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Assessment of "Material Injury" and "Causation": Recent Developments in Australia

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The article discusses the most recent developments in Australia's anti-dumping practice on the determination of "material injury" and "causation". It argues that while Australia's anti-dumping investigating authority has failed to conduct assessment of "injury-causation" adequately and objectively in past investigations, in two recent investigations the authority seems to have become more objective and comprehensive in its "injury-causation" determinations. The developments suggest that the Australian authority has started moving towards a thorough and unbiased analysis of "injury-causation" in accordance with WTO rules. They also suggest that active and full participation in "injury-causation" defence in an investigation is crucial for exporters and other parties with shared interest to increase their odds of success.

1 INTRODUCTION

It is settled, under the laws of the World Trade Organization (WTO), that an imposition of anti-dumping measures on allegedly dumped imports must be based on a positive finding of three key elements, including (1) the existence of dumping, (2) domestic industry of the importing country producing "like goods" has suffered "material injury", and (3) the injury has been caused by the dumping in question.[1] In other words, the finding of dumping, by itself, is not sufficient to justify an application of anti-dumping measures; rather, it is essential for investigating authorities of an importing country to establish that the alleged dumping has caused material injury to the relevant local industry.

Australia is one of the first countries to introduce an anti-dumping mechanism[2] and also one of the most frequent users of anti-dumping measures[3]. Despite its abundant experience in conducting anti-dumping investigations, Australia's anti-dumping investigating authority – the Anti-Dumping Commission (AD Commission) and formerly Australian Customs and Border Protection Service (Australian Customs) – appears to have not adequately conducted the "injury-causation" tests in past investigations failing to consider all of the relevant factors and evidence. Rather, it appears that the authority has tended to rely predominantly on the allegations and

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1 See Edwin Vermulst, *The WTO Anti-Dumping Agreement: A Commentary* (New York: Oxford University Press, 2005) at 73-93.

2 For a detailed discussion of the evolvement of Australia's anti-dumping system, see Whitwell, R., *The Application of Anti-Dumping and Countervailing Measures by Australia* (Central Queensland University Press, 1997).

3 See WTO, Anti-Dumping, "Anti-dumping Initiations: By Reporting Member 01/01/1995-31/12/2014", available at https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsByRepMem.pdf and WTO, Anti-Dumping, "Anti-dumping Measures: By Reporting Member 01/01/1995-31/12/2014", available at https://www.wto.org/english/tratop_e/adp_e/AD_MeasuresByRepMem.pdf. Also see Weihuan Zhou, "Australia's Anti-Dumping and Countervailing Law and Practice: An Analysis of Current Issues Incompatible with Free Trade with China" (2015)49(6) *Journal of World Trade* (forthcoming December 2015) at 1-2. An accepted draft of the article is available at: http://ssrn.com/abstract=2598386

(insufficient) evidence provided by Australian industry applicants in its assessment of "injury-causation". Consequently, an affirmative finding of "injury-causation" has become natural once dumping has been found. However, in two recent investigations – the Solar Panels investigation[4] and the Newsprint investigation[5], the AD Commission seems to have become more objective and inclusive in assessing evidence before it relating to "injury-causation". This is a positive development of the anti-dumping practice in Australia, suggesting that the AD Commission is shifting to a more comprehensive and unbiased assessment of "injury-causation" whereby due accounts will be paid to submissions by all interested parties.

2 "INJURY-CAUSATION" TEST UNDER THE WTO – BASIC RULES

Article VI:1 of the *GATT 1994* and Article 3 of the *Agreement on the Implementation of Article VI of the GATT* (commonly known as the WTO Antidumping Agreement (AD Agreement)) have set out the requirements of, and factors to be considered in, the determination of "injury" and "causation". Specifically, Articles 3.1 and 3.2 of the AD Agreement mandate an assessment of the volume of dumped imports and its impact on prices of domestic "like goods" based on positive evidence and objective examination. Article 3.4 further requires investigating authorities to consider "all relevant economic factors and indices having a bearing on the state of the (local) industry" in concern. These provisions have been considered and interpreted by panels and the Appellate Body in a number of cases, which has developed several basic WTO rules including that

- positive evidence "must be of an affirmative, objective and verifiable character … and … be credible";[6]
- an injury determination must be based on the evidence before an investigating authority as a whole;[7]
- objective examination of injury requires investigating authorities to conduct an injury determination in good faith and in an unbiased manner;[8]
- a determination of injury based on selective use of evidence may constitute a breach of the requirement of objective examination; [9]
- all of the fifteen factors listed in Article 3.4 of the AD Agreement must be considered in determining injury.[10] These factors are "sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the

[4] Anti-Dumping Commission, Public Record for Investigation - Case 239, PV Modules or Panels Exported from China, available at http://www.adcommission.gov.au/cases/Pages/CurrentCases/EPR239.aspx (Solar Panels Investigation)

[5] Anti-Dumping Commission, Public Record for Investigation - Case 242, Newsprint Exported from France and Korea, available at http://www.adcommission.gov.au/cases/Pages/CurrentCases/EPR242.aspx (Newsprint Investigation)

[6] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted on 23 August 2001, para. 192. (*US — Hot-Rolled Steel*)

[7] Appellate 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, adopted on 5 April 2001, para. 107. (*Thailand – H-Beams*)

[8] See above n 6, Appellate Body Report, *US — Hot-Rolled Steel*, para. 193.

[9] Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R, adopted on 20 December 2005, para. 181.

[10] Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted on 5 April 2001, para. 7.225; above n 7, Appellate Body Report, *Thailand – H-Beams*, paras. 121-128.

magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments";

- investigating authorities are also required, under Article 3.4 of the AD Agreement, to consider "all relevant economic factors" in addition to the listed factors therein;[11] and
- an evaluation of the factors envisaged under Article 3.4 of the AD Agreement mandates not only facts/data compilation, but also "a thorough and dynamic evaluation of data capturing the current state of the industry".[12]

On the assessment of "causation", Article 3.5 of the AD Agreement requires investigating authorities to establish a causal link between dumping and injury based on all relevant evidence at hand and to examine any known factors other than dumping so as to ensure that injury caused by these other factors is not attributed to dumping.[13] Known factors include, at least, "those causal factors that are clearly raised before the investigating authorities by interested parties in the course of an AD investigation".[14] Once known factors are identified, investigating authorities must, as the Appellate Body has famously established,

> "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 … in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury …"[15]

This is known as the "non-attribution" rule. The Appellate Body has also ruled that "an examination of the collective impact of other causal factors" would be necessary in certain cases.[16]

3 Assessment Of "Injury-Causation" In Australia

Article 3 of the AD Agreement on the assessment of "injury" and "causation" is incorporated into section 269TAE of the *Customs Act 1901* (Customs Act), Australia's principal anti-dumping legislation. In 2012, the Minister for Home Affairs provided some policy directions on the assessment of "material injury" (Ministerial Direction), the key ones including[17]

- the determination of "material injury" must be based on facts and not on assertions unsupported by facts;
- it is essential to establish that the injury identified is material in degree and is caused by dumping;

[11] See above n 6, Appellate Body Report, *US — Hot-Rolled Steel*, para. 195.
[12] Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted on 18 August 2003, paras. 7.314-7.316. Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted on 1 October 2002, paras. 7.42-7.45.
[13] Also see above n 6, Appellate Body Report, *US — Hot-Rolled Steel*, para. 222.
[14] See above n 10, Panel Report, *Thailand – H-Beams*, para. 7.273.
[15] See above n 6, Appellate Body Report, *US — Hot-Rolled Steel*, para. 223.
[16] Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted on 18 August 2003, para. 192.
[17] Anti-Dumping Commission, Australian Customs Dumping Notice No. 2012/24, New Ministerial Direction on Material Injury, available at http://www.adcommission.gov.au/adsystem/referencematerial/Documents/ACDN2012-24.pdf.

- material injury is an injury which is not immaterial, insubstantial or insignificant and must be based on an assessment of a range of factors as contemplated in the Customs Act, with no one or several of these factors being necessarily determinative;
- in all cases, a loss of market share cannot be decisive; and
- it would be difficult to demonstrate "material injury" if dumped imports hold a small market share of the Australian market.

In practice, Australia's investigating authority arguably has not fully followed the WTO rules, the Customs Act and the Ministerial Direction in many previous investigations. In particular, the authority appears to have not conducted a thorough evaluation of all of the relevant injury factors and of all of the relevant evidence before it. Below, we consider two major manufacturing industries in Australia and for each industry, one relevant anti-dumping investigation.

A. Australia's Steel Industry

Australia's steel industry, represented by BlueScope Steel Limited (BlueScope)[18], has been the most frequent users of Australia's anti-dumping system. In the Plate Steel Investigation, one of the most recent investigations brought by BlueScope, the AD Commission found that the allegedly dumped imports caused material injury to the local industry.[19] However, the AD Commission's analysis of "injury-causation" seems to be inadequate and flawed.

For example, the AD Commission found that the dumped imports caused the sales volume and market share of BlueScope to fall in the injury analysis period (IAP) between 2008 and 2012.[20] However, the diagrams on which the AD Commission relied to reach that conclusion, at best, show that the market share and sales volume of BlueScope and of the subject imports fluctuated during the period, and that at the end of the period, BlueScope still held the largest market share of the Australian market with insignificant declines compared to its market share at the beginning of the period.[21] The AD Commission's analysis of the volume effects above was significantly brief and did not show the suffering of material injury by BlueScope in terms of sales volume and market share. Likewise, the AD Commission's assessment of other 10 injurious factors was only 1 page long and did not provide adequate evaluation of these factors and the overall state of the steel industry.[22]

Turning to the "causation" analysis, the AD Commission focused on 1 financial year only, instead of the entire IAP, in determining that the alleged dumping was the cause of BlueScope's loss of market share and sales volume, although in the other financial years it is evident that the sales volume and market share of BlueScope and of all imports of the goods under consideration (including both dumped and un-dumped imports) fluctuated corresponding to the changes of the Australian steel market.[23]

Further, while a number of interested parties claimed that the alleged "material injury" was caused by factors other than dumping, the AD Commission relied predominantly on 1 injury factor – the impacts of dumped imports on BlueScope's domestic sales price – and on the

[18] http://www.bluescopesteel.com.au/
[19] Anti-Dumping Commission, Dumping of Hot Rolled Plate Steel, Exported from the People's Republic of China, Republic of Indonesia, Japan, the Republic of Korea and Taiwan, Report No 198 (16 September 2013) (REP 198).
[20] Ibid., pp.53-54.
[21] Ibid.
[22] Ibid., pp. 60-61.
[23] Ibid., pp. 64-65.

evidence provided by BlueScope.[24] Two aspects of this are particularly significant. First, while the AD Commission recognized that BlueScope's high raw materials costs contributed to its weak performance during the IAP, it did not give weight to this factor without explaining why.[25] Second, while the AD Commission was aware of the price depression of steel products globally during the IAP, it did not consider how this may have impacted on the sales price of BlueScope.[26] However, given BlueScope's high production costs and the low steel prices globally, it seems to be more reasonable to observe that BlueScope's poor performance during the IAP may have been a result of its inefficiency and un-competitiveness in the global steel market. This observation is supported by the well-known fact that BlueScope has been struggling to increase its profits and profitability for years[27] notwithstanding that it has received continuous protection by way of anti-dumping duties and various forms of government assistance over the same period. Recently, BlueScope was reported to be considering closure of one of its steel-making plants due to high manufacturing costs.[28] These facts suggest that the major cause of the poor performance of Australia's steel industry represented by BlueScope may well have been its own high costs of production, not alleged dumping.

B. Australia's Automotive Industry

Another traditional manufacturing industry in Australia is the automotive industry. In 2011, Arrowcrest Group Pty Ltd (Arrowcrest), which then represented over 95% of aluminium road wheels (ARWs) production in Australia, lodged an application for investigation into ARWs exported from China (ARWs Investigation).[29] Australian Customs found, in favour of Arrowcrest, that the allegedly dumped imports caused material injury to the Australian industry represented by Arrowcrest during the IAP from FY2006/07 to FY2010/11.[30] However, Australian Customs' assessment of "injury-causation" was inadequate and unpersuasive in many aspects.

First, Australian Customs' evaluation of volume effects (i.e. loss of sales volume and market share) and causation in this respect was problematic. The data used by Australian Customs showed that changes in the sales volume and market share of Arrowcrest, of Chinese exports of the subject goods, and of all other imported subject goods were at least partially due to the changes in the size of Australia's ARWs market.[31] In addition to the changes in the overall market, two other factors unrelated to dumping are also significant. In relation to Arrowcrest's decrease in market share and sales volume in FY 2008/09, the contributing factor was apparently the GFC. Further, while over 70% of Australia's ARW market involved the AM segment, Arrowcrest consistently and predominantly focussed on the OEM market.[32] This creates the question whether Arrowcrest's failure to maintain its market share and sales volume in certain

[24] Ibid., pp. 70-75.
[25] Ibid., p. 74.
[26] Ibid.
[27] See BlueScope, 2013/2014 Annual Reports, available at http://www.bluescope.com/annualreport2014/index.html#4.
[28] See Fairfax Media, "Threat to close BlueScope's Port Kembla Steelworks by 2017", available at http://www.thecourier.com.au/story/3137181/threat-to-close-bluescope-by-2017/?cs=2452
[29] Australian Customs and Border Protection Service, Public Record for Investigation - Case 181, Aluminium Road Wheels Exported from the People's Republic of China, available at http://www.adcommission.gov.au/cases/Pages/ArchivedCases/EPR181.aspx
[30] Australian Customs and Border Protection Service, Aluminium Road Wheels Exported from the People's Republic of China, Report to the Minister No. 181 (12 June 2012) (REP 181).
[31] Ibid., pp. 58-63.
[32] Ibid., pp. 60-61.

periods of the IAP was due to its (unsound) decision to focus its business on the OEM market. In the OEM market itself, Arrowcrest's sales volume and market share actually increased during the IAP (except for FY2008/09 due to the GFC).[33] In addition, while Arrowcrest claimed that it lost sales volume to Toyota – one of its major customers – during the IAP, the claimed loss appears to be caused by Toyota's reduced local production of motor vehicles.[34]

Second, Australian Customs found that Arrowcrest suffered a loss of revenue during the IAP based on a finding that Arrowcrest's sales revenue in the AM segment decreased during the period, despite the fact that the sales revenue of Arrowcrest in the OEM market increased significantly during the IAP (except for a decline during FY2008/09 due to the GFC).[35] Given the significant portion of OEM sales in Arrowcrest's business, Australian Customs' conclusion, which ignored the revenue increase in the OEM sales, seems to be untenable and contrary to the WTO requirement of objective examination (as it relied on selected evidence).

Third, Australian Customs found that Arrowcrest "suffered injury in the form of reduced profit and profitability" during the IAP.[36] This finding is not supported by positive evidence as the data used by Australian Customs does not affirmatively show a loss of profit and profitability during the IAP. Rather, the data shows that while Arrowcrest suffered a loss of profit and profitability during the GFC, it achieved a significant increase in profit and profitability following the GFC and managed to maintain the same level of profit and profitability at the end of the IAP compared to the level at the beginning of the period.

Fourthly, Australian Customs considered 10 other injury factors but its analysis of 7 of the factors was extremely brief suggesting a failure of thorough evaluation of the factors and of the current state of the Australian industry.[37]

Fifthly, while interested parties made submissions to show that factors other than dumping had contributed to the alleged injury, Australian Customs relied heavily on Arrowcrest's evidence in rejecting these submissions and did not provide a convincing analysis for some of its conclusions.[38] For example, Ford and HSV showed that one of the factors contributed to injury was the lack of supply by Arrowcrest of certain ARW models.[39] In its assessment of the factor, Australian Customs did no more than just compiling the claims from the parties[40], which indicates an acceptance of Arrowcrest's claim without any analysis of why its claim shall prevail. In addition, while interested parties identified factors such as Toyota's reduced domestic production and the general decline in the production of motor vehicles in Japan, Australian Customs did not examine these factors by explaining to what extent they had contributed to the alleged injury and how it separated these factors from the alleged dumping.[41] In the absence of such an analysis, Australian Customs' assessment of causation may have failed to satisfy the WTO requirements of "non-attribution".

Arrowcrest does not represent the whole automotive industry in Australia although it is one of the major upstream manufacturers and suppliers. While the imposition of anti-dumping duties on

[33] Ibid., pp. 60, 62.
[34] Ibid., p. 61.
[35] Ibid., p. 63.
[36] Ibid., p. 64.
[37] Ibid., pp. 64-66.
[38] Ibid., pp. 74-80.
[39] Ibid., pp. 77-78.
[40] Ibid.
[41] Ibid., pp. 73, 77-79.

ARWs afforded protection to the upstream industry represented by Arrowcrest, it inflated the production costs of downstream automotive manufacturers (such as Toyota, Holden, Ford, and HSV) and final consumers. Despite the continuous financial assistance provided by Australian government to the automotive industry, the industry has been proved to be unable to withstand foreign competition and will see the closure of local manufacture plants by major automotive producers by 2017.[42] As the steel industry, the root cause of the poor performance of Australia's automotive industry is not alleged dumping but has been the inefficiency and un-competitiveness of the industry. The application of anti-dumping measures does not contribute to the enhancement of the efficiency of the industry and hence would not be effective to reinvigorate the industry in the long run.

4 RECENT DEVELOPMENTS IN AUSTRALIA

The Newsprint Investigation and the Solar Panels Investigation are two of the few recent investigations in Australia where the investigating authority found in favour of exporters on "injury-causation". In both cases, the AD Commission found that injury caused by the allegedly dumped imports was negligible. As will be shown below, the exporter-favourable findings were attributed to the AD Commission's more adequate and objective evaluation of all evidence before it than its practice in previous investigations.

A. Newsprint

The Newsprint Investigation was brought by Norske Skog Industries Australia Limited (NSIA), the Australian subsidiary of the world's largest newspaper producer Norske Skog[43], against newsprint exported to Australia from France and Korea. In its application, NSIA claimed that the dumped subject imports caused material injury to it in the form of loss of sales volume, market share, profit and profitability, and decline in selling prices, revenue, production utilisation, and employment.[44] Bowater Korea, one of the two cooperative Korean exporters subject to the investigation – the other one being Jeonju, argued forcefully against NSIA's claims of "material injury" and "causation", and successfully convinced the AD Commission that some of NSIA's claims should be dismissed. Eventually, the investigation was terminated in respect of all exporters from Korea other than Jeonju on the ground that the injury caused by their dumped exports to Australia was negligent.[45] The termination decision was made notwithstanding the AD Commission's finding of a dumping margin of 14.4% for Bowater Korea and of 20% for the other Korean exporters.

The key arguments of Bowater Korea on "injury-causation" can be summarised below, including that

[42] See Productivity Commission, Australia's Automotive Manufacturing Industry, Inquiry Report, 31 March 2014, available at http://www.pc.gov.au/inquiries/completed/automotive/report, at 2.

[43] http://www.norskeskog.com/Default.aspx

[44] Anti-Dumping Commission, Newsprint Exported from France and Korea, Application by Australian Industry (22 April 2014) at 23-31.

[45] The investigation against Jeonju was also terminated based on the AD Commission's finding of negative dumping margin for the exporter. See Anti-Dumping Commission, Newsprint Exported from France and Korea, Termination Report 242 (23 March 2015) at 5.

(1) the alleged injury actually occurred only in one and the most recent period of the IAP (i.e. FY2013/14) whereas in the other periods of the IAP (i.e. FY2010/11 – FY2012/13) NSIA's economic performance in terms of the injury indicators (such as price and capacity utilisation) had been reasonably well.[46] Even in FY2013/14, NSIA's performance started to improve without any indicia of injury since the second quarter of 2014;[47]
(2) the alleged injury was a result of the shrinking global market for newsprint and as a consequence the deteriorating business and financial conditions of Norske Skog since 2000 which impacted on its reputation and led to consumers starting to source from other suppliers;[48]
(3) the declining global market also contributed to the price depression of newsprint. Given the market power of Norske Skog as a price-setter rather than price-taker, the price depression was unlikely to be caused by the alleged dumping;[49]
(4) Norske Skog's reduction and closure of production in New Zealand was not due to the alleged dumping but the high energy costs in New Zealand and its own restructuring strategy;[50]
(5) despite the alleged dumping, NSIA managed to extend long-term contracts until 2020 with two largest Australian customers which represent over 70% of the newsprint market in Australasia; therefore, it was unlikely to suffer any material injury in terms of price caused by dumping;[51]
(6) the loss of other major customers by NSIA in Australia was due to factors other than the alleged dumping, including the customers' shift to 100% recycled paper (according to Australia's movement to recycled newspaper) which NSIA was unable to supply but Korean and French suppliers can;[52]
(7) any alleged injury cannot be caused by newsprint imports from Bowater Korea whose sales volume in Australia was insignificant;[53] and
(8) by bringing this investigation and similar investigations in other countries (such as Malaysia), Norske Skog was attempting to secure a monopoly position globally through trade remedies.[54]

In response, NSIA submitted that some of the arguments raised by Bowater Korea were irrelevant to the injury determination.[55] NSIA was correct in pointing out that submissions relating to

[46] See Anti-Dumping Commission, Newsprint Exported from France and Korea, Submission by Bowater Korea (Public Record no. 014), 14 July 2014, at 2, 8-9; also see Anti-Dumping Commission, Newsprint Exported from France and Korea, Second Supplementary Submission by Bowater Korea (Public Record no. 026), 13 October 2014, at 1-2.
[47] See Anti-Dumping Commission, Newsprint Exported from France and Korea, First Supplementary Submission by Bowater Korea (Public Record no. 020), 23 July 2014, at 1-2.
[48] See above n 46, Submission by Bowater Korea, at 2-6; above n 46, Second Supplementary Submission by Bowater Korea, at 3-4.
[49] See above n 46, Second Supplementary Submission by Bowater Korea, at 5-6, 8.
[50] Ibid., at 6-7.
[51] Ibid., at 7.
[52] Ibid., at 13; also see above n 47, First Supplementary Submission by Bowater Korea, at 3-4; above n 46, Second Supplementary Submission by Bowater Korea, at 2-3.
[53] See Anti-Dumping Commission, Newsprint Exported from France and Korea, Meeting with the AD Commission (Public Record no. 035), 16 December 2014, at 2.
[54] See above n 46, Submission by Bowater Korea, at 10-12.
[55] See Anti-Dumping Commission, Newsprint Exported from France and Korea, Submission by Australian Industry (Public Record no. 021), 20 August 2014.

Norske Skog's global activities (e.g. items (4) and (7)) were probably not pertinent to the injury analysis although they may assist the AD Commission to understand Norske Skog's business strategy and the global context of the investigation.

The AD Commission agreed with NSIA that it suffered material injury in terms of reduction of sales volume, price depression and price suppression, reduced revenue, reduced profits and profitability, and declines in a number of other injury factors.[56] The AD Commission's analysis of these injury factors has continued to be very brief without giving due consideration to the submissions made by Bowater Korea, hence giving rise to the issue of lack of adequate evaluation and objective examination. However, the AD Commission's assessment of "causation" seems to be more comprehensive than in previous investigations. For example, the AD Commission carefully considered factors such as the contractions in demand and "changes in purchasing policies by newspaper publishers in the Australian newsprint market" and found that these factors contributed to the alleged injury, although it still concluded that the dumped imports caused material injury to NSIA.[57]

Interestingly, the turning point for Bowater Korea concerned its brief submission relating to its insignificant sales volume in Australia. The AD Commission found that "the quantity of imports from all Korean exporters other than Jeonju … represents … less than one per cent of the entire Australian newsprint market in the investigation period", and that Bowater Korea's sales were limited to "a relatively minor market segment".[58] As it is impractical and hence unlikely for newspaper publishers to source newsprint in small volumes, Bowater Korea did not compete with NSIA in any significant way in the Australian market. Accordingly, the AD Commission decided not to include Bowater Korea in its cumulative assessment of material injury on the ground that the condition of competition between domestically produced newsprint and that imported from Bowater Korea is not similar.[59] Moving on to assess the impact of the dumped imports from Bowater Korea and the other Korean exporters (other than Jeonju) on the Australian industry, the AD Commission found that the impact was negligible.[60]

The AD Commission's injury determination in the Newsprint Investigation is significant in at least two aspects. First, it shows a changing behaviour of the AD Commission to consider all of the relevant evidence before it without disproportionately relying on information provided by Australian applicants. In the investigation, the AD Commission was not reluctant to rely on submissions provided by Bowater Korea and to make its findings based on a submission not fully elaborated by the exporter. Although some parts of the AD Commission's injury analysis remained to be brief and heavily rely on the applicant's evidence, the willingness of the AD Commission to reach a negative finding on "injury-causation" based on submissions of exporters is undoubtedly a positive development. Second, the investigation is one of the rare cases in Australia where the investigating authority used the flexibility under WTO jurisprudence to find in favour of exporters in "injury-causation" determination. Article 3.3 of the AD Agreement allows investigating authorities of WTO members to cumulatively assess injury. One of the conditions for a cumulative assessment is that cumulation must be "appropriate in light of the

[56] Anti-Dumping Commission, Newsprint Exported from France and Korea, Final Report No. 242 (30 April 2015) (REP 242).
[57] Ibid., at 40-45.
[58] Ibid., at 36.
[59] Ibid., at 36.
[60] Ibid., at 37-40.

conditions of competition … between the imported products and the like domestic product." According to the panel in the *EC – Pipe Fittings* case, investigating authorities have a wide discretion to decide whether the condition has been satisfied on a case-by-case basis.[61] This decision has not been considered by the Appellate Body. This wide discretion was clearly exercised by the AD Commission in the Newsprint Investigation to decide that cumulative assessment of injury was inappropriate on the ground that NSIA and all Korean exporters of newsprint to Australia (other than Jeonju) competed in different segments of the market. This decision is sound. Given the insignificant sales volume of the Korean exporters and the close business ties between NSIA and the largest newspaper publishers in Australia, it is reasonable to observe that the exporters were in fact unable to target these major customers and did not compete with NSIA for the customers.

B. Solar Panels and Modules

The Solar Panels Investigation was brought by Tindo Manufacturing Pty Ltd (Tindo) against PV panels or modules exported from China. This investigation is interesting in several factual aspects. First, Tindo is the sole manufacturer of the subject goods in Australia and only entered the PV panels and modules market in July 2012. Second, in FY2012/13 Tindo's market share in the Australian market was only about 0.018%. Third, in contrast with Tindo being a start-up, all of the selected Chinese exporters were major and experienced producers and global suppliers of the subject goods. These facts had put the AD Commission in an awkward position; on one hand, the AD Commission understandably needed to seek to protect the infant producer being the sole manufacturer in the Australian industry, while on the other hand, it seems to be clear enough that as a new and inexperienced producer and supplier of the subject goods, Tindo would not be able to survive the foreign competition in any case (e.g. even though anti-dumping duties were imposed on the Chinese exports of the subject goods).

In its application, Tindo claimed that the allegedly dumped imports caused material injury to it by adversely impacting on its market share, price, profit and profitability.[62] Tindo's claims were vigorously rebutted by two interested parties – China's industry association representing the Chinese solar industry and True Value Solar Pty Ltd an Australian end-user – as being insufficient to establish "injury-causation". The main arguments of the interested parties include that

- the alleged volume effects did not exist as Tindo's sales volume and market share actually increased since FY2012/13 while China's exports of the subject goods decreased by 28% in the same period;[63]
- the alleged price depression and price suppression did not occur as Tindo's price reduction during the injury period was much less significant than its cost reduction; [64]

[61] Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted on 18 August 2003, para. 7.242.
[62] Anti-Dumping Commission, PV Modules or Panels Exported from China, Application by Australian Industry (14 May 2014) at 26-44.
[63] Anti-Dumping Commission, PV Modules or Panels Exported from China, Submission by Industry Association (Public Record no. 53), 24 June 2014, at 3-5.
[64] Ibid., at 5-6.

- the alleged loss of profits and profitability did not occur as Tindo in fact managed to increase its profits and profitability since FY2012/13 – the only period where a decrease occurred was when Tindo's production costs increased significantly;[65] and
- even assuming the alleged injury occurred, the injury was caused by factors unrelated to dumping, including (1) Tindo's lack of comparative advantage over the major Chinese suppliers, (2) Tindo's unsound business decision to focus on production and sale of AC modules when the majority demand of the Australian market is for DC modules, (3) Tindo's high costs of production, and (4) "the phase-out and abolition of the incentives in the form of higher feed-in tariffs [in Australia] over the period 2011 until 2013" causing the overall demand for the subject goods to fall.[66]

In its statement of essential facts (SEF), the AD Commission found that the volume of the dumped imports and the dumping margins for all of the selected exporters were not negligible.[67] On "material injury", the AD Commission, again, made a positive finding in terms of volume effects, price effects, profits and profitability effects and other 4 injury factors without adequately analysing these factors by considering all of the submissions made by the interested parties.[68] In sharp contrast, in its analysis of "causation" the AD Commission fully considered these submissions as well as other evidence in concluding that the impact of the alleged dumping on the domestic industry was negligible. The main factors that the AD Commission considered include (1) the low dumping margins found for each of the selected exporters (i.e. 2.1%-8.7%) compared to the significant price undercutting margin of around 45%, which indicates that the impact of dumping on Tindo's sales price was insignificant; (2) Tindo's business plan was not viable by setting its sales price too high and focusing its production and sales on AC modules instead of DC modules which are considerably cheaper and highly demanded; and (3) Tindo's decision to enter into the market at a time the market had started declining particularly as a result of the abolition of the feed-in tariffs. The demand contraction was found to "have significantly contributed to the injury experienced by Tindo".[69]

Compared to the Newsprint Investigation, the Solar Panels Investigation shows a more comprehensive and objective analysis of evidence on "causation" by the AD Commission. While the AD Commission's assessment of "material injury" remained to be inadequate, its affirmative decision in this regard may be considered as a necessary comfort to the infant Australian producer. It is probably that the AD Commission had already decided its focus of analysis and the final outcome of the case so that it believed that no parties were to take issue with its assessment of injury. An important message to exporting countries that the investigation conveys would be that affirmative decision of "injury-causation" may no longer be a natural flow from a positive finding of dumping, and that it is absolutely possible for exporters to turn the AD Commission to their side as long as they actively participate in investigations. The investigation also shows that the AD Commission has become reasonably cautious in determining whether to afford protection to domestic industries by way of anti-dumping duties if such protection tends to have little effect.

[65] Ibid., at 6-7.
[66] Ibid., at 7-9. Also see Anti-Dumping Commission, PV Modules or Panels Exported from China, Submission by End User (Public Record no. 76), 24 July 2014.
[67] Anti-Dumping Commission, PV Modules or Panels Exported from China, Statement of Essential Facts (Public Record no. 112), 1 April 2015, at 8. (SEF 239)
[68] Ibid., at 47-52.
[69] Ibid., at 53-62.

The Solar Panels Investigation has not been completed. An unpleasant development subsequent to the SEF concerns Tindo's claim that a "particular market situation" existed in China's solar panels and modules market.[70] While the AD Commission should have decided not to consider the claim as it was made more than 20 days after the publication of the SEF[71], it decided to do so. The AD Commission's current consideration of the claim on "particular market situation" creates the uncertainties as to whether the dumping margins found in the SEF are to be increased and if so, whether the impact of dumping on the domestic industry will still be found to be insignificant. These uncertainties will remain until the final decisions of the AD Commission which is expected to be made by 18 July 2015.[72]

5 CONCLUSION

An assessment of "material injury" and "causation" is fundamental to determination of whether an anti-dumping measure can be imposed on allegedly dumped imports. Such an assessment must be conducted in accordance with the WTO AD Agreement and the relevant WTO jurisprudence. While Australia incorporated the relevant provisions of the AD Agreement into the Customs Act, in practice Australia's investigating authority seems to have deviated from the WTO rules in its determination of "injury-causation" in past investigations. In particular, the authority's evaluation of "injury-causation" was inadequate and relied predominantly on allegations and evidence advanced by Australian industry applicants. This has been exemplified by Australian Customs' "injury-causation" determination in the ARWs Investigation and the AD Commission's determination in the Plate Steel Investigation.

In two of the most recent investigations, however, the AD Commission seems to have become more inclusive and objective in assessing the evidence relating to "injury-causation" before it than its practice in the previous investigations. In particular, in the Newsprint Investigation and the Solar Panels Investigation the AD Commission has done a more adequate evaluation of "injury-causation" by giving due account to submissions by all interested parties rather than relying disproportionately on evidence provided by Australian applicants. The AD Commission's "injury-causation" assessment suggests that positive findings of "injury-causation" in favour of Australia's industry applicants will no longer flow naturally from a positive finding of dumping. Rather, the AD Commission is increasingly inclined to consider all of the evidence in a comprehensive manner and less reluctant to reject allegations of "injury-causation". While some analysis of the AD Commission in the two investigations remained inadequate, this is a positive step towards a thorough and unbiased analysis of "injury-causation" in accordance with the WTO rules. For interested parties against allegations of "injury-causation", the two investigations also suggest that they are expected to actively and fully participate in investigations by providing relevant submissions and evidence to allow the AD Commission to undertake a proper evaluation and to increase their own odds of success.

[70] Anti-Dumping Commission, PV Modules or Panels Exported from China, Submission by Australian Industry (Public Record no. 118), 5 May 2015.
[71] Anti-Dumping Commission, PV Modules or Panels Exported from China, Submission by Industry Association (Public Record no. 124), 29 May 2015.
[72] Anti-Dumping Commission, PV Modules or Panels Exported from China, Extension to due date for Final Report (Public Record no. 121), 19 May 2015.