INJURY DETERMINATION IN ANTIDUMPING LAW

CHANG CAN

DOCTOR OF JURIDICAL SCIENCE
CITY UNIVERSITY OF HONG KONG
FEBRUARY 2012
Injury Determination in Antidumping Law
反傾銷法中的損害問題研究

Submitted to
School of Law
法學院
in Partial Fulfillment of the Requirements
for the Degree of Doctor of Juridical Science
法學博士學位

By

Chang Can
常粲

February 2012
二零一二年二月
Abstract

Of the two necessary conditions for imposing antidumping duties (Dumping and Injury), the provisions concerning injury leave more latitude to the administrators of the antidumping law. Therefore, to restrain the abuse of antidumping measures effectively, attention should be concentrated on the injury determination mechanism. Concerning how to conduct an injury determination, this thesis performs the analysis from the following aspects, which formed separate chapters: basic principles and elements of an injury determination, determination of the causal link, special considerations for the “threat of material injury” and “material retardation” standards.

Within each chapter, in the first place, the thesis summarizes the specific requirements for the injury determination based on Article 3 of the Antidumping Agreement and interpretation thereof by the relevant authority, for example, the WTO Panel/Appellate Body. Secondly, the thesis would find out some common problems while examining whether the injury determination conducted by the WTO member states conforms to the above requirements. Finally, the thesis proposes feasible solutions to tackle these problems and puts forward a positive reformation scheme in accordance with the philosophy of the WTO system.

The basic principles and elements for an injury determination have been elaborated by the content of the Anti-dumping Agreement (hereinafter the “ADA”) together with interpretations by the WTO Panel/Appellate Body. Although the analytic method of antidumping reports may substantially differ among the WTO member states, they have enacted similar antidumping law provisions to Article 3 of the Antidumping Agreement and implemented consistent procedures. Therefore, the space for abuse and the flexibility endowed to the investigating authority is limited, though problems still exist, especially for the developing countries.
This thesis pointed out that “causal link” is a determinative factor for an injury investigation; however, in most countries the causation determination was not conducted in a satisfactory way. The causation threshold under the current Antidumping Agreement is relatively low which would leave a hole in embankment and connived at the flood of the antidumping measures. Furthermore, in many circumstances the investigating authority has confused “Causality” with “Correlation”. This thesis advocates a further strengthening of the causation standard.

The “threat of material injury” standard, which is not frequently applied, is a preventive mechanism permitting the investigating authority to act before actual injury of domestic industries happened. The nature of this standard indicated that any conclusion made as to the anticipated injury can only be based on assumptions and any decision is nothing more than speculation in absence of a refined analysis. Especially when economic situation deteriorates, this standard is easy to be manipulated by protectionists to shelter the vulnerable domestic industry from the outside competition. Therefore, this thesis suggested that this standard be subject to stricter and more detailed rules.

The “material retardation” standard is discussed and relied on by few countries for the antidumping investigation. Based on an exhaustive study on relevant antidumping reports issued by the pioneer users, this thesis discussed the following questions: (1) how to define a domestic industry is established or not; (2) how to examine whether material retardation has occurred where the data on the economic factors may be unavailable due to the relatively short time the domestic producer has been in existence; (3) how to take into consideration a special factor “viability of the industry” for the causation determination. In this way, this thesis generalizes a legislative framework and a balanced way for
enforcing the retardation standard.

To sum up, in light of the nature of antidumping law, the reformatory direction for the injury determination is to restrict abuse of antidumping measures by promulgating detailed rules and implementing strict procedures. Specifically speaking, the first priority is to strengthen the causation threshold, directly or indirectly by requiring the investigating authority to adopt some particular methodology (for example, the “but for”/ “if not” test). For the “threat of injury” and “material retardation” standards, on one hand, as the relevant provisions of the Antidumping Agreement are far from enough to provide a clear guideline, detailed road maps need to be drew for an easy application, especially for the developing countries; on the other hand, strict procedural rules should be prescribed in advance to prevent future misuse of these two standards.
### Table of Content

**ABSTRACT** ....................................................................................................................... 1

**ACKNOWLEDGEMENT** ..................................................................................................... 1

**TABLE OF CONTENT** ...................................................................................................... 1

**ABBREVIATION** ............................................................................................................... IV

**CHAPTER ONE  FEATURES OF ANTIDUMPING RULES AGAINST GLOBALIZATION** ....... 1

1. **EVOLUTION OF ANTIDUMPING LAWS** ................................................................. 2
   1.1 **Genesis of Antidumping Law in the Early 20th Century** ........................................ 2
   1.2 **GATT/WTO Rules Negotiations and Corresponding Trade Policies** ................. 5

2. **DUMPING AND INJURY DETERMINATION OF CURRENT ADA** ......................... 10
   2.1 **Dumping** ........................................................................................................... 10
   2.2 **Injury** ............................................................................................................... 11
      2.2.1 **Incorporation and Development of Injury Rules** ............................................ 12
      2.2.2 **The Meaning of “Injury” and “Material”** ....................................................... 13
      2.2.3 **Types of Injury** ............................................................................................ 18
      2.2.4 **Non-Mandatory Rules** ................................................................................ 20
   2.3 **Importance of Injury Determination in the Decision-making Process** ............... 33

3. **PRESENT ANTIDUMPING LAW: TRADE LIBERALIZATION OR PROTECTIONISM** ... 35
   3.1 **Application Trend of Antidumping Measures** .................................................... 35
   3.2 **Nature of Domestic Antidumping Laws** ............................................................. 37
   3.3 **Possible Reform of ADA** .................................................................................. 41

**CHAPTER TWO  PRINCIPLES OF INJURY DETERMINATION AND MATERIAL INJURY** .... 46

1. **THE OBJECT OF INJURY** ......................................................................................... 47
   1.1 **Like Product** ...................................................................................................... 47
      1.1.1 **Product under Consideration** ........................................................................ 49
      1.1.2 **Factors Determining the Like Product** ......................................................... 56
   1.2 **Domestic Industry** ............................................................................................. 61
      1.2.1 **Scope of Domestic Industry** .......................................................................... 61
      1.2.2 **Related Domestic Producer and Regional Domestic Industry** ..................... 62
      1.2.3 **The Definition of “Producer”** ...................................................................... 64
   1.3 **The Debate and Proposals in Doha Round Concerning “Like Product” and “Domestic Industry”** ................................................................................. 65

2. **PRINCIPLES AND ELEMENTS OF INJURY ANALYSIS** ............................................ 72
   2.1 **“Objective Examination” and “Positive Evidence”** .......................................... 72
      2.1.1 **Definitions and Characters of “Positive Evidence” and “Objective Examination”** 74
      2.1.2 **Rules in Operation** ....................................................................................... 75
   2.2 **Elements of Injury Analysis** ................................................................................ 91
1. AN OBSCURE STANDARD ..................................................................................................253
  1.1 Evolvement under GATT/WTO System .........................................................................253
    1.1.1 From “Prevent” to “Retard” ..................................................................................253
    1.1.2 The Only One GATT Case related to Retardation Standard ...................................255
  1.2 Countries’ Legal Guidelines ..........................................................................................256
  1.3 Limited Cases ..............................................................................................................258

2. ESTABLISHMENT OF A LEGISLATIVE FRAMEWORK AND A BALANCED WAY FOR
   ENFORCEMENT ................................................................................................................261
  2.1 Contradiction between Retardation Standards and the Other Two Standards .........261
  2.2 Countries’ Practice for Determining “Un-established Industry” ...............................264
    2.2.1 USA ......................................................................................................................264
    2.2.2 South Africa .........................................................................................................281
    2.2.3 EU ........................................................................................................................282
  2.3 Retardation Determination ...........................................................................................284
    2.3.1 Difficulty to Conduct a Normal Injury Test ............................................................285
    2.3.2 Methodology: Unitary or Bifurcated .....................................................................289
    2.3.3 Countries’ Practice ...............................................................................................293
  2.4 Causation Test: Viability ..............................................................................................304

CHAPTER SIX  REFORM OF INJURY DETERMINATION RULES .....................313
  1. WTO: A PLATFORM TO PROPEL REFORM ..........................................................313
  2. THE SYSTEM REQUIRING IMPROVEMENT .........................................................316
    2.1 Problems re Injury Determination ............................................................................316
    2.2 Strengthening the Causation Standard .....................................................................320
      2.2.1 Doha Round Proposals regarding the Causation Test .......................................321
      2.2.2 Recent Regression of Causation Standard amidst the Economic Crisis ...........324
      2.2.3 The Necessity and Possibility to Raise the Causation Standard under the WTO
          System .....................................................................................................................335
    2.3 Restrict Current Abuse of Threat of Material Injury Standard ................................340
      2.3.1 Doha Round Proposals and Draft Consolidated Texts .......................................342
      2.3.2 Suggestions .......................................................................................................345
      2.4 Precautions against Future Misuse of Retardation Standard ................................347
        2.4.1 Doha Round Proposals and Draft Consolidated Texts .......................................348
        2.4.2 Suggestions .......................................................................................................351
    2.5 Loopholes and the Road Ahead .................................................................................354

BIBLIOGRAPHY ................................................................................................................357
  BOOKS: ..............................................................................................................................357
  ARTICLES: ..........................................................................................................................359

中文参考文献 ..................................................................................................................367
  书籍： ..............................................................................................................................367
  文章： ..............................................................................................................................368