Lakshmikumaran & Sridharan attorneys

INTERNATIONAL TRADE

amicus

An e-newsletter from Lakshmikumaran & Sridharan, New Delhi, India

September 2013 / Issue 28

Contents

September
2013

Article

Issues in evaluating an application seeking initiation of an antidumping investigation - Analysis of Guatemala Cement case

By **T.D. Satish**

The starting point of any anti-dumping investigation is an application made by or on behalf of a domestic industry to the investigating authority[1], containing information and evidences alleging dumping causing injury to such domestic industry. This application becomes one of the most essential documents on which initiation and subsequent anti-dumping investigation are based. However, at the stage of pre-initiation itself, questions like those below may arise:

a) What is the kind of information which should be presented by the domestic industry?

b) What information can be considered as 'reasonably available'?

c) What should be the quality of such application?

d) What should be the level of examination on the part of the investigating authority?

The DSB Panel in *Guatemala Cement case*[2] answered the above questions by shedding light on Articles 5.2 and 5.3 of WTO:Anti-Dumping Agreement (ADA). The dispute revolved around anti-dumping duty imposed by Guatemala on imports from Mexico. Mexico argued that the entire initiation of investigation was vitiated by the fact that the application filed by Guatemalan domestic industry was inadequate and insufficient to justify initiation of investigation.

In the facts of the case, the Guatemalan domestic industry filed the application by providing 2 invoices of 1 bag of cement each as evidence with respect to normal value and 2 invoices of 7035 and 4221 bags of cements respectively as evidence for export price, to prove existence of dumping. As regards evidence of normal value, Mexico contended that the invoices did not specify the product, the amount, the source, representativeness of the evidence with respect to the total quantity produced in Mexico, etc. Mexico also contended that there were many factors, viz., differences in quantity, product description, prices in export market and domestic market and levels of trade which severely affected price comparability between the normal value and export price evidences respectively. It also said that the application contained no evidence with respect to threat of injury to the domestic industry due to dumped goods from Mexico since apart from 2 export invoices no other evidence was given with respect to factors set forth in Article 3.7 ADA. For these two twin issues, Mexico alleged that the application filed by the Guatemalan domestic industry lacked sufficient evidence with respect to (i) dumping; (ii) threat of injury and; (iii) causal link. Thus, in Mexico's view the application did not

[1] Exception being suo-moto initiations under Article 5.6 WTO:Anti-Dumping Agreement

[2] Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement From Mexico – DS 156

meet the standards of Article 5.2 of WTO: ADA. Mexico further argued that even if Guatemalan domestic industry makes such bare application, it was incumbent upon Guatemala to consider the accuracy, adequacy and sufficiency of evidence presented while deciding to initiate the investigation, which Mexico alleged was not done and hence Article 5.3 of ADA was violated.

The panel in this case came out with a determination, which became the standard for pre-initiation stage of an investigation. It started its analysis by demarcating the role of the applicants and the investigating authorities at the pre-initiation stage. As regards applicant's role in filing the application, relying upon a report in an earlier dispute[3] on the same issue, it held that Article 5.2 puts a requirement on the applicant to necessarily provide evidences, as is reasonably available, with respect to (i) dumping; (ii) injury to the domestic industry and; (iii) causal link between the two and that such evidence and information, should enable the investigating authority to reject the application on its face value, where the authority considers that such application does not contain information as is reasonably available to the applicant. The standard of information to be presented by the applicant set by the panel was not that of a simple assertion and unsubstantiated by relevant evidence, but of a higher standard. As regards the contents of evidence to be presented, the panel, set the standard by requiring applicants to file application with information, which are substantiated by some amount of evidence, as is reasonably available with the applicants.

As regards Article 5.3, Mexico argued that Guatemala failed to examine the "accuracy and adequacy" of the evidence provided in the application was sufficient to justify initiation of an investigation. Guatemala argued that investigating authority must examine the accuracy and adequacy of the evidence to justify the initiation but such investigating authority is not required to carry out any investigation or confirm or verify the claims contained in the application. In arguing so, Guatemala relied upon the decision in *Softwood Lumber* to assert that a panel should consider whether a reasonable, unprejudiced person could have found… that sufficient evidence existed to justify initiation and also that the level of "sufficient" evidence to justify initiation is significantly lower than the level of evidence required for preliminary or final determination.

The panel, relying on *Softwood Lumber,* came to the conclusion that it is *the sufficiency of the evidence, and not its adequacy and accuracy per-se, which forms the legal standard to determine whether to initiate the investigation or not.*[4] Thus, Article 5.3 is a requirement imposed on the investigating authority that upon acceptance of an application, which contains evidence on dumping injury and causal link as is reasonably available to the applicant, the investigating authority has to further undertake an examination of the evidence and information

[3] DS 60 Guatemala Cement Panel Report

[4] Para 8.31 DS156 Guatemala Cement

[5] Para 7.50 in DS 60 Guatemala Cement

contained in the application. *The decision to initiate is made by reference to the objective of sufficiency of the evidence in the application, and not by reference to whether the evidence and information provided in the application is all that is reasonably available to the applicant.*[5]

The panel examined whether the evidence presented in the application with respect to normal value, export price and the threat of material injury, was sufficient to justify initiation of investigation. As regards dumping, it examined Article 5.3 read with Article 2, which talks about dumping. But it pointed out that reference to Article 2 was made just for guidance and not to make a determination on Article 2 itself. Upon perusing the records and applying Article 2, it held that given the evidence, an unbiased and objective investigating authority could not have concluded that there was sufficient evidence of dumping to justify the initiation of an anti-dumping investigation. It observed that an investigating authority was not expected to perform complex adjustments and calculations at the stage of initiation. However, where it is obvious that there are substantial questions of comparability between the export price and normal value the investigating authority should at least acknowledge that differences in the prices generate questions with regards to their comparability, and either give some consideration as to the impact of those differences on the sufficiency of the evidence of dumping or seek such further information as might be necessary. Since neither of the above was done by Guatemala, the panel considered that there was insufficient evidence with respect to dumping. Similarly, for examining the sufficiency of evidence for threat of injury, it referred to Article 3 for guidance and held that Guatemala did not examine the sufficiency of evidence with respect to threat of material injury.

An investigating authority, according to the panel, should not be content with the information provided in the application but rather try gathering evidence on its own in order to fill the evidentiary gap to meet the standard under Article 5.3. However, where such act is not undertaken on its own by an investigating authority to bridge the gap and bring the information in the application in conformity with Article 5.3, it cannot be said that the 'reasonably available' standard under Article 5.2 will not permit initiation of investigation as the evidence as is reasonably available to the applicant would not be objectively judged.

To conclude, as far as Articles 5.2 and 5.3 of ADA are concerned, the panel in Guatemala clearly defined the role of an applicant in making an application and the role of an investigating authority in examining the application so filed. Further, the information so contained must be backed with evidences as may be reasonably available with the applicant but such information should not be totally based on mere assertions. It must be ensured that the application is not accepted by an investigating authority at its face value and at least some examination is conducted to examine the adequacy and accuracy of not only the information in the application, but more importantly the evidences presented.

[The author is a Senior Associate, International Trade Practice, Lakshmikumaran & Sridharan, New Delhi]

Trade Remedy News

Anti-dumping actions by India

Product	Country	Notification No.	Date of Notification	Remarks
Digital Versatile Discs-Recordable (DVD-R and DVD-RW)	China, Hong Kong and Chinese Taipei	Notification No.19/2013-Cus. (ADD)	29-8-2013	ADD extended up to 22-7-2014 consequent to sunset review initiation
Hot Rolled Flat Products of Stainless Steel-304 grade	China	Notification No. 2/2013-Cus. (SG)	29-8-2013	Definitive Safeguard Duty imposed for a period of 200 days, from 4-1-2013 to 22-7-2013 (confirming only the provisional duty already imposed)
Paracetamol	China	F.No.14/1009/2012-DGAD	26-8-2013	ADD continuation recommended in sunset review
Resin or other organic substances bonded wood or ligneous fibre boards of thickness below 6mm	China, Indonesia, Malaysia and Sri Lanka	Notification No.18/2013-Cus. (ADD)	8-8-2013	Definitive ADD imposed
Rubber Chemicals - N-1, 3-dimethyl butyl-N'Phenylenediamine also known as PX-13 or 6-PPD		F. No. D-22011/ 1/2013	29-8-2013	Initiation of review investigation for continuation of safeguard duty
Vitamin -A Palmitate	China and Switzerland	F.No.15/7/2011-DGAD	21-8-2013	ADD continuation recommended in sunset review

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Frozen Warmwater Shrimp	USA	78 FR 50385 C-533-854	19-8-2013	Final affirmative countervailing duty determination by USDOC. To be implemented if USITC issues a final affirmative injury determination.
Metoprolol Tartrate	Mexico	-	August 26, 2013	Initiation of countervailing duty investigation

Product	Country	Notification No.	Date of Notification	Remarks
Polyethylene Terephthalate (PET) Film, Sheet, and Strip	USA	C-533-825 78 FR 47276	5-8-2013	CVD extended after expedited second sunset review
		A-533-824 78 FR 48143	7-8-2013	Preliminary results of anti-dumping duty administrative review (2011-2012). Weighted average dumping margin established for specific exporters.
		C-533-825 78 FR 48147	7-8-2013	Preliminary results of countervailing duty administrative review. Net countervailable subsidy rate determined for the period January 1, 2011, through December 31, 2011.
Single mode optical fibre	China	MOFCOM Announcement No.54 of 2013	14-8-2013	ADD investigation initiated
Tertiary Butylhydroquinone (TBHQ)	China	MOFCOM Announcement No. 57 of 2013	22-8-2013	ADD investigation initiated. Period of investigation is from April 1, 2012 to March 31, 2013

WTO News

Korea seeks consultation with US against measures on washing machines

Korea has, on 29th of August, requested consultations with USA on the latter's anti-dumping and countervailing measures on "large residential washers" (large washing machines) from Korea. As per the communication circulated on 3-9-2013, use of 'zeroing' methodology by the USDOC in the final determination of sales at less than fair value is considered inconsistent with the provisions of Anti-Dumping Agreement (ADA), GATT 1994 and the Marrakesh Agreement. Korea is of the view that a determination to use the Weighted Average-to-Transaction comparison methodology under Article 2.4.2 of the Anti-Dumping Agreement (ADA) does not provide authority to apply the methodology of "zeroing." Violation of Articles 2.1, 2.4, 5.8, 9.3, 9.4 and 18.4 of the AD Agreement, Article VI:1 and VI:2 of the GATT and Article XVI:4 of the Marrakesh Agreement by the US, have been raised by Korea in this dispute (DS 464).

Panel holds Chinese measures on broiler products from US not correct

Chinese Anti-dumping duty and Countervailing duty on certain broiler chicken products from USA (DS427) have been found to be inconsistent with the provisions of WTO's Anti-dumping Agreement (ADA) and the Agreement on Subsidies and

Countervailing Measures (SCM). As per report issued on 2-8-2013 by the DSB, the panel has upheld all US claims on the conduct of investigation by MOFCOM wherein China failed to disclose certain essential facts to individual US respondents with respect to the calculation of the "all others" rates; did not provide an opportunity for the interested parties with adverse interests to meet and present their views; and did not require non-confidential summaries of information.

It was concluded that MOFCOM had not explained how its subsidy calculation ensured that it only countervailed those subsidies bestowed on the production of subject products and that allocation of processing costs, by China, to products that were not actually associated with their production and sale was inconsistent with Article 2.2.1.1 of ADA. However, rejecting the US contention of violation of Articles 3.1 and 4.1 of the Anti-Dumping Agreement and Articles 15.1 and 16.1 of the SCM Agreement, the panel held that MOFCOM was not obligated to identify all domestic producers in the process of defining the domestic industry.

Panel established to consider Chinese ADD on certain stainless steel tubes from EU

The Dispute Settlement Body of the WTO has established panel to consider European Union's allegations of violation of Articles 1, 2.2, 2.4, 2.4.2, 3.1, 3.2, 3.4, 3.5, 6.4, 6.5, 6.5.1, 6.7, 6.8, 6.9, 7.4, 12.2 and 12.2.2 of the Anti-dumping Agreement; and Article VI of the GATT 1994, by China in imposing anti-dumping duty on 'high-performance stainless steel seamless tubes' from the EU. As per the minutes of the DSB meeting held on 30-8-2013, it was noted that the matter in this dispute was the same as in DS454 where a panel had already been established and composed and hence it was agreed to have the same panelists in this case as well. India along with Japan, Korea, Turkey and USA will also participate as third parties in the dispute. *For news on EU's request for consultations, please refer July issue of L&S International Trade Amicus.*

US and Indonesia lock horns in WTO

Trade relations between United States of America and Indonesia deteriorated further with both pointing out faults in each other's measures affecting mutual international trade. The US has, on 30-8-2013, filed revised consultation request with Indonesia, to address recent modifications to Indonesian measures of non-automatic import licensing requirements and quotas that allegedly serve as serious impediments to trade in horticultural products, animals, and animal products. Indonesia on its part is seeking WTO-DSB's authorisation to suspend the application of tariff concessions and related obligations to USA, after the DSB ruled in favour of Indonesia in the dispute *United States – Measures affecting the production and sale of clove cigarettes* (WTDS406).

As per press release of USDOC, USA's revised request, on import regulations, will facilitate coordination with the similar consultation request of co-complainant New Zealand. According to USA, Indonesian measures affect import of fruits, vegetables, flowers, dried fruits and vegetables, juices, cattle, beef, and other animal products into Indonesia and are in violation of Articles III:4, X:1, X:3(a), XI:1, XIII:2(a), XIII:2(c), and XIII:2(d) of the GATT 1994; Article 4.2 of the Agriculture Agreement; Articles 1.3, 3.2, 3.3, 3.5(a), 3.5(b), 3.5(c), and 3.5 (k) of the Import Licensing Agreement and Articles 2.1 and 2.15 of the Agreement on Pre-shipment Inspection. In the dispute on clove cigarettes, USA as per communication dated 22-8-2013 has objected to the level of suspension of concessions and hence the matter has been referred to arbitration under Article 22.6 of the Dispute Settlement Undertaking.

News Nuggets

Emerging markets and use of trade-restrictive measures

The European Commission recently released the report on 'Potentially Trade-Restrictive Measures' covering 31 of the EU's main trading partners, including the G20 countries. While the report records that G20 economies continue to use a number of trade-restrictive measures, it also devotes considerable attention to such measures by developing or emerging economies.

South Africa, Argentina, Russia and Indonesia are said to have adopted the maximum number of import restricting measure by way to imposing tariffs and applying export duties. Ukraine's attempt to renegotiate many of its bound import duties beyond the rates agreed upon in its WTO accession also finds a mention.

The report places India behind Brazil and Argentina in respect of restrictions on government procurement. It highlights business localisation requirements, increase in customs duty on premium cars and export duties on bauxite, preference for locally manufactured electronic goods including tablet PCs, dot matrix printers etc and various export promotion schemes from India under the Foreign Trade Policy as trade-restrictive. It records India as an active user of anti-dumping and safeguard measures along with China and Egypt.

A positive note about India is that the report estimates GDP growth figures at 6.3% in 2014 just behind China at 7.7%, ahead of Brazil at 2.3%; as compared to 2.7% for the US, 1.2% for Japan.

Trading food concerns

India's Food Security Ordinance providing for supply of food grains at a subsidised price is a subject of much debate as being against WTO norms. Food security will also be a core issue at the upcoming WTO ministerial meet in December as also the proposal by developing countries to relax the Aggregate Measure of Support (AMS) norms.

In the developed world, US is reported to be close to approving a major investment by a Chinese company in Smithfield Inc reported to be the world's largest producer of pork. Food security and economic security were again advanced as an argument against this move stating that control would be transferred to a foreign company and food safety standards would not be ensured. However, another view, a political one is that US would not be keen to stall another investment, right after it halted the Chinese investment in wind farms citing national security concerns.

Ratio Decidendi

Circumvention of anti-dumping duty – Processing of 'unfinished' goods in third country

The US Court of International Trade has held that "unfinished small diameter graphite electrodes (SDGE)" and "artificial graphite rods" are actually one and the same. It was noted that there is no evidence on the record that 'unfinished' has any meaning whatsoever in the trade.

The case pertained to the anti-circumvention investigation of the anti-dumping duty applied on SDGE from a UK company who sourced the

unfinished products from China. USDOC had alleged that in the process, anti-dumping duty on imports from China, on the subject goods, was being circumvented. The US Commerce department had contended that the process of assembly or completion in the U.K. is minor or insignificant.

The court in this case found that Commerce's determination that Plaintiff's artificial graphite rods (inputs for manufacture of SDGE) are "of the same class or kind" as SDGE, was correct. It was also held that there was sufficient evidence that artificial graphite rods are produced from input materials covered under the scope of the previous AD Order and exports from the UK company are finished from inputs produced in China. The court also upheld the USDOC finding that the value of the processing performed in the U.K. represents a 'small proportion' of the value of the merchandise imported into the US as it was evident from the breakdown of the production process that all but five minutes of the production process that takes a substantial number of days is done in China. The court also agreed to Commerce's decision to use a surrogate value methodology in determining the value of inputs from a NME country in an anti-circumvention inquiry. [*U.K. Carbon and Graphite Co. Ltd.* v. *United States* – US Court of International Trade Order dated 29-8-2013]