

Chapter 6

Injury and Causation in Trade Remedies: Developments Under the Doha Round

Abstract This chapter examines the various proposals concerning the improvement to the treaty language on injury and causation under the Rules negotiations of the Doha Round. The proposals are made specifically in relation to the Antidumping as well as the Subsidies and Countervailing Measures Agreement. This chapter analyses the key proposals by the negotiating countries and whether there is any convergence of views among the WTO Members on any of the outstanding topics of injury and causation.

A Introduction

The Doha Round of trade negotiations that were launched in November 2001 had an ambitious agenda. In the Doha Ministerial Declaration, WTO Members agreed to undertake “negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants.”¹ Reforming the trade remedy agreements was considered to be particularly important in the light of the increasing use of trade remedies in multiple jurisdictions. Negotiations on trade remedy instruments such as antidumping, subsidies and countervailing measures (including fisheries subsidies and RTAs, collectively known as Rules negotiations) turned out to be one of the key areas of discussion under the Doha Round. Several proposals were made during 2002–2007, the initial and perhaps the most active phase of the Doha Round to reform or clarify the existing provisions of the Antidumping Agreement and the Subsidies and Countervailing Measures Agreement. Several proposals were initiated for clarifying the treaty provisions on injury and causality in these agreements as well. It is noteworthy that a similar exercise was not undertaken in the case of the Agreement on Safeguards.

¹World Trade Organization, Ministerial Declaration of 14 November, 2001, WT/MIN (01)/DEC/1, 41 I.L.M. 746 (2002) (hereinafter *Doha Declaration*).

In December, 2005 at the WTO Ministerial Conference in Hong Kong, the Negotiating Group on Rules was directed “to intensify and accelerate the negotiating process” and also mandated the Chairman to prepare consolidated texts of the Anti-Dumping and Subsidies Agreements “that shall be the basis for the final stage of the negotiations.” On the basis of the Ministerial Conference decision, the Chair of the Negotiating Group on Rules, Ambassador Guillermo Valles Galmés of Uruguay circulated to members on November 30, 2007 his first draft of consolidated texts on anti-dumping, subsidies and countervailing measures, including fisheries subsidies. The Chair’s texts proposed a number of changes in the Anti-Dumping Agreement. The Chair of the Negotiating Group on Rules (NGR) subsequently issued a Chairman’s text in 2011.

This chapter summarizes the various proposals submitted by the WTO members and analyses whether these proposals make substantial progress in elucidating the framework on injury and causation. By examining this issue, this chapter seeks to address the question whether there is consensus among the WTO members in using quantitative tools for establishing causation.

B Rules Negotiations and Members’ Proposals

By early 2002, various WTO panels and the Appellate Body (AB) had issued several landmark decisions in the field of injury and causation. The WTO panel and Appellate Body decisions, which I had examined exhaustively in Chap. 3, had already been issued and set the standard for the conduct of non-attribution analysis. The WTO panels and AB decisions in *EC—Bed Linen*,² and the panel’s decision in *Thailand—H Beams*³ had set important principles in the assessment of injury factors for determination of material injury and the assessment of other known factors which cause injury to the domestic industry at the same time as the dumped or subsidized imports. In the field of safeguard investigations, the WTO panels and the Appellate Body had clarified the scope of non-attribution analysis in cases such as the *Argentina—footwear*,⁴ *US—Wheat Gluten*,⁵ *US—Lamb*,⁶ *US—Line*

²Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linens from India*, WT/DS141/AB/R/W (April 24, 2003).

³Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R (April 5, 2001).

⁴Appellate Body Report, *Argentina—Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (January 12, 2000).

⁵Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R (January 19, 2001).

⁶Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R (May 16, 2001).

*Pipe*⁷ and *US—Tyres*.⁸ These cases not only provided significant clarification in the conduct of the causation test, but also introduced standards which were generally non-existent or unheard of at the time of the conclusion of the Uruguay Round.

Immediately after the launch of the Doha Round, a group of countries including Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand and Turkey submitted a series of proposals.⁹ These set of countries known in the negotiating circles as the “Friends of Antidumping” (for short, “Friends Group” or “FAN”) represent exporting countries that are often targeted in antidumping proceedings in major importing markets. The United States and European Union were also active in negotiations. The United States, in particular, was interested in improving the strength and effectiveness of the Antidumping Agreement.¹⁰

The following discussion focuses on some of the specific proposals in the field of causation under the Rules negotiations.

C Relationship Between Material Injury and Causation

Under Article 3.1 of the ADA, an antidumping authority is to engage in an “objective examination” of “the volume of dumped imports”, “the effect of dumped imports on prices in the domestic market for like products”, and the consequent impact of dumped imports. Articles 3.2 and 3.4 of the ADA elaborate on these obligations, as does Article 3.7 of the ADA with respect to threat of injury determinations.

On November 22, 2002, the Friends Group made a proposal seeking to clarify the relationship between Articles 3.4 and other provisions of Article 3 to establish a more meaningful guidance for injury determination.¹¹ The Friends Group proposal noted that WTO dispute settlement panels and the Appellate Body have confirmed that the authorities must consider all elements as listed in Articles 3.1, 3.2 and 3.4 and all other known elements as listed in Article 3.5 in determining the existence of injury to domestic industry through the effects of dumping.

The Friends Group proposal referred to the WTO panel ruling in *Thailand—H Beams*¹² that the injury analysis must contain “a persuasive explanation as to how

⁷Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R (March 8, 2002).

⁸Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R (October 5, 2011).

⁹See William Kerr and Laura Loppacher, *Anti-dumping in the Doha Negotiations: Fairy Tales at the World Trade Organization*, 38(2) JOURNAL OF WORLD TRADE 211, 216 (2004).

¹⁰*Id.* at 216.

¹¹Negotiating Group on Rules, Paper by Friends of Antidumping, Antidumping: Illustrative Major Issues, TN/RL/W/6 (April 26, 2002).

¹²Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R ¶ 8.3(b) (April 5, 2001) as modified by the Appellate Body.

the evaluation of relevant factors led to the determination of injury.” The proposal noted that the scope of review by panels and the Appellate Body on individual injury determinations were limited because Article 3 provides little guidance on how the authorities should analyze these factors in determining injury.

FAN paper on interaction between Articles 3.1, 3.2, 3.4 and 3.5 of ADA.

It is our view that Members should make substantial progress in clarifying a fair, reasonable and rigorous approach to the various injury factors as listed in Article 3.4, and to other factors set out in provisions of Articles 3.1 through 3.5. According to Article 3.1, injury determination involves, inter alia, an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports prices in the domestic market for the like product, and (b) the impact of those imports on domestic producers. These elements are further elaborated in Articles 3.2 and Article 3.4. Article 3.5 spells out the requirement for demonstration of a causal relationship leading to injury through the effects of dumping as set forth in Articles 3.2 and 3.4. Article 3.5 further provides guidance with respect to which factors other than the effects of dumped imports that shall be examined in determining such a causal relationship. It is therefore necessary to clarify the relationship between Article 3.4 and other provisions of Article 3 to establish more meaningful guidance for injury determination.

Friends Group made an additional submission seeking clarification of Article 3.4.¹³ The proposal sought to elucidate the concept of ‘material injury’. The FAN proposal included an amendment of footnote 9 of the ADA in order to clarify the definition of material injury:

FAN Proposal: Article 3.4 of ADA

The term ‘material injury to a domestic industry’ means the state of the domestic industry as demonstrated by an important and measurable deterioration in the operating performance of the domestic industry, based on an overall assessment of all relevant economic factors and indices having a bearing on the state of the domestic industry including those enumerated in Article 3.4.

The Friends Group proposal also noted that Article 3.4 of the current AD Agreement lists factors that must be considered when injury is determined, but does not provide adequate guidance to evaluate those factors. The United States too felt that the scope of the authority’s obligation to examine “relevant factors and indices” other than the ones explicitly listed in Article 3.4 of the ADA and Article 15.4 of the ASCM is less clear. However, other members such as Australia had doubts about the additional need to clarify the examination of injury factors included in Article 3.4 of the ADA and its relationship with other provisions of Article 3 such as Article 3.1 and 3.2 and 3.5.

Australia’s questions on FAN proposals on Article 3.4 Injury parameters

1. Do the proponents consider that this is an area where agreement could be reached on criteria used to evaluate injury factors?
2. Do the proponents consider that the ADA must specify all circumstances in relation to the factors outlined in Article 3.4? As Article 3.4 state in the last sentence, “this list is

¹³Negotiating Group on Rules, Paper from Friends of Antidumping, *Second Submission of Proposals on the Determination of Injury*, *Negotiating Group on Rules*, TN/RL/W/38 (March 23, 2005).

not exhaustive, nor can one or several of these factors necessarily give decisive guidance.”

3. Could the proponents elaborate on what is meant by clarifying the relationship between Article 3.4 and other provisions of Article 3?

Brazil's response to Australia's queries

We have now had more than two decades of experience, with dozens of different countries and legal systems applying these factors to a wide variety of industries. Although we do not believe we can or should devise rigid mathematical formulas, we believe that the Members could make substantial progress in clarifying a fair, reasonable and rigorous approach to the various injury factors.

We do not consider that all circumstances must be specified in the ADA. However, the fact that we need not (indeed, could not) specify all circumstances is not a reason to avoid any and all efforts at clarification. There are many areas where clarification can and should be made, even if the list itself continues to be non-exhaustive.

On the other hand, certain other WTO Members such as Egypt observed that the various panel and Appellate Body reports have provided sufficient guidance on the obligations imposed on investigating authorities in injury determinations and that the case specific analysis of the injury factors should be left to the discretion of the investigating authorities.¹⁴

In regard to the relationship between Articles 3.1, 3.2, 3.4 and 3.5 of the ADA, the United States made a proposal in June 2003.¹⁵ As is evident from the discussions in Chaps. 3 and 4 of this book, the volume of dumped imports is crucial in determining the volume effect in the injury and causation determination. The Appellate Body in the *EC—Bed Linen*,¹⁶ observed that Articles 3.1 and 3.2 of the ADA “do not set out a specific methodology that investigating authorities are required to follow when calculating the volume of dumped imports”. The Appellate Body also acknowledged that, in the light of ADA Article 6.10 (and under the circumstances described in the second sentence therein), these provisions must be interpreted in a way that does not require investigating authorities to investigate each producer or importer individually for the purposes of assigning a dumping margin. While the Appellate Body concluded that the EC’s particular method of calculating the volume of “dumped imports” did not satisfy the requirements of Articles 3.1 and 3.2, it stated that there may be several possible ways of making such calculations that did satisfy these provisions. Members should consider whether the ADA should be clarified to specify methods that investigating authorities can readily implement in the injury investigation to calculate the volume of dumped imports for the purposes of Articles 3.1 and 3.2 especially when the investigating authorities may not be examining each individual producer or importer.

¹⁴Negotiating Group on Rules, Communication from Egypt, TN/RL/ W/56 (Feb. 10, 2003).

¹⁵Negotiating Group on Rules, Communication from the United States, TN/RL/W/130 (June 20, 2003).

¹⁶Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linens from India*, WT/DS141/AB/R/W (April 24, 2003).

1 *Degree of Causal Relationship*

According to the paper submitted by the Friends of Antidumping, the AD Agreement does not sufficiently describe the methodologies for establishing causal link between dumping and injury.¹⁷ The FAN paper also noted that in practice authorities too often impose AD measures even when factors other than dumping are the substantial causes of the injury being experienced by the domestic industry. According to the Friends Group, in order to justify the imposition of AD measures, it is not sufficient that dumped imports merely have “contributed” to the material injury to some extent.¹⁸ The FAN submission on causation noted as follows:

FAN submission on causation

“The obligations set forth in Article 3.5 should be rigorously observed. Moreover doesn’t Article 3.5 merit further elaboration? In order to improve and clarify the Agreement, isn’t it important to develop the procedures and criteria utilized to analyze the causal relationship, with a view to ensure that, even in the presence of other factors, a causal relationship will be found only when there is clear and substantial link between the dumped imports and the injury?”

In short, a key element of the paper was the need to introduce a substantial causal relationship between dumped imports and material injury to the domestic industry. In other words, if the cause of injury to the domestic industry is some other causal factor, then antidumping remedy should not be provided.

A similar proposal was made by China in 2003.¹⁹ The proposal made by China imputed that the present framework of causation in the ADA/SCMA is inadequate. China stated that Article 3.5 should be clarified to ensure that a causal link could only be established when the dumped import is the “substantial reason” for the injury to the domestic industry. In the NGR, Australia specifically asked a question whether the use of the “substantial cause” standard would undermine the scope of the antidumping.²⁰ China however asserted that Article 3.5 of the ADA, as it stands, fails to provide a methodology of defining the causal relationship between dumping and injury. China also expressed the desire that WTO Members could distinguish the injury caused by dumped imports from the injury caused by other factors and that antidumping measures could be taken only when the dumped imports are the major cause of the injury.²¹

¹⁷WTO Negotiating Group on Rules, *Proposal of the People’s Republic of China on the Negotiation on Antidumping*, TN/RL/W/66 (March 6, 2003).

¹⁸*Id.*

¹⁹*Id.*

²⁰WTO Negotiating Group on Rules, *Communication of Australia*, Paper by Australia: Comments on Document TN/RL/W/6, TN/RL/W/22 (October 15, 2002).

²¹WTO Negotiating Group on Rules, *Submission from the People’s Republic of China*, Replies to the Questions and Comments of the WTO Members Concerning the Proposal of China, TN/RL/W/94 (May 5, 2003).

The Friends of Antidumping submitted a second proposal in 2005 in which they called for an amendment to Article 3.5 of the ADA.

FAN proposal on the sufficiency of causal relationship

“It must be demonstrated that the dumped imports in and of themselves are, through the effects of dumping, as set forth in paragraph 2 and 4, causing injury within the meaning of this agreement. (emphasis not original)”

D Non-attribution Language

Article 3.5 of the ADA requires the establishment of a causal relationship between dumped imports and injury to the domestic industry. The investigating authorities are also required to examine any known factors other than the dumped imports which at the same time are injuring the domestic industry and the injuries caused by these other factors must not be attributed to dumped imports.

India also made a proposal on need for clarifying the “non-attribution” language in October 2002.²² The ‘non-attribution clause’ i.e. requirement for segregating injury caused by factors other than dumped imports was particularly controversial in view of the Appellate Body decision in *US—Hot rolled steel*.²³ According to the Appellate Body, investigating authorities when conducting causation analysis should ensure that the injurious effects of the other known factors are not attributed to dumped imports. As the Appellate Body stated, this analysis requires the investigating authorities to appropriately assess the injurious effects of those other factors; such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports.

India acknowledged that separating and distinguishing the injurious effects from the different causal factors could be a difficult exercise. However, India stressed that for invoking anti-dumping measures, there is a need to specify an appropriate standard for establishing causality between dumped imports and material injury. While refraining from prescribing any standard, India proposed that there is a need to elaborate Article 3.5 so as to provide appropriate guidance to investigating authorities while separating and distinguishing the injurious effects of other factors from the injurious effects caused by the dumped imports.

Around the same time in October, 2002, Australia made a proposal, which opposed drastic changes to the injury and causation provisions. According to Australia, there was no lack of clarity in Article 3.5 of the ADA; Australia noted

²²WTO Negotiating Group on Rules, *Second Submission of India: Antidumping Agreement*, TN/RL/W/26 (October 17, 2002).

²³Appellate Body Report, *US- Hot rolled Steel*, ¶¶ 225-228.

that Article 3.5 only required adequate regard to other injury factors. Australia noted in its submission.²⁴

Australia's position on Article 3.5

The question of causal link has been the subject of several recent WTO dispute settlement cases relating to anti-dumping and safeguards measures. The *Thailand Steel case* emphasized that although Article 3.5 requires that regard must be given by authorities to known factors other than dumped imports which are causing injury, this did not mean that there was an express requirement for an authority to examine these factors on their own initiative. However, they could choose to do so.

South Africa made a proposal in 2006 which reiterated the views expressed by Members such as the Friends of Antidumping, China and India.²⁵ South Africa acknowledged that it may not be possible to quantify exactly to what degree each factor is contributing to the injury affecting the domestic industry under investigation. However, according to South Africa, any inability at quantification of injury factors should not be a reason in granting import relief when other known factors contribute to a larger degree in the injury caused. In other words, according to South Africa, the injury caused by dumped imports must be at least as significant as the other known factors, individually or collectively. The extent of contribution should be borne out by the non-attribution, in South Africa's view.

As elaborately discussed in Chaps. 3 and 4 of this book, the most complex issue arising out of the implementation of the non-attribution analysis is the separation or isolation of the nature and extent of other known factors which may be causing injury to the domestic industry at the same time as the imports. While most of the WTO members agreed on the importance of this separation and segregation of effects, most of the proposals provided very little guidance on this issue. For example, Australia posed a couple of questions to China on the methodology for separation of the role of other known factors.

Australia's questions to China

Question: How does China envisage that these criteria of substantial reason can be made operational? Quantitative or qualitative assessment or should be even both examining causal link, and what should be done in practicable terms?

China's answer to Australia's question

Answer: As a common practice now, the causal relationship may be established if the investigating authorities determine that the dumped imports constitute one cause to the injury of the domestic industry in an antidumping investigation. Such loose provision leaves room for investigating authorities to discretionarily take measures to a great extent.

The purpose of the AD Agreement is to punish unfair trade practices, i.e. those measures which cause injury to the domestic industries of other Members through dumping. Article 3.5 of the AD Agreement provides that the investigating authorities shall also examine any

²⁴WTO Negotiating Group on Rules, Communication of Australia, Paper by Australia: Comments on Document TN/RL/W/6, TN/RL/W/22 (October 15, 2002).

²⁵Negotiating Group on Rules, Communication of South Africa (2006).

known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by those other factors must not be attributed to the dumped imports. However, this Article fails to provide the methodology of defining the causal relationship between dumping and injury, which leads to the fact that, the investigating authorities in practice always neglect those other factors and take it for granted that the injuries are attributed to the dumping. China holds that in order to determine the causal relationship in a correct manner, the Agreement should provide that the investigating authorities shall separate and distinguish the injuries caused by other factors not attributed to the dumped imports from all the injuries, and should specify the method to separate and distinguish such injuries.

As for the standard of assessment as well as the way of operation in practice, China is willing to discuss with other Members in a bid to establish an objective and operative standard.

In short, China did not specify any method for performing the non-attribution requirement. As Chaps. 3 and 4 of this book have examined, most users of antidumping have been using qualitative approaches for conducting non-attribution. It is revealing that most jurisdictions, including developed country Members such as the EU and Australia are not using quantitative tools in such examination. In several jurisdictions such as India, Brazil, Argentina, Turkey, Mexico and several other countries, the final antidumping proceedings have been at best qualitative and, in most cases, are based on a checklist approach. A particular known factor is raised only to be rejected as not being a cause. The possible causes of injury to the domestic industry could be several factors, but the findings, more often than not, do not discuss such factors. It is interesting to note that even a 2005 FAN proposal conceded the difficulty in separating and distinguishing the injurious effects of dumped imports from the injurious effect of other known factors.²⁶ It is pertinent to quote the FAN statement: “[i]t might be difficult, in most cases, to quantify precisely the degree to which dumped imports have contributed to the injury being experienced by the domestic industry relative to the effects of other factors”.²⁷ The FAN Group proposal also suggests that such a separation of the injurious effects could be based on a qualitative information or less than perfect quantitative information or estimates based on such information. The FAN Group proposes that the purpose of any examination is to find out whether the dumped imports in and of themselves are causing material injury and as to what type of evidence was analyzed in reaching the conclusion.²⁸

It is appropriate to mention in this regard that the United States had made two proposals in seeking to clarify the causation provision under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. In the first paper, the United States proposed that any clarification should ensure “that any affirmative obligations

²⁶WTO Negotiating Group on Rules, Paper from Friends of Antidumping, *Second Submission of Proposals on the Determination of Injury*, Negotiating Group on Rules, TN/RL/W/38 (March 23, 2005).

²⁷*Id.* at 7.

²⁸*Id.*

are clearly set forth in the Agreement and are workable for authorities to implement”²⁹ In the second paper, the United States also expressed the two key principles that any revision to the injury and causation provisions should embody (i) that an authority is not required to determine that dumped or subsidized imports are the sole cause of injury to the domestic industry.³⁰ This would confirm Members’ current understandings and practice; and (ii) when authorities assess the effects of known factors other than dumped or subsidized imports, they should not be required to quantify the effects of these factors. The United States further noted that they were not aware of any reliable methodology.³¹ Considering the fact that the United States was one of the very few jurisdictions that had used econometric models to quantify the extent of injury, this was an important statement. It is also pertinent to note that the US Court of Appeals for the Federal Circuit (USAFCA) has insisted in *Bratsk Aluminum Smelter v. United States*,³² that the U.S. International Trade Commission should provide quantitative explanation based on trade data in the injury determination.

In the subsequent paper, which was submitted in July 2005 and discussed at the September 2005 session of the Negotiating Group on Rules (NGR), the United States provided a further explanation of why clarification of the causation obligation established by Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement would be useful. The United States also explained and suggested several specific ways in which the obligation should be clarified. In light of the above, the text proposed by the United States on causation included a modification of Art 3.5 of the ADA and the insertion of a new Article, namely Article 3.5.1. The United States also proposed a similar revision to the concerned provision under the SCM Agreement. It may be noted that the proposed deletions are struck through, while the proposed additions are underlined.

Article 3.5 of the AD Agreement: U.S. Proposal

“It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry. As described in subparagraph 5.1, the authorities must not attribute to the dumped imports and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, inter alia, the volume and prices of imports not sold

²⁹Communication from the United States, *Identification of Additional Issues Under the Anti-Dumping and Subsidies Agreements*, TN/RL/W/98 (May 6, 2003).

³⁰Communication from the United States, *Causation (ADA Article 3.5; ASCM Article 15.5)*, TN/RL/GEN/59 (July 13, 2005).

³¹*Id.* fn. 7.

³²444 F.3d 1369 (Fed.Cir. 2006) (noting that the ITC will have to determine whether imposing the duties would benefit the domestic industry given the possibility of non-subject imports replacing the subject imports).

at dumping prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.”

Article 3.5.1 of the ADA: US Proposal

“To make an affirmative determination that dumped imports are causing injury, the authorities must determine that the effects of the dumped imports are injurious notwithstanding the effects of the other known factors. The authorities need not isolate or quantify the effects of either the dumped imports or the other known factors, either individually or collectively. They also need not evaluate whether the effects of the dumped imports are more important than the effects of the other known factors, either individually or collectively.”

On 30 November 2007, the Chair of the Negotiating Group on Rules issued a Draft Consolidated Chair Texts of the AD and SCM Agreements.³³ As the Chairman clarified, the draft texts on antidumping and subsidies/countervailing duties reflected a “bottom up” approach, identifying the most contentious issues contained in brackets with no legal text provided. The Chairman also noted that this was an interim step, pending the tabling of a revised text.

Chairman’s Text of the 2007 Working Document

“Article 3.5: It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries ous effects of caused by these other factors must not be attributed to the dumped imports.¹² The examination required by this paragraph may be based on a qualitative analysis of evidence concerning, *inter alia*, the nature, extent, geographic concentration, and timing of such injurious effects. While the authorities should seek to separate and distinguish the injurious effects of such other factors from the injurious effects of dumped imports, they need not quantify the injurious effects attributable to dumped imports and to other factors, nor weigh the injurious effects of dumped imports against those of other factors. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

¹² Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

³³ Negotiating Group on Rules, *Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/213 (November 30, 2007).

The draft calls upon “the authorities [to] seek to separate and distinguish the injurious effects of such other factors from the injurious effects of dumped imports”. One of the changes suggested in the 2007 Chairman’s Text was that the non-attribution analysis may be based on qualitative assessment, rather than a quantitative assessment which was a significant development from the general tenor of discussions that prevailed in the early phase of the Doha Round. The delegations of Hong Kong, China, Japan, Korea R P, Norway, Switzerland, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu submitted a paper which, inter alia, proposed certain amendments to the Chair’s Text. The proposal in essence argues that “to the extent that a quantitative analysis is impracticable, the examination required by this paragraph may be based on a qualitative analysis of evidence”.³⁴ This proposal indicates the differences among delegations in choosing an analytical tool in the causation analysis.

Subsequently, on May 8, 2008, the Chairman of the Negotiating Group on Rules issued a working document regarding negotiations on rules.³⁵ The document, which included a cover note and three Appendices relating to anti-dumping, horizontal subsidies and fisheries subsidies, sought to capture the full spectrum of issues and the reactions of delegations to the Chair’s 2007 draft. The Chairman issued another Text on Rules on December 19, 2008. The 2008 Chairman’s text included the following observation on causation.

Chairman’s Text on causation in 2008

[CAUSATION OF INJURY: Delegations maintain a wide range of views on such questions as whether it should be mandatory to separate and distinguish the effects of dumped imports and other factors, the extent to which authorities should be required to conduct a quantitative (as opposed to qualitative) analysis of non-attribution, and the extent to which authorities should be required to weigh the injurious effects of dumped imports against the effects of other factors.]³⁶

On April 21, 2011, the Chairman of the Negotiating Group on Rules issued a new legal text on Antidumping.³⁷ The objective of preparing the Chairman’s text is to “capture” the current situation in the Rules negotiations. The Chairman’s Text indicates that the language on causation is still bracketed, which indicates that there is no agreement or convergence of views on this important issue.

³⁴Negotiating Group on Rules, Hong Kong, China; Japan; Korea, Rep. of; Norway; Switzerland; and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, TN/RL/W/233 (March 12, 2008).

³⁵Negotiating Group on Rules, *Working Document from the Chairman*, TN/RL/W/232 (May 28, 2008).

³⁶Negotiating Group on Rules, *New Draft Consolidated Chair Texts for AD and SCM Agreements*, TN/RL/W/236 (December 19, 2008).

³⁷Negotiating Group on Rules, *Communication from the Chairman, Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade*, TN/RL/W/254 (April 11, 2011).

Chairman's Text on Causation in 2011

[CAUSATION OF INJURY: Delegations continue to hold widely diverging views on issues relating to causation of injury. Recent discussions have focused on two issues: whether it should be mandatory to separate and distinguish the effects of dumped imports and other factors, and the extent to which authorities should be required to conduct a quantitative (as opposed to qualitative) analysis of non-attribution. Although there seems to be a shared view that authorities should carefully consider the effects of factors other than dumped imports, and ensure they are not attributed to dumped imports, there are substantial gaps regarding the degree of precision that can or should be required.]

The Chairman's text on Article 3.5 of the Antidumping Agreement reflect the lack of consensus and understanding in identifying an acceptable standard on injury and causality (causation) in antidumping proceedings.

E Negotiations on Subsidies and Countervailing Measures

Although there have been fewer proposals on subsidies than on anti-dumping, a wide range of proposals have nevertheless been submitted regarding prohibited subsidies, actionable subsidies and export credits. In the SCMA negotiations, the Friends Group or other developing countries were not as active as they were in reformulating the language of injury and causation in antidumping proceedings. The United States made, perhaps the only substantive proposal in the negotiations on Agreement on Subsidies and Countervailing Measures.

U.S. Proposal on Causation in SCMA

"15.5 It must be demonstrated that the subsidized imports are, through the effects [footnote] of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry; As described in subparagraph 5.1, the authorities must not attribute to the subsidized imports and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, inter alia, the volume and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

15.5.1 To make an affirmative determination that subsidized imports are causing injury, the authorities must determine that the effects of the subsidized imports are injurious notwithstanding the effects of the other known factors. The authorities need not isolate or quantify the effects of either the subsidized imports or the other known factors, either individually or collectively. They also need not evaluate whether the effects of the subsidized imports are more important than the effects of the other known factors, either individually or collectively."

Notwithstanding the few submissions that were made in clarifying and elaborating the injury and causation provisions, the 2008 Chairman's Text did not include any suggested changes to Article 15 of the SCMA. It is also noteworthy that the Chairman of the Negotiating Group on Rules did not release any text in 2011.

F Conclusion

As the Chairman's text indicates, consensus on a widely acceptable language on injury and causal link in the context of Rules Negotiations has turned out to be almost elusive and extremely difficult in the WTO. Although most WTO members are in favour of rigorous assessment of injury and causation assessment, there is very little unanimity in the methodologies to be used. A bone of contention is whether the WTO members should necessarily segregate and isolate the injurious effects of other known factors as opposed to the injurious effects of dumped or subsidized imports. While a number of new users such as China, India and the FAN Group have suggested the importance of non-attribution analysis, they are yet to suggest concrete methodologies or analytical tools for carrying out the "segregation or separation" of effects of other factors. The new users are yet to endorse the use of econometric or statistical tools, whereas traditional users such as the United States that have developed sophisticated economic models are not in support of recommending such models. These contrasting positions call into question whether non-attribution in its strict sense is ever possible in trade remedies. Although the Rules negotiations have produced some serious discussion on causation, the debate on the use of quantitative as opposed to qualitative assessment is still inconclusive. In other words, the discussion on injury and causation in trade remedy instruments reflects the deeply divisive role of trade contingent protection among various WTO members. It also reaffirms the hypothesis of this study that trade remedies are inherently political instruments and that achieving scientific precision in injury and causation should neither be the goal nor the short term objective of trade remedy investigations.

Injury and Causation in Trade Remedy Law

A Study of WTO Law and Country Practices

Nedumpara, J.J.

2016, XLII, 262 p. 8 illus., 7 illus. in color., Hardcover

ISBN: 978-981-10-2196-1