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Article

Use of 'Particular Market Situation' provision in Anti-dumping Investigations

By **Divyashree Suri**

Article 2 of the WTO Anti-dumping Agreement provides for provision regarding determination of dumping. As per Article 2.1, a product is considered as being dumped if the export price of the product is less than the normal value. Article 2.1 of the Anti-dumping Agreement provides that domestic selling price of like article in the exporting country shall be considered as normal value. However, Article 2.2 allows the investigating authority of a country to reject domestic prices for the purposes of calculating normal value in the event that the domestic sales of the like product do not permit a proper comparison because they are (i) not in the ordinary course of trade; (ii) are low in volume; or (iii) affected by 'particular market situation'. If any one of these situations is established regarding the domestic sales price of the product, the investigation authority can opt for alternative methods of determination of normal value.

Australia imposed anti-dumping duty on the import of A4 copy paper from Indonesia on 18th April 2017. Australian Anti-dumping Commission ("ADC") found that a market situation existed in the Indonesian A4 copy paper market because of strong influence on raw material inputs. Therefore, the ADC determined that the domestic sales under such a market situation were not suitable for use in determining normal value. Indonesia challenged this aspect of the ADC determination, among others, before the WTO DSB. Panel Report was issued in this case on 4th December 2019.[1]

'Particular market situation' under Article 2.2 of the Anti-dumping Agreement had not been interpreted by any previous WTO Panel or Appellate Body. However, the concept of 'particular market situation' existed in pre-WTO Tokyo Round Anti-Dumping Code. In *EEC-Cotton Yarn,* the GATT Panel interpreted 'particular market situation' under Article 2.4 of the Tokyo Round Code to observe that it was "*only relevant in so far as it had the effect of rendering the sales themselves unfit to permit a proper comparison.*"[2]

The Panel Report issued in *Australia — Anti-Dumping Measures on A4 Copy Paper* also stressed that mere existence of a 'particular market situation' in a country is not sufficient to reject domestic prices. Investigating Authority is required to examine whether 'a proper comparison' between domestic and export price is permitted or not. Only if a proper comparison cannot be made because of existence of 'particular market situation', can the investigating authority reject the domestic prices.

The Panel concluded that a 'particular market situation' is when there exists a unique set of circumstances relating to the market. The Panel refrained from assigning a more specific meaning

[1] Panel Report, *Australia – Anti-Dumping Measures on A4 Copy Paper* (DS529), circulated 4th December 2019

[2] GATT Panel Report, *EEC-Cotton Yarn,* adopted 30 October 1995.

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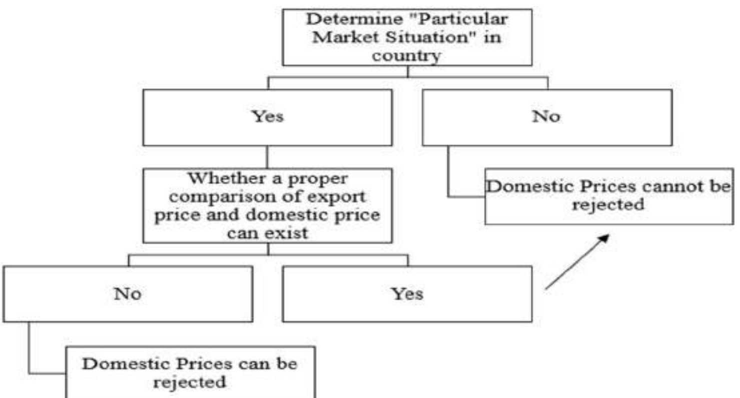
to the term, since the Panel observed that analysis must be made on a case-to-case basis.

Panel held that distortion of raw material prices arising from government action can result in a particular market situation and therefore determination regarding 'Particular Market Situation' by ADC was consistent with Article 2.2. However, the Panel observed that the rejection of domestic prices was not warranted, since ADC did not establish the lack of comparability between domestic and export price of like product i.e. A4 copy paper.

Following diagram is illustrative to summarize the observation of the Panel:



When can the 'domestic prices' and 'export prices' be considered as incomparable?

The Panel found that the relative effect of the existing particular market situation on domestic and export price must be examined. A simplistic understanding limited to whether the 'impact' of the market situation extends to both domestic and export price is not sufficient. The Panel notes that even in a situation that both domestic and export prices are impacted, the level and nature of such impact may differ. Therefore, the assessment would not only require a numerical assessment of the prices, but also a holistic qualitative assessment.

The Panel went on to hold that no blanket rule can be constructed for the purposes of examination, since the approach would depend on the factual matrix of each case. For example, in the present case, Indonesia argued that the input costs were distorted for products which are sold in the domestic markets, as well as for products which are exported. However, the Panel held that other factors such as prevailing conditions of competition, existing relationship between price and cost, etc. must be examined in order to determine how a producer/exporter can enjoy the benefit of the decreased costs differently in each market.[3]

Rejection of actual cost reflected in the records of the exporter

Article 2.2.1.1 of the Anti-dumping Agreement provides that costs shall 'normally' be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and 'reasonably reflect the costs' associated with the production and sale of product under consideration. In *EU-Biodiesel*[4], the EU commission decided to disregard the actual recorded cost of soybean to

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[3] The Panel stated that in the current factual scenario, the investigating authority should have considered the following to make a fair comparison:

> *"(a) the domestic price of A4 copy paper was affected by government intervention that distorted costs and prices; and/or*
>
> *(b) the "particular market situation" meant that the domestic price of A4 copy paper was fixed in a manner incompatible with normal commercial practice; and/or*
>
> *(c) the "particular market situation" meant that the domestic price of A4 copy paper was fixed according to criteria which were not those of the market-place.*

[4] Panel Report, *European Union - Anti-Dumping Measures on Biodiesel from Argentina* (DS473).

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calculate the cost of production of biodiesel because those costs were found to be artificially lower due to the distortion created by the Argentine export tax system. The Appellate Body observed that costs being 'artificially low' due to an existing export tax system was not a valid reason to determine that the costs were not reasonably reflected. It further held that the EU Commission was obligated to rely on the records maintained by the producers.

The Panel observed that, unlike the decision by the EU Commission in *EU-Biodiesel*, rejection of cost by ADC was not because it was not 'reasonable' but because 'cost of producing pulp was substantially less than the competitive benchmark'.[5] The Panel further acknowledged that because of the use of work 'normally' in Article 2.2.1.1 there may be situations where the exporter records may need to be rejected despite them being (i) in accordance with the generally accepted accounting principles of the exporting country and them (ii) reasonably reflecting the costs associated with the production and sale of the product under consideration. However, the Panel still considered ADC decision as inconsistent with Article 2.2.1.1. It observed that the ADC did not examine, in accordance with Article 2.2.1.1, whether costs of exporter were GAAP consistent and reasonably reflected costs associated with the production and sale of A4 copy paper.

[5] Panel Report, *Australia – Anti-Dumping Measures on A4 Copy Paper* (DS529), paras. 7.104 to 7.106. The distinction made by the Panel here is not obvious and is inconsequential. Rejection of recorded cost by ADC because it was 'it was substantially less than the competitive benchmark' effectively means that the cost was not 'ideal' or 'reasonable' in itself. In other words, it is hard to see how the determination by the ADC in this regard is different than the determination by the EU Commission under question in *EU-Biodiesel*.

Conclusion

Australia's rejection of exporter's cost has been considered as inconsistent with Article 2.2 and Article 2.2.1.1 of the Anti-dumping Agreement but the critical issue regarding the use of 'particular market situation' provision, which formed the basis for the complaint by Indonesia, still lacks clarity. Interpretation of the term 'Particular market situation' by the Panel is overly broad and ignores relevant 'context' under Article 2.2 and also conflicts with requirement in Article 2.2.1.1. as interpreted by the Appellate Body in *EU-Biodiesel*.

The Panel has ignored the language of Article 2.2, which clearly states that 'particular market situation' should exist in relation to the 'sale' of the like product in the domestic market. Distortion of input costs as a result of government action does not directly affect the situation of 'sale' of the upstream like product as such. The Panel has also ignored that the other two possibilities permitting rejection of normal value under Article 2.2 are regarding (i) ordinary course of trade & (ii) low volume of sales, which have very specific meaning directly in relation to the sale of the like product.

Thus, the term 'particular market situation' should also be limited in scope and should cover other such similar type of market situations, which directly affect domestic sales transaction prices but are not covered by the earlier two possibilities.[6]

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[6] For example, sale of an unintended byproduct in the domestic market at extremely low prices may give rise to 'particular market situation' when export of such byproduct is under investigation.

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Trade Remedy News

Trade Remedy actions by India

Product	Exporting Country/ies	Notification No.	Date of Notification	Remarks
Continuous Cast Copper Wire Rods	Indonesia, Malaysia, Thailand, Vietnam	1/2020-Cus. (CVD)	08-01-2020	Definitive countervailing duty imposed
Ciprofloxacin Hydrochloride	China PR	F. No. 6/36/2019-DGTR	10-01-2020	Anti-dumping investigation initiated
Dimethyl Formamide	China PR and Saudi Arabia	F.No. 6/37/2019-DGTR	14-01-2020	Anti-dumping investigation initiated
Newsprint in rolls or sheets, excluding glazed newsprint	Australia, Canada, European Union, Hong Kong, Russia, Singapore and United Arab Emirates	F.No.6/40/2019-DGTR	20-1-2020	Anti-dumping investigation initiated
Phenol	South Africa	F. No. 7/25/2019	27-12-2019	Sunset Review of anti-dumping duties initiated
Phosphoric Acid of all grades and concentrations	Korea RP	F. No. 7/28/2019	27-12-2019	Sunset Review of anti-dumping duties initiated
Viscose Spun Yarn	China PR, Indonesia, Vietnam	F. No. 6/41/2019-DGTR	14-01-2020	Anti-dumping investigation initiated

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Trade remedy actions against India

Product	Importing country	Notification No.	Date of Notification	Remarks
Corrosion-Resistant Steel Products	USA	85 FR 877 [A-533-863]	8-1-2020	ADD – Weighted-average dumping margins for M/s. Uttam Galva and all other exporters revised
Forged Steel Fittings	USA	85 FR 1300 [C-533-892]	10-1-2020	Preliminary Determination in CVD investigation postponed
Forged Steel Fluid End Blocks	USA	85 FR 2385 [C-533-894]	15-1-2020	Countervailing duty investigation initiated
Forged Steel Fluid End Blocks	USA	85 FR 2394 [A-533-893]	15-1-2020	ADD - Less-Than-Fair-Value Investigations initiated
Polyester Textured Yarn	USA	85 FR 1301 [C-533-886]	10-1-2020	Countervailing Duty Orders issued
Steel products	EU	Commission Implementing Regulation (EU) 2020/35	15-1-2020	Safeguard duty - Implementing Regulation amended
Welded Carbon Steel Standard Pipes and Tubes	USA	85 FR 2715 [A-533-502]	16-1-2020	ADD – Affirmative Administrative Review

WTO News

US-India steel dispute – Joint communication issued by India and United States

Consequent to the USA's intention to appeal compliance panel report in the dispute *US-Countervailing Measures on Certain Hot-Rolled Steel Flat Products from India: Recourse to Article 21.5 of the DSU by India*, India and United States have on 16th of January 2020 issued a joint communication stating that notice of appeal and appellant submission shall be filed by the United States once the Appellate Body division has been formed. According to WT/DS436/22, India may also file appeal at that point of time on alleged errors in issues of law covered in the panel report and legal interpretations developed by the panel. Each party has also reserved its right to request for adoption of Panel Report once the Appellate Body is established.

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India Customs & Trade Policy Update

Social Welfare Surcharge payable in cash on imports under MEIS/SEIS – No recoveries for past cases where SWS paid through scrips: CBIC has clarified that in case of imports under Merchandise Exports from India Scheme (MEIS) and Services Exports from India Scheme (SEIS), Social Welfare Surcharge (SWS) is not exempted and must be levied and collected on the imported goods. Circular No. 2/2020-Cus., dated 10-1-2020 clarifying so, also observes that the debit of SWS through duty credit scrips is not envisaged in the FTP and the exemption notifications, and hence the same must be paid in cash. The Circular however states that it has been decided by the Board that in respect of past cases, payment of SWS made through duty credit scrips may be accepted as revenue duly collected and recoveries in cash will not be insisted.

DTA supplies by SEZ – Registration under Steel Import Monitoring System when not required: DGFT has clarified that if the goods imported after registration under Steel Import Monitoring System (SIMS) in SEZ/FTWZ are supplied to DTA unit without any processing, the DTA unit need not seek any registration under SIMS. However, according to Policy Circular No. 30/2015-20, dated 8-1-2020, if manufacturing process in SEZ results in change of HS Code at 8-digit level, the importer in DTA shall be required to register under SIMS. It may be noted that Import Policy of Iron & Steel was revised from 'Free' to 'Free subject to compulsory registration under Steel Import Monitoring System' for the items covered in chapter 72, 73 and 86 of ITC (HS), with effect from 21-11-2019.

Imports of refined bleached deodorized palm oil and palmolein made restricted: DGFT has placed the imports of refined bleached deodorized palm oil and palmolein in the restricted category. According to the Notification No. 39/2015-20, dated 8-1-2020 amending Chapter 15 in Schedule-I of ITC (HS) Import Policy of items under Exim code 151190 has been amended from 'Free' to 'Restricted'.

Gifts – Import prohibition clarified: Clarifying on the recent DGFT Notification relating to prohibitions on import of gifts, CBIC has clarified that the DGFT Notification effectively means that if goods imported through courier/post as gifts seek exemption available for imports of *bona fide* gifts up to a CIF value of Rs. 5000/- *vide* Sl. No. 608A of Notification No. 50/2017-Cus., then such imports will be prohibited. However, gifts can be allowed import free (without prohibition) on payment of full Customs duties as applicable. CBIC Circular No. 4/2020-Cus., dated 21-1-2020 in this regard notes that goods imported as gifts would be personal imports and hence tariff rate of duty will be 35% BCD and 28% IGST. Further, according to the Circular, lifesaving drugs or medicines can continue to avail exemption available under Sl. No. 607A and 608A of above-mentioned notification.

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Ratio Decidendi

Anti-dumping duty – Normal value in exporting country when not to be rejected

The Anti-dumping Bench of CESTAT at New Delhi has rejected the contention that the export price to India of Nitrocellulose was not comparable with the price in the domestic market in Thailand because the product under consideration was subject to domestic regulations enforced by Defence Industrial Departments and because of which there was a limited supply available within the country leading to an increase in the price. The Indian domestic industry had plead that mere existence of license regulations cannot lead to a conclusion that there was distortion in price. Rejecting the appeal filed by the two exporters from Thailand, the Tribunal noted that the consideration for issuance of a license had no connection with the domestic requirement or import of the article, and that there was no restriction on the quantity or value of import. It also noted that provisions of the Arms Act in Thailand also did not contain any mechanism for fixing of a selling price in the domestic market.

Noting that the Appellants had not substantiated that factors as enumerated in Clause (2) of Annexure 1 of Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, existed, the Tribunal rejected the plea that sales in the domestic market were not 'in the ordinary course of trade' because of the restrictions. It observed that when substantial sales have been made by the exporters in the domestic market and there was absence of any good reason for reduction of the domestic sale price, the 'normal value' would be the comparable price, in the ordinary course of trade, for the like article when destined for consumption in the exporting country.

The Tribunal further did not accept the plea that non-furnishing of the verification report caused great prejudice to the Appellant-exporter. It observed that all the factual information provided by the exporters was accepted by the Designated Authority and, therefore, there was no reason to seek any clarification or supply a copy of the verification report. The fact that comments of the exporters on the subsequently shared verification report were duly examined by the Central Government and hence there was no violation of natural justice, was also noted.

On the issue of confidentiality, the Tribunal rejected the contention that the Domestic Industry had wrongly claimed confidentiality with regard to the information required to be furnished in the prescribed formats or that the Domestic Industry was not justified in not providing even a summarization of the information. [*Nitro Chemical Industry Ltd.* v. *Designated Authority*, DGTR – 2019 VIL 772 CESTAT DEL CU]

Exemption – Rules for import of goods at concessional rate of duty for manufacture of excisable goods, not procedural

Madras High Court has held that Rules 3 and 4 of the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996 are not procedural. Setting aside the Tribunal Order allowing benefit of exemption in a case where the registration under the Rules was taken after the imported goods were allowed to be cleared by Customs authorities, the Court held that CESTAT erred in

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holding that the Rules are merely procedural or directory in nature. It was also held that the Certificate that the assessee had not availed the Cenvat Credit on that consignment, had nothing to do with the 1996 Rules in question. Further, the Court also upheld the maintainability of the appeal before it, observing that the controversy was not with regard to valuation of the goods or rate of duty, but, was of the wrong exemption claimed by the assessee and granted by the Tribunal. [*Commissioner* v. *Medreich Sterilab Ltd.* – 2020 TIOL 68 HC MAD CUS]

Valuation – Service charge paid for import, when not includible

CESTAT Hyderabad has held that the service charge paid to the importer by another company (buyer) was not includible in the assessable value as there was no evidence showing that the importer-respondent acted as a canalizing agent or that the transaction was on high seas sales. It observed that the mere fact that the bids for import were finalized by the assessee-respondent after approval of the buyer company, would not change the nature of transaction. The Tribunal also noted that was no evidence that there was privity of contract between overseas supplier of coal and the buyer company, and that the buyer company was either the owner or held themselves out to be the importer. [*Commissioner* v. *MMTC Ltd.* – 2019 TIOL 3471 CESTAT HYD]

News Nuggets

United States and China sign Phase-I of Trade Deal – Agreement also provides for bilateral evaluation and dispute resolution arrangement

United States and China have on 15th January 2020 entered into a trade deal. As per reports, China has committed to purchase US goods and services worth USD 200 Billion by 2021 and crack down on business practices that the Trump administration has criticized. The deal also includes significant commitments from China to buy agricultural products, as well as airplanes, pharmaceuticals and oil and gas. While Tariffs on various products have been halved, it seems that issues such as intellectual property theft and currency manipulation have been addressed.

According to elaborate document titled "Economic and Trade Agreement between the United States of America and the Peoples Republic of China – Phase-1" released by USA, the agreement deals with obligations of both parties in the areas of intellectual property, technology transfer, trade in food and agricultural products, financial services, macroeconomic policies and exchange rate matters and transparency, and expanding trade.

The agreement also covers a chapter on Bilateral Evaluation and Dispute Resolution Arrangement, which provides that where one Party believes that the other Party is not acting in accordance with the Agreement, the Complaining Party can submit an appeal to the

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Bilateral Evaluation and Dispute Resolution Office of the Party complained against. According to this document, the appeal and any information and matters related to it are confidential and shall not be shared beyond the Bilateral Evaluation and Dispute Resolution Office, absent the agreement of the Parties.

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