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AD investigations – Rate of duty for non-cooperating exporters

By **Bhargav Mansatta**

The recent Panel Report in *Canada – Welded Pipe* has reinforced the disciplines for applying "facts available" standard under the WTO Anti-dumping Agreement (AD Agreement) and has clarified the extent of analysis expected from investigating authorities while applying the standard. Article 6.8 read with paragraph 7 of Annex II of the AD Agreement provides the legal basis for determining anti-dumping duty rate for non-cooperative exporter. The third sentence of paragraph 7 of Annex II arguably supports the practice of assigning higher anti-dumping duty rate to such exporters. It states that *"if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate"*.

In the underlying investigation against *Welded Pipe,* Canada established dumping margin and anti-dumping duty rate of 54.2% for "all other exporters" [i.e. exporters which were considered as non-cooperating] on the basis of facts available[1]. Specifically, Canada adopted the highest transaction-specific dumping margin from a cooperating exporter as appropriate for establishing dumping margins and duty rates for such non-cooperating exporters.

The Canadian investigating authority – CBSA, adopted this methodology pursuant to sub-section 29(1) of SIMA based on which normal values will be established by a ministerial specification in case of non-cooperating exporters. The ministerial specification in the relevant part provides as follows:

> *"Normal values of the goods will be based on the export price determined under section 24 or 25 of SIMA plus an amount equal to the highest margin of dumping (expressed as a percentage of the export price), found for the final determination from exporters who were required to provide information and who fully complied with the Agency's request for information."*[2]

Taiwan challenged this decision of CBSA before the WTO DSB and argued that Article 6.8, and Annex II, paragraph 7, required the CBSA to undertake a comparative evaluation and assessment of all the available evidence when selecting facts available. The Panel agreed with Taiwan and observed *that the Statement of reasons contains no comparative evaluation of the facts available, nor any explanation of why the CBSA relied on the highest amount by which the normal value exceeded the export price on an individual*

1 Statement of Reasons concerning Final Determination, November 26, 2012, para. 110.

2 CBSA, SIMA Handbook, sections 5.12-5.14.

transaction for a cooperative exporter[3]. The Panel concluded that the CBSA failed to provide any indication as to how it determined the highest transaction specific dumping margin from a cooperating exporter as appropriate and even the best fitting information. The Panel observed that the CBSA went beyond what was appropriate when it singled out the highest transaction-specific amount of dumping from a cooperative exporter without any comparative evaluation and assessment, and without any form of explanation. Therefore, the Panel concluded that the CBSA acted in a manner inconsistent with Article 6.8 of the Anti-dumping Agreement, and its Annex II, paragraph 7, when establishing the dumping margin and duty rate for "all other exporters".

The Panel has primarily expressed its concern on (i) assigning the highest rate from a cooperative exporter to non-cooperative exporters without any comparative evaluation or assessment and (ii) not providing any form of explanation in the determination.

It may be observed that the practice of determining "all others duty" rate by the Designated Authority in India is no different and thus may not be consistent with the obligations under Article 6.8 of the Anti-dumping Agreement. For example, in a recent case in *Normal Butanol* originating in or exported from, among others, European Union, the Designated Authority while determining dumping margin of non-cooperative exporters stated that:

> *"the highest domestic selling price of cooperative exporters without any adjustment is taken into consideration for the computation of NV. For the determination of ex- factory export price, the lowest export price of cooperative exporters with adjustments as noted in case of cooperative exporters is taken into consideration."*[4]

In other words, like CBSA, the final findings of the Designated Authority calculated highest dumping margin for non-cooperative exporter based on the price information from cooperating exporter[5]. Also, it offered no explanation as to how it determined that the highest domestic selling price as the normal value and the lowest selling price to India as the export price from a cooperating exporter was appropriate and even the best fitting information.

In the United States, the methodology of assigning duty rate to non-cooperating exporter slightly varies. There is some element of comparative evaluation of data while

[3] Panel Report, *Canada-Welded Pipe,* para. 7.135.

[4] Anti-dumping investigation concerning imports of Normal Butanol or "N-Butyl Alcohol" originating in or exported from European Union (EU), Malaysia, Singapore, South Africa and United States of America (USA), 19th February, 2016.

[5] In fact, the practice of Designated Authority is perhaps more onerous for non-cooperating exporter as it selects highest normal value of a transaction and the lowest export price in other transaction instead of limiting itself to one individual transaction that reflects the highest dumping margin.

determining rates for such non-cooperative exporters. Recently in *Certain Polyethylene Terephthalate (PET) Resin* from India, the USDOC adopted the rate assigned in the petition as the applicable rate (AFA rate) for Dhunseri who was considered as non-cooperative. The petitioners argued that as an alternative to the petition rate, the USDOC should base Dhunseri's margin based on constructed normal value calculated upon petitioner's own consumption quantities valued variously at Dhunseri, Indian, or U.S. values for each input and partly from Dhunseri's audited 2015 financial statement, and based on calculation [of export price] drawn from US sales document that Dhunseri submitted [as part of its partial response to questionnaire]. The USDOC, in response, disagreed with the submission of the petitioner and explained that it is its practice of assignment of the highest rate from the petition as the AFA rate for non-cooperating respondents in the investigation and that it may choose to use the highest transaction-specific margin calculated for any cooperative respondent as the AFA rate (as petitioners suggest) if a petition margin cannot be corroborated with the information on record which was not the case in that investigation[6]. However, it is difficult to assume that the explanation provided by the USDOC would be considered as adequate or that the practice would be considered as consistent with the obligations under Article 6.8 of the Anti-dumping Agreement if it were to be challenged before the WTO DSB.

Nevertheless, it seems that the current practice of the Designated Authority is susceptible to challenge. At the very least, the Panel Report in *Canada – Welded Pipe* makes it clear that explanation stating the reason for preference for one set of information over the other is necessary even if assigning the highest possible rate in all cases is not inconsistent *per se* with the obligations under Article 6.8 of the Anti-dumping Agreement.

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

[6] Issues and Decision Memorandum for the Final Determination of the Less-Than-Fair-Value Investigation of Certain Polyethylene Terephthalate (PET) Resin from India, 4 March 2016, Comment 14.

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	F.No.15/22/2016-DGAD [Case No. NSR 2/2017]	27-2-2017	ADD New Shipper Review initiated
Aluminium Foil	China	F.No.14/06/2015-DGAD	10-3-2017	Definitive anti-dumping duty recommended in final findings
Cold rolled flat products of stainless steel widths from 600 mm to 1250 mm	China, Korea, EU, South Africa, Taiwan, Thailand and USA	F.No.14/1/2014-DGAD	17-2-2017	Extension of last date in respect of Anti-circumvention case
Flexible Slabstock Polyol	Thailand	F.No.14/34/2015-DGAD	21-2-2017	Definitive anti-dumping duty recommended in final findings
Indolinone - Unfinished form of Diclofenac Sodium (DFS)	China	F.No. 14/22/2014-DGAD	15-2-2017	Definitive anti-dumping duty recommended in final findings issued in anti-circumvention investigation
Jute Products – Jute yarn/twine, Hessian fabric and Jute sacking bags	Bangladesh and Nepal	F.No. 14/19/2015-DGAD, Corrigendum	9-2-2017	Duty table revised
Linear Alkyl Benzene	Iran, Qatar and China PR	F.No.14/20/2015-DGAD	6-3-2017	Definitive anti-dumping duty recommended in final findings
Methyl Ethyl Ketone or MEK	China, Japan, South Africa and Taiwan	F.No.14/26/2016-DGAD [Case No. OI 06/2017]	9-2-2017	Anti-dumping investigation initiated
Monoisopropylamine (MIPA)	China	F.No.14/46/2016-DGAD [Case No. OI 07/2017]	15-2-2017	Anti-dumping investigation initiated
Nylon Filament Yarn	China, Chinese Taipei, Malaysia, Indonesia, Thailand and Korea RP	F.No.15/17/2016-DGAD	9-3-2017	Time for filing questionnaire response extended

Product	Country	Notification No.	Date of Notification	Remarks
Phosphoric Acid -Technical Grade and Food Grade (including Industrial Grade)	China	F.No.15/5/2016-DGAD [Case No.NSR 1/2017]	9-2-2017	ADD New shipper review initiated
Polyester Staple Fibre	China, Indonesia, Malaysia and Thailand	F.No.14/49/2016-DGAD [Case No. OI 04/2017]	2-2-2017	Anti-dumping investigation initiated
Seamless tubes, pipes and hollow profiles of iron, alloy or non-alloy steel	China	7/2017-Cus. (ADD)	17-2-2017	Definitive anti-dumping duty imposed
Veneered Engineered Wooden Flooring	China, Malaysia, Indonesia and European Union	F.No. 14/34/2016-DGAD [Case No.- OI 08/2017]	17-2-2017	Anti-dumping investigation initiated

Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Graphite electrode systems	EU	Commission Implementing Regulation (EU) 2017/422 and 2017/421	9-3-2017	Anti-dumping duty and countervailing duty continued after sunset review
New Pneumatic Off-the-Road Tyres	USA	A-533-869 [82 FR 12553]	6-3-2017	Anti-dumping duty order issued
New Pneumatic Off-the-Road Tyres	USA	82 FR 12556 [C-533-870]	6-3-2017	Countervailing duty Order issued
Resealable can end closures	Australia	Anti-dumping Notice No. 2017/16	17-2-2017	Anti-dumping investigation terminated
Stainless steel wires	EU	Commission Implementing Regulation (EU) 2017/220	8-2-2017	Anti-dumping duty revised following partial interim review

WTO News

Russia-EU disputes – Appellate Body partly upholds panel's finding on Russian import restrictions on pigs, pork from EU, while Russia files another appeal against panel ruling on LCV vehicles from EU

WTO Appellate Body has on 23rd February issued its report in the case *"Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union"* (DS475). Russia had imposed a EU-wide ban on imports of live pigs and their genetic material, pork, pork products and certain other commodities from the European Union, purportedly because of concerns related to instances of outbreak of African swine fever (ASF) in Estonia, Latvia, Lithuania, and Poland. The Appellate Body upheld the findings of the panel that the ban was not in compliance with regionalization requirements under the SPS Agreement (Article 6.1), which Russia was mandated to follow. Panel's finding that the European Union had provided the necessary evidence to objectively demonstrate to Russia, pursuant to Article 6.3, that certain areas within the European Union's territory were, and were likely to remain, ASF-free, was also upheld by the Appellate Body. The Appellate Body however reversed the Panel's findings regarding Russia's recognition of "pest- or disease-free areas" and "areas of low pest or disease prevalence in respect of ASF", and the finding that therefore measures are inconsistent with Russia's obligations under Article 6.2 of the SPS Agreement.

In another dispute between Russia and the European Union, the Russian Federation has on 20th of February, filed a notice of appeal in the case brought by the European Union in *"Russia — Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy"* (DS479). Russia seeks review by the Appellate Body of the Panel's findings regarding the relationship between Article 6.5 and Article 6.9 of the AD Agreement with respect to data retrieved from the national electronic customs database as well as data submitted by the participating German exporting producer. Further, Russia also seeks to review Panel's interpretation of Article 4.1 of the AD Agreement.

Meanwhile, on 24th of February, European Union has in its reply to Russia, in respect of the former's steel import licensing system, has stated that the TARIC code, at 10-digit level, is an essential element to be included in the surveillance document since it gives the most detailed information regarding the description of the product that will be imported. It is stated that a 6-digit level would be inaccurate. EU requires that imports of certain steel products be subject to prior Union surveillance in order to provide early and advanced statistical information permitting rapid analysis of import trends from all non-EU member countries, already at the level of the intention to import.

According to the document circulated in Committee on Import Licensing on 24th of February, the measures provide for only 5% deviation in price and quantity for imports, which according to Russia is not as per the normal commercial practice in steel trade.

Indonesia files appeals against panel ruling on agricultural import measures, and against ruling on EU dumping duties on fatty alcohol

Indonesia has on 17th of February filed a notice of appeal in the cases brought by New Zealand and the United States in *"Indonesia – Importation of Horticultural Products, Animals and Animal Products"* (DS477 and 478). Indonesia seeks review by the Appellate Body of the Panel's findings regarding the illegality of Indonesia's quantitative restrictions on imports of certain products, which it claims is maintainable by virtue of Article XI:1(c) and Article XX(a).

Further, Indonesia has also filed a notice of appeal in the case *"European Union – Anti Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia"* (DS442). Indonesia seeks review by the Appellate Body of the Panel's findings regarding Article 2.4 and 17.6 of the AD Agreement.

Panel established in Turkish complaint over Moroccan steel duties

On 20 February, the Dispute Settlement Body (DSB) agreed to establish a panel to examine Turkey's complaint regarding anti-dumping duties imposed by Morocco on imports of hot-rolled steel from Turkey – *Morocco - Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey* (DS513). According to Turkey, the measures appear to violate Articles 1, 3.1, 3.2, 3.4, 3.5, 5.10, 6.8, 6.9, 18.1 and paragraph 1, 3, 5, 6 and 7 Annex II of the Anti-Dumping Agreement, along with some provisions of the Import Licensing Procedures and the GATT, 1994. India along with China, Egypt, the European Union, Japan, Kazakhstan, Korea, the Russian Federation, Singapore and the United States have reserved their third party rights to participate in the panel proceedings.

Trade Facilitation Agreement comes into force

On 22 February, the Trade Facilitation Agreement (TFA) entered into force after ratification by Rwanda, Oman, Chad and Jordan. The WTO Members hailed its entry in a General Council meeting held on 27th of February and pledged to work towards advancing the full implementation of the Agreement. According to some studies by the WTO, full implementation of the TFA would slash members' trade costs by an average of 14.3%, with developing countries gaining the most. The TFA is also likely to reduce the time needed to import goods by over a day and a half and to export goods by almost two days, representing a reduction of 47% and 91% respectively over the current average. Meanwhile it may be noted that India has, on 23rd of February, submitted draft text for trade facilitation in services. As per reports, the draft will be discussed within the council for trade in services during 14-17 March.

News Nuggets

DG Azevêdo visit to India – Advancing global trade and the role of the WTO

On 9 February, DG Azevêdo on his visit to New Delhi, India met members of the Confederation of Indian Industry. He stated that a number of trade issues of interest to India's economy were under discussion at the WTO, ahead of the 11th Ministerial Conference in Buenos Aires this December. He drew attention to discussions on agriculture issues and the facilitation of services trade, where India has been playing a leading role in discussions in Geneva, and pledged his support to help advance this work. During his visit the Director-General met Nirmala Sitharaman, Indian Commerce Minister as well as representatives from the private sector and experts across a range of sectors, including agriculture. Mr. Azevêdo also attended the WTO@20 conference organised by the Appellate Body in New Delhi.

Ratio Decidendi

Anti-dumping duty – Consideration of analogous ME country when goods shipped through intermediate country

The Court of Justice of the European Union has rejected the contention that the EU authorities can make use of data from an analogous market economy country only in order to replace data from countries of production with no market economy. The issue involved imposition of anti-dumping duty on solar modules from China, and the applicant was of the view that the Regulation was adopted in breach of Article 2 of the Basic Regulation in so far as it imposed anti-dumping measures calculated on the basis of a non-market economy methodology on products from market economies. It was argued that the institutions did not calculate separate dumping margins for cells originating in third countries but consigned from China, modules originating in third countries but produced in China or modules originating in China but produced in third countries.

The court in this regard was of the view that by using the expression 'in the case of imports from non-market economy countries' in Article 2(7)(a) of the Basic Regulation, the legislature did not intend to limit the use of data of market-economy third countries to countries where the latest, even non-substantial, processing or working took place, before export to the European Union, namely the country of origin. It was held that by such expression, the intention was to refer to the 'exporting country', in accordance with Article 1(2) and (3) of the Basic Regulation.

Finally it was held that for cells and modules originating in and consigned from China and for modules originating in China but consigned from third countries, the consideration of exporting country as the country of origin

would not be contrary to Article 1(3) of the basic regulation, regardless of whether non-substantial processing or working took place in a third country from which the product was shipped to the European Union. It was also held that the intermediate country can similarly be considered as the exporting country for modules consigned from China but originating in a third country. [*Canadian Solar Emea GmbH* v. *Council of the European Union* – Judgement dated 28-2-2017 in Case T-162/14, CJEU]

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.P.)
Phone : +0532 – 2421037, 2420359
Email: lsallahabad@lakshmisri.com