Lakshmikumaran & Sridharan attorneys

INTERNATIONAL TRADE

amicus

An e-newsletter from
Lakshmikumaran & Sridharan, India

October 2015 / Issue 53

Contents

October
2015

Article

Consistency between Indian Domestic Law and WTO:ADA to be maintained

By **Atul Gupta**

Article II of the GATT, 1994 provides that a Member country shall follow MFN principle. Article II.2 provides for exception to the MFN principles. One of such exception permits imposition of Anti-dumping Duty in terms of Article VI of the GATT, 1994. Article VI of GATT 1994 provides for imposition of Anti-dumping Duty on fulfilment of certain conditions. WTO Members also entered into an Agreement on implementation of Article VI of the GATT, 1994 (known as WTO:ADA) which in:

(i) Article 1 provides that the provisions contained in the Agreement will govern the application of Article VI of GATT 1994 in so far as action is taken under Anti-dumping legislation or regulations;

(ii) Article 18.1 reiterates that no specific action against dumping from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this agreement;

(iii) Article 18.4 provides that each Member shall take all necessary steps, of general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

Therefore, if any law, regulation or administrative action adversely affects interest of a producer or exporter of another Member, then such law, regulation or administrative action should be in conformity with the GATT, 1994 as well as WTO: ADA. However, a Member is at liberty to have more onerous law, regulation or administrative action for its subjects which does not adversely affect the interest of a producer or exporter of another Member. Such instances may be like:

(a) a sunset review may be conducted within a period shorter than 5 years;

(b) investigation shall be completed within a period shorter than one year, if it does not affect the time required by a producer or exporter to file response and make preparation for onsite verification;

(c) mandating for acceptance of domestic sales price in the exporting country as normal value though such sales price is below the cost of production.

In the above background, the Supreme Court of India had an occasion to interpret the legal provisions relating to imposition of definitive anti-dumping duty retroactively.

Indian investigating authority takes almost

18 months time to complete most of the investigations, though the Indian law, in line with Article 5.10 of the WTO:ADA, stipulates that the investigations shall be concluded within a period of one year. It is however provided that only in "special circumstances" the period to conclude investigation may be extended by a further period of six months. The exception to extend the period by six months has been used as a rule by the Indian investigating authority without disclosing any special circumstance. Such extension of the time period of investigation has created a problem as to how to protect the Domestic Industry during the interregnum, i.e. "gap period" between the date when provisional duty expires after six months of its imposition and the date when the definitive duty is imposed.

In these circumstances, the Central Government tried to achieve the goal of protecting the Domestic Industry during such interregnum by imposing definitive anti-dumping duty from the date of imposition of provisional anti-dumping duty. The Customs authorities were recovering anti-dumping duty on imports which had entered into India during the interregnum because according to them anti-dumping duty was imposed with retrospective effect and there is no hiatus provided in the Indian legal provisions or in the notifications which imposed anti-dumping duty.

Certain importers raised the dispute about such illegal action of the customs authorities and the matter reached the Supreme Court of India for interpretation and decision. The Apex Court after referring to various previous authorities, summarized the principles for interpretation of a domestic law where a corresponding international treaty or agreement exists:

(1) Article 51(c) of the Constitution of India is a Directive Principle of State Policy which states that the State shall endeavour to foster respect for international law and treaty obligations. As a result, rules of international law which are not contrary to domestic law are followed by the courts in this country. This is a situation in which there is an international treaty to which India is not a signatory or general rules of international law are made applicable. It is in this situation that if there happens to be a conflict between domestic law and international law, domestic law will prevail.

(2) In a situation where India is a signatory nation to an international treaty, and a statute is passed pursuant to the said treaty, it is a legitimate aid to the construction of the provisions of such statute that are vague or ambiguous to have recourse to the terms of the treaty to resolve such ambiguity in favour of a meaning that is consistent with the provisions of the treaty.

(3) In a situation where India is a signatory

nation to an international treaty, and a statute is made in furtherance of such treaty, a purposive rather than a narrow literal construction of such statute is preferred.

(4) The interpretation of such a statute should be construed on broad principles of general acceptance rather than earlier domestic precedents, being intended to carry out treaty obligations, and not to be inconsistent with them.

(5) In a situation in which India is a signatory nation to an international treaty, and a statute is made to enforce a treaty obligation, and if there be any difference between the language of such statute and a corresponding provision of the treaty, the statutory language should be construed in the same sense as that of the treaty. This is for the reason that in such cases what is sought to be achieved by the international treaty is a uniform international code of law which is to be applied by the courts of all the signatory nations in a manner that leads to the same result in all the signatory nations.

After referring to various provisions of the WTO:ADA and the Indian legal provisions, the Supreme Court also came to a conclusion that *the delicate balancing act between protection of domestic industry and the hardship caused in the course of international trade has been tilted in favour of the latter.* It was held that the Central Government does not have any power to impose anti-dumping duty with retrospective effect except in the case of Section 9A(3) of the Customs Tariff Act, 1975 which is in line of Article 10.4 of the WTO:ADA. Finally, it was held that the definitive anti-dumping duty can be collected only for the period for which provisional anti-dumping duty was imposed and the Central Government cannot collect anti-dumping duty on the imports entered into India during the interregnum.

This is a leading judgment which enumerates the principles for interpretation of Indian domestic law in terms of an international treaty. It also clarifies that absence of a provision of the WTO:ADA in Indian law does not mean that the authorities are not obliged to follow the same. The authorities in India are bound by the provisions contained in the WTO:ADA unless India has enacted a legal provision which is more onerous to its subjects and at the same time which is not adverse to the interest of a producer/exporter of another Member country. The judgment may also prompt the Indian Investigating Authority to complete the investigations 'normally' within a period of one year so that the domestic industry may be continued to be protected in a manner which is legal and also consistent with India's international obligations.

[The author is a Joint Partner, International Trade Practice, Lakshmikumaran & Sridharan, New Delhi]

Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Acrylonitrile butadiene rubber (NBR)	Korea RP	46/2015-Cus. (ADD)	4-9-2015	Definitive anti-dumping duty continued after sunset review
Albendazole	China	F. No. 14/31/2013-DGAD	18-9-2015	Time for completion of ADD investigation extended
Clear Float Glass	Pakistan, Saudi Arabia and UAE	F. No. 15/16/2015-DGAD	23-9-2015	New-Shipper Review initiated for M/s. Tariq Glass Industries Ltd., Pakistan
Float Glass	China and Indonesia	47/2015-Cus. (ADD)	8-9-2015	Definitive anti-dumping duty continued (after sunset review) on imports from China PR
Front Axle Beam and Steering Knuckles	China	F. No.15/11/2014-DGAD	11-9-2015	ADD sunset review recommends continuation of duty
Hot Rolled Flat Products of steel in Coils	All countries	2/2015-Cus. (SG)	14-9-2015	Provisional Safeguard duty imposed
Polyester yarn	China and Thailand	F. No. 15/03/2014-DGAD	22-9-2015	ADD sunset review recommends continuation of duty

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Frozen Warmwater Shrimp	USA	[A-533-840] 80 FR 54524	10-9-2015	Dumping margin determined in final results of administrative review 2013-14
Hot-Rolled Carbon Steel Flat Products	USA	[A-533-820] 80 FR 54521	10-9-2015	Preliminary results of 2013-14 anti-dumping duty administrative review find no entries of subject goods from specified companies
		[C-533-821] 80 FR 57336	23-9-2015	Compliance proceedings commenced pursuant to CVD order in WTO/DS436

Product	Country	Notification No.	Date of Notification	Remarks
Open mesh fabrics of glass fibres	EU	Commission Implementing Regulation (EU) 2015/1507	9-9-2015	ADD on goods originating from China extended to goods exported from India
Preserved Mushrooms	USA	[A-533-813] 80 FR 53104	2-9-2015	Anti-dumping duty continued
Stainless steel bar	USA	[A-533-810] 80 FR 55332	15-9-2015	No dumping margin found for Ms. Bhansali Bright Bars Pvt. Ltd. in final results of administrative review 2013-14
Stainless steel wires	EU	Commission Implementing Regulation (EU) 2015/1483	1-9-2015	Definitive ADD imposed
Tubes and pipes of ductile cast iron	EU	Commission Implementing Regulation (EU) 2015/1559	18-9-2015	Provisional anti-dumping duty imposed
Welded Carbon Steel Standard Pipes and Tubes	USA	[A-533-502] 80 FR 54523	10-9-2015	Administrative Review of the anti-dumping duty order rescinded

WTO News

Chinese Taipei files dispute against India over Anti-dumping duty on USB flash drives

On 24 September 2015, Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei) has notified the WTO Secretariat of a request for consultations with India regarding anti-dumping duties imposed by India on USB flash drives imported from Chinese Taipei. According to Chinese Taipei, sub-clause (iii) of Annexure II to the Customs Tariff (Identification, Assessment & Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 read with Rule 9(2) of the said Rules is "as such" inconsistent with Article 3.3 of the WTO's AD Agreement as it does not require an assessment of whether cumulative assessment of the effects of imports from more than one country, subject to simultaneous anti-dumping investigations, is appropriate in light of the conditions of competition "between the imported products".

It has also been contended that Indian measures in relation to initiation of investigation,

rejection of questionnaire responses and application of facts available, definition of the product under consideration, calculation of normal value and dumping margin, injury determination, and in relation to conduct of the investigation, are inconsistent with the various provisions of the AD Agreement and GATT.

Safeguard investigations initiated by Malaysia and India on imports of hot-rolled coils

Last month Malaysia and India launched Safeguard investigations in respect of imports of Hot-rolled flat products of non-alloy and other alloy steel in coils. While on 11-9-2015, Malaysia has initiated a safeguard investigation on flat-rolled products of iron or non-alloy steel, hot-rolled, not clad, plated or coated, and flat-rolled products of other alloy steel in coils, not further worked than hot-rolled, of a width of 600 mm or more, of a thickness between 1.20mm to 22.00mm, India has on 7-9-2015 initiated a safeguard investigation on Hot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more. It may be noted that India has also imposed provisional Safeguard duty by the Ministry of Finance Notification dated 14-9-2015.

Four panels established on requests from Indonesia, Japan and Chinese Taipei

The DSB of the WTO has, on 28-9-2015, established 4 panels in the different disputes, last month. Two of these disputes were initiated by Japan and one each was initiated by Indonesia and Chinese Taipei. While in the first dispute by Japan against Korea (DS495), it is alleged that Korea has adopted and maintains sanitary and phytosanitary (SPS) measures that are inconsistent with several provisions of the SPS Agreement, second dispute (DS497) by Japan disputes Brazil's introduction of a number of measures that enable domestic companies to reduce their obligation to pay certain internal taxes and charges, thus having serious trade-restrictive effects on a broad range of products imported into Brazil from Japan.

Indonesia in its dispute (DS491) alleges that the USA's dumping, subsidy, and threat of injury determinations on certain coated paper from Indonesia are inconsistent with the US obligations under the GATT 1994, the Anti-Dumping Agreement and the Subsidies and Countervailing Measures (SCM) Agreement. In the last of the dispute where the panel was established last month, Chinese Taipei seeks to examine the safeguard measure imposed by Indonesia on certain iron and steel products (DS490). India has also reserved its third-party rights to participate in the panel's proceedings in disputes DS495 and DS497.

Ratio Decidendi

Anti-dumping duty not imposable during the period after expiry of provisional duty and before imposition of final ADD

The Supreme Court of India has held that Anti-dumping duty is not imposable on imports made during the period after the expiry of the provisional anti-dumping duty and before imposition of the final/

definitive anti-dumping duty. It was held that incorporation of provisional duty in the final duty, in the manner provided by Rule 13 of the [Indian] Anti-dumping Rules can only be for the period upto which the provisional duty can be levied and not beyond. The Court in this regard observed that the marginal note to Rule 20 states that the same is concerned only with the date of commencement of duty, and that sub-rule (2)(a) only enables levy of final anti-dumping duty from the date of imposition of a provisional duty so as to convert the provisional measure into a final measure. Dismissing the Revenue department's appeal, the Apex Court further held that neither sub-section (2) nor sub-section (6) of Section 9A authorises the Central Government to levy anti-dumping duty with retrospective effect and that any levy during the gap period or the interim period would necessarily amount to a retrospective levy of duty.

The Indian Apex Court in this regard also held that [Indian] Anti-dumping Rules have been framed keeping in view the WTO's Anti-dumping Agreement of 1994 strictly in mind, and that language of Section 9A of the Customs Tariff Act read with the Anti-dumping Rules has to be construed in the same sense as that of the WTO's Anti-dumping Agreement. It was observed that if there is a difference in the language in a statute made to enforce treaty obligation, where India is signatory to an international treaty, and the corresponding provision of the treaty, statutory language should be construed in the same sense as that of the treaty. [*Commissioner* v. *G.M. Exports* – C.A. No. 3889 of 2006, along with C.A. Nos. 7814/2012, 7894/2015, 7895/2015, 5119/2012, 3082/2011 and 3086/2011, decided on 23-9-2015]

News Nuggets

Ecuadoreans can sue the Canadian subsidiary to enforce award

International law particularly when it revolves around investments and claims of host state makes for an interesting study. For instance, Argentina's disputes with its investors, the efforts by bond-holders to sue Argentina and their success in US courts. An oft-mentioned point is that the investors are generally successful in pursuing its claims at times, by incorporating subsidiaries in treaty countries to benefit from a BIT. However, the Canadian Supreme Court lent a different angle to this last month. The respondents/plaintiffs in *Chevron Corp.* v. *Yaiguaje,* representing about 30000 Ecuadorian villagers, approached the court seeking enforcement of an award made by an Ecuadorean court. Earlier the proceedings had been conducted in Ecuador and enforcement had been denied in US.

The Canadian Supreme Court has held that obligation created by a foreign judgment is universal and each jurisdiction has an equal interest in the obligation resulting from the foreign judgment, and no concern about territorial overreach could emerge. The

respondents sought to enforce the award against the Canadian subsidiary. While the entity argued that the award by Ecuadorean court was against its parent and it was essential for the enforcing court must have a real and substantial connection with the dispute. However, the court opined that where jurisdiction stems from the defendant's (the entity's) presence in the jurisdiction, there is no need to consider whether a real and substantial connection exists. It was sufficient to establish presence-based jurisdiction of the defendant who was carrying on business in the forum. The court added that the defendant-subsidiary being a judgement-debtor does not necessarily follow from the holding on jurisdiction. At the time of enforcing the award all claims, defences including whether the proceedings were fair, etc. would be examined.

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

B-6/10, Safdarjung Enclave
New Delhi - 110 029
Phone : +91-11-4129 9811
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. Maharashtra
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

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