Debunking the Myth of Particular Market Situation: Unfinished Business from GATT/WTO to ChAFTA

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Euobserver: Steel workers recently protested in Brussels against granting China market economy status (Photo: Eszter Zalan)
Preliminary Questions

1. What is “Particular Market Situation” (“PMS”) under the WTO law?
2. Why is it important?
3. How has the issue of PMS been dealt with under the WTO?
Objective and Structure

Objective
Developing a normative approach to the interpretation and application of PMS so as to prevent abuse of PMS by WTO members

Structure
1. WTO Anti-Dumping Agreement
2. GATT/WTO Drafting Records
3. Australia’s Practice
4. China – Australia Free Trade Agreement (ChAFTA)
5. Normative Approach to PMS
6. Recent Development under the WTO jurisprudence
1. Anti-Dumping Agreement

2.2 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 the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.
2. GATT/WTO Negotiating Records

Article VI of the GATT

- No reference to PMS
- Review Round – Interpretative note added to Article VI:1

2. It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.
GATT/WTO Negotiating Records

Kennedy Round (1963-1967)

- UK’s draft International Code on Antidumping Procedure and Practice
- No discussions on PMS
- Draft Anti-Dumping Code – Kennedy Round Anti-Dumping Code

A.2(d) When there are no sales of the like product in the ordinary course of trade in the domestic market or when, because of the *particular market situation*, such sales *do not permit a proper comparison*, the margin of dumping shall be determined by comparison with a comparable export price …, or with the cost of production in the country of origin plus a reasonable allowance for administrative, selling and other costs and profits
GATT/WTO Negotiating Records

Tokyo Round (1973-1979)

• Article A.2(d) was renumbered to Article 2.4 in the Tokyo Round Anti-dumping Code WITHOUT changes to the text of PMS
• No discussions on PMS
• Discussions on government influence and price reliability
• Agreement on proper and fair comparison
**GATT/WTO Negotiating Records**

**Uruguay Round (1986-1994)**

- No discussions of PMS
- Input dumping

“Input dumping is considered to occur when materials or components that are used in manufacturing a product are purchased internationally or domestically at dumped prices and their cost advantage has an effect on the price of the product though the product itself is exported at undumped prices.”

“Irrespective of the cost of the inputs, no dumping will occur as long as there is a comparable domestic price of the like product for consumption in the exporting country and that price is not higher than the export price.”
3. Australia’s Practice

① Increasing Use of Anti-dumping

② Granting China full market economy status for ChAFTA negotiations

③ As ChAFTA negotiations progressed, China became the lead target of antidumping actions

④ Consistent finding of PMS against China
   a. Frequently in raw materials market due to influence of Chinese government
   b. Assumption of PMS in the market of final goods
   c. Use of surrogate costs for the determination of constructed normal value
   d. Inflated dumping margins and anti-dumping duties
Australia AD & CVD – General

Figure 1

Australian anti-dumping and countervailing activity
1990-91 to 2014-15

Australia AD – Countries (1995-2014)

Source: WTO
Australia AD & CVD - Sectors

Figure 2

Australian anti-dumping and countervailing initiations and measures imposed by industry, 2014-15

Cases initiated in 2014-15

Steel: 86%
Food: 7%
Plastics & polymers: 7%

Measures imposed in 2014-15

Steel: 61%
Power transformers: 22%
Other metals: 11%
Paper: 6%

4. China – Australia Free Trade Agreement

① Feasibility Study – no ambitious agenda on trade remedies
② No substantive outcomes despite China’s concerns
③ No disciplines beyond WTO rules
④ Further cooperation and consultation, e.g. High Level Dialogue on Trade Remedies
China – Australia Free Trade Agreement

China’s Position on PMS

The GOC is implacably opposed to the persistent misuse of the concepts of “particular market situation” and “competitive market costs” by the Australia side against Chinese exporters in normal value calculation.

In spite of the above positions, the GOC has still insistently answered the Commission’s questionnaire concerning “particular market situation” in previous cases ... with an aim to assist the Commission to understand the operation and characteristics of China’s economic system, so that it could make correct conclusions in its investigations. These practices have projected fully GOC’s cooperation and good will.

From now on, the GOC would not continue to answer questions concerning unprincipled allegations of “particular market situations”. Neither would the GOC continue to analyse the compliance of the Commission’s practice to WTO rules and Australia’s WTO obligations...

Now it’s the turn of the Australian side to make a determination whether to honour its international commitments, exhibit its good faith and take a mutual-respect position towards the Chinese side... The GOC would remind the Commission to kindly take WTO rules, Australia’s international obligations and China-Australia bilateral economic relationship into consideration.

Source: Alleged dumping and subsidisation of silicon metal from China – Submission of the Government of China concerning Government Questionnaire (18 April 2014)
5. An Normative Approach to PMS

**EEC – Cotton Yarn**

“... the wording of Article 2:4 [now Article 2.2 of the WTO AD Agreement] made it clear that the test for having any ... recourse [to use of CNV] was not whether or not a “particular market situation” existed *per se*. A “particular market situation” was only relevant insofar as it had the effect of rendering the sales themselves unfit to permit a proper comparison. In the Panel's view, therefore, Article 2:4 specified that there must be something intrinsic to the nature of the sales themselves that dictates they cannot permit a proper comparison.”

5. An Normative Approach to PMS

1st Approach

A PMS would arise only if the situation in concern has resulted in price distortions of the goods subject to investigations. The whole issue of PMS does not concern an alleged market situation *per se* but concerns whether the consequence of the existence of the situation has been distortions of normal value.

- whether domestic price of subject goods should be disregarded for the purpose of determining normal value depends on whether the price has been distorted: *AB Report, US – Hot Rolled Steel*
- the mere existence of a monopoly is not sufficient to substantiate that domestic prices are distorted and hence unsuitable for use as normal value: *Enichem Anic SRL & Anor v The Anti-Dumping Authority & Anor.* (1992) 29 ALD 431

Where the alleged price distortions are in the raw materials/inputs market, it would be insufficient to show that the price of raw materials is distorted; rather, a PMS would arise only if the price distortion of raw materials has passed through to, and hence caused distortions in, the price of the final goods.
5. An Normative Approach to PMS

2nd Approach

A PMS would arise only if the situation in concern precludes a proper comparison between export price and normal value. The comparability should NOT be treated as being affected if both of the prices are distorted even-handedly by the alleged market situation.

• Article 2.2 of the AD Agreement incorporates a test of “proper comparison” between export price and normal value

• Unlike the NME Assumption, the existence of PMS cannot be assumed but must be established by positive evidence and objective assessment by investigating authorities

Where the alleged price distortions are in the raw materials/inputs market, a PMS should not be found if the price distortions of raw materials have affected the export price and domestic price of the final goods even-handedly.

Thus, a finding of PMS would not be based on positive evidence and objective assessment if it is based on a finding of price distortion in domestic price only.
6. Recent Development

**AB Report on EC – Fasteners (Article 21.5)**

Article 2.4 of the Anti-Dumping Agreement has to be read in the context of the second *Ad Note* to Article VI:1 of the GATT 1994 and Section 15(a) of China's Accession Protocol. We recall that the rationale for determining normal value on the basis of [the surrogate prices] was that the Chinese producers had not clearly shown that market economy conditions prevail in the fasteners industry in China. [footnote omitted] Costs and prices in the Chinese fasteners industry thus cannot, in this case, serve as reliable benchmarks to determine normal value. In our view, *the investigating authority is not required to adjust for differences in costs between the NME producers under investigation and the analogue country producer where this would lead the investigating authority to adjust back to the costs in the Chinese industry that were found to be distorted.*
Recent Development

Panel Report on *EC – Biodiesel*

The EU’s finding that the raw materials prices were lower than international prices due to the distortion created by the Argentine export tax system “does not constitute a legally sufficient basis under Article 2.2.1.1 for concluding that the producers’ records do not reasonably reflect the costs associated with the production and sale of biodiesel”.

*Article 2.2.1.1 of the AD Agreement*

For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.
Conclusion

- PMS is becoming a hot issue in international trade law
- Trade initiatives either on the multilateral level or bilateral level would be frustrated by abuse of PMS leading to the imposition of more and higher antidumping duties
- The lack of disciplines under the WTO or FTAs such as ChAFTA provides the soil for growing protectionist use of PMS
- To avoid any tit-for-tat application of PMS, the WTO tribunals should standardise the law and practice in a way that carries on the spirit of free trade