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## Article

### Brexit: Invalidation of existing trade remedy measures in the EU

By **Bhargav Mansatta**

With the UK parliament passing the Brexit Bill on 14th of March 2017 paving the way for the government to trigger Article 50 of the EU Treaty (which allows the UK to begin the process to exit from the European Union), Brexit may now only be a matter of time.

Among the plethora of trade related issues that may arise on the first day of Brexit, an important issue is that of the continuation of existing trade remedy measures by the EU. As of December 2016, 114 AD measures and 15 CVD measures were in force by the EU.<sup>1</sup>

#### Invalidation of existing anti-dumping and countervailing duties

Two most essential elements under any anti-dumping investigations are (i) determination

of export price for comparison with normal value to arrive at dumping margin and (ii) Injury caused to domestic industry (i.e. the EU industry).

#### (i) Determination of export price

Ordinarily, the export price is the price paid or payable for the product when sold for export from the exporting country to the Union.<sup>2</sup> The export price that is so determined for the product under investigation in the EU is in effect the weighted average of the prices at which the product under investigation was imported by 28 EU member states.

Hypothetical illustration: Imports of stainless steel in the EU in 2013

Country	Import Price (\$)	Quantity (Kg)
Czech Republic	10	50
Spain	15	20
UK	5	100

Weighted average export price of stainless steel determined by the EU would be 7.66\$ per kg. If the normal value for the like product was 10\$, the dumping margin would have been 2.4\$ or 31% (i.e. as the percentage of export price).

Weighted average export price for stainless steel for the EU in the above situation in

absence of the UK i.e. after Brexit would be 11.42\$. Keeping all other factors (normal value, other adjustments) constant, the consequent dumping margin will be negative. The positive dumping margin of 31% becomes incorrect and thereby also the consequent imposition of anti-dumping duty when the UK leaves the EU. The anti-dumping measures in

<sup>1</sup> Anti-dumping, Anti-subsidy, Safeguard statistics covering the 12 months of 2016 (December 2016); 9 AD measures and 6 CVD measures are in force against India.

<sup>2</sup> Article 2(8) of the EU AD Regulation.

force in the EU will be without any factual or legal basis and cannot be continued from the first day of Brexit for this reason alone.<sup>3</sup>

## **(ii) Determination of injury**

Since, export price does not form the basis for determination of subsidy margin or imposition of countervailing duty, countervailing determinations are not affected for the stated reason. However, the injury determination, in both anti-dumping and countervailing duty investigations will get invalidated because of Brexit. Anti-dumping and countervailing duties are imposed only when the injury was caused to the EU industry because of dumped or subsidized imports. The positive determination regarding injury in all the cases is made after analysing a host of economic factors of the Union industry such as profit, return on investment, capacity etc. All the injury determinations that accounted for injury caused to the segment of industry situated in the UK for its conclusion are invalidated on the first day of Brexit. In short, as is the case of export price and the consequent dumping margin, the injury determinations are also without any factual or legal basis.<sup>4</sup>

It will not suffice to suggest, which may be the situation in some of the cases, that the

domestic industry was not located in the UK, and therefore the injury assessment in those cases is not affected by Brexit. Various injury parameters are analysed by the authority for determining injury such as domestic sales, export sales, domestic market share, etc. Exclusion of UK from the EU will affect these indices. For example, EU domestic sales that included sales to the UK are now actually to be accounted as export sales and any loss arising out of decline in such sales have to be considered as an injury caused due to other factors. Needless to say, the change of these indices will eventually affect and perhaps reverse the conclusion regarding existence of material injury.<sup>5</sup>

## **Re-validation of anti-dumping and countervailing duties - Review investigations**

It is arguable that the EU should initiate review investigations in these cases so as to allow continuation of existing duty.

However, such review investigations can only validate the existing anti-dumping duty if the outcome of the review investigation is brought into effect on the first day of Brexit. If the review is initiated on the day of Brexit, anti-dumping or countervailing duty will

<sup>3</sup> The calculation (involving country wise data) for arriving at one export price is not disclosed during the investigation process but it is reasonable to presume the export price determined did also involve the price at which product was imported in the UK and therefore the export price is no longer accurate.

<sup>4</sup> Assessment of Union Interest under Article 21 of the EU Basic Anti-Dumping Regulation is also affected due to Brexit. Interest of domestic industry, user and consumers in the UK should be excluded. However, since there is no corresponding obligation under the WTO Agreements in this regard, the EU will not be under an obligation to carry out re-assessment. Obviously, it does have an obligation to do so under its own law.

<sup>5</sup> The illegality of the determination is even more glaring if the industry was in the UK because in such cases the sales made by that industry to the rest of EU are no longer domestic sales at all but on the contrary are to be accounted as exports made by other non-subject countries.

remain in force pending the review. It is to be noted that anti-dumping duty cannot be levied in excess of the margin of dumping at any point in time.<sup>6</sup> Moreover, no anti-dumping duty or countervailing duty can be imposed in absence of material injury. As noted above, determination regarding dumping and injury are no longer valid and therefore continuation of anti-dumping or countervailing duty after Brexit cannot be considered as legal and consistent under the WTO obligations even during the review investigation period.<sup>7</sup>

It is also not credible to suggest considering the EU system of prospective levy, the anti-dumping duties or the countervailing duties in question were imposed based on the data during the identified period of investigation (POI) - a definite period in the past, and therefore the imposition of duty is legally valid. The argument would effectively imply that the

EU is entitled to continue to collect the duty even though the exporter is dumping goods or is exporting the subsidized goods that is causing injury (at least in part) to a third country.

Article 11(3) of the EU Basic Anti-Dumping Regulation provides for *suo moto* initiation of interim review by the Commission. It is advisable that the EU initiates review investigation beforehand to arrive at a revised determination of dumping and injury on the day of Brexit in all the cases where anti-dumping /counter vailing duty is in force. If the EU fails to amend the existing measures or withdraw the measures altogether, challenge against the existing measures before the WTO DSB can be expected.

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<sup>6</sup> Anti-dumping Agreement, Article 9.3; Article 19.4, Agreement on Subsidies and Countervailing Measures.

<sup>7</sup> Subsequent refund of anti-dumping duty under Article 11(8) of the EU Basic Regulation may not be the appropriate remedy, even assuming it will be possible under the existing cumbersome mechanism. From among the other issues associated with the refunds, it is only possible in case the anti-dumping duty exceeds the dumping margin. Refund of duty is not contemplated for lack of material injury. See Commission Notice concerning the reimbursement of anti-dumping duty, 2002, OJ C 127/10.

## Trade Remedy News

### Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
1,1,1,2-Tetrafluoroethane or R-134a	China	10/2017-Cus. (ADD)	24-3-2017	Provisional assessment for certain new shippers during pendency of New Shipper Review
Aluminum Radiators, Aluminium Radiator Sub-Assemblies and Aluminium Radiator Core, including in CKD or SKD conditions, for use in used/ on road vehicles and generator sets, excluding aluminum radiators meant for use in new automobiles	China	F.No.14/24/2015-DGAD	20-3-2017	Definitive anti-dumping duty recommended to be imposed
Clear Float Glass of nominal Thickness ranging from 4mm to 12mm (both inclusive)	Iran	F.No.14/7/2015-DGAD	20-3-2017	Definitive anti-dumping recommended to be imposed
Dimethylacetamide	China, Turkey	F.No.14/41/2016-DGAD [Case No. OI- 15/2017]	17-3-2017	Anti-dumping investigation initiated
Elastomeric Filament Yarn	China, South Korea, Taiwan and Vietnam	F.No.14/29/2015-DGAD	24-3-2017	Definitive anti-dumping duty recommended to be imposed
Flexible Slabstock Polyol	Thailand	12/2017-Cus. (ADD)	11-4-2017	Definitive anti-dumping duty imposed
Glassware	China, Indonesia	F.No.14/45/2016-DGAD [Case No. OI-20/2017]	28-3-2017	Anti-dumping investigation initiated
Indolinone	China	9/2017-Cus. (ADD)	24-3-2017	Definitive anti-dumping duty imposed (related to anti-circumvention of Diclofenac Sodium)

Product	Country	Notification No.	Date of Notification	Remarks
Linear Alkyl Benzene	Iran, Qatar and China	12/2017-Cus. (ADD)	11-4-2017	Definitive anti-dumping duty imposed
Phosphoric Acid-Technical Grade and Food Grade (Including Industrial Grade)	China	8/2017-Cus. (ADD)	15-3-2017	ADD - Provisional assessment for certain new shippers during pendency of New Shipper Review
Phosphorus Pentoxide or P <sub>2</sub> O <sub>5</sub>	China	FNo.14/47/2016-DGAD [Case No. OI 17/2017]	17-3-2017	Anti-dumping investigation initiated
Polytetrafluoroethylene (PTFE)	Russia	FNo.15/2/2015-DGAD	15-3-2017	Anti-dumping duty imposed by Notification No. 23/2016-Cus. (ADD) recommended to be modified
Toluene Di Isocyanate	China, Japan, Korea RP	FNo.14/36/2016-DGAD	28-3-2017	Provisional anti-dumping duty recommended to be imposed
Veneered Engineered Wooden Flooring	China, Malaysia, Indonesia and EU	FNo.14/34/2016-DGAD	13-4-2017	Extension of time for filing questionnaire response up to 24 April, 2017

### Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Cut-to-Length Carbon-Quality Steel Plate	USA	C-533-818 [82 FR 16790]	6-4-2017	Affirmative CVD sunset review
Hollow Structural Sections	Australia	Anti-Dumping Notice No. 2017/25	15-3-2017	Resumption of the Investigation
Stainless Steel Wire Rods	USA	A-533-808 [82 FR 16795]	6-4-2017	Affirmative ADD sunset review

## WTO News

### EU tariff rate quotas on poultry imports - WTO issues panel report

On 28 March, the panel report in the case brought by China “European Union – Measures

Affecting Tariff Concessions on Certain Poultry Meat Products” (DS 492) was issued by the WTO. China had challenged certain Tariff-Rate Quotas extended by the European Union

to Brazil and Thailand, pursuant to provisions of Article XXVIII of GATT. With respect to two of ten TRQs at issue in this dispute, the Panel found that the EU's allocation of TRQ shares to Brazil and Thailand was inconsistent with the requirements of Article XIII:2. Specifically, the Panel held that EU had failed to factor in changed circumstances and that China had a "substantial interest" in supplying the products concerned.

In another dispute involving poultry, USA has blocked India's request to establish compliance panel, under Article 21.5, to study whether India has complied with the recommendations of the DSB in the dispute DS 430 "*India — measures Concerning the Importation of Certain Agricultural Products*". The Appellate Body had issued its report in June 2015 and India had in July 2016 informed the DSB of adoption of necessary measures to comply with the recommendations and rulings in the dispute. Interestingly, in July 2016, the matter relating to level of suspension of concessions was referred to arbitration pursuant to Article 22.6 of the DSU.

Similarly, in another dispute between Colombia and Panama, the DSB has agreed to establish a panel in terms of Article 21.5 of the DSU, to determine whether Colombia complied with an earlier WTO ruling regarding its import tariffs on textiles, apparel and footwear. Here also interestingly, the matter has already been referred by Panama to arbitration pursuant to Article 22.6 to determine appropriate

level of suspension of concessions or other obligations.

### **Ukraine questions India's anti-dumping duty on Cold rolled/cold reduced flat steel products**

Ukraine has raised questions over India's imposition of provisional anti-dumping duty on certain cold rolled or cold reduced flat steel products. According to Ukraine, while examining underselling, the Indian investigating authority did not explain in the preliminary determination, how the non-injurious price was established, and how the amount of USD 594 per MT corresponds with non-injurious price. The provisional antidumping duty was imposed by India at the amount of difference between the landed value of the subject goods and the amount indicated as USD 594 per MT. As per document G/ADP/Q2/IND/17, dated 28-3-2017, circulated by Ukraine in the Committee on anti-dumping practices, imports from Ukraine were less than 3% during the period of investigation. Ukraine also questions the methodology used by the investigating authority to consider separate and aggregate influence of all other factors on the domestic industry.

### **Mexico disputes Costa Rica's restrictions on avocado imports while Turkey complains about USA's countervailing duty on pipe and tube products**

Mexico has notified the WTO Secretariat of its consultations with Costa Rica regarding certain measures imposed by the latter that allegedly restrict or prohibit import of fresh

avocados from Mexico. According to Mexico, Costa Rica also failed to implement, or recognize in its internal regulations, certain obligations contained in the WTO's Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).

Turkey has also on 8th of March, notified the WTO Secretariat of its consultations with the United States regarding USA's countervailing duties on imports of certain pipe and tube products (DS 523). Turkey claims that certain substantive and methodological aspects of the determinations and the imposition of the countervailing duties in the investigations pertaining to Certain Oil Country Tubular Goods (OCTG), Welded Line Pipe, Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes, and Circular Welded Carbon Steel Pipes and Tubes, are inconsistent with the WTO's Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the General Agreement on Tariffs and Trade (GATT) 1994.

### **Panels established to review US renewable energy measures and Russian transit restrictions**

On March 21, the Dispute Settlement Body (DSB) agreed for establishment of two new dispute panels - one to review a complaint filed by India regarding certain measures at the state level in the United States to promote renewable energy (DS 510) and the second to review Ukraine's complaint regarding restrictions on goods in transit through the Russian Federation. It may be noted that the Appellate Body in its report in September

2016, in another dispute (DS 456) between India and USA, on certain Indian measures concerning renewable energy sector (solar cells and solar modules), had sustained USA's claims that India's measures are inconsistent with WTO non-discrimination obligations under Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.

### **Role of e-commerce in fostering development, discussed**

The Committee on Trade and Development at WTO recently discussed the role of electronic commerce in fostering development amongst members. Generally, members acknowledged the role of e-commerce in providing means and opportunities to promote global trade. However, many developing members also highlighted the digital divide within the membership noting that certain developing countries do not have access to certain basic requirements, such as power supply, connectivity, bandwidth or access to the internet. These members pushed for the role of the Committee to be focused first on resolving these access issues for the developing members.

### **Issues concerning consumer products discussed at TBT committee meeting**

57 specific trade concerns were raised by WTO members at the latest meeting of the TBT Committee on 29th of March. Of these, 9 queries pertained to labelling of food and alcoholic beverages, new energy vehicles, chemicals, cyber security, steel and IT equipment. The United States, Japan, the European Union



and Australia raised concerns about a new Chinese law on cyber security. The members said there is a possibility for discrimination against foreign technologies and IT firms, and that there are uncertainties on the scope of the law and the meaning of certain terms. Issues

were raised regarding EU's law on "organic" labelling and standards and guidelines for radio equipment, Dominican Republic's technical regulations for import of steel rebars, Italy's labeling requirements for grains used to prepare pasta, amongst others.

## Ratio Decidendi

### Circumvention of anti-dumping duty – Scope of product under consideration

The High Court of Delhi has rejected the challenge to initiation of anti-circumvention investigation relating to anti-dumping duty on cold-rolled stainless steel sheets and coils, in respect of coils of width larger than 1250 mm. Anti-dumping duty was imposed on coils of width from 600 mm to 1250 mm and the petitioner relied on the observations- repeated at least in two proceedings, by the Indian authority, about the technical and commercial unviability of importing 1250 mm or more wide goods and then cutting or slitting them to smaller width for use in India. The Court in this regard observed that inquiry that led to earlier findings (and observations), in respect

of imposition of anti-dumping duty, were in the context of likelihood of injury, and that in circumvention proceedings, the trajectory of the inquiry is altogether different. Dismissing the writ petition, the Court was of the view that whilst the decisive nature of the observations of the DA in past instances is compelling to hold that there should not be a fresh inquiry, one cannot be oblivious to the nuanced nature of the circumvention procedure. The Court was not persuaded by the petitioners' argument that the subject matter of the previous orders and observations were the same in circumvention proceedings. [*Suncity Sheets Pvt. Ltd. v. Union of India* - W.P.(C) 3544/2016, C.M. Nos. 15209/2016 & 25402/2016, decided on 8-3-2017, Delhi High Court]

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