

Preface and Acknowledgements

Trade remedy laws are firmly rooted either in the complex world of economics or in the intricacies of accounting. This is not typically a lawyer's discipline. For whatever reason, I developed a liking for this subject without fully appreciating the multi-disciplinary character of this field. This was not entirely surprising considering that trade remedy practice is one of the most prominent areas of international trade law practice and provides a lifeline for lawyers committed to remain in this specialization of practice. In particular, this area of practice flourished in India in the early 2000s and like any other trade lawyer, I wanted to plunge deep into this field.

Any introductory text book on trade remedies will straightaway mention that there are only three focal points in a trade remedy case: imports, injury, and causation. In other words, the requirement to establish causation between imports and injury to the domestic industry is a vital element. It is central to determining the liability for the exporters involved in trade remedy cases and for the domestic industry to get import relief. However, it was not difficult for me to realize that the international treaty provisions on establishing injury and causation were significantly deficient when compared to other disciplines of trade remedy law such as the determination of dumping or subsidization.

Several scholars have pointed out the logical fallacies in making imports a cause of injury. Much of the criticism came from the economists. The disconnect could not have been more apparent, as most of the legal practitioners and policy makers assumed that imports themselves are a cause of injury. Despite the logical contradictions and structural infirmities, trade remedy actions deserve a special place in international trade law practice. It is easy to condemn this branch of international trade law or policy, but for lawyers, businesses, and policy makers, the need for trade remedies cannot be overemphasized. Rather than condemning the application of trade remedy measures, I was convinced that the focus should be on making in the injury and causation findings coherent within the context of the present international legal framework. This study is a modest attempt in achieving a semblance of coherence or at least in highlighting the need for more structured enquiries in this field.

A substantial body of this publication stems from my doctoral research on the issues of injury and causation in trade remedy law both within the context of the WTO and member practices. The work heavily rests on the existing literature, journal articles, and various interviews, most of which are referenced in this book. During my research, I had a chance to meet with and speak to some of the leading exponents of trade remedy practice in various jurisdictions. The discussions were enriching and inspiring, but most of the practitioners and experts agreed that the present practices in demonstrating injury and causation required some deeper study and course correction. Some of the respondents addressed the need for a counterfactual “but-for” enquiry in injury and causation analysis. I found the discussion on the counterfactual analysis especially illuminating. I have devoted an entire chapter on the utility of Common Law analytical tools in the injury and causation analysis.

My own findings and observations emphasize the need for recasting the injury and causation standards in WTO trade remedy law based on the general theories of causation in law. In other words, the suggestions for incorporating terms such as “principal cause,” “substantial cause,” and “a cause in and of itself” are by no means new and are somewhat unnecessary, in my view. Some of these suggestions have been discussed at length and explicitly discarded in previous trade negotiations. Trade remedy instruments have a particular public choice function. The negotiating history of the various trade remedy agreements should not be lost sight of in this debate.

The use of quantitative tools is another interesting issue. Quantitative tools are almost impenetrable to most lawyers and there is a general aversion to using such tools, at least in trade remedy practice. It is surprising that the lack of faith in economic tools is deep even within some of the advanced jurisdictions. On the whole, most of the trade remedy users increasingly use qualitative tools—a method which is generally descriptive and fairly easy to use.

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James J. Nedumpara

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Nedumpara, J.J.

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