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Article

Compliance with recommendations and rulings of the DSB by the EU in trade remedy cases

By **Bhargav Mansatta**

Article 19.1 of the WTO Dispute Settlement Understanding (DSU) provides that where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In the disputes involving trade remedy measures, Article 19.1 of the DSU obliges the Member to amend or withdraw the duty to bring the measure into conformity with that agreement.

On two occasions noted herein, practice of the European Commission (Commission) was declared inconsistent with the obligations under the Anti-dumping agreement. While the Commission has not resorted to the WTO inconsistent methodology in new investigations, it has indirectly relied on these inconsistent methodologies for its 'likelihood' determination in expiry reviews.

In a review proceeding, reliance on methodologies, which were declared inconsistent by a Panel or the Appellate Body with WTO obligations may not be considered as WTO consistent. In *US-Zeroing (EC)* (Article 21.5 – EC), Appellate Body observed that if an investigating authority relies upon a margin of dumping calculated using a WTO-inconsistent methodology to support its likelihood-of-dumping determination [in a review under Article 11.3 of the Anti-dumping Agreement], the use of such a methodology would render the sunset review determination inconsistent with Article 11.3 of the Anti-dumping Agreement.

Continued use of multiple averaging for the purpose of dumping margin determination

In several cases, the Commission calculated dumping margin for each model types of the product under investigation. Consequently, different anti-dumping duty rates were recommended for different product types. In *Bed linen from India*, the Commission determined dumping margin for each model type and zeroed negative dumping margins which were arrived at with respect to certain model types.

The measure was challenged before the WTO DSB and use of zeroing methodology was declared inconsistent with the obligations under the Anti-dumping Agreement. Appellate Body also observed that having defined the product at issue as it did, the EU was bound to treat the product consistently thereafter in accordance with that definition. Article 2.4.2 of the Anti-dumping Agreement does not provide for establishment of 'existence of margins of dumping' for types or models of the product under investigation but the product that is subject to investigation.

In *US-Softwood lumber*, the Appellate Body clarified that the investigating authority may take multiple averaging to establish margin of dumping for the product under investigation as intermediate calculations only but margins of dumping under Article 2.4.2 is for the product as a whole. The Appellate Body also noted that the investigating authority must treat that product as a whole for, *inter alia*, the following purposes: (i) determination of the volume of dumped imports,

(ii) injury determination, (iii) causal link between dumped imports and injury to domestic industry, and (iv) calculation of the margin of dumping. Thus, multiple averaging for different types of product under consideration which eventually results in different anti-dumping duties for different product types may not be consistent with WTO Anti-dumping Agreement.

In 1997 i.e. prior to the issuance of Appellate Body Report in *EC-Bed linen* case, the Commission in the case of import of Ring Binder mechanism from China determined the weighted average normal value per model (FOB Malaysian port) and compared it to the weighted average export price of the comparable model (FOB China port) for determining dumping margin for each model. Consequently, different anti-dumping duty was recommended for different product types of the PUC. In the expiry review, the Commission continued with the anti-dumping duty that was imposed based on dumping margin determined for each model types even though Appellate Body reports in *EC-Bed linen* and *US-Softwood Lumber V*, which declared this methodology as WTO inconsistent, pre-dates the expiry review determination.

Continued use of Individual Treatment test against non-market economy countries

In *EC-Steel Fasteners*, Rule 9(5) of the EU Basic Anti-dumping Regulation was under challenge as it provided that anti-dumping duty will be specified for the country concerned and not for each supplier in case of imports from non-market economy countries. If exporters from this country satisfied the separate Individual Treatment (IT) test then these exporters could be provided with individual duty rate. The Appellate body, in the report circulated on 15 July 2011, declared Rule 9(5) of the EU Basic Anti-dumping Regulation 'as such' inconsistent with the obligations under the Anti-dumping Agreement.

In *Melamine from China*, in May 2011, the Commission applied individual treatment test for five exporting producers from China. It rejected individual treatment to two exporters and therefore individual duty was not provided for these two exporters. In the expiry review determination issued recently, the Commission continued the imposition of anti-dumping duty as prescribed in the original investigation. This implied continued application of IT test.

Conclusion

The Commission has failed to correct the inconsistency in the original investigation in these review proceedings. Moreover, the Commission merely extends the anti-dumping duty that is in force in an expiry review if it determines that there is a likelihood of continuation of recurrence of dumping and thus may not be able to modify the existing anti-dumping duty that is based on WTO inconsistent methodology. The Commission has also not initiated *suo moto* partial interim review to bring these measures into conformity with its obligations under the WTO. This practice of the Commission undermines its record of compliance with the WTO DSB recommendations.

Be that as it may, it is advisable that the exporters request for partial interim review, ensure full cooperation by providing all the necessary information and specifically raise the issue of WTO inconsistency of the existing measures during the review proceedings. This should allow sufficient opportunity to the Commission to comply with the recommendations of the WTO DSB.

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Trade Remedy News

Trade Remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Caustic Soda	Iran, Saudi Arabia, USA	F.No.15/19/2015-DGAD	20-6-2017	Final findings of MTR recommending revision of definitive ADD
Clear Float Glass of nominal thickness ranging from 4mm to 12 mm (both inclusive)	Pakistan	30/2017-Cus. (ADD)	16-6-2017	ADD imposed on a Pakistani exporter based on Individual Duty Margin
Colour coated/pre-painted flat products of alloy or non-alloy steel	China , EU	F.No.354/190/2016-TRU	26-6-2017	Extension of time for completion of AD investigation up to 28 September, 2017
Grinding Media Balls	Thailand and China	34/2017-Cus. (ADD)	13-7-2017	Anti-dumping duty extended till 15-7-2018
High Tenacity Polyester Yarn	China	F.No.6/12/2017-DGAD	15-6-2017	Anti-Dumping Duty Investigation initiated
O-Acid	China	35/2017-Cus. (ADD)	13-7-2017	Provisional ADD imposed
Pentaerythritol	China	32/2017-Cus. (ADD)	29-6-2017	Definitive anti-dumping duty imposed
Polytetrafluoroethylene or PTFE	China	F.No.15/11/2016-DGAD	23-6-2017	ADD sunset review recommends imposition of definitive anti-dumping duty
Sewing Machine Needles	China	31/2017-Cus. (ADD)	22-6-2017	Definitive anti-dumping duty continued after sunset review
Soda Ash	China, EU, Kenya, Pakistan, Iran, Ukraine, USA	33/2017-Cus. (ADD)	30-6-2017	Anti-dumping duty extended till 2-7-2018 pending sunset review

Textured Tempered Coated and Uncoated Glass	China	F.No.14/03/2016-DGAD	20-6-2017	Definitive anti-dumping duty recommended to be imposed
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Trade Remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Finished Carbon Steel Flanges	USA	A-533-871 [82 FR 29483]	29-6-2017	Final Determination of Sales at Less Than Fair Value
Finished Carbon Steel Flanges	USA	C-533-872 [82 FR 29479]	29-6-2017	Final Affirmative Countervailing Duty Determination
Lined Paper Products	USA	C-533-844 [82 FR 28047]	20-6-2017	Final Results of Countervailing Duty Administrative Review, 2014 amended – Subsidy rates for specific company revised
Lined Paper Products	USA	A-533-843 and C-533-844 [82 FR 30844]	3-7-2017	ADD and CVD sunset reviews initiated
Oil Country Tubular Goods	USA	A-533-857 [82 FR 28045]	20-6-2017	Antidumping Duty Order revised for specific companies
Polyethylene terephthalate (PET)	EU	2017/C 216/05 R663 and R664	6-7-2017	CVD - Initiation of a partial interim review
Stainless Steel Bar	USA	A-533-810 [82 FR 30844]	3-7-2017	ADD sunset review initiated
Stainless steel bars and rods	EU	Commission Implementing Regulation (EU) 2017/1141	27-6-2017	Definitive CVD imposed after sunset review
Stainless Steel Wire Rod	USA	A-533-808 [82 FR 13136]	23-6-2017	Antidumping Duty Order continued after sunset review

WTO News

European Union's CVD measures on PET from Pakistan found to violate WTO provisions

WTO's panel has found certain measures by the European Union on Polyethylene Terephthalate (PET) imports from Pakistan as being in violation of various provisions of the Subsidies and Countervailing Measures Agreement (SCM Agreement). The Panel in its report in the case "*European Union — Countervailing Measures on certain Polyethylene Terephthalate from Pakistan*" (DS486) issued on 6th of July, 2017, states that the European Commission acted inconsistently with Article 1.1(a)(1)(ii) of the SCM Agreement by failing to provide a reasoned and adequate explanation as to why the entire amount of remitted duties was "in excess of those which have accrued" within the meaning of footnote 1 of the said Agreement. Inconsistency with Article 3.1(a) of the SCM Agreement was also observed inasmuch as the Commission improperly found existence of 'subsidy' contingent on export performance. Pakistan's claims in respect of Long Term Financing of Export-Oriented Projects were also upheld by the panel while it found inconsistency of the various EU provisions with Articles 1.1(b) and 14(b) of the Agreement.

EU appeals Panel Report in US compliance in the Boeing dispute

On 9 June, the WTO Panel issued its Compliance Panel Report in *United States – Measures affecting Trade in Large Civil Aircraft (Second Complaint)*" (DS 353). In the Compliance proceedings, EU had challenged the

continued maintenance of certain subsidies pertaining to Research and Development (R&D) and certain States' tax programs. The Panel found that with respect to certain programs, EU had established USA's continued non-compliance.

The EU has, subsequently, on 29 June, filed its appeal against the Panel Report circulated. The Notification of Appeal challenges the Panel's findings pertaining to certain determinations by the panel regarding non-existence of certain alleged US subsidies and US compliance in part.

National security cited in trade concerns at Goods Council meeting

On 30 June, WTO Members discussed national security exceptions of GATT at the Goods Council Meeting. The concerns were raised with respect to two specific trade concerns - USA's investigation on the impact of steel and aluminium imports on national security, and the Gulf States' interests regarding trade restrictions on Qatar. While Members raised concerns over India's plans to increase customs duties on more information technology products, US investigations under Section 232 of the US Trade Expansion Act of 1962 were also questioned by Russia, EU and China, terming it inconsistent with GATT.

WTO members review three regional trade agreements

On 29 June, the Committee on Regional Trade Agreements (CRTA) met to review three Regional Trade Agreements and their correlation with WTO rules. Korea-Vietnam Free Trade

Agreement, the Deep and Comprehensive Free Trade Area between the EU and Ukraine and the Georgia- Russia Free Trade Agreement were discussed. It was stated that the coverage of trade, including goods and services, was high in all these agreements. However, in respect of EU-Ukraine Agreement, the Russian Federation was of the view that the agreement was an exemplary case of a situation where a free trade area worsened trade conditions for other trading partners, and thus was not compatible with GATT Article XXIV:4 and GATS Article V:4. The Chairperson informed members that a total of 74 RTAs have not been notified to the WTO as of June, 2017.

Panels established to rule on US subsidy duties and Colombia's compliance with tariff ruling

On 19 June, the WTO's Dispute Settlement Body

agreed to establishment of Panels to rule on Turkey's subsidy claims against USA's steel pipes and tubes subsidies in *United States — Countervailing Measures on Certain Pipe and Tube Products (Turkey)* (DS 523) and Colombia's compliance with Appellate Body determinations in *Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear* (DS 461). While Brazil, Canada, China, the European Union, Japan, Kazakhstan, Korea, the Russian Federation and Saudi Arabia have reserved their third party rights to participate in the US-Turkey dispute, Australia, China, Ecuador, EU, Guatemala, Honduras, India, Indonesia, Japan, Kazakhstan, Korea, Russia, Singapore, Chinese Taipei and USA have reserved their third party rights to participate in the panel proceedings of dispute involving Colombia and Panama.



Ratio Decidendi

Anti-dumping duty – Errors in calculation of cost of production – Absence of reasoned explanation for adjustment

The General Court of the European Union has on 11th of July, 2017 annulled the Council Implementing Regulation (EU) No 1106/2013, dated 5th of November, 2013, imposing a definitive anti-dumping duty on imports of certain stainless steel wires originating in India, as far as it relates to the applicant-exporter from India. The Court in this regard was of the view that the EU authorities infringed their obligation to state reasons while adjusting upwards the costs provided by the applicant. It observed that explanations provided during the administrative proceedings to the applicant were incomplete, and that even in the contested regulation the

authorities did not provide explanations enabling the applicant to understand the reasoning followed in relation to various 'cost of manufacture' figures used to determine the rate of adjustment.

The authorities had on the basis of the annual accounts, constructed a reference cost of manufacture (notional COM), to which the SGA costs were added in order to arrive at the readjusted Cost of Production (COP). The latter was then compared with the COM provided by the applicant in order to determine the rate of adjustment which should be applied to the costs declared in the anti-dumping questionnaire for each type of product. The Court however held that explanation given by the authorities to justify the construction of COM on basis of the annual

accounts was not convincing. The authorities in this regard had justified the construction arguing that since at the provisional stage of the investigation it was not possible to reconcile the figures provided by the applicant with the data contained in its internal accounting system and hence it was necessary to use the available data in accordance with Article 18 of the basic regulation. The court however noted that the provision was not applied at the final stage of the investigation.

The Court however rejected the argument of improvement in certain factors during the period. It was held that merely because certain injury factors improved during the period considered, it does not mean that the EU industry does not

suffer material injury. Further, contention that the presence of imports from China had affected the injury analysis of the EU authorities was also rejected by the Court observing that applicant could not demonstrate any manifest error of assessment in the finding that despite the Chinese imports the injury caused by the Indian imports was significant. Similarly the allegation, that certain costs were taken into account incorrectly or twice in the context of the SGA costs was also rejected by the Court. [*Viraj Profiles Ltd. v. Council of the European Union – Judgement dated 11-7-2017 in Case T-67/14, EU General Court (Seventh Chamber)*]

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