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Contents

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Article

SEZs whether eligible constituent of "Domestic Industry" under Indian trade remedial laws?

By **Vikram Agarwal and Greetika Francis**

A policy was introduced on 1st April 2000 by the central government for setting up of Special Economic Zones ("SEZ") in the country with a view to provide an internationally competitive and hassle-free environment for exports. Units may be set up in SEZ for manufacture of goods or rendering of services. The SEZ Act, 2005 was introduced to provide the legal framework for establishment and operation of SEZs. A SEZ is conceived of as an engine to economic growth of the country with a view to attracting investment and generation of foreign exchange through export of goods and services. As per the SEZ Act, 2005, the SEZ units are considered to be producers situated "outside" the customs territory of India.

Thus, it is relevant to consider whether producers located in SEZ are eligible to constitute "Domestic Industry" for the purposes of Indian trade remedial investigations.

Rule 2(b) of Indian Anti-Dumping (AD) Rules defines the term "domestic industry" as "*the domestic producers as a whole engaged in the manufacture of the like article and any activity connected therewith or those whose collective output of the said article constitutes a major proportion of the total domestic production of that article except when such producers are related to the exporters or importers of the alleged dumped article or are themselves importers thereof in such case the term 'domestic industry' may be construed as referring to the rest of producers.*" Similar definition of "domestic industry" exists under the Indian Countervailing Duty (CVD) law as well.

Under the Customs Tariff Act, 1975, the definition of "domestic industry" for the purposes of the Safeguards investigation is ""*domestic industry" means the producers- (i) as a whole of a like article or a directly competitive article in India; or (ii) whose collective output of a like article or a directly competitive article in India constitutes a major share of the total production of the said article in India*".

Based on the definitions for the purposes of trade remedial investigations as noted above, there appears to be no confusion regarding the inclusion of SEZ units as domestic producers and therefore, are eligible to constitute "domestic industry".

However, provisions under the SEZ Act, 2005 hold SEZ units as "outside" India and thereby, not "domestic" producers. Specifically, Section 30 of the SEZ Act, 2005 provides that any goods removed from a Special Economic Zone to the Domestic Tariff Area ("DTA") shall be chargeable to **duties of customs** including anti-dumping, countervailing duty and safeguard duties under the Customs Tariff Act 1975, similar to levy of customs duty on such goods when imported from foreign countries. Further, Section 53 of the Act provides that SEZ shall be deemed "outside" the customs territory of India for undertaking the authorized operations.

It is evident that Section 53 of the SEZ Act creates a "legal fiction" which deems a SEZ unit

as "outside" the Indian custom territory. However, such a fiction is restricted to the authorised operations mentioned under the SEZ Act and do not extend to other Acts and the Constitution of India. All laws applicable in India, except for those specifically provided for by way of the SEZ Act and Regulations, apply equally to SEZs.

An important aspect is to be noted in the provisions of Section 53 of the SEZ Act, 2005 which do not provide that the SEZ is located outside 'India'. Rather, the said provision refers to the expression 'customs territory of India' which though not defined in SEZ Act or the Customs Act, finds reference in the GATT Agreement. Under GATT 1994, 'customs territory' is defined to mean an area subject to common tariff and regulations of commerce. Thus, the term 'custom territory' cannot be equated to the territory of India. Various provisions of SEZ Act, 2005 itself would be redundant and unworkable if SEZ was to be considered an area outside India,[1] which is constitutionally impermissible.[2]

In view of the above facts, there is reason to believe that even though a SEZ unit is dominantly oriented towards serving export markets, it is ultimately a "domestic producer" in India.

Predominance of arguments also lie in favour of considering SEZ units as eligible domestic industry for the following reasons:

(a) The SEZ unit, though falling outside the 'customs territory of India', is a unit manufacturing and operating within the territory of India;

(b) The SEZ unit may be oriented towards export markets, but may also be serving the Indian market;

(c) As a business, the SEZ unit may equally require protection by imposition of duties against imports from certain sources as other Indian producers, especially to the extent that it serves the Indian market.

The issue arises in view of various trade remedy investigations undertaken by the DGTR, wherein the Authority has taken contrary positions with respect to the inclusion / exclusion of SEZ units as part of the "domestic industry". In this regard, we note that in the anti-dumping investigation pertaining to *Solar Cells* (2014),[3] the Authority considered claims pertaining to the exclusion of a domestic producer as it was situated in a SEZ and found that "*there is no explicit exclusion of EOUs / SEZs from the scope of domestic industry*"[4] and went on to include a SEZ unit as part of the eligible domestic industry. Similarly, in the Preliminary Findings with respect to *Electrical Insulators* (2014)[5], the Authority noted that "*Rule 2(b) nowhere provides that an SEZ unit shall not be considered as a part of the domestic producer/ domestic industry*".[6] Per contra, in the Safeguard investigation pertaining to *Solar Cells* (2018)[7], the Authority excluded the SEZ units from the scope of the domestic industry and concluded that domestic industry would constitute of other producers, excluding all the SEZ units.[8] Similarly, even in the anti-dumping investigations concerning *Non Woven Fabrics* (2017)[9], the Authority

[1] *Tirupathi Udyog Limited rep. by its Manager-Administration Shri D.V. Saradhy v. Union of India (UOI) through the Secretary, Ministry of Finance and Ors.* [2011 (272) ELT 209 (A.P.)].
[2] *Essar Steel v. Union of India* [2010 GLH (1) 52].

[3] Anti-Dumping Investigation concerning imports of Solar Cells whether or not assembled partially or fully in modules or panels or on glass or some other suitable substrates, originating in or exported from Malaysia, China PR, Chinese Taipei and USA, Final Findings dated 22 May 2014.
[4] *Id.,* at paragraph 19(xi).
[5] Anti-Dumping investigation concerning imports of Electrical Insulators originating in or exported from China PR, Preliminary Findings dated 1 July 2014.
[6] Id., at paragraph 40.
[7] Safeguard investigation concerning imports of "Solar Cells whether or not assembled in modules or panels" into India, Final Findings dated 16 July 2018.
[8] Id., at paragraph 27 (iv).
[9] Anti-dumping investigation concerning imports of Non-Woven Fabric, originating in or exported from Malaysia, Indonesia, Thailand, Saudi Arabia and China PR, Final Findings dated 2 September 2017.

did not consider the SEZ producer to be eligible for the purposes of constituting domestic industry or for assessing its standing.

Thus, the debate with respect to SEZ as a domestic industry for trade remedial investigations remains a live one. It is hoped that over the course of upcoming investigations the Authority will concretize its stance with respect to the participation of a SEZ unit as "domestic industry".

[Both the authors are Principal Associates in International Trade Practice, Lakshmikumaran & Sridharan, New Delhi]

Trade Remedy News

Trade Remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Acetone	Korea RP, Taiwan, Saudi Arabia	F.No.7/9/2019-DGTR	07-08-2019	Anti-dumping Sunset Review investigation initiated
Atrazine Technical	China PR	F. No. 6/19/2018-DGAD	22-08-2019	Definitive Countervailing duty recommended
Flexible Slabstock Polyol	Singapore	F.No.7/12/2019-DGTR	09-08-2019	Anti-dumping Sunset Review investigation initiated
High-Speed Steel of Non-Cobalt Grade	Brazil, China, Germany	F.No.6/23/2018-DGTR	01-08-2019	Final Findings recommend imposition of definitive anti-dumping duty
Homopolymer of vinyl chloride monomer (PVC) (suspension grade)	China PR, Thailand, United States of America	32/2019-Cus. (ADD)	10-08-2019	Continuation of anti-dumping duty for a period of 30 months with respect to China PR and USA
Jute Products	Bangladesh, Nepal	30/2019-Cus. (ADD)	01-08-2019	Imposition of anti-dumping duty for New Shippers on the basis of residual rates
Jute Products	Bangladesh, Nepal	29/2019-Cus. (ADD)	01-08-2019	Rescind Notification No.23/2018-Cus. (ADD) regarding provisional assessment of jute goods exported by New Shippers till final findings of New Shipper Review

Product	Country	Notification No.	Date of Notification	Remarks
Nylon Multi Filament Yarn	China PR, Korea RP, Taiwan, Thailand	F.No.6/11/2019 -DGTR	09-08-2019	Clarification with respect to PCN issued
Polystyrene	Iran, Malaysia, Singapore, Chinese Taipei, UAE and USA	F. No. 6/10/2019-DGTR	20-8-2019	Extension of time for filing questionnaire response
Refined Bleached Deodorised Palmolein and Refined Bleached Deodorised Palm Oil	Malaysia	F.No.22/4/2019 -DGTR Case No. (SG) 04/2019	14-08-2019	Initiation of Bilateral Safeguard Investigation under India-Malaysia Comprehensive Economic Cooperation Agreement (Bilateral Safeguard Measures) Rules, 2017
Textured Tempered Coated and Uncoated Glass	Malaysia	31/2019-Cus. (ADD)	06-08-2019	Corrigendum issued to rectify Duty Table in Customs Notification No. 12 / 2019 – Customs (ADD)
Welded Stainless Steel Pipes and Tubes	China PR, Vietnam	F.No.6/22/2018 -DGAD	31-07-2019	Final Findings recommend imposition of definitive countervailing duty

Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Polyethylene terephthalate (PET)	European Union	Commission Implementing Regulation (EU) No. 2019/1286	30-7-2019	Definitive countervailing duty imposed subsequent to sunset review
Tubes and Pipes of Ductile Cast Iron (also	European Union	Council Regulation 2019/1250 (Case AD616a)	22-07-2019	Requirement for registration of imports subject to re-opening of investigation in order to implement judgments dated 10 April 2019, in

Product	Country	Notification No.	Date of Notification	Remarks
known as Spheroidal Graphite Cast Iron)				cases T-300/16 and T-301/16, with regard to Implementing Regulations (EU) 2016/387 and (EU) 2016/388 imposing a definitive countervailing duty and a definitive anti-dumping duty

WTO News

Panels established to review US solar cell duties & Indian sugar programmes

On 15 August, in a meeting of the Dispute Settlement Body (DSB), WTO members agreed to China's request for a dispute panel to review a US safeguard measure on imports of crystalline silicon photovoltaic products. While acknowledging the right of WTO members to temporarily suspend concessions and take safeguard measures on imports, China claimed that USA failed to conform to the most essential conditions for the imposition of a safeguard measure. US stated that it was willing to engage in the panel proceedings and asked China to support opening the panel meetings to the public. The DSB agreed to the establishment of the panel. The European Union, Japan, India, Brazil, the Philippines, Russia, Chinese Taipei, Canada and Malaysia reserved their third-party rights to participate in the proceedings.

DSB also agreed to establish panels requested by Brazil, Australia and Guatemala to review India's support measures for the sugar sector. The claim which stands is that India's support to the industry exceeds the levels of domestic support allowed to India under WTO's Agriculture Agreement and that India was granting prohibited export subsidies. India refused to the request for a single panel to review claims. The DSB agreed to the establishment of three panels. The United States, the European Union, Honduras, Russia, Costa Rica, Colombia, Japan, Thailand, Panama, Canada and China all reserved their third-party rights in all three proceedings. Australia, Brazil and Guatemala also reserved third party rights in the proceedings of their fellow complainants.

US renewable energy measures - United States appeals panel report

On 15 August, the United States filed an appeal concerning the WTO panel report in the case brought by India in "*United States — Certain Measures Relating to the Renewable Energy Sector*" (DS510). The panel report was circulated to WTO members on 27 June 2019. The Panel had found that all of the US measures at issue were inconsistent with Article III:4 of the GATT 1994 because they provided an advantage for the use of domestic products, which amounts to less favourable treatment for like imported products. The United States seeks review of the

Panel's legal findings that the amended versions of the Washington State Additional Incentive and the California Manufacturer Adder fell within the Panel's terms of reference and the finding that the measures were inconsistent with Article III:4.

US anti-dumping measure on certain oil country tubular goods from Korea - Korean request for retaliation referred to arbitration

On 9 August, at a DSB Meeting, Korea expressed its disappointment with US for its failure to comply with the rulings and recommendations of the DSB in the dispute DS488, "*United States — Anti-dumping Measures on Certain Oil Country Tubular Goods from Korea*" which had been adopted on 12 January 2018. It requested authorization to suspend concessions at an annual level equivalent to the level of nullification or impairment caused by the United States' failure to comply with the DSB rulings. Korea estimated this level to be US$ 350 million yearly, to be adjusted on an annual basis. The authorization request made by Korea has been referred to WTO arbitration.

India Customs & Trade Policy Update

Fees for excess utilization of duty saved amount can be paid within 2 years: Regional Authorities have been granted power to condone delay in payment of fee for excess utilisation of duty saved amount. As per the new provisions inserted in Para 5.16(a) of the Handbook of Procedures Vol.1, RA may accept additional fee to cover the excess imports, if the same is furnished beyond one month but within two years of the excess imports. This will however be subject to payment of composition fee of Rs. 5000/- per authorization. DGFT Public Notice No. 22/2015-20, dated 31-7-2019 has been issued for the purpose.

Gradual relaxation in percentage of physical examination of exports: CBIC has asked its field formations to gradually taper down the percentage of physical examination in cases wherever the earlier examination has validated the declaration made in the shipping bill. RMCC shall for this purpose consider the feedback received from field formations. Circular No. 22/2019-Cus., dated 24-7-2019 notes that CBIC has received representations wherein exporters have raised the issue of repeated opening of export containers for 100% examination related to risky exporters under the new procedure laid down in Circular 16/2019-Cus.

Global Authorization for Intra-Company Transfer (GAICT) of SCOMET Items/Software/Technology – Procedure specified: Para 2.79F has been introduced in the Handbook of Procedures Vol.1, 2015-20 for laying down the procedure for issuance of Global Authorization for Intra-Company Transfer (GAICT) for SCOMET Items/ Software / Technology. Pursuant to the introduction of the said para, no pre-export authorization will be required for re-export of imported SCOMET items, software and technology (excluding SCOMET Categories 0, 1B, 1C2, 3A401, 5 and 6) subject to the conditions laid down therein. DGFT Public Notice No. 20/2015-20, dated 24-7-2019 has been issued for the purpose.

Ratio Decidendi

Anti-dumping duty – Non-advertence to material placed on record – Sunset review recommending non-continuation of ADD set aside

The High Court of Gujarat has set aside the final findings of the Designated Authority, in a sunset review, recommending non-continuation of anti-dumping duty on imports of paracetamol from China. The Court observed that the conclusion reached in the final findings was diametrically opposite to the disclosure statement as well as observations made in the earlier part of final findings. It noted that while considering factors like surplus capacity in China and analysis of China customs data, the DA in its earlier part of the findings stated that there is probability of Chinese producers/exporters resorting to dumping in the event of removal of ADD, but, in its conclusion stated that domestic industry failed to substantiate its claim. The Court observed that impugned final findings cannot be said to be strictly in accordance with the provision of Rule 23 of Customs Tariff Rules 1995 as there was non-advertence to the material placed on record. It was also held that imports from China, which constituted 98% of total imports and 6% of consumption in India, was more than the insignificant imports as defined in Rule 14(d) of Customs Tariff Rules 1995. Observing that imports were 5.84% as per findings of the DA itself, it set aside the finding that the imports were insignificant.

The High Court also held that there is no inflexible proposition in law that in no case final findings of the Designated Authority can be subjected to challenge under Article 226 of the Constitution. It held that even if alternative remedy of appeal under Section 9C of the Customs Tariff Act 1975 before CESTAT is available, High Court under Article 226 has power to issue necessary order.

Further, the Court took note of the fact that no information as sought was supplied after the Disclosure Statement. Court also held the stand of respondent that information of DGCIS is not in public domain, as unacceptable and that non-supply of information is also a breach of principles of natural justice. [*Framson Pharmaceuticals Gujarat (P) Ltd.* v. *UoI* – Judgement dated 3-7-2019 in R/Special Civil Application No. 5278 of 2019, Gujarat High Court]

Anti-dumping duty – Extra clear float glass different from clear float glass

CESTAT Ahmedabad has held that anti-dumping duty is not leviable on extra clear float glass since it is different from clear float glass. Relying on different literatures, the Tribunal observed that the glass making technique and the raw material of both products were different. It noted that visibility is lower in clear float glass than in extra clear float glass whose price was also higher. Observing that extra clear float glass was not manufactured in India, Tribunal held that there was no injury to the domestic industry. [*Jajoo Architectural Glass* v. *Commissioner* – 2019 VIL 453 CESTAT AHM CU]

Classification of goods – Similarity of contents when not a criterion

CESTAT New Delhi has observed that assorted birthday candles with Chlorate, Potassium, Aluminium, etc., (material for fireworks) only in material contents of the central wig, are not

classifiable as fireworks. The Tribunal for this purpose, relied upon Rule 3(a) of Interpretative Rules and the essential use criteria. It observed that if similarity of contents is the criteria, even matchstick is a firework. Tribunal also held that although CHA is obligated with CBLR Regulations but not every breach leads to revocation of license. [*Jaiswal Cargo Imports Services Ltd.* v. *Commissioner* - Final Order No. 51004/2019, dated 7-8-2019, CESTAT New Delhi]

Classification of goods - No estoppel to raise dispute in subsequent import

Mumbai Bench of CESTAT has held that there is no estoppel in raising classification dispute in subsequent import of a product and that in absence of appropriate classification there is no binding to treat previous classification as the sole option. The Tribunal observed that Granola bar comprised of various products including oats and its character is altered post baking and mixing, and therefore it would not be appropriate to fit it in category of cereals or prepared food in absence of coverage by residuary entry under Heading 1904. [*General Mills India Ltd.* v. *Commissioner* - Final Order No. A/86392 / 2019, dated 13-8-2019, CESTAT, Mumbai]

EPCG scheme – No interest payable on Composition fee as same not duty under Customs Section 28

CESTAT Bangalore has held that composition fee paid for extension in export obligation beyond two-years period is not duty under Section 28 of the Customs Act, 1962. It was held that the final duty under EPCG scheme was yet to be assessed and hence, the interest was not liable to be paid on it. Assessee, importing under EPCG scheme, could not fulfil export obligation within the stipulated time and requested for extension. JDGFT directed to pay 50% duty for unfulfilled export obligation as pre-condition to consider request for extension. Assessee paid the amount with interest on it but subsequently submitted application of refund which was denied holding it as applicable on delayed payment of duty. [*Lulu International Convention Centre Pvt. Ltd.* v. *Commissioner* – 2019 VIL 514 CESTAT BLR CU]

NEW DELHI
5 Link Road, Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014
Phone : +91-11-4129 9811

B-6/10, Safdarjung Enclave
New Delhi -110 029
Phone : +91-11-4129 9900
E-mail : lsdel@lakshmisri.com

MUMBAI
2nd floor, B&C Wing,
Cnergy IT Park, Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

CHENNAI
2, Wallace Garden, 2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU
4th floor, World Trade Center
Brigade Gateway Campus
26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Ph: +91(80) 49331800
Fax:+91(80) 49331899
E-mail : lsblr@lakshmisri.com

HYDERABAD
'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church,
Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail :lshyd@lakshmisri.com

AHMEDABAD
B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE
607-609, Nucleus, 1 Church Road,
Camp, Pune-411 001.
Phone : +91-20-6680 1900
E-mail :lspune@lakshmisri.com

KOLKATA
2nd Floor, Kanak Building
41, Chowringhee Road,
Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH
1st Floor, SCO No. 59,
Sector 26,
Chandigarh -160026
Phone : +91-172-4921700
E-mail :lschd@lakshmisri.com

GURGAON
OS2 & OS3, 5th floor,
Corporate Office Tower,
Ambience Island,
Sector 25-A,
Gurgaon-122001
phone: +91-0124 - 477 1300
Email: lsgurgaon@lakshmisri.com

ALLAHABAD
3/1A/3, (opposite Auto Sales),
Colvin Road, (Lohia Marg),
Allahabad -211001 (U.R)
phone . +91-0532 - 2421037, 2420359
Email:lsallahabad@lakshmisri.com