Lakshmikumaran & Sridharan attorneys

INTERNATIONAL TRADE

amicus

An e-newsletter from
Lakshmikumaran & Sridharan, India

November 2016 / Issue 66

Contents

November
2016

Article

Alignment of 'Period of Investigation' in AD and CVD investigations to avoid double remedy

By **Aman**

Paragraph 5 of Article VI of the General Agreements on Tariffs and Trade, 1994 (hereinafter referred to as "GATT") states that *"No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization"*. As is evident from the text of the provision, Article VI:5 prevents a situation of double remedy/compensation for the "same situation" of "dumping" or "*export* subsidization" (and not "*domestic* subsidization") in relation to concurrent anti-dumping (AD) and countervailing duty (CVD) investigations.

It must be noted that an *export* subsidy will result in a *pro rata* reduction in the export price of a product, but will not affect the price of domestic sales of that product; and the subsidy will lead to a higher margin of dumping. In such circumstances, the situation of subsidization and the situation of dumping are the '*same situation*'. In other words, the dumping margin already accounts for the export subsidy in such cases; and the application of concurrent duties would amount to the application of 'double remedies' to compensate for, or offset, a same situation. It is, therefore, also logical to see why there is an express prohibition in connection with situations of *export* subsidization and not *domestic* subsidization.[1] Such an interpretation is supported by the Report of the Appellate Body (hereinafter referred to as the "AB") of the World Trade Organization (hereinafter referred to as "WTO") in the *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, 11th March 2011 (hereinafter referred to as *"US — Anti-Dumping and Countervailing Duties (China)"*). The relevant extract of the AB Report is reproduced below:

> *"Article VI:5 prohibits the concurrent application of antidumping and countervailing duties to compensate for the same situation of dumping or export subsidization. In our view, the term 'same situation' is central to an understanding of the rationale underpinning the prohibition contained in Article VI:5, which in turn sheds light on the reason why, in the case of domestic subsidies, an express prohibition is absent.*
>
> *We recall that, in principle, an export subsidy*

[1] Only in a situation where the normal value is *not* based on actual prices in the exporter's domestic market *can there be a possibility* that the concurrent application of anti-dumping and countervailing duties on the same product could lead to 'double remedies'. See para 569 of *US — Anti-Dumping and Countervailing Duties (China)*.

will result in a pro rata reduction in the export price of a product, but will not affect the price of domestic sales of that product. That is, the subsidy will lead to increased price discrimination and a higher margin of dumping. In such circumstances, the situation of subsidization and the situation of dumping are the 'same situation', and the application of concurrent duties would amount to the application of 'double remedies' to compensate for, or offset, that situation. By comparison, domestic subsidies will, in principle, affect the prices at which a producer sells its goods in the domestic market and in export markets in the same way and to the same extent. Since any lowering of prices attributable to the subsidy will be reflected on both sides of the dumping margin calculation, the overall dumping margin will not be affected by the subsidization. In such circumstances, the concurrent application of duties would not compensate for the same situation, because no part of the dumping margin would be attributable to the subsidization. Only the countervailing duty would offset such subsidization.

To the extent that these assumptions hold true, then the presence, in Article VI, of an express prohibition on the concurrent application of duties to counteract the 'same situation' of dumping or export subsidization, along with the absence of an express prohibition in connection with situations of domestic subsidization, appears logical — at least when normal value is calculated on the basis of domestic sales prices."[2]

Section 9B(1)(a) of the Customs Tariffs Act, 1975 in India (hereinafter referred to as "Customs Tariff Act") incorporates Article VI:5 of GATT. However, there is no jurisprudence in relation to this issue in India.

This Article discusses that in order to avoid the "double compensation" pursuant to Article VI:5 of GATT and Section 9B(1)(a) of the Customs Tariff Act – the Period of Investigation (hereinafter referred to as "POI") in the AD and CVD Investigations should be aligned when the AD and CVD investigations are initiated in relation to the same imported product.

The need for alignment of POI

As mentioned above, to avoid compensation for the same situation of dumping and export subsidization in the form of both AD and the CVD measures, it is necessary to use the same POI in both AD and CVD investigations.

If the POI is not aligned and kept common for both the AD and CVD investigations, it would be difficult to determine the amount of duty to be imposed especially taking into account the requirements of 'Lesser Duty Rule' applicable in jurisdictions like India and the European Union. If the amount of injury margin determined in Period A for say AD investigation is to be compared with

[2] See paras 567-569 of *US — Anti-Dumping and Countervailing Duties (China)*.

the amount of injury margin determined for Period B in CVD investigation, it would be difficult to determine at what level the ceiling would operate – injury margin of Period A or the injury margin of Period B. Assuming Period A is an earlier period and Period B is a later period, dumping margin and/or subsidy margins in the two periods will not remain the same. And if AD duty is imposed to the full extent of injury margin for Period A and in the subsequent Period B, if the injury margin is higher, one can still impose CVD to the extent of the difference between the injury margin for Period B and that of Period A, though there would not have been any CV Duty if Period A had remained the POI for both the investigations.

To implement the aforesaid provision, members of the WTO select a common POI in both the investigations to avoid any complications in respecting its obligations under Article VI:5 of the GATT. As an illustration, one can see the practice of the European Union which has maintained a common POI for both AD and CVD Investigations in pursuance of its obligation under Article VI:5 GATT equivalent under EU law [i.e. paragraph 1 of Article XIV of Regulation (EU) 2016/1036 of the European Parliament and the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (codification)]. In the instances cited below the European Authority had initiated the AD and CVD Investigation for the same POI for the same product under consideration:

- *In a) Council Regulation (EC) No. 2603/2000 of 27 November 2000 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain polyethylene terephthalate originating in India, Malaysia and Thailand* and b) *Council Regulation (EC) No. 2604/2000 of 27 November 2000 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain polyethylene terephthalate originating in India, Indonesia, Malaysia, the Republic of Korea, Taiwan and Thailand.* The POI in both the cases was 1st October 1998 to 30th September 1999.
- *In a) Council Regulation (EC) No. 1628/2004 of 13 September 2004 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain graphite electrode systems originating in India* and b) *Council Regulation (EC) No. 1629/2004 of 13 September 2004 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain graphite electrode systems originating in India.* The POI in both the cases was 1st April 2002 to 31st March 2003.
- *In a) Council Regulation (EC) No. 599/2009 of 7 July 2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in the United States of America* and b) *Council Regulation (EC)*

No. 598/2009 of 7 July 2009 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in the United States of America. The POI in both the cases was 1st April 2007 to 31st March 2008.

- *In a) Council Regulation (EC) No. 452/2011 of 6 May 2011 imposing a definitive anti-subsidy duty on imports of coated fine paper originating in the People's Republic of China* and *Council Regulation (EC) No 452/2011 of 6 May 2011* and b) *Council Regulation (EC) No. 451/2011 of 6 May 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of coated fine paper originating in the People's Republic of China.* The POI in both the cases was 1st January 2009 to 31st December 2009.
- *In Commission Implementing Regulation (EU) No. 1379/2014 of 16 December 2014 imposing a definitive countervailing duty on imports of certain filament glass fibre products originating in the People's Republic of China and amending Council Implementing Regulation (EU) No. 248/2011 imposing a definitive anti-dumping duty on imports of certain continuous filament glass fibre products originating in the People's Republic of China.* The POI in both the cases was 1st October 2012 to 30th September 2013.

Therefore, to avoid double remedy that Article VI:5 and Section 9B(1)(a) of the Customs Tariff Act prohibit, it is important that the concerned authorities of the AD and the CVD Investigations should align the POIs to make any "set off" of AD and CVD possible, especially in jurisdictions like India which follow the "lesser duty rule".

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

Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Ammonium Nitrate	Indonesia, Russia, Georgia, Iran	14/01/2016-DGAD	31-10-2016	Extension for filing Questionnaire Response
Caustic Soda	Japan, Qatar	14/31/2015-DGAD	14-10-2016	Anti-dumping investigation initiated
Ceramic Tablewares and Kitchenwares	China	4/5/2016-DGAD	13-10-2016	Anti-dumping investigation initiated

Product	Country	Notification No.	Date of Notification	Remarks
Colour coated / pre-painted flat products of alloy or non-alloy steel	China and European Union	14/28/2016-DGAD	20-10-2016	Provisional ADD recommended
Jute Products (Jute Yarn / Twine, Hessian fabric, Jute sacking bags)	Bangladesh, Nepal	14/19/2015-DGAD	20-10-2016	Definitive Anti-dumping duty recommended
Low Ash Metallurgical Coke	Australia, China	14/9/2015-DGAD	20-10-2016	Definitive Anti-dumping duty recommended
Normal Butanol	Saudi Arabia	14/20/2016-DGAD	14-10-2016	Extension for filing Questionnaire Response
Resorcinol	China, Japan	14/37/2016-DGAD	13-10-2016	Anti-dumping investigation initiated
Sulphonated Naphthalene Formaldehyde	China	14/15/2016-DGAD	13-10-2016	Anti-dumping investigation initiated
Wire Rod of Alloy or Non-Alloy Steel	China	51/2016-Cus. (ADD)	2-11-2016	Provisional Anti-dumping duty imposed

Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Lined Paper Products	United States of America	[A-533-843] 81 FR 24823	14-10-2016	Preliminary Results of ADD Administrative Review
Lined Paper Products	United States of America	[C-533-844] 81 FR 70091	11-10-2016	Preliminary Results of CVD Administrative Review; Calendar Year 2014 – Net subsidy rate determined for specific manufacturer
Oil Country Tubular Goods	United States of America	[C-533-858] 81 FR 24799	14-10-2016	Preliminary Results and Partial Rescission of CVD Administrative Review
Resealable Can End Closures	Australia	Statement of Essential Facts No. 350	6-10-2016	Implementation of provisional dumping measures

WTO News

Steel continues to be at centre of discussions at WTO

Steel and various trade remedy measures put in place by various Member countries against imports of steel continued to be the centre point of many discussions at the WTO last month. While, at the meeting of the WTO's Committee on Anti-Dumping Practices on 27 October, 2016, many countries raised concerns regarding the rising number of trade remedial actions against steel imports, similar concerns were also raised at the meeting of Safeguards Committee on 24th of October. Further, in a meeting of Committee on Import Licensing on 3rd of November, European Union's recently introduced surveillance measure on imports of certain steel and iron products was also discussed by number of countries.

India's practice and recent anti-dumping actions were questioned by number of countries. While China raised its concerns about an Indian practice called "complete value chains," whereby India asks all companies in an exporting chain — including both related and unrelated companies — to respond to questionnaires in an investigation, according to Japan and Ukraine India's investigation into imports of cold-rolled steel from Japan and Ukraine which resulted in a preliminary determination of dumping was inconsistent with WTO rules. Ukraine also challenged investigations by Russia which led to the imposition of AD duties on bars and rods and ferrosilicon manganese from Ukraine as well as a new investigation on hot-rolled steel.

Further, while China and the Russia expressed concerns over the investigations initiated by the European Union on imports of cold-rolled and hot-rolled steel, the concerns about rise in trade defence measures in the steel sector was echoed by Brazil which cited specific instances of initiation of investigation by the USA on imports of hot-rolled and cold-rolled steel.

At the Meeting of the Safeguards Committee, while reviewing around 17 Safeguard investigations on steel products, Japan, Brazil, Canada, Australia, the United States, Korea, Chinese Taipei, European Union, Hong Kong (China) and China voiced concerns about the increasing number of safeguard actions being notified to the committee for review. These members said that safeguards should only be used in exceptional circumstances, as such measures generally affect all exporters of the targeted product.

Interestingly, Saudi Arabia, on 5 October 2016, on behalf of the GCC member states, notified the WTO's Committee on Safeguards that it initiated on 3 October 2016 a safeguard investigation on Ferro-silico-manganese, and Turkey has sought consultations with Morocco over latter's anti-dumping measures on hot-rolled steel.

Turkey seeks consultation with Morocco over anti-dumping measures on steel

On 4 October, Turkey notified the WTO Secretariat that it had requested dispute

consultations with Morocco regarding anti-dumping duties imposed by Morocco on imports of Turkish hot-rolled steel (DS513). The duties entered into force on 26 September 2014. Turkey alleges that the Moroccan measures are inconsistent with a number of procedural and substantive provisions of the WTO's Anti-Dumping Agreement. It may be noted that this is the first WTO dispute case involving Morocco as a party.

The request for consultation primarily challenges various aspects of the Moroccan anti-dumping measures, *inter alia,* duration of the Investigation (Article 5.10), improper use of "facts available" to determine dumping margins (Article 6.8 and Annex II), non-disclosure of essential facts (Article 6.9), import Restrictions (Article 18.1 as well as Articles I:1, X:1, X:2, X:3(a) and XI:1 of the GATT 1994 and Articles 3.2 and 3.3 of the Import Licensing Agreement) and the injury/causation determination (Articles 3.1, 3.2, 3.4, and 3.5).

China blocks US panel request in dispute over raw materials

On 26 October, 2016, in the meeting of the Dispute Settlement Body (DSB), China has blocked USA's attempt to seek establishment of the panel in the dispute DS508 (*China — Export Duties on Certain Raw Materials*). According to the United States, while China continued to maintain export restraints on other raw materials and the measures are inconsistent with WTO rules and China's accession commitments, China stated that this policy was a key part of its efforts to protect the environment and it was not in a position to accept the establishment of a panel. The dispute involved measures affecting export of various forms of antimony, cobalt, copper, graphite, lead, magnesia, talc, tantalum, and tin. Under WTO rules, a request for the creation of a panel can be blocked in the first instance and hence the DSB deferred the establishment of a panel.

Interestingly, European Union has also requested consultations with China regarding China's duties and other alleged restrictions on the export of various forms of antimony, chromium, cobalt, copper, graphite, indium, lead, magnesia, talc, tantalum and tin (DS509).

WTO issues panel report regarding US anti-dumping duties on Chinese imports

Panel report in the case brought by China regarding *"United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China"* (DS471) has been issued by the DSB panel on 19-10-2016. In this dispute, China had raised claims with respect to certain issues concerning anti-dumping measures imposed by the United States Department of Commerce (USDOC). USDOC's use of the exceptional weighted average-to-transaction (WA-T) methodology, including its use of zeroing under this methodology; treatment of multiple exporters from non-market economies (NMEs) as a NME-wide entity (single rate presumption); and its use of facts available in determining anti-dumping duty rates for such entities, as well as the level of such duty rates, were alleged

to be in violation of the WTO provisions by China here.

The Panel upheld China's claims, in specific as-applied instances regarding the inconsistency of the US practice of applying zeroing in the dumping margin calculations made through the WA-T methodology. It was also held that the Single Rate Presumption constitutes a measure of general and prospective application, which is, as such, inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement. As regards China's claims concerning the use of adverse facts available, the Panel observed that China could not demonstrate that the alleged AFA Norm constitutes a norm of general and prospective application.

Appellate Body issues report regarding EU duties on biodiesel from Argentina

WTO's Appellate Body has on 6-10-2016 issued its report in the case *"European Union – Anti Dumping Measures on Biodiesel from Argentina"* (DS473). This dispute concerns two sets of measures of the European Union. First, Argentina's "as such" claims against Article 2(5), second subparagraph, of Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (the Basic Regulation). Second, Argentina challenged certain aspects of the anti-dumping measures imposed by the European Union on imports of biodiesel from Argentina. The Panel had rejected Argentina's "as such" claim. However, it upheld several of its challenges against the measures imposed by the European Union on imports of biodiesel from Argentina.

The Appellate Body has now upheld the Panel findings. The Appellate Body concurred with the view of the panel that EU authorities' determination that domestic prices of soybeans in Argentina were lower than international prices due to the Argentine export tax system was not, in itself, a sufficient basis for concluding that the producers' records did not reasonably reflect the costs of soybeans associated with the production and sale of biodiesel, or for disregarding the relevant costs in those records when constructing the normal value of biodiesel. The Appellate Body Report was also adopted by the WTO Member's on October 26, 2016.

Philippines and Iceland ratify Trade Facilitation Agreement

Philippines and Iceland have ratified Trade Facilitation Agreement (TFA) on 27th and 31st of October, 2016, respectively. With these ratifications, total of 96 Member of the WTO have till now endorsed the new multilateral agreement. It may be noted that the TFA will enter into force once two-thirds of the WTO membership has formally accepted the Agreement. Over 86 per cent of the ratifications needed for entry into force have been received already.

India's Agreement on Trade in Services with Association of Southeast Asian Nations, questioned

On reply to the series of questions posed by USA on India's agreement on Trade in Services with the Association of Southeast Asian Nations,

India has stated that additional sectors, namely accounting and book keeping Services, excluding auditing services, architectural services, integrated engineering services, urban planning services, medical and dental services, and services provided by midwives, nurses, physiotherapists and para-medical personnel, under the professional services category have been committed by India and that these were not committed in GATS. Document WT/REG372/2, dated 25-10-2016 circulated in Committee on Regional Trade Agreement, also states that under engineering services, limitations on Market Access and National Treatment were made 'None' from 'Unbound' under modes of supply 1 and 2.

Ratio Decidendi

Confidentiality of information supplied by uninterested party

The Designated Authority, in garb of unclaimed confidentiality, cannot avoid its responsibility to act fairly in its quasi-judicial role and refuse to indicate reasons for its findings. The Larger Bench of the Supreme Court of India while observing so, held that Rule 7 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 [Indian AD Rules] does not postulate that the DA can claim confidentiality and that too not in respect of any information supplied by a party but in respect of its reasons or findings derived from information supplied by the very same party.

It was held that in cases where it is not possible to accept a claim of confidentiality, Rule 7 leaves no option with the authority but to ignore such confidential information if it is of the view that the information is really not confidential but the concerned party does not agree to its being made public. The department in the dispute had contended that the use of the term 'any party' in the opening sentence of Rule 7(1) in place of the expression 'interested party' indicates that if the DA is satisfied about confidentiality of information without specific authorisation, he may be justified in his action whereby he himself claims confidentiality in appropriate cases without any party exercising the right of confidentiality.

The Apex Court however was of the view that in case the DA is conceded power to gather information from sources other than interested parties, he should not treat such information as confidential unless the party which has supplied the information makes a request to keep the information confidential. It was held that even in such a situation where uninterested party claims confidentiality in respect of information supplied, as per Rule 7, the DA has to take all necessary precautions to decide the genuineness of such claim.

Finally, it was held that though judgement in the case of *Reliance Industries* case did not go into the details of the relevant Rules including Rule 7, the observations made therein in respect of rule of confidentiality as spelt out in said Rule do not diminish its scope. [*Union of*

India v. Meghmani Organics Ltd. - 2016-TIOL-170-SC-CUS-LB]

ADD – Computation of normal value – Relationship between producer and distributor

The Court of Justice of the European Union has upheld the Order of the General Court wherein the lower court had held that in order to assess whether a single economic entity (producer and trader) existed, the activities of the related trader concerning products other than the product in dispute has also to be taken into account, as also the proportion of sales made by that distributor that relate to products from unrelated producers.

The Court was of the view that in order to reflect the economic reality of the relationship between that producer and that distributor, the EU institutions are required to take into account all factors relevant to the determination as to whether or not that distributor carries out the functions of an integrated sales department for that producer. It was noted that the factors cannot be limited to the functions carried out by the related distributor in connection only with the sales of the product concerned, manufactured by the producer which claims to form a single economic entity with that distributor.

Additionally, the Court was of the view that a distributor that forms a single economic entity with a producer established in a third State cannot be regarded as carrying out functions comparable to those of an agent working on a commission basis, within the meaning of Article 2(10)(i) of the basic regulation. Article 2(10)(i) of the Basic Regulation provides that an adjustment is to be made for differences in commissions paid in respect of the sales under consideration and that the term 'commissions' is to be understood to include the mark-up received by a trader of the product or the like product if the functions of such a trader are similar to those of an agent working on a commission basis. [*PT Perindustrian dan Perdagangan Musim Semi Mas v. Council of the European Union* – Judgement dated 26-10-2016 in Case C-468/15 P]

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

INTERNATIONAL OFFICES :

LONDON
Lakshmikumaran & Sridharan Attorneys (U.K.) LLP
Octagon Point,
St. Paul's,
London EC2V 6AA
Phone : +44 20 3823 2165
E-mail : lslondon@lakshmisri.com

GENEVA
Lakshmikumaran & Sridharan SARL
35-37, Giuseppe Motta
1202 Geneva
Phone : +41-22-919-04-30
Fax: +41-22-919-04-31
E-mail : lsgeneva@lakshmisri.com