author notes that one of the reasons why the GCC states are reluctant to use the WTO framework for resolving trade issues is their lack of expertise and knowledge of the WTO rules.¹ Indeed, the process of bringing an action within the WTO is complex and requires significant legal expertise. A Member State must prepare legal and economic information that essentially cannot be prepared by other Member States or the WTO bodies.² In other words, a Member State must alone confront the problem of gathering and presenting the relevant data. Ironically, despite the lack of expertise, the GCC governments delay introduction of courses and training programs that would comprehensively cover the issue related to international trade.³

At the same time, it would be misleading to state that the GCC countries do not have any experience in anti-dumping. Although they do not appear as complainants in the trade disputes that are resolved in the WTO framework, they occasionally appear in proceedings involving anti-dumping issues as third parties and even make submissions. For instance, the United Arab Emirates (UAE) appeared as a third party in *Canada — Welded Pipe*.⁴ The UAE even made submissions on such issues of whether for the purposes of immediate termination of the proceeding the margins of dumping must be determined on exporter-specific or country-wide basis.⁵ Another issue on which the UAE submitted its position is the treatment of imports from exporters with *de minimis* margins of dumping in the injury investigation.⁶ The KSA appeared as a third party in *EU — Biodiesel*.⁷ The representatives of the KSA made submissions and made oral statements. The issues on which the positions were submitted are: the meaning of the term ‘cost’ incurred by exporter or producer under investigation and the standard of reasonableness of assessing the costs incurred by exporter or producer under investigation.⁸ Furthermore, the KSA appeared as a third party in *US — Anti-Dumping Methodologies (China)*.⁹ However, in this proceeding the Kingdom submitted neither written nor oral arguments to the WTO Panel. Moreover, the KSA participated as a

¹ Ibid

² Ibid

³ Ibid

⁴ WTO, *Canada - Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu – Panel Report* (21 December 2016) WT/DS482/R

⁵ Ibid

⁶ Ibid

⁷ WTO, *European Union — Anti-Dumping Measures on Biodiesel from Argentina – Report of the Appellate Body* (6 October 2016) DS473

⁸ Ibid

⁹ WTO, *United States — Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China – Report of the Panel* (19 October 2016) DS471

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third party in *US — Washing Machines*.¹⁰ In this case, the KSA did not make written submissions, but participated in oral arguments. Another dispute in which the KSA took part as a third party is *China — HP-SSST (Japan)*.¹¹ No written submissions were made by the Kingdom in that case. In addition, Saudi Arabia made a third party-appearance in *China — Autos (US)*.¹² In that case, the KSA made both oral statements and written submissions. The KSA also appeared as a third party in *China — GOES*.¹³ In that case, the Kingdom made the submission that the price effects must be attributed to subject imports and expressed its position on other relevant issues.¹⁴

Furthermore, the GCC states in general and the KSA in particular gained some experience in anti-dumping proceedings by virtue of actions brought against them by other jurisdictions. Several cases were filed against Saudi companies in India, Turkey and the EU (Mattar, 2014). These cases resulted in termination of investigations and duties imposed.¹⁵ While participation in such proceedings in the capacity of a defendant may be a stressful experience for businesses and government, it also enhances experience.

Finally, there are certain domestic anti-dumping developments. Recently, the Middle East Battery Company, a KSA company, and Reem Batteries & Power Appliances Co. SAOC, an Omani company made a complaint against South Korea. The complaint contends that: ‘the imports of electric lead-acid accumulators of capacity of 35 up to 115 Amp-hour, whether or not rectangular (including square) of a kind used for starting piston engines (Automotive Batteries) originating in or exporting from the Republic of South Korea...are imported into the GCC market at dumped prices and are thereby causing material injury to the GCC domestic industry of the like product’.¹⁶

The Permanent Committee on Anti-Injurious Practices in International Trade (Permanent Committee), established under the Common Law and charged with the review of the complaints, approved the initiation of the investigation and the publication of the notice of initiation in the Official Gazette of the Bureau of the Technical Secretariat for Anti-Injurious Practices in International Trade (Official Gazette). The letter of intent has been sent to the embassy of South Korea in Riyadh.¹⁷

¹⁰ WTO, *United States — Anti-dumping and Countervailing Measures on large residential washers from Korea — Report of the Appellate Body* (7 September 2016) DS464

¹¹ WTO, *China — Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (“HP-SSST”) from Japan — Report of the Appellate Body* (14 October 2015) DS454

¹² WTO, *China — Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States — Report of the Panel* (23 May 2014) DS440

¹³ WTO, *China — Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States — Report of the Appellate Body* (18 October 2012) DS414

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Bureau of Technical Secretariat for Anti-Injurious Practices in International Trade, ‘Notice: Concerning the Initiation of an Anti-Dumping Investigation against the Imports of Electric Lead-Acid Accumulators of Capacity of 35 up to 115 Amp-hour, Whether or not Rectangular (Including Square) of a Kind Used for Starting Piston Engines (Automotive Batteries) Originating in or Exported from the Republic of Korea’ (2015) 5 (31) Official Gazette 4

¹⁷ Bureau of Technical Secretariat (n 19)

Another anti-dumping complaint was submitted by the National Committee of the Iron Industries to the Saudi's Chambers Committee. According to its Chairman, Shuail Alayad, the Chinese iron is the biggest competitor to the Saudi product and the increase in the quantity of the iron imported led to the dumping stage (Al-Bakmi, 2016). The Sub-National Committee for the Iron Industry in the Council of the Saudi Chambers also warned against serious consequences that may occur by virtue of the impact of global economy on iron industry in the KSA. It called all relevant authorities to intervene expeditiously to deal with the surplus production, to impose more than 20% as a protection fees on iron imports, to encourage and support the export of iron to increase its competition capacity and to deal positively with the surplus for the long term (Al-Materi, 2016). In March 2015, the Chairman of the Committee of the ready-mixed concrete, Yasser Al-Sohimi, pointed to a similar problem in the ready-mixed concrete sector. He argued that the production capacity of 40 ready-mixed concrete factories in the city decreased by about 50% because of the dumping (Al-Sohimi, 2016). A third serious dumping allegation is related to Turkish eggs. According to the egg traders in Saudi Arabia, a big fall in the prices of the Saudi eggs has been mainly caused by low prices of Turkish eggs. The local production of eggs decreased. Al-Mahmudy, an investor in the poultry sector, state that 'the surplus in the domestic market puts pressure on the price which contributed to its lowering'.¹⁸ Furthermore, he explains that since four months and as a result of the closure of the borders between Turkey and Russia, the Saudi local market is witnessing clearly the dumping of the market by Turkish eggs.¹⁹

Some of the statements issued by the representatives of the interested parties reveal the misconceptions the Saudi businesses hold about dumping injuries. The statements alarmingly sound as calling for protectionism. However, it is not the function of anti-dumping law to serve as a tool for protectionism, although some commentators observe that it is often used as such (Prusa, 2005). In *Solutions of urea and ammonium nitrate originating in Russia*, the EU Council correctly noted that 'the objective of an anti-dumping duty is not to close the Community market from third country imports but to restore a fair level playing field'.²⁰ This statement shows that anti-dumping laws are designed to ensure fair game, rather than to protect domestic industries from fair competition. The aforementioned statements liberally make allegation of dumping solely because prices went down. This is an oversimplified view of injury. From the perspective of anti-dumping laws, injury is a much more complex concept. For this reason, it is often challenging to determine it.

The Concept of Injury

Injury is one of the central concepts of anti-dumping law. Some scholars opine that injury to domestic producers must be a sole cause that would justify anti-dumping measures against exporters (Goetz, 2005). Such an approach is adopted by the current WTO/EU anti-dumping regimes. However, it was not always so. The WTO anti-dumping framework has been always greatly influenced by the US anti-dumping law.

¹⁸ 'Turkish eggs put pressure on the Saudi eggs that caused lowering its prices'

¹⁹ Ibid

²⁰ **Council Regulation (EC) No 238/2008 of 10 March 2008 terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) No 384/96 of the anti-dumping duty on imports of solutions of urea and ammonium nitrate originating in Russia [2008] 75 OJ L 14**

In the early days of development of anti-dumping mechanisms, the use of anti-dumping measures was based on whether there was a predatory intent on the part of the producers (Nedumpara, 2016). However, since the 1920s the US anti-dumping legislation moved from the predatory intent-based anti-dumping laws to injury-based ones.²¹ The predatory intent considerations, however, did not disappear: the US Tariff Commission continued considering whether there was the predatory intent in order to justify its decision to impose anti-dumping duties.²² Since the 1960s the decisions began to be based mainly on the injury considerations.²³ Finally, the Trade Agreement Act 1979 set forth the material injury test as the basis for the decision of whether to impose anti-dumping duties.²⁴

The way injury is interpreted affects the extent of freedom of trade. Thus, if the interpretation is broad and inclusive, then a protectionist stance is almost unavoidable. At the same time, if the interpretation is too narrow, then States will be essentially barred from taking any efficient measures against the dumped imports. Jameson, observing how the US International Trade Commission interpreted the concept of injury, claimed that the interpretation is not sufficient to grant relief to US industry that suffers from the dumped imports and other developments incited by global trade liberalization (Jameson, 1986). According to him, the Commission must have taken a broader approach to the interpretation of the concept of injury so as to hold that a mere existence of unfairly traded imports in the US market constitutes an injury.²⁵ Such stance is obviously protectionist. Fortunately, the drafters of the WTO and the EU instruments took a more balanced approach toward the concept of injury.

Article 3 of the ADA begins with a footnote, which defines the term ‘injury’ as including ‘material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry’. The EU Basic Anti-Dumping Regulation defines injury in a similar way but instead of a domestic industry it refers to ‘the Union industry’.²⁶ The concept of injury as set forth in Article 3 of the ADA and Article 3 of the EU Basic Anti-Dumping Regulation was first articulated in GATT 1947 (Madden, 1984). Article VI of GATT 1947 refers to all the three types of injury. However, it took some time before the three types of injury became recognized in domestic legislation.²⁷ For instance, the US Trade Practices Act 1974 initially referred to ‘injury’ without any qualifications.²⁸ Congress was reluctant to refer to ‘material injury’ because it was concerned that the term ‘material’ as understood in the US law would mean the standard higher than that one contemplated by GATT 1947.²⁹ Later, the obligations the United State undertook within the GATT

²¹ Ibid

²² Ibid

²³ Ibid

²⁴ Ibid

²⁵ Ibid

²⁶ **Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union [2016] 176 OJ L 21, art 3 (1)**

²⁷ General Agreement on Tariffs and Trade (GATT) 1947, 55 UNTS 194

²⁸ Madden (n 85)

²⁹ Ibid

framework that suggested that it must adopt the material injury standard and the threat of material injury standard.³⁰

At this point, it is important to note that the term ‘injury’ relates to the domestic/Union industry. In other words, the object of injury is the domestic/Union industry and not the general welfare of a country. The concept of domestic/Union industry is discussed in detailed manner in one of the subsequent sections. Here, it suffices to explain that the attachment of the term ‘injury’ to the domestic/Union industry reflect the object of anti-dumping law: to shield domestic producers from unfair trade practices. Anti-dumping laws are not concerned with questions of general welfare. In fact, they may undermine general welfare by enabling protectionism. Murray and Rousslang recognize that low price of imports, while potentially hurting domestic producers, benefit domestic consumers and thus, are likely to improve national net welfare (Murray and Rousslang, 1989)

Both Article 3 of the ADA and Article 3 of the EU Basic Anti-Dumping Regulation do not provide definitions of material injury, threat of material injury and material retardation. However, some insight can be gained from the analysis of domestic legislation and cases that employ the same concepts. In *American Spring Wire Corp. v. United States*, the US Court of International Trade, referring to the US legislation, pointed that material injury is an injury as ‘harm which is not inconsequential, immaterial, or unimportant’.³¹ Such an observation suggests that to be actionable a material injury must have tangible consequences and must be important.

The threat of material injury suggests that material injury has not been suffered by the domestic injury. This standard means only that there is evidence demonstrating that the dumping will cause foreseeable and imminent injury provided that no measures are taken (Can Chang, 2012). In *Republic Steel Corp. v. United States*, the US Court of International Trade recognized that threat of material injury is a separate matter from material injury.³² The Court found that establishing threat of material injury requires a different approach and cannot be solely based on the very same data which led to the determinations that there is no actual material injury.³³ In *Hubei Xinyegang Steel Co*, the CJEU accepted that a higher standard applies when it comes to establishing a threat of injury.³⁴

The concept of material retardation suggests that, although there was no material injury or threat of a material injury, the establishment of a domestic industry has been seriously retarded.³⁵ In *Metallverken Nederland BV v. US*, the US Court of International Trade noted that material retardation is the lowest level of injury.³⁶ The EU Commission explains material retardation as follows. Dumped imports may potentially discourage

³⁰ Ibid

³¹ *American Spring Wire Corp. v. United States*, 590 F. Supp. 1273, 8 C.I.T. 20 (Ct. Int'l Trade 1984)

³² *Republic Steel Corp. v. United States*, 591 F. Supp. 640, 8 C.I.T. 29 (Ct. Int'l Trade 1984)

³³ Ibid

³⁴ **Case T-528/09 *Hubei Xinyegang Steel Co. Ltd v Council of the European Union* [2014]ECLI:EU:T:2014:35**

³⁵ Chang (n 92)

³⁶ *Metallverken Nederland BV v. US*, 728 F. Supp. 730 (Ct. Int'l Trade 1989)

‘potentially interested EU firms from producing the product concerned’.³⁷ The Commission concedes that material retardation can be a sole basis of the anti-dumping complaint. At the same time, the Commission points that allegations of material retardation ‘normally supplement those on injury’.³⁸ This reservation suggests that the claim that is based on the actual material injury and on the material retardation will have stronger merits than the claim based solely on the material retardation.

The relationship between the three standards is not clear (Clarke and Horlick, 2007). Specifically, it is not clear whether finding of only one of the aforementioned forms suffices to qualify as an injury or it is necessary to establish that at least more than one of the forms in order to prove that there is an injury.³⁹ According to some cases, the simultaneous finding of material injury and material retardation is inconsistent. Thus, in *Korea—Antidumping Duties on Imports of Polyacetal Resins from the United States* WTO Panel noted that it would be an incompatible finding that dumped imports injured domestic industry and at the same time materially retarded the establishment of the domestic industry.⁴⁰ Hence, according to the Panel, at least two of the standards of the concept of injury, material injury to a domestic industry and material retardation of the establishment of the domestic industry are mutually exclusive.

To sum up, both the ADA and the Basic Anti-Dumping Regulation define injury as encompassing three standards: material injury, the threat of material injury and material retardation. Yet, the laws omit defining these concepts. They stop short at defining what factors should be taken into account in order to evaluate these types of injuries. The analysis of case law allows suggesting that material injury is the highest level of injury, while material retardation is the lowest level. It appears then that the lower the level, the higher standard of proof. For instance, investigative authorities must adhere to the higher standard when it comes to proving the threat of material injury.

The Two Major Principles of Injury Determination

General Remarks

Article 3.1 of the ADA and Article 3 (2) of the EU Basic Anti-Dumping Regulation provide that injury determination ‘shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products’. In *Thailand — H-Beams*, the WTO Appellate Body in relation to the similar provisions in the SCM Agreement indicated that they are overarching provisions that set forth fundamental and substantial obligations of Member States in respect of injury determination.⁴¹ The Appellate Body also noted that these provisions are clarified in the subsequent paragraphs.⁴² In *Egypt — Steel Rebar*, the WTO Panel noted that these

³⁷ European Commission, ‘Guide on How Draft an Anti-Dumping Complaint’ [2009] 343 OJ L 51, para 102

³⁸ Ibid, para 103

³⁹ Ibid

⁴⁰ WTO, *Korea—Antidumping Duties on Imports of Polyacetal Resins from the United States – Report of the Panel* (2 April 1993) ADP/92

⁴¹ WTO, *Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland – Report of the Appellate Body* (12 March 2001) WT/DS122/AB/R

⁴² Ibid

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provisions constitute general guidance as ‘to the nature of the injury investigation and analysis that must be conducted by an investigating authority’.⁴³In a word, the provisions set the fundamental principles which must guide investigative authorities. One may distinguish two major concepts in these provisions: positive evidence and objective determination. These concepts are discussed in a greater detail in the following parts.

Positive Evidence

What constitutes positive evidence in injury determination is a critical issue in anti-dumping investigations. In *US-Hot-Rolled Steel*, the WTO Appellate Body indicated that positive evidence must be of an affirmative, objective and verifiable nature.⁴⁴ Such evidence also must be credible.⁴⁵ Furthermore, the decision of the Appellate Body in *US — Lead and Bismuth II* suggests that the concept of positive evidence bars the investigative authorities to ground their decisions on assumptions.⁴⁶ In that case, the Appellate Body pointed out that the presumptions made at earlier stages of the investigations must be reviewed at later stages in the light of positive evidence. Furthermore, in *Mexico — Anti-Dumping Duties on Rice*, the Appellate Body clarified that the concept of positive evidence does not completely reject assumptions.⁴⁷ However, any assumptions must be based on positive evidence.⁴⁸ According to the Appellate Body, assumptions are based on positive evidence when they constitute ‘reasonable inferences from a credible basis of facts’ and are capable of being sufficiently explained.⁴⁹ The Appellate Body further noted that assumptions cannot be considered as being based on positive evidence when the investigative authority fails to explain why it is appropriate to use them in the analysis.⁵⁰

Positive evidence may have a wide scope. In *Thailand — H-Beams*, the Appellate Body conceded that the concept of positive evidence is not confined to evidence disclosed to, or discernible by, the parties to the investigation.⁵¹ The Appellate Body pointed that anti-dumping investigations may involve both confidential and non-confidential information.⁵² The requirement of positive evidence does not exclude confidential information.⁵³ At the same time, the Appellate Body drew attention that the decision must be based on the totality of evidence, which includes confidential and non-confidential information.⁵⁴

⁴³ WTO, *Egypt — Definitive Anti-Dumping Measures on Steel Rebar from Turkey – Report of the Panel* (8 August 2002) WT/DS211/R

⁴⁴ WTO, *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Report of the Appellate Body* (24 July 2001) WT/DS184/AB/R

⁴⁵ Ibid

⁴⁶ WTO, *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom - Report of the Appellate Body* (10 May 2000) WT/DS184/AB/R

⁴⁷ WTO, *Mexico — Definitive Anti-Dumping Measures on Beef and Rice – Report of the Appellate Body* (29 November 2005) WT/DS295/AB/R

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ *Thailand — H-Beams* (n 103)

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid

In practice, investigative authorities use various data that qualifies as positive evidence. For instance, the EU institutions use the Eurostat data as positive evidence of import volumes and prices (Van Bael, I., and Bellis, 2011). If for some reason the Commission finds the Eurostat data unreliable, it may use statistics of other countries.⁵⁵ For instance, on one of the occasions the Commission used the statistics of the Chinese customs authorities.⁵⁶ In addition, the EU Commission may use the accounting data from the third parties provided that the method of accounting is reasonable.⁵⁷

In *EU — Biodiesel*, Argentina challenged the use by the EU the revised data on the production capacity in reaching decision that overcapacity was the other factor causing an injury.⁵⁸ The country argued that the revised data played a significant role in the analysis and the extent to which the data influenced the analysis was unacceptable by virtue of the principles of positive evidence and objective examination.⁵⁹ Argentina claimed that the requirement to make injury determination based on positive evidence was an absolute one.⁶⁰ The Appellate Body disagreed with such a position.⁶¹ It specified that the positive evidence and objective examination requirements mean that these standards must be met by every investigative authority in every anti-dumping examination.⁶² However, this requirement is silent on the extent to which certain evidence must or must not play a role in the analysis.⁶³

One may observe that in the WTO adjudication, the concept of positive evidence is interpreted broadly as providing only general guidance as to injury determination. The Court of Justice of the European Union interprets these provisions in a similar manner. Thus, the CJEU on numerous occasions pointed out that as far as the EU institutions are concerned, they enjoy a wide discretion in setting a common commercial policy.⁶⁴ The reason why the EU institutions enjoy such a wide discretion is that common commercial policy often involves complex economic, political and legal issues.⁶⁵ Furthermore, the CJEU repeatedly affirmed that injury determination involves the assessment of complex economic matters. For this reason, the EU investigative authorities enjoy a wide discretion in injury determinations.⁶⁶ Therefore, the CJEU limits its review to mainly procedural matters.⁶⁷ In *Interpipe Niko Tube* the CJEU rejected the claim since a significant amount of data from the EU seamless pipes and tubes industry was missing as the result of the industry's refusal to cooperation, the

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ WTO, *European Union — Anti-Dumping Measures on Biodiesel from Argentina — Report of the Appellate Body* (6 October 2016) DS473, para 6.1.3.3

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Ibid

⁶² Ibid

⁶³ Ibid

⁶⁴ Case 191/82 *Fediol v Commission* [1983] ECR 2913; Case C-535/06 P *Moser Baer India v Council* [2009] ECR I-7051; Case T-156/11 *Since Hardware (Guangzhou) v Council* [2012] ECR

⁶⁵ Case C-351/04 *Ikea Wholesale Ltd v Commissioners of Customs & Excise* [2007] ECR I-07723

⁶⁶ Case T-164/94 *Ferchimex v Council* [1995] ECR II-2681; Case T-107/04 *Aluminium Silicon Mill Products v Council* [2007] ECR II-669; Case C-69/89 *Nakajima All Precision Co. Ltd v Council of the European Communities* [1991] ECR I-02069

⁶⁷ *EFMA v Council* [1999] ECR II-3291

analysis was not based on positive evidence. The rejection suggests that the positive evidence principle says nothing about the amount of data and the extent to which it influences the decision of the investigative authority.⁶⁸

Academic interpretation of the concept of positive evidence is mainly based on the interpretation of the WTO adjudication bodies. Thus, Chang observes that the concept of positive evidence is mainly concerned with the quality of evidence the investigative authorities may use in order to make injury determination (Can Chang, 2012). Referring to the Oxford Dictionary, the author points out that the term ‘positive’ means ‘formally or explicitly stated; definite, unquestionable (positive proof)’.⁶⁹ He further observes that reiterates the wording of the Appellate Body, stating that positive evidence means the evidence affirmative, objective and verifiable character, and adds that it must be credible.⁷⁰ However, it appears from Chang’s analysis that the dictionary meaning of positive evidence is much stricter than the meaning the WTO adjudication bodies and the CJEU attribute to it. Indeed, the aforementioned cases show that the evidence in anti-dumping investigations is often questionable and indefinite. Yet, the WTO adjudication bodies and the CJEU view such evidence as the positive evidence merely because they acknowledge that investigative bodies enjoy a wide discretion when it comes to evidence.

Objective Examination

Objective examination is the second fundamental principle of injury determination. In *US — Hot-Rolled Steel*, the Appellate Body explained the difference between the positive evidence requirement and the objective examination principle.⁷¹ According to the Appellate Body, while the concept of positive evidence is concerned with facts, the concept of objective examination is concerned with the investigative process.⁷² The Appellate Body further pointed out that the principle of objective examination requires that the examination process, which involves collection of information, inquiries and evaluation, must comply with ‘the basic principles of good faith and fundamental fairness’.⁷³ It was further observed that objective examination means that the domestic industry and the effects of dumped import must be investigated ‘in an unbiased manner, without favouring the interests of any interested party, or group of interested parties’.⁷⁴ In other words, the principle of objective examination requires the investigation to be even-handed.

The case law sheds a light on what kind of examination cannot qualify as an objective one. In *US — Hot-Rolled Steel*, the Appellate Body ruled that when the investigative authorities examine only a part of domestic industry, without giving a satisfactory explanation of why it is not necessary to examine other parts, it will not comply with

⁶⁸ *Joined cases C-191/09 P and C-200/09 P Council of the European Union and Commission of the European Communities v Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT) and Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT)* [2012] ECLI:EU:C:2012:78

⁶⁹ *Ibid*

⁷⁰ *Ibid*

⁷¹ *US — Hot-Rolled Steel* (n 108)

⁷² *Ibid*

⁷³ *Ibid*

⁷⁴ *Ibid*

the objective examination requirement.⁷⁵ In *Mexico — Anti-Dumping Duties on Rice*, the Appellate Body observed the selective use of information in investigation violates the objective examination principle.⁷⁶ The Appellate Body noted that the principle requires the investigative authorities to rely on ‘data which provide an accurate and unbiased picture of what it is that one is examining’.⁷⁷ The objective examination requires case-specific approach and rejects making decisions based on generalities. In *EC-Bed Linen*, the Appellate Body found that the EC investigative authorities failed to comply with objective examination principle when they regarded all imports from non-examined exporters and producers as dumped only because a number of exporters from the sample were found to have dumping.⁷⁸ The Appellate Body specified that such an approach means that the EC simply presumes that the imports from non-examined producers are dumped only because they are subject to imposition of anti-dumping duties.⁷⁹ The Appellate Body explained that such an approach makes the finding that the domestic industry is injured more likely and therefore, is inconsistent with the objectivity requirement.⁸⁰

As well as the principle of positive evidence, the principle of objective examination is interpreted broadly by the CJEU. In *Gold East Paper*, the CJEU rejected the argument that by grounding its analysis on the sample consisting of the four complaining producers, the EU Commission did not comply with the objective examination principle.⁸¹ The Court pointed out that in making injury determinations the investigative authorities depend on the willingness of the parties to cooperate in providing them with the necessary information within the prescribed periods.⁸² According to the Court’s logic, if the parties are unwilling cooperate and thus, the data is limited, the analysis based on such limited data does not violate the objective examination principle. Essentially, the Court ruled that it is up to the investigative authority to decide whether or not to proceed on the limited data and if it decided to proceed, it cannot be said that the objective examination principle is violated since the investigative authority enjoys a wide discretion in anti-dumping matters.

Such position of the Court is supported by other cases. In *Sun Sang Kong Yuen Shoes Factory*, the CJEU refused to uphold that the EU investigative authority failed to comply with the objective examination principle when they did not take into account a piece of evidence submitted by the complainant.⁸³ The Court found that the EU investigative authorities did not exceed their discretion.⁸⁴ The decision once again suggests that the discretion is wide and the objective examination principle does not

⁷⁵ Ibid

⁷⁶ *Mexico — Anti-Dumping Duties on Rice* (n 109)

⁷⁷ Ibid

⁷⁸ WTO, *European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India – Report of the Appellate Body* (1 March 2001) WT/DS141/AB/R

⁷⁹ Ibid

⁸⁰ Ibid

⁸¹ **Case T-443/11 *Gold East Paper (Jiangsu) Co. Ltd and Gold Huasheng Paper (Suzhou Industrial Park) Co. Ltd v Council of the European Union* [2014] EU:T:2014:774**

⁸² Ibid

⁸³ **Case T-409/06 *Sun Sang Kong Yuen Shoes Factory (Hui Yang) Corp. Ltd v Council of the European Union* [2010] ECR II-00807**

⁸⁴ Ibid

mean that the investigative authority must take into account all the evidence submitted by producers under investigation.

The Two Major Factors

General remarks

According to Article 3.1 of the ADA and Article 3 (2) of the EU Basic Anti-Dumping Regulation, injury determination must be based on the two major factors: (1) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products and (2) the consequent impact of these imports on domestic producers of such products. Both factors involve complex concepts such as ‘like products’, ‘dumped imports’ and so on. In the following sections, the factors and the concepts are examined in a greater detail.

Volume of dumped imports

No specific methodology of the assessment

Article 3.2 of the ADA and Article 3 (3) of the EU Basic Anti-Dumping Regulation provides guidance as to how the volume of the dumped imports must be assessed. Specifically, Article 3.2 of the ADA and Article 3(3) of the Regulation accordingly provide that the investigative authorities should look at whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. The analysis of the WTO case law shows that complainants attempt to use this provision in order to challenge various methodologies adopted by the investigative authorities. However, the WTO adjudication bodies, as a rule, reject such arguments. On several occasions they ruled that as far as the assessment of a significant increase in the dumped imports is concerned, Article 3.2 does not set forth any specific methodology.

In *EC — Salmon (Norway)*, the WTO Panel pointed out that the ADA does not provide any specified methodology for determining the volume of dumped imports.⁸⁵ The Panel drew attention that the ADA requires the volume to be determined on the basis of positive evidence and through an objective examination.⁸⁶ Furthermore, in *Thailand — H-Beams*, the WTO Panel noted that it is up to the investigative authority to decide what kind of methodology is to be used in order to determine whether there had been a significant increase in the dumped imports.⁸⁷ In addition, the Panel found that nothing in Article 3.2 suggests the frequency of the imports analysis.⁸⁸ In particular, the Panel rejected Poland’s claim that the quarterly analysis of the imports were too frequent.⁸⁹ The Panel found that the Thai investigative authorities were entitled to make such an analysis.

In *Mexico — Steel Pipes*, the WTO Panel pointed out that Mexico violated the provisions of Article 3.2 by estimating the volume of the dumped imports by using a

⁸⁵ WTO, *European Communities — Anti-Dumping Measure on Farmed Salmon from Norway – Report of the Panel* (16 November 2007) DS337, paras. 7.632-7.634

⁸⁶ *Ibid*

⁸⁷ WTO, *Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland – Report of the Panel* (28 September 2000) WT/DS122/AB/R, para. 7.159

⁸⁸ *Ibid*, para. 7.168

⁸⁹ *Ibid*

non-representative sample.⁹⁰ The Panel opined that Mexico could have obtained more credible data to assess the volume of imports.⁹¹ It was specified that Mexico could base its conclusion on a statistically robust sample provided by the competent Mexican government agency.⁹² Furthermore, the Panel found that Mexico violated Article 3.2 by assessing imports from countries other than Guatemala.⁹³

In *Guatemala — Cement II*, Mexico argued that Guatemala violated Article 3.2 because it based its decision on the data that covered only one-year.⁹⁴ The Panel rejected the argument. The Panel noted that Article 3.2 suggests nothing about the period about which the data should be collected to see whether there has been a significant increase in dumped imports.⁹⁵ In other words, the Panel once again held that no specific methodology is required by Article 3.2: here the assumption that the assessment of increase in volume of dumped import requires the data covering a certain timeframe was rejected.

Dumped imports

One may observe that as far as the volume factor is concerned, Article 3.2 employs two concepts: significant increase and dumped imports. Neither the ADA nor the EU Basic Anti-Dumping Regulation gives the definition of ‘dumped imports’. They only provide the definition of a dumped product. The ADA defines a dumped product as follows: ‘a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country’.⁹⁶ The EU Basic Anti-Dumping Regulation adopts a very similar definition, with few exceptions. First, the definition omits the clarification following after the words ‘being dumped’.⁹⁷ Second, it explicitly states that it concerns the product exported to the Union.⁹⁸ Third, instead of the concept of ‘normal value’, the EU Regulations refers to a ‘comparable price’.

It appears that the clarification made after the words ‘being dumped’ in the ADA essentially refers to the process of importing. In other words, a product being dumped in a country means that a dumped product is exported in a country. The common sense suggests that dumped imports refer to the imports of dumped products, eg products, whose export prices less than a normal value for a like product, in the ordinary course

⁹⁰ WTO, *Mexico — Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala — Report of the Panel* (8 June 2007) DS331, paras. 7.293–7.295

⁹¹ Ibid

⁹² Ibid

⁹³ Ibid

⁹⁴ WTO, *Guatemala — Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico — Report of the Panel* (24 October 2000) DS156, para 8.266

⁹⁵ Ibid

⁹⁶ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement), 1868 UNTS 201, Article 2.1

⁹⁷ **Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union [2016], Article 1 (2)**

⁹⁸ Ibid

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of trade, as established for the exporting country. Therefore, the full definition of dumped imports should be read as follows: imports of products, whose export price is less than a normal value/comparable price for a like product, in the ordinary course of trade, as established for the exporting country. This complicated definition requires explanation of the several concepts involved: 'less than normal value/comparable price', 'like product', 'ordinary course of trade'. The explanation of these concepts is given below.

In *US — Oil Country Tubular Goods Sunset Reviews*, the Panel explained that the starting point for defining normal value is 'the comparable price, in the ordinary course of trade' for the like product when it is marketed in the exporting country.⁹⁹ According to the Panel, this suggests that in the first place the investigative authority must compare home market and export prices.¹⁰⁰ The concept of comparable price in the EU framework is very similar to the concept of normal value in the WTO framework. Thus, in *Ikea Wholesale*, the CJEU similarly to the Panel observed that determination of dumping therefore entails a comparison between, on the one hand, the export price of the product under investigation and, on the other hand, the normal value of the like product on the domestic market of the country of origin'.¹⁰¹ While the concepts of a comparable price and normal value are similar, it appears that there is a difference. In *US — Oil Country Tubular Goods Sunset Reviews*, the Panel, while emphasizing that the comparison between the home market prices and export prices is fundamental for determination of dumping, nevertheless reserved that only in the circumstances listed in Article 2.2 (the absence of sales of like products in ordinary course of business in the domestic market of the exporting country, or the absence of opportunity to compare the prices because of the particular market situation or the low volume of the sales in the domestic market of the exporting country) the investigative authority can 'look to alternative bases to home market prices, such as costs' in order to determine normal value.¹⁰² The EU Basic Anti-Dumping Regulation also allows comparison with bases other than home market prices. However, the circumstances in which such comparison is permitted are slightly different. Under the EU framework, these circumstances are: the absence of production or sale of the like product in the market of the exporting country.¹⁰³ It appears that the WTO regime is more liberal when it comes to the circumstances in which the investigative authority is allowed to use bases of comparison other than home market prices. Specifically, the ADA more vaguely describes the circumstances referring to 'particular market situation' and 'low volume of sales'. The EU Regulation does not speak of low volumes: it speaks of absence of sales. Thus, its wording is stricter than that one of the ADA. Furthermore, the EU Regulation does not refer to ambiguous 'particular market situation'. It simply mentioned two circumstances: the exporter in the exporting country does not produce or does not sell the like product in the exporting country.

⁹⁹WTO, *United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina- Report of the Panel* (16 July 2004) DS268, para. 7.76

¹⁰⁰ Ibid

¹⁰¹ Case C-351/04 *Ikea Wholesale Ltd v Commissioners of Customs & Excise* [2007] ECR I-07723, Para 112

¹⁰²*US — Oil Country Tubular Goods Sunset Reviews* (n 163)

¹⁰³**Regulation (EU) 2016/1036 (n 161), Article 2 (1)**

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As far as the concept of the like product is concerned, in *US — Orange Juice (Brazil)*, the Panel pointed out that the term ‘product’ refers to product as a whole as opposed to individual transactions.¹⁰⁴ Furthermore, in *EC — Salmon (Norway)* the Panel pointed out that Article 2.1 does not provide guidance as to the parameters of the scope of the relevant product.¹⁰⁵ Moreover, in *EC — Fasteners (China)*, the Panel found that the concept of the like product does not require an internal homogeneity of that product.¹⁰⁶ Neither the ADA nor the EU Basic Anti-Dumping Regulation defines the concept of the ordinary course of trade. However, in *US — Hot-Rolled Steel*, the Appellate Body agreed with the definition offered by the United States. According to that definition, the ordinary course of trade refers to ‘conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been normal for sales of the foreign like product’.¹⁰⁷ In simple terms, the ordinary course of trade refers to the established conditions and practices of trade.

To sum up, the concept of dumped imports refers to imports of products, whose export price is less than a normal value/comparable price for a like product, in the ordinary course of trade, as established for the exporting country. The normal value is usually ascertained from the comparison between the home market prices and the export prices. Under the limited circle of circumstances, the investigative authorities may resort to other bases of comparison. The EU framework is more restrictive when it comes to such circumstances than the WTO anti-dumping law. The concept of like products does not suggest any specific parameters and thus does not require homogeneity of the relevant products. The ordinary course of trade refers to the established conditions and practices of trade.

Significant increase

The concept of significant increase has been interpreted by the WTO adjudication bodies in the context of instruments other than the ADA. Considering the identical wording in the 1979 Subsidies Code, the WTO Panel in *Salmon CVD* pointed out that the requirement of a significant increase in volume first of all requires that there must be a change in volume.¹⁰⁸ The Panel specified that the continued constant level, even if they are high, do not mean change in volume.¹⁰⁹ Furthermore, in another case arising out of the 1979 Subsidies Code the Panel specified that simply a large share held by the exporters does not satisfy a significant increase standard.¹¹⁰

¹⁰⁴ WTO, *United States — Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil – Report of the Panel* (25 March 2011) DS382, para. 7.135

¹⁰⁵ *EC — Salmon (Norway)* (n 149), para. 7.48

¹⁰⁶ WTO, *European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Report of the Panel* (3 December 2010) DS397, para. 7.265

¹⁰⁷ WTO, *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Report of the Appellate Body* (24 July 2001) WT/DS184/AB/R, para. 139

¹⁰⁸ WTO, *United States - Imposition of Countervailing Duty on Imports of Fresh and Chilled Atlantic Salmon from Norway – Report of the Panel* (30 November 1992) ADP/87, paras 266-267

¹⁰⁹ *Ibid*

¹¹⁰ WTO, *Brazil—Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community – Report of the Panel* (27 January 1994) SCM/179

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As far as the concept of significant increase arising out of the ADA is concerned, the Panel does not take a strict wording approach. In *Thailand — H-Beams*, the Panel pointed out that even if the investigative authority fails to characterize the increase in the dumped imports as ‘significant’, it does not mean that the authority violates the significant increase concept.¹¹¹ The Panel specified: ‘that the word ‘significant’ does not necessarily need to appear in the text of the relevant document’.¹¹² The wording is thus secondary. It suffices that from the records of the investigative authority it is apparent that the authority has considered whether the increase was significant.

Effect of the Dumped Imports on Prices

Possible effects

Article 3.2 of the ADA and Article 3 (3) of the EU Basic Anti-Dumping Regulation direct the investigative authorities to consider the following while assessing the effect of the dumped imports on prices in the domestic market: whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member/of the Union industry or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.¹¹³ The Articles make it clear that these directions do not give decisive guidance. In *Korea — Certain Paper*, the Panel interpreted the effect provisions as suggesting the following possible effects: significant price undercutting, significant price depression, or significant price suppression.¹¹⁴ In the following sections, these effects are discussed in more details.

Price Undercutting

Price undercutting is the effect of the dumped imports that consists in the sale by the domestic producers the relevant products at lower prices or in undermining the prices of the domestic producers.¹¹⁵ Article 3.2 requires an investigative authority to establish whether there is link between the subject imports and price undercutting.¹¹⁶ It must be a causal link. In other words, price undercutting must be an effect of the dumped imports.¹¹⁷

In *Egypt — Steel Rebar*, the Panel pointed out that Article 3.2 does not require making the price undercutting analysis in any particular way.¹¹⁸ The Panel reiterated this position in *EC — Tube or Pipe Fittings* by indicating that, although Article 3.2 requires

¹¹¹WTO, *Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland – Report of the Panel* (28 September 2000) WT/DS122/AB/R, para 7.161

¹¹² Ibid

¹¹³Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement), 1868 UNTS 201, Article 3.2 and **Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union [2016], Article 3 (3)**

¹¹⁴ WTO, *Korea — Anti-Dumping Duties on Imports of Certain Paper from Indonesia – Report of the Panel* (28 October 2005), DS312, para. 7.253

¹¹⁵ WTO, *China — Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (“HP-SSST”) from Japan – Report of the Appellate Body* (14 October 2015) DS454, para 5.158

¹¹⁶ Ibid

¹¹⁷ Ibid

¹¹⁸WTO, *Egypt — Definitive Anti-Dumping Measures on Steel Rebar from Turkey – Report of the Panel* (8 August 2002) WT/DS211/R, paras. 7.70 and 7.73

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the investigative body to consider whether price undercutting is ‘significant’, it does not set forth any specific methodology for determination of a margin of undercutting.¹¹⁹ It appears that the only limitations to the discretion of the investigative authority come in the form of the positive evidence and objective examination principles. In *EC — Salmon (Norway)*, the Panel found that by not taking into account a price premium for the domestic product over the imports while determining whether there was price undercutting, the EU did not conduct the price undercutting analysis objectively and thus, failed to comply with Articles 3.1 and 3.2.¹²⁰

At the same time, in *EC — Fasteners (China)* the Panel found that by not having regard to the due allowance for the price differences in the home market prices and the export prices the EU did not violate Article 3.2.¹²¹ The Panel once again reiterated that Article 3.2 does not set forth any methodology for the price undercutting analysis.¹²² Furthermore, the Panel noted that the discretion of the investigative authority is limited by the general requirements of objective examination and positive evidence.¹²³ However, such limitations do not require paying respect to the due allowance.¹²⁴

Price Depression

The Oxford Dictionary defines depression as ‘[t]he action of lowering something or pressing something down.’¹²⁵ Price depression therefore means the action of lowering prices or pressing them down. In the context of Article 3.2 price depression thus refers to the effect of the dumped imports that consists in that the domestic produces by virtue of the dumped imports are made to lower down prices or press them down.

In *China — GOES*, the Appellate Body pointed out that Article 3.2 instructs an investigating authority to consider whether price depression is a consequence of subject imports.¹²⁶ The Appellate Body specified that an investigating authority is required to consider whether subject imports ‘has explanatory force for the occurrence of significant depression... in domestic prices’.¹²⁷ Furthermore, the Appellate Body noted that the elements relevant to the consideration of significant price depression may differ from those ones relevant to the consideration of significant price undercutting.¹²⁸ It was further explained that while prices of subject imports do not significantly undercut prices in the domestic market, they nevertheless may have a price-depressing effect on the domestic prices.¹²⁹

¹¹⁹WTO, *European Communities — Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil – Report of the Panel* DS219 (7 March 2003), para. 7.281

¹²⁰*EC — Salmon (Norway)* (n 149), para. 7.640

¹²¹ WTO, *European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Report of the Panel* (3 December 2010) DS397, para 7.328

¹²² Ibid

¹²³ Ibid

¹²⁴ Ibid

¹²⁵ ‘Depression’ (Oxford Dictionaries Online) <<https://en.oxforddictionaries.com/definition/depression>> accessed 28 February 2017

¹²⁶ WTO, *China — Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States – Report of the Appellate Body* (18 October 2012) DS414, para 136

¹²⁷ Ibid

¹²⁸ Ibid 137

¹²⁹ Ibid

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Overall, the ruling in *China — GOES* suggests that there is a notable difference between price undercutting and price depression. Unfortunately, the Appellate Body did not specify this difference. It only noted that the methods to analyze price undercutting and price depression may differ.

Price Suppression

The wording in Article 3.2 and its interpretation in *Korea — Certain Paper* suggests that price suppression refers to the effect of the dumped imports that consists in preventing prices from increases. The Appellate Body interprets price suppression essentially in the same way as price depression. Specifically, it points out that price suppression effect suggests that there must be a link between the subject imports and the prevention of prices from growing.¹³⁰ Similarly, the Appellate Body noted that while the dumped imports may not undercut prices, it may nevertheless prevent them from growing.¹³¹ Also, the Appellate Body pointed out that the elements taken into account in the price undercutting analysis and the elements of the price suppression analysis may differ.¹³²

Consequent Impact on Domestic Producers

General Remarks

The second major factor that must be considered in injury determinations is the consequent impact of the dumped imports on domestic producers. Article 3.4 of the ADA and Article 3 (5) of the EU Basic Anti-Dumping Regulation provide general guidance as to how the consequent impact must be ascertained. Specifically, the assessment of the consequential impact must include:

- (1) an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity;
- (2) factors affecting domestic prices;
- (3) the magnitude of the margin of dumping;
- (4) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.¹³³

The EU Basic Anti-Dumping Regulation provides for slightly different guidance to assess consequent impact on domestic producers. As well as the ADA, it requires an evaluation of all relevant economic factors and indices, but it differs in the aspects on which these factors and indices must have a bearing impact. In addition to actual and potential decline in sales, profits, output, market share, productivity, return on investments and utilization of capacity and other factors referred to in Article 3.2, it lists such factor as the fact that an industry is still in the process of recovering from the effects of past dumping or subsidization.¹³⁴ The lists are not exhaustive. Furthermore, it

¹³⁰ *China — GOES* (n 190), para 136

¹³¹ *Ibid*, para 137

¹³² *Ibid*

¹³³ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement), 1868 UNTS 201, Article 3.2

¹³⁴ **Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union [2016], Article 3 (5)**

is provided that neither one nor several factors necessarily give decisive guidance. In the following sections, the factors are considered in greater details.

Relevant Economic Factors

The relevant economic factors referred to in Article 3.4 there are: actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity. In *EC — Bed Linen*, the Appellate Body ruled that these factors are mandatory, not merely illustrative ones.¹³⁵ The Appellate Body drew attention that the word ‘including’ suggests that the list of these factors is not exhaustive.¹³⁶ These factors should be considered among all the factors. In a word, while the list of the factors is not exhaustive, it is mandatory. Also, consideration of other relevant economic factors is not only allowed, but encouraged. In *Mexico — Corn Syrup*, the Panel reaffirmed the mandatory nature of the factors.¹³⁷ Furthermore, the Panel pointed out that consideration of each factor must be apparent in the final determination of the investigative authority.¹³⁸

Factors Affecting Domestic Prices

In *Egypt — Steel Rebar*, the Panel specified that Article 3.4 does not require considering all factors affecting domestic prices.¹³⁹ The Panel noted that Article 3.4 requires only evaluation of factors affecting domestic prices in accordance with the principle of objective examination.¹⁴⁰ In *EC — Tube or Pipe Fittings*, the Panel held that the reference to factors affecting domestic prices in Article 3.4 does not mean that the investigative authority should go beyond the Article 3.2 price analysis.¹⁴¹ Furthermore, the Panel opined that nothing in Article 3.4 suggests that the investigative authority is required to observe that certain of the factors potentially affecting price are better to be analysis within the cumulative assessment framework provided by Article 3.5.¹⁴²

Magnitude of the Margin of Dumping

The magnitude of the margin of dumping is an injury indicator, which is assessed on the macroeconomic level. In *EU — Footwear (China)*, the Panel rejected China’s argument that the EU Commission barely evaluated the impact of the magnitude of the margin of dumping.¹⁴³ In its determination, the Commission only indicated that the magnitude of the actual margin of dumping could not be considered as negligible.¹⁴⁴ No other specifications of the impact on the margin were given. Yet, the Panel concluded that this observation made by the Commission suffices to hold that the

¹³⁵WTO, *European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India — Report of the Panel* (30 October 2000) WT/DS141/AB/R, para 6.154–6.159

¹³⁶ Ibid

¹³⁷ WTO, *Mexico — Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States — Report of the Panel* (28 January 2000) DS132, para 7.128

¹³⁸ Ibid

¹³⁹ WTO, *Egypt — Definitive Anti-Dumping Measures on Steel Rebar from Turkey — Report of the Panel* (8 August 2002) WT/DS211/R, paras. 7.60–7.61

¹⁴⁰ Ibid

¹⁴¹WTO, *European Communities — Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil — Report of the Panel* DS219 (7 March 2003), para 7.335

¹⁴² Ibid

¹⁴³ WTO, *European Union — Anti-Dumping Measures on Certain Footwear from China — Report of the Panel* (28 October 2011), para 7.430

¹⁴⁴ Ibid

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Commission duly considered the impact of the magnitude of the margin of dumping.¹⁴⁵ The decision suggests that in order to comply with the requirement to consider the impact of the margin of dumping on the domestic industry, it suffices for the investigative authority to indicate that the factor was considered and that its impact was found to be not negligible without further specifications.

Actual and Potential Negative Effects

The fourth factor in the consequent impact analysis requires examination of actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. In *EC — Tube or Pipe Fittings*, Brazil complained that the EU Commission failed to consider such factor as actual and potential negative effects on growth. The Panel noted that indeed in the relevant document there was no separate record of an evaluation of actual and potential negative effect on growth.¹⁴⁶ However, the Panel pointed out that this factor was implicitly addressed by the Commission elsewhere in the document.¹⁴⁷ Hence, the Panel did not find violation of Article 3.4. The holding suggests that the Panel does not require strictly formalistic approach in addressing the actual and potential negative effects factor. Rather, the Panel looks at the substance of the content of the relevant document and when such examination shows that the factor has been addressed, although implicitly, the investigative authority is considered to be in compliance with Article 3.4.

CONCLUSION

The assessment of the consequent impact of the dumped import on domestic producers must be based on the list of factors specified in Article 3.4. Although the list is not exhaustive, it is mandatory. It means that in the relevant document the investigation authority must address all the factors. The address does not have to be explicit. It can be ascertained implicitly from the document. In a word, while applying the strict all factors standard, the WTO adjudication bodies make allowances as to the form in which the factors must be addressed.

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¹⁴⁵ Ibid

¹⁴⁶ *European Communities — Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil — Report of the Panel DS219* (7 March 2003), para 7.310

¹⁴⁷ Ibid

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