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Article

Connotation of term “Country of Export” in Anti-Dumping Duty Notification

By Aayush Singla

An Anti-dumping duty is levied against the goods originating in or exported from the subject countries. The final findings issued by the Directorate General of Anti-Dumping and Allied Duties (“DGAD”) and the Customs Notification issued by the Central Government contain a ‘duty table’ which sets out the amount of anti-dumping duty for different combinations of producers/exporters from various countries. The duty table has, *inter alia*, four columns namely, ‘Country of Origin’, ‘Country of Export’, ‘Producer’, ‘Exporter’. The meaning of the terms ‘Country of Origin’ and ‘Producer’ is quite obvious and clear. ‘Country of Origin’ means the country where the goods are manufactured i.e. where they originate and the producer is the person/entity who manufactured the goods. However, number of times doubts have been raised as to what is the meaning of ‘Country of Export’ and ‘Exporter’ and what are the relevant factors that determine the ‘Country of Export’. The article aims to explain the connotation of the term ‘Country of Export’ in context of anti-dumping duty notifications.

In today’s business environment, it is a common practice for manufacturing companies to have extended trading arms (whether related or unrelated) which may be established in different countries for managing the export business. For example, a manufacturing company in China may have a company registered in Singapore for managing its export transactions to India. In such a situation, goods are first sold by the Chinese company to the Singapore company which are then re-sold to the Indian Customers. However,

goods are, in most the cases, shipped directly from China to India. Therefore, while the goods are moving directly from China to India, it is only the invoicing/ documentation which takes place *via* Singapore. This brings us to a question as to which country is the Country of Export in such a scenario, China or Singapore? The Country of Export, in this case, would be China because the country of export is decided on the basis of physical shipment of goods to India irrespective of the physical presence of the exporter on record in that country. It is only the location and physical movement of goods that matters. The location of exporter is irrelevant. This fundamental principle has also been outlined by the CESTAT in *Borax Morarji Limited v. Designated Authority*¹ in which it was held that:

- *Para 3: “Admittedly, the producer ETI Maden of Turkey did not export the product itself, but the product was exported from Turkey to India through Boro Chemi International Pvt. Ltd., Singapore. The subject goods, which were exported did not reach India via Singapore, but were directly exported from Turkey to India. Obviously, therefore, the exports were made from Turkey, even though the exporter Boro Chemi International Pvt. Ltd., who was the Area Agent of the producer for Asia was located in Singapore. **Even where an exporter is located outside the country of export, he would remain competent to export the goods from the country of export and merely, because he operates***

¹ *Borax Morarji Limited v. Designated Authority* - 2007 (215) E.L.T. 33 (Tri. - Del.)

from some other country, the export cannot be said to have been made from that other country where the office of the exporter may be located. Even by operating from country other than the country of export, a person can export goods from the country of export and his physical presence in the country of export will not be necessary to effect the exports that he makes from the exporting country, subject of course to the municipal laws of that country.” (emphasis supplied)

- **Para 10.1: “..... It is obvious that a person can export goods from a country without himself remaining physically present there.....”** (emphasis supplied)

In the above paragraphs, the Hon’ble CESTAT has observed that a person can export the goods from a country without himself remaining physically present there. In other words, the CESTAT observed that there exists no nexus in the location of the exporter and the country of export. The country of export is, therefore, the country from where the goods are shipped to India irrespective of the physical presence of the exporter on record.

Therefore, in the example discussed earlier, if an anti-dumping duty notification is in place against the goods originating in or exported from China, the column ‘Country of Export’ in the duty table will contain China and the column ‘Exporter’ will have the name of the Singapore company which is the exporter on record. Therefore, the goods exported by the Singapore Company will be said to have been exported from China, the country of export.

Let us consider another situation. Suppose an anti-dumping duty is in force against a product originating in or exported from Malaysia. A producer in Vietnam (non-subject country) also manufactures the same product. An exporter (trader), located in Malaysia, purchases the goods from the producer in Vietnam and sells them to customers in India but the goods are shipped directly from Vietnam to the India. In this situation, the country of origin as well as the country of export for the imported goods is Vietnam. Therefore, no anti-dumping duty is leviable because the imported goods are neither originating in nor exported from the subject country i.e. Malaysia. Interestingly, the exporter is located in Malaysia and the import documents bear the name of Malaysian exporter, still the goods will not be liable for anti-dumping duty. In practice, the Customs Authorities might argue that since the exporter is located in Malaysia, the goods will be liable to anti-dumping duty. However, the same will be incorrect in light of the fundamental principle discussed above.

Conclusion

The country of export is determined on the basis of the place from where the goods are physically shipped. The location of exporter is irrelevant. The name of the exporter is mentioned in the duty table of the anti-dumping duty notification because of the Indian practice of giving combination (producer and exporter combination) rate of duty.

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Trade Remedy News

Trade Remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
1-Phenyl-3-Methyl-5-Pyrazolone	China	F.No.15/3/2016-DGAD	9-8-2017	ADD sunset review recommends termination of definitive anti-dumping duty
Ammonium Nitrate	Russia, Indonesia, Georgia and Iran	44/2017-Cus. (ADD)	12-9-2017	Definitive anti-dumping duty imposed
Belting Fabric	China	F.No. 14/35/2016-DGAD	23-8-2017	ADD investigation initiated
Castings for Wind Operated Electricity Generators	China	42/2017-Cus. (ADD)	30-8-2017	Definitive anti-dumping duty imposed
Caustic Soda	Japan and Qatar	F.No.14/31/2015-DGAD	4-10-2017	Time for completion of ADD investigation extended till 13-1-2018
Ceramic Tableware and Kitchenware, excluding knives and toilet items	China	File No.14/05/2016-DGAD	4-10-2017	Time for completion of ADD investigation extended till 12-1-2018
Color coated/pre-painted flat products of alloy or non-alloy steel	China and European Union	F.No.14/28/2016-DGAD	30-8-2017	ADD - Final findings recommends imposition of definitive anti-dumping duty
High Tenacity Polyester Yarn	China	F.No.6/12/2017-DGAD	22-9-2017	ADD - Corrigendum to initiation Notification – Changes in PUC

Hot Rolled and Cold Rolled Stainless steel flat products	China	1/2017-Cus. (CVD)	7-9-2017	Definitive Countervailing duty imposed
Melamine	European Union, Iran, Indonesia and Japan	F.No. 7/14/2017-DGAD and 47/2017-Cus. (ADD)	22-9-2017 and 6-10-2017	Add Sunset Review investigation initiated and anti-dumping duty extended till 7-10-2018
Metronidazole	China	41/2017-Cus. (ADD)	29-8-2017	Anti-dumping duty extended till August 28, 2018 consequent to initiation of sunset review
Naphthalene in both its forms - Crude and Refined	Crude from China, European Union, Russia, Iran, and Japan Refined from China, European Union and Taiwan	F.No.354/86/2017-TRU	16/08/2017	ADD - Extension of time period of anti-dumping duty investigation upto 30th November, 2017
New/unused pneumatic radial tyres with or without tubes and/or flap of rubber (Including tubeless tyres) for buses and trucks	China	45/2017-Cus. (ADD)	18-9-2017	Definitive anti-dumping duty imposed
Non-Woven Fabric	Malaysia, Indonesia, Thailand, Saudi Arabia and China	F. No. 14/23/2015-DGAD	2-9-2017	ADD - Final findings recommends termination of investigation
Normal Butanol or 'N' Butyl Alcohol	Saudi Arabia	F.No.354/196/2017-TRU	24-8-2017	ADD - Extension of time period of anti-dumping duty investigation upto 1 st December, 2017

Nylon Filament Yarn	China, Chinese Taipei, Malaysia, Indonesia, Thailand and Korea RP	F.No.15/17/2016-DGAD	25-9-2017	ADD sunset review - Clarification on PCN methodology to be followed
Nylon Filament Yarn (Multi Filament)	EU and Vietnam	F.No.14/33/2016-DGAD	25-9-2017	ADD - Extension of time for filing questionnaire response
Nylon Filament Yarn (Multi Filament)	EU and Vietnam	F.No.14/33/2016-DGAD	22-8-2017	ADD investigation initiated
O-Acid	China	F. No. 14/31/2016-DGAD	18-9-2017	ADD - Extension of time period for completing investigation
Para Nitro Aniline (PNA)	China	F.No.15/09/2016-DGAD	29-8-2017	ADD - Final findings recommends imposition of definitive anti-dumping duty
Polybutadiene Rubber or PBR	Korea RP, Russia, South Africa, Singapore and Iran	Office Memorandum F.No.354/216/2017-TRU	6-9-2017	ADD - Time for completing investigation extended
Resorcinol	China and Japan	File No.14/37/2016-DGAD	27-9-2017	ADD – Time period for conclusion of investigation extended till 12-1-2018
Rubber Chemicals (TDQ & PX-13, MOR and MBTS)	EU and China	F. No. 15/5/2016-DGAD	2-9-2017	ADD sunset review recommends continuation of duty on PX-13 from EU and MOR from China
Straight Length Bars & Rods of Alloy Steel	China	F.No.6/10/2017-DGAD	22-9-2017	ADD investigation initiated
Styrene Butadiene Rubber (SBR) of 1500 and 1700 series	European Union, Korea RP or Thailand	43/2017-Cus. (ADD)	30-8-2017	Definitive anti-dumping duty imposed

Sulphonated Naphthalene Formaldehyde (SNF)	China	F.No.354/267/2017-TRU	29-9-2017	Time for completion of ADD investigation extended till 12-1-2018
Toluene Di-Isocyanate (TDI)	China, Japan, Korea	F.No.354/82/2017-TRU	26-9-2017	ADD – Time period for extension of investigation extended till 4-1-2018
Wire Rod of Alloy or Non-alloy steel	China	F.No.14/17/2016-DGAD	30-8-2017	ADD - Final findings recommends imposition of definitive anti-dumping duty

Trade Remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Carbazole Violet Pigment 23	USA	[C-533-839] 82 FR 42648	11-9-2017	Rescission of Countervailing Duty Administrative Review; 2015
Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel	USA	[C-533-874] 82 FR 44558	25-9-2017	Preliminary Affirmative Countervailing Duty Determination
Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel	USA	[A-533-873] 82 FR 42788	12-9-2017	Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations
Frozen Warmwater Shrimp	USA	[A-533-840] 82 FR 43517 and 82 FR 43740	18-9-2017/19-9-2017	ADD Administrative Review; 2015-2016 - Final weighted-average dumping margins
Hollow Structural Sections	Australia	2017/129	14-9-2017	Termination of anti-dumping investigation
Polyethylene Terephthalate Resin	USA	[A-533-861] 82 FR 43525	18-9-2017	Rescission of Antidumping Duty Administrative Review; 2015/2017
Polyethylene Terephthalate Resin (PET)	Canada	Canada International Trade Tribunal	18-8-2017	Initiation of Investigation into alleged dumping and injurious subsidization.

Resin)			Press Release		
Stainless Steel Flanges	USA		[C-533-878] 82 FR 42654	11-9-2017	CVD investigation initiated
Stainless Steel Flanges	USA		731-TA-1383-1384	2-10-2017	ADD - Determination of reasonable indication of material injury
Welded Carbon Steel Pipes and Tubes	USA		[A-533-502] 82 FR 46485	5-10-2017	ADD - Affirmative findings in sunset review



WTO News

China Tariff Rate Quotas for certain agricultural products - Panel established in DS517

On 22nd September, 2017, the WTO Dispute Settlement Body agreed to establish a panel to rule on a complaint filed by the United States regarding China's administration of its tariff rate quotas (TRQs) for certain imported farm goods. USA has concerns regarding China's administration of its TRQs for wheat, short- and medium-grain rice, long-grain rice and corn. This is the second time that the establishment of panel in this issue was requested. Australia, Brazil, Canada, Ecuador, European Union, Guatemala, Indonesia, Japan, Kazakhstan, Korea, Norway, Russian Federation, Singapore, Chinese Taipei and Viet Nam have reserved their third-party rights to participate in the panel proceedings.

Ukraine files dispute against Kazakhstan's anti-dumping duties

On 21st September, 2017, Ukraine requested WTO consultations with Kazakhstan regarding anti-dumping measures levied by the latter on certain types of steel pipes imported from

Ukraine. The request for consultations has been filed under Article 4 of the Understanding on rules and procedures governing the settlement of disputes. Ukraine in this regard alleges violation of various provisions of the Anti-dumping agreement and the GATT 1994.

Korea-India Comprehensive and Economic Partnership Agreement reviewed

On September 20, 2017, the WTO members reviewed Korea-India Comprehensive Economic Partnership Agreement at a meeting of the Committee on Regional Trade Agreements (CRTA). Only aspects of the RTA notified by the parties under the General Agreement on Trade in Services (GATS) were covered. India-Korea CEPA had entered into force on 1 January 2010. India and Korea said they are currently in negotiations to "upgrade" their commitments for goods, services and investment. The meeting note in this regards states that there exists substantial scope for India and Korea to explore complementarities and to harness the full potential of trade and investment ties.

Indonesia disputes Australian duties on paper imports

On 1 September, request for consultations in the WTO with Australia was made by Indonesia regarding imposition of anti-dumping duties by Australia on imports of A4 copy paper from Indonesia. The request for consultations has been filed under Article 4 of the Understanding on rules and procedures governing the settlement of disputes. Indonesia charges that Australia's actions appear to be inconsistent with provisions under the WTO's Anti-Dumping Agreement regarding determination of dumping. Australia's non-use of the Indonesian exporters' home market price for normal value as it found that a particular market situation existed, has been disputed by Indonesia alleging inconsistency with Article 2.2 of the Anti-Dumping Agreement.

Appellate Body holds US B&O Aerospace Tax rate as not an 'export subsidy'

The WTO Appellate Body has, on September 4, 2017, reversed the Panel's finding that the Business & Occupation Aerospace tax rate is *de facto* contingent upon the use of domestic over imported goods. Particularly, it was held that the Panel did not articulate a legal standard under Article 3.1(b) of the SCM Agreement requiring the use of domestic goods to the complete exclusion of imported goods, in its *de jure* and *de facto* contingency analyses of the First and Second Siting Provisions. No recommendation was made by the Appellate Body in this dispute. This dispute pertains to US legislation of November 2013, enacted through Engrossed Substitute Senate Bill 5952 (ESSB 5952), which amended and extended various tax incentives for the aerospace industry. India participated as third party in this dispute.

EU's Anti-dumping measures on Fatty Alcohols from Indonesia - Appellate Body issues report

The WTO Appellate Body has, on September 5, 2017, held that Indonesia has failed to demonstrate that EU authorities acted inconsistent with Article 2.4 of the Anti-Dumping Agreement by treating the mark-up paid by PT Musim Mas to ICOF-S as a difference affecting price comparability, and therefore making a downward adjustment to the export price. Moreover, EU authorities were found to have acted inconsistently with Article 6.7 of the Anti-Dumping Agreement by failing to make available or disclose the results of their on-the-spot investigations to PT Musim Mas.

This is the first WTO dispute filed by Indonesia against the EU. The dispute concerns imposition of provisional anti-dumping duties on certain chemical products in May 2011 and definitive anti-dumping duties in November 2011. It may be noted that the measures also concern India and Malaysia. India has reserved third party rights in this dispute.

EU files appeal against panel ruling in EU duties on PET from Pakistan

On August 30, 2017 the European Union notified the DSB of its decision to appeal to the Appellate Body certain issues of law and legal interpretations in the panel report. in "European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan" (DS486). The panel circulated its report on July 6, 2017. The appeal has been filed under Article 16.3 and Article 17 of the Understanding on rules and procedures governing the settlement of disputes. The European Union requests the Appellate Body to reverse the entirety of the Panel's findings and conclusions.

Brazil's Taxation programs found to be inconsistent with WTO obligations

On August 30, 2017, the Panel issued its reports in two separate complaints filed by the EU and Japan against Brazil concerning taxation measures and other charges (DS472 and DS497). Three programmes were under scrutiny in this dispute – the ICT programmes, The INNOVAR AUTO programme and the PEC and RECAP programmes. All the above programmes have been found to be prohibited subsidies, inconsistent with Article 3.1(b) and 3.2 of the Agreement on Subsidies and Countervailing Measures. Tax reductions accorded to imported products from MERCOSUR members and Mexico under the INNOVAR – AUTO programme have been found to be inconsistent with the MFN principle under Article I of the GATT 1994. Certain aspects of the INNOVAR – AUTO

programme and ICT Programmes have been found to be inconsistent with the national treatment principle under Article III of the GATT 1994. Additionally, the INNOVAR – AUTO programme and ICT Programmes have been found to be inconsistent with Article 2.1 of the TRIMS.

The Panel did not accept Brazil's general defences for ICT and INNOVAR programs that they are not within the scope of the ASCM, TRIMS and GATT 1994 as these agreements regulate products *per se*, and not issues concerning production processes and production steps imposed on producers. The panel also rejected Brazil's defence that the two programs are covered under Article III:8(b) of the GATT 1994 and therefore are exempted from the disciplines of Article III of the GATT 1994 and Article 2.1 of the TRIMs Agreement.



Ratio Decidendi

Continuation of anti-dumping duty after initiation of sunset review

Observing that the factors that should weigh with the Central Government, both for the initiation of the Sunset Review and for continuation of ADD cannot be said to be unconnected, the Delhi High Court has by an interim order directed continuation of anti-dumping duty pending sunset review in case of imports of Metronidazole in India from China. The Court in its earlier hearing had directed the authorities to initiate sunset review investigations, in a writ petition filed after Directorate General of Anti-Dumping & Allied Duties, Ministry of Commerce and Industry, Government of India declining to initiate a Sunset Review in the case.

The Court held that the conclusions reached by the DA, did not prima facie account for the detailed statistics placed before the DA. It was noted that the possibility of undercutting of the price at which the product may be sold by the domestic industry, and the present annual capacity of entities in China which are unutilized and far exceed the Indian demand, were not adverted to by the DA. Considering balance of convenience, the High Court upheld the view that loss of the domestic industry on account of cessation of anti-dumping duty cannot be compensated if later it is held that the anti-dumping duty ought to have been continued. [*Aarti Drugs Ltd. v. Designated Authority – Order dated 29-8-2017 in W.P. (C) No. 7464/2017*]

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