MEANING OF 'DOMESTIC INDUSTRY' UNDER ANTI-DUMPING AGREEMENT

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1. INTRODUCTION

1.1 Introductory

Injury determination in respect of anti-dumping is impossible unless an *a priori* determination is made as to the possible injured parties. Conceptually, the answer is an industry in the importing country producing a product like the subject merchandise[1]. Imports in such circumstances can be regulated to protect the interests of domestic producers[2]. The sequential questions that arise are regarding the identification of the industry and the implications of only a part of the industry agreeing to initiate a legal action against the exporter or the foreign producer. This work seeks to limit itself to examining in detail the former. The GATT legal framework provides an elaborate definition of the domestic industry. The WTO Panel in several cases has given an opinion on the scope and import of this definition. These observations have been dealt in detail apart from the detailing of the relevant provisions.

1.2 Legal Framework

Article VI of the GATT is entitled "Anti-Dumping and Countervailing Duties". It is the font of the multilateral Anti-Dumping law[3]. It is the 'seed provision' or the 'enabling

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[1] See Raj Bhala, *Modern GATT Law – A Treatise on the General Agreement on Tariffs and Trade*(Sweet & Maxwell, London, 2005), p. 712.

[2] Dumped or subsidized imports can, therefore, be subjected to anti-dumping or countervailing measures respectively, only if they cause or threaten injury to domestic producers. See RK Gupta, *Safeguards Countervailing and Anti Dumping Measures Against Imports and Exports Commentary, Cases and Text* (Academy of Business Studies, New Delhi, 1998), p. 117.

[3] This fact is evident on considering the formal title of the Anti-Dumping Agreement, namely, Agreement on the Understanding of Article VI of the General Agreement on Tariffs and Trade 1994. Furthermore, the opening provision of the Anti-Dumping Agreement expressly incorporates by reference its parent provision in GATT: An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

provision' for the each of the Articles in the Anti-Dumping Agreement. As far the provision relating to the definition of the domestic industry in the Anti Dumping Agreement is concerned it is no exception. Article VI:1[4] and Article VI: 6(a)[5] refer expressly to a domestic industry. Under the Anti-Dumping Agreement domestic industry is defined under Article 4[6]. The definition of domestic industry thus in respect of the Anti-Dumping law cannot be emphasized enough. In most of the cases an anti-dumping action is initiated by the domestic producers[7]. Thus, there is a need to define them within the specific legal framework. This is particularly important as anti-dumping measures are an exception to the free trade regime promoted by the GATT. Thus, in order to safeguard frivolous attempts on the part of a country to disallow imported goods in the name of anti-dumping and injury to its domestic producers it assumes significance[8]. A precise and clear definition of domestic industry would ensure that the free trade regime is not threatened unsurreptitiously[9]. In fact, at times there have

[4] Article VI: 1 reads as: "The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products is to be condemned if it causes or threatens a material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry...."

[5] Article: 6(a) reads as: "No contracting party shall levy anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry...."

[6] The Agreement provides greater clarity and more detailed rules concerning the method of determining dumping and injury, the procedures to be followed in anti-dumping investigations, and the duration of anti-dumping measures. See S.R. Myneni, *International Economic Law* (Allahabad Law Agency, Faridabad, 2006), p. 381.

[7] Today, however, most Anti-Dumping cases are not characterized by a wholly domestic industry, producing a like product entirely in the importing country with raw materials and intermediate inputs from that country. Through foreign direct investment in the importing country, the industry may have producers from another country, and the shareholders of these producers may be scattered all across the globe. These multi national corporations may be indifferent or even hostile to a petition brought by a traditional competitor with roots entirely in the importing country. Raj Bhala (2005), p. 712.

[8] All trade economists agree that opening markets while preserving the ability to apply anti-dumping measures under the present rules is foolish: it merely replaces one tariff by another duty which is applied discriminatorily. Alejandro Jara, *'Services, Anti-Dumping and Other "New Issues" in the WTO Negotiations and their Relevance for the FTAA'*. The document is available online at http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=606205(Retrieved on January 4, 2010)

[9] However, much of the GATT and WTO jurisprudence that has developed does not accord a very high importance to the need to arrive at a precise scope of the definition of the domestic industry. The determination of injury to the industry invariably in almost cases assumes more significance than the prior step of determining the 'domestic industry' as such. See J. Michael Finger and Kwok-Chiu Fung, *'Will GATT Enforcement Control Antidumping?'*(1994) 9(2), June, *Journal of Economic Integration*, 198-213.

been calls that the anti-dumping laws as they stand in operation not only breed protectionism but also are unfair[10].

2. MEANING OF DOMESTIC INDUSTRY

2.1 Definition of Domestic Industry

The definition of domestic industry is important for the fact that dumping investigation could not normally be launched except in response to an application made by or on behalf of the industry[11]. 'Domestic Industry' has been defined under Article 4 of the Anti Dumping Agreement. The text reads as follows:

4.1 For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

(i) when producers are related[12] to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;

(ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if *(a)* the producers within such market sell all or almost all of their production of the product in question in that market, and *(b)* the demand in that market is not to any substantial

[10] See Robert E. Hudec, *Essays on the Nature of International Trade Law*(Cameron May, London, 1999), p.254. For further readings see Bhala, Raj, *International Trade Law: Theory and Practice*(Lexis-Nexis, New York, 2000), p. 837; where the author put forth the view that antidumping law remains a strategic weapon in the protectionist arsenal. The practical and ambitious inquiry is thus not whether it is economically relevant but instead whether that law can be circumscribed to minimize the risk of protectionist abuse.

[11] Auter Krishen Koul, *The General Agreement on Tariffs and Trade (GATT)/World Trade Organisation (WTO) Law, Economics and Politics*(Satish Upadhyay, New Delhi, 2005), p. 143.

[12] The footnote to Article 4:1(i), following the word 'related' specifies that: For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if *(a)* one of them directly or indirectly controls the other; or *(b)* both of them are directly or indirectly controlled by a third person; or *(c)* together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

4.2 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied[13] only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti-dumping duties on such a basis, the importing Member may levy the anti-dumping duties without limitation only if *(a)* the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and *(b)* such duties cannot be levied only on products of specific producers which supply the area in question.

4.3 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994, such a level of integration, that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraph 1[14].

4.4 The provisions of paragraph 6 of Article 3 shall be applicable to this Article[15].

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[13] The footnote to Article 4:2, following the word 'levied' specifies that: As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

[14] The effect of this provision is to apply the definition of a "domestic industry" to a customs union. One of the examples of unified markets is the European Union. In the anti-dumping investigation concerning imports of catalysts in India(Notification No. ADD/W/39/95-96 dated 7 May 1997) the Designated Authority determined that the European Union was a customs union where there were no customs barriers or duties and where common rates of duties were applied to imports from non-member countries. Even anti-dumping and countervailing measures were adopted for the entire territory of EU as a whole irrespective of the fact that exports may have been made only to some of the constituents of EU. See RK Gupta (1998), p. 136.

[15] Article 3.6 provides: The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

2.2 Interpretation and Application of definition of Domestic Industry

2.2.1 Producers of like product/Major proportion

The determination of injury has to be made with regard to domestic industry. In this regard all the three Agreements have provided:

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The term like product is defined in Article 2.6 of the Anti-Dumping Agreement[17]. The Agreement adopts the same definition of the term like product for the determination of 'domestic industry[18].' The definition of like product as always presents a problem in the context of domestic industry as well. While on one hand complainants may try to narrow the scope of 'like product' to increase their success rate[19]. Simultaneously on the other hand selection of a range of products including the like product may work to

[16] Article 3.6 of the Anti-Dumping Agreement

[17] Article 2.6 reads as: "Throughout this Agreement the term "like product"(*produit similaire*) shall be interpreted to mean a product which shall be identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."

[18] Basic regard should be had to the fact that Article VI embodies something of a disgression from the general GATT rules: while the basic rule of GATT deals with discriminatory treatment, this provision deals with non-discriminatory unfair practices. This suggests that the likeness concept in Article VI should be interpreted narrowly so as to limit the coverage of the antidumping obligation. See Won-Mog Choi, *'Like Products' in International Trade Law Towards a Consistent GATT/WTO Jurisprudence* (Oxford Press, Oxford, 2003), p. 127.

[19] An illustration of this was found in the *New Zealand- Import of Electrical Transformers from Finland* case: In its examination whether the New Zealand transformer industry had suffered from the imports in question, the Panel subsequently dealt with the argument put forward by New Zealand that this industry was structured in such a way that there existed four distinguishable range of transformers... which for purposes of injury determination had to be considered separately. The Panel was of the view that this was not a valid argument, especially in light of the fact that the complaining company[represented]... the New Zealand transformer industry.... It was thus, in the Panel's view, the overall state of health of the New Zealand transformer industry which must provide the basis for a judgment whether injury was caused by dumped imports.

the disadvantage of the domestic producers as the injury determination in such cases may be diluted because of a selection of a wider product group[20].

The other part of the definition of domestic industry, stating that a domestic industry may in the alternative constitute 'whose collective output of the products constitutes a major proportion of the total domestic production of those products' came in for consideration by the Panel on *Argentina — Poultry Anti-Dumping Duties*[21]. The Panel on considered whether or not the phrase "a major proportion" implies that the "domestic industry" refers to domestic producers whose collective output constitutes the majority, that is, more than 50 per cent, of domestic total production. The Panel considered different dictionary definitions and noted that the word "major" is also defined as "important, serious, or significant". The Panel therefore found that "an interpretation that defines the domestic industry in terms of domestic producers of an important, serious or significant proportion of total domestic production is permissible[22].

2.2.2 Scope of the term 'product'

In determining whether the term product encapsulates only industrial products, the answer has been in the negative. Grafting history from the 1948 Havana Charter indicates a much wider connotation for the term industry. It includes such activity as agriculture, forestry, mining, etc. as well as manufacturing[23]. Presently, the only exception seems to be services which are not regulated by the anti-dumping laws. Antidumping law is designed to prevent exporters from selling into foreign markets at below the normal home price and thereby increasing their market share. In the early 1990s, the Japanese were accused of dumping financial services in the United States. They were also accused of dumping cheap airline tickets in the US market; in fact, they were selling tickets at prices that were not permitted in the Japanese market, which is

[20] RK Gupta (1998),p. 133.

[21] *infra*

[22] There has been certain criticism of the allowance to interpret the term industry to encompass only a regional subpart of a larger national production and distribution pattern. See John J. Barcelo, *' Anti-Dumping Laws as Barriers to Trade – The United States and the International Dumping Code', Cornell Law Review*(1972) 57 pp. 491-560 in Ronald A. Cass, Michael S. Knoll(ed.), *International Trade Law*,(Ashgate, Burlington, 2003), p. 205. Also see Richard D. Bultock, *'An Economic Analysis of Dumping', Journal of World Trade* (1987) 21 pp. 45-54.

[23] Havana Report, United Nations Document ICITO/1/8 at 74(1948), quoted in John H. Jackson, *World Trade and the Law of the GATT* (Lexis-Nexis, New York, 1969), p. 418.

tightly controlled by the government[24]. Antidumping law has traditionally applied to goods. However, the increasing international trade in services for instance, United States companies have keypunching done in the Philippines) may require the expansion of antidumping law to services as well. Furthermore, goods and services are often substitutes for each other. If a car manufacturer designs a new automobile in house, it becomes part of the cost of the car, and is sold as a good; but if the manufacturer contracts out the design, the manufacturer has bought a service. Antidumping law has been perverted into a protectionist measure, which is used for partisan political purposes[25].

2.2.3 Jurisprudence on the meaning of domestic industry

Referring to Article 4.1 and footnote 9 to Article 3[26], the Panel on *Mexico — Corn Syrup*[27] stated: "These two provisions inescapably require the conclusion that the domestic industry with respect to which injury is considered and determined must be the domestic industry defined in accordance with Article 4.1". The view that the definition of the domestic industry has to be construed in a particular manner and necessarily so found echo in *Argentina — Poultry Anti-Dumping Duties*[28]. The Panel rejected the argument

[24] The US anti dumping case concerning vector computers resulted in the highest anti dumping duty ever applied. Turning to enforcement, the Cray-NEC case offers an interesting development: if Japanese supercomputers cannot be sold in the US market, they can be located in Japan and their services sold to US potential buyers from there(through appropriate telecommunications). In other words, the Cray-NEC case may offer the first clear example of trade in services as a substitute to trade in goods- raising a host of issues regarding antidumping procedures. See Maur, Jean-Christophe and Messerlin, Patrick A.A., *'Antidumping in Supercomputers or Supercomputing in Antidumping? The Cray-NEC Case'*, Available online at SSRN: http://ssrn.com/abstract=920990. For further reading see Jan H. Dalhuisen, *Dalhuisen on International Commercial, Finance and Trade Law* (Hart, Oxford, 2000), p. 780.[25] See Patrick Sullivan, *'Anti Dumping Law and Dumping of Services'*, 24 *NYU International Law and Politics*, (Summer 1992), pp 1677-1709. The author has argued in his article that even though it would be difficult to calculate the cost of services, it would not be impossible. Services are sold with invoices which can be audited. The author recommends a reform of the dumping law and inclusion in the new law measures against dumping of services.

[26] A footnote to Article 3, following the word 'injury' specifies that: Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or the material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

[27] *Mexico- Anti-Dumping Investigation of High Fructose Corn Syrup(HFCS) from the United States* WT/DS 132/R, Report of the Panel adopted on 28/01/2000. The Panel found that Mexico failed to consider domestic industry "as a whole" in its threat of material injury analysis as required by Article 3.4 and considered only a portion of the industry's production and thus violated Article 3.1,3.2,3.4 and 3.7.

[28] *Argentina- Definitive Anti-Dumping Duties on Poultry from Brazil* WT/DS 241/R, adopted on 22/04/2003.

that Article 4.1 does not contain an obligation, but is merely a definition, which as such cannot be violated. The Panel considered that Article 4.1 provides that the term 'domestic industry' 'shall' be interpreted in a specific manner. This imposes an express obligation on Members to interpret the term 'domestic industry' in that specified manner. Thus, if a Member were to interpret the term differently in the context of an anti-dumping investigation, that Member would violate the obligation set forth in Article 4.1. Hence apart from clarifying the fact that the domestic industry as defined in Article 4.1 has to be considered the Panel has also emphasized that the consideration of this definition is mandatory and there is no escape route available to escape the obligations attached there under[29]. In *EC — Bed Linen*[30], the Panel examined whether, further to having defined the Community industry as a group of 35 producers and resorted to a sample of those producers, the European Communities was precluded from considering information relating to producers not within that sample, or not within the Community industry. The Panel, in a finding subsequently not addressed by the Appellate Body, resolved the issue whether 'consideration of evidence for domestic producers outside the selected sample but within the domestic industry constitutes, ipso facto, a violation of Article 3.4', as follows:

[I]t is clear from the language of the AD Agreement, in particular Articles 3.1, 3.4, and 3.5, that the determination of injury has to be reached for the domestic industry that is the subject of the investigation. ... In our view, it would be anomalous to conclude that, because the [investigating Member] chose to consider a sample of the domestic industry, it was required to close its eyes to and ignore other information available to it concerning the domestic industry it had defined. Such a conclusion would be inconsistent with the fundamental underlying principle that anti-dumping investigations should be fair and that investigating authorities should base their conclusions on an objective evaluation of the evidence. It is not possible to have an objective evaluation of the

[29] This view was re-affirmed in the *European Communities- Anti-Dumping Duties on Imports of Cotton Type Bed Linen From India* WT/DS 141/R, Report of the Panel adopted on 30/10/2000. The Panel in this case observed that : "in our view, information concerning companies that are not within the 'domestic industry' is irrelevant to the evaluation of the 'relevant economic factors and indices having a bearing on the state of the industry as required under Article 3.4. This is true even though those companies presently produce or in the past may have produced, the like product.....Information concerning the Article 3.4 factors for companies outside the domestic industry provides no basis for conclusions about the impact of dumped imports on the domestic industry itself". Hence, the Panel stated, though negatively that only domestic industry as defined under Article 4 shall be taken into consideration for assessing the injury caused by the merchandise in question.

[30] *Ibid.*

evidence if some of the evidence is required to be ignored, even though it relates precisely to the issues to be resolved.....

Hence, the Panel observed in the *EC- Bed Linen* case that the European Communities could consider under Article 3 information relating to companies outside of the sample, where such information was drawn from the domestic industry. Furthermore, the Appellate Body in *US — Hot-Rolled Steel*[31] ruled that investigating authorities can undertake "an evaluation of particular parts, sectors or segments within a domestic industry", provided they respect the fundamental obligation in Article 3.1 to conduct an 'objective assessment':

.... it seems to us perfectly compatible with Article 3.4 for investigating authorities to undertake, or for a Member to require its investigating authorities to undertake, an evaluation of particular parts, sectors or segments within a domestic industry. Such a sectoral analysis may be highly pertinent, from an economic perspective, in assessing the state of an industry as a whole[32].

3. CONCLUSION

The term domestic industry as defined under the Anti-Dumping Agreement has been consistently interpreted. However, like any other provision of involving the term 'like product' the scope of the term domestic industry is determined by it. The term like product has occupied central place in numerous rulings of the WTO Panels and Appellate bodies. Apart from that the other determining factor in the definition of the term domestic industry seems to be the scope of the term product itself. As indicated above the scope of the term product is not limited to industrial products itself but also includes within its scope agricultural products, etc. However, it is undeniable that service economies are the new engines of the world economy. The rapid expansion of information has resulted in the burgeoning expansion of the service sector. Thus, it can be anticipated that keeping services out of the scope of Anti-Dumping provisions would

[31] *United States- Anti-Dumping Measures on Certain Hot Rolled Steel Products From Japan* WT/DS184/R adopted on 28/02/2001.

[32] Even though the Panel never expressly mentioned the enabling provision of Article 4.1 but nonetheless the observations can be comfortably applied to the provision. The underlying premise being that where necessary the market may be divided for the purpose of identifying and determining the domestic industry, the entire exercise being termed as sectoral analysis. However, the Appellate Body ruled that the injury determination should be based on the totality of the domestic industry and not simply on one part of the domestic industry.

not be a viable alternative in the near future. As pointed out above, arguments have been made in this direction. The rationale for this has also been examined from the view that it is increasingly becoming difficult to separate the products from the services. Hence, this aspect of the definition of domestic industry might keep the policy makers and the academicians occupied in the near future. Otherwise, however, the definition as such provided under the Anti-Dumping Agreement has not attracted any significant controversies or disagreements. This can be attributed more to the relatively less importance attached to the definition of domestic industry rather than a intellectual agreement over the interpretation of the term.