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Article

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The Use of "Particular Market Situation" Provision and its Implications for Regulation of Antidumping

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The particular market situation provision of the WTO Antidumping Agreement is increasingly invoked against what may be described as "input-dumping," but this potentially violates the current Antidumping Agreement rules. This paper examines the practice and recent changes regarding the PMS provision in the US by critically examining relevant antidumping investigations in the US in light of GATT/WTO jurisprudence. Such US practice has not yet been extensively subjected to scholarly examination. The paper finds that the recent legal change in the US widens the scope and applicability of the PMS provision to cover input subsidies, allowing the use of not only surrogate prices but also surrogate costs. Further, the required standard of evidence to find PMS seems to have been diminished in the recent application. A widespread use of the PMS provision in such a deviant way calls for a fundamental review of the current trade remedy rules of the WTO.

Keywords: Particular Market Situation, PMS, Anti-dumping, Input-dumping, Input-subsidy, General Subsidy
JEL Classification: F13, F15, K33, F55, L40

I. INTRODUCTION: THE ISSUE OF PARTICULAR MARKET SITUATION

Despite well-known flaws in the current regulation of antidumping, efforts at reform seems dismal, given the non-progress in the resumed DDA talks. In the meantime, while old squabbles about dumping margin calculating methods have not been resolved, new issues emerge. Recent issue of interest relates to "particular market situation (PMS, hereafter)," which has received little attention to date. Normally, dumping is determined by comparing home prices of the exporting country to its export prices. However, the WTO Antidumping Agreement (ADA, hereafter) allows for using two alternatives, either "comparable price of the like

product when exported to an appropriate third country" (third country sales price) or "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits" (constructed normal value) when there is a "particular market situation" which does not permit a proper comparison with export prices. Therefore, the "particular market situation" provision opens up the opportunity to use third country sales price or constructed normal value based on costs, which has often led to finding dumping where there is none or to inflate the dumping margin.

Zhou and Percival (2016) argue that a major user of antidumping such as Australia has been prolific in using the PMS criterion against Chinese imports, mainly interpreting PMS as government control of prices. As Yun (2016) notes, aggressive state intervention to boost export competitiveness through state controlled enterprises, especially in developing countries, has caused much anxiety in the international trade community lately. The chapter on state owned enterprises in the recently negotiated Trans Pacific Partnership (TPP) Agreement to curb what is known as "non-commercial assistance," embodies such concerns. There have always been misgivings about extensive government subsidies in the input market that may lead to artificially low cost of production, masking dumping where it actually exists. Lindsey and Ikeson (2002) show that the US has increasingly identified the problem of dumping as "artificial comparative advantage created by market distorting government policies," breaking away from the traditional notions based on competition policy such as price discrimination or predation to justify antidumping. For example, in the DDA negotiations, US has opposed using competition policy standards to conceptualize dumping, arguing that dumping is generally the result of government policies in their domestic markets such as industrial policy, trade barriers to create "sanctuary home markets," lax competition policy, and government price controls or subsidies giving artificial competitive advantages to their domestic firms.

In line with this perception, the recent US legal changes to its antidumping law address the perceived problem of input subsidies. A related issue of "input dumping" was raised as far back as the Uruguay Round negotiations. Input dumping is said to occur when materials used for the manufacture of a product were purchased at dumped or below cost prices. However, discussions during the UR did not result in any agreement, and the current ADA does not contain any provisions that would curtail input dumping (Furculita, 2017; Zhou and Percival, 2016).

Experts note that the PMS provision may serve as a convenient tool to replace the NME methodology applied to China, in the wake of its "possible" graduation from NME status.[1] The NME methodology allows the use of surrogate costs to construct production costs in an antidumping investigation, which often leads to inflation of the dumping margin. Even more worrisome is the possibility that the PMS provision will be more widely invoked against any market economy when government intervention is thought to be extensive and general so that conventional countervailable subsidy provision may not provide adequate remedy. Some scholars have criticized such use of the PMS criterion as reckless, and call for a clarification of how PMS should be interpreted and to establish a disciplined standard of review for finding dumping when there is a particular market situation (Watson, 2014; Zhou and Percival, 2016; Vermulst et al., 2016).

Taking heed of this calling, the current paper examines how PMS has been interpreted and applied in antidumping investigations in the US, one of the major users of antidumping measures. In particular, since the US has recently amended its antidumping law to introduce hitherto non-existing definition of PMS, potentially expanding the possibility of its application, it would be meaningful to trace how the practice of applying PMS in antidumping investigations in the US has evolved. This is done mainly by critically examining some of the major antidumping cases in the US where PMS had been an issue. This exercise elicits the standards by which the US authorities have applied the PMS criterion, and how it has evolved. But first, in the next section, the paper goes through the provisions relating to PMS

[1] Whether China automatically graduates from NME status with the expiration of Paragraph 15 of its Accession Protocol in 2016 is not entirely clear. According to Paragraph 15, importing countries are allowed to presume China to be a nonmarket economy unless proven otherwise, until December 11, 2016. China has argued that expiration of this provision at the end of 2016 guarantees it market economy status. However, others have argued that other legal interpretation is possible (see Stewart et al., 2014) and Miranda (2014)). The US has not conferred market economy status to China yet, but is in the process of reviewing China's NME status as part of its antidumping investigation (see, "Certain Aluminum Foil from the People's Republic of China: Notice of Initiation of Inquiry Into the Status of the People's Republic of China as a Nonmarket Economy Country Under the Antidumping and Countervailing Duty Laws (A-570-053)," 82 FR 16162 (April 3, 2017).) China has taken the matter to the WTO, where a panel has been formed in July 2017 to adjudicate the issue. (US-Measures Related to Price Comparison Methodologies (DS515: 2016), EU-Measures Related to Price Comparison Method (DS516: 2017)).

in the WTO Antidumping Agreement and discusses some relevant dispute cases to establish what the status quo maybe in interpreting PMS at the WTO.

II. PMS IN THE WTO ANTIDUMPING AGREEMENT

The ADA distinguishes three circumstances where export price to a third country or constructed normal value based on costs should be used: 1) there are no sales in the ordinary course of trade, 2) particular market situation such that it is not possible to make a proper comparison, 3) insufficient volume of domestic sales such that it is not possible to make a proper comparison (ADA Article 2.2). The triggering condition for the third criterion is specifically stated in footnote 2 to the ADA. It stipulates that domestic sales volume of 5 percent or more of the sales to the importing member constitutes a sufficient volume of sales allowing proper comparison. Lower levels are acceptable if evidence demonstrate that such lower ratio is of sufficient magnitude to enable a proper comparison.

To know when the first criterion applies, one would need to know what "ordinary course of trade" means. This is not explicitly defined in the ADA, but Article 2.2.1 indicates that "Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs" *may be* treated as not being in the ordinary course of trade.

This is not an exclusive definition however, and it is possible that circumstances other than below cost sales could constitute sales out of ordinary course of trade. In *US-Hot Rolled Steel*,[2] the Appellate Body confirmed that the ADA does not define the term "ordinary course of trade" and that in this dispute, Japan had agreed to the definition given by the US authority.[3] The AB was also content with this definition, and further commented that the "sales below cost" method provided by Article 2.2.1 "does not purport to exhaust the range of methods for determining whether sales are 'in the ordinary course of trade' and it does not cover the more

[2] Appellate Body Report, *United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (adopted August 23, 2001). See Section 3 for the US definition.

[3] *Ibid*, para 139.

specific issue of sales between affiliated parties, because in such transactions "the affiliation itself may signal that *sales above cost*, [original emphasis] but below the usual market price, might not be in the ordinary course of trade."[4]

When and how the PMS criterion can be applied is even more elusive than in the case of the "ordinary course of trade," although as to when the PMS criterion can be triggered is quite evident from Article 2.2. First, such a particular situation must exist, and second, because of that situation, domestic market prices become inappropriate to compare with export prices. To know when the first triggering condition is met, the scope of PMS needs to be defined. Since the term "particular market situation" is not defined anywhere in the ADA, however, it is not clear when a particular market situation can be said to exist. One natural inference would be that since transactions that are out of "ordinary course of trade" (eg, sales made at prices below cost) would have been already disregarded under the first criterion in Article 2.2, PMS probably does *not* refer to what would be regarded as "out of ordinary course of trade." Depending on the scope of what is to be regarded as ordinary course of trade, PMS could refer to any number of situations that are *in* ordinary course of trade. PMS also probably does *not* refer to insufficient volume of sales, since this is so clearly defined in the footnote. Therefore, it can be inferred that PMS refers to a residual category, a situation constituting of sales that are not, for example, below cost (or any other circumstances that may said to be outside the ordinary course of trade), and meets the volume threshold, but is still unusual or particular to the home market, making it so different from the conditions of the export market such that comparing the prices of the two markets would be inappropriate. Zhou and Percival (2016) subscribe to this view.

Another approach to interpreting the term PMS is that it has an ancillary role, referring to the situation of "no sales of the like product in the ordinary course of trade." That is, PMS is simply a reiteration, so that Article 2.2 is actually laying out only two possible cases for applying constructed normal value: in the particular condition where there is "no sales of the like product in the ordinary course of trade," or insufficiency of volume of trade. In this case, there would be no need to separately define the term PMS. In some treatise on WTO's antidumping rules, hardly any significance has been attached to the term PMS. For example, Matsushita et al. (2006: 409) set forth only two situations for using third-country

[4] *Ibid*, para 147.

sales prices: 1) "when there are no sales of the like product in the ordinary course of trade," and 2) "where there is a low volume of such sales." They go on to explain that when there are no sales of the like product or even when there is such a sale, there may be situations where "the national antidumping authority cannot rely on the sale as the references of comparison" giving such examples as customized sales and thin domestic demand. Still, PMS is not offered as a separate category triggering the use of either export price to a third country or constructed normal value. US authorities seem to have taken a similar line of reasoning when encompassing PMS within the clause defining "ordinary course of trade" rather than giving it a stand-alone definition in the recent amendment to its antidumping law. Under the new definition of ordinary course of trade, it is made explicit that PMS shall be considered as being out of ordinary course of trade. Therefore, PMS refers to situations, the scope of which is not limited, that lie outside the ordinary course of trade, along with two other situations which are already explicitly identified (below cost sales and non-market transactions with affiliated parties: see Section 4 for more details).

Under the first approach PMS is categorized as "ordinary course of trade" while in the second approach PMS is categorized as "outside the ordinary course of trade," but the effect is the same. Whichever approach is taken, PMS covers a broad range of situations. Under such a broad interpretation of PMS, circumstances such as government intervention or control of prices, including those that may distort the input market, would not be excluded from the ambit of PMS. Then, the natural question that follows is whether it would be reasonable to use such "distorted" input prices to construct production costs. How the cost of production should be constructed is dictated in Articles 2.2.1.1 and 2.2.2. Article 2.2.1.1 stipulates that costs shall normally be calculated on the basis of records kept by the exporter or producers under investigations, if those costs 1) follow the customary accounting principles of the exporting country, and 2) reasonably reflect the costs associated with the production and sales of the product. Further, Article 2.2.2 specifies that in principle, "the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to the production and sales in the ordinary course of trade of the like product by the exporter of producer under investigation." When such information is not available, the amounts can be determined on the basis of actual amounts for products belonging to the same general category of the product in question, or the weighted average of the actual amounts incurred, or any

other reasonable method, provided that the amount for profit do not exceed the profit normally realized in the same general category of products, but all from the market of the country of origin.

The second condition necessary to trigger the PMS criterion seems to be the more important, decisive one. It requires that the nature of particular market situation should be such that it does not permit proper comparison with the export price. It does not matter whether or not the particular market situation is in or out of ordinary course of trade, or whether there are sufficient volume of home sales. Whatever is said to be a particular market situation, as long as that particular market situation leads to impairment of price comparability, authorities should be able to use third country sales price or costs as normal value. Since neither the scope of PMS, nor conditions of proper price comparison is clearly defined in the Agreement, this gives wide discretion to antidumping authorities in determining the range of situations that may constitute particular market situation, as long as they can demonstrate that it impairs comparability with export price. Zhou and Percival (2016) argue that one important consideration regarding proper price comparison is to make sure whether PMS has a differential effect on domestic prices and export prices. If it only affects the domestic price, adjustments should be made in the alternative values used as normal value to reflect the effects of PMS. However, if the effect has been even handed (eg, if the effect of input subsidy for the product under question in the domestic market has also passed through to exports, which is most likely), no adjustments need to be made for a proper comparison between domestic and export prices.

Some of these questions relating to how to interpret and apply the PMS criterion have been weighed in the *EC-Cotton Yarn* (Brazil, 1995) GATT dispute case.[5] In this dispute Brazil challenged EC's determination of normal value which failed to consider the PMS prevailing in Brazil at the time. Brazil argued that during the period of review there was an exchange rate freeze and high inflation in the domestic market, which should have been factored in the construction of normal value. EC argued on the contrary, that those circumstances did not constitute PMS because they had no impact on domestic prices. The Panel agreed with the EC, and

[5] GATT Panel Report, *EC-Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137 (adopted July 4, 1995).

concluded that PMS must have impact if it is to affect comparability. The existence of PMS *per se* is not relevant.[6] From this first dispute case regarding PMS under the GATT/WTO jurisprudence, we can establish some important standard of review regarding PMS:

1. The Panel did not set clear limit on the kind of situations that can give rise to PMS. External factors such as government macroeconomic policies or exchange rate policies were not specifically rejected as the grounds on which PMS can be invoked.

2. However, whatever the kind of PMS maybe, in order to constitute PMS, the circumstances must have impact on the price of the product under question.

3. Furthermore, in order to trigger the use of third country sales price or constructed normal value, such impact of PMS on prices must cause incomparability of domestic prices and export prices

Whether surrogate costs can be used when a particular situation give rise to distorted input market has been considered in the recent *EU- Biodiesel* dispute[7]. EU argued that Argentina's export tax on soybeans and soybean oil, the main raw materials used in the production of biodiesel, created a PMS in the input market, artificially lowering the prices of major inputs in the production of biodiesel. Therefore, the argument went, the records of the Argentinean producers did not reasonably reflect the raw materials costs, justifying its replacement by an average reference prices of the raw materials published by the Argentine Ministry of Agriculture. This resulted in an increase of the provisional dumping margins. Argentina contested EU's use of surrogate costs on such a basis, arguing that EU's Basic Regulation Article 2(5)[8] was inconsistent with ADA Articles 2.2 and 2.2.1.1

[6] *Ibid*, para 478.

[7] Panel Report, *European Union-Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R, (adopted March 29, 2016), Appellate Body Report, *European Union-Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R (adopted October 2016).

[8] The second paragraph of the EU's Basic Regulation Article 2(5) which was the main bone of contention, reads "If costs associated with the production and sale of the product under investigation

which require construction of normal value to be based on exporter's records and costs existing in the originating country.

The Panel found that although EU's regulation under question was not inconsistent with the ADA "*as such*," in that the Basic Regulation Article 2(5) did not force, but merely allowed the authorities to use information outside of the originating country. However, the Panel viewed that the regulation could be *applied* inconsistently with ADA, which was indeed found to be the case in the biodiesel dispute.[9] The AB upheld the Panel's view and concluded that unreasonable domestic input prices were not a sufficient basis on which to use surrogate input prices: "…we agree with the Panel that the EU authority's determination that domestic prices of soybeans in Argentina were lower than international prices due to the Argentine export tax system was not, in itself, a sufficient basis for concluding that the producers' records did not reasonably reflect the costs of soybeans associated with the production and sale of biodiesel, or for disregarding the relevant costs in those records when constructing the normal value of biodiesel."[10]

The AB further argued that Article 2.2.1.1 of ADA required the *records* of the exporter to reflect costs reasonably not that the *costs themselves* to be reasonable. That it "… relates to whether the records kept by the exporter or producer under investigation suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration,"[11] but did not involve an examination of the "reasonableness" of the reported costs themselves, as proposed by the EU. It agreed with the Panel's consideration that "…the object of the comparison is to establish whether the records reasonably reflect the costs actually incurred, and not whether they reasonably reflect some hypothetical costs

are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or where such information is not available or cannot be used, on any other reasonable basis including information from representative markets." Furculita (2017) suspects that EC specifically intended to use Article 2(5) to address the issue of input prices from markets considered to be distorted, especially considering the fact that it was introduced right after granting Russia market economy status. Article 2(5) thus enabled EU to effectively replace the NME methodology with finding PMS in input markets.

9 Panel Report, *EU-Biodiesel*, para 7.169-7.174, and para 7.220-7.249.

10 Appellate Body Report, *EU-Biodiesel*, para 7.2.

11 *Ibid.*

that might have been incurred under a different set of conditions or circumstances and which the investigating authority considers more "reasonable" than the costs actually incurred."[12]

The AB observed that Article 2.2 does not specify precisely what evidence an authority may resort to in case the records do not reasonably reflect costs, so that the authority had the right to use information other than that contained in the exporter's records, whether it is from inside or outside the originating country, but in doing so, the authority must make adjustments to ensure that the costs reflect the cost of production in the originating country. The investigating authority may not "simply substitute the costs from outside the country of origin for the 'cost of production in the country of origin.' …." It should be ensured that whatever information is used, it should be used to arrive at the "cost of production in the country of origin," even if it requires the investigating authority to adapt the information that it collects.[13]

Further, the AB upheld the Panel's finding that such adaptation means restoring the prevailing cost condition. It criticized the EU for not adapting the information it used to ensure that it represented the cost of production *in* Argentina. On the contrary, the EU authorities "specifically selected the surrogate price for soybeans to remove the perceived distortion in the cost of soybeans in Argentina," using the particular information "precisely because it did *not* represent the cost of soybeans in Argentina."[14] Thus, the AB agreed with the Panel that the surrogate price for soybeans used by the EU authorities did not represent the cost of soybeans in Argentina and concluded that the Panel did not err in finding EU to be inconsistent with ADA, "*as applied*."

AB's ruing in the biodiesel case establishes four important principles: 1) that an investigating authority is not limited in the information it uses to construct normal value, whether the information is from inside or outside the originating country, 2) but whatever information it uses to calculate normal value, it must reflect actual cost of production in the originating country, 3) if such information is short of capturing the costs in the originating country, the authority must make adjustments to reflect real cost of production in the originating country, including those factors

[12] *Ibid*, para 6.8.

[13] *Ibid*, para 6.73.

[14] *Ibid*, para 6.81.

that are perceived to be "distorting" the cost of production in the originating country, and 4) "unreasonable domestic input prices" is not a sufficient basis on which to use surrogate prices for inputs.

Initial scholarly assessments of the biodiesel rulings have been positive. For example, Furculita (2017) praises the AB ruling for skillfully distinguishing information from cost, with the effect of not infringing too much on the rights of the authorities to use the kind of information they want, but at the same time, restraining liberal use of surrogate costs for normal value construction. Unfortunately, such technical maneuvering does not put an end to the debate between those who still regard distorted input markets to represent "unfair trade" and those who feel that dealing with input market subsidies with antidumping measures is an abuse of the WTO law. There is no clear answer to the question of what members are allowed or not allowed to do when costs themselves are thought to be unreasonable. The ADA provisions do not explicitly address this question. Therefore, this is a matter of clarifying the concept of dumping and aims of the Antidumping Agreement, and not simply interpreting technical aspects of calculating methodologies under the current ADA rules. Given this backdrop of WTO deliberations on PMS, the next section examines whether the US application of the PMS provision has been consistent with these principles, and if not, what the difference might imply with respect to the future evolution of international trade regimes.

III. PMS IN US ANTIDUMPING LAW

Until recently, the term "particular market situation" was not explicitly defined anywhere in the US law, but the term appears in two places in reference to determining the normal value. According to the Tariff Act of 1930, third country sales, not cost of production, are to be used as basis of normal value under three situations: when the product under consideration is not sold in the exporting country, or amount sold is insufficient for a proper comparison, or there is particular market situation in the exporting country which does not permit proper comparison with the export price or constructed export price (Tariff Act Sec 773(a)(1)(C)). In the case where third country sales prices are used as the basis for comparison, three conditions should be fulfilled: such price has to be representative, the product should be sold in sufficient quantities, and particular market situation in the third country

does not prevent a proper comparison with the export price or constructed export price. (Tariff Act Sec 773(a)(1)(B)(ii))

Notwithstanding this rule, however, if the administering authority determines for some reason that the exporting country price cannot be used as normal value, constructed normal value based on production costs can be used instead of third country sales prices (Sec 773(a)(4): Use of Constructed Value). There are no explicit criteria which trigger the use of constructed value instead of third country sales prices, leaving the decision entirely to the discretion of the administering authority. That is, no particular hierarchy between using third country sales prices versus cost of production has been established by law. Nevertheless, the Regulation of the Department of Commerce declares that in practice, viable third country sales would be preferred to using constructed value: "The Secretary normally will calculate normal value based on sales to a third country rather than on constructed value if adequate information is available and verifiable" (Title 19 of the CFR 351.404(f)). At the same time, the pathway to using constructed value instead of third country sales prices is made more explicit under the exception in the Departmental Regulation than it is in the Tariff Act. The Regulation provides for an exception which states "The Secretary may decline to calculate normal value in a particular market … if it is established to the satisfaction of the Secretary that: (i) in the case of the exporting country or a third country, a particular market situation exists that does not permit a proper comparison with the export price or constructed export price" (19 CFR 301.404(2)).

While the Tariff Act does not define "particular market situation," the Statement of Administrative Action associated with the URRA (1994) provides some illustrative examples. They include situations 1) where a single sale in a foreign market constitutes five percent of sales to the US, 2) extensive government controls over pricing in a foreign market, and 3) differing patterns of demand in the US and a foreign market. On the other hand, the recent amendment to the Tariff Act explicitly defines PMS as a situation that is "out of ordinary course of trade." The Trade Preference Extension Act (TPEA) of June 2015 (Trade Remedies Act) makes significant changes to US antidumping laws governing the treatment of particular market situations. First, Section 504 of the TPEA amends Section 771(15) of the Tariff Act to expand the definition of "ordinary course of trade" by incorporating "particular market situations," as an example of circumstances that are outside the ordinary course of trade. The amended Tariff Act Sec 771(15)(C) reads as

"Situations in which the administering authority determines that the particular market situation prevents a proper comparison with the export price or constructed export price." This is in addition to the two existing examples, below cost sales and transactions between affiliated parties that deviate from arm's length market prices.

The TPEA 2015 also amends the definition of constructed value (Sec 773(e)), by inserting the condition associated with particular market situation: "… if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology …" This renewed definition expands the discretion given to the authorities in choosing constructed value calculating methodology, enabling it to determine particular market situation to exist not only in the product market under consideration, but also in the related input markets of the product.

Apparently, the US antidumping law gives wide discretion to the administering authority in determining what constitutes PMS, which is not unexpected given the ambiguities in the ADA. However, given the AB report on *EU-Biodiesel*, the amendment to the definition of constructed value which also reserves wide discretion to the administering authority in choosing the method of calculating constructed value, including the use of costs that are not actual costs of the producer or that are not from the originating country, is potentially inconsistent with the ADA, if and when "applied."

Despite the claim that third country sales prices are preferred to constructed normal value, statistics show that constructed value methodology takes up the greater portion in determining normal value in US antidumping investigations. An examination of preliminary determinations from 1979 to 1990 shows that a total of 119 determinations of dumping of finished manufactures were issued by the Commerce Department and 37 percent of them relied, at least in part, on constructed value as opposed to 29 percent which relied on third country sales. Surrogate sales approach was reserved to NME countries such as China, which formed only 6.7 percent of the total (Clarida, 1996: 365-370).

A more recent data from 2010-2016 shows that out of a total of 487 original investigations, authorities relied at least partly on constructed value for almost 29 percent of the cases, while normal value based on sales to third country market was

relied upon in only 4.7 percent of the cases. At the same time, application of the NME methodology consistently increased from 27 percent in 2010 to 32 percent in 2016, which is a testimony to increasing antidumping actions against China. (see Table 1). It is difficult to measure how many of the investigations relying upon constructed value were PMS cases. Although a full sample of PMS investigations in the US is not available to the author, there have been several important PMS cases in the US, from which one can discern some established standards by which the US antidumping authorities applied the PMS provision.

Table 1. Frequency of Normal Value Calculation Method Used

Year	Number of Investigations	HM	CV	COP	NME	TM	FA	NA
2010	38	10	2	11	27	3	1	0
2011	29	12	7	8	15	1	2	0
2012	38	12	6	13	19	1	9	0
2013	60	26	23	21	19	6	5	0
2014	105	45	30	34	26	8	24	0
2015	88	39	37	24	23	4	5	1
2016	129	65	36	59	32	0	20	0
Total	487	209	141	170	161	23	66	1
	(%)	42.92	28.95	34.91	33.06	4.72	13.55	0.21

Note: HM: Home Market, TM: third country market, CV: constructed value, COP: cost of production analysis, NME: non-market economy, FA: use of facts available (usually facts supplied by the petitioner), NA: statistics not available or not collected.

Source: Author calculation based on US submission of Semi-Annual Report of Anti-Dumping Actions to the WTO, 2010-2016.

VI. MAJOR CASES CONCERNING PMS IN THE US

Initially, the author searched the US Federal Register and the internet home page of the Department of Commerce with key words such as "particular market situations" and "particular market situation allegations" to find the most recent PMS cases. Documentation on preliminary and final determinations or decisions were retrieved from the Federal Register Website (https://www.federalregister.gov/public-inspection/current) and the Enforcement and Compliance site (http://enforcement.trade.gov/frn/)

for the initial list of searched cases, which provided the lead to earlier cases that were cited as precedents. Examination of some of these significant cases for which there was information show that a wide range of circumstances, from "incidental markets" or lack of an established market and differences in quality, to government intervention were found to constitute PMS.

In the *Fresh Kiwifruit from New Zealand (1996)*, the petitioner claimed that the New Zealand Kiwi Marketing Board (NZKM) came to be established as the exclusive exporter of export quality kiwifruit from New Zealand, and that New Zealand has been a "dumping ground" for production that could not be sold in export markets, driving down domestic prices, giving rise to precluding proper comparisons between New Zealand sales and US sales.[15]

Defendants countered that the home market was viable because it exceeded the 5 percent threshold rule. It was argued that the exception to the rule is for "particular market situations" which only exist where a single sale in the home market constitutes five percent of sales to the US or there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set, or where demand patterns in the US and in the foreign market were different.

In this case, the Department of Commerce (DOC) used constructed normal value, not on the basis of PMS, but on the basis of "less than cost sales." The home market clearly met the five percent threshold test for market viability, but after applying the below-cost test, substantially more than 80 percent of the home market sales were found to be sold at prices below the cost of production for an extended period of time, which would not permit the recovery of all costs within a reasonable period of time. A PMS would warrant a departure from the normal 5 percent test, but based on the evidence on the record, the DOC did not find PMS to exist. The position of the DOC was that the petitioner did not demonstrate that kiwifruit NZKB sold in export markets were of higher quality than those sold in the home market. Further, the fact that NZKB is a dominant exporter by itself did not establish that there were price controls in the kiwifruit market or that NZKMB is the exclusive exporter from New Zealand. On the contrary, resellers were permitted to sell in other markets if they were licensed by the NZKMB. Thus export markets and export pricing were

[15] Fresh Kiwifruit from New Zealand; Final Results of Antidumping Administrative Review, 61 FR 46438 (September 3, 1996), Comment 3. All information pertaining to each case comes from the documents quoted in the footnotes for all following antidumping review cases.

not subject to absolute control and manipulation by the NZKMB. Even if it were in a position to manipulate export prices, there was no evidence showing that the NZKMB acts on behalf of the New Zealand government to control prices in the home market. Therefore, evidence of price control presented by the petitioners was not considered to be sufficient to satisfy the PMS standards under the law. According to the DOC, a finding of sales below cost of production does not, in and of itself, establish that a "PMS" exists. As to what might constitute a PMS, the DOC agreed with the defendant, referring to the SAA that accompanies the URAA at 822, which establishes that a "particular market situation" might exist where 1) a single sale in the home market exceeds the quantitative viability threshold, 2) there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set, or 3) there exists differing demand patterns, even though the language of the SAA does not limit the range of PMS to such examples.

Certain Durum Wheat and Hard Red Spring Wheat from Canada (2003)[16] is another case that dealt with a government entity, Canada Wheat Board (CWB). CWB is a government controlled monopoly buyer and seller of wheat in the Canadian domestic market. The PMS allegation was made on the basis of government's price control. It was claimed that the heavy regulation of the rail system on the part of the Canadian government allowed CWB sufficient power to control cost of freight, which forms a large component of wheat price, inhibiting competitive pricing. At the same time, numerous non-tariff barriers protected the Canadian wheat market, and government guarantee of the survival of the milling industry, gave additional support to the industry.

However, the DOC determined that the evidence on PMS was insufficient. While accepting the fact that CWB is a government entity having monopoly, it did not consider its control so extensive that prices could not be considered to be competitively set. DOC required that even where there is evidence of government control, there must be substantial evidence that such control is so extensive that prices are not competitively set. This decision was made even in the face of a

[16] Issues and Decision Memorandum for the Final Determinations of the Antidumping Duty Investigations of Certain Durum Wheat and Hard Red Spring Wheat from Canada, 68 FR 52741 (September 5, 2003). A-122-845, A-122-847.

concurrent countervailing subsidy investigation which found government subsidy to exist in the final determination.[17]

Similarly, the DOC required high standard of evidence in the *Certain Cold-Rolled and Corrosion Resistant Carbon Steel Flat Products from Korea (1997)*.[18] Petitioners argued that PMS existed in the Korean steel market because the steel prices were controlled *de facto* by the government, given the circumstantial evidence, independent third party sources, and analysis of price movements. Since home market sales were not viable, and too late to collect third country sales data, it was argued that constructed value should be used, and further, constructed value calculation should not use actual profit realized on sales in Korea but facts available (ie, facts provided by the petitioners), because Korean market profit information did not reflect true market prices.

The DOC was not persuaded by this argument. According to the DOC, there was no "convincing evidence" that PMS existed. Even though the DOC agreed that there was substantial government influence, it was not "to such an extent as to preclude a proper comparison." The DOC argued that government policies that influenced market prices such as prior approval ended during 1981-1993, before the period under review. Moreover, neither did verification of circumstantial evidence and independent reports show existence of government controls. While the petitioners argued that flat steel prices were an indication of government control, the DOC countered that flat prices do not necessarily show price control since it is not inconsistent with expected price trends in an oligopolistic market such as the Korean steel market. Further, there was evidence of price competition through discounts, credit adjustments, and freight equalization. This case therefore, set a high standard for government control criteria to constitute a PMS.

[17] Issues and Decision Memorandum for the Final Countervailing Duty Determinations of the Investigations of Certain Durum Wheat and Hard Red Spring Wheat from Canada. 68 FR 52746 (September 5, 2003). C-122-848, C-122-846.

[18] Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administration Review (Cold-Rolled from Korea) 62 FR 18404 (April 15, 1997).

In the two cases *Fresh Atlantic Salmon from Chile (1998*,[19] and *Certain Frozen Warmwater Shrimp from Ecuador (2006)*[20], the DOC found PMS to exist on the grounds of domestic markets being "incidental" to export markets. In the *Salmon-Chile* case, the DOC concluded that the home market was incidental to the Chilean salmon industry, which was primarily export-oriented. The home market was comprised almost exclusively of salmon graded as "industrial" or "reject," which were sold locally for drastically reduced prices compared to export merchandise. The "perfunctory marketing and distribution of salmon" in the home market was also consistent with the incidental nature of those sales. Upon verification of submitted evidence, the DOC refuted the claim that the difference between the home market and the US were only one of differences in product mix. The DOC argued on the contrary that the difference was one of quality, which was large enough to make domestic sales impossible to compare with US sales.

Similarly, the DOC determined that home sales were incidental to the export market in the *Shrimp-Ecuador* case, due to low quality of products sold in the domestic market, rendering the Ecuadorian market inappropriate for determining the normal value. In the absence of any third-country sales, the DOC used constructed normal value. One of the defending firms argued that its sales of shrimp in the home market were of export quality, unlike the home market sales of other respondents who were found to be selling at prices below cost. However the DOC's position was that *several factors*, in addition to quality, contributed to the finding of PMS. The finding of PMS was based on "the totality of the record evidence," and that "no one factor is dispositive." While it is not very clear from the document what these other factors were, DOC continued to find that the defendant's home market sales were of products left over from the US sale transaction, and sold on sight at the plant. The home market sales were therefore regarded as incidental to its principal business of selling to the US market.

[19] "Notice of Final Determinations of Sales at Less than Fair Value: Fresh Atlantic Salmon from Chile." 63 FR 31411 (June 9, 1998), Comment 4.

[20] "Issues and Decision Memorandum for the Final Results of New Shipper Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from Ecuador." 71 FR 54977 (September 20, 2006), Comment 1.

Interestingly, in the *Large Power Transformers (LPTs) from the Republic of Korea (2016),*[21] it was responding firms and not petitioners who invoked the PMS criterion to argue for using constructed normal value, as in the *EC-Cotton* GATT dispute. They contended that LPTs are highly specialized, large capital goods that are customized to unique customer specifications and therefore did not permit proper price-to-price comparisons. They argued that in other antidumping investigations, it was DOC practice to resolve the problem of each sales being unique by relying on constructed value rather than model matching as it did in this review. DOC countered that it was DOC practice not to use constructed value where possible, and that it was proper to use price-to-price comparison through model matching based on physical characteristics. It was argued that constructed value should be relied on only when comparisons were unreasonable and unable to find a proper match. Further, the cases the defending firm referred to were all significantly different from the LPT case, especially because they far exceeded the degree of customization compared to LPTs.

Certain Oil Country Tubular Goods (OCTG) from the Republic of Korea (2017)[22] is the first PMS case quoting the TPEA and so it sets an important precedent with respect to what concepts and types of analysis would be necessary to address future allegations of PMS under the amended Sec 773(e), which allows using alternative methodology for calculating the normal value "if PMS exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade."

In this case, PMS was alleged to affect the cost of production in Korea on four accounts: 1) the distortion of OCTG costs caused by imported Chinese hot-rolled steel, 2) the Korean government subsidy to domestic production of hot rolled steel, a major input for OCTG, 3) distortion of hot rolled steel costs caused by strategic alliance between hot rolled coil suppliers and OCTG producers, and 4) the Korean government involvement in Korean electricity pricing. In the preliminary review of 2016, the DOC was not convinced that there was sufficient evidence of PMS in

[21] "Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea: 2013-2014." A-580-867 (March 8, 2016).

[22] "Issues and Decision Memorandum for the Final Results of the 2014-2015 Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods form the Republic of Korea." A-580-870 (April 10, 2017).

the input market when the four allegations where considered individually, and no PMS was found to exist. This was overturned in the final decision, resulting in higher dumping margins.

The DOC argues in the final decision that when the analysis was refocused on the totality of the conditions in the Korean market, the allegations represented facets of a single, particular market situation, having cumulative effects. However, it seems that the DOC primarily focused on the distorted prices in the input market to be the main culprit constituting PMS. According to the DOC, subsidies received by Korean hot-rolled steel producers totaled up to 60 percent of the cost of hot rolled steel, which at the same time constituted around 80 percent of the cost of OCTG production. Without conducting a separate analysis as to whether the subsidy to inputs was passed on to the final product and interfered in the competitive price setting in the final product market, the DOC took presence of subsidy to be sufficient evidence of competitive benefit to the OCTG market. The petitioner went as far as to point out that the PMS provision "… is not a subsidy provision that requires a finding of financial contribution and specificity to benefit solely the Korean OCTG industry to distort cost of production of OCTG. The particular market situation provision has no requirement that subsidies only affect those inputs that were used to produce Korean OCTG." This contention was not directly refuted in the declaration of DOC's position. That is, the new PMS provision is seen to obviate the need to conduct any pass through analysis, or the obligation to meet WTO consistent definition of subsidy.

The DOC quantified the impact of distortion by making an upward adjustment, equal to net domestic subsidization rate (ie, the countervailing duty rate less all export subsidies), to the respondent firms' reported cost of hot rolled coil. The adjustment rate was based on the subsidy rates found for POSCO and all other producers of hot rolled steel in the final determination in *Hot-Rolled Steel Flat Products from Korea (2016)*.[23] All the other three factors (imported Chinese hot rolled steel, strategic alliance, government involvement in the electricity market) were argued to have exacerbating effects on such downward price distortion in the input market, although the impact of these remaining factors could not be quantified. The DOC noted that imported Chinese steel products placed downward

[23] "Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Affirmative Determination." 81 FR 156 (August 12, 2016), C-580-884.

pressure on Korean domestic steel prices, although this was not a unique situation for the Korean market. Therefore, this by itself would not constitute a PMS, but it helped to intensify the impact of PMS found to exist resulting from input subsidies effects. Although admitting that there is no specific evidence of direct relationship between the alleged strategic alliance and hot-rolled steel pricing during the period of review, the DOC speculated that in general, "strategic alliance between HRC producers and OCTG producers may also have affected prices." While carefully declaring that the determination of PMS was not based "solely upon any support from the government of Korea for electricity," the DOC is now inclined to believe that, because electricity in Korea "functions as a tool of the government's industrial policy," and that because the largest electricity supplier, KEPCO is a government controlled entity, government control must be so extensive as to prohibit competitive price setting, even though the extent of control could not be quantified. Although making a decision on the basis of the totality of evidence is not unprecedented in PMS analysis (as can be seen in the earlier US DOC decision in the *Shrimp-Ecuador* case, for example), collectively considering individual factors that are not supported by strong evidence does not seem to be a very persuasive grounds on which to make a PMS decision. All of this indicates that a much lower standard of evidence has been applied to the OCTG case compared to the pre-TPEA cases.

Most importantly, the DOC made its position clear about the legal interpretation of the amendments contained in the TPEA. The DOC agreed with the petitioner that Section 504 of the TPEA enables the DOC to address a particular market situation in the input market. The DOC states that "Section 504 of the TPEA added the concept of particular market situation in the definition of the term "ordinary course of trade," for purposes of constructed value under section 773(e) and through these provisions for purposes of the cost of production under section 773(b)(3)." As explained above, section 773(e) allows the investigating authority to "use another calculation methodology under this subtitle or any other calculation methodology" if PMS exists such that "the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade."[24]

[24] PMS allegations were made in two other antidumping cases following the OCTG, but neither of them has yet reached the final determination stage. In the *Certain Softwood Lumber Products from Canada (2017),* it was claimed that government support in the downstream markets (eg energy programs

The foregoing discussion shows that in general, PMS allegation has not been common in US practice before the TPEA amendment. Although no attempt was made to acquire a complete sample of cases involving PMS cases, given the total number of antidumping investigations taken each year in the US, only a handful of cases with meaningful information regarding PMS could be found. The cases examined in this paper show a clear break since the introduction of the TPEA amendments. The US practice can generally be characterized as follows:

1) Since there has been no clear definition of PMS until recently, relevant US laws did not set specific limit to the scope of PMS. A wide range of situations were found to constitute PMS, and of these, thin markets (for various reasons) and government controls were the most frequently sited.

2) A fairly high standard of evidence was required to find PMS before the 2015 TPEA amendments. In the cases where government intervention was alleged to distort prices, mere existence of government control or monopoly was not enough to determine PMS. The control had to be extensive enough to preclude competitive pricing, which in turn would prevent comparison with export price. In the case of thin markets, for example due to customization of products, the extent of customization had to be so great as to preclude comparison through model matching. Clearly, the standard for triggering the PMS criterion is that there must be impact and that comparability is affected, consistent with what has been established in the *EC-Cotton Yarn* GATT dispute.

3) The 2015 TPEA amendments make a clear break from the past practice. The intention of making an explicit definition of PMS as sales outside the ordinary course of trade is clearly to include situations of input market distortions

encouraging the demand for lumber byproducts) as well as input markets (subsidized log prices) created PMS (see "Certain Softwood Lumber Products from Canada: Preliminary Affirmative Determination of Sales at Less Than Fair Value." 82 FR 2017 (June 30, 2017), Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada, A-122-857 (June 23, 2017). In the case of steel concrete reinforcing bar from Taiwan, a PMS allegation was made with respect to billets purchased from China (see "Decision Memorandum for the Preliminary Determination in the Less-Than-Fair Value Investigation of Steel Concrete Reinforcing Bar from Taiwan." A-583-859 (February 28, 2017)). Final decisions in these cases would be important in further developing US standards of PMS analysis in the post-TPEA era.

explicitly. This allows the use of not only surrogate prices for the product under the antidumping investigation but also surrogate prices for inputs (ie, surrogate costs). Further, the standard of evidence to require finding of PMS seems to have been diminished, as can be seen in the OCTG case. In the OCTG case, presence of subsidy for a major input was almost automatically taken to constitute PMS. Neither effects on competitive pricing of the final product nor effect on comparability was seriously considered. In light of the EU-Biodiesel WTO dispute, such a decision would not be considered to be WTO consistent. The AB report clearly states that costs used to calculate the constructed normal value should reflect the "actual costs" of the producer, retaining the distortion caused by the PMS, and not the cost that the investigating authority thinks is reasonable. In fact, the authority should make adjustment to restore the distortion if other than producer's actual costs are used. This is to enable proper comparison with export price, since the exported products would have been produced with the same "distorted" costs. Unless the exported price is also adjusted upwards, the elimination of distortion would not facilitate but rather interfere with proper comparison. Whether the OCTG decision is an aberration, or sets a future trend leading to a more frequent PMS findings (enabling the use of constructed prices and surrogate costs), is still to be seen.

V. CONCLUSION

Recently, "particular market situation," defined frequently as government control preventing competitive pricing, is increasingly invoked to trigger the use of constructed normal value in antidumping investigations. This phenomenon is closely related to the debate on the status of China's economy. The presumption of NME status under China's Protocol of Accession had allowed importing countries to apply the so called NME methodology until December 2016. Some scholars point out that once China gains market economy status, the PMS provision could serve as a convenient tool to continue NME methodology against China, but then, applying PMS to market economies to enable the use of surrogate costs would be abusing the WTO rules. They therefore call for establishing a clearer standard for interpreting and applying the PMS provision.

Although PMS is not clearly defined in the ADA, the foregoing discussions show that a reasonable interpretation of the ADA and GATT/WTO jurisprudence provides for some general standards by which PMS can be interpreted:

1) Scope/reach: there is no clear limitation on the kind or type of situations that can be regarded as constituting PMS, as long as the situation has an impact on the price of the product under question. Therefore, this does not necessarily exclude government intervention or policies that affect prices, whether in regards to the product market or the input market. Allowing for such a broad interpretation of the scope can be a source of ambiguity and contention.

2) Triggering condition: the existence of the PMS by itself does not trigger the PMS criterion. The triggering condition for using constructed cost is that first of all the PMS must have an impact on the price, and second, the extent of such impact must be so great as to make proper comparison with export price inappropriate.

3) Function: The PMS provision allows investigating authorities to use third country sales or costs as normal value. Under such circumstances, the costs used to construct the normal value must be those from the producer's records and from the originating country. Information from other countries can be used, but if so, they must be adjusted back to reflect the conditions prevailing in the originating country. That is, the authorities are limited in the use of surrogate costs to construct the cost of production, in a way as to eliminate the distortion claimed to be created by the PMS. It is the comparability of prices that should be ensured, not the "reasonableness" of prices.

A critical examination of relevant US laws and antidumping cases reveal that there is a major change in the US practice in 2015 with the passage of the TPEA amendments regarding PSM. Before the change in law, invoking PMS criterion was rare and even though US has always regarded government control as one of the major circumstances constituting PMS, a high standard of evidence was required to find PMS. Such US practice seems to have been consistent with WTO ADA provisions and the WTO/GATT jurisprudence discussed above.

Significant changes occurred with the enactment of the TPEA. The TPEA amendments have explicitly defined PMS as a transaction that is "outside the ordinary course of trade," and widened its scope to include price distortions (due to government control or interventions such as subsidies) in the input market as well as the market of the product under investigation. The significance of the change does not come from making the definition explicit, but in allowing the use of any methodology to construct normal value in such cases, including the use of surrogate costs, normally only used against NMEs. The motivation of the US amendments in the wake of China's possible graduation from NME status seems to be akin to that of the EU, when it adopted the Basic Regulation Article 2(5), evidently to address the issue of input price distortions when Russia gained market economy status. More worryingly, recent examples indicate that such deviant use of PMS may be widely invoked against any market economies.

Accumulating WTO jurisprudence of the *EU-Biodiesel* kind is useful, but it would not fundamentally solve the core problem of PMS. The PMS problem is a continuation of an old debate about "input dumping." As negotiation history shows, "input dumping" was raised as a problem since the Uruguay Round, and US position in the DDA has evidently turned away from conceptualizing dumping as price discrimination or predation to one of distortive government policies, including input subsidies. As long as there are countries which regard that state intervention is a strong force distorting input prices and that it is a problem to be reckoned with by trade policy, the PMS problem will not go away. It is not enough to criticize abusing PMS as a convenient replacement of NME methodology, or a back door to curtailing "input dumping," which may be better remedied through other provisions. The underlying problem cannot be resolved by just disputing calculation methodology under the current rules of the ADA. A more fundamental approach would be to face the issue of "input dumping" more squarely in the face and begin the process of more clearly conceptualizing dumping, input dumping, PMS, and purposes of antidumping. This would lay down the basis on which a negotiation can take place to make up new rules in this area. Nothing less than a complete overhaul of the trade remedy rules of the WTO, encompassing countervailable subsidies, antidumping and safeguards, as well as consideration of competition policy, would be necessary. This is obviously a tall order and is beyond the scope of this paper. The purpose of this paper is not to provide a comprehensive critique of the current trade remedy rules or to offer any suggestions for alternative reforms.

Neither is it the purpose of this paper to give a systematic critique of the US antidumping practice overall. The purpose of this paper is to try and identify the core issue underlying the recently emerging discussions related to PMS. It is found that the real problem is not interpretive or technical one about calculation methodologies, but a conceptual one about input dumping and how it should be dealt with, and more broadly, clarifying the concept of dumping and purpose of antidumping.

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