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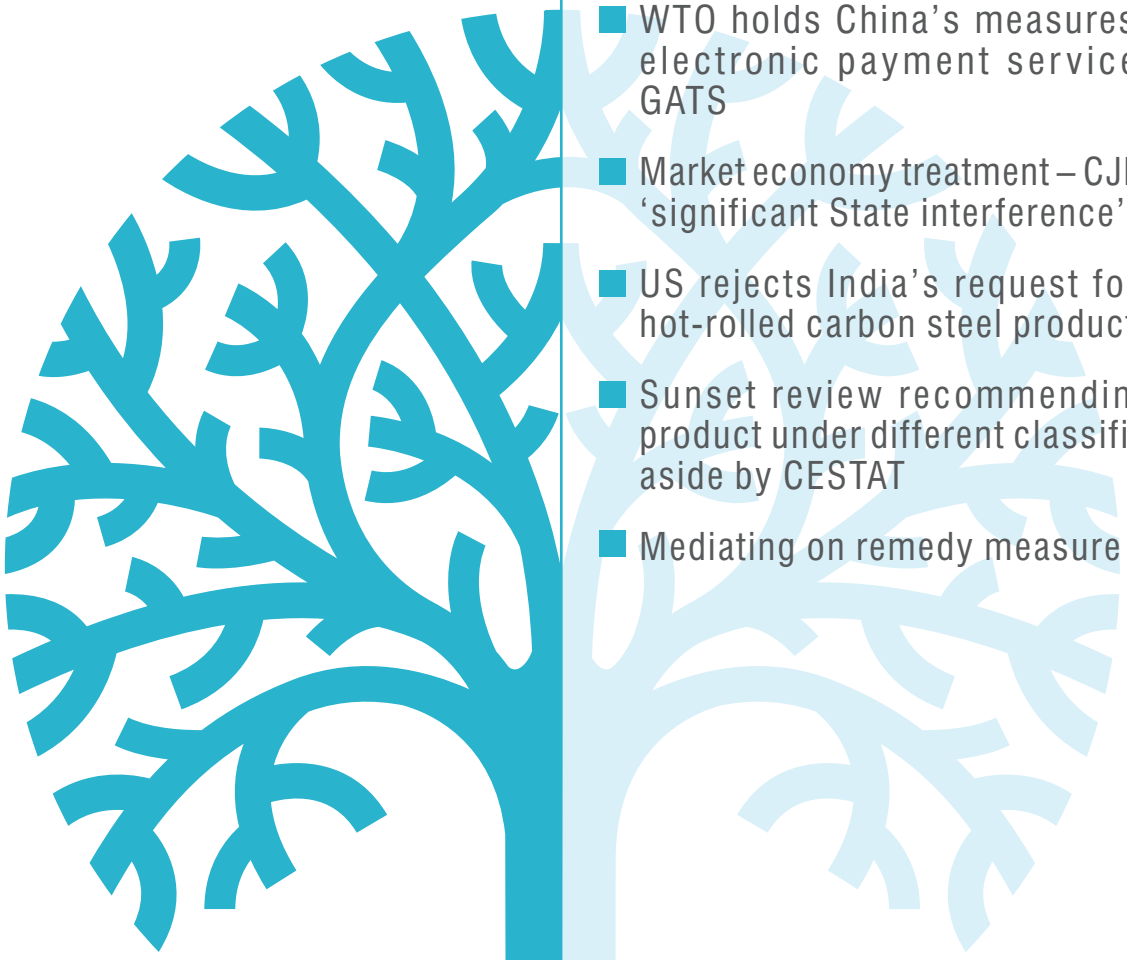
In Focus



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Anti-dumping duty on 'unknown' exporters

By **Bhargav Mansatta**

In anti-dumping investigations, 'all others' rate is intended to cover exporters who have not participated. Two categories of exporters can actually form part of the 'all others' rate i.e. 'known' exporters who failed to participate and 'unknown' exporters who did not participate in the anti-dumping investigation. As a matter or practice, anti-dumping duty is generally applied on the 'non-participating' exporters without further distinguishing between known and unknown exporters. This is true not only for investigating authority in India but for several other countries including EU and China. A practice may generally be believed to be correct and may not be objected very often, but this by itself is no proof of consistency of such measure with the WTO obligations. Thus, it is of importance to understand the WTO obligation in this regard.

Article 6.8 and Para 1 of the Annex II of the Anti-dumping Agreement (ADA) which provides for the imposition of the 'all others' rate, reads as below:

"In cases in which any interested party *refuses access to, or otherwise does not provide necessary information* within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, *may be made on the basis of the facts available.* The provisions of Annex II shall be observed in the application of this paragraph."

Annex II, paragraph 1 reads:

"As soon as possible after the initiation of the investigation, *the investigating authorities should specify in detail the information required from any interested party,* and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that *if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available,* including those contained in the application for the initiation of the investigation by the domestic industry."

It is normally understood that the above provisions authorize the member countries to apply 'facts available' to exporters who do not participate in the investigation process including the exporters who were not known to the investigating authority.

The Appellate Body in the case of *Mexico – Anti-dumping Measures on Rice,* [WT/DS295] had the opportunity to interpret the above provisions. In this case, the Mexican investigating authority sent the public notice of initiation and a questionnaire to two known exporters and to the United States embassy in Mexico City. Two exporters as well as an industry association appeared of their own initiative and received a questionnaire. The investigating authority ultimately used facts available against all exporters apart from the four that received the questionnaire. The Appellate Body held that the second sentence of paragraph 1 of Annex II of the Anti-dumping Agreement requires that an exporter shall be given the opportunity to provide the information required by the investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests. An exporter that is unknown to the investigating authority, and therefore not notified of the information required of it, is denied the opportunity to provide the information[1].

There should be little room for doubt after the aforesaid finding that 'all others' rate of anti-dumping duty cannot be applied on facts available basis to exporters who are not known to the authority or from whom no information was requested thereby.

However, the issues surfaced again, when in calculating the anti-dumping rates, the investigating authority in China

[1] Appellate Body Report, Mexico – Anti-Dumping Measures on Rice, paras. 259-260

applied "facts available" to exporters/producers that were "unknown" to it. This was challenged by the United States in the recent case concerning *China – AD CVD duty on GOES* [WT/DS/414]. The report in Mexico case was re-invoked by the Panel. China argued that in the case of *Mexico – Anti-Dumping Measures on Rice* the Appellate Body was faced with the situation wherein there were many other known exporters, including the members of the rice association that appeared in the investigation, and that this was not the case before MOFCOM, where there were no other known exporters/producers. However, the Panel rejected the argument and reinforced its understanding of the provision contained Article 6.8 and Annex II of the Anti-dumping Agreement.

The Panel observed that the second sentence of paragraph 1 of Annex II of the Anti-dumping Agreement conditions the use of facts available. Only when an interested party is aware that necessary information is not supplied by it within a reasonable time, the investigating authority will be free to resort to facts available. Further, given that the unknown exporters were not notified of the "necessary information" required of them, it cannot be concluded that 'they refused access to or failed to provide the information' as per Article 6.8.[2] Further, it was also clarified that the requirement under Article 6.8 and the second sentence of paragraph 1 of Annex II is legally distinct from the general notice requirement stemming from Article 6.1 and the first sentence of paragraph 1 of the Annex II of the ADA.

Article 6.1 provides as below:

"All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question."

According to the Panel, a general public notice of initiation which is published by the investigating authority will not meet the requirement of Article 6.8. While nothing may prevent the exporters from coming forward voluntarily pursuant to such a notice, there is no corresponding obligation in the Anti-dumping Agreement on the exporters to do so.

The decision of the Panel is likely to create practical difficulties for investigating authorities in as much as there is no guidance in the Anti-dumping Agreement as to how to determine margin of dumping for such 'unknown exporters'. Article 6.10 read with Article 9.4 of the ADA provides for calculation of anti-dumping duty rates in a situation wherein the investigating authority were to resort to sampling method. China argues that these provisions lay down a general objective regarding the calculation of rates for unknown exporters.The panel however found it difficult to accept that a general objective even though inferred from the provision of Article 6.10 and Article 9.4 of the ADA could actually override the specific obligations under Article 6.8.

The Panel itself acknowledges the lacuna in the agreement. However, it noted that Article 6.8 and Annex II are very explicit regarding the conditions that must exist before an investigating authority may resort to facts available. The existence of a lacuna in the Anti-dumping Agreement does not mean that the conditions should be ignored in order to fill the gap.[3] Unless the Appellate Body reverses the jurisprudence so far developed while deciding the issue in appeal[4], there can be no further room for ambiguity as far as the scope of Article 6.8 and Annex II of the Anti-dumping Agreement is concerned. Investigating authorities are not permitted to cover 'unknown exporters' within the ambit of 'all others' rate. The investigating authorities are required to revisit their current practices and modify the same in line with the interpretations given by the Panel.

[The author is a Senior Associate, International Trade Division, Lakshmikumaran & Sridharan, New Delhi]

[2] Panel Report, China – AD-CVD on GOES, para. 7.387

[3] Panel Report, China – AD-CVD on GOES, para. 7.390

[4] The Panel Report was not adopted as China has filed appeal against it

Trade Remedy News

Anti-dumping / Safeguard actions by India

Acetone from EU, South Africa, Singapore and USA – ADD extended: Anti-dumping duty on Acetone from EU, South Africa, Singapore and USA has been extended for a period of one more year i.e. upto 18.6.2013 pursuant to the initiation of a Sunset Review, vide Customs Notification No. 37/2012-Cus. (ADD), dated 19-7-2012. Earlier Notification No. 33/2008-Cus. which has expired on 18-6-2012 has been amended.

Carbon Black from China – Safeguard duty recommended: The Director General (Safeguards) in the Ministry of Finance has recommended imposition of Safeguard duty on carbon black imported from China. Notification No. GSR D-22011/12/2011, dated 31-7-2012 while concluding that injury to the domestic industry has been caused by increased imports from China, recommends safeguard duty starting, in the first year, from 30% less anti-dumping duty payable.

4, 4 Diamini Stilbene 2, 2 Disulphonic Acid (DASDA) from China – ADD investigation initiated: DGAD in the Indian Ministry of Commerce has initiated Anti-Dumping Duty Investigation on imports of 4, 4 Diamini Stilbene 2, 2 Disulphonic Acid (DASDA) originating in or exported from China vide Initiation Notification No. 14/1/2012-DGAD, 26th July 2012.

Grinding Media Balls from Thailand and China – Definitive ADD imposed: India has imposed definitive Anti-dumping duty on Grinding Media Balls (excluding forged grinding media balls) originating in, or exported from, Thailand and China. Notification No. 36/2012-Cus. (ADD), dated 16-7-2012 imposes such duty for a period of 5 years.

Hexamine from Saudi Arabia and Russia – ADD sunset review initiated: DGAD, Ministry of Commerce has initiated Sunset Review of the Anti-dumping duty imposed on Hexamine originating in or exported from Saudi Arabia & Russia. Period of review is April, 2011 to March, 2012 as per initiation Notification No. 15/1000/2012 dated 17th July 2012.

Resin or other organic substances bonded wood or ligneous fibre boards – Provisional ADD recommended: DGAD has recommended imposition of provisional anti-dumping duty on the import of 'Resin or other organic substances bonded wood or ligneous fibre boards of thickness below 6mm, except insulation boards, laminated fibre boards which are not bonded either by resin or other organic substances' originating in or exported from China, Indonesia, Malaysia and Sri Lanka. Notification No. 14/29/2010-DGAD, dated 23rd July, 2012 may be seen for the text of the preliminary findings.

Anti-dumping actions against India

Stainless Steel bar – USA continues ADD: The United States International Trade Commission in its five-year sunset review of ADD imposed on Stainless steel bars from Brazil, India, Japan and Spain has determined that revoking the anti-dumping duty would lead to recurrence of material injury to its domestic industry. As per News Release 12-079, dated 17-7-2012, ADD will hence remain in force.

Carbon Steel Welded Pipes – Canada determines reasonable indication of injury due to dumping and subsidizing: Canadian International Trade Tribunal has on 13-7-2012 determined that there was reasonable indication of injury due to dumping of Carbon Steel Welded Pipes by Chinese Taipei, India, Oman, Republic of Korea, Thailand, Turkey and United Arab Emirates. It also noted that there was evidence of subsidizing of the subject goods from India, Oman and UAE. These acts, according the Tribunal, have caused injury or retardation or are threatening to cause injury to the domestic industry of Canada.

WTO News

China's measures affecting electronic payment services violate GATS

The WTO Dispute Settlement panel has found that certain Chinese measures relating to Electronic Payment Services are violative of GATS provisions (DS413). The Panel concluded that China maintains "China Union Pay" (CUP) as a monopoly supplier for clearing of certain types of RMB-denominated payment card transactions which is violative of Article XVI:2(a) of the GATS requiring Members not to limit the number of service suppliers where market access commitments have been undertaken. It was found that China acted inconsistently with its mode 3 market access commitment under the said GATS Article by granting CUP a monopoly for clearing certain types of RMB payment card transactions between China, Hong Kong and Macau. The panel also held that the requirement that all payment cards issued in China must bear the "Yin Lian"/"UnionPay" logo and be interoperable with that network; that all terminal equipment in China must be capable of accepting "Yin Lian"/"UnionPay" logo cards; and that acquiring institutions post the "Yin Lian"/"UnionPay" logo and be capable of accepting all payment cards bearing the "Yin Lian"/"UnionPay" logo are inconsistent with China's mode 1 and mode 3 national treatment obligations under the GATS Article XVII. It was found that through these requirements, China modifies the conditions of competition in favour of 'CUP' and therefore fails to provide national treatment to such service providers of other members. It was however held that USA failed to prove that the China's issuer, terminal equipment and acquirer requirements were inconsistent with GATS Article XVI:2(a) and prima facie also under Article XVI:1in respect of mode 3 market access requirements.

US rejects India's request for Panel on hot-rolled carbon steel products dispute

USA has, on 23rd July, rejected India's first request for establishment of DSB panel for resolving dispute pertaining to countervailing measures applied by the United States on certain hot-rolled carbon steel products from India. As per India's request the measures are inconsistent with Agreement on Subsidies and Countervailing Measures (SCM) and the GATT 1994. As per Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, the panel has to be established latest at the DSB meeting following the meeting at which the request first appears as an item on the DSB's agenda. The next meeting is scheduled for 31st of August.

DSB Panel established in China's rare earths export dispute case

The Dispute Settlement Body of the WTO has established a Panel, on 23rd July, 2012, to decide on certain complaints of USA, EU and Japan relating to certain alleged export restraints by China on export of rare earths, tungsten and molybdenum (DS431, 432 and 433). As per the countries which brought this dispute to the DSB of the WTO, export quotas, export duties, various restrictions on the right to export and administrative requirements that limit China's exports of these materials by increasing the burden and costs for exporting, distort the market and create competitive advantages in favour of China's manufacturing industry to the detriment of foreign competition. As per the request, the restraints are in violation of China's WTO commitments undertaken under the General Agreement on Tariffs and Trade (GATT) as well as under its Accession Protocol. India is one of the third parties to the dispute. It may be

noted that on 30th of January this year the WTO had held that China's export restrictions on several other industrial raw materials like bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc, were in breach of the WTO rules (DS394, 395 and 398).

China appeals against Panel findings in countervailing duty dispute with USA

China has filed appeal against the DSB Panel Report in *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States* (DS414). Earlier, the DSB panel in the WTO had held that Chinese anti-dumping and countervailing duty measures on Grain Oriented Flat-rolled Electrical Steel from USA were inconsistent with various provisions of WTO's Anti-Dumping Agreement and the SCM Agreement. China has sought review of the Panel's interpretation of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement as it related to MOFCOM's discussion of the existence of adverse price effects and final determinations with respect to price effects. China has assailed Panel's finding that it had acted inconsistently with its obligations under Articles 6.9 and 12.2.2 of the Anti-dumping Agreement and Articles 12.8 and 22.5 of the SCM Agreement.

US seeks consultations with China on ADD and CV duty dispute on automobiles

The United States has, on 5 July 2012, requested consultations under Article 4 of the DSU with China concerning Anti-Dumping and Countervailing Duties on certain automobiles from the United States. United States alleges that the measures imposed by China are inconsistent with several obligations arising out of Anti-dumping Agreement, Subsidies and Countervailing Measures Agreement and Article VI of the GATT, 1994.

Egypt informs WTO on imposition of safeguard duty on cotton yarn

Egypt has notified its decision to the WTO to apply definitive safeguard duty on the import of cotton yarn and mixed cotton yarn. The safeguard duty will be force till December, 2014. As per the notification circulated in the WTO Committee on Safeguards on 20th of July, 2012, the volume of imports increased sharply, the sales and market share of the domestic industry declined significantly; production and capacity utilisation declined; labour numbers and productivity declined; the volume of inventory increased and there was a sharp increase in the domestic industry's losses.

Russia and Vanuatu ratify accession to the WTO

Russia and Vanuatu are the latest two countries to enter the WTO. On 21st of July, the Russian President signed Parliamentary legislation bringing Russia's trading laws in compliance with the international standards set under the WTO. In 2011, Russia was the world's ninth largest exporter, shipping $522 billion in goods and $54 billion in services to its trading partners. Last year, Russians imported $323 billion in goods and $90 billion in services. Vanuatu, an island nation in the South Pacific Ocean, has also on 25th July, officially notified the WTO that it had ratified its accession package which spells out its membership terms. Both the countries will become the 156th and 157th members respectively of the WTO after 30 days of their ratification.

RATIO DECIDENDI

Market economy treatment – CJEU clarifies 'significant State interference'

The Court of Justice for the European Union in its recent judgment has upheld the order of the General Court which had held that State control due to the wide dispersion of the non State-owned shares, together with the fact that the State owned the biggest block of shares, cannot be equated to 'significant State interference'. The Court observed that as per the provisions, a producer from non-market economy country in order to have market economy treatment, must produce sufficient evidence to show that its decisions regarding prices, costs and inputs, including raw materials, cost of technology and labour, output, sales and investment, were taken in response to market signals reflecting supply and demand, and without significant State interference. The Court noted that use of the word 'interference' implied actual interference and that interference in the producer's decisions regarding price, costs and inputs must be 'significant'. It was also observed that even though the State *de facto* controlled the meetings of shareholders and appointed the Board of Directors which gave the State a certain influence over that company, it did not mean that the State interfered significantly in the company's decision regarding price, etc. The Court found that such interference also did not automatically follow either from the fact that some of the directors of that company are connected to it by employment contracts or by a contract for supply of services. The Court further rejected the argument that since China Chamber of Commerce Metals, Minerals & Chemicals Importers and Exporters (CCCMC) was verifying export prices for customs clearance which included the setting of a minimum price for Glyphosate exports and vetoed exports that did not respect these prices, it amounted to significant State interference. [*Council of the European Union* v. *Zhejiang Xinan Chemical Industrial Group Co. Ltd.* – CJEU judgement dated 19-7-2012 in Case C 337/09 P].

Sunset review recommending ADD on products under different classification and notification thereto, set aside by CESTAT

The Customs, Excise & Service Tax Appellate Tribunal (CESTAT), New Delhi has set aside the sunset review findings of the Designated Authority recommending anti-dumping duty on PVC Paste Resin also falling under Tariff Items 3904 22 10 of the Customs Tariff Act. Originally, the Central Govt. had imposed ADD on the said product classifiable under Tariff Item 3904 21 10, without mentioning in the notification that the classification was only indicative. It was noted that no one had challenged the initial levy. The DA's findings and the Customs Notifications No. 70/2010-Cus and 8/2012-Cus were set aside by the CESTAT on the grounds that new tariff headings were included in the sunset review investigation and ADD imposed on such items and natural justice were violated during the investigation in as much as adequate time and opportunity were not granted to the appellant. The DA was directed to issue a fresh finding after granting hearing to the appellants. Duties were however continued on a provisional basis for a period of six months. [*Leather Cloth & Plastic Manufacturers Association* v. *D.A.* – Final Order No. AD/A/10/12-Cus., dated 7-7-2012].

Normal value computation - ADD on Ceftriaxone Sodium Sterile from China, reduced

The CESTAT has lowered the rate of anti-dumping duty on imports of Ceftriaxone Sodium Sterile

from China. While reducing the duty to US $ 39.42 as against US $ 55.61, it called for the confidential records. The calculation of normal value was amended by considering the price of the raw materials which, according to the Tribunal, compared well with the value at which the domestic industry itself was procuring the goods. The DA had adopted the option of constructing the normal value based on the import price of the raw material while discarding method based on international price of Ceftriaxone Sodium (non-sterile). CESTAT however rejected the arguments of the appellant relating to identification of domestic industry and non-grant of market economy treatment. [*Suzhou Dawnrays Pharmaceuticals Co. Ltd.* v. *Union of India* – Final Order No. AD/A/09/12-Cus., dated 5-7-2012].

News Nuggets

Mediating on remedy measure

Antigua continues to seek an acceptable settlement of the issue of supply of gaming services through internet to the United States. The long running dispute remains open despite a WTO ruling that Antigua may suspend concessions under Article 22 of the DSU. On a finding that by prohibiting providers of betting and gaming services in Antigua, USA had violated its obligations under GATS to grant unrestricted market access, the Dispute Settlement Body ruled that USA had to bring its laws in conformity with its obligations under GATS. Aggrieved by non-compliance by the US, Antigua sought to enforce cross-retaliation measures, that is to suspend IP protection it is obligated to provide under the TRIPS agreement, to the extent of impairment caused to it – calculated as 21 million USD. Antigua had argued that restricting import of services and/or goods from USA is neither practicable nor effective.

However even a favourable decision dated 9-8-2007 has not helped in resolving the issue. One of the problems for Antigua is to actually account for using up the benefits accorded to it to override TRIPS obligations. Resorting to cross retaliation measure has a precedent in WT/DS27/ARB/ECU wherein Ecuador and USA sought to enforce such measures to remedy impairment due to European Communities regime for importation, sale and distribution of bananas. But, they were not enforced and the issue was resolved through negotiation. The Antiguan government had several rounds of negotiations and has now approached WTO Director General for mediation.

Improving investor climate and sustainable development

The UNCTAD released the World Investment Report, 2012 recently. Focussing on FDI, it states that the growth rate will be slow in 2012 and that Russia's accession to the WTO could increase the role of services sector in transition economies of South-East Europe. The Report also analyses the trends in Investor-State Dispute Settlement (ISDS) and suggests reform to bring greater transparency and legitimacy to the ISDS mechanism.

The Report talks of measures to make International Investment Agreement (IIA) attuned to sustainable development, providing policy

space to national government. It calls for general exception to domestic regulatory measures, making country specific reservations to national treatment (NT) and ensuring investors' compliance with applicable corporate social responsibility standards. An interesting observation in respect of IIA is the concept of Special and Differential Treatment (SDT) for the less developed party. It suggests *inter alia,* making Fair and Equitable Treatment (FET) and NT not legally binding on the less-developed party, limiting the Full Protection and Security (FPS) provision to "physical" security and protection alone and further limiting it to a level commensurate with the country's stage of development and providing for exhaustion of local remedies and alternative dispute resolution.