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## Article

### Countervailing duty laws in India

By **Radhika Sharma**

India has finally opened its account by concluding its first Countervailing Duty (“CVD”) investigation with the issuance of the final findings<sup>1</sup> in the CVD investigation concerning “Castings for Wind Operated Electricity Generators” from China PR. However, this has brought to light the fact that certain provisions of the Indian law relating to imposition of Countervailing Duty, are not in conformity with the Agreement on Subsidy and Countervailing Measures (“ASCM”)

#### *Understanding subsidies*

Subsidy is defined as the benefits that come from outside a business or firm<sup>2</sup>. Subsidies are usually granted by the Government in order to promote economic, social and political policy.<sup>3</sup> Such subsidies have varying impact on the domestic industry of the importing country. So, in order to keep the domestic producers at par with the foreign producers, who have benefitted from a subsidy provided by their respective government, countervailing duty (CVD) investigations are carried out for imposing a duty to countervail the subsidies bestowed upon the imported products. In any such CVD investigation, the primary task is to examine whether the alleged subsidies are

counteravailable in terms of the provisions of the ASCM.

#### *Non-actionable subsidies under ASCM*

Article VI of GATT 1947 regulates the imposition of Anti-dumping Duties and Countervailing Duties. Part-V of the ASCM provides the provisions governing the investigation of countervailable subsidies and the levy of countervailing duty. At the time of coming into force of the ASCM, it recognised three types of subsidies, viz., Prohibited (Part –II), Actionable (Part –III) and Non-actionable (Part- IV).

Prohibited subsidies include export subsidies and subsidies for import substitution (i.e. use of domestic over imported goods). Actionable subsidies included subsidies that would cause or threaten material injury to the domestic industry of other member, or nullify or impair benefits accruing directly or indirectly to other members, or cause serious prejudice to other members<sup>4</sup>. Non-actionable subsidies are not countervailable. In terms of Article 8 of the ASCM, non-actionable subsidies included subsidies that were not specific under Article 2 of the ASCM and also subsidies for research

<sup>1</sup> Final findings No. 17/6/2013-DGAD, dated 27th November 2015

<sup>2</sup> The World Trade Organization, by Mitsupatsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, Chapter- 12.

<sup>3</sup> Be Sodersten and Geoffrey Reed, In International Economic 299 (3rd Edition)

<sup>4</sup> Article 5 of ASCM

and development, subsidies for assistance to dis-advantageous region and subsidies for new environmental requirements.<sup>5</sup>

When the ASCM agreement was signed, Article 8 of the said Agreement, dealing with non-actionable subsidies, was applied provisionally for five year period in terms of Article 31 of the ASCM. Article 31 provided that not later than 180 days before the end of the said five year period, the Committee shall review the operation of those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period. However, the provisions of Article 8 were not extended as no consensus was reached between the members<sup>6</sup> for extension or modification of the said provision. Thus, the category of non-actionable subsidies ceased to exist as of 31 December 1999, as per ASCM Article 31<sup>7</sup>.

### **Non-actionable subsidies under Indian law**

Indian law relating to imposition of CVD is contained in Section 9 of the Customs Tariff Act 1975 (the “Act”) and the Customs Tariff (Identification, Assessment, and Collection of Countervailing Duty on Subsidized Articles and for Determination of Injury) Rules, 1995 (the “CVD Rules”). Section 9, sub-clause (3) of the Act, provides that the Central Government shall not levy countervailing duty unless it is determined that the subsidies

are – (a) export oriented, or (b) contingent upon use of domestic goods over imported ones or (c) conferred on limited number of persons engaged in manufacturing, producing and exporting the article. Further, clause (c) of sub-section (3) of Section 9 dealing with the determination of specificity of subsidies in question, provides that duty shall not be imposed if, the subsidy is falling under Section 9(3)(c) if it is for (a) research activities conducted by or on behalf of persons engaged in the manufacture, production or exporting; or (b) assistance to disadvantaged regions within the territory of the exporting country; or (c) assistance to promote adaptation of existing facilities to environmental requirements. Thus, the concept of non-actionable subsidies is fully incorporated in the Indian laws.

Apart from the express prohibition contained in Section 9(3)(c) of the Act, an indirect reference may also be found in the CVD Rules. Rule 4(i) enjoins a duty on the designated authority to determine the nature and amount of subsidy. Rule 11 provides that the Authority, need not ascertain as to the nature of subsidies if they are related to (a) Research activities conducted by or on behalf of persons engaged in the manufacture, production or exporting; or (b) Assistance to disadvantaged regions within the territory of the exporting country; or (c) assistance to promote adaptation of existing facilities to environmental requirements.

<sup>5</sup> Article 8

<sup>6</sup> [www.wto.org](http://www.wto.org)

<sup>7</sup> WTO Trade Remedies, by RiidigerWolfrum, Peter Tobias Stoll and Michael Loebele, Volume-4, 2008.

Without examining whether the subsidies are specific within the meaning of Article 2 of ASCM, no CVD can be levied in respect thereof. Accordingly, by excluding the three types of subsidies from the scope of the specificity analysis, the Indian laws effectively provide a window for excluding non-actionable subsidies from the levy of CVD.

Section 9(3)(c) of the Customs Tariff Act, 1975 and the relevant CVD Rules mentioned above were enacted with effect from 1-1-1995, by Section 2, of the Customs Tariff (Amendment) Act, 1994 (12 of 1994), the said provision have not however been amended in keeping with the existing provisions on non-actionable subsidies under the ASCM. Despite the fact that the WTO law no longer recognises non-actionable subsidies, the Indian law continues to recognise them under Section 9(3) of the Customs Tariff Act 1975. This provision is more beneficial to other Members of the WTO and therefore, none of them have raised any objections.

### **Status of non-actionable subsidies in USA and EU**

The USA has already amended its provisions in compliance with the SCM Agreement<sup>8</sup>. The said law for U.S. expired on July 1, 2000, under Section 282(2)(c) of URAA, provides that sub-paragraph B, C, D and E of Section 771 of the Tariff Act 1930<sup>9</sup>, which established the non-countervailable status of “non-

actionable subsidy” under U.S. law expires 66 months after the date of entry into force of the WTO unless extended by Congress.

Similarly, the EU has also amended its provisions for non-actionable subsidy vide document No. Com (2002) 468 final, dated 19.08.2002, amending EU Council Regulation (EC) No 2026/97 of 6 October 1997<sup>10</sup>. In its preamble, EC stated the rationale for making the amendment in the following words:

*“Article 4 of Regulation (EC) No 2026/97 provides that certain subsidies for environment, research and regional development are non-countervailable. Furthermore, Article 10 (5) and (6) of that Regulation state that investigations can be initiated to determine whether subsidies have such non-countervailable status or must not be initiated if they relate to certain non-countervailable subsidies. The corresponding provisions in the WTO Agreement on Subsidies and Countervailing Measures were due to expire on 31 December 1999 unless the Members of the WTO decided otherwise. No such decision has been taken and therefore the relevant provisions do not apply anymore. Accordingly, it is necessary to assess whether the provisions on non-countervailable subsidies in Regulation (EC) No 2026/97 should be maintained. **In this respect, major trading partners of the Community no longer apply these provisions in their countervailing investigations. In view of this, and in order***

<sup>8</sup> Overview and compilations of U.S. Trade statutes Part I and II, 2010 Edition, 111th Congress 2nd Session

<sup>9</sup> U.S. Code § 1677 (5B)-(G)

<sup>10</sup> By Regulation (EC) No 2026/97 of 6 October 1997, the Council adopted common rules for protection against subsidised imports from countries which are not members of the European Communities.

**to maintain the balance of rights and obligations under the WTO Agreement on Subsidies and Countervailing Measures, it is considered appropriate to repeal the provisions of Regulation (EC) No 2026/97 relating to non-countervailable subsidies.”**

The reasons stated by EC are equally applicable to India. The continuation of non-actionable subsidies in India’s statute books causes harm to the Indian domestic producers.

They will not be able to get countervailing duties imposed to remedy the injurious effect of such subsidies. Further, the balance of rights and obligations undertaken by India under the ASCM also become skewed. There is a strong case for amending the law, especially Section 9(3) and the corresponding provision under the CVD Rules, to be in line with India’s WTO obligations under the ASCM.

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

## Trade Remedy News

### Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
2-Ethyl Hexanol	EU, Indonesia, Korea RP, Malaysia, Saudi Arabia, Chinese Taipei, USA	F.No.35/264/2015-TRU	19-11-2015	Anti-dumping investigation extended till 19-2-2016
Carbon black used in rubber applications	China and Russia	54/2015-Cus. (ADD)	18-11-2015	Definitive anti-dumping duty continued after sunset review
	Korea RP	F.No. 14/9/2014-DGAD	20-11-2015	Anti-dumping investigation terminated
Castings for Wind Operated Electricity Generators	China PR	F.No. 17/6/2013-DGAD	27-11-2015	Definitive countervailing duty recommended at 8.78% for Zhejiang Jiali Wind Power Technology Co. Ltd. and 13.44% for others
Jute Products	Bangladesh, Nepal	F.No.14/19/2015-DGAD	4-12-2015	Time to file responses to questionnaires, extended
Melamine	China PR	F.No. 15/17/2014-DGAD	5-12-2015	Continuation of ADD recommended in sunset review
Mulberry raw silk (not thrown) of grade 3A	China PR	F.No. 14/17/2014-DGAD	4-12-2015	Definitive anti-dumping duty recommended



Product	Country	Notification No.	Date of Notification	Remarks
Normal Butanol or N-Butyl Alcohol	EU, Malaysia, Singapore, South Africa, USA	F No. 14/4/2013-DGAD	20-11-2015	Anti-dumping investigation extended till 19-2-2016
Purified Terephthalic Acid	China PR, Iran, Indonesia, Malaysia and Taiwan	F No. 14/8/2015-DGAD	12-11-2015	Provisional anti-dumping duty recommended

### Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Carbazole Violet Pigment	USA	[A-533-838] [C-533-839] 80 FR 71773	17-11-2015	Anti-dumping duty and countervailing duty continued
Cold-Rolled Steel Flat Products	USA	[A-533-865] 80 FR 74764	30-11-2015	Preliminary determinations of anti-dumping Duty investigations, postponed
Corrosion Resistant Steel Products	USA	[C-533-864] 80 FR 68854	6-11-2015	Countervailable subsidy rates determined in preliminary determinations
Welded Stainless Pressure Pipe	USA	[C-533-868] 80 FR 76265	8-12-2015	Preliminary determination of countervailing duty investigation, postponed

## WTO News

### WTO issues panel report on Colombia's measures on textiles, apparel and footwear

On 27th November 2015, WTO issued the panel report in the case brought by Panama namely, "*Colombia — Measures relating to the importation of textiles, apparel and footwear*" (WT/DS/461). The Panel was of the view that in respect to imports of products classified in

Chapters 61, 62, 63 and 64, the compound tariff of Colombia constituted an ordinary customs duty which exceeded the levels bound in their Schedule of Concessions and hence was inconsistent with Article II:1(b), first sentence, of the GATT 1994. It was also held that the said tariff was further inconsistent with Article II:1(a) of the GATT 1994 inasmuch as it accords treatment less favourable than that envisaged

in Colombia's Schedule of Concessions. The measures were also found to be not necessary to protect public morals or to secure compliance with the Colombian anti-money laundering legislation. Further noting that the measures applied to both legal as well as illegal trade, the Panel refrained from making a finding on whether Article II of the GATT 1994 applies to "illicit trade".

### **US COOL – Arbitration report released**

WTO arbitrator has determined that the annual level of nullification or impairment of benefits accruing to Canada as a result of the US COOL measure is CAD 1,054.729 million. Similarly, in case of benefits nullified with respect of Mexico, it was found that level of impairment was to the extent of USD 227.758 million. The report released on 7-12-2015 also allows Canada and Mexico to request authorization from the Dispute Settlement Body (DSB) to suspend concessions and related obligations in the goods sector under the GATT 1994, to the abovementioned level. The disputes, DS384 and DS386, have an interesting history inasmuch as the consultations were sought in December 2008 and the first panel report was released in November 2011 finding that the US measures were inconsistent with the USA's WTO obligations and violated Article 2.1 of the TBT Agreement. After the appellate body's report, arbitrator had, in 2012, determined the reasonable period of time for implementation of the DSB recommendations. However compliance panel was established in September 2013. The present arbitration, on the level of retaliation, commenced after the Appellate Body

report in May this year under the compliance proceedings.

### **Compliance panel issues report on US dispute with Mexico over tuna**

In another TBT dispute (DS381) which originated in 2008, the Appellate Body of the DSB has, on 20th November 2015, circulated to the WTO Members its report in the compliance proceedings in the dispute concerning USA and Mexico. Mexico had alleged that the US measures (dolphin-safe labelling requirements) as amended after the panel and Appellate Body reports in the original proceedings still violated Article 2.1 of the TBT Agreement, Article I:1 of the GATT 1994 and Article III of the GATT 1994. The Appellate Body reversed the panel findings and held that the eligibility criteria accorded less favourable treatment to Mexican tuna products than that accorded to like products from the United States and to like products originating in any other country. It was found that the amended measure modified the conditions of competition to the detriment of Mexican tuna products in the US market.

### **Afghanistan WTO accession package ready for formal adoption**

On 11th November 2015, WTO members negotiating Afghanistan's accession agreed by consensus on the terms of the country's WTO membership. The decision has paved the way for the ninth least-developed country to join the organization since 1995. Afghanistan's Accession Package will be submitted to ministers for a formal decision at the WTO's Conference in Nairobi this month.

## Ratio Decidendi

### Anti-dumping duty – Individual treatment and risk of circumvention

European Union's General Court (Seventh Chamber) has annulled the Council Regulation (EU) No. 502/2013 of 29 May 2013 amending Implementing Regulation (EU) No. 990/2011. The 2011 Regulation had imposed a definitive anti-dumping duty on imports of bicycles originating in the People's Republic of China, and as a result of the interim review, the same was amended by the 2013 Regulation which denied the Individual Treatment to the appellant and asked them to clear the goods on payment of country-wide anti-dumping duty. The Court in this regard held that the authorities cannot invoke a solely hypothetical risk of circumvention, intrinsic in their view, to the concept of 'related companies', to refuse the grant of an individual anti-dumping duty. It was noted that the risk of circumvention was intrinsic to the very principle of the application of an individual anti-dumping duty, since, even despite any link between several companies, those companies may organise themselves to channel their exports through the one that has been subjected to the lowest duty rate. Further, relying on various WTO reports, it was held that the risk that the imposition of individual anti-dumping duties might be ineffective for combating dumping cannot, in itself, justify the imposition of a countrywide duty on exporting producers.

The EU Court also observed that though the evidence of withdrawal of the appellant-exporter from shareholding of an Joint venture along with another group (which according to the authorities also had interest in the product concerned) was communicated to the authorities late, almost 40 days before the adoption of the contested regulation, nevertheless the same could have been verified despite the advanced stage of investigation.

Earlier, the EU authorities had denied the Individual treatment observing that the applicant had refused to provide the necessary information on the structure of the group and essential information concerning production, export sales volume and prices of the product concerned to the European Union during the relevant investigation period by the companies forming part of the Jinshan group. The authorities were of the view one of the group subsidiaries active in the production and export of the product concerned to the European Union during part of the RIP, namely GP, was related to the another group of companies and that the latter was involved in the production and sales of the product concerned. The EU Court however held that the apart from GP, none of the subsidiaries of Jinshan group active in the production of the product concerned, was related to the applicant. [*Giant (China) Co. Ltd. v. Council of the European Union - In Case T-425/13, decided on 26-11-2015*]



#### **NEW DELHI**

5 Link Road,  
Jangpura Extension,  
Opp. Jangpura Metro Station,  
New Delhi 110014

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B-6/10, Safdarjung Enclave  
New Delhi - 110 029  
Phone : +91-11-4129 9811  
E-mail : [lsdel@lakshmisri.com](mailto: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](mailto:lsbom@lakshmisri.com)

#### **CHENNAI**

2, Wallace Garden,  
2nd Street  
Chennai - 600 006  
Phone : +91-44-2833 4700  
E-mail : [lsmds@lakshmisri.com](mailto: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](mailto: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](mailto: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](mailto:lsahd@lakshmisri.com)

#### **PUNE**

607-609, Nucleus, 1 Church Road,  
Camp, Pune - 411 001. Maharashtra  
Phone : +91-20-6680 1900  
E-mail : [lpune@lakshmisri.com](mailto:lpune@lakshmisri.com)

#### **KOLKATA**

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

#### **CHANDIGARH**

1st Floor, SCO No. 59, Sector 26,  
Chandigarh - 160026  
Phone : +91-172-4921700  
E-mail : [lschd@lakshmisri.com](mailto: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](mailto:lsgurgaon@lakshmisri.com)

#### **EUROPE**

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

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