Lakshmikumaran & Sridharan attorneys

INTERNATIONAL TRADE

amicus

An e-newsletter from Lakshmikumaran & Sridharan, New Delhi, India

January, 2013 / Issue–20

Lakshmikumaran & Sridharan wishes you a very happy and prosperous New Year 2013

Contents

Article

De-minimis dumping margin – Consequences 2

Trade Remedy News

Anti-dumping actions by India 4

Safeguard action by India 4

Trade remedy actions against India 5

WTO News 5

News Nuggets 6

Ratio Decidendi 7

January
2013

Article

De-minimis dumping margin – Consequences

By **Atul Gupta**

Article 5.8 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, commonly known as Anti-Dumping Agreement (ADA), provides for the immediate termination of investigation in an anti-dumping duty case if the margin of dumping is determined as *de minimis* by the authorities. Article 5.8 further defines the meaning of *de minimis* dumping margin as a margin of dumping less than 2%, expressed as a percentage of the export price. These provisions are also enshrined in Rule 14(c) of the Indian Anti-dumping Duty Rules, i.e. in the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995.

The dispute in respect of *de minimis* dumping margin came before the WTO's DSB in *Mexico - Definitive Anti-Dumping measure on Beef and Rice* (DS295). The Unites States challenged Mexico's anti-dumping measure "as applied" as Mexican Authorities had included those exporters whose dumping margin was *de minimis,* though imposed zero duty in respect of these exporters. The US also challenged the Mexican law "as such" which provided inclusion of such exporters in the review investigations. The DSB's Appellate Body in this case concluded that (i) *de minimis* dumping margin referred to in Article 5.8 is in respect of each exporter and not for country as a whole; (ii) investigation in respect of those exporters for whom dumping margin has been established as *de minimis* shall be terminated immediately; and (iii) when such exporter has been excluded from the original anti-dumping measure, then they cannot be again investigated in any review [including changed circumstances, sun-set review, mid-term review]. It was concluded that even fixing of zero anti-dumping duty in respect of such exporters is inconsistent with the ADA. According to the Appellate Body, one way to terminate the investigation is to exclude such exporters from the Order establishing anti-dumping duty.

A consequential problem that arises subsequently is that when such exporter begins to dump goods after original anti-dumping duty investigation is over, the domestic industry cannot file an application for initiation of changed circumstances/mid-term review investigation against such exporters.

To overcome such problems, the EU initiated[1] a fresh anti-dumping duty investigation limited to such exporter and finally imposed anti-dumping duty on such exporter on conclusion of investigation finding dumping by such exporter[2]. The EU had first excluded such exporter from the order establishing earlier anti-dumping duty[3]. This determination of EU was challenged in the domestic courts on the ground that a fresh investigation cannot be initiated against such exporter. The Court of First instance as well as Court of Justice[4], however, upheld the action of imposition

1 Notice of initiation of an anti-dumping proceeding concerning imports of ironing boards originating in the People's Republic of China, limited to one Chinese exporting producer, Hardware (Guangzhou) Co. Ltd, and of initiation of a review of the anti-dumping measures on imports of ironing boards originating in the People's Republic of China (2009/C 237/05).

2 Council Implementing Regulation (EU) No. 1243/2010 of 20 December 2010.

3 Council Implementing Regulation (EU) No. 1241/2010 of 20 December 2010.

4 Judgment dated 18 September 2012 of the General Court — *Hardware (Guangzhou)* v. *Council* (Case T-156/11).

of anti-dumping duty by the European Council.

The US also excludes such exporters from the original investigations[5] and then does not include them in review investigations. However, in case such an exporter claims the change of name, it conducts an investigation to determine that there is no other change in the constitution of such entity.

Earlier, India used to exclude the exporters with less than de minimis dumping margins from the levy of antidumping duty[6]. Presently India applies 'nil' rate of anti-dumping duty on such exporters by indicating their name in the duty table with 'nil' rate of duty[7]. The investigation is not terminated against them. Such exporters would be covered in the subsequent reviews[8]. It is apparent that such practice of India is inconsistent with the ADA as interpreted by the DSB. The Indian AD rules are also silent about it. Other than Rule 14 of the said rules, there is no provision specifying how the termination of the investigation has to be given effect to. An amendment to the rules would certainly go a long way in resolving such issues.

A question also arises as to the treatment of imports from such exporters in the injury analysis. The panel in DS 294 has held: *"Several panels have expressed the view that the term "dumped imports" in Article 3 refers to all imports attributable to producers or exporters for which a margin of dumping greater than de minimis has been calculated and excludes imports from producers and exporters found in the course of the investigation not to have dumped. …..We consider that an interpretation of 'dumped imports' in Article 3 which would allow an investigating authority to include in the volume of dumped imports for purposes of injury analysis imports attributable to a producer/ exporter for which a de minimis margin has been calculated is impermissible".* Therefore, volume of imports from exporters found to have not dumped or having a dumping a dumping margin less than *de minimis* levels shall not be included for the purposes of injury analysis. However, India includes the volume of such imports also in injury analysis. DGAD shall think of aligning its current practices with that of the global practices in line with the interpretations given by WTO DSB.

[The author is a Principal Associate, International Trade Practice, Lakshmikumaran & Sridharan, New Delhi]

---

6 *Sodium Cyanide exported from, the United States of America, CzechRepublic, the European Union and Korea RP* - Final Finding No. 8/1/99-DGAD dated 6-3-2000.

7 *Poly vinyl Chloride (PVC) suspension Grade from Taiwan, China PR, Indonesia, Japan, Korea RP, Malaysia, Thailand and USA* – Final Finding No. 14/8/2006 dated 26-12-2007; *Poly vinyl Chloride Paste Resin (PVC Paste Resin) from Taiwan, China PR, Indonesia, Japan, Korea RP, Malaysia, Thailand and Russia* – Final Finding No. 14/36/2009 dated 2-5-2011; and *Plain Medium Density Fibre Board from China, Malaysia, New Zealand, Thailand and Sri Lanka* - Final Finding No. 14/12/2007 dated 26-8-2009.

8 *Sodium Cyanide exported from, the United States of America, CzechRepublic, the European Union and Korea RP* - Final Finding (Sun-Set Review) No. 15/9/2003-DGAD dated 27-9-2005.

Trade Remedy News

Anti-dumping actions by India

Product	Country	Notification No.	Date of Notification	Remarks
Cable ties	China and Taiwan	56/2012-Cus. (ADD)	14-12-2012	Anti-dumping duty modified (method of calculation changed) pursuant to mid-term review
Cast Aluminum Alloy Wheels or Alloy Road Wheels used in Motor Vehicles	China, Thailand and Korea RP	14/7/2012-DGAD	10-12-2012	ADD investigation initiated
Choline Chloride	China	57/2012-Cus. (ADD)	21-12-2012	Definitive ADD imposed for 5 years
Phthalic Anhydride	Korea RP, Taiwan and Israel	58/2012-Cus. (ADD)	24-12-2012	Definitive ADD imposed for 5 years
Polyvinyl Chloride (PVC) Suspension Grade	Taiwan, China, Indonesia, Japan, Korea RP, Malaysia, Thailand and USA	52/2012-Cus. (ADD)	6-12-2012	ADD extended upto 22-1- 2014
Sodium Hydrosulphite	China	55/2012-Cus. (ADD)	14-12-2012	ADD re-imposed for 5 years after sunset review
Vitrified Porcelain tiles	China	53/2012-Cus. (ADD)	14-12-2012	ADD not to be imposed on goods produced by M/s. Jiangxi Zhengda Ceramics Co. Ltd. China and exported by M/s Foshan Z&D Ceramics Ltd., China w.e.f. 23-5-2011

Safeguard action by India

Product	Country	Notification No.	Date of Notification	Remarks
Electrical Insulators	China	5/2012-Cus. (SG)	20-12-2012	Safeguard duty imposed till 31-12-2013 as follows: ● First year - 35% ● Second year - 25%

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Graphite Electrodes	Customs Union of Russia, Kazakhstan and Belorussia		26-12-2012	Final findings issued and ADD to be effective from 30 days from 26-12-2012
Carbon Steel Welded Pipe	Canada	Press Release	11-12-2012	Determination of threat of injury

WTO News

Canadian measures in the renewable energy generation sector are violative of WTO agreements

On 19th December 2012, DSB Panel of the WTO has issued report on a complaint by Japan and EU concerning certain measures by Canada in the renewable energy sector and in the Feed-in-tariff program. The dispute relates to domestic content requirements that need to be complied with in the design and construction of electricity generators utilizing solar photovoltaic and wind power technology so as to qualify for guaranteed prices offered under the Feed-In Tariff ("FIT") Program. Japan claimed that by such requirements, Canada has violated Article III:4 of the GATT 1994; Article 2.1 of the TRIMs Agreement; and Articles 3.1(b) and 3.2 of the SCM Agreement.

The Panel upheld the claims of Japan and EU under Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994. It found that Canada had not established it was entitled to rely upon Article III:8(a) of the GATT 1994 because procurement of electricity under the FIT Programme was undertaken by the Ontario Government "with a view to commercial resale". The Panel also found that the challenged measures fell within the scope of paragraph 1(a) of the Illustrative List.

The Panel, by majority, however dismissed allegations of existence of a subsidy. It was observed that the Hourly Ontario Electricity Price ("HOEP") that was at the centre of main benefit arguments could not serve as an appropriate benchmark against which to determine whether the challenged measures conferred a "benefit" since (i) the HOEP did not result from the operation of a *competitive* wholesale electricity market, but rather a market that was significantly influenced by government regulation; (ii) the economics of *competitive* wholesale electricity markets in general suggest that they will *rarely* attract the degree of investment in generation capacity needed to secure a reliable electricity system; and (iii) the *prevailing conditions of supply and demand in Ontario* suggest that a competitive wholesale electricity market would fail to achieve this outcome in Ontario.

Panel established on US countervailing and anti-dumping measures on Chinese products

On 17th December 2012, the Dispute Settlement

Body (DSB), established a panel to examine the complaint by China against United States' countervailing and anti-dumping measures applied to Chinese exports. China argues that the US Public Law 112-99 (which allows application of countervailing duties on non-market economy countries) was inconsistent with the GATT 1994, the SCM Agreement and the Anti-Dumping Agreement. Australia, Canada, European Union, Japan, Vietnam and Turkey have reserved their third-party rights to participate in the Panel's proceedings.

Panama seeks consultation with Argentina on certain trade measures in goods and services

Panama has on 12th December 2012, notified the WTO Secretariat of a request for consultations with Argentina on alleged discrimination and restrictions in certain measures applied by Argentina to trade in goods and services. As per document circulated on 19th of December, 2012, the consultation would cover discriminatory assessment of profits tax depending on the origin or place of residence of the foreign service supplier; discriminatory measures based on an alleged unjustified increase in wealth and discrimination in the valuation of transactions with parties from the listed countries. The said document also includes certain measures affecting trade in the reinsurance services sector, discriminatory requirements for the registration of companies, branches and shareholders from certain foreign service suppliers, measures affecting the repatriation of investments and trade in financial investments and others.

News Nuggets

Complaints against 'subsidised' shrimp exports

The petition by the Coalition of Gulf Shrimp Industries might prove to be the latest catch for shrimp exports from India and six other countries. Last week US domestic producers sought relief from 'subsidized shrimp imports' from China, Ecuador, India, Indonesia, Malaysia, Thailand, and Vietnam. Among the various schemes or programmes listed are intervention by government of Thailand in markets to provide shrimp to processors at artificially low prices and Indian subsidies to reduce ocean freight costs, export promotion schemes and subsidies/ assistances for new shrimp farms and shrimp hatcheries. Shrimp imports into US are already attracting anti-dumping duties. US DOC may initiate the CVD investigation in a few weeks.

India-ASEAN FTA on services 'finalised'

Even as India-EU FTA continues to be 'in news' with deadlock over liberalising services, reports suggest that India and ASEAN have finalised the agreement on services. Currently, India has an FTA with ASEAN in respect of goods, which entered into force in 2010. The actual text of agreements will be finalised by February 2013. It remains to be seen how the various conflict points of free movement of professionals and access to sectors like banking, insurance, health, accountancy, architecture and engineering have been resolved.

Ratio Decidendi

Zeroing in review investigations permissible

The United States Court of International Trade has upheld the US Department of Commerce's arguments that the use of zeroing to calculate dumping margin during reviews, but not in investigations, is reasonable. The Commerce Department had argued that there is inherent difference between the two processes which permit it to treat non-dumped transactions differently. The department pointed out that reviews involve average-to-transaction comparisons while investigations use average-to-average comparisons. The Court held that Commerce has hence adequately explained its inconsistent interpretation of 19 U.S.C. § 1677(35)(A). The Court further also held that when adjusting Export Price under 19 U.S.C. § 1677a(c)(2)(A), the Commerce department is permitted to offset expenses incurred with refunds or reimbursements for those expenses and that the fact that plaintiff did not report the receipt of a bunker fuel adjustment during the period of review did not mean non-payment of bunker fuel surcharge by them or their affiliates. Earlier the Commerce had calculated Plaintiff's international freight expenses using a surrogate rate from the STS Agreement which had increased the international freight expenses thereby lowering the constructed export price even further and hence made a finding of dumping more likely. [*Fischer S.A. Comercio, Industria and Agricultura and Citrosuco North America, Inc.* v. *United States* – Order dated 6-12-2012].