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Particular Market Situation in anti-dumping cases: A tool to address distortions

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Introduction

Article 2.1 of the WTO's Anti-Dumping Agreement ('**ADA**') provides that a product is considered as being dumped into an importing country if the export price of the product is less than the normal value. The normal value, under the primary method, is the domestic selling price of like article in the exporting country.

However, Article 2.2 of the ADA allows an investigating authority to reject the domestic selling prices for calculating the normal value in cases where, because of a 'Particular Market Situation' ('**PMS**'), such domestic sales do not permit a proper comparison with the export price. The provisions allow an investigating authority to determine the normal value in such cases through the secondary methods, namely, the export price to third country or the cost of production. Similar provisions have been incorporated into Section 9A(1)(c) of the Customs Tariff Act, 1975 ('**CTA**').

Therefore, determination of a PMS situation in the exporting country assumes paramount importance for an investigating authority as it alters the basis for determining the dumping. However, the phrase PMS has not been defined either in the ADA or under the CTA. Therefore, the law is silent regarding the appropriate approach to determine the existence of a PMS.

As the name suggests, a PMS is a situation existing in the 'market' of a product in the exporting country which is 'particular' or 'distinct' to the product in a manner that it can potentially distort its domestic selling prices and render them unfit for comparison with the export prices. One cannot exhaustively list out the situations in which a PMS can be found to exist, and a fact-finding exercise must be done on a case by case basis. Some of the situations may include Government interventions, cost distortions, etc.

The only thing which is clear from the provisions is that a mere existence of PMS is insufficient for discarding the domestic sales. After PMS is found, the investigating authority has to further determine whether the said PMS does not permit a proper comparison between the domestic sales and the export sales of like article from the exporting country. It is only when both these determinations are made can an authority discard the domestic sales for calculating the normal value.

We discuss below some of the recent cases wherein the Indian investigating authority undertook a PMS analysis.

Low Density Poly Ethylene (LDPE) from Saudi Arabia

In the LDPE case[1], the domestic industry alleged that there existed a PMS with regards to price of input raw materials such as ethane, propane and butane and utilities like natural gas in Saudi Arabia, Qatar and UAE, as the price of

[1] Ministry of Commerce and Industry (Department of Commerce) (Directorate General of Trade Remedies) - Final Finding (Case No. AD (OI) 25/2020) 31 March 2022

such inputs are distorted (lower than international prices) due to government interventions thereby distorting the costs and domestic prices of downstream LDPE produced from such inputs. The domestic industry also argued that the cost of production of LDPE producers should be adjusted to reflect the undistorted costs.

The other interested parties contended that the prices of the said inputs are lower in these countries due to their abundant availability in these countries. Nevertheless, they also claimed that PMS situation can be found only when the PMS prevents a proper comparison of domestic sales with the export price.

With respect to Saudi Arabia, the Authority noted that the prices of such inputs are fixed by the Government, which also regulated prices for domestic sales of certain upstream hydrocarbons, including ethane. In order to determine whether the distortions in the price of the inputs in production of LDPE can be considered as a PMS, the Authority referred to the WTO decision in *Australia — Anti-Dumping Measures on A4 Copy Paper* (DS529) where the panel considered whether the input price distortion can be construed as a particular market situation. The Panel had noted that *'capable of preventing a proper comparison'* is not a necessary qualification for a situation to constitute *'particular market situation'*. The Panel had noted:

> *'7.27 …….We find no functional purpose is served by incorporating into the meaning of 'particular market situation' part of the function that will necessarily be served by the terms 'because of and 'not permit a proper comparison'. Accordingly, we find that 'capable of preventing a proper comparison' is not a necessary qualification for a situation to constitute the 'particular market situation'. Indeed, incorporating such a meaning into the term 'particular market situation' would alter the functioning of this provision. Thus, we find that the term 'particular market situation' does not require or contemplate an analysis relating to the capability of causing domestic sales to not permit a proper comparison in the abstract. Rather, the terms 'because of and 'not permit a proper comparison' in Article 2.2 already properly and adequately fulfil this function.'*

Basis the above, the Authority concluded that since the prices of the said inputs were found to be influenced by the government intervention, to that extent PMS exists in Saudi Arabia. The Authority also concluded that there did not exist a PMS in Qatar and UAE as no evidence was placed on record by domestic industry that raw material prices are fixed or regulated by the Government in Qatar or UAE.

After concluding that PMS exists in Saudi Arabia, the Authority went on to examine the second condition i.e. whether the effect of such PMS is such that it does not permit a proper comparison between the domestic selling price and the export price.

In this regard, the Authority again referred to the Panel report in *Australia-Copy Paper* which had observed:

> '*7.73. Where a 'particular market situation' is found to exist, the investigating authority must examine whether 'a proper comparison' of the domestic and the export price is permitted or not. We consider that the 'proper comparison' language calls for an assessment in respect of the comparison of domestic and export prices.*

'7.74 ……The function of the 'permit a proper comparison' test is to determine whether the domestic price can or cannot be used as a basis for comparison with the export price to identify the existence of dumping. It is implied here in Article 2.2 that the words 'a proper comparison' refer to the comparison between the domestic price and the export price. Thus, the purpose of an investigating authority's examination under the second clause of Article 2.2 of the Anti Dumping Agreement is to determine whether domestic sales of the like product in the ordinary course of trade do not permit a proper comparison between the export price and the domestic sales price because of the particular market situation or the low volume.'

'7.75 ……We therefore consider that the 'proper comparison' language calls for an assessment of the relative effect of the particular market situation on domestic and export prices. We understand that, in certain circumstances, as a result of this assessment, the investigating authority may conclude that the particular market situation has no effect on the export prices.'

The Authority examined all the available evidences on record viz. the cost of production of LDPE, the domestic selling prices and the export prices of LDPE as reported by the responding producers from Saudi Arabia and concluded that there was no sufficient evidence to conclude that the PMS in Saudi Arabia had specifically impacted only the domestic selling price of LDPE in such a manner that a proper comparison between domestic selling price and export price is not permitted. A tacit conclusion of the Authority was that even if inputs costs were distorted in Saudi Arabia, it had equally impacted the domestic selling prices and export prices of LDPE, thereby permitting a proper comparison of two variables.

Thus, the Authority concluded that that there was no sufficient evidence on record to reject actual cost of raw materials and the domestic selling prices of producers/exporters from Saudi Arabia for determining the dumping margins under Article 2.1 and 2.2 of the ADA.

Uncoated Copier Paper from Indonesia

A somewhat similar reasoning was adopted by the Authority in the recently concluded sunset review investigation of Uncoated Copier Paper from Indonesia (Final Findings dated 26.11.2021). The domestic industry had alleged existence of PMS in Indonesia on account of various policies and actions of the Government of Indonesia which allegedly influenced and artificially lowered the prices of input material (wood pulp).

The Authority finally concluded that even if it is considered that the prices of raw material wood pulp are artificially lowered due to Government interventions, the domestic industry did not give any evidence to show that this has led to lower prices only in the domestic market and not the export price.

Glass Fibre from Egypt

Recently, in the Anti-dumping investigation concerning imports of 'Glass Fibre and Article thereof' originating in or exported from Bahrain and Egypt (Final Findings dated 30.11.2021), the domestic industry had alleged a PMS with respect to one of the producer / exporter of glass fiber from Egypt *viz.* Jushi Egypt as it was established and operating in the SETC zone in Egypt (similar to an SEZ in India). It was alleged that the domestic sales of the producer from SETC to the domestic tariff area in Egypt are

subject to various terms and conditions, by virtue of being in the zone. It was also contended that the SETC zone in Egypt was allegedly established with the various investments and infrastructural support from the Chinese government and the said producer, having a Chinese parent company, had numerous advantages such as cheap raw material, tax and utilities benefits rendering the costs and domestic prices in Egypt as unreliable.

The Authority, by referring to the Australia-A4 Copy Paper ruling, observed that a PMS can be understood as those situations, although not exceptional, lead to price distortions in the domestic market rendering the normal value unfit for comparison with the export price. To examine whether a PMS exists in the domestic market of an exporting country, the Authority noted that the issues needed to be conclusively established in that case were:

a. Whether the price of the like article in domestic market is fair and reliable and is representative especially when it emanates from a unit situated in SEZ with various tariff, fiscal and logistics concessions and also investments from China?

b. What is the extent of price variation between the transactions occurring between the related and unrelated parties?

However, the Authority did not go into a detailed examination of above issues to determine the existence of PMS as the issue of PMS was raised at a belated stage and on the basis of the facts available it was not able to conclusively establish the existence of a PMS in domestic market of Egypt on account of the SETC operations of Jushi Egypt.

Conclusion

PMS issues have recently been raised in number of Indian anti-dumping investigations. It has become a new tool in the hands of the domestic industry to allege distortion in costs and domestic selling prices in the exporting country. However, as a long as PMS does not create hindrance in a proper comparison between domestic selling price and export price, its impact is neutral.

There are no clear guidelines to determine the kind or type of situations that can result in a PMS. Considering its importance, some developed countries like Australia and USA have amended their regulations to provide standard guidelines and approaches to determine whether a PMS occurs in the trade practices of exporters. Although it is recognized that PMS situations cannot be exhaustively defined, it is high time that Indian Authority also issues some guidelines for determining existence of PMS in anti-dumping investigations.

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Trade Remedy News

Trade Remedy actions by India

Product	Country	Notification No.	Date of notification	Remarks
Decor Paper	China PR	F. No. 6/38/2020-DGTR	10 April 2022	Anti-dumping duty table recommended to be substituted in respect of imports from M/s. Hangzhou Huawang New Material Technology Co. Ltd., China
Fluoro backsheet	China PR	F. No. 6/3/2021-DGTR	29 March 2022	Anti-dumping duty recommended
Jute products	Bangladesh and Nepal	11/2022-Cus. (ADD)	31 March 2022	Anti-dumping duty extended till 31 August 2022
Low Density polyethylene (LDPE)	Saudi Arabia, Singapore, Thailand and USA	F. No. 6/30/2020-DGTR	31 March 2022	Anti-dumping duty recommnded
New/unused pneumatic radial tyres for buses and trucks	China PR	F.No. 07/02/2022 - DGTR	30 March 2022	Sunset review of anti-dumping duty initiated
Rubber chemicals	TDQ from China PR, EU and Russia; PVI from China PR; CBS from China PR	F. No. 6/4/2021-DGTR	30 March 2022	Anti-dumping duty recommended

Trade remedy actions against India

Open mesh fabrics of glass fibres	EU	Commission Implementing Regulation (EU) 2022/651	20 April 2022	New Exporter Review of anti-dumping duty initiated
Polyethylene Terephthalate (PET)	USA	87 FR 19531	4 April 2022	Affirmative sunset reviews issued for anti-dumping and countervailing duties
Polyethylene Terephthalate Resin	USA	87 FR 21092	11 April 2022	Countervailing duty Orders continued
Polyethylene Terephthalate Resin	USA	87 FR 21871	13 April 2022	Anti-dumping duty Orders continued
Raw honey	USA	87 FR 22188	14 April 2022	ADD – Final determination of sales at less than fair value
Sodium Nitrite	USA	87 FR 23567	20 April 2022	Scheduling of the final phase of countervailing duty and anti-dumping duty investigations
Sulfanilic Acid	USA	87 FR 19069	1 April 2022	Expiry reviews of anti-dumping and countervailing duty initiated

WTO News

Costa Rican import restrictions on Mexican avocados violate SPS Agreement

On 13 April, the WTO circulated the panel report in the case brought by Mexico in '*Costa Rica — Measures Concerning the Importation of Fresh Avocados from Mexico*' (DS524). The panel found that Costa Rica has acted inconsistently with Article 5.1 of the Sanitary and Phytosanitary Measures Agreement, by failing to ensure that its phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to plant life or health. Costa Rica was similarly also found to be violating Articles 5.2, 5.3 and 2.2 of the SPS Agreement.

India Customs & Trade Policy Update

Mauritius imports under CECPA – Customs duty further reduced

The effective rate of duty on imports from Mauritius under the India-Mauritius Comprehensive Economic Co-operation and Partnership Agreement ('CECPA') has been further reduced by India with effect from 31 March 2022. This is the second tranche of tariff concessions. It may be noted that the agreement came into effect on 1 April 2021. Notification No. 17/2022-Cus., dated 31 March 2022 has been issued by the Central Board of Indirect Taxes and Customs for this purpose. Further, it may also be noted that as per DGFT Public Notice No. 4/2015-20, dated 20 April 2022, the online applications for allocation of Tariff Rate Quota under India-Mauritius CECPA for the financial year 2022-23 will be considered by the DGFT on first come first served basis with no end date.

Cotton, not carded or combed – Basic Customs Duty and Agriculture Infrastructure and Development Cess exempted

Cotton, not carded or combed has been fully exempted from Basic Customs Duty (BCD) and Agriculture Infrastructure and Development Cess (AIDC). Notification No. 21/2022-Cus., dated 13 April 2022 issued for the purpose is effective from 14 April 2022 till 30 September 2022.

Urea imports allowed through Indian Potash Limited till 31 March 2023

Import of urea on Government account has been allowed through Indian Potash Limited subject to Para 2.20 of Foreign Trade Policy 2015-20, till 31 March 2013. Earlier such imports were allowed only till 31 March 2022. Notification No. 65/2015-20, dated 1 April 2022 amends the policy condition of urea covered under ITC (HS) 3102 10 10 under Import Policy.

Tur and Urad importable freely till 31 March 2023

Urad (Beans of SPP Vigna Mungo (L.) Hepper – 0713 31 10) and Tur/Pigeon peas (Cajanus Cajan – 0713 60 00) can now be imported freely, i.e. without any import restrictions till 31 March 2023.

Exemption from IGST and Compensation Cess for imports under advance authorisations or EPCG or by an EOU extended till 30 June 2022

Exemption from Integrated Goods and Services Tax and Compensation Cess in respect of goods imported under advance authorisations or Export Promotion Capital Goods (EPCG) authorisation or by an Export Oriented Unit (EOU), has been extended by three more months till 30 June 2022. Notifications Nos. 18 and 19/2022-Customs, both dated 31 March 2022 have been issued for the purpose. Changes in this regard have also been made in the Foreign Trade Policy 2015-20. DGFT Notification No. 66/2015-20, dated 1 April 2022 amends Para 4.14, 5.01(a) and 6.01(d)(ii) of the FTP for this purpose.

EPCG authorisation – Amendments made to reduce compliance burden and enhance ease of doing business

The Directorate General of Foreign Trade ('DGFT') has amended Chapter 5 of the Handbook of Procedures relating to Export Promotion Capital Goods ('EPCG') scheme. The amendments in various paragraphs of the scheme have been done with a view to enhance ease of doing business and to reduce the

compliance burden. Importantly, among many changes, the request for extension in export obligation period can be made to the concerned RA within 6 months [earlier 90 days] from the date of expiry of original EO period. Further, the RA may consider the request for extension received after 6 months but within 8 years from the date of issue of authorisation, with a late fee of INR 10,000. In respect of annual reporting of EO fulfilment, as per the new changes, the authorisation holder has to submit a report on fulfilment of export obligation online by 30th of June instead of 30th of April every year. Any delay in filing such report can now be regularised on payment of INR 5000 late fee for every financial year per authorisation. DGFT Public Notice No. 3/2015-20, dated 13 April 2022 has been issued for the purpose.

Ratio Decidendi

Anti-dumping duty – Discretion to include importers in the scope of 'domestic industry'

The Gauhati High Court has held that the amendment brought in to the definition of 'domestic industry' by the notification dated 1 December 2011 in Rule 2(b) of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 do bring in a discretion upon the authorities to include the producers related to the exporters or importers of the dumped article or the importers themselves in the concept of 'domestic industry'. Deliberating on the amendments in the definition of 'domestic industry' on 15 September 1999, 27 February 2010 and the one on 1 December 2011, the Court was however of the view that such discretion may not be an absolute discretion but would be a circumstantial discretion to be determined on case to case basis.

The Court observed that by omitting the word 'only' on 1 December 2011, the element of exclusion of the producers related to the exporters or importers of the dumped article or the importers themselves of the dumped article, brought in by the word 'only' in the pre-amended definition of domestic industry, stood removed. It however held that the discretion as per the definition in the notification dated 1 December 2011 would be a narrower discretion than the discretion that was provided in the definition of 'domestic industry' as per the definition in the notification dated 15 September 1999 which substituted the word 'shall' with the word 'may'. [*Century Plyboards India Ltd.* v. *Union of India* – 2022 TIOL 488 HC GUW CUS]

Anti-dumping duty – Determination of non-injurious price in INR and not USD

The Gauhati High Court has held that it would be more appropriate to have the non-injurious price determined in terms of Indian Rupees (INR) by following the procedure and principles for determination provided in Annexure-III to the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 and thereupon convert it to US Dollars

(USD) by applying the rate of exchange prevailing on the date when the non-injurious price so determined is required to be acted upon by the authorities for arriving at the anti-dumping duty that may be levied. The Court was of the view that such a procedure adopted would also be consistent with the provisions of Article 2.4.1 of the WTO's Anti-dumping Agreement. The High Court in this regard also observed that if the contrary is accepted, that as all other parameters are required to be taken into consideration for arriving at the ADD are in terms of USD, therefore, non-injurious price would also have to be determined in terms of USD, the purpose of having the non-injurious price as one of the parameters for determining the ADD may be served, but it may not be the appropriate and correct reflection of the non-injurious price. [*Century Plyboards India Ltd.* v. *Union of India* – 2022 TIOL 488 HC GUW CUS]

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