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Article

Initiation of investigation: Issue of cumulation

By **Atul Gupta**

Article 5 of WTO:ADA provides for initiation and subsequent investigation. Clause (ii) of Article 5.2 provides that the application shall contain the information relating to the names of the country or countries of origin or export in question. Article 5.4 prohibits initiation of an Anti-dumping Duty investigation unless the Investigating Authority (“IA”) determines the eligibility of the applicant to file application by or on behalf of the Domestic Industry. The Designated Authority will also determine the “like article” to the alleged dumped goods. Those who produce like article will be the domestic producers for the investigation and those domestic producers will be considered for determining the domestic industry and the eligibility of the applicant. Unless such a determination is reached, though may be *prima facie*, the IA may not proceed to make a determination about the adequacy and accuracy of evidences regarding dumping, injury and causal link.

Therefore, it seems that the need for determination of the domestic industry comes at the stage of initiation of an investigation. At that stage, the eligibility of the applicant domestic producer to be considered as part of the domestic industry may be determined. A domestic producer may be disqualified to be considered as part of the domestic industry, if such domestic producer is related to the exporters or importers or is itself an importer

of the allegedly dumped product. However, through the practice and interpretation of the Agreement, such domestic producer may not be disqualified to be part of the domestic industry on satisfaction of such conditions *per se*. But the IA will use its discretion on certain objective criteria such as (i) whether the behaviour of the domestic producer is like a trader; or (ii) whether the domestic producer is opposing the investigation to continue to secure benefit of dumping at the expense of other domestic producers; or (iii) the share in the volume of the alleged dumped imports made by such domestic producer, etc.

Only on determination of the constituents of the domestic industry, the IA may determine whether the alleged dumped imported article from a country caused any injury to the Domestic Industry.

At the stage of determination of injury from the alleged dumped imports, the IA may consider applicability of Article 3.3 of WTO:ADA which mandates fulfilment of certain conditions before the IA could cumulatively assess the effect of imports from countries which are simultaneously subject to Anti-dumping Duty investigation. Such conditions are that the IA determines that (a) the margin of dumping established in relation to imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5, and the volume of imports from each country is

not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product. It may also be noted that even in situations where such conditions are satisfied, it is not mandatory for the IA to cumulatively assess the effect of imports.

One of the conditions is determination of dumping margin for the country as a whole. It may be noted that the requirement to determine dumping margin for the purposes of Article 5.8 is restricted for each exporter. If *de minimis* dumping margin is found in respect of a particular exporter, then investigation shall be terminated *qua* that exporter. However, for the purposes of Article 3.3, the dumping margin for the country as a whole must be above the *de minimis* level. It is possible that dumping margin for an exporter may be below *de minimis* level, but the dumping margin for the country as a whole may be above it (though it may be doubted whether the undumped imports should be excluded for such determination of *de minimis* dumping margin for the country). In cases, where one or more exporters are found cooperating and the dumping margin is determined for all others on facts available, then the weighted average of such dumping margins of cooperating and non-cooperating exporters may not satisfy the requirement regarding dumping margin for the country as a whole. This is because of the

reason that the Designated Authority in India calculates the dumping margin for the non-cooperating exporters based on the lowest export price of the cooperating exporter.

It may also be noted that the clause used in Article 3.3 “where imports of a product from more than one country are simultaneously subject to anti dumping investigations” indicates that the stage for decision to do cumulative assessment comes only when simultaneous investigations are underway, instead of at the time of initiation of the investigation. It also indicates that the IA may initiate more than one Anti-dumping investigation by a single Initiation Notice. However, it seems that it may not be possible to do cumulative assessment for investigations initiated with some gap.

Practically also the IAs make determination regarding satisfaction of conditions under Article 3.3 after the expiry of the period specified for receiving data from the exporters.

The issue may be examined from another angle with the help of an example. There are four domestic producers A, B, C and D of a product. If domestic producer A, B and C (except D) have technological limitation on production of the product, say in terms of width upto 100 units where the width has a significant importance in use of the product and determination of interchangeability of the product with width higher than 100 units. Alleged dumped Imports above the *de minimis* volume are taking place from countries X, Y and Z. One related exporter of D is situated in

country X and is exporting significant alleged dumped quantity of the goods. If the domestic producers A, B and C only are considered to be forming part of Domestic Industry, then the product exceeding width 100 units may not be covered in the PUC. If the domestic producer D is included in the domestic industry, then complete product may be included in the investigation.

In such a case, IA may examine and determine the domestic industry based on the country to be subjected to investigation and accordingly after considering A, B and C as Domestic Industry may initiate investigation against country X. Thereafter, considering all the four as Domestic Industry, IA may initiate investigation against countries Y and Z also. However, at the time of arriving at the decision to cumulatively assess the effect of the imports from such countries which are simultaneously subjected to investigation, i.e., X, Y and Z, the IA is required to examine only conditions provided under Article 3.3. Further,

on fulfilment of the condition of Article 3.3, the IA is not at liberty to again re-determine the scope of the Domestic Industry for achieving the goal of Article 3.3.

From the initiation notices issued by the Designated Authority in India, it does not appear that the Designated Authority makes determination of the conditions as required under Article 3.3 for cumulative assessment. Further, without examining the data received from the exporters, such determination is meaningless because only on receipt of the data from exporters a determination regarding condition (b) may be made. It seems that the investigations are conducted cumulatively *ab initio* without fulfilment of prior conditions or Article 3.3. The Designated Authority may determine this issue as and when the same turns up for its consideration in an investigation conducted by it.

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Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Albendazole	China	62/2015-Cus. (ADD)	14-12-2015	Definitive anti-dumping duty imposed
Aluminium Foil	China	FNo.14/6/2015-DGAD	15-12-2015	Anti-dumping investigation initiated
Axle for Trailers	China	FNo.14/17/2015-DGAD	28-12-2015	Anti-dumping investigation initiated
Clear Float Glass	Iran	FNo.14/7/2015-DGAD	23-12-2015	Anti-dumping investigation initiated

Product	Country	Notification No.	Date of Notification	Remarks
Cold Rolled Flat Products of Stainless steel	China, Korea, EU, South Africa, Chinese Taipei, Thailand and USA	61/2015-Cus. (ADD)	11-12-2015	Definitive anti-dumping duty continued pursuant to Sunset Review
Gliclazide	China	59/2015-Cus. (ADD)	8-12-2015	Definitive anti-dumping duty imposed
Hot Rolled flat sheets and plates (excluding hot rolled flat products in coil form) of alloy or non-alloy steel	All countries	F.No.D-22011/47/2015	7-12-2015	Safeguard investigation initiated
Linear Alkyl Benzene	Iran , Qatar and China	F. No. 14/20/2015-DGAD	7-12-2015	Anti-dumping investigation initiated
Melamine	China	F.No. 15/17/2014	5-12-2015	Anti-dumping duty recommended pursuant to Sunset Review
Melamine Tableware and Kitchenware products	China, Thailand and Vietnam	55/2015-Cus. (ADD)	4-12-2015	Definitive anti-dumping duty imposed
Methylene Chloride	China and Russia	58/2015-Cus. (ADD)	8-12-2015	Provisional anti-dumping duty imposed
Mulberry Raw Silk (not thrown) of grade 3A and below	China	F.No. 14/17/2014-DGAD	4-12-2015	Definitive anti-dumping duty recommended
Phthalic Anhydride	Japan and Russia	56/2015-Cus. (ADD)	4-12-2015	Definitive anti-dumping duty imposed
Plastic processing or injection moulding machines	China	57/2015-Cus. (ADD)	4-12-2015	Definitive anti-dumping duty imposed
Purified Terephthalic Acid	China, Iran, Indonesia, Malaysia and Taiwan	60/2015-Cus. (ADD)	10-12-2015	Provisional anti-dumping duty imposed

Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Cold-Rolled Steel Flat Products From India	USA	[C-533-866] 80 FR 79562	22-12-2015	Preliminary Countervailable subsidy rate determined at 4.45%
Corrosion-Resistant Steel Products	USA	US ITA Press Release	22-12-2015	Preliminary affirmative determination of dumping
Graphite electrode systems	EU	2015/C 415/10 and 2015/C 415/11	15-12-2015	Expiry review of countervailing and anti-dumping duties initiated
Hollow Structural Sections	Australia	2015/154	22-12-2015	Anti-dumping investigation initiated
M a n g a n e s e Oxide	EU	2015/C 421/08	17-12-2015	Anti-dumping investigation initiated
Silicomanganese	USA	[A-533-823] 80 FR 75660	03-12-2015	Final results of anti-dumping administrative review 2013-14 finds nil dumping margin
Stainless steel wires	EU	2015/C 411/04	11-12-2015	Partial interim review of anti-dumping duty initiated

WTO News

WTO members secure Nairobi Package

WTO members recently concluded their 10th Ministerial Conference in Nairobi by securing historic agreements on a series of trade initiatives. Centrepiece of the Nairobi Package is a Ministerial Decision on Export Competition, including a commitment to eliminate subsidies for farm exports. Under the decision, developed members have committed to remove export subsidies immediately, except for some specified agriculture products, and developing countries will do so by 2018. Member countries have agreed to ensure that any export subsidy has at most minimal

trade distorting effects and that the same do not displace or impede the exports of another member country. It may be noted that all the countries have also agreed to not to provide export credits, export credit guarantees or insurance programmes for exports of products listed in Annex 1 of the Agreement on Agriculture.

On demand from a large number of developing countries for a Special Safeguard Mechanism (SSM) for agricultural products, India negotiated a ministerial declaration that recognises that developing countries will have the right to have recourse to a

SSM as envisaged under paragraph 7 of the Hong Kong Ministerial Declaration. The SSM allows developing countries to resort to higher customs duties on some farm produce to protect the interests of its farmers. WTO members also agreed to engage constructively to negotiate and to make concerted efforts to adopt a permanent solution on the issue of public stockholding for food security purposes. Negotiations in this regard will now be held in the Committee on Agriculture in Special Session.

USA files dispute against China over taxes on aircraft

On 8 December 2015, the United States has notified the WTO of a request for consultations with China regarding measures providing tax advantages in relation to the sale of certain domestically produced aircraft in China. WTO document WT/DS501/1 circulated by USA in this regard states that “it appears that China exempts the sale of certain domestically produced aircraft, including general aviation, regional, and agricultural aircraft, from the value-added tax (VAT), while imported aircraft continue to be subject to the VAT”. According to USA, these Chinese measures violate Articles III:2, III:4 and X:1 of the GATT, 1994. Similarly various provisions of the Protocol on the Accession of the People’s Republic of China have also been alleged to have been violated.

Safeguard investigations - Egypt launches investigation on import of polyethylene terephthalate, while

Vietnam on steel products

Egypt has on 8-12-2015 initiated a Safeguard investigation on import of Polyethylene Terephthalate (PET). The product under consideration is classified under HS tariff item number 390760. The investigation was initiated after a safeguards petition was filed by Egyptian Indian Polyester Company.

Vietnam has launched Safeguard investigation on import of semi-finished and certain finished products of alloy and non-alloy steel on 25-12-2015. The initiation was notified to the WTO’s Committee on Safeguards on 28-12-2015. The products covered are semi-finished products of iron or non-alloy steel products and bars & rods of iron or non-alloy steel.

India-US dispute on agricultural products – Reasonable period of time agreed

India and United States of America have agreed that the reasonable period of time for India to implement the DSB recommendations in the dispute *India-Measures Concerning the Importation of Certain Agricultural Products from the United States* (DS430) shall be 12 months from the date of adoption of the DSB recommendations and rulings. According to document WT/DS430/14, dated 11-12-2015, the reasonable period of time will hence expire on 19 June 2016. It may be noted that DSB in its panel and appellate panel reports had found the Indian measures, prohibiting imports of certain agricultural products from USA, being in violation of Articles 2.3, 5.1, 5.2 and 6 of the Sanitary and Phytosanitary Measures Agreement (SPS).

Ratio Decidendi

Circumvention of anti-dumping duty – Time period for change in pattern of trade

The Court of Justice of the European Union has held the Council Implementing Regulation (EU) No. 260/2013 invalid. The Regulation extended the definitive anti-dumping duty imposed by Regulation (EC) No. 1458/2007 on imports of gas-fuelled, non-refillable pocket flint lighters originating in the People's Republic of China to imports of such products consigned from Vietnam.

The disputed Regulation stated that the volume of imports of the product concerned from the PRC to the EU was weak during 2007 when volume of imports of the product from Vietnam to the EU increased and that exports of lighter parts from the PRC to Vietnam increased from 1999, and hence it constituted a change in the pattern of trade between the PRC and Vietnam, on the one hand, and the EU, on the other. The Court of Justice was however of the view that it cannot validly be concluded that there was a link between increase in exports of lighter parts from the PRC to Vietnam and the

increase of imports of the product concerned to the EU from Vietnam. The referring Court in this regard had also observed that though there is no provision for time-related requirements concerning the change in the pattern of trade, nevertheless there was a gap in time between the fall in imports of the product concerned from the PRC during 1991, the increase in exports of lighter parts from the PRC to Vietnam, beginning in 1999, and the increase in imports to the EU of the product concerned from Vietnam during 2007.

The CJEU however rejected the contention of the importer that the contested regulation is invalid because it was adopted at a time when the original Regulation No 1458/2007 (imposing anti-dumping duty on imports from China) was no longer in force. It was held that Regulation extending anti-dumping measures to the circumventing imports may be adopted even after the original measures have expired, if the extended measures have exclusively retroactive effect. [*APEX GmbH Internationale Spedition v. Hauptzollamt Hamburg-Stadt* - Case C-371/14, decided on 17-12-2015]

News Nuggets

India revises its model BIT text

India finalised the model Bilateral Investment Treaty (BIT) agreement last month. The first version was seen as pro-State with clauses like those relating to investor responsibilities, provision for the host State to make counter

claim, absence of Most Favoured Nation clause and so on. The revised text incorporates some changes which make it more in line with standard treaty clauses but also has some non-regular clauses.

The definition of enterprise now does not include clauses like ‘having management and substantial operations in the host State’ and making ‘substantial contribution to the development of the host State’. The definition of ‘measure’ is now broader to include rule, procedure, requirement or practice rather than ‘legally binding action that is applied directly to an investment’. The article on scope still excludes measure by local government, taxation, issuance of compulsory licenses and government procurement.

A notable revision in the dispute settlement mechanism is that even though there is a

requirement to exhaust local remedies, the investor may resort to arbitration if he can prove no local or domestic remedy exists. Where after pursuing the same, the investor does not receive any resolution to his satisfaction, he can resort to arbitration. Certain other clauses in the first version like disclosure requirements, list of mitigating factors to be considered while deciding the amount of compensation have also been changed. The revised draft also contains a provision to establish an institutional mechanism for appeals. It remains to be seen how acceptable the clauses will be to India’s partners.

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