



Application Of Particular Market Situation (Pms) Provision: A Proxy Tool To Continue Nme Treatment

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Abstract

WTO Trade Remedies works as an exception to the principles of free trade among nations and are invoked by the member countries to mitigate economic loss caused by dumping, subsidies, and against unprecedented increase in imports. They are often viewed as instruments to constrain the member countries in order to respond unilaterally to promote their own interest. One such methodology to arrive at injury by a particular member country is Particular Market Situation s, under WTO legislative and procedural framework. However, the same lacks clarity regarding its application by the investigating agencies, resultantly there is lot of inconsistency in the practices of the investigating agencies pertaining to the invocation of PMS for the calculation of normal value in anti-dumping investigations. In the existing state of affairs, it is very critical to address this issue because such unjustified as well as incorrect invocation of PMS by the investigating agencies expose the threat of imposition of retaliatory tariffs. This may, needless to state, shall adversely affect the global trading system or may even escalate to trade-war. Moreover, post the expiration of Article 15 of China accession protocol in December 2016, the member countries have made subsequent legislative modifications providing an ambit of wide powers in the hands of investigating agencies for application of PMS. The issue comes with application of PMS to not only Non-market economy but also Market economy. The authors attempt to offer an analytical study on the application of PMS focused on market economies, alongside highlighting the practices of different investigating agencies with an aim to focus on the jurisprudential development of the concept as a whole.

Keywords: Particular market situation, Non-market economy, Anti-dumping agreement

INTRODUCTION

China, upon accession to World Trade Organization (WTO), consented that member countries may give it a treatment of a non- market economy (NME) till December 2016 in anti-dumping investigations subject to proving market conditions by China¹. This in

¹ Weihuan Zhou, 'Debunking the Myth of 'Particular Market Situation' in WTO Antidumping law' (2016) 19(4) SSRN < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862892> accessed 29 October 2021

trade parlance refers to as an 'NME' Assumption². This assumption allows investigating authorities to disregard the domestic prices or costs of production of the exported products in China and either use constructed prices as normal value (NV) or use third country export price to calculate the NV. When a country discards the domestic prices to construe NV of a country suffering the alleged dumping a large number of factors including those related to cost influence such decision to construe a hypothetical normal value³. This is referred as NME Methodology.

The treatment of China as an NME was to expire on 11 December 2016 as agreed under the 'Accession Protocol'⁴. China is now eligible to be a Market Economy unless proven by investigating authorities that it is still an NME⁵. The benefit of positive assumption of being a market economy now lies in favor of China. However, many members still consider China a NME⁶. Under these alternatives, members justify discarding domestic price in anti-dumping investigations by stating that these practices are in accordance with Article 2.2 of the Anti-dumping Agreement (ADA), provides-

“when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of **the particular market situation** or low volume of sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the dumping margin is determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that the price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general cost and for profits”⁷.

A close analysis of the aforesaid article shall reveal that three special situations wherein deviation from taking domestic price as normal value is allowed. These factors are (i) zero sale in the ordinary course of trade (ii) volume of sale is low (iii) Existence of Particular Market Situation (PMS)⁸. Under these three Circumstances, the NV may be determined by drawing analogy from the price of export of like product to a third country (surrogate country) or by constructing (by adding cost of production, administrative cost, selling charges and reasonable amount of profit) the normal value (known as Constructed

² Protocol on Accession of the People's Republic of China 2001, WT/L/432 , s 15(a) &(d),

³ James J. Nedumpara and Archana Subramanian, 'China's Long March to Market Economy Status: An Analysis of China's WTO Protocol of Accession and Member Practices' in James J. Nedumpara and Weihuan Zhou (eds.) *Non-market Economies in the Global Trading System- the special case of China* (Springer 2018)

⁴ Protocol on Accession of the People's Republic of China 2001, WT/L/432 , s 15(a) &(d),

⁵ James J. Nedumpara and Archana Subramanian, 'China's Long March to Market Economy Status: An Analysis of China's WTO Protocol of Accession and Member Practices' in James J. Nedumpara and Weihuan Zhou (eds.) *Non-market Economies in the Global Trading System- the special case of China* (Springer 2018)

⁶ Weihuan Zhou, 'Debunking the Myth of 'Particular Market Situation' in WTO Antidumping law' (2016) 19(4) SSRN < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862892> accessed 30 October 2021

⁷ Anti-Dumping Agreement 1995, Art. 2

⁸ UNCTAD, 'Training Module on the WTO Agreement on Anti-dumping' < https://unctad.org/en/Docs/ditctnkd20046_en.pdf > accessed 29 October 2021

Normal Value)⁹. Out of these three situations, two are specific. The issue comes with the term PMS which is undeniably broad in its scope and covers many undiscovered circumstances. Therefore, many member countries consistently use existence of PMS as an alternative to NME to discard the domestic selling price of the product under consideration in the exporting country in an anti-dumping investigation.

DEVELOPMENT TRENDS OF A PARTICULAR MARKET SITUATION

The scope and coverage of PMS has not been discussed much in the Negotiating History. The Kennedy Round of Negotiations (1963- 1967) which were based on Draft International Code on Anti- Dumping Procedure and Practice (Draft Code) had referred to the term PMS. But neither the Draft Code nor the negotiations thereafter, dilated on the term 'PMS'. However, the draft code on Anti- dumping, which is the product of negotiations, included a provision on PMS in Article A. 2(d) of the Code¹⁰ without further adding to its scope.

The First case that dealt with the term "Particular Market Situation" was EC- Cotton yarn¹¹. The case pertains to Brazil's allegation that EC had violated Article 2.4 of the AD Code by failing to consider that "Particular Market Situation" which prevailed in the domestic market of Brazil, due to the frozen exchange rates which were to combat high inflation. The argument advanced by EC was that the term PMS mostly pertains to the situations that are internal to domestic market situation of the exporting country and will include external factors only when these factors affect the domestic sales and prices and Brazil nowhere provides that the prevailing condition affected the sale and price of the domestic market¹². But, Brazil argued that the term "Particular Market Situation" includes all the relevant situations external to the domestic market and that has an impact on price comparability and the prevailing conditions in the domestic market and such that it does not allow proper comparison. However, the panel rejected the claim of Brazil and concluded that existence of PMS is relevant only when it renders domestic sales themselves unfit for proper comparison¹³.

The term 'PMS' was further dealt in detail in EU-Biodiesel case.¹⁴ Argentina challenged the calculation of Anti- dumping duty based on CNV, and the EU anti- dumping rules as violative of WTO laws. The issue arose from an EU investigation against Argentina (and

⁹ Weihuan Zhou, 'Debunking the Myth of 'Particular Market Situation' in WTO Antidumping law' (2016) 19(4) SSRN < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862892> accessed 29 October 2021

¹⁰ Weihuan Zhou, 'Debunking the Myth of 'Particular Market Situation' in WTO Antidumping law' (2016) 19(4) SSRN < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862892> accessed 29 October 2021

¹¹ GATT Report, *EC-Imposition of Anti-dumping Duties on Imports of Cotton Yarn From Brazil*, WTO Doc. ADP/137 (Adopted on 4 July 1995)

¹² GATT Report, *EC-Imposition of Anti-dumping Duties on Imports of Cotton Yarn From Brazil*, ¶ 346 WTO Doc. ADP/137 (Adopted on 4 July 1995)

¹³ GATT Report, *EC-Imposition of Anti-dumping Duties on Imports of Cotton Yarn From Brazil*, ¶ 478 - 479 WTO Doc. ADP/137 (Adopted on 4 July 1995)

¹⁴ Panel Report, *European Union- Anti-dumping Measures on Biodiesel From Argentina*, WTO Doc. WT/DS473/R (Adopted on 26 October 2016)

Indonesia) biofuel imports wherein the EU investigating authority observed a differential export tax system on the input products (i.e. soyabeans, soyabeans oil) therefore, on the resulting biodiesel. The authority deemed that this tax scheme artificially lowered the domestic raw material costs which meant that the costs of these materials were not properly reflected on the Argentina producers' records. Therefore, these costs should not be used in calculating the NV as they suffer an "appreciable distortion" and the domestic production is not made in an ordinary course of trade due to government intervention. The investigating authority instead used average international reference prices of soybean¹⁵. The panel report in this case addresses, "(i) whether the investigating authority is allowed to use surrogate country's selling price on the ground that the actual input cost or cost of production has been distorted or artificially lowered, and (ii) whether the duties imposed as a result of using surrogate input cost in the calculation of CNV would result in the imposition of dumping duty higher than the dumping margin"¹⁶. For the first proposition, the Panel (conceded by Appellate Body) concluded that mere determination of the domestic prices of soybeans in the domestic market of Argentina were below the international prices due to the taxing system was not enough to discard the producer's records of cost of production. For second proposition, the panel found that construction of NV based on the CNV or surrogate input cost is likely to inflate the dumping margins and therefore, against Article 9.3 states that, "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2"¹⁷.

Recently, the term gained currency when WTO adjudicatory body again took up the matter in Australia- Anti-Dumping measures on A4 copy paper¹⁸. The dispute pertained to Australia's anti-dumping measures imposed against A4 copy paper exported from Indonesia. Australia found that a PMS exists in Indonesia's A4 copy paper sector as government regulation distorts the domestic industry price of pulp and paper industries. However, Indonesia contended that Australia's determination of PMS is an apt interpretation of PMS and excludes – "(i) Situations where input costs of the product are allegedly distorted; (ii) Situations that affect both domestic market sale and export sales of the product; (iii) Situations arising from government action"¹⁹. The panel started the analysis by observing that the qualifier 'Particular' before 'Market Situation' called for a fact-specific and case-to-case analysis of 'PMS' as the phrase 'Particular' means 'distinct, individual, single, specific'. The Panel assessed that 'PMS' and 'function together establish

¹⁵ White & Case WTO Report, 'WTO Appellate Body Report: EU-Biodiesel (Argentina)' (White & Case LLP, 24 Oct 2016) < <https://www.whitecase.com/publications/alert/wto-appellate-body-report-eu-biodiesel-argentina>> accessed 29 October 2021

¹⁶ Weihuan Zhou, 'Panel Report on EU-Biodiesel: A Glass Half Full?- Implications for the Rising Issue of 'Particular Market Situation' (2016) 2(2) SSRN < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2820857> accessed 30 October 2021

¹⁷ Anti-Dumping Agreement 1995, Art. 9

¹⁸ Panel Report, *Australia-Anti-Dumping Measures on A4 Copy Paper*, WTO Doc. WT/DS529/R (Adopted on 4 December 2019)

¹⁹ Panel Report, *Australia-Anti-Dumping Measures on A4 Copy Paper*, ¶ 7.15 WTO Doc. WT/DS529/R (Adopted on 4 December 2019)

a condition for disregarding the domestic price of the like product as the basis for normal value' work together. So, if the existence of 'PMS' allow proper comparison, then the domestic sales price cannot be disregarded. The panel does not agree to Indonesia's claim that the low price input product should be disqualified from constituting "PMS". On requirements of unilateral effect on the domestic sale prices, the panel concluded that incorporation of such requirements would deprive the intended function of the language "permit proper comparison". With regard to government intervention, the panel analysed that a situation arising from governmental intervention does not necessarily disqualifies the market to constitute "PMS". Therefore, the panel concluded that AD Commission has not acted inconsistently with the Article 2.2 of the AD Agreement. However, the panel held that mere existence of "PMS" does not allow the commission to disregard the domestic selling prices. It can only be disregarded when such situations do not permit "proper comparison".

The aforesaid cases throw some light into the interpretation of the term PMS, however, scholarship on the same is lacking in pith and substance. To further mention in the same breath, lack of detailing in the Negotiating History of the term PMS has often resulted in unmonitored application of PMS by member countries . With sunset of accession protocol of China, an increasing trend has been observed in the application of PMS. The practice of using PMS unfairly is emerging not only against China but also against market economy countries, which certainly is worrying and attracts a bigger problem of a trade war. Thus far, the panel, and the appellate body havenot dilated on the meaning of the term or its detailed application. This undeniably adds to the uncertainty in and around the usage of PMS by investigating authorities throughout the member countries.

MEMBERS' INTERPRETATION OF PMS -AN ALTERNATIVE TO NON-MARKET ECONOMY TREATMENT METHODOLOGY

There are a few number of member countries that consider trading with NMEs as unethical to 'fair trade'²⁰. Even the WTO does not prevent members to label another member as NME subject to satisfaction of the criteria provided in the domestic laws. In addition, WTO does not provide any definition of Market Economies (ME)²¹ or Non-market Economies²², neither have any major initiatives been taken to define these terms

²⁰ Dwight H. Perkins, *Economic Transformation of China* (World Scientific Publishing Co., 2015) <<https://www.worldscientific.com/worldscibooks/10.1142/9201>> accessed 29 October 2021; See Letter from Sen. Sherrod Brown to President Donald Trump (16 May, 2017), <www.brown.senate.gov> accessed 15 June 2020

²¹ United Nations Conference on trade and development (UNCTAD) states that market economies relies heavily upon market forces to determine levels of production, consumption, investment and savings without government intervention

²² NMEs are typically centrally planned economies where government regulates the domestic and even export prices. See Lydia Brashear, 'Factors or Prices: An Evaluation of Antidumping Laws as Applied to Companies Existing in Non- market Economies' 5(3) AM. U.J. INT'L L. & POL'Y <<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1594&context=auilr>> accessed 29 October 2021; see also James J. Nedumpara and Archana Subramanian,

during Uruguay Rounds or in the subsequent negotiations²³. Historically, the underline idea is that the General Agreement on tariff and trade (GATT) is designed by the market economies and for market economies²⁴. The only consideration to NME was given in GATT Review Session of 1954- 1955 when Czechoslovakia proposed to amend sub- para 1(b) of Article VI of GATT. It provided a reference to problems of comparability in calculating dumping margins in countries having state monopoly. It also stated that in such circumstances an alternative method to calculate the dumping margin is required to implemented, and cited two best options- (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade; or (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.²⁵ The proposal did not materialize until Tokyo Round 1979 which while drafting Anti-dumping Code recognized that “special regard must be taken to situations of centrally controlled countries in anti- dumping investigations”²⁶. However, the note to Article VI²⁷ does not provide any specific course of action that an investigating authority should take in dealing with countries that are centrally planned. This vacuum left members to interpret and set criteria for countries that are NME, unilaterally and according to their subjective satisfaction which is often unjustifiable²⁸. The succeeding paragraphs provide few member country interpretations of PME.

I. European Union

In determining dumping margin, several factors play an important role. Out of these, one of the most important factors is to determine whether the alleged country has been given market or non-market economy status²⁹. European Union (EU) in its anti-dumping

‘China’s Long March to Market Economy Status: An Analysis of China’s WTO Protocol of Accession and Member Practices’ in James J. Nedumpara and Weihuan Zhou (eds.) *Non-market Economies in the Global Trading System- the special case of China* (Springer 2018)

²³ James J. Nedumpara and Archana Subramanian, ‘China’s Long March to Market Economy Status: An Analysis of China’s WTO Protocol of Accession and Member Practices’ in James J. Nedumpara and Weihuan Zhou (eds.) *Non-market Economies in the Global Trading System- the special case of China* (Springer 2018).

²⁴ Alexander Polouektov, “The Non- market economy” Issue in International Trade in the context of WTO accessions’ UNCTAD/ DITC/ TNCD/ MISC. 20 < https://unctad.org/en/docs/ditctncdmisc20_en.pdf> accessed 29 October 2021

²⁵ *Id.*

²⁶ Weihuan Zhou, ‘Debunking the Myth of ‘Particular Market Situation’ in WTO Antidumping law’ (2016) 19(4) SSRN < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862892> accessed 29 October 2021

²⁷ Anti- Dumping Agreement 1995, Art VI bis

²⁸ James J. Nedumpara and Archana Subramanian, ‘China’s Long March to Market Economy Status: An Analysis of China’s WTO Protocol of Accession and Member Practices’ in James J. Nedumpara and Weihuan Zhou (eds.) *Non-market Economies in the Global Trading System- the special case of China* (Springer 2018); see Alexander Polouektov, “The Non- market economy” Issue in International Trade in the context of WTO accessions’ UNCTAD/ DITC/ TNCD/ MISC. 20 < https://unctad.org/en/docs/ditctncdmisc20_en.pdf> accessed 29 October 2021 See also Xuewei Feng ‘The Termination of the Grand Father Clause in China’s Accession Protocol and the Normal Value Construction After Fifteen Years of Accession’ in James J. Nedumpara and Weihuan Zhou (eds.) *Non-market Economies in the Global Trading System- the special case of China* (Springer 2018)

²⁹ Alexander Sandkamp & Erdal Yalcin, ‘China’s Market Economy Status And European Anti- Dumping Regulation’ (2016) < <https://www.ifo.de/en/node/25221>> accessed 29 October 2021

regulations (the 'Basic Regulation') classifies China as a NME, justifying it by saying that China does not fulfill the criteria of MEs³⁰. However, the regulations fail to provide any definition of NMEs or what kind of treatment should be given to it³¹. This causes the investigating authority to resort to alternative methodologies which warrants the anti-dumping commission to use analogue country selling price as NV. Regulation (EU) 2017/2321³² has brought an amendment to the anti-dumping regulation which determine the calculation of NV for imports from NME countries (where significant distortions exist due to government intervention)³³.

In addition, European Union made amendments to PMS provision in its Anti- dumping regulation³⁴. With this, EU has introduced the New Trade Defence Rules which provide that where the domestic prices and costs associated with the production are distorted due to state interference and no proper basis for comparison with the export price, such costs and prices would not be used for determination of dumping margin³⁵. Such cases allow investigating authority to use the cost of production and sale in third country with similar level of economic development. In addition, they have also introduced the concept of "Significant distortions".

Point (b) of Article 2(6a) of the Basic Regulation defines "Significant distortion" as – "Significant Distortions are those distortions which occur when cost or price reported (including prices of input product and energy) does not reflect as the result of free market forces as such cost or prices are substantially controlled by government or the result of government intervention"³⁶.

This amendment would allow the AD commission to construct Normal Value by taking relevant data of an appropriate representative country having similar level of economic development as that of exporting country³⁷. However, the concept of "Significant

³⁰ James J. Nedumpara and Archana Subramanian, 'China's Long March to Market Economy Status: An Analysis of China's WTO Protocol of Accession and Member Practices' in James J. Nedumpara and Weihuan Zhou (eds.) *Non-market Economies in the Global Trading System- the special case of China* (Springer 2018)

³¹ Stephannie Noel, 'Why the European Union Must Dump So-called 'Non-Market Economy' Methodologies and Adjustments in Anti-Dumping Investigations, (2016) 11(7&8) SSRN <[https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3019035#:~:text=The%20European%20Union%20\(EU\)%20should,the%20WTO%20anti%20dumping%20rules.](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3019035#:~:text=The%20European%20Union%20(EU)%20should,the%20WTO%20anti%20dumping%20rules.)> accessed 29 October 2021

³² Amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidized imports from countries not members of the European Union [2017] OJ L 338/2

³³ Notification of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements, G/ADP/N/1/EU/3/Suppl.2 and G/SCM/N/1/EU/2/Suppl.2, 23 January 2018

³⁴ 'The EU's new trade defence rules and first country report' (ec.europa.eu, 20 December 2017) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_5377> accessed 29 October 2021

³⁵ *ibid*

³⁶ Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations (2017) SWD (2017) 483 final/2 <https://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156474.pdf> accessed 29 October 2021

³⁷ Salvatore CICU, 'Protection Against Dumped and Subsidised Imports: 2016/0351 (COD) (europarl.europa.eu, 2020) <[https://www.europarl.europa.eu/legislative-train/api/stages/report/current/theme/a-balanced-and-progressive-trade-policy-to-harness-globalisation/file/new-methodology-for-calculating-dumping-margins-](https://www.europarl.europa.eu/legislative-train/api/stages/report/current/theme/a-balanced-and-progressive-trade-policy-to-harness-globalisation/file/new-methodology-for-calculating-dumping-margins-2576)

Distortion” applied in calculation of Normal Value neither finds its mention in Anti-Dumping Agreement nor in Article VI of the General Agreement on Tariffs and Trade (GATT). This has the proclivity to increase uncertainty with respect to circumstances it covers³⁸.

II. United States

In calculating NV for China, United States does not trust home market price of China due to interference of the state, therefore it constructs NV by using China’s “factors of production” by applying similarly situated “surrogate” ME countries³⁹. This produces dumping margin which has no relation with price discrimination between the domestic and export price⁴⁰.

In 2015, the USA had legislated the Trade Preferences Act⁴¹ in anticipation of possible mode of calculating the NV for China and similar countries. This Act has widened the scope of PMS and is frequently used to discard the domestic selling price as NV. The Act states that PMS exists when the “cost of material and fabrication or other processing of any kind does not reflect on the production in ordinary course of trade”⁴². In situations where PMS exists and cost of materials does not reflect the accurate cost of production in the ordinary course of trade, for construction of normal value, the authority may resort to a calculation methodology which has been applied to non-market economy countries or any other reasonable method⁴³.

The amendments will have potential implications on different exporters of different countries as it confers a wide power in the hands of US Department of Commerce (US DOC), International Trade and Commerce (ITC) and Customs and Border Protection, as it does not define the scope of PMS. In addition, it provides a vast array of new tools that these agencies can use to counter the adverse effects of the alleged dumping⁴⁴.

In 2017, the Trade Preference Extension Act was applied for the first time in anti-dumping duty investigation on certain oil country tubular goods (OCTG) from the

(2016)> accessed 29 October 2021

³⁸ ‘New EU Anti-dumping Methodology comes under Criticism’ (30 April 2020) <<https://www.twn.my/title2/wto.info/2018/ti180501.htm>> accessed 29 October 2021

³⁹ Matthew R. Nicely & Brain Gatta, “U.S. Trade Preferences Extension Act (TPEA) of 2015 could lead to increased use of “Particular Market Situation” (2016) 11(5) Global Trade & Cust. <<https://kluwerlawonline.com/journalarticle/Global+Trade+and+Customs+Journal/11.5/GTCJ2016032>> accessed 29 October 2021

⁴⁰ *ibid*

⁴¹ Trade Preferences Act 2015

⁴² Trade Preferences Extension Act 2015, s 504

⁴³ Devin S. Skies, ‘The First Particular Market Situation Determination Falls: Nexteel Co. v. United States Slip Op. 19-1 (Ct. Int’l Trade 2019) (Choe-Groves,J.) (akingump.com, 26 Feb 2019) <https://www.akingump.com/en/experience/practices/international-trade/ag-trade-law/the-first-particular-market-situation-determination-falls.html> ≥ accessed 29 October 2021

⁴⁴ *ibid*

Republic of Korea⁴⁵. The Commerce issued its final results stating that Particular Market Situation existed in Korea with respect to hot-rolled coil, an input product in producing the product under investigation. However, the preliminary findings do not indicate that such situation existed. Later on when appealed to Court of International Trade (CIT), it was alleged that Commerce used PMS to increase dumping margin as no evidence has been provided to discard domestic price of the origin country as Normal Value⁴⁶. Reversing the Finding of Commerce, CIT stated that Commerce has not provided any substantive evidence to prove that PMS existed in Korea and therefore, why they have discarded the domestic selling price for the calculation of NV⁴⁷.

CIT again dealt with PMS issue in *Saha Thai Steel Pipe Public Company V. United States*⁴⁸. The issue dealt by the Court was, "whether Commerce's PMS adjustment is supported by substantial evidence, and is in accordance with the law".⁴⁹ An administrative review has been initiated against Saha Thai, Pacific pipe, and Thai Premium on an application made by Defendant-Intervener (Wheatland). Before the release of preliminary findings, Wheatland alleged the existence of a PMS in Thailand, wherein the cost of production was distorted and cost of production in the ordinary course of trade was not precise⁵⁰. Wheatland averred that – (i) The Government of Thailand subsidized Thai producers of hot-rolled coil, enabling its sale at below-market prices to downstream producers of Circular welded carbon steel pipes ("CWP"), and (ii) the prices for imports of HRC into Thailand were distorted through dumping, subsidization, and global overcapacity⁵¹.

Commerce accepted Wheatland's submission by determining that it had provided new factual information in support of PMS allegation⁵². It provided seven days period to the interested parties to clarify, correct or rebut the allegation. Commerce in its final findings affirm that PMS exists in Thailand⁵³.

Many members have shown concerns over the legislated Trade Preference Act, 2015 as

⁴⁵ Decision Memorandum for the Preliminary Results of the 2016-2017 Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea < <https://enforcement.trade.gov/frn/summary/korea-south/2018-22128-1.pdf> >

⁴⁶ Devin S. Skies, 'The First Particular Market Situation Determination Falls: Nexteel Co. v. United States Slip Op. 19-1 (Ct. Int'l Trade 2019) (Choe-Groves,J.) (akingump.com, 26 Feb 2019) <https://www.akingump.com/en/experience/practices/international-trade/ag-trade-law/the-first-particular-market-situation-determination-falls.html> > accessed 29 October 2021

⁴⁷ Devin S. Skies, 'The First Particular Market Situation Determination Falls: Nexteel Co. v. United States Slip Op. 19-1 (Ct. Int'l Trade 2019) (Choe-Groves,J.) (akingump, 26 Feb 2019) <https://www.akingump.com/en/experience/practices/international-trade/ag-trade-law/the-first-particular-market-situation-determination-falls.html> > accessed 29 October 2021; See Sidley Austin LLP, 'U.S. Department of Commerce Employs New "Particular Market Situation" Approach to Calculate Dumping Margins (lexology, 19 April 2017) < <https://www.lexology.com/library/detail.aspx?g=f73f018a-ba62-48dc-a6af-ffa7d551dd3> > accessed 29 October 2021

⁴⁸ Consol. Court No. 18-00214

⁴⁹ *Id.*

⁵⁰ *Saha Thai Steel Pipe Public Company V. United States*, Consol. Court No. 18-00214 at 3

⁵¹ *Saha Thai Steel Pipe Public Company V. United States*, Consol. Court No. 18-00214 at 4

⁵² *Saha Thai Steel Pipe Public Company V. United States*, Consol. Court No. 18-00214 at 4

⁵³ *Saha Thai Steel Pipe Public Company V. United States*, Consol. Court No. 18-00214 at 6

it provides a wide discretionary power in the hands of investigating authority to discard the domestic selling price as NV and use CNV instead, which in turn shall increase the duty that will be ultimately imposed. Indonesia raised the concern over the use of PMS, particularly in biodiesel. In addition, Korea also questioned the use of 'adverse fact available' in the anti-dumping investigations⁵⁴.

CIT started its analysis by looking at Section 504 (c) of TPEA, 2015 and stated that it provides discretion to Commerce to adjust the cost of production calculation methodology when PMS exists. However, the Statute does not provide any such discretionary power in calculation of cost of production (for below-cost-sales purposes) or application of the below-cost test as set out in Tariff Act, 1930. The context of the amended provision on PMS is that the 'constructed value' is the basis of "normal value", not the home market sales⁵⁵. However, the PMS adjustments made by the Commerce is based on the comparison between Plaintiff's U.S. sales to its home-market sales. Therefore, the Court held that the commerce misapplies a PMS adjustment to the cost of production for the purposes of the home-market sales-below-cost test.

Recently, CIT again took up the matter in *Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. V. United States*⁵⁶. A petition has been filed by the Domestic industries claiming that the imports of welded pipe from Turkey are likely to be made at less than fair value. The Petitioner (BMB) alleged that the legislated statute (TPA) does not allow commerce to make PMS adjustments to importer's cost of production for the purpose of sales below the cost of production. The court (as held in the previous case) concluded that no adjustments for a PMS is permitted for the sales below cost test.

With the legislation of Trade Preference Act, 2015, wide power exists with the investigating authority. Now, they can discard the domestic selling price in determining NV as per their subjective satisfaction that the domestic production has been made outside the ordinary course of trade. Further, a letter by White House National Trade Council Director Peter Navarro to Commerce Secretary Wilbur Ross stated "the particular market situation methodology could be a useful tool to stop both diversionary dumping by non-market economies like China and an undervaluation of Korean subsidies under the guise that it is a market economy"⁵⁷.

III. Australia

Section 269TAC (2)(a)(ii) of the Customs Act, 1901⁵⁸ contemplates construction of NV as given under Article 2.2 of AD Agreement when the prevailing situation in the domestic

⁵⁴ 'Semi-annual reports of members on Anti-dumping Actions' (WTO, 25 April 2020) <https://www.wto.org/english/news_e/news18_e/anti_25apr18_e.htm> accessed 29 October 2021

⁵⁵ *Saha Thai Steel Pipe Public Company V. United States*, Consol. Court No. 18-00214 at 9

⁵⁶ Consol. Court No. 19-00056

⁵⁷ Alston & Bird, 'Night Note: The First 100 Days- Trade in the first 100 Days of the Trump Administration' (Alston & Bird, 18 April 2018) <<https://www.alston.com/-/media/files/insights/publications/2017/04/nightnoteweek10.pdf>> accessed 29 October 2021

⁵⁸ Customs Act, 1901, s 269TAC(2)(a)(ii)

market of the exporting country is such that the sales in the domestic market are not suitable for determining the Normal Value. This section creates a suitability test in accepting or discarding the Normal Value.

After FTA between China and Australia⁵⁹, Australia considers China as Market Economy, therefore in order to justify using surrogate country export prices or constructed NV, Australia often uses Section 269TAC (2)(a)(ii) in anti-dumping investigations against China. In 2017, the final report of the Anti-dumping investigation on Zinc Coated Steel and Aluminum zinc coated steel exported from the people's republic of China and Taiwan⁶⁰ established that a situation exists in China which renders the domestic selling prices of galvanized steel and aluminum zinc coated steel in the Chinese market as unsuitable for determining NV under subsection 269TAC (1).

Further, Australian guidance on market situation⁶¹ laid down that PMS **very well** engulfs a number of circumstances including the case of the domestic selling prices in exporting countries which have been substantially altered by government influence causing those prices not beneficial for use in establishing domestic normal values.

In addition, the Australian Dumping and Subsidy Manual of 2018⁶² provides for different market situations under which domestic sales price are not relevant for determining the normal value as it does not reflect a fair price in normal market conditions. The manual also provides, among others, government influence on prices or costs that could be one of the reasons of distracting domestic market prices. Further, it mentions that "market conditions will no longer be said to prevail when the number of government owned enterprises, together with any unprofitable sales by those same enterprises, has caused a significant distortion to the prices received by private enterprises."

PMS has been dealt within the domestic jurisdiction of Australia in the infamous case of A4 copy⁶³ paper, exported from the Federal republic of Brazil, China, Indonesia and Thailand. In this case, it has been alleged that PMS exists in the domestic market of China and Indonesia as the price of the A4 copy paper is artificially low, due to the input product being available at subsidized rate. Therefore, domestic sales of the subject goods in China and Indonesia are unsuitable for determining normal value. For China, the commission stated that the prevailing market condition of China is not fit to consider domestic sales prices in determining Normal Value. In respect of Indonesia, the commission concluded that there is substantial involvement of Government in the forestry and pulp industry

⁵⁹ Trade & Investment Queensland 'China- Australia Free Trade Agreement', (2015) <<https://www.tiq.qld.gov.au/download/business-interest/export/free-trade-agreements/China-Australia-Free-Trade-Agreement.pdf>> accessed 29 October 2021

⁶⁰ Anti-dumping Commission report (final report), reviews of Anti-dumping measures applying to Zinc Coated Steel and Aluminum zinc coated steel exported from the people's republic of China and Taiwan, p 27

⁶¹ Australian Market Regulation Feed, < <https://asic.gov.au/regulatory-resources/markets/supervision/australian-market-regulation-feed/>> accessed 29 October 2021

⁶² Dumping and Subsidy Manual, (November 2018)

⁶³ <https://www.industry.gov.au/sites/default/files/adc/public-record/221-report-final-report-rep-341.pdf>

sector and the price of Indonesian A4 copy paper in the domestic market is significantly low in comparison to the regional benchmark. The investigation results in imposition of AD Duty based on the dumping margin calculated on the basis of CNV.

Thereafter, Indonesia had taken the matter before the WTO panel⁶⁴. Indonesia claimed that the Commission's determination is inconsistent with Article 2.2 of the AD Agreement as it has disregarded domestic selling prices by concluding that PMS existed in the market of Indonesia. Indonesia maintains that the proper interpretation of "PMS" excludes Situations – (i). where costs of input products has been distorted; (ii) not having an exclusive and unilateral impact on the sales of domestic market; and (iii) arising out of any government action⁶⁵. These exclusions disqualify the presence of "Particular Market Situation" in the matter at issue. Additionally, Indonesia contended that the PMS corresponds to an "exceptional set of circumstances which unilaterally affect the domestic market prices and therefore, affect the comparability of such prices with the export prices. The panel in this case held that mere existence of PMS does not allow members to discard the domestic selling prices as NV. Using surrogate country selling price or CNV are only allowed when government controlled prices of the product do not allow a proper comparison.

IV. Canada

On 4 September 2019, Canada amended its Special Import Measures Regulations⁶⁶ (SIMR). The amendment addresses how the Canada Border Services Agency may calculate the constructed normal value in anti- dumping investigation where (i) Input products are acquired from associated parties at a price which is below a representative benchmark, and (ii) where distortion in domestic selling price has been created from the existence of "Particular Market Situation"⁶⁷.

CONCLUSION

The data gathered from various jurisdictions on PMS goes on to show that PMS' multi-faced application driven by case to case basis circumstances has been greatly circumscribed in way wherein member countries apply it in such a manner that defeats the purpose of fair multilateral trading system. Countries like Australia, EU and USA use PMS only to justify their actions in treating China still as an NME. The domestic legislations of these countries allow the use of special Anti- dumping rules. In practice,

⁶⁴ Panel Report, *Australia-Anti-Dumping Measures on A4 Copy Paper*, WTO Doc. WT/ DS529/R (Adopted on 4 December 2019)

⁶⁵ Panel Report, *Australia-Anti-Dumping Measures on A4 Copy Paper*, ¶ 7.15 WTO Doc. WT/ DS529/R (Adopted on 4 December 2019)

⁶⁶ Regulations Amending the Special Import Measures Regulations, SOR/2019-314

⁶⁷ Greg Tereposky and Daniel Hohnstein, 'Canada implements new Anti-dumping Rules targeting related-company input dumping and "Particular Market Situations" Input Distortions' (tradeisds, 4 Sep 2019) <<https://tradeisds.com/canada-implements-new-anti-dumping-rules-re-input-cost-distortions/>> accessed 29 October 2021

the investigating authorities arbitrarily choose the surrogate country that inflates the normal value and therefore, the dumping margin, allowing the investigating authorities impose unjustified high dumping duties for protecting their domestic industry⁶⁸.

The panel in Australia A4 size paper declined to define the scope of PMS. It reiterated the same principle that “PMS allows to discard the domestic selling price only if the prevailing situation distorts the comparability of domestic selling prices with export prices”. The uncertainty in defining the scope of PMS by the panel report in Australia A4 paper violates Article 3.2 of the Dispute Settlement Understanding which obligates the Dispute Settlement system to provide security and predictability to the multilateral trading system⁶⁹.

Undeniably, the approach adopted by investigating authorities is reflective of high degree of ambiguity. Furthermore, the domestic legislations which confer unfettered powers in such only contribute towards an unfair assessment leading to impediment in free and fair exports. Unfortunately, the underlying objective of these newly amended laws is to increase the dumping margin thereby imposing a higher dumping duty. Conclusively, it would adversely affect the global economy and prejudice the interest of consumers, who would have ultimately benefitted from the less cost of the goods. It would create a situation where these consumers will be at mercy of the predatory prices of the goods imposed by the domestic producers.

Considering the fact that the PMS may be invoked against all the member countries unlike the NME, that can be exclusively invoked against China, there is a great need for development of WTO standards on consistent and legitimate application of PMS by the investigating authorities. The WTO tribunals should endeavor to develop jurisprudence for the application of PMS in order to avoid retaliatory actions among the WTO members. Otherwise the Global Trading System will soon be converted into zero-sum game.

Moreover, WTO members should strive to achieve adequate standards and consistent mechanism under their domestic regulations in consonance with the AD agreements to prevent misapplication of this controversial provision.

⁶⁸ James J. Nedumpara and Archana Subramanian, ‘China’s Long March to Market Economy Status: An Analysis of China’s WTO Protocol of Accession and Member Practices’ in James J. Nedumpara and Weihuan Zhou (eds.) *Non-market Economies in the Global Trading System- the special case of China* (Springer 2018)

⁶⁹ Understanding On The Rules and Procedures Governing The Settlement Of Disputes, Art. 3