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Scope of product under consideration in anti-dumping investigations

反倾销调查中的涉案产品范围

By **Bhargav Mansatta**

'Product under consideration' (PUC) in an anti-dumping investigation is the imported product which is alleged as being dumped in the domestic market of the investigating country. To this end, Article 2.1 of the Anti-dumping Agreement (ADA) provides as below:

"For the purpose of this Agreement, a *product is to be considered as being dumped,* i.e. introduced in to the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."

When the export price of the identified PUC is lower than its normal value then it is characterized as dumping and the product is called as the dumped product. Article 2.4.2 of the ADA explains how domestic investigating authorities must proceed in establishing 'the *existence of margins of dumping*', i.e. it explains how dumping is to be established in an anti-dumping investigation. It provides in relevant part as below:

"Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of process of *all comparable export transactions* or by a comparison of normal value and export prices on a transaction to transaction basis…"

There is no specific provision in the ADA concerning the selection, description, or determination, of a PUC. The ADA does not provide any guidance with regard to identification of PUC.

When the alleged dumped product is capable of production or is available in different types and models, domestic industry while filing the petition for initiating anti-dumping investigation, to avail maximum protection, often seeks to include all product types and models within the scope of PUC. The problem arises at the time of imposition of anti-dumping duty in cases where there is considerable difference in the price and physical characteristics of different product types and models which form part of single PUC.

In *EC – Bed Linen*[1], the EC defined PUC as bed linen of cotton-type fibres, pure or mixed with man-made fibres or flax, bleached, dyed or printed. Bed linen included bed sheets, duvet covers and pillow cases, packaged for sale either separately or in sets. The EC calculated separate margins of dumping for separate model types to apply the 'zeroing methodology'. In the zeroing methodology, the EC compared weighted average normal value with the weighted average of export price for each model type separately within the PUC instead of PUC as a whole. It arrived at negative dumping margin for certain model types. While adding up the amounts it had calculated as 'dumping margins' for each model, it 'zeroed' the negative dumping margins which were arrived at with respect to certain model types. Thereafter, it added positive dumping margins and zeroes to determine the overall margin of dumping for the PUC.

The WTO Appellate Body (AB) observed that having defined the product at issue as it did, the EC was bound to treat that product consistently thereafter in accordance with that definition. Article 2.4.2 does not provide for the establishment of 'the existence of margins of dumping' for types or models of the product under investigation but the product that is subject to investigation.[2]

The foregoing observation was made by the AB while holding the 'zeroing' methodology as being inconsistent with ADA. The AB based on the interpretation of Article 2.4.2 held the methodology adopted by the EC as

[1] Appellate Body Report, European Communities – Anti-dumping duties on imports of cotton-type bed linen from India, WT/DS141/AB/R, 1 March 2001

[2] *Id,* para. 52

inconsistent with ADA. The interpretation of the AB with regard to Article 2.4.2 will not only render zeroing as inconsistent but will also prevent members from imposing different rates of anti-dumping duty for different type of models by adopting multiple averaging.

The observation in *EC-Bed Linen* case came for consideration before the AB in *United States - Softwood Lumber*[3]. The AB clarified that multiple averaging is not *per se* prohibited under Article 2.4.2 and the reasoning of the AB in *EC-Bed Linen* case should not be read as prohibiting that practice. The AB did not rule on multiple averaging in *EC-Bed Linen* case as it was not an issue before it. However, it disagreed with the United States' argument that Article 2.4.2 of ADA refers to comparison at sub-group levels and that it does not address the issue of how the results of such comparison are to be aggregated.

The AB observed that investigating authority may undertake multiple averaging to establish margins of dumping for a product under investigation but they are not 'margins of dumping' within the meaning of Article 2.4.2, they are only intermediate calculations. It can form the basis for determining final dumping margin for the PUC as a whole. Thus, as per Article 2.4.2, investigating authority has to necessarily establish margins of dumping for the product as a whole.[4]

The AB also found the basis for its determination in Article 2.1 of the ADA which provides for determination of dumping of a *product*. In addition, it referred to Articles 6.10, 9.2 of the ADA and Article VI:2 of GATT 1994. Article 6.10 provides that the investigating authority shall determine an individual margin of dumping for each known exporter or producer concerned of the *product under investigation*. Article 9.2 of ADA and Article VI: 2 of GATT 1994 provide for imposition of anti-dumping duty on the imported product i.e. PUC.

In many cases, investigating authorities in EU, India, U.S. and other jurisdictions tend to use the flexibility provided under the ADA while determining the scope of PUC. However, considering the foregoing interpretation, heterogeneity amongst the products within the PUC may invite practical difficulties at the time of imposition of duties. Overtly broad PUC may result in imposition of anti-dumping duty which is not appropriately attributable to each product type within the PUC. Also, the entire subsequent investigation hinges on the identified PUC. Determination of 'like product', price comparison, evaluation of information and the like will depend on PUC.

In *EC-Salmond*[5], Norway argued that internal homogeneity within the PUC is mandatory under the ADA. Norway stated that if cars and bicycles are treated as one product under investigation then it would not be known whether some or all of the products are dumped. The Panel while rejecting the argument noted as below [6]:

> "We are not persuaded by Norway's extreme example. Any grouping of products into a single product under consideration will have repercussions throughout the investigation, and the broader such a grouping is, the more serious those repercussions might be, complicating the investigating authority's task of collecting and evaluating relevant information and making determinations consistent with the AD Agreement."

Thus, from the foregoing analyses of the WTO disputes, it can be summarized that there is little doubt regarding the flexibility provided to investigating authorities in identifying the PUC, but before exercising their discretion regarding the scope of PUC, investigating authorities have to be mindful of the repercussions and complications which the overtly broad PUC may create in subsequent stages of the investigation process. Excessive heterogeneity among the products covered under the PUC may result in a determination which may fall foul of other provisions of the ADA.

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[3] Appellate Body Report, United States – Final dumping determination on softwood lumber from Canada, WT/DS264/AB/R, 11 August 2004

[4] *Id,* para. 96 to 98

[5] Panel Report, European Communities – Anti-dumping measure on farmed salmon from Norway, WT/DS337/R, 16 November 2007

[6] *Id,* para. 7.58

Trade Remedy News 贸易救济新闻

Anti-dumping actions against China
对中国的反倾销行动

Product 产品	Country 国家	Measures 措施	Notification/Notice No. 通知号
2,4-Dichlorophenoxy-acetic acid 2，4二氯苯氧乙酸	Australia 澳大利亚	ADD sunset review initiated 发起反倾销日 落复审	Customs Dumping Notice No. 2012/39, dated 10-8-2012 2012年8月10日，海关倾销通知第2012/39
Hot-Rolled Steel Plate 热轧钢板	Canada 加拿大	ADD continuation recommended in sunset review 日 落复审中 建议继续征收反倾销税	Expiry Review No. RR-2012-001, dated 23-8-2012 2012年8月23日，期终复审第RR-2012-001
Metronidazole 甲硝锉	India 印度	ADD continued for another five years 继续另外5年的反倾销税	Notification No. 40/2012-Cus. (ADD), dated 30-8-2012 2012年8月30日，通知第40/2012-Cus.(ADD)
Paracetamol 扑热息痛	India 印度	ADD sunset review initiated 发起反倾销日 落复审	Notification No. 14/1009/2012-DGAD, dated 28-8-2012 2012年8月28日，通知14/1009/2012-DGAD
Lever arch mechanisms 文件夹金属件	EU 欧盟	Definitive ADD imposed 征收最终反倾销税	Council Implementing Regulation (EU) No 796/2012, dated 30-8-2012 2012年8月30日
Tyres–New Pneumatic non-radial bias tyres for buses and lorries 轮胎-用于客车和卡车新的充气非子午斜交胎	India 印度	ADD continuation recommended in sunset review 日 落复审建议继续征收反倾销税	Notification No.15/35/2010-DGAD, dated 2-8-2012 2012年8月2日，通知第15/35/2010-DGAD

Anti-dumping actions by China
中国采取的反倾销行动

Product 产品	Country 国家	Measures 措施	Notification/Notice No. 通知号
Chloroprene Rubber 氯丁橡胶	Japan 日本	Initiated mid-term review 期中复审立案	MOFCOM Announcement No. 45 of 2012, dated 8-8-2012 2012年8月8日，商务部2012年公告第45号
Dichloromethane 二氯甲烷	UK / USA / Netherlands / Germany / South Korea 英国／美国／荷兰／德国／韩国	ADD terminated 终止反倾销措施	MOFCOM Announcement No. 48 of 2012, dated 14-8-2012 2012年8月14日，商务部2012年公告第48号
Sulfamethoxazole 磺胺甲恶唑	India 印度	ADD revised 修改反倾销税	MOFCOM Announcement No. 50 of 2012, dated 16-8-2012 2012年8月16日，商务部2012年公告第50号
Renewable Energy Program 可再生能源	USA 美国	Definitive affirmative finding of trade barriers investigation 贸易壁垒调查最终肯定性裁决	MOFCOM Announcement No. 52 of 2012, dated 20-8-2012 2012年8月20日，商务部2012年公告第52号
BPA 双酚A	Japan/ South Korea/ Singapore/ Chinese Taiwan 日本／韩国／新加坡／台湾	Initiated ADD Expiry Review 发起反倾销期终复审	MOFCOM Announcement No. 43 of 2012, dated 29-8-2012 2012年8月29日，商务部2012年公告第43号

WTO News 世贸组织新闻

美国对来自印度的钢材反补贴案成立争端解决专家组

应印度的请求，世贸组织争端解决机构成立专家组，分析美国对来自印度的某些热轧碳钢板产品的进口实施某些反补贴税措施。根据印度的请求，该措施不符合世贸组织的补贴和反补贴协议以及1994年关税和贸易总协定。在7月23日早上，美国已经拒绝了印度第一次请求建议专家组的意见。欧盟、沙特阿拉伯、加拿大、中国、土耳其和澳大利亚是该争议的第三方。

阿根廷在争端解决机构中成为关注焦点

上个月，阿根廷因相关的世贸组织争议成为关注的焦点。阿根廷提出大量的磋商请求而许多国家也提交请求，要求与阿根廷就后者限制进口的措施进行磋商。墨西哥于8月24日通知世贸组织，请求与阿根廷磋商。日本和美国在2012年8月21日提出了类似请求。所有的三个国家主张阿根廷通过非自动进口许可证以及其他相关措施正在实施对进口的限制，进口货物受到限制，并且在进口产品和国内产品之间形成歧视。

在其他的发展中，阿根廷已经提出与欧盟和美国进行磋商的请求。2012年8月17日，与欧盟和西班牙进行磋商的请求主要涉及某些影响欧盟进口生物柴油的措施。争议中的措施是在欧盟对从再生资源中取得的能源法律框架下国家实施情况。根据阿根廷的请求，该措施将在欧洲原产的产品以及产自其他地区的产品之间造成歧视，这也意味着为了达到遵守强制性生物能源目标，欧盟实际上禁止从欧盟以外地区进口生物柴油，并且因此违反了1994年关税和贸易总协定第三条、第14条的内容，以及与贸易有关的投资措施协议第2条和马拉喀什协议第十六条第4款。

2012年8月30日，阿根廷告知就美国对原产自阿根廷的进口肉类和其他动物性产品适用的措施请求磋商。阿根廷主张基于公共卫生理由进行的限制没有科学上的正当性，并且这些措施看是取消或影响了阿根廷理应基于世贸组织协议获得的利益。

Ratio Decidendi 判决理由

“国内产业”可以包括涉案产品的进口商

加尔各答高等法院合议庭已经撤销了独立法官的判决，即认为在调查中的涉案产品进口商不能被视为符合“国内产业”的定义。合议庭认为在解释“进口商”术语时，除了独立法庭考虑的文字和表面的意思以外，立法目的也应当作为一部分进行考虑。法庭进一步认为在申请作为国内产业的国内生产商的联盟备忘录中的目的条款，对这些国内生产商提供了商业原则，这些也应当被考虑进去。有认为“进口商”现实和逻辑上的意义应当是除为了贸易目的以外从事进口业务的人。因此，法庭认为尽管上诉人进口了少量的涉案产品，仍将符合作为“国内产业”的定义。*[State of Gujarat Fertilizers & Chemicals Ltd. 对 Additional Secretary* 和调查机关 – 2012年8月7日加尔各答高的法院判决FMA 55 of 2012 with M.A.T. 1960/2011]