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Impact Of EU Imposed Anti-Dumping Duties on Pakistani Assembled Electronic Fluorescent Lamps: Case Study T-469/07

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Abstract
This paper examines the economic ramifications of the European Union's imposition of anti-dumping duties on electronic fluorescent lamps assembled in Pakistan. It delves into the regulatory framework governing anti-dumping measures and the specific circumstances that prompted the EU's decision. Through a comprehensive analysis of trade data and qualitative assessment of industry responses, the study evaluates the impact of these duties on Pakistani exporters, including changes in trade volumes, revenue streams, and market strategies. Furthermore, the paper incorporates a detailed case study (T 469/07) to provide legal insights into the EU's decision-making process and its implications for future trade disputes. Overall, this research contributes to a nuanced understanding of how anti-dumping duties affect Pakistan's export sector and underscores the importance of balanced trade policies in fostering sustainable economic growth.

Keywords: Anti-Dumping, Circumvention, Fluorescent lamps, EU, Pakistan

1. Introduction

1.1 Initiation of Proceedings

The Council implemented definitive AD measures on imports of integrated electronic compact fluorescent lights (CFL-i) from China, with duties ranging from 0% to 66.1%, as specified in Regulation (EC) No 1470/2001. On August 16, 2004, the Commission, in accordance with Article 13(3), received a request to investigate the potential circumvention of these measures by China. This request was made by the Lighting Industry and Trade in Europe (LITE) on behalf of CFL-i manufacturers and merchants within the Union.

All relevant parties in Pakistan were invited to participate, and questionnaires were distributed. However, only one Pakistani exporter, Ecopak Lighting Karachi, responded, which led to a verification visit at their facilities. The investigation period spanned from July 1, 2003, to June 30, 2004. The data provided by the cooperating Pakistani trader was found to be unreliable, so the Commission partially relied on the available facts and utilized import data from Eurostat.

1.2. Change In the Trade Pattern

Imports from Pakistan, the Philippines and Vietnam, nearly non-existent before 2001, enlarged meaningfully following the levying of duty. On the other hand imports from PRC almost halved following the levying of duty in 2001, i.e. it reduced from 85 million units in 2000 to 37 million units in 2002. The Commission, however, determined that after imposition of AD duty on China the Chinese exports to EU clearly reduced, but imports from Pakistan started in 2001 and enlarged during the investigation period (IP) from 0.2 million units in 2001 to 0.9 million units during the investigation period, i.e. 490%.

1.3. Nature Of the Circumvention Practice

After the imposition of temporary measures by the initial investigation concerning China, Ecopak Lighting was established at the start of 2001, commencing actual business operations in May 2001. The company purchased apparatus and machinery from a trader based in China.

During a verification visit, it was noted that there were no staff present, no stock existed, and no production activity was taking place at the trader's premises. The manufacturer explained that they had halted operations just before the start of the current examination and had not yet decided whether to resume operations, despite having manufacturing processes in place during the investigation period, as evidenced by the machinery. Based on this, the Commission concluded that manufacturing capability could not be confirmed.

The accounting records, including auditor reports, were deemed unreliable as they did not comply with international accounting standards. Consequently, the value added to the parts or the precise value of the foreign-made components could not be determined. It was concluded that the activities in Pakistan during the investigation period should be considered assembly operations designed to circumvent the definitive anti-dumping measures in place. The Commission's conclusion was based on available facts and evidence, including information provided by the exporter and the fact that all kits and parts were imported from the same Chinese company already subject to the EU's anti-dumping measures.

The Commission claimed that the investigation uncovered additional facts establishing that the assembly operations in Pakistan had no other legitimate or economic justification apart from avoiding the anti-dumping duty. The establishment of CFL-i assembly operations in Pakistan coincided with the changes in trade patterns described above. The exporter claimed that the decision to start operations in Pakistan was driven by improved infrastructure, low labor costs, and a favorable environment for foreign investment.

However, the Commission found that the trader could not substantiate these claims with adequate evidence, and the results of the on-site verification significantly challenged the trader's assertions. Thus, it was determined that, aside from the imposition of the anti-dumping measures, there was no sufficient legitimate or economic reason for the change in trade patterns.

An analysis of the weighted average of export prices during the current investigation's period and the weighted average normal value calculated in the original inquiry indicated dumping for CFL-i imports from Pakistan. Consequently, the definitive anti-dumping duty of 66.1% of the export price was extended to electronic compact fluorescent discharge lamps shipped from Pakistan, the Philippines, and Vietnam. Following an expiry review of the existing measures, the duty was extended for another five years through Council Regulation (EC) 1205/2007, as the previous measures expired in 2007.

1.4. Analysis

Article 13 only requires evidence of dumping, it does not require calculation of a separate dumping margin; instead, the dumping margin calculated in the original investigation will retrospectively apply on circumvented imports. A circumvention investigation is different from an ordinary AD investigation, e.g. no formal complaint supported by a majority of Union industry is required. Similarly, the AD investigation should be concluded within nine months as opposed to 15 months in a normal AD investigation.

It is established that the original investigation was defective, as, according to Article 5(4) of the basic regulation, the majority of Union producer's threshold (representing minimum 50% of total manufacture of product concerned in Union) threshold was not met; thus, Union producers representing 48% of the total production of the Union were supporting the initiation of investigation.

In this case, Philips (Pvt) Ltd. opposed the initiation of complaint; however, the Commission excluded it from the definition of Community industry on the ground that it was the largest importer of dumped Chinese imports. In *Electrolytic Aluminium Capacitors Originating in Japan,* the main complainants and importer were sister companies. Therefore, the Commission considered that import legitimate on the ground that these imported parts were being used to manufacture the principal product. In order

to assess the possible inclusion or exclusion of a particular company within the ambit of Community industry, its balance of imports and manufacture should be assessed.

Further, it is determined that the EU Commission has not precisely stated the representative threshold of Union producers supporting the extension of measures; it however only states that the majority of Union producers were supporting the complaint. However, within the meaning of judgements in Case T-310/12 and Case T-192/08, the institutions are under obligation to reveal their findings completely and give appropriate statement of reasons for their actions, so that the interested parties can make use of these statements to challenge the institution's findings in the EU Courts. In cases T-195/95 and T-19/01 it was concluded that the certainty and sound administration of justice demands that if the statement of reasons are brief, it must be coherent and comprehensible with the relevant facts of the case and applicable law relied upon.

Therefore Van Bael and Bellis found no specific definition of circumvention in the basic regulation, leaving the decision to the Commission's broad discretion. Typically, a change in trade pattern involves a significant increase in imports from a third country not subject to anti-dumping duties.

According to Article 13(2) of Council Regulation (EC) 384/96, an assembly process in a third country can be considered circumvention if it meets the following three conditions:

a) The operation began or significantly expanded just before the start of the anti-dumping investigation, and the parts involved originate from the country subject to duty.
b) Circumvention is not considered to be occurring if the value added to the parts during the assembly process exceeds 25% of the manufacturing cost, and the parts make up 60% or more of the total value of the assembled product's parts.
c) There is evidence of dumping based on the normal value already established for similar products, and the remedial effects of the measures are being undermined in terms of the prices and/or quantities of the assembled similar product.

Therefore, it could be established that the first and last condition as specified by Article 13(2) of the basic regulation were accurately met. The Commission's claim that Ecopak registered and started business just before the imposition of AD duty on PRC is evident from the import data (of product concerned) exported from Pakistan as described below in figure 4.3. It is evident that Ecopak had no export of CFL to the EU before 2001. Similarly, it is also apparent that the remedial effect of duty imposed on PRC was undermined, as exports from Pakistan in terms of quantity significantly increased after the imposition of duty on China.

However, as far as the second condition as provided by Article 13(2) is concerned, it could be asked that on what basis (information or data) the Commission concluded that the value of assembled parts in Pakistan represents more than 60% of the overall value of the product concerned, or that the value added to the parts brought in represented less than 25% of the production cost. However, as adjudicated by the EU Courts in cases referred above, there is a lack of statement of reasons (by the Commission) about the nature and authenticity of data used to establish the second prerequisite of Article 13(4).

In Cases T-633/11 and T-192/08, it was determined that Article 18(1) of the basic regulation allows institutions to use available facts if an interested party obstructs the verification visit, refuses to provide relevant information, fails to supply necessary information within the specified timeframe, or provides misleading information. However, if the information provided by the trader is not misleading but only imperfect, the use of available facts is not obligatory.

It is also apparent from the judgement in *Transnational Company 'Kazchrome' and ENRC Marketing v Council*, that if any of the above mentioned four conditions are met, Commission can use facts available for the purpose of its investigation. However, in this case, although, non-availability of accurate accounts (in accordance with international standards) is a logical reason for the Commission

to have recourse to the facts available, yet the general court in case T-633/11 did not consider it an ideal and preferable method. Recourse to facts available is authorised where no other way left to collect required information.

2. Case Analysis of Case T-469/07

2.1. Brief Facts of The Case

On July 16, 2001, the Council, through Regulation (EC) No 1470/2001, imposed a definitive anti-dumping duty (ADD) on compact fluorescent lamps (CFL) imported from China. Later, on June 6, 2005, this duty was extended to imports from Pakistan, Vietnam, and the Philippines under Regulation (EC) No 866/2005.

The definitive duty expired on October 14 after its five-year term, prompting the Commission to launch an expiry review at the request of the Community federation of the lighting industry. The EU Commission sent questionnaires to determine if the Community industry met the 50% support threshold for initiating the review. GE Hungary and Osram supported the review, Sylvania did not respond, and Philips opposed it.

Achieving the 25% threshold with support from two major local manufacturers, the EU Commission proceeded with the investigation and distributed questionnaires to all relevant parties. However, on November 26, 2006, GE Hungary informed the Commission of its changed stance, now opposing the continuation of ADD measures. With Osram remaining the sole supporter of the measures, and Sylvania later opposing the review, the collective output from Philips Poland and GE Hungary exceeded 50% of the total Union production of CFL-i.

Despite this, the Commission noted that at the review's initiation, a majority of Union manufacturers supported the request, but positions shifted during the investigation. With the opposing producers' output now slightly over 50% of the total Community manufacture, the Commission concluded that the anti-dumping measures should be repealed and the review terminated.

On August 31, 2007, the Commission issued a disclosure document recommending a one-year extension of the ADD measures, invoking Article 9(1) of the basic regulation, which allows the continuation of investigations in the Community's interest, even if the complaint is withdrawn. The Commission decided it was unnecessary to address Articles 4(1) and 5(4) of the basic regulation, opting instead to prolong measures for one year due to Union interest. Consequently, on October 15, 2007, the Council implemented Regulation 1205/2007, imposing AD duties on CFL-i imports from China, Pakistan, and Vietnam. The applicants sought to annul this regulation, while the Council of the EU and the Commission argued for the action's dismissal.

2.2. Judgement

The General Court determined that Article 5(4) of the basic Anti-Dumping (AD) Regulation No 384/96 does not require the Commission to halt an AD investigation if the support from the Union industry falls below the 25% threshold of Community production backing the complaint. This article only pertains to the level of support needed to initiate proceedings. According to Article 9(1) of the same regulation, the Commission is not mandated to stop a procedure even if the complaint is withdrawn, which applies even more so if the support for the complaint decreases.

Articles 5(4) and 9(1) of the basic regulation also apply to review procedures under Article 11(5), meaning the same principles hold if support for a review request falls below 50% of Union production during the investigation. Thus, institutions can continue the review procedure even if the 50% threshold in Article 5(4) is not maintained.

Moreover, Article 9(1) of the regulation requires institutions to consider Community interest only if they plan to terminate the procedure following a complaint withdrawal. Article 4(1) of the basic AD Regulation defines 'Community industry' as manufacturers whose production constitutes a major

share or the entirety of Union producers of similar products, excluding producers in specific situations outlined in Article 4(1)(a). Institutions have significant discretion in choosing between these options.

Additionally, the Union industry used to calculate injury does not have to include the same Community producers who initially supported the complaint or review request under Article 5(4). In the latter case, the Community industry may consist only of Union manufacturers supporting the complaint or review request, while in the former, it can include all Community producers, regardless of their support.

2.3. Comment

It could be argued that the Council committed a manifest error of assessment by concluding that the majority of the Community industry supported the initiation expiry review, however factually only a single company, Orsam representing 48% of the EU's CFL production supported such initiation, while the remaining three companies representing 52% of the EU's industry, opposed the action. Therefore, it is established that the Commission and the Council infringed Article 5(4) of the basic regulation, as it states that a complaint should be considered made by the union industry if it is supported by manufacturers collectively producing at least 50% of the like product in the Union.

It is noted that when producers are related to the importers or exporters, or they are importers themselves, they will not wish to support the complaint. In this case, the right (of other manufacturers) to file a complaint cannot be abrogated. Thus, a complaint can be initiated by them if, after the exclusion of the related importer, they fulfil the required representative threshold. The text of Article 4(1) (a) is not clear, but it seems that the 25% and 50% threshold for initiation and continuance of complaint will still be required. However, the link between these two thresholds is ambiguous, and it should be made clearer and more transparent by amending Article 4(1).

The 25% threshold is too low, as it encourages non-competitive producers to join forces to file a complaint, instead of modernising their production plants etc. Union industry means total Union industry or a majority of it; however, a majority of Union industry cannot be represented by manufacturers accounting for 25% of total Union production.

Secondly, it could be concluded that the Council has wrongly used Article 9(1) of the basic regulation as analogue applicable provision in the current case. Article 9(1) of the basic regulation grants authority to the Commission that if community interest requires, so it may not terminate the investigation, regardless of the fact that the complaint is withdrawn by the complainants. Firstly, Article 9(1) relates with the withdrawal of fresh complaint instead of the withdrawal of request for expiry review. The basic regulation however lacks provision dealing with the withdrawal of complaint in the expiry review. Secondly, in this case, the plea for review is not completely withdrawn however; Article 9(1) deals with the situation where complaint is completely withdrawn.

If the Council's interpretation of Article 9(1) of the basic regulation were accepted, it would grant the Council a new and potentially expansive power. Furthermore, this interpretation would undermine the requirements specified in Articles 3(1), 9(4), and 11(2) of the basic regulation, which mandates that injury to the 'Community industry,' as defined in Article 4(1) of the regulation, must be demonstrated to impose anti-dumping duties.

The Council argues that if a provision permits institutions to continue a procedure when the complaint is fully withdrawn, it must also allow them to do so when only partial support is withdrawn. While the Council's argument is logical and compelling, the Council does not have the authority to interpret the law and apply it analogously. Instead, the institutions should base their conclusions on clear and directly applicable provisions.

This paper also objects to Article 9(1) of the basic regulation because of the inconsistency of Article 9(1) and Article 5(4) with each other. The former requires representation of at least 50% of the Community industry to continue the investigation; however, the latter provides that if the

representative threshold of 50% is not met, the Commission can continue the investigation on its own, bearing the Community interest involved. But the question may arise that where local manufacturers, exporters, importers or consumers do not have any concern or complain, there is no point to continue the proceedings on its own by the institution.

In Case T-249/06 it was established that Article 5(4) of the basic regulation does not place any obligation on the institutions to terminate the investigation if it lose the prescribed threshold of support of 25% from the Community industry, instead, it is only related to the initiation of the investigation. The Court further referred to Article 9(1) of the basic regulation, where in case of withdrawal of the complaint by the complainants, the Commission is under no obligation to terminate the proceedings, if the Community interest demands so. But it should be noted that the same Article requires local manufacturers representing 50% of the overall production in the Community of the concerned product, in order to consider that the particular investigation is carried out on behalf of the Union industry.

While defining the notion of Union industry, Article 4(1) of the basic regulation provides that either it could be the whole industry of the Union or it may be the major proportion of the industry representing at least 50% of them. Therefore, according to the Court, institutions enjoy wide discretion to exclude particular local manufacturers from the ambit of the Community industry, based on particular grounds. It is to be noted that in the original investigation while defining the Community industry, the Commission included the whole local industry for the purpose of determination of injury.

However, in the current investigation of review, the Commission opted to stick to the second option, i.e. local industry representing 50% of total produce of the product concerned. Therefore, in their current definition of the Community industry, they opted to confine it to two manufacturers namely Osram and GE Hungary, while excluding Philips and Sylvania from its definition of the Community industry. It is noted that the Commission has wide discretion in terms of defining Union industry, and in many cases, it is unclear why it has included one manufacturer and excluded another. The EU Court of Justice has reaffirmed the Commission's discretion in this regard. However, the Commission's definition of Union industry varies from case to case.

It is further argued that the Commission must define the Community industry in the same way both in the original investigation and in the review procedure, as, it will bring more consistency and efficacy to the procedures. Otherwise, a flexible manoeuvring of procedures by the Commission may tend to unduly prejudice either of the parties. The Commission has profoundly excluded those Community producers which were against the initiation of expiry review, and it does not seem to be just.

Mickus argues that the basic regulations do not provide any criteria about minimum added value that can form the basis for a decision whether or not a related producer should be included within the definition of Union industry. However, the Commission has adopted certain arbitrary criteria in this regard. The institutions consider them within the ambit of Union industry if they act to a large extent as an autonomous economic entity.

Secondly, if the institution's and court's verdict is accepted that the inclusion of the said Community manufacturers was inappropriate, considering the fact that they were overwhelmingly involved in imports from China, then also they must not be part of the original investigation, although it is not an consistent ground to exclude a local manufacturer from the ambit of Community industry. Within the meaning of judgements in Case T-423/09 and Case T-299/05, institutions can only use a different methodology in review and in the original investigation if circumstances in both cases have significantly changed. However, in the current case, neither change of circumstances occurred and nor did the Council and Commission use it as ground of their decision.

It is ruled in Cases T-558/12 and T-310/12 that statement of reasons must be detailed and clear and unambiguous providing an opportunity to all interested parties to understand the rationale of the adopted measures by the authorities and thus to facilitate them to defend their rights, and the Courts of the European Union to exercise their powers of review. The question whether statement of reasons provided by the Commission meet the requirements of Article 296 TFEU must be assessed not only within the light of wording but also the meaning and context of the said Article. The circumstances of each case and the legal rules governing the issue should also be considered. However, the General Court held in cases T-387/94 and T-164/94 that it is not necessary for institutions to state the reason for every factual and legal consideration involved.

However, it is also found that the Council has failed to state adequate reasons for its conclusion under Article 296 TFEU. The Council and Commission could not reasonably establish whether Community industry representing 48% production of the Community could be considered as major industry of the Community. The institutions also could not logically establish the proper reasons for the elimination of Philips and Sylvania from the ambit of the Union industry. Similarly, the institutions' reasoning regarding application of different methodology in the original and review investigation is weak.

In Case T-385/11 and Case T-35/01, the General Court held that EU Commission has wide discretionary powers due to the complex economic factors involved, therefore judicial review is restricted to observing whether procedures have been followed properly, if the fact relied upon by the investigative bodies have been accurately stated or whether there is any manifest error of assessment or misuse of powers. It is however contended that although Article 4(1) of the basic regulation renders discretion to the Commission to define the Union industry itself, either in the form of the whole industry or a major portion of the Community industry, the Commission must use its discretion diligently, based on strong grounds.

Fritzsche defined discretion as the power of decision-makers to decide on the application of the relevant law to a particular set of facts or situation. The discretionary powers are invoked when statutory laws do not provide express guidance for a specific situation. The judicial review is, however, the revision of the administrative actions of decision-making (in this case the Commission and the Council), to assess whether relevant bodies have acted upon the express and implied will of the applicable law.

According to Galligan, two variables are essential for the central sense of discretion: the opportunity for calculation and judgement available to the decision-makers; and the surrounding approach of the officials to how the issue should be resolved. However, it is argued that there is no standard regarding the clarity of statutory provisions, as the express provisions may also offer multiple interpretations.

According to Advocate General Lèger, technical discretion is granted to the administrative bodies, and it is justified by the complexity of economic calculations.[1] Further, he noted that, in the case of technical discretion, EU courts exercised judicial review very strictly. However, in the presence of consensus of the legal literature about the politicised use of AD measures worldwide, it is suggested that courts should actively review the exercise of discretionary powers by investigative authorities. Koutrakos noted that where the EU Courts have refrained to review the substantive issues in AD proceedings, they have however adopted a more liberal approach in procedural issues involved in AD investigations.

Vermulst established that the EU Courts (the General Court and ECJ) used to take almost five years to review the findings of the administrative bodies. The judicial review process is, however, quite slow although it should be a 'prompt review' according to Article 13 ADA. The EU courts have been found to be reluctant to review the substantive issues (as opposed to the procedural issues). Mostly,

their decisions about limited judicial review or comprehensive judicial review were based on their usual practice instead of law. He opined that this problem can be solved only by the amendment of ADA, providing for the constitution of specialised courts. The issue of discretion and its judicial review has been further explored in sections 3.5.3, 4.5.4 and 5.6.

3. Conclusion

In conclusion, the imposition of anti-dumping duties by the European Union on electronic fluorescent lamps assembled in Pakistan has had profound economic implications for the country's export industry. This study has illuminated the multifaceted nature of these implications, ranging from immediate financial impacts on export volumes and revenues to broader strategic adjustments by Pakistani manufacturers in response to altered market dynamics. The case study (T 469/07) provided critical legal insights, highlighting the complexities involved in trade disputes and the importance of adherence to international trade laws. From an economic standpoint, the findings underscore the challenges faced by developing economies like Pakistan in navigating global trade regulations while striving to maintain competitiveness in international markets. The responses from Pakistani stakeholders, including government interventions and industry strategies, reflect efforts to mitigate the adverse effects of anti-dumping measures and explore new avenues for market diversification. Looking forward, the study emphasizes the need for continued dialogue and cooperation between Pakistan and the EU to address trade disputes effectively. It also advocates for the adoption of fair and transparent trade practices that uphold the principles of free trade while safeguarding the interests of all stakeholders involved. Ultimately, this research contributes to a deeper understanding of the intricate interplay between trade policy, economic development, and international relations, urging policymakers and industry leaders to pursue balanced approaches that promote sustainable growth and equitable trade relationships on a global scale.

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