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INTERNATIONAL TRADE

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An e-newsletter from
Lakshmikumaran & Sridharan, India

October 2016 / Issue 65

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October
2016

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Targeted dumping: An examination

By **Prianka Mohan**

Targeted dumping is dumping that is targeted at a certain purchaser, region or time period. The law permits the use of an alternative methodology for computation of the dumping margin if there is targeted dumping. The legal provisions relating to targeted dumping are set forth in Article 2.4.2 of the Agreement on Implementation of Article VI of GATT 1994 ("Anti-dumping Agreement"). The manner of triggering the provisions for using a different basis for comparison was examined in a recent ruling of the WTO Dispute Settlement Body and provides guidance on the issue.

The WTO Appellate Body in *United States – Anti-dumping Measures and Countervailing Measures on Large Residential Washers from Korea*[1] was issued in September and a key issue in the dispute was concerning the United States' use of alternative methodologies for price comparison based on the fact that there was targeted dumping. The present article analyzes the nature of the examination to be undertaken under Article 2.4.2 of the Anti-dumping Agreement in light of the findings of the WTO Appellate Body in the above dispute.

Legal provisions relating to targeted dumping

Article 2.4.2 of the Anti-dumping Agreement relates to the nature of the fair comparison to be undertaken while computing the dumping margin in investigations. It provides, in relevant part, as under:

> "[. . .] the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

The first sentence of Article 2.4.2 of the Anti-dumping Agreement sets out comparison methodologies that should normally be used in determining the dumping margin in investigations. There is flexibility provided on whether to undertake a weighted average-to-weighted average ("W-W") comparison or a transaction-transaction ("T-T") comparison.

[1] Appellate Body Report, *United States – Anti-dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R (7 September, 2016)

The second sentence sets out a third comparison methodology, that may be used only in exceptional cases.[2]

The requirements or conditions for use of the third methodology may be segregated into three parts[3] – the "methodology clause", the "pattern clause" and the "explanation clause". The "methodology clause" sets forth that a comparison may be undertaken of the weighted average normal value with prices of individual export transactions ("W-T"). The conditions that are to be met for use of the W-T comparison are provided in the "pattern clause" and the "explanation clause". The authority must identify a pattern that is present in respect to export prices differing significantly among "purchasers, regions or time periods". Lastly, an explanation must be provided as to why the differences that are identified in the pattern cannot be taken into account by use of the W-W or T-T methodology. Set forth below is an examination of the key requirements under each clause.

The 'methodology clause"

The "methodology clause" relates to the transactions on which the W-T comparison methodology may be used. In particular, the W-T methodology can be used only in respect to individual transactions and not all export transactions. In other words, the W-T comparison should be used only for the pattern transactions or the transactions which are considered as being targeted.

The Panel held that the W-T methodology cannot be used for all transactions and must be restricted only to the targeted transactions. The same is also apparent from the intent of Article 2.4.2 of the Anti-dumping Agreement. In particular, Article 2.4.2 of the Anti-dumping Agreement was included with the intent of dealing with "masked, selective dumping". If the W-T methodology were used for all export transactions, then the very intent of provision would be lost. Therefore, once the requirements relating to the "pattern clause" and "explanation clause" are satisfied, the W-T comparison methodology may be used only in respect to the pattern transactions.

The "pattern clause"

The pattern clause is integral as identification of the pattern is the trigger for resorting to the W-T methodology. The Panel defined a pattern as a "regular and intelligible form or sequence discernible in certain actions or situations." The Appellate Body agreed with this definition and noted that a pattern would consist of a certain set of transactions, termed as targeted transactions, that differ significantly from the other transactions in respect to their export prices. These pattern

[2] Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada (Recourse to Article 21.5 of the DSU by Canada)*, WT/DS264/AB/RW (15 August, 2006), Paras 86 and 97; Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (9 January, 2007), Para 131.

[3] Panel Report, *United States – Anti-dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R (11 March, 2016), Para 7.9.

transactions would therefore be a sub-set in the primary set of export transactions that have been identified based on differences arising in reference to purchasers, region or time period, pursuant to Article 2.4.2 of the Anti-dumping Agreement.

One of the issues before the DSB in reference to the "pattern clause" was whether the practice of the United States where it identifies a pattern based on an examination of export transactions across all three categories cumulatively is permissible. In particular, the United States identifies a pattern *across* purchasers, regions *and* time periods rather than "among purchasers, regions or time periods". The Panel and Appellate Body held that a pattern can be found only if the prices are found to differ among different purchasers or among different regions or among different time periods. It is not possible for a "regular" and "intelligible" sequence to be present across the three categories. The Appellate Body noted that there is the possibility that a pattern that is found in respect to transactions to a particular purchaser is in a certain region, therefore there would be a pattern of significantly differing prices among different purchasers and among different regions.

Nonetheless, it is fairly clear that a pattern under Article 2.4.2 of the Anti-dumping Agreement will be present only if the exports prices to a particular purchaser are lower than export prices to other purchasers, or export prices to a particular region are lower than export prices to other regions, or export prices during a particular time period are lower than export prices during other time periods. There is the possibility of an overlapping of the sequences or patterns but the same cannot be determined based on an examination of factors cumulatively across the three factors.

Another issue that arose in regard to identification of pattern under the second sentence of Article 2.4.2 of the Anti-dumping Agreement is whether the identification of the "targeted" transactions can be based purely on quantitative criteria or is there also an obligation to undertake a qualitative analysis. The Panel had found that a quantitative analysis is sufficient and that there is nothing in the text of Article 2.4.2 that indicates that the authority should go into the factual aspects surrounding the transactions identified. This was however reversed by the Appellate Body.

The Appellate Body clarified that the legal provision provides that a pattern exists only if prices "differ significantly". The inclusion of the word significant imposes not only an obligation to undertake a quantitative analysis but also a qualitative analysis. The Appellate Body made it clear that the authority would not need to consider the cause or the reasons for the price differences but would need to consider certain objective market factors. An example provided in the findings provides clarity. A minor numerical difference in cases where the prices are high would not be considered as "significant" but if the prices were low, the same would be "significant". Therefore, the identification of the pattern should be pursuant to a quantitative and qualitative analysis.

The "explanation clause"

The last requirement under the second sentence of Article 2.4.2 of the Anti-dumping Agreement is to provide an explanation as to why the price differences identified in the pattern transactions cannot be accounted for by using the W-W or the T-T comparison methodology. The issue that arose in regard to the obligation under the "explanation clause" in the dispute was whether the authority must provide an explanation for why both the W-W *and* T-T comparison methodology cannot be used or whether the W-W *or* T-T comparison methodology cannot be used.

The Panel held that the authority would satisfy the requirements under the "explanation clause" if it provides an explanation in respect to only one type of comparison and not both. It noted that the provision requires that an explanation be provided for why "*a* weighted average-to-weighted average *or* transaction-to-transaction comparison" does not take into account the price differences. The use of "a" and "or" imply that the explanation is to be provided for one of the methodologies and not both.

However, the Appellate Body reversed the Panel's findings and held that the W-T comparison is an exceptional methodology that is permitted to be used only when the normal comparison methodologies are not suitable. If the explanation provides reasons for the inappropriateness of only one of the normal comparison methodologies and fails to account for the other methodology, although it may have taken into account the price differences, then the rationale for making the W-T methodology permissible only in exceptional circumstances is defeated. Thus, an authority would need to provide an explanation for both the methodologies prior to resorting to the W-T methodology.

The other ambit of the obligation under the "explanation clause" is the nature of the explanation that needs to be provided. The obligation, in essence, is what would be considered as "appropriate" in the context of the second sentence of Article 2.4.2 of the Anti-dumping Agreement. In the facts of the dispute, the explanation that had been provided by the United States was that the W-W comparison conceals differences and further that there was a difference between the margin of dumping using the W-W comparison and the margin of dumping using the W-T methodology.

The Panel held that the above reasons would not be considered as satisfying the requirements of the "explanation clause". The mere presence of the difference in the dumping margin based on the two methodologies cannot be a reason for using the W-T comparison methodology as the rationale for permitting the use of the W-T methodology is to unmask such individual transactions that are protected under the W-W methodology. Therefore, the explanation would need to examine the factual circumstances surrounding the investigation to satisfy the requirements under Article 2.4.2 of the Anti-dumping Agreement.

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

Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
4,4Diamino Stilbene2, 2 Disulphonic Acid	China PR	15/18/2015-DGAD	26-9-2016	Mid-term review recommends continuation of revised ADD
AA Dry Cell Batteries	China PR and Vietnam	14/31/2014-DGAD	27-9-2016	DGAD recommends non-imposition of ADD
Ammonium Nitrate	Russia, Indonesia, Georgia and Iran	14/01/2016-DGAD	20-9-2016	ADD–Time for submission of questionnaire response, extended till 17-10-2016
Axle for Trailers	China PR	14/17/2015-DGAD	30-9-2016	Definitive ADD recommended
Caustic Soda	Chinese Taipei	15/10/2016-DGAD	30-9-2016	ADD–Time for submission of questionnaire responses, extended till 14-10-2016
Narrow Woven Fabric	China PR	50/2016-Cus. (ADD)	6-10-2016	ADD continued after sunset review
Ofloxacin	China PR	14/06/2016-DGAD	4-10-2016	ADD investigation initiated
Ofloxacin Acid (O-Acid)	China PR	14/31/2016-DGAD	21-9-2016	ADD investigation initiated
Polybutadiene Rubber (PBR)	Korea PR, Russia, South Africa, Iran and Singapore	14/40/2016 DGAD	16-9-2016	ADD investigation initiated
Soda Ash	Turkey and Russia	15/17/2015-DGAD	23-9-2016	Mid-term review recommends revocation of ADD
Soda Ash	China PR, EU, Kenya, Pakistan, Iran, Ukraine and USA	15/28/2014-DGAD	23-9-2016	Mid-term review recommends revocation of ADD
Toluene Di-Isocyanate (TDI)	China PR, Japan and Korea RP	14/36/2016-DGAD	5-10-2016	ADD investigation initiated
Wire Rod of Alloy or Non-Alloy Steel	China PR	14/17/2016-DGAD	27-9-2016	Provisional ADD recommended

Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Cold-Rolled Steel Flat Products	USA	81 FR 64436 [C-533-866]	20-9-2016	CVD Orders issued
Welded Stainless Pressure Pipe	USA	81 FR 66921 [A-533-867]	29-9-2016	ADD – Estimated weighted average dumping margin determined at 12.66%
Welded Stainless Pressure Pipe	USA	81 FR 66925 [C-533-868]	29-9-2016	CVD – Subsidy rates determined ranging from 3.13 to 6.22%
Zinc Coated (Galvanised) Steel	Australia	Anti-Dumping Notice No. 2016/105	7-10-2016	Investigation into alleged dumping and subsidization initiated

WTO News

India's domestic content requirement for solar products violate WTO Rules – Appellate Body upholds panel report

The Appellate Body of the WTO's DSB in its report on 16-9-2016, upheld the findings of the panel that India's domestic content requirement for solar cells and modules violates provisions of Article III:4 of the GATT 1994 and Article 2.1 of the TRIMS Agreement (DS456). Relying on its earlier report in dispute *Canada – Renewable Energy / Canada – Feed-in Tariff Program* (DS426), the Appellate Body was of the view that the measures are not covered by the government procurement exemption under Article III:8(a) of the GATT 1994, because the procured product (electricity) was not in a "competitive relationship" with the product discriminated against (solar cells and modules for production of electricity). It was observed that under Article III:8(a), the product purchased by way of procurement must necessarily be "like", or "directly competitive" with or "substitutable" for the foreign product subject to discrimination.

The panel's finding that solar cells and modules are not "products in general or local short supply" in India within the meaning of Article XX(j) of the GATT 1994, was also upheld by the Appellate Body thus holding that the measures were not justified under the said provisions. Certain guidelines in this regard were also set by the panel for the purpose of assessing as to whether products are "in general or local short supply" within the meaning of Article XX(j). Finally, the measures were also held to be in violation of the provisions of Article XX(d) of the GATT which establishes a general exception for measures necessary to "secure

compliance" with a WTO Member's "laws or regulations" which are not themselves GATT-inconsistent. Observing that India could not demonstrate that the passages and provisions of the domestic instruments, set out the rule "to ensure ecologically sustainable growth while addressing India's energy security challenge, and ensuring compliance with its obligations relating to climate change", the Appellate Body recommended that the DSB request India to bring its measures into conformity with its obligations under WTO Agreements.

Interestingly, India has also filed a dispute against USA's domestic content requirement in renewable energy sector (DS510). India, in this dispute, alleges that states of Washington, California, Montana, Massachusetts, Connecticut, Michigan, Delaware and Minnesota also provide illegal subsidies in the renewable energy sector.

Further, it may be noted that in another dispute between India and USA relating to restrictions on agricultural products imposed by India (DS430), though India has asked for sequencing of events i.e. establishment of compliance panel before arbitration for retaliation proceeds, according to USA, there is no such provision in the WTO Rules.

EU aircraft subsidies – Compliance panel report issued

WTO panel has issued its report under Article 21.5 (compliance of the DSB recommendations) in the dispute *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft,* wherein USA had in the year 2004 alleged that European Communities (now EU) and certain of its member countries were providing subsidies inconsistent with their obligations under the SCM Agreement and GATT 1994, which affected trade in large civil aircrafts. The compliance panel is of the view that EU and certain member States failed to implement DSB recommendations and rulings to bring their measures in conformity with their obligations under the SCM Agreement. It was observed that out of the 36 compliance steps said to be taken by EU, only two could be characterized as "actions" concerning the degree of ongoing subsidization of 'Airbus' while remaining 34 steps were only assertion of facts or presentation of arguments for the purpose of supporting European Union's theory of compliance.

It may be noted that the Appellate Body had in 2011 held that the measures put in place by EU were incompatible with Article 5(c) of the SCM Agreement, and EU had in December 2011 informed the DSB that the measures have been brought in conformity with the WTO Rules. Finding that EU has failed to implement the recommendations and rulings of the DSB to bring its measures into conformity with its obligations under the SCM Agreement, the panel was of the view that the measures nullified/impaired benefits accruing to the United States.

Interestingly, the EU has also disputed certain US measures as providing prohibited subsidies to the large aircrafts produced in

the USA (DS353), and the compliance panel report is awaited in the dispute.

China initiates safeguard investigation on sugar

China initiated a safeguards investigation on imports of sugar on 22 September, 2016. The interested parties are to present evidence and comments on the investigation to the Trade Remedy and Investigation Bureau of MOFCOM within 20 days of the initiation notice. Further, interested parties are to register themselves within 20 days of the publication of the initiation notification.

Russia files appeal against panel report in 'pork import restrictions'

Russia has filed appeal before the Appellate Body of the DSB, against certain findings of the panel in the dispute *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union* (DS475). It may be noted that the panel had in August this year observed that the EU-wide ban and the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are inconsistent with Article 6.1 of the SPS Agreement. According to Russia, panel failed to give full legal effect to the Russian Federation's Accession Protocol, and to recognize the sequencing inherent in the bilateral veterinary certificates. It is now alleged that the Panel hence erred under Articles 1.1, 2.2, 2.3, 3.1, 5.1, 5.2, 5.3, 5.6, 5.7, 6.1, 6.3, 8 and Annex C of the SPS Agreement. Further, Russian Federation also appeals the Panel's conclusions that the European Union has objectively demonstrated that areas within the European Union are and are likely to remain free of African swine fever.

However, in another recent dispute between EU and Russia (DS485), wherein Russia's certain measures, which lead to application of customs duties in excess of those set forth in its Schedule of Concessions, were found to be inconsistent with first sentence of Article II:1(b) of the GATT 1994, Russia has decided not to appeal against the panel report.

It may also be noted that recently, Ukraine, a former State in the erstwhile USSR, has filed a dispute against Russia over latter's transit restrictions. According to the document WT/DS512/1 circulated on 21-9-2016, restrictions on traffic in transit that the Russian Federation has recently adopted and implemented following Ukraine's decision to start the implementation of the Deep and Comprehensive Free Trade Area with the European Union on 1-1-2016 are inconsistent with the Russian Federation's WTO obligations.

US disputes Chinese subsidies on agricultural products

United States has sought consultations with China alleging provision of excess domestic support to certain agricultural producers of specified products. As per document dated 13-9-2016 by the US delegation to WTO, China appears to provide domestic support in excess of its commitment level specified in Section I of Part IV of its Schedule CLII because it provides domestic support in excess of its product-specific *de minimis* level of 8.5

percent for wheat, Indica rice, Japonica rice, and corn. Listing out various legal instruments through which China provides domestic support, document circulated in WTO on 20-9-2016 states that the measures appear to be inconsistent with China's obligations pursuant to Articles 3.2, 6.3, and 7.2(b) of the Agriculture Agreement (AoA).

It may be noted that this is the first dispute of the kind brought before the WTO, particularly after the agreement reached in 2013 Ministerial meeting held in Bali, Indonesia, wherein the Members had agreed to refrain from challenging through the WTO Dispute Settlement Mechanism, compliance of a developing Member with its obligations under Articles 6.3 and 7.2 (b) of the AoA in relation to support provided for traditional staple food crops in pursuance of public stockholding programmes for food security purposes.

Panel established in dispute between Colombia and EU over imported spirits

The Dispute Settlement Body on 26 September, 2016 established the Panel in the dispute concerning imported spirits between Colombia and the European Union. The EU had made the second request for establishment after Colombia had blocked its first request.

The dispute concerns certain measures in relation to the treatment that Colombia accords at the national level and departmental level to imported alcoholic beverages. Brazil, Canada, Chile, China, El Salvador, Guatemala, India, Kazakhstan, Korea, Mexico, Panama, the Russian Federation, Chinese Taipei and the United States hare reserved their rights as third parties in the proceedings.

Ratio Decidendi

Anti-dumping–Application of alternative methods for computation of cost of production for Normal value, when not permissible

The European Court of Justice has held that not every measure of the public authorities of the exporting country, which could have an influence on the price of the raw materials (Crude Palm Oil in the case) and, as a result, on the price of the product in question, can be considered as source of a distortion that permits the authorities of the importing country to discard the prices included in the records of the party under investigation for the purpose of computation of normal value. The Court in this regard was of the view that otherwise, the principle enshrined in the first sub-paragraph of Article 2(5) of the Basic regulation (that records of the party concerned are the prime source of information in order to establish costs of production), would be rendered useless. It was held that only when measure causes appreciable distortion of the prices of the raw material, can the price be disregarded and that the institutions must rely on direct evidence, or at least on circumstantial evidence pointing to the existence of the factor for which the adjustment was made.

It may be noted that according to Article 2(5) of the Basic regulation, if costs of production and sale of the product are not reasonably reflected in the records of the party concerned, they are to be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets.

The ECJ further held that hence it is necessary to examine whether the EU authorities had established to the requisite legal standard the conditions for disregarding the prices of the raw material as contained in the records of the exporter. It was observed that although the EU authorities had alleged that the DET system having differential export duties on products ensured that larger quantities of the raw material was available in the domestic market and thereby distorted the prices, it could not establish the extent to which this led to appreciable distortion of the prices in the domestic market of the exporter. The CJEU hence annulled Articles 1 and 2 of Council Implementing Regulation (EU) No. 1194/2013, dated 19-11-2013 imposing a definitive anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia, in so far as it concerned specified exporters. [*PT Wilmar Bioenergi Indonesia* v. *Council of the European Union* – Judgement of General Court (Ninth Chamber) dated 15-9-2016 in Case T-139/14]

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