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Article

Enhancing effectiveness of enforcement – Retreading trade remedy law

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As a top merchandise trader, just behind China[1], the USA is a huge import destination and a frequent user of the Anti-dumping instrument, USA is not new to innovations in AD laws and has already been through the Bryd Amendment which sought to distribute the revenue from AD levies among petitioners alone and was termed as not compatible with the WTO agreement. Recently USA's trade remedy laws have been relaxed in favour of its domestic industry with significant changes both in anti-dumping and countervailing measures. Substantial changes have been made in this regard in the Tariff Act of 1930 by the American Trade Enforcement Effectiveness Act which was part of the larger Trade Preferences Extension Act of 2015. The Act was made into law after the same was signed by the US President on 29th of June. Let us analyse some of the major changes.

Material injury – Effect of profits of domestic industry

Section 771(7) of the Tariff Act [19 USC 1677(7)] relating to analysis of 'material injury', has been amended to provide for consideration of not only 'profits' but specifically 'gross profits', 'operating profits' and 'net profits', when the International Trade Commission (ITC, Commission) evaluates the impact of dumped goods on the domestic industry. Further, while determining 'material injury', the ITC would have to specifically consider 'ability to service debt' and 'return on assets', and see whether the imports cause injury to the domestic industry. It is noteworthy that even the un-amended provisions made it mandatory for the Commission to evaluate all relevant economic factors which have a bearing on the state of the industry in the USA, including but not limited to what was stated.

Article 3.4 of the WTO's Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement, ADA) also states that the list, as specified there, is not exhaustive and that various factors have to be considered for the purpose of determination of material injury. It may be noted that the preposition that in a particular case, the examination of relevant economic factors other than those listed in Article 3.4 could also be required, was further reiterated in DSB's panel/Appellate Body report in *Mexico – Corn Syrup, US – Hot rolled Steel*, and *Korea – Certain paper.* Therefore, 'gross profits', 'operating profits', 'net profits', ability to service debt', and 'return on assets', could be considered even before this amendment to conclude 'material injury' or absence of the same.

Further, another amendment has been made in the provisions which prohibit the Commission from finding absence of material injury, merely because the domestic industry is profitable or because the performance

[1] International Trade Statistics 2014 , https://www.wto.org/english/res_e/statis_e/its2014_e/its2014_e.pdf

of that industry has recently improved. It is already known that just on the basis of profits the ITC cannot conclude absence of material injury, and that other factors have also to be considered [refer, WTO's report in *EC – Bed linen, US – Hot rolled Steel,* etc.]. This specific prohibition further highlights the same, and addresses the apprehension of the domestic industry that Commission may find absence of material injury just because the domestic industry is showing profits.

Adverse facts available – No need to corroborate data

Section 776 of the Tariff Act (19 USC 1677e) has been amended to state that the administrative authority and the Commission shall not be required to corroborate any dumping margin or countervailing duty applied in a separate segment of the same proceeding, when the administering authority relies on secondary information, in case of uncooperative exporter. Further, specific provisions have been made to provide for more discretion to the authorities in determination of subsidy rates and dumping margins. The authority may now use a countervailing subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country or in absence of same, use a countervailing subsidy rate for a subsidy program from a proceeding that the authority considers reasonable to use. In case of anti-dumping proceeding, the authorities have been given discretion to use any dumping margin from any segment of the proceeding under the applicable anti-dumping order.

It is further elaborated that the US authorities are not required to determine or make any adjustment to a countervailing subsidy rate or weighted average dumping margin based on any assumptions about the information the interested party would have provided if they had complied with the request for information. The authorities are further under no obligation to demonstrate that the countervailing subsidy rate or the dumping margin used reflects the alleged commercial reality of the interested party.

It may be noted that US Court of International Trade has been always of the view that corroboration of the data is required when secondary information is used by the department [refer, Slip Opinion dated 15-10-2012 by the US Court, in the case of *Essar Steel Ltd.*]. Further, recently the DSB's Appellate Body, in a dispute between USA and India (DS36), has also held that Article 12.7 of the SCM Agreement places an obligation of conduct on investigating authorities to provide reasoning and evaluation to justify the selection of a given 'fact', on par with the standard applicable under Article 6.8 read with Annex-II of the ADA. The Appellate Body specifically found that *"Article 12.7 requires an investigating authority to use facts available that* ***reasonably*** *replace the missing necessary information with a view to arriving at an* ***accurate determination****, and that this also includes an evaluation of available evidence"* [emphasis ours].

While both the ADA and SCM provide that 'investigation, preliminary and final determinations, affirmative or negative, may

be made on the basis of the facts available' if the interested member or parties refuses to provide information, leaving the matter entirely to the discretion of the ITC may not be what is envisaged by the WTO agreements. It is often said that imposition of AD is more a subjective exercise though efforts are taken to make it as objective (fair) as possible relying on data and providing an opportunity to the foreign exporters to establish that there is no dumping etc. The amendments seem to make the exercise more subjective.

Other notable changes

In respect of computation of cost of production in the exporting country, Section 771(15) of the Tariff Act (19 USC 1677(15)) and Section 773(e) (19 USC 1677b(e)) have been amended to specifically provide that if a particular market situation exists such that cost of material, fabrication or processing do not reflect the cost of production accurately, the authority may use another calculation methodology. There is no clear definition as to what is a 'particular market situation'.

Discretion has also been given to the authorities to disregard certain price or cost values, in case of computation of normal value of exports from a non-market economy. The authority can now disregard price or cost without further investigation if it has determined that broadly available export subsidies existed or particular instances of subsidization occurred with respect to those price/costs or if the same were subject to anti-dumping order.

Lastly, Article 6.10.2 of the ADA places an obligation on the authorities to determine individual margin of dumping for any exporter or producer not initially selected, except where the number of exporters or producers is so large that individual examination would be 'unduly burdensome' to the authorities. This process of selection, also known as 'sampling' is prevalent in various jurisdictions, particularly in EU, though it is used only sparingly in India. Now, specific provisions have been made for the purpose of determination of 'unduly burdensome'. The authorities in this regard may consider complexity of the issues, any prior experience, total number of investigations, and such other factors relating to timely completion of each such investigation/review as the authority considers appropriate.

Therefore, what we see is another discretion given to the authorities in respect of the trade remedy measures.

Conclusion

While the measures may not be immediately subject to challenges in the WTO, they have not been welcomed alike by all sections even in the US. For instance a former chairman of the ITC[2] has voiced concern over the increased litigations which the amendments may bring about. It remains to be seen whether other member countries will allow the same level of discretion for their agencies.

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[2] http://www.cato.org/publications/commentary/leveling-playing-field-us-manufacturers

Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Caustic Soda	China and Korea RP	Notification No. 42/2015-Cus. (ADD)	18-8-2015	Definitive anti-dumping duty continued after sunset review
Diketopyrrolo Pyrrole Pigment Red 254 (DPP Red 254)	China and Switzerland	Notification No. 41/2015-Cus. (ADD)	17-8-2015	Definitive anti-dumping duty imposed
Flax or Linen Fabric having flax content of more than 50%	China and Hong Kong	Notification No. 39/2015-Cus. (ADD)	12-8-2015	Definitive anti-dumping duty continued after sunset review
Flexible Slabstock Polyol	China , Korea RP and Chinese Taipei	Notification No. 44/2015-Cus. (ADD)	18-8-2015	Anti-dumping duty discontinued
Phosphoric Acid (excluding Agriculture or Fertilizer grade)	Korea RP	Notification No. 45/2015-Cus. (ADD)	24-8-2015	Definitive anti-dumping duty continued after sunset review
Plain Medium Density Fibre Board	China , Thailand, Malaysia, Sri Lanka	F.No. 15/28/2013-DGAD	17-8-2015	ADD sunset review recommends continuation of duty
Plastic Processing Machines	China	F.No. 354/53/2009-TRU (Pt-I)	18-8-2015	Time period to complete ADD sunset review extended till 8-11-2015
Potassium Carbonate	EU, China, Korea RP and Taiwan	Notification No. 40/2015-Cus. (ADD)	12-8-2015	Anti-dumping duty revoked on goods from EU and China. ADD however continued on goods from Korea RP and Taiwan, with modifications
PVC Flex Films	China	Notification No. 43/2015-Cus. (ADD)	18-8-2015	Anti-dumping duty extended till 29-7-2016
Viscose Staple Fibre excluding Bamboo Fibre	China , Indonesia	Notification No. 37/2015-Cus. (ADD)	6-8-2015	Anti-dumping duty extended till 25-7-2016
Vitamin C	China	Notification No. 38/2015-Cus. (ADD)	6-8-2015	Definitive anti-dumping duty continued after sunset review

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Carbazole Violet Pigment 23	USA	[C-533-839] 80 FR 47462	7-8-2015	Affirmative CVD sunset review
Carbazole Violet Pigment 23	USA	[A-533-838]	6-8-2015	Affirmative ADD sunset review. Weighted average dumping margin of 44.80% for India.
Certain Cold-Rolled Steel Flat Products	USA	[C-533-866] 80 FR 51206	24-8-2015	Countervailing duty investigation initiated.
Cold-Rolled Steel Flat Products	USA	[A-533-865] 80 FR 51198	24-8-2015	ADD – Less than fair value investigation initiated.
Polyethylene Terephthalate Resin	USA	[C-533-862] 80 FR 48819	14-8-2015	Preliminary determination of countervailing duty investigation. Countervailable subsidy rates of 115.04% for JBF Industries and 5.50% for Dhunseri Petrochem and others.
Polyethylene Terephthalate Film, Sheet, and Strip	USA	[A-533-824] 80 FR 46957	6-8-2015	Final results of anti-dumping duty administrative review for the period July1, 2013 – June 30, 2014. Weighted average dumping margin of 0% for Jindal Poly Films Limited and 0.79% for SRF Limited.
Polyethylene Terephthalate Film, Sheet, and Strip	USA	[C-533-825] 80 FR 46956	6-8-2015	Final results of countervailing duty administrative review for the period January 1 – December 31, 2013. Subsidy rate of 9.86% for Jindal Poly Films Limited and 2.11% for SRF Limited.

WTO News

WTO issues Compliance Panel report on EU's AD measures on fasteners from China

The WTO issued the Compliance Panel report in the case "European Communities — Definitive anti-dumping measures on certain iron or steel fasteners from China" on 7-8-2015. China challenged the review process undertaken by the EU and continued imposition of AD at revised rates. The panel upheld China's claims as regards treatment of certain information as confidential, stating

that the EU had violated Article 6.5 of the AD Agreement, reiterating that for confidentiality claim of good cause has to be assessed objectively by the Investigating Authority and that it cannot be simply based on the subjective concerns raised by the party submitting the confidential information. As regards interested parties' rights to have access to information and defend their interests, the Panel found that by not allowing the Chinese producers to have access to the information on the file regarding the list and characteristics of the products, the Commission violated Article 6.2.

The Panel concluded that the Commission violated Article 2.4 of the AD Agreement by failing to provide the Chinese producers with information regarding the characteristics of the analogue country producer's products that were used in determining normal values in the review investigation. It also upheld China's contention that by defining the domestic industry on the basis of domestic producers who came forward in response to a notice of initiation, EU's injury determination was inconsistent with the obligation to make an objective injury analysis based on positive evidence as laid down in Article 3.1 of the AD Agreement.

Panel established to examine Indonesia's complaint on AD imposed on biodiesel

The Dispute Settlement Body (DSB), on 31 August, established a panel to examine the complaint brought by Indonesia against the European Union over anti-dumping measures on biodiesel from Indonesia. In its request for consultation, Indonesia argued that the EU regulation providing for adjustment or establishment of the cost of production on the basis of data or information other than that pertaining to the production in the country of origin is inconsistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 besides challenging the imposition for not adjusting for price differentials and EU not according due weightage for Indonesia's status as a developing country member.

More members ratify the Trade Facilitation Agreement

China, Chinese Taipei, Belize, Switzerland, Niger and Nicaragua have formally accepted the new Trade Facilitation Agreement (TFA), taking the total number of ratifications to 16. The TFA will enter into force once two-thirds of the WTO membership, complete their domestic ratification process. This is as per the Protocol of Amendment adopted by the members on 27-11-2014 to insert the Agreement on Trade Facilitation into Annex 1A of the WTO Agreement. The agreement contains provisions for expediting the movement, release and clearance of goods, including goods in transit. It also sets out measures for effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issues and also provides for technical assistance and capacity building to the lesser developed countries.

Vietnam notifies launching of safeguard investigation on monosodium glutamate

Vietnam has, on 1st September, initiated

an investigation on imports of monosodium glutamate following an application from one of the major producers of the goods who submitted evidence of increase in import and sharp decline in domestic production and market share, productivity, and profits.

Ratio Decidendi

CJEU explains 'community industry' for purpose of initiation and review of imposition of AD

The appellant had sought annulment of the Council Regulation imposing anti-dumping duties on imports of integrated electronic compact fluorescent lamps following an expiry review. It contended that since the support for the continuation of the duties had fallen below the threshold of 50% of community producers, the Council could not have proceeded with the same, given a finding of injury to domestic industry and continued the duties. The General Court had held that EU institutions were entitled to continue the review procedure notwithstanding the fact that it was possible that the 50% threshold referred to in Article 5(4) of the basic regulation was no longer met. Agreeing with the General Court, the CJEU held that to initiate an investigation, Community producers whose collective output constitutes more than 50% of the total production of the like product produced by that portion of the Community industry which express either support for or opposition to the complaint and those accounting for at least 25% of total production of the like product produced by the Community industry must support the complaint. A fall in the Community producers' support for a complaint or a request for a review need not necessarily lead to the termination of the investigation.

Distinguishing between 'major' and 'majority' the CJEU reasoned that the regulation refers to 'major proportion' of the Community production, and not to the 'majority of the Community production' and hence to continue with the review it was sufficient that the sole community producer accounting for 48% of community production supported the review process because the threshold of 25% was met. [*Philips Lighting Poland SA* v. *Council of the European Union*, Case C511/13 P, CJEU judgement dated 8-9-2015]

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