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ADHYATAN

TPM Newsletter

The issue of trans-national subsidies and treatment thereof in anti-subsidy investigations has been a topic of debate for a very long time. With no place in the Agreement on Subsidies and Countervailing Measures ("ASCM"), the investigating authorities have been left quite perplexed regarding the manner in which such subsidies may be addressed in anti-subsidy investigations.

A literal interpretation of the term "trans-national subsidies" implies a subsidy across national boundaries, that is, a subsidy given by the Government of one country, to an entity in another country. An example of a trans-national subsidy may be benefits received by a company from its Government to set up operations in a different country. One of the live examples of it is investments being done by Chinese companies with the support of the Government of China in modern fisheries and rubber-related plantations in Thailand, Malaysia, Myanmar, Laos, Cambodia and Cameroon. Another case in point of trans-national is setting up of steel manufacturing by Chinese companies with the help of Government of China in Indonesia. Of late, such trans-national subsidies have emerged as a significant deterrent to fair market principles, allowing certain countries to export goods at non-competitive price or unfair price in importing countries.

Treating trans-national subsidy as a countervailing subsidy

The difficulty in consideration of trans-national subsidies within the scope of countervailable subsidy may arise from the language of Article 1 and 2 of the Agreement on Subsidies and Countervailing Measures ("ASCM"). Article 1 of the ASCM provides that a subsidy shall be deemed to exist if there is a financial contribution by a government or any public body within the territory of a Member. It might appear that Article 1 suggests that subsidy has to be provided by the government in its own territory. However, the agreement does not explicitly specify the territory of which member is relevant for determining whether subsidy has been conferred, therefore the use of "a member" in the agreement may be interpreted as the government or a public body providing the subsidy and the recipient of the subsidy need not necessarily be within the same territory. Therefore, a view may be taken that by absence of "the member", the ASCM has left open the scope of member which is providing the subsidy. This proposition also gets strength from the WTO Panel Report ruling in the matter of US-FSC[1] wherein the Panel held that 'the recipient of a financial contribution need not be within the territory of that Member. The other obstruction in considering transnational subsidy can be due to the Article 2 of the Agreement which deals with "specificity". Article 2 of the Agreement lays down the conditions under which a subsidy may be treated as specific. Herein,

[1] *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, (2010)*

the Agreement refers only to the subsidies conferred upon enterprises located within a designated geographical region within the jurisdiction of the granting authority. This implies that a subsidy shall be specific only when it is provided within the designated geographical region in the jurisdiction of the granting authority and satisfies the criteria further laid down under Article 2. However, in case of trans-national subsidies, the financial contribution has instead been given by the Government of a country, directly or indirectly, within the territory of a different country. Therefore, an investigating authority may not be able to treat a trans-national subsidy as a specific subsidy for the purpose of levy of countervailing/anti-subsidy duty.

First step taken by European Union to counter the issue

The European Commission in a recent investigation of Woven and Stitched Glass Fibre[2] was also faced with the issue of trans-national benefit. In this case, it was noted that the Government of China and Government of Egypt had signed a memorandum in the 1990s, under which they mutually agreed to establish a special economic zone in Egypt. The two Governments then signed a cooperation agreement whereby both the countries agreed to provide benefits to entities operating in the economic zone. The Government of Egypt provided land, labour and tax benefits and the Government of China provided benefits in the form of preferential arrangement of funds. Thus, a company set up and operating in the special economic zone was entitled for benefits from both the countries.

*The Commission relied upon Article 11 of the ILC Ru*les on State responsibility *to interpret the term "by the government" and took the view that under the ASCM a financial contribution provided by another state which the territorial government acknowledges and adopts as its own can be considered as financial contribution by the latter . Therefore, due to Egypt's acknowledgment and adoption of the Chinese Government's contributions as its own, it has led to subsidies provided by the Government of China be treated as a financial contribution by Government of Egypt. The Commission has, thus, considered benefit as a subsidy for the levy of countervailable duty.*

Thus, the European Commission has taken the first step towards covering trans-national subsidies within the purview of the anti-subsidy investigations. However, the decision taken by the European Union is yet to stand judicial scrutiny and the principles adopted by the European Commission may not be easily replicated in all cases. Another major issue which remains unaddressed till now is that of receipt of subsidized inputs by a producer in one country from

[2] *Countervailing duty investigation on the imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt*

another country. For instance, in the anti-subsidy investigation concerning the imports of Welded Stainless-Steel Pipes and Tubes (welded pipes)[3], the domestic industry demonstrated that the producers in Vietnam were benefitting from import of subsidized raw material, steel[4] from China. It was contended that 80-90% value of export of the subject goods from Vietnam comprised of subsidized steel from China and the value addition being done in Vietnam was very minimal. The import of such subsidized steel allowed them to export welded pipes and tubes at cheaper prices. However, this aspect was not examined by the Indian Authority in the investigation and such benefits were not considered for the purpose of levy of duties.

Although the finding by the European Union Commission addresses only a small aspect of trans-national subsidies, it can still act as a steppingstone for future investigations involving the same issue. In the present situation, close cooperation between countries and Chinese corridors in different countries is leading to increased instances of trans-national subsidies. Thus, the issue of trans-national subsidies is likely to come to the forefront more often. With the drastic impact it may have in allowing certain countries to export cheaper goods, the importing countries may soon have to come up with effective ways to redress the trade distortion arising as a result.

[3] *Anti-subsidy investigation concerning the imports of Welded Stainless-Steel Pipes and Tubes originating in or exported from China PR and Vietnam*
[4] *Final Finding of the countervailing duty/anti-subsidy investigation concerning imports of certain Hot Rolled and Cold Rolled Stainless Steel Flat Products, originating in or exported from the People's Republic of China*

Border Adjustment Tax: Is it WTO Compliant?

Salil Arora, Associate

In the recent times, the Indian Government has adopted a policy of promoting self-reliance, reducing dependence on imports, while encouraging exports. When the whole world is struggling due to COVID pandemic and the ensuing recession, our Hon'ble Prime Minister has laid out the objective of Atmanirbhar Bharat to achieve self-reliance and provide a boost to domestic economy. One of the steps which will help India move towards a self-sustainable nation would be the imposition of additional duty on imported goods, that is, border adjustment tax ("BAT"), which is a destination-based tax on imported goods. Destination-based taxes are charged on products based on their location of sale to the final consumers rather than the location of their production. Under the proposed taxation policy, exported goods are exempt from tax while the goods imported into India are subject to the tax. On 30th November 2019, Shri Piyush Goyal, Hon'ble Minister of Commerce and Industry publicly announced that India is considering introduction of border adjustment tax on low cost imports from free trade partner countries, to put imports and domestically manufactured products at the same footing.

The rationale behind the proposed move is that the goods produced in India attract various domestic taxes in form of electricity duty, tax on fuel, clean energy cess, biodiversity fees etc. which increase the cost of production and get embedded in the price of goods. However, similar goods originating in a foreign country do not attract such taxes in their domestic countries and thus, have an unfair advantage over the locally manufactured goods, when imported into India. For example, steel producers have to bear the burden of ₹400/MT, in form of clean energy cess tax on coking coal. With coking coal accounting for around 40% of domestic cost of steel production, the cess entails additional costs for local steel producers which ultimately renders the domestically produced products

Border adjustment tax is charged based on location of sale of the product rather than the location of production.

The rationale behind imposition of border adjustment tax is to provide level playing field to imported and domestic products.

The domestic products attract various taxes in form of electricity duty, fuel tax, clean energy cess etc. which is not levied by the exporting countries on the products being exported to India.

Currently, imported like products have an advantage over the domestically produced products.

uncompetitive vis-à-vis the imports. The border adjustment tax aims to offset the impact of such taxes to bring the locally produced goods and imported goods at par. Thus, such tax is structured to achieve a level of equivalence in the indirect taxes charged on goods produced and sold in the domestic market, and that imported into India.

Border adjustment tax and WTO Agreement

Significant uncertainty surrounds the border adjustment tax and there have been several doubts raised regarding its consistence with the WTO Agreements and principles. India is a signatory to the General Agreement on Tariffs and Trade (GATT) and any additional duties on imports must be consistent with the provisions of GATT. In particular, any such duty must be consistent with Article II and III of the GATT, which deal with concessions in duties on imports and treatment of international taxation and regulations.

Article II:1(b) of GATT provides that, other than custom duty, imports must be exempt from all other duties or charges of any kind in excess of those in force on the date of execution of GATT or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date. However, Article II:2(a) allows a government to impose a charge equivalent to the internal tax imposed on a like domestic product at the time such imported product crosses its border. Article III:2 of GATT provides that the tax on imports shall not be levied at a rate or amount higher than the amount levied on such domestically produced like articles. Since border adjustment tax is intended to be equivalent to non-creditable duties imposed on domestically produced goods, it would accordingly be consistent with the provisions of Article II and Article III of GATT.

Here, provisions of Article III:1 of the GATT must also be considered, which provide that any internal taxes or charges should not be applied on imported or domestic

Any duty levied on imports must be in compliance with the WTO Agreements, including GATT.

Article II and III of GATT must be considered.

Article II:1(b) provides that imports must be exempt from any king of charges other than custom duty. However, Article II:2(a) permits a government to impose charges on imports equivalent to internal taxes imposed on like articles.

Article III:2 provides that the tax on imports shall not be at a rate higher than that imposed on domestically produced products

products so as to afford protection to domestic production. The intent behind this provision was discussed by the WTO Appellate Body in Japan – Alcoholic Beverages II, wherein it was held that the purpose of Article III is to provide equality of competitive conditions for imported products in relationship to the domestically produced like products. The provision of non-application of internal measures on imports is to avoid protectionist measures in favour of the domestic product. Similarly, in the case of Canada – Periodicals, the WTO Appellate Body held that the fundamental purpose of GATT 1994 is to ensure equality of competitive conditions between imported and like domestic products. Since the border adjustment tax is not intended to protect the domestically manufactured goods, but only to levy equal amount of indirect taxes to imported products, it can be considered as consistent with the principle of equality of competitive conditions, as laid down in provisions of Article III of the GATT and by the WTO Appellate Body.

Recently, the Union Steel Minister has requested the Finance Ministry to impose border adjustment tax on imports into India to provide a level playing field to domestic industry. The request comes in light of the US-China trade war, which is at its historical peak as well as the likelihood of increase in imports into the country post COVID period. The request has also been echoed by members of the Niti Aayog. However, at this stage, there is no information with regard to whether the Ministry of Finance is considering imposition of the tax in near future.

WTO Appellate Body has held that there must be equality of competitive conditions for imported goods and domestic goods. Thus, protectionist measures should not be applied in favour of domestic product.

Border adjustment tax is consistent with GATT as it does not provide protection to the domestic products but only levies equal amount of indirect taxes on imports.

Trade Remedial Actions in India

Initiation of investigations

- *Anti-subsidy investigation into imports of Viscose Rayon Filament Yarn exported from China PR (20 July)*

Duties recommended

- *Final findings issued recommending continued imposition of safeguard duty concerning imports of Solar Cells (18 July)*

Customs Notifications

- *Continuation of anti-dumping duty pursuant to sunset review investigation on imports of Steel and Fibre Glass Measuring Tapes from China PR till 7th July 2025 (8 July)*
- *Extension of anti-dumping duty on imports of Phenol from South Africa till 9th January 2021 (9 July)*
- *Extension of anti-dumping duty on imports of Fluoroelastomers (FKM) from China PR till 27th October 2020 (21 July)*

Deadline for filing sunset review applications for anti-subsidy cases

Vide Trade Notice 4/2020 dated 24th July, following deadlines have been prescribed for filing petition for sunset reviews in anti-subsidy investigations

- *General deadline – 270 days before expiry of duty*
- *In case of difficulties faced – 180 days before expiry of duty*
- *In exceptional situations – 120 days before expiry of duty*

Investigations initiated	Findings issued
1	**1**

Ongoing anti-dumping investigations	Ongoing anti-subsidy investigations	Ongoing safeguard investigations
54	**7**	**3**

Trade Remedial Actions against India

Turkey

Bicycle tyres and tubes from China, India, Indonesia, Malaysia and Thailand

On 22nd July 2020, The Department of Anti-Dumping and Subsidy initiated an anti-dumping investigation concerning imports of Bicycles Tyres and Tubes from China, India, Indonesia, Malaysia and Thailand.

United States of America

Forged Fluid End Blocks from India

On 16th July 2020, The Department of Commerce issued preliminary determination related to Forged Fluid End Blocks from India, where it found that the subject goods are not being sold in the United States at less than fair value.

Other Trade Remedial Actions

Argentina

- *Initiation of anti-dumping investigation into imports of Crosses and Tricets from China. (6 July)*

Canada

- *Continuation of anti-dumping duty and countervailing duty on imports of OCTG I from China PR. (3 July)*

European Union

- *Termination of new exporter review in anti-dumping duty imposed on imports of Bicycles from China PR (1 July 2020)*
- *Termination of reopening of anti-dumping duty investigation into imports of Certain Cast Iron Articles from China PR (16 July)*
- *Continuation of anti-dumping duty and countervailing duty on Solar Glass imported from China PR (22 July)*

Egypt

- *Final decree issued extending anti-dumping duty on imports of Fiber Blankets from China till 24 August 2025 (1 July)*

Australia

- *Initiation of anti-dumping investigation concerning imports of Black Concrete Underlay Films from Malaysia (10 July)*
- *Initiation of inquiry into continuation of anti-dumping duty on imports of Steel Reinforcing Bar from China PR (10 July)*
- *Final report recommending continued imposition of anti-dumping duty on imports of Steel Reinforcing Bar from Thailand (10 July)*
- *Initiation of anti-dumping investigation into imports of Round Seamless Copper Tubes from China PR and Korea RP and countervailing duty investigation into imports from China PR (13 July)*
- *Resumption of anti-dumping investigation concerning imports of Power Transformers from China PR (17 July)*
- *Final report issued recommending expiry of anti-dumping duty concerning imports of Hollow Structural Sections from Thailand (27 July)*
- *Initiation of exemption inquiry in relation to Certain Hollow Structural Sections subject to anti-dumping duty imported from China PR, Korea RP, Malaysia, Taiwan and Thailand (27 July)*
- *Initiation of inquiry into continuation of anti-dumping duty on imports of Rod in Coil from China PR (27 July)*

GCC

- *Initiation of safeguard investigation concerning imports of Certain Steel Products including Hot Rolled Steel Coils, Cold Rolled Steel Coils, Metal Coated Steel Plates, Steel Bars and Wires, Round, Square and Rectangular Steel Bars, Steel Sections, Angle Steel Materials, Shapes and Sections and Welded Seamless Pipes (23 July)*

Vietnam

- *Imposition of final anti-dumping duty on imports of Plastic Products and Plastic Products made from Polymers from Propylene from China, Malaysia and Thailand. (22 July)*
- *Imposition of anti-dumping duty on imports of MSG products from China and Indonesia. (24 July)*

United States of America

- *Initiation of sunset review investigation of anti-dumping and countervailing duty concerning imports of Hand Trucks from China (1 July)*
- *Initiation of sunset review investigation of anti-dumping and countervailing duty concerning imports of Passenger Vehicles and Light Truck (PVLT) Tires from China (1 July)*
- *Affirmative countervailing duty determination on imports of Utility Scale Wind Towers from Canada, Indonesia, Vietnam (6 July)*
- *Affirmative Anti-dumping duty determination on imports of Utility Scale Wind Towers from Canada, Indonesia, Korea RP, Vietnam (6 July)*
- *Anti-dumping duty concerning imports of Tetrahydrofurfuryl Alcohol from China continued pursuant to sunset review investigation (8 July)*
- *Anti-dumping duty concerning imports of Polyvinyl Alcohol from China and Japan continued pursuant to sunset review investigation (15 July)*
- *Preliminary determination by Department of Commerce regarding dumping of Forged Fluid End Blocks from Italy and Germany, finding existence of dumping (16 July)*
- *Initiation of countervailing duty investigation concerning imports of Phosphate Fertilizers from Morocco and Russian Federation (23 July)*
- *Affirmative anti-dumping duty determination issued on imports of PET films from Korea RP and Oman (22 July)*
- *Initiation of anti-dumping and countervailing duty investigation concerning imports of Silicon Metal from Bosnia and Herzegovina, Iceland, Kazakhstan and Malaysia (27 July)*
- *Initiation of anti-dumping and countervailing duty investigation concerning imports of Standard Steel Welded Wire Mesh from Mexico (27 July)*
- *Initiation of anti-dumping and countervailing duty investigation concerning imports of Twist Ties from China (27 July)*

Bureau of Indian Standards

Mandatory Standards issued

- *IS 15030, Terephthalic Acid*
- *IS 14490, Plain Copier paper*
- *IS 14709, n- Butyl Acrylate*
- *IS 336, Ether*
- *IS 5295, Ethylene Glycol*
- *IS 537, Toulene*

Effective date of mandatory standards extended till 3rd Nov

- *IS 695, Acetic Acid*
- *IS 517, Methanol*
- *IS 2833, Aniline*

Establishment of new Standards notified

- *17077 (Part 2) (Acrylonitrile Butadiene Styrene)*

Standards modified

- *IS 2508, Polyethylene Films and Sheets*
- *IS 646, Liquid Chlorine*
- *IS 1029, HR Steel Strips*
- *IS 10910, Polypropylene and its copolymers for its safe use in contact with foodstuffs*
- *IS 14434, Polycarbonate Moulding and Extrusion Material*
- *IS 16112, Beta Picoline*
- *IS 16738, Positive list of constituents for Polypropylene, Polyethylene and their Copolymers for its Safe Use in Contact with Foodstuffs*

Foreign Trade Policy (FTP)

83 new products have been included under the scope of MEIS benefit, while 42 products have been removed.

Free Trade Agreement

DGFT has notified mandatory online application for Certificates of Origin for exports to Thailand under India-ASEAN FTA.

Non-Tariff BIS Notifications In India

8

Non-Tariff WTO Notifications by Others

280

Magotteaux Co. Ltd Vs DGTR with AIA Engineering Limited Vs Union of India

Final Order No. 50720/2020

The order emanates from appeals filed by, M/S Magotteaux Co. Ltd (Thai exporter) and AIA Engineering Ltd (domestic industry) against the extension of anti-dumping duties against imports of Grinding Media balls (excluding the forged balls) from Thailand and China, pursuant to a sunset review. The exporter challenged the extension of duties on a number of grounds, including relating to determination of likelihood of dumping and injury in the event of cessation of duty, non-injurious price and injury margin. Some of the key issues raised and findings of the Tribunal thereon have been discussed below:

Computation of landed value for injury margin

The exporter alleged that the Designated Authority has wrongly computed the landed value of dumped imports by considering the preferential rate of duty, which was nil, under the ASEAN agreement. However, the Tribunal rejected this claim on the ground that the landed value of the dumped imports are computed based on the assessable value of imports, with the applicable customs duty. Since no customs duties were applicable on imports from Thailand, under the India-ASEAN FTA, the Tribunal found that the landed value was rightly calculated as per the consistent practice of the Designated Authority of adopting the applicable custom duty.

Extension of duty, despite superlative profits by the domestic industry

The Thai exporter further claimed that there was no need for continuation of anti-dumping duty as the domestic industry was earning "superlative" profits and its return on capital employed was in excess of 22%. In this regard, the exporter relied on the financial statements of the domestic industry. The Tribunal clarified that the balance sheet and profit & loss account of the companies have information with regard to the company as a whole and it shows cumulative results for all the products of the company, including the product under consideration, whereas the anti-dumping duty proceedings are confined to the product under consideration. Therefore, the profitability of the company as a whole is not relevant.

Insignificant imports, not warranting extension of duty

The next issue raised by the exporter was that insignificant imports do not warrant extension of anti-dumping duty. In this regard, the Tribunal was of the view that while the imports from the subject countries were below 1% of the market share, the same was not a relevant consideration in a sunset review investigation. In a sunset review investigation, the Authority is required to examine the likelihood of recurrence or continuation of injury on account of dumped imports, which has been categorically examined by the Designated Authority in his final finding. Further, while Rule 14 of the Anti-Dumping Rules provide for termination of investigation where imports were found to be insignificant, the said Rule was not applicable in case of sunset reviews.

Improper examination of likelihood of dumping and injury

The exporter further contented that the Designated Authority has erroneously examined the likelihood of recurrence or continuation of dumping and injury. The Tribunal examined the facts and evidence on record, and found that the likelihood of recurrence of injury, in the event of cessation of anti-dumping duty, was evident from the following

(i) Even though the imports were in low volume, they were at a dumped price.

(ii) The imports were made below the non-injurious price of the domestic industry.

(iii) Despite there was surplus capacities, the exporter made further expansion in the existing capacities and there was a huge difference between the demand in the subject country and the capacities available in the subject country.

(iv) The exporter had manufacturing facilities in almost all of its prime market all over the world. Thus, there was no alternate market to absorb the excess capacities other than the Asian markets.

(v) The exporter was exporting the subject goods to the third countries on the dumped price coupled with significant unutilized capacities

(vii) The exporter has not provided transaction wise information with regard to imports to the third countries so it cannot be confirmed if the imports were not made at dumped or injurious prices.

Examination of causal link

The exporter also alleged that the findings could not be sustained as the Authority did not examine causal link between dumping and injury, and whether domestic industry suffered injury due to other factors. However, the Tribunal found that such examination was limited to the original investigations. Since the Authority has already examined causal link in the original investigation, it did not need to be examined again in the sunset review.

Disclosure of non-injurious price to exporter

The exporter contended that the non-disclosure of the 'non-injurious price' calculation sheet has led to the violation of principles of natural justice. The Tribunal did not accept this ground and held that the calculation of non-injurious price (NIP) is based on the confidential cost data of the domestic industry and disclosure of that will breach the confidentiality provision provided under Rule 7 of the Rules.

Need for modification of anti-dumping duty

Lastly, the exporter challenged the extension of duty on the ground that the rate of the duty was required to be modified based on the dumping margin and injury margin determined in the sunset review. The Tribunal referred the scope of sunset review, as laid down under the decision of the Hon'ble Supreme Court in the matter of Kumho Petrochemicals, and on its own decision in the case of Thai Acrylic Fibre Co. Ltd for examining the scope of the sunset review investigation. The Tribunal noted that since a sunset review investigation entails a likelihood determination, the present level of dumping is not as important as the likelihood of recurrence or continuation of injury. Since the duty are in force in the period of investigation, the current dumping margin may be low or non-existent. Thus, the criteria under section 9A(1) that anti-dumping duty should not exceed the dumping margin would have no practical application for continuance of the anti-dumping duty under section 9A(5) of the Customs Tariff Act. Therefore, the Tribunal found that the extension of existing duties in sunset review was appropriate.

Accordingly, the Tribunal rejected the appeal of the Thailand exporter and confirmed the continuation of anti-dumping duty for another five year. Further, the Tribunal also rejected the appeal of the domestic industry, wherein it had contended that the Thai exporter should be treated as non-cooperative as it failed to file correct information and claimed excessive confidentiality. However, the Tribunal found that once the Designated Authority has applied its discretion and used best available information for the exporters, and there is no perversity in the exercise of the discretion, it was not appropriate for the Tribunal to intervene.

European Union — Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia

DS494: Panel Report dated 24 July

The present dispute arose pursuant to complaint by Russia with regard to "Cost Adjustment Methodologies" used by the European Union. Russia claimed that the European Union had an unwritten methodology, wherein it adjusted the input costs, such as of gas or electricity, in determination of normal value where it found that the same were artificially or abnormally low due to government intervention. Russia alleged that European Union replaces or adjusts the cost of such inputs using data obtained from other sources, which it considered to be undistorted. This led to the normal value and thereby, the dumping margin being overstated.

The Panel noted that the Anti-Dumping Agreement requires determination of cost of production as per the records of the responding exporter, provided they reasonable reflect the costs associated with the production and sales of the product under consideration. This aspect was examined by the Appellate Body earlier in EU – Biodiesel (Argentina) and Ukraine – Ammonium Nitrate, wherein it was noted that the Anti-Dumping Agreement does not allow an evaluation of the reasonableness of the costs themselves, anti-dumping the investigating authorities cannot disregard input prices on the basis that they are lower than other prices internationally. That being the case, the input costs recorded in the books of the exporter cannot be rejected under the Cost Adjustment Methodology on grounds of them being artificially low or distorted. Accordingly, the Panel found that the Cost Adjustment Methodology was inconsistent with the provisions of the Anti-Dumping Agreement.

The Panel further noted that the Anti-Dumping Agreement requires determination of normal value based on cost of production in the country of origin. Under the Cost Adjustment Methodology, European Union had also relied on out-of-country benchmarks for inputs, which Russia claimed was inconsistent with the Agreement. The Panel noted that although European Union made adjustments for export-related and transportation concepts, it had not explained how the adjusted out-of-country input price information represents or reflects the cost of production in the country of origin. Thus, the approach followed by the European Union was inconsistent with the provisions of the Anti-Dumping Agreement.

Russia also claimed that certain provisions of European Union's Basic Anti-Dumping Regulation were inconsistent with the provisions of Anti-Dumping Agreement. In particular, Russia referred to the provisions in the European Union Regulation, relating to particular market situation, which provides that a particular market situation would be deemed to exist, inter alia, where prices were artificially low, when there is significant barter trade or non-commercial processing arrangements. Russia claimed that the phrase "where prices were artificially low" was beyond the Anti-Dumping Agreement, and introduced a condition not envisaged under the Agreement. However, the Panel found that the Anti-Dumping Agreement did not provide for a restriction on the meaning of particular market situation, and thus, the provisions of the European Union law could not be found inconsistent with the Agreement.

Further, Russia referred to the provisions of European Union law, which provided that where costs of an exporter were rejected and such costs could not be determined based on other exporters in the country, the European Union could determine costs on any other reasonable basis, including information from other representative markets. Russia claimed that this provision was inconsistent with the Agreement, which required considered of costs in the country of origin. The Panel found that where costs of an exporter were rejected, the investigating authorities had discretion to refer to other sources, so long as they use them to arrive at the costs in the "country of origin". Thus, out-of-country benchmarks or information may be used, provided they are adjusted to reflect the costs in the country of origin.

The findings of the Panel have, as such, been in line with the findings of the Appellate Body in the earlier cases of EU – Biodiesel (Argentina) and Ukraine – Ammonium Nitrate. In each finding, the WTO Dispute Settlement Body has found that the costs reported by the exporters cannot be rejected, on grounds of input costs being distorted. This may significantly curtail the ability of an investigating authority to address market distortions arising as a result of government intervention, by imposition of anti-dumping duties. However, it has been seen that governments of different countries are intervening in the market through imposition of export duties on inputs or as a major producer of inputs. In such cases, producers in those countries have access to the inputs at artificially low prices, which in turn allows them to export the goods at unfair prices. This is further concerning as some of these government interventions cannot be easily addressed under the Agreement on Subsidies and Countervailing Measures ("ASCM") as well. However, with neither anti-dumping nor anti-subsidy law providing due recourse, such unfair competition may prove to be difficult to address.

About Us

TPM was founded in 1999 at a time when the practice of trade remedies in India was in its infancy and there were only a handful of firms in the field. While other firms added these services to their existing portfolios, TPM dealt exclusively in cases in the domain of trade remedies.

TPM began its journey with a staff of merely 2 professionals. Today, it has a team of more than 40 professionals including Cost Accountants, Chartered Accountants, Company Secretaries, Lawyers, Engineers and MBAs.

From the beginning, TPM was focused on providing consultancy in the field of trade remedies. TPM helps domestic producers suffering due to cheap and unfair imports into India to avail the necessary protection under the umbrella of the WTO Agreements. TPM has also assisted the domestic producers in other countries to avail similar measures in their respective countries. Besides assisting domestic producers in India and other countries, TPM also assists exporters and importers facing trade remedial investigations in India or other countries. TPM has assisted Indian exporters facing investigations in a number of jurisdictions such as Argentina, Brazil, Canada, Egypt, European Union, GCC, Indonesia, Korea RP, Turkey and USA.

TPM has an enviable experience in the field, of more than 700 cases. Its unique experience in the field sets it apart from other firms. While the firm is primarily dedicated to trade remedies, it also provides services in the field of trade policy, non-tariff barriers, competition law, trade compliance, indirect taxation, trade monitoring and analysis. It also represents industries before the Government in matters involving customs policy.

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