Dumping Margin Determination In India

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Abstract: GATT/WTO does not restrain the practice of anti-dumping, but it safeguards the domestic market of country importing goods from injuries of dumping. According to the principles, countries could take an action against the dumped products only if it causes actual injury to domestic market of that country.1 Mere intent to cause injury without actual injury is not actionable. Thereby, it tries to strike a balance between interest of domestic market and free trade.

Key Words- **Anti Dumping, Margin, Dumping, Gatt, Normal Value, Export Price.**

I. INTRODUCTION

"Dumping" is defined as a situation in which the export price of a product is lower than its selling price in the exporting country. A bargain sale, in the sense of ordinary trade, is not dumping. Where it is demonstrated that the dumped imports are causing injury to the importing country within the meaning of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-dumping Agreement"), pursuant to and by investigation under that Agreement, the importing country can impose anti-dumping measures to provide relief to domestic industries injured by imports.[1]

A country's imposition of an anti-dumping duty is determined by the dumping margin--the difference between the export price and the domestic selling price in the exporting country. By adding dumping margin to export price, the dumped price can be rendered a "fair" trade price. Existence of dumping can be estimated by calculating the dumping margin which is the difference between the Normal Value of the like article and the export Price of the product under consideration.

Dumping margin= normal value- export price

The normal value is the comparable price at which the goods under complaint are sold, in the ordinary course of trade, in the domestic market of the exporting country or territory while the export price of goods imported into India is the price paid or payable for the goods by the first independent buyer.

India is the country most frequently affected by both AD and CV measures. More than 15 per cent of all final measures imposed in AD and 21 per cent of all measures imposed in CV investigations were aimed at India.

Article 2.4 of the Anti dumping Agreement specifically governs the calculation of the dumping margin.

Article 2.4.2 of the Agreement further stipulates that:

'the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately b the use of a weighted average-to-weighted average or transaction-to-transaction comparison.'

Determination of dumping was considered by the tribunal in the Pig Iron Manufacturers Association v. DA dispute.[2] The appellant objected to the imposition of the minimum anti dumping duty recommended by the DA. It was argued that Section 9A of the Customs Tariff Act stipulates that the anti dumping duty shall not exceed the margin of dumping. Fixing a minimum duty would lead to imposing an anti dumping duty even in cases where the export price is at or higher than the normal value. According to section 9A , there could not be any duty where the export is at or above the normal value. Consequently, the Tribunal held that the provision in the corrigendum is, therefore, required to be set aside. The tribunal upheld the contention of the appellant regarding the standing and normal value, as well as the contention against minimum anti dumping duty.

In B.L.A. Industries and Ors. v. DA[3], the tribunal held that the anti dumping duty should be imposed in US Dollars in order to avoid erosion of duties to the domestic industry due to exchange fluctuations[4].

In HaldarTopsoe A/S v. DA[5], the tribunal considered the calculation of the dumping margin. Section 9A of the CT Act provides for the determination of the margin of dumping. It also provides the maximum limit of anti dumping duty that can be imposed on an imported article. When the export price of the article is less than the normal value, the difference is that the dumping margin and anti dumping duty cannot exceed this

[1] Van den Bossche, Peter (2005). 'The Law and Policy of the World Trade Organization.' Cambridge, UK: Cambridge University Press. pp. 42.ISBN 978-0-511-12392-4. "Dumping, i.e. bringing a product onto the market of another country at a price less than the normal value of that product is condemned but not prohibited in WTO law"

[2]2000 (116) E.L.T. 67 (Tribunal)

[3]2000 (117) E.L.T. 625 (Tribunal)

[4]DSM Idemitsu Ltd. V. DA 2000(119) E.L.T. 308 (Tribunal)

[5]2000(116) E.L.T. 377 (Tribunal)

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margin. The tribunal was of the view that the dumping margin calculation is exporter- or exporting- country- specific. Furthermore, it can impose a duty only when a product is dumped at a price lower than the normal value in the domestic market; that difference alone can be the maximum limit of the anti dumping duty.

The SC was of the view that the statute itself gives sufficient guidelines to the DA to be adopted in the process of determining the 'normal value'. The Honourable Court furthermore explained that the guidelines had been placed in a preferential sequence. According to the provision if acceptable material is available with regard to the comparable price in the ordinary course of the trade in the exporting country or territory itself, then the normal value will have to be determined on the basis of choices between comparable representative export price and cost of production in the country of origin of the goods.

The SC concluded: a perusal of the said provisions clearly shows the normal value will have to be determined with reference to comparable price; the word 'comparable price' in the context can only be with reference to the price of similar articles sold under similar circumstances irrespective of the manufacturer. By holding anti dumping duty to be exporter-specific, the tribunal could not have restricted the scope of the investigation only to materials to be produced by a party against whom an investigation is being conducted.[6]

Also, the Tribunal held that anti dumping is country specific, and the EU can't be a territory for the purpose of determining the normal value. The SC disagreed with the tribunal and was of the view that the use of the word 'territory' on section 9(1)(c) indicates that the CT Act empowers the DA , while determining normal value, to take into account the comparable price of the 'like' article in the exporting country or territory.

In HaldarTopsoe A/S Section 9A(1) of the CT Act contemplates the levy of an Anti dumping duty not exceeding the margin in relation to such articles. If the DA found two different customs duties, there had been two different dumping margins. Therefore, the contention of the respondent that there cannot be two dumping duties with regard to the same catalyst was upheld.[7]

In Birla Ericson Ltd. V. DA[8], another appellant, Samsung Electronics Co. Ltd., argued that instead of adopting comparable representative price on exports to China and Hong Kong for calculating the normal value, the DA should have adopted the cost of production method for finding the normal value.

The calculation of dumping margin and different methodologies used for it is always under controversy. The DA in Apar Industries Ltd. V. DA, the tribunal held that enhancement of the cost of raw material by 10% towards VAT and transportation charges, in arriving at normal value in absence of any evidence indicating additional payment over and above invoice price shown by appellant's purchase register, is unwarranted and not in consonance with principles of arriving at cost of production under Rule 10.[9]

To determine whether the foreign products are imported at a price lower than normal value, the Ministry of Commerce calculates the dumping margin as the difference between a weighted average normal value and a weighted average export price to India, or the difference between individual normal values and individual export prices on a transaction-to-transaction basis over the period of investigation. In special circumstances, the Ministry may compare a weighted average normal value to prices of individual export transactions to India.

II. SCOPE IN THE ANTI-DUMPING

The Ministry determines the normal value using one of four methods. Whenever possible, the normal value is calculated using the sales price in the exporting country's home market. However, if there is an insufficient quantity of sales in the exporting country's domestic market, the weighted average sales price is below the weighted average unit cost, or the volume of sales below unit cost during the investigation period is more than 20 percent of the total sales being used to determine normal value, the Ministry calculates the normal value using one of the two alternative methods.[41]

The Ministry may calculate a "constructed" normal value using the exporting country's cost of production plus a reasonable amount for selling, general and administrative costs and profits, or use the prices of sales from the exporting country to a selected third country. For non-market economy countries, the Ministry determines the normal value using either the sales price or constructed value in a selected market economy country, or the price from a selected market economy country to a selected third country which may include India.[42]

III. INDIAN ASPECTS OF ANTI-DUMPING

The Ministry generally calculates a separate antidumping margin for each supplier. However, if any interested party fails to provide authentic, necessary information within the time limit, or it is difficult to verify the provided information, the Ministry may make its determination on the basis of "facts available," which includes the information submitted in the petition or submitted by interested parties. When the number of suppliers or products involved in the investigation is too large, the Ministry may select a sample of suppliers or products for the investigation using statistical sampling methods based on information available at the time of selection or by choosing those suppliers or products with the largest import volumes. The Ministry calculates the dumping margin for those firms not in the sample using a weighted average of the dumping margins calculated for those suppliers selected for the investigation. When determining whether the foreign imports are causing or threatening to cause material injury to the domestic industry, or materially retarding the establishment of an industry, the Ministry considers the volume of dumped imports, the effect of the dumped imports

[6]Designated Authority v. HaldarTopsoe A/S., 2000(120) E.L.T. 11 (SC)

[7]Ibid

[8]2004 (167) ELT 163 (Tri- Del)

[9]2006(204)E.L.T. 180 (Tri-Del)

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on prices of the like product in India's market, and the consequent effect of the dumped imports on domestic producers. To examine the impact of the dumped imports on domestic industry, the Ministry evaluates the magnitude of the margin of dumping and all relevant economic factors and indices including natural and potential decline in sales, profits, output, market share, productivity, and return on investments, inventories, employments, wages, and growth in the domestic industry.

IV. DE MINIMUS MARGIN

Any exporter whose margin of dumping is less than 2% of the export price shall be excluded from the purview of anti-dumping duties even if the existences of dumping, injury as well as the causal link are established.

Further, investigations against any country are required to be terminated if the volume of the dumped imports from that particular source is found to be below 3% of the total imports, provided the cumulative imports from all those countries who individually account for less than 3%, are not more than 7%.

Degree of dumping is to be determined from the fact that whether it is in such aquantity that it can be injurious to the domestic industry or is the effect de minis. If the margin of dumping of an exporter is less than 2 per cent of the export price, it shall not be considered as a case of dumping. To determine whether dumping has been practiced, comparison is to be made between the export price and normal value. The difference between these two is termed as dumping margin. [Export price < Normal price = dumping]. Complex procedures and rules are to be followed along with multiple calculations for the purpose of price comparison

Price Undertaking: The provision regarding price undertaking was laid down in anti dumping code 1968 for the first time. Article 8 of anti dumping agreement expressly provide for the concept of price undertaking:

i. Article 8.1 States that, "Proceedings may be suspended or terminated without the imposition of provisional measures or anti dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping. It is desirable that the price increases be less than the margin of dumping if such increases would be adequate to remove the injury to the domestic industry."

The price undertaking restrains the continuation of investigation procedure in cases where as a consequence of price undertaking the margin of dumping is eliminated by raising his level of price or the exporter may cease to dump product in area suffering from injury. Rise in price must not be higher than the margin of dumping. There is no issue if price raised is though lesser than margin of dumping sufficiently removes the injury caused to domestic market.

So far, in the United States and the European Union, in cases involving more than one transaction, all export prices higher than the weighted-average domestic price were regarded to be the same as the weighted-average domestic price, and thus no credit was given for "negative" dumping margins. This practice results in artificial dumping margins, and the inflation of actual margins.

The Anti-dumping Agreement takes into account this point, prescribing that margins shall be established on the basis of a comparison of weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis (Article 2.4.2).

An Example of Unfair Price Comparison

	Domestic Price(Rs.)	Export Price(Rs.)	Dumping Margin(Rs.)
Transaction 1	400	400	-150 -> 0
Transaction 2	300	300	- 50 -> 0
Transaction 3	200	200	+ 50
Transaction 4	100	100	+150
Average Value	250	250	0

$$\text{Dumping margin percent} = \frac{0 + 0 + 50 + 150}{400 + 300 + 200 + 100} \times 100 = 20\%$$

The anti dumping Agreement clarified the method used in calculating dumping margins by establishing:

- New criteria for determining sales below cost (Article 2.2.1),
- Adjustment mechanisms for start-up costs (Article 2.2.1.1),
- The acceptance of cost calculation based on accepted accounting principles in the exporting country (Article 2.2.1.1), and
- New criteria for setting profit rate in constructed value, (Article 2.2.2).

Zeroing (As in Table): The panel in US-Zeroing maintained that calculations of dumping margins are based on the idea that Anti-dumping duties should be imposed to the extent that the export price in individual transactions is below the domestic selling price. Therefore, the EU's method of calculating dumping margins did not necessarily expand the dumping margin and cannot be considered a violation of the Agreement.

V. CALCULATION OF ANTI DUMPING MARGIN

The Agreement contains rules governing the calculation of dumping margins. In the usual case, the Agreement requires either the comparison of the weighted average normal value to the weighted average of all comparable export prices, or a transaction-to-transaction comparison of normal value and

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export price (Article 2.4.2). A different basis of comparison can be used if there is “targeted dumping”: that is, if a pattern exists of export prices differing significantly among different purchasers, regions or time periods. In this situation, if the investigating authorities provide an explanation as to why such differences cannot be taken into account in weighted average-to-weighted average or transaction-to-transaction comparisons, the weighted average normal value can be compared to the export prices on individual transactions.

The Agreement requires that, when anti-dumping duties are imposed, a dumping margin be calculated for each exporter. However, it is recognized that this may not be possible in all cases, and thus the Agreement allows investigating authorities to limit the number of exporters, importers, or products individually considered, and impose an anti-dumping duty on uninvestigated sources on the basis of the weighted average dumping margin actually established for the exporters or producers actually examined. The investigating authorities are precluded from including in the calculation of that weighted average dumping margin any dumping margins that are de minimis, zero, or based on the facts available rather than a full investigation, and must calculate an individual margin for any exporter or producer who provides the necessary information during the course of the investigation.

VI. INDIAN SUBMISSION IN US ZEROING CASE

Model Zeroing and Simple Zeroing are as such inconsistent with the AD Agreement

India asserts that existing case law on the issue of zeroing confirms that model zeroing and simple zeroing are "as such" inconsistent with Article 2.4 and 2.4.2 of the AD Agreement. According to the Appellate Body, "when investigating authorities use a zeroing methodology … to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. … The inherent bias in a zeroing methodology … may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping." Furthermore, in the EC – Bed Linen case, the Appellate Body was of the view that "a comparison between export price and normal value that does not fully take into account the prices of all comparable export transactions – such as the practice of zeroing at issue in this dispute – is not a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2." According to India, these findings on zeroing were applicable with equal force to model zeroing and simple zeroing resorted to by the United States in its anti-dumping investigation procedures.

Furthermore, India argued that from the ruling of the Appellate Body in the US – Corrosion-Resistant Steel Sunset Review case, it is clear that the requirements of a "fair comparison" in Article 2.4 apply equally to a dumping margin calculated or used for purposes of Article 9.3. Thus, the resort by the United States, to simple zeroing as a normative rule in sunset reviews and reviews for the purpose of Article 9.3 is "as such" inconsistent with the provisions of Article 2.4

The India – EC Bed linen Case and the Practice of “Zeroing”

This issue was raised before the AB in the case of European Communities -Anti-Dumping Duties on Imports of Cotton-type Bed linen from India.[10] In all anti-dumping disputes the consideration of factual aspects are vital since they will substantially influence the interpretation of various provisions of ADA. The European Communities (EC) and India appealed on certain issues of law and legal interpretations in the Panel Report. The Panel was established to consider the complaint made by India with regard to the imposition of definitive anti-dumping duties imposed by the EC on imports of cotton – type bed linen.[11]

Zeroing

In the present case the EC identified Indian Cotton-type bed linen- a certain number of different “models” or “types” of that product, for investigation. Next it calculated a weighted average normal value for each of these models and a weighted average export price. For some models normal value was higher than export price, by subtracting export price from normal value for those other models, the EC established a“positive dumping margin” for each model. For other models, normal value was lower than export price and by subtracting export price from normal value for these other models the EC established a “negative dumping margin” for each model, or in other words dumping has not occurred, and the export price exceeds the normal value. Thus, there was a “positive dumping margin” where there is dumping, and a “negative dumping margin” where there is not. The positive and negative of the calculation indicated, precisely, how much the export price was above or below the normal value. EC then added up the amounts it had calculated as “dumping margins” for each model of the product in order to determine an overall dumping margin for the product as a whole. In doing so EC treated any “negative dumping margins” as zero, hence use of the term “zeroing” and then finally, having added up the “positive dumping margin” and “zeros”, EC divided this sum by the cumulative total value of the export transactions involving all types and models of that product. In this way, the EC obtained an overall margin of dumping for the product under investigation.

The fair comparison is provided in Article 2.4 of the ADA. It states:

[10] AB Report, WT/DS141/AB/R.

[11] On 12 June 1997, EC made its preliminary affirmative determination of dumping, injury and causal link. Provisional anti-dumping duties were imposed on 14 June 1997. EC published its affirmative determination on 28 November 1997. The injury margins were determined to be above the level of dumping margin in all cases and the margin was fixed from 2.6% to 24.7% and duties imposed on imports of cotton – type bed linen originating from India.

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A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability….

The EC argued before the AB that, the Panel failed to give proper meaning to the word "comparable" in Article 2.4.2. According to EC, Article 2.4.2 requires only that theweighted average normal value be compared with the weighted average export prices for "comparable" transactions and that the concept of "dumping margin" in the ADA not only refers to the dumping margin for the product under investigation, but also to the dumping margin established for each product type or for each individual transaction. EC pointed out that Article 2.4.2 provides no guidance as to how the "dumping margins" determined for individual product types should be combined in order to calculate an overall rate of dumping for the product under investigation.

The EC further submitted that the offsetting of "positive dumping margins" by "negative dumping margins" in effect requires a comparison of a weighted average normal value for all product types of bed linen with a weighted average export price for all product types, and such an interpretation would distort price comparability and is equal to disregarding the notion of "normal value".

VII. CONCLUSION

Article 2.4.2 provides no guidance as to how the "margin of dumping" for each of the types or models should be combined in the second stage in order to calculate an overall margin of dumping for the product under investigation.

After referring to Article 2.4.2 and Article 2.1 the ADA the AB made it clear that the margin of dumping to which Article refers was the margin of dumping for a product. So it was the duty of the EC to establish "the existence of margins of dumping" for the product under investigation-the cotton type bed linen and not for the various types or models of that product.

In conclusion the AB upheld the findings of the Panel that the practice of "zeroing" when establishing "the existence of margin of dumping", as applied by the EC in the dispute, European Communities – Anti-dumping Duties on Imports of Cotton-type Bed Linen from India was inconsistent with Article 2.4.2 of the ADA.

Even though many WTO members welcomed the AB's decision, it failed to lay specific guidelines for the calculation of the weighted av erage normal value

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