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Article

Market economy status for Chinese exporters

By Manoj Gupta

Recently the European Court of Justice gave a landmark ruling laying down certain parameters for granting market economy treatment to the individual exporters from non-market economy (NME) countries. The issue as the one before the court, being more factual, needs to be dealt with on case-to-case basis. However, looking at the trend, particularly during the last one year, it is becoming obvious that the approach towards the subject is not clear. The issue is increasingly getting relevant as the provision permitting non-market economy treatment to the exporters from China will expire after 11 December 2016.¹

Market economy status, or the lack of it, traces its origin from Second Ad-note to paragraph 1 of Article VI of GATT, 1994 wherein it is provided that in case of imports from a country having complete or substantially complete monopoly of its trade and where *all* domestic prices are fixed by the State, strict comparison of export price with domestic prices may not be appropriate. This provision, which provides discretion to the authorities to avoid use of domestic prices of the exporting country, has also been incorporated in the WTO's Anti-dumping Agreement through Article 2.7. As the condition that *all* domestic prices are being fixed by the State is not a reality in the case of transitional economies, in respect of China, Article 15 allows exporters to establish that market economy conditions prevail for the firm(s) concerned, if not for the entire industry or the country as a whole.

If the market economy condition is not established then the authorities of the importing country may take the help of prices prevailing in another market economy

country (surrogate country) for determination of normal value or choose to construct the normal value. Normal value based on surrogate country prices or constructed normal value invariably leads to higher anti-dumping duty on Chinese exports.

State interference or influence?

Reverting to the ruling of the European Court of Justice, the Court in its order has clarified the meaning of 'significant State interference' in Article 2(7)(C) as it appears in the EC's anti-dumping Regulation. The same phrase i.e. "significant State interference" appears in Clause 8(3) of the first Annexure to the Indian Anti-dumping Rules also. In its order, the Court has held that firstly the provision is not directed at all types of State interference in producer undertakings, but only those that concern their decisions regarding prices, costs and inputs.² It was noted secondly, that use of the word 'interference' implies actual interference in the decisions and that it is not sufficient that a State has a certain amount of *influence* over those decisions. The court further added that the interference in such decisions must be 'significant' i.e. State interference which is, neither by its nature nor effect, capable of rendering a producer's decisions regarding prices, costs and inputs incompatible with market economy conditions cannot be considered 'significant'.

The ECJ acknowledged the fact that the State, even though held minority shares in the company, due to wide diversification of other shares, *de-facto* controlled shareholder meetings and appointment of board of directors, which gave the State a certain influence. The order, however, held that such '*influence*' did not

¹ See para 15(d) of the China's Accession Protocol. It provides that the provision permitting non-market economy treatment to the exporters from China will expire after 15 years from the date of accession.

² *Council of the European Union v. Zhejiang Xinan Chemical Industrial Group Co. Ltd.*, C 337/09 P, ECJ, 19 July 2012

mean that there was significant State interference. Even the fact that some of the directors of the company were connected to it by employment contract or by contract for supply of services, was not found to be a determinative factor to conclude existence of State interference.

On the other front, the European Union has recently amended Article 9(5) of its Basic Regulations in order to comply with the WTO's DSB Appellate Body report in *EU-Fasteners from China*. The Panel as well as Appellate Body of the WTO had held that the European Union's provision [Article 9(5) of the EU's Basic Regulation] was inconsistent with Articles 6.10 and 9.2 of the Anti-dumping Agreement (ADA)³ as it presumed that a country-wide duty be imposed on producers/exporters in investigations involving non-market economies, unless they satisfy the conditions for individual treatment in that provision. Regulation (EU) No. 765/2012, dated 13th June 2012 issued for the purpose, came into force from 16th June 2012 and substitutes earlier para which read as,

"The Regulation imposing the duty shall specify the duty for each supplier or, if that is impracticable, and in general where Article 2(7)(a) applies, the supplying country concerned."

with new para which reads as,

"The Regulation imposing anti-dumping measures shall specify the duty for each supplier or, if that is impracticable, the supplying country concerned. Suppliers which are legally distinct from other suppliers or which are legally distinct from the State may nevertheless be considered as a single entity for the purpose of specifying the duty. For the application of this subparagraph, account may be taken of factors such as the existence of structural or corporate links between the suppliers and the State or between suppliers, control or material influence by the State in respect of pricing and output, or the economic structure of the supplying country."

So, the anomaly of any presumption has been removed. Now the provision itself provides that even distinct suppliers may be considered as single entity and be imposed a single anti-dumping duty. EC, in order to ensure conformity with the obligations under the Anti-dumping Agreement, has adopted the wordings of the Appellate Body as an amendment to its regulation.

It is seen that the phrase used in the *EC-Fasteners* dispute and in the new provision is '*material influence by the State in respect of pricing and output*'. Thus, while in terms of the latest ECJ judgement, '*State influence*' is not enough, and '*State interference*' is required for refusing individual treatment to reject the actual cost of the exporter for the purpose of determining normal value in case of imports from non-market economies, '*State influence*' is enough for the purpose of treating exporter and country as 'a single entity', as per the latest amendment. '*State influence*' may have different connotations and may result in a different interpretation from the word '*state interference*'. It will be interesting to see how EC will reconcile the two sets of provisions. So, one has to be careful and see when *influence* becomes *interference*.

One may argue that both the provisions are for different purposes as the ECJ judgement relates to determination of normal value by way of grant of individual treatment to exporters from NMEs whereas the latest amendment is in relation to imposition of individual anti-dumping duty rate for each exporter. It is therefore possible, atleast theoretically, for EC, in case of non-market economy country, in a particular fact situation, to first determine individual normal value for the exporter because of '*inadequate state interference*', but reject individual treatment because of '*material state influence*'. Word '*material influence*' indicates a lower

³ Also see *EC-Footwear from China*, WT/DS405, Para 7.92 and 7.147

threshold of evidence compared to 'State interference'. In short, different interpretation adopted by the ECJ and the Appellate Body may give rise to contradiction while applying the EC law against the exporter from non-market economy country.

Sampling, how far effective

In *EU-Footwear from China*, the Panel has held that in a case involving non-market economy, anti-dumping duties can be imposed on non-sampled exporters based on a finding of dumping involving an MET analysis on information provided by a limited number of examined producers⁴. It was noted that China failed to demonstrate that sampling was prohibited for the purpose of making market economy treatment determination.

However, the European Union's Court of Justice⁵ has observed that provisions regarding sampling of exporters, when their number is huge, would not be applicable in cases involving normal value determination in imports from NME countries. The court noted that Article 2(7) of the basic (EU) Regulation, concerned solely with the determination of normal value and Article 17 thereof relating to provisions for sampling i.e. to methods for determining dumping margin, are different in content and purpose. Indian provisions *pari materia* with European provisions on NME and sampling are present in Clauses 7, 8 in Annexure-I, and, in Rule 17(3) of the Anti-dumping Rules, 1995 respectively.

The European Court observed that obligation for recognition of the economic conditions under which each producer operates i.e. grant of individual market economy treatment, in respect of concerned product, is not affected by the manner in which the dumping margin is to be calculated.

Present situation

Interpretation by various authorities being divergent, there is no clarity on the issues identified herein. The amendments carried out to make the law more transparent are also leading to more questions than answers. The disputes between the two (EU and China) are on the rise, latest being the initiation of anti-dumping duty investigation by EU on import of solar panels from China.⁶ There is also fear of Chinese retaliation to start similar investigation on the raw material from EU for the same solar panels. The German Chancellor, however, had stated that the said trade case targeting Chinese solar panel companies should be resolved through negotiations/dialogue rather than investigation, though it may be noted that the investigation itself was due to the efforts of a German company.⁷

The problem, it seems, may end after December 2016 when the provision permitting non-market economy treatment in the Chinese Accession Protocol will expire. However, it may be of interest to note that Australia has granted market economy status to China but allows for rejection of domestic selling prices of the exporter as the basis for normal value when there is a 'market situation' making sales not suitable for use in determining a price.⁸

The next few years would be very important to watch how the disputes develop between EU and China and also the stand taken by the other countries in relation to Non-market economy country, particularly China.

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⁴ Paras 7.194-7.199 of DS405 - European Union-Antidumping duties on footwear from China

⁵ P - Brosmann Footwear (HK) Ltd v. Council of the European Union, ECJ Order in Case C 249/10, 2nd Feb., 2012

⁶ Notice of initiation of an anti-dumping proceeding concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in the People's Republic of China, Official Journal C 269, 06/09/2012 p. 5

⁷ Financial Times – www.ft.com, dated 30-8-2012 and 2-9-2012

⁸ Australian Customs & Border Protection's Dumping and Subsidy Manual

Trade Remedy News

Anti-dumping actions by India

Product	Country	Measures	Notification No.	Date of Notification	Remarks
Resin or Bonded wooden boards (specified)	China, Indonesia, Malaysia and Sri Lanka	Provisional ADD imposed for six months	43/2012-Cus. (ADD)	21-9-2012	Based on preliminary findings dated 23 July 2012
Carbon Black	China, Australia, Russia and Thailand	ADD mid-term review - Time to complete investigation extended till 29-11-2012	15/41/2010-DGAD	21-9-2012	
Ductile iron Pipes	China	ADD Sunset review initiated	15/1006/2012-DGAD	7-9-2012	
		ADD extended till 12-9-2013	41/2012-Cus. (ADD)	13-9-2012	Basic Notification No. 103/2007-Cus., dated 14-9-2007 expired on 13-9-2012
Paracetamol	China	ADD extended till 2-9-2013	42/2012-Cus. (ADD)	19-9-2012	Basic Notification No. 99/2007-Cus., dated 3-9-2007 expired on 2-9-2012
Phosphoric Acid	China	ADD Sunset review initiated	15/1010/2012-DGAD	10-9-2012	
		ADD extended till 12-9-2013	45/2012-Cus. (ADD)	25-9-2012	Basic Notification No. 17/2008-Cus., dated 19-2-2008 expired on 13-9-2012
Pre-sensitized Positive Offset Aluminum Plates/ PS Plates of specified thickness	China	ADD Sunset review initiated	15/11/2012-DGAD	18-9-2012	
		ADD on China PR extended till 23-9-2013	44/2012-Cus. (ADD)	25-9-2012	Basic Notification No. 108/2007-Cus., dated 25-9-2007 expired on 24-9-2012 Anti-dumping duty against Bulgaria, Malaysia, Singapore and South Korea withdrawn

Safeguard action by India

Product	Country	Measures	Notification No.	Date of Notification	Remarks
Electrical Insulators	China	Safeguard Duty recommended for 2 years	D-22011/14/2011	27-9-2012	

Trade remedy action against India

Pyridine - China initiates ADD investigation: On 21st September 2012, China initiated an anti-dumping investigation against imports of Pyridine from India and Japan. The product HS code is 29333100 and interested parties are required to file the registration form within 20 days of initiation.

Findings digest

Safeguard final findings in electrical insulators of glass and ceramic from China

In this investigation, claim for exclusion of glass insulator was made by exporters and importers as the same was not produced by domestic industry and was also claimed to have different properties than ceramic/porcelain insulator, which was produced by the domestic industry. Director General (Safeguards) held that even though technology involved and the principal raw material used for production of glass and porcelain insulators are not the same, yet the properties of the resultant product are same and consumers are not willing to pay different prices for glass insulator produced through different technology, manufacturing process and raw materials. The DG thus held that unless the differences in technology, manufacturing process or raw materials result in different product properties and prices, such dif-

ferences are entirely irrelevant. Interestingly, the DG has included certain types of insulators, even though they were produced by the supporters of domestic industry and not petitioner domestic producer itself, yet some other types of insulators have been excluded as they were not produced or sold by the domestic industry itself.

Claim for inclusion of insulators made of polymer made by few other domestic producers was also rejected. It was held that such inclusion would tantamount to investigation without complying with the provisions of Rule 5 and Rule 6 of Customs Tariff (Transitional Product Specific Safeguard Duty) Rules, 2002 and also for the reason that the data on the parameters of market disruption or threat of market disruption needs to be verified with reference to the records of the manufacturers of this product.

As regards data to be considered for investigation, it was held that data of domestic player operating in SEZ cannot be considered as they are deemed to be operating outside Indian Customs territory and not competing with other domestic units. Interestingly, even though the DG included the grades produced by supporters in product under consideration, yet injury parameters of such supporters were not considered while examining injury to domestic industry.

WTO News

Boeing dispute - EU to ask WTO's permission to impose countermeasures on US

The European Union has, on 27th September, requested the WTO for authorization to impose countervailing measures against the United States of America. The countermeasure amounting to USD 12 billion is sought on the basis of estimates of damages suffered by EU because of the alleged US failure to withdraw subsidies as directed by WTO's Appellate body (DS353). The request, under Article 22.2 of the Dispute Settlement Understanding, is intended to be placed in the DSB meeting on 23-10-2012. Earlier, the EU had, on 25th September, requested consultations with the USA as it disagreed with the consistency of the measures taken by the US to fulfill the recommendations of the DSB. According to EU the US still maintains specific subsidies and that there are indications that more subsidies have been granted to Boeing in the meantime. The matter was brought before the WTO in 2005 when the EU had requested for consultations with the US on the latter's alleged prohibited and actionable subsidies to the producers of large civil aircraft (Boeing).

DSB – Three panel requests and three new consultations

The dispute settlement body of the WTO has received three requests, one each from US, China and Ukraine for the establishment of panel to resolve disputes. There were three consultation requests as well by China, USA and Argentina.

While the US has requested establishment of panel to resolve dispute involving anti-dumping and countervailing duties imposed by China on certain automobiles from the United States (DS440), China's request concerns countervailing duty measures imposed by the USA on certain products from China (DS437). Ukraine disputes the Australian

plain packaging requirements in case of tobacco products (DS434). The DSB has on 28th September, also agreed to establish panel in two of the requests i.e. DS434 (Australian plain packaging) and DS437 (US's countervailing measures on certain products from China). The first request for panel in DS440 (China's anti-dumping duties) was however blocked by China.

As far as consultations are concerned, China has asked the US on 17-9-2012 for consultations on the latter's countervailing and anti-dumping measures applied to a wide range of products exported by China to the US (DS449). Broadly, China disputes the double remedy of imposition of countervailing duty as well as anti-dumping duty on various products from non-market economy countries. China disputes that the provisions brought into force retrospectively were inconsistent with Articles X.1 to 3 of the GATT as the provisions were not published promptly and were enforced prior to their official publication.

The US, on the same day i.e. 17-9-2012, requested consultations with China disputing the Chinese subsidies to the automobile and automobile parts enterprises in China (DS450). As per the US communication under Article 4.4 of the DSB, China provides various forms of export-contingent subsidies through a program establishing "export bases" for the automobile and automobile-parts industries in China which are inconsistent with Article 3 of the SCM Agreement.

By communication dated 3-9-2012, Argentina has requested for consultations with the US concerning the latter's measures affecting the importation of fresh lemons from the North East region of Argentina. Argentina considers measures of the US as violative of provisions of GATT 1994, Sanitary and Phytosanitary Measures (SPS) and the Marrakesh Agreement.

News Nuggets

Tariffs on the rise - WTO policies whether need review?

As the WTO discussed recently the growing discontent among nations on the multilateral policies of the WTO agreements, trade in goods continued to battle against cries of protectionism as countries increasingly seek to secure their markets. The WTO discussed for 3 days on formulating new approaches to multilateral trade opening in areas such as trade facilitation; addressing 21st-century issues and identifying areas in need of new regulations; and looking at the role of non-state actors in strengthening the multilateral trading system.

On the tariff side, Brazil and Ukraine have recently announced their intention to raise import tariffs for over 100 commodities. While Brazil argued that it wanted to stem flooding of its markets with cheaper imports, Ukraine aims to correct its burgeoning trade deficit after its accession to WTO in 2008. Ukraine draws support from Article XXVIII of GATT which enables a member to modify the concessions agreed to by it after consultation with other members who are likely to be affected by the change. A member making such changes may also be required to provide adequate compensation to other members. Such a move is also open to retaliatory raise in tariffs or reduction of concessions by other members.

In other developments, the WTO members will also shortly debate on Ecuador's proposal to examine the policy space available to countries,

under WTO rules, to impose regulation on financial services. Ecuador along with India, Argentina, Turkey, Brazil, and South Africa are seeking to evolve a consensus to review provisions which limit a member country's ability to strengthen financial regulations or capital controls.

ICSID interprets minimum standard of treatment under CAFTA

Guatemala was found to have violated the 'minimum standard of treatment' envisaged in the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), in the ICSID's decision delivered in July 2012. The dispute pertained to the use of an administrative procedure 'lesivo' by which the concession given to the foreign investor-railroad company was cancelled. The matter is under consideration as per Guatemala's domestic laws. The ICSID Tribunal held that though this did not amount to indirect expropriation or violation of national treatment standards, the action was arbitrary and unjust. Guatemala had argued that the railroad company had failed to carry out its part of the contract to build rail routes. It said that it would be injurious to state interest to wait for contracted period of 50 years. The foreign investor has sought a fresh look at the Tribunal's award as per Article 49 of the ICSID conventions citing that the continuous losses suffered by it during the period prior to the administrative order have not been considered. That is they have been 'omitted to be decided'. It remains to be seen whether the ICSID will entertain a claim for losses prior to the period of alleged violation of CAFTA.

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