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From Legislation to Judgment: Case Study of T-199/04 in EU Trade Law

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Abstract
This paper examines the application of Anti-Dumping duty on imports of cotton type bed linen originating from Pakistan with particular reference to a Pakistani exporter Gul Ahmad (Pvt) Ltd. This research has delved into the legal discourse and jurisprudence evolving about the scope and limitations of Article 3(7) of the basic regulation and Article 3.5 of the GATT Article VI agreement. This research has taken on board the legal opinions of other researchers and judges about the causation and importance of creating a causal link while determining the injury caused to the importers. In this particular case it has been found that the EU Commission erroneously attributed the injury caused to its local industry to the alleged dumped imports while, conversely, it was being caused due the grant of generalised preferential system to Pakistan. Trough which Pakistani exporters benefitted and the influx of Pakistani imports increased in time. The same fact was established by the general court in its judgement which was later turned down by the EU Court of Justice.

Key Words: Anti-Dumping, Causal Link, Injury, Other known factors, Gul Ahmad, Eurocotton

1. Case Analysis of Gul Ahmed Textile (Pvt) Ltd V Council of The European Union Case T-199/04

1.1. The Factual Context of The Case

Gul Ahmed Textile Mills Ltd, a Pakistani company based in Karachi, specializes in exporting bed linen to the European Union but does not sell locally in Pakistan. In response to a complaint filed by Eurocoton on July 30, 1996, the EU imposed definitive anti-dumping (AD) duties on cotton-type bed linen from Pakistan, along with Egypt and India, through Council Regulation (EC) No 2398/97. In October 2001, an MOU was signed between the EU and Pakistan concerning market access for textiles. This led to the adoption of Council Regulation (EC) 2501/2001 in December 2001, which granted Pakistan preferential tariff treatment from January 2002 to December 2004, effectively removing AD duties on Pakistani textiles.

However, following a new complaint from Eurocoton in November 2002, the EU Commission initiated another AD investigation on Pakistani cotton-type bed linen, covering the period from October 1, 2001, to September 30, 2002. The investigation included a sample of six Pakistani companies responsible for over 35% of exports, with questionnaires sent to these companies and additional input from other stakeholders.

During the investigation, the Commission encountered threats that interrupted verification visits at two exporting companies, allowing full verification only at Gul Ahmed's facilities and partial verification elsewhere. On March 2, 2004, the EU Council imposed definitive AD measures through Regulation (EC) No 397/2004, setting a 13.1% duty on cotton-type bed linen from Pakistan. This regulation was later amended by Council Regulation (EC) No 695/2006 on May 5, 2006, reducing the duty for Gul Ahmed's products to 5.6%.

1.2. Plea and Arguments of Gul Ahmed

Gul Ahmed Textile Mills Ltd challenged the contested anti-dumping (AD) regulation and sought its annulment, while the Council and Commission opposed this plea. The applicant alleges that the EU Council made a manifest error of assessment while determining the injury margin caused to the EU market; as it has failed to asses the impact of grant of GSP plus status to the Pakistani exporters similarly, it did not acknowledge the fact that the imports from Pakistan greatly increased due to the lapse of preceding AD duty. They argued that, the list provided in Article 3(7) is not exhaustive rather it is exemplary hence, the investigative bodies are duty bound to examine the injurious impact of all other known factors enlisted in the provided list or not, while determining the injury factor for the local industry.

They asserted that the end of previous AD duties on Pakistani products disrupted the causal link between the alleged dumped imports and the injury claimed by the EU industry. Gul Ahmed contended that the Council misinterpreted Article 3.5 of the 1994 AD Code and Article 3(7) of the basic regulation. They argued that these provisions should not be read to exclude the impact of other factors, such as the GSP scheme, which significantly reduced Pakistani import prices by about 10%. This reduction was not factored into the Council's assessment. The company also pointed out that the sample used in the investigation was not representative of the full range of imports, as it covered only a third of the imports during the investigation period. They claimed that the increase in Pakistani imports was largely due to the GSP scheme rather than dumping practices. Gul Ahmed argued that the injury to the EU industry, evident from economic indicators like price drops and reduced profitability, was primarily due to changes in the legislative framework and not solely attributable to Pakistani imports. They claimed that the increase in imports was a result of duty elimination rather than dumping. In essence, Gul Ahmed's arguments focused on the contention that the injury to the EU industry was not accurately linked to the imports from Pakistan and was influenced more by changes in trade regulations and market conditions.

1.3. Legal Basis Of Council's Arguments

The EU Council argued that, the regulatory changes including the withdrawal of preceding Anti-Dumping duty or grant of GSP plus status to Pakistani exporters cannot be considered within the scope of 'Other known factors' defined in Article 3(7); conversely, the said Article intends to include market trends and behaviors. They argued that modifications to duties impact only the volume and pricing of dumped imports, not the Union industry itself. The Council asserted that relevant economic indicators already accounted for these aspects when assessing injury.

Additionally, the Council maintained that even if the introduction of preferential tariffs for Pakistan and the removal of previous AD duties were considered 'known factors,' they did not disrupt the causal link between dumped imports and the alleged injury. They pointed out that the previous AD duties were not lifted until January 30, 2002, and the GSP scheme only took effect from January 1, 2002, which means they could not account for the negative trend observed during the investigation period, which spanned from October 1, 2001, to September 30, 2002. They also noted that three of the six Pakistani exporters sampled, including Gul Ahmed, were not subject to prior AD duties.

Additionally, the Council contended that, the prices of domestic industry remained stable rather increased following the laps of preceding Anti-Dumping Duty on Pakistani exports and grant of GSP+ status to Pakistan which suggests that these regulatory changes does not injuriously affected the union industry. The Council also asserted that, the same issue was not raised by the Gul Ahmed in Administrative procedures, in front of the EU Commission. In reply, Gul Ahmad challenged the EU Council's interpretation and the jurisprudence backed by their argument that, legislative amendments fall out of the scope of Article 3(7) arguing that this interpretation lacked legislative support. The Council asserted that the causal link between the alleged dumped imports and alleged injury caused to the EU industry should be established only post legislative amendments.

1.4. Judgement of the General Court

The General Court found that by the time the complaint was lodged, the EU institutions were aware of legislative changes, making it crucial to consider Gul Ahmed's claims about their impact. The Court determined that if the EU institutions overlook all relevant factors, aside from dumped imports, that could influence the Union industry, they cannot accurately assess whether the injury is exclusively due to dumped imports. A thorough evaluation requires differentiating the effects of various factors to justify the imposition of anti-dumping duties.

> *"The Court criticized the Council for distinguishing between regulatory changes and market developments, arguing that this distinction is not supported by Article 3.5 of the WTO Agreement or Article 3(7) of the basic regulation. These provisions aim to prevent the misattribution of negative effects from other factors to the investigated imports. The Court concluded that both the removal of previous anti-dumping duties and the implementation of preferential tariff arrangements were significant factors that should have been considered under Article 3(7). The Council's failure to properly account for these factors meant that the investigation did not adequately establish the causal link between Pakistani imports and the harm to the Union industry".*

The Court observed that, the Council's argument that legislative or regulatory amendments cannot break the causal link between the alleged dumped imports and alleged injury is flawed. It also established that, instead of relying on generic economic statistics, the Council should have conducted an in-depth analysis of specific data provided by a specific exporter, involved in investigation. Finally, the Court concluded that, the EU Council has failed to conduct a causation analysis appropriately, thus by such failure, it has attributed the injury caused by other known factors to the alleged dumped imports which is in contravention to the intent and meaning of Article 3.5 of the WTO Agreement. Consequently, the contested regulation was annulled in relation to Gul Ahmed, making it unnecessary to review other aspects of their argument.

1.5. Comment

Causation analyses require investigative bodies to establish a direct relationship between dumped imports and the alleged harm inflicted on the domestic industry. Determining this causal link is crucial for deciding whether to impose anti-dumping duties. Although it might seem straightforward, it has often been contentious due to the absence of explicit legal criteria for establishing such a link. The researcher argues that the factors listed in Article 3(7) are not exhaustive but rather indicative, suggesting that other relevant factors can also be considered. To properly interpret Article 3(7), one must understand its purpose within the General Agreement on Tariffs and Trade (GATT), which is to ensure a non-attribution analysis that separates the damage caused by dumped imports from that caused by other known factors.

Cases C-341/95 and C-76/00 established that Union legislation should, whenever possible, align with international law, especially when its provisions are intended to implement an international agreement. However, Dider noted that while the EU institutions have increasingly focused on the injury caused by 'other known factors,' their approach was different before the Uruguay Round. Since the adoption of a more rigorous policy to differentiate between the effects of dumped imports and those of other factors, only a few cases have demonstrated that 'other known factors' disrupt the causal link between dumped imports and harm to the Union industry.

In another judgement of Case C-149/96 and Case T-192/08, the court set the parameter to judge the legality of the Union institution's actions taken within the context of an international agreement. It ruled that the efficacy of the EU institution's actions will be reviewed by the courts in the light of the WTO Agreement, through which the investigative institutions seek power. In the same way the interpretation of Article 3(7) as done by the EU Council shall be cross-checked against not only the

text of Article 3.5 of the AD Code 1994 but also the intent and rationale of legislators behind the incorporation of Article 3(7).

In the paper, J. J. Nedumpara and J. J. Nedumpara discuss the concept of causation or the causal link in antidumping investigations as a critical aspect of determining whether injury to a domestic industry is directly attributable to dumped imports. They highlight that establishing causation involves demonstrating that the harm suffered by the domestic industry is a direct result of the lower-priced foreign imports, rather than other potential factors such as changes in market conditions, domestic competition, or broader economic conditions. The paper explains that different jurisdictions have varying approaches to proving this causal link. For instance, some countries require a rigorous and detailed analysis to isolate the effects of dumping from other influences, while others may adopt more flexible criteria. The authors emphasize the complexity involved in proving causation and the challenges faced by investigating authorities in distinguishing between the impact of dumped imports and other external factors that might affect the industry.

Simon Lester discusses three possible options where causation analyses could be considered satisfied. First, if it is established that, increased imports are the only cause of injury caused to the local industry; second, if dumped imports do not solely cause material injury but their contribution to the injury is huge; third, causation test is satisfied, when increased imports analysed in isolation are contributing to the injury caused to local industry.

However, it may be submitted that, the other known factors may be different and versatile depending upon the nature of the dispute and circumstances of each case. Therefore, if one applies literal or mischief rule of interpretation, considering the purpose of the Article, which was to avoid the calculation of injury in a dumping case which instead was due to other known factors, in either case the wording of the Article seems to be inclusive rather than conclusive.

Article 3.5 of the WTO Agreement and Article 3(7) of the EU's basic regulation suggest that the factors listed in these provisions are meant to be illustrative rather than exhaustive. Although the factors outlined in Article 3(7) can be relevant in numerous situations and provide helpful guidance on potential sources of harm beyond imports, this list is not obligatory or definitive.

Mickus argue that, an anti-dumping duty can only be imposed, if it is found that Union industry is being injured due to these imports. As a common practice, the Commission is found to establish this causal link on two grounds; firstly, drastic increase in foreign imports and secondly, depreciation of prices of Union industry. Therefore, causation would be established where Union market is being injured and this injury coincides with increase in imports and reduction of prices.

Nishimura discusses the necessity for countries to prove that increased imports have caused or threaten to cause serious injury to their domestic industries. The paper highlights the challenges in demonstrating this causal relationship, given that economic impacts from increased imports can be influenced by various factors beyond just the influx of foreign goods. Nishimura notes that the WTO's safeguards framework requires a thorough investigation to isolate the effects of imports from other market conditions, which often leads to complex and lengthy debates.

The WTO Panel report WT/DS122/R clarified that Article 3.5 requires investigating authorities to consider other known factors and provides an illustrative list of these factors. Additionally, it mandates that damage caused by these other factors should not be attributed to dumped imports. Similarly, in report ADP/97, the WTO panel emphasized that the examples of other known factors listed in Article 3.5 of the WTO Agreement are intended as examples only. Due to the complexity of economic and commercial issues in each case, it was not feasible for legislators to provide a comprehensive list of all possible factors.

However, Prost *et al.* contend that, on a larger scale the Panel and the appellate tribunal has not sufficiently determined the methodology to be used by the national investigative bodies to establish

causal link. However, while reviewing the determinations of the national investigative bodies, they have revealed two standards; (i) coincidence in time and correlation standards, and (ii) condition of competition slandered.

Article 3.5 of the WTO Agreement quoted a few examples of other known factors, and the rest is left up to the investigative bodies to analyse the injury caused by all differing and possible other factors affecting the local industry. The wide discretion available to Commission in injury determination is automatically extended to causation analyses as well. However, the researcher suggests that the discretion given by Article 3.5 of GATT should not be misinterpreted by the signatories of the Agreement and should not lead to a conclusion that it is up to the national investigating bodies to adjudicate which factors need to be considered and which do not need to be examined. It may further be asserted that the rationale of Article 3.5 of the WTO Agreement and Article 3(7) of the basic regulation should not be overridden by the grant of discretion to investigation institutes.

Another issue in analyzing causation is accurately quantifying the injury caused by both dumped imports and 'other known factors' when both are contributing to harm simultaneously. In the Upland Cotton case, the Appellate Body determined that while 'other known factors' might contribute to price suppression, the injury from these factors does not sever the genuine causal link between significant U.S. price-contingent subsidies and notable price reductions. Although Sapir et al. generally agree with the Appellate Body's findings on causation analysis, they believe the Appellate Body should have offered more detailed guidance on non-attribution analysis.

Additionally, the list of 'other known factors' in Article 3(7) is intended to be exemplary and indicative. However, some judges and parties have argued that due to the complex economic and commercial calculations in anti-dumping cases, legislators have granted investigative agencies broad discretion to determine the relevance of other factors based on the specific circumstances of each case. This view was upheld in Cases T-462/04, T-385/11, and T-633/11.

Ngobeni's analysis explores the concept of causation within South Africa's anti-dumping regulations, in relation to the WTO's Anti-Dumping Agreement. Ngobeni underscores that proving a causal link between dumped imports and material injury to domestic industries is essential. The analysis assesses how South Africa's procedural framework aligns with international standards, stressing the need for clear and substantiated evidence to confirm that dumping practices have caused harm to local producers. This approach ensures that the imposition of anti-dumping duties is both justified and consistent with global trade rules.

Prost *et al*. argued that, non-attribution analysis and establishment of causal link among dumped imports and material injury caused to Union industry is a very difficult and complicated practice; which tend to exert extra burden upon investigative bodies. The insufficient separation among dumped imports and injury has been common reason for inconsistency of the adopted regulations with the WTO Agreement. However, this paper contends that, AD measures adopted by the national investigative bodies are not controversial due to lack of competence of the institutions or complexity of the causation analyses. Instead, it is due to the profound arbitrary decisions drawn by the investigative agencies caused by ambiguous wording of the applicable provisions of international and national AD frameworks.

Although it is established that it was impossible for legislators to include an exhaustive list of other known factors in Article 3(7) of the basic regulation, it seems to be unjust to establish the preference of Literal rule over Mischief rule of interpretation of Article 3(7). However, it is crystal clear that the rationale of Article 3(7) is to restrict the protection of local industry beyond what is necessary.

In order for this obligation to be caused, Article 3.5 requires that the factor at issue:

> "(*a*) *Be 'known' to the investigating authority;*

(b) Be a factor 'other than dumped imports'; and

(c) Be harming the local commerce at the same time as the dumped imports"

This paper establishes that in order to maintain the inclusion or exclusion of any injurious factor within the meaning of other known factors, all three above-mentioned conditions must be met. If any of them could not be established, then such factor may not be considered as other known factor. For example if a factor is known and separate from dumped imports but it is not causing injury, then it is not other known factor.

Similarly, if a factor is separate from dumped imports and it is also causing injury but it is not known to the investigative agencies, then it failed the test of other known factors. In the same way if such a factor is known and causing injury to the local market but is not separate from the dumped imports, in that case as well it is not able to be considered.

Keeping in view the above-mentioned pre requisites of application of Article 3(7) of the Regulation, if one analyses the current case, one must admit that the subject matter of this case fulfils all terms and conditions to be considered as other known factors, as the legislative amendments and grant of preferential tariff arrangements by the EU institutions was a factor known to the EU institutions. And in the author's opinion, these legislative amendments were a separate factor from dumped imports. However, difference of opinion exists regarding this point. The jurists and researchers are divided into two groups in this regard, one of which states that legislative amendments and grant of preferential tariff arrangements was a separate factor, whose consequences in the form of increase of export from Pakistan to EU markets was known to the EU.

But the other school of thought opines that the effect of legislative amendments was not on the EU market but on the dumped imports itself. Thus the injury suffered by the EU is not due to the amendments but to the dumped imports themselves. However, in the writer's opinion the legislative amendments and grant of special tariff arrangements was a known, separate factor causing injury to the EU market. Hence, it should be interpreted and included within the meaning of other known factors as described by Article 3(7) of the Regulation.

Additionally, the author suggests that as held by the EU Court in Case T-299/05 the basic purpose of adoption of AD laws and the imposition of AD duties, has been to restrict unfair trade and practices while ensuring a fair comparison among NV and EP considering all those factors affecting price the comparability. Therefore, if the Council's argument is accepted that the origin of injury is in dumped imports instead of legislative amendments, then the question may arise why the EU institutions adopted regulations which provide for concessional arrangements for developing countries and ultimately result in the form of material injury to the Union industry? Meanwhile the consequences of lifting previous AD duties and the grant of preferential tariff arrangements to Pakistan were already known: that ultimately it will result in the form of benefit to Pakistani exporters in terms of their cost of production.

Similarly, Article 15 of 'SCM' requires the segregation of injurious effects caused by subsidised imports from injury caused due to subsidy. In a dispute among Korea and Japan about 'countervailing measures on dynamic access memories from Korea', the Appellate Body disagreed with Korea's argument that injurious effects should be segregated, and thus upheld the Panel's findings. The AB concluded that, it would imply additional burden on investigative bodies; first, to inquire the purpose of subsidy as granted by the exporting country and secondly, to evaluate that, if in the absence of subsidy, the exports would have been in same volume or at same prices. However, Article 15 does not require two inquiries.

Crowley and Palmeter argue that, AB's conclusion would weaken the causation test between subsidies and countervailing measures, as required by Article 15. It would render protection beyond necessity to the local industry. The AB has not interpreted Article 15 within its whole context ignoring

its purpose and context. The AB's contention that, Korea argument offers two additional tests to be carried out by the investigative bodies is not substantial. It overlooks the way by which burden of proof moves during legal proceedings.

In their 2023 study, Aspan and colleagues examine the process of establishing causation when imposing anti-dumping duties on uncoated writing and printing paper from Indonesia. They stress that demonstrating a causal link between dumped imports and the harm experienced by domestic industries is a crucial element of the anti-dumping investigation. The authors point out that Indonesian legal procedures mandate a comprehensive proof showing that the injury to local producers is directly caused by unfairly priced imports. This requirement ensures that anti-dumping measures are based on a well-documented connection between the dumped products and the adverse effects on the domestic market.

In Cases T-410/06 and T-138/02, the General Court clarified that anti-dumping duties are not punitive measures for past actions but are intended to protect and prevent unfair competition arising from dumping practices. To determine the appropriate anti-dumping duties to safeguard the Union industry, investigations must rely on the most current information available.

Le Lan's 2021 study examines how causation is addressed in the context of U.S. anti-dumping measures, focusing on the legal and practical challenges involved. The author emphasizes that proving a causal link between dumped imports and domestic injury is a crucial aspect of enforcing anti-dumping laws. According to Le Lan, the U.S. system requires clear evidence that the harm experienced by local industries directly stems from unfairly priced imports. This requirement ensures that anti-dumping duties are applied correctly and only when a genuine connection between dumping practices and material injury is established.

It seems to be a sweeping statement by the Council that even if legislative amendments could be regarded as other known factors, even then they could not break the causal relationship. The author is not sure on what basis the Council can claim this. However, it is suggested that, if the Union market has suffered materially due to exports from Pakistan, and injury margin is increased after the withdrawal of previous AD duties on Pakistan and grant of generalised tariff preferences to Pakistan. Then there would be sufficient reasons to believe that the causal link may have been broken. At least it would require deep analysis of the facts to reach a conclusion about what percentage of material injury originated from legislative amendments and how much originated from the dumped imports.

The investigative bodies are required to state explicit, unambiguous, clear and reasoned explanation about causation analysis. In this regard, the investigative bodies should conduct a proper economic analysis. Similarly, the Panel in *US-Steel* established that, a thorough quantitative analysis is required for adequate non-attribution analysis. However, it is maintained that, specific economic or quantitative model is the discretion of national investigative agencies. Vermulst noted that, only a few 'other known factors' have been able to break the causal link among dumped imports and injury caused to Union industry. These factors include; de minimis dumping margin; de minimis market share of the dumped imports; de minimis injury margin and lack of interest of Union industry. However, the current case is unique in its nature, as admissibility of legislative amendments under the scope of Article 3(7) has not been argued before. Also, there is dearth of legal literature on this specific point.

Moreover, the investigation period includes three months when previous AD duties were in place. The two-year investigation period also includes almost nine months when Pakistani exports were benefiting from the EU's preferential tariff arrangements approved for Pakistan. Therefore, it is evident that the two principal policy changes in the EU's trade policy relating to Pakistan in the form of removal of previous AD duty and approval of GSP status for Pakistani imports also emerged in the overall calculation of normal value, and export price etc. through the investigation period. As a

matter of fact, however, the period through which Pakistani industry benefited by removal of duties and grant of GSP status should not be part of the investigation period.

It is submitted that it is right to say that the applicant, i.e. Gul Ahmed, was not subject to the AD duties levied by the previous regulation, hence it should not affect applicants' exports. But as a matter of fact another factor, i.e. grant of preferential tariff arrangements, is also under consideration, which definitely benefited Pakistani exports, including the exports of Gul Ahmed. Resultantly, their cost of production decreased due to the reduction of duty and concessional arrangements for developing countries like Pakistan.

However, it is submitted that it is challenging to recognise how come EU producers can submit in the Court that origin of injury caused to the Union is in the legislative amendments and grant of special tariff arrangements to Pakistan; while on the other hand it was Eurocoton itself that launched the complaint of dumped imports from Pakistan. If such statement of association representing Pakistan is right and well-founded, then it may cause serious questions regarding the validity of issues.

The case was initially decided in favour of Gul Ahmed against the Council. However, the Council appealed the decision to the Court of Justice, which overturned the General Court's ruling. The Court of Justice disagreed with the General Court's interpretation of the causal link and other known factors under Article 3(7) of the basic Regulation. It also ruled that legislative amendments do not qualify as 'other known factors' within the meaning of Article 3(7) of the basic Regulation.

1.6. Conclusion

This paper examined the decisions of the General Court and the EU Court of Justice in Case C-638/11, revealing divergent interpretations of Article 3(7) of the basic Regulation. The General Court ruled that elements such as the GSP status granted to Pakistan and the removal of prior anti-dumping duties should be factored in when distinguishing injury caused by dumped imports. It highlighted that the list of 'other known factors' in Article 3(7) serves as a guide rather than a complete enumeration, implying that institutions must consider all pertinent factors impacting the market.

In contrast, the EU Court of Justice ruled that legislative changes or GSP status could not be deemed 'other known factors' directly influencing the Union industry's conduct. It required the analysis to focus solely on factors with a direct impact on the Union market. This paper argues that such legislative amendments are indeed significant and affect the market, suggesting that the broad and ambiguous nature of Article 3(7) leads to varied interpretations. Therefore, it recommends that a more detailed list of 'other known factors' should be established to ensure consistent application in causal link assessments.

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