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Article

Suspension of lesser duty rule by the EU in anti-dumping investigations

By **Vikrant Nehra**

The European Union ('EU' or 'Union'), like India, follows a lesser duty rule in case of anti-dumping investigations as is 'desirable' by the WTO's Anti-Dumping Agreement. As per this rule, the amount of anti-dumping duty on imports should either be the margin of dumping or margin of injury, whichever is lesser. Article 9.1 of the Anti-Dumping Agreement states as under:

*"9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that **the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.**"*

Article 9.3 of the Anti-Dumping Agreement further states that the anti-dumping duty shall not exceed the margin of dumping. There were no exceptions to the application of the lesser duty rule prior to 30-05-2018.¹ However, point 2a was inserted in Article 7 of the EU Regulation

2016/1036 of 08-06-2016 ('the Basic Anti-dumping Regulation'), which provides that:

*"2a. When **examining whether a duty lower than the margin of dumping would be sufficient to remove injury, the Commission shall take into account whether there are distortions on raw materials** with regard to the product concerned.*

For the purposes of this paragraph, distortions on raw materials consists of the following measures: dual pricing schemes, export taxes, export surtax, export quota, export prohibition, fiscal tax on exports, licensing requirements, minimum export price, value added tax (VAT) refund reduction or withdrawal, restriction on customs clearance point for exporters, qualified exporters list, domestic market obligation, captive mining if the price of a raw material is significantly lower as compared to prices in the representative international markets

...

For the purpose of this Regulation, a single raw material, whether unprocessed or processed, including energy, for which a distortion is found, must account for not less than 17% of the cost of production of the product concerned. For the purpose of this calculation, an undistorted price of the raw

¹ Regulation (EU) 2018/825 of the European Parliament and of the Council of 30 May 2018 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union (OJ L 143, 7.6.2018, p. 1–18).

material as established in representative international markets shall be used.”

Thus, the lesser duty rule may be suspended by the EU if there are distortions of raw materials price.² Moreover, as per Article 7(2a), the lesser duty rule can only be suspended when a single raw material for which distortion is found accounts for not less than 17% of the cost of production of the product concerned. After these requirements of Article 7(2a) are met, it still has to go through the rigours of the Union interest test. The test shall include the examination of information such as spare capacities in the exporting country, competition for raw materials and the effect on supply chains for the EU companies.³ Only when these conditions are met, the lesser duty rule may be suspended.

In *Mixtures of urea and ammonium nitrate originating in Russia, Trinidad and Tobago and the United States of America*⁴, the complainant alleged raw material distortions of gas in Russia accounting for more than 17% of the cost of production of the product under investigation. The European Commission (‘Commission’) concluded that the natural gas market in Russia is distorted because of the following reasons:

- (i) The maximum domestic price of the natural gas is regulated by the Russian State for Gazprom, which is by far the

biggest producer and seller of natural gas in Russia and owner of the gas pipes;

- (ii) There exists an export tax of 30% on gas;
- (iii) There exists dual pricing concerning the natural gas in Russia for domestic and export sales;
- (iv) Gazprom enjoys the only licence to export natural gas which could qualify as either ‘licensing requirements’ or ‘qualified exporter list’ measure under Article 7(2a);
- (v) Natural gas accounts for more than 50% of the cost of production of the product concerned;
- (vi) The Russian government regulates transportation tariffs and prices of logistic support services and supply and services fees; and,
- (vii) The natural gas prices in Russia are regulated by the State not only *via* federal laws but are also based on policy objectives.

As there was the existence of export tax, dual pricing, licensing requirements as well as qualified exporter list and a single raw material i.e. natural gas accounted for more than 17% of the cost of production of the product concerned, the Commission found that the requirements of Article 7(2a) were met.

Thus, the cost of raw material was replaced with the Waidhaus price - the price of exported Russian gas at the German/Czech border, which was considered as an appropriate benchmark by the Commission to calculate the normal value. This price was duly adjusted to ex works-level of

² See Introduction of Significant Distortions Methodology in the EU’s anti-dumping laws, available at: <https://www.lakshmisri.com/insights/articles/introduction-of-significant-distortions-methodology-in-the-eu-s-anti-dumping-laws/>

³ Article 7(2b) of the Basic Anti-Dumping Regulation.

⁴ Commission Implementing Regulation (EU) 2019/1688 of 8 October 2019 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of mixtures of urea and ammonium nitrate originating in Russia, Trinidad and Tobago and the United States of America (OJ L 258, 9.10.2019, p. 21).

the Russian producers. The transport costs from the Union border to the Russian gas supplier were based upon estimates. However, the transport costs in Russia from the Russian gas supplier to the exporting producers in Russia and other additional charges were based upon the actual figures provided by the exporting producers.

With regarding to the Union interest test as enshrined in Article 7(2b) of the Basic Anti-Dumping Regulation, the Commission found that Russia has a spare capacity which can be used to increase exports to the EU, Russian producers have an unfair advantage *vis-à-vis* the EU producers with regard to the natural gas due to the regulation in the Russian market and the measures would not negatively affect the supply chain in Europe of the product concerned.

Therefore, the Commission concluded that a duty lower than the margin of dumping would not be sufficient to remove injury to the EU industry and imposed measures at the level of the dumping margin in respect of Russia.

In *Hot rolled stainless steel sheets and coils from Indonesia, Taiwan and China*⁵, the requirements of Article 7(2a) were met against Indonesia and China, however, the lesser duty rule was still applied as it was not in the Union's interest to impose the duty equivalent to the dumping margin because of the negative effect it would have had on the supply chains for the EU companies and in particular on users.⁶

⁵ Commission Implementing Regulation (EU) 2020/508 of 7 April 2020 imposing a provisional anti-dumping duty on imports of certain hot rolled stainless steel sheets and coils originating in Indonesia, the People's Republic of China and Taiwan (OJ L 110, 8.4.2020, p. 3).

⁶ See Implementation of Significant Distortions Methodology by EU in original anti-dumping investigations – Who's next after China?, available at:

The EU practice shows that application of the lesser duty rule is the norm in anti-dumping investigations and suspension of lesser duty rule, which was introduced in June 2018, an exception. Stringent conditions attached to the application of Article 7(2a) makes it difficult for the EU industry to request for suspension of lesser duty rule even in case of imports from China where substantial information and evidence is available to establish 'significant distortions' under Article 2(6a) of the Basic Anti-Dumping Regulation and reject domestic costs and prices of the producers/exporters.

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<https://lakshmisri.com/insights/articles/implementation-of-sdm-by-eu-in-original-add-investigations-who-s-next-after-china/>

Trade Remedy News

Trade Remedy actions by India

Product	Country	Notification No.	Date of Notification	Remarks
Aceto Acetyl Derivatives	China	F. No. 6/28/2020-DGTR	21-08-2020	Anti-dumping investigation initiated.
Acrylonitrile butadiene rubber	Korea PR	27/2020-Cus. (ADD)	21-08-2020	Anti-dumping duty extended till 03-12-2020.
Aniline or Aniline oil	China	20/2020-Cus. (ADD)	29-07-2020	Provisional anti-dumping duty imposed.
Black Toner in Powder Form	China, Malaysia, Chinese Taipei	22/2020-Cus. (ADD)	10-08-2020	Provisional anti-dumping duty imposed.
Caustic Soda	China and Korea RP	25/2020-Cus. (ADD)	17-08-2020	Anti-dumping duty extended till 17-11-2020.
Choline chloride in all forms	China, Malaysia, Vietnam	F.No. 6/18/2019-DGTR	25-08-2020	Definitive anti-dumping duty recommended.
Clear Float Glass	Malaysia	F. No. 6/15/2019-DGTR	20-08-2020	Anti-dumping duty recommended.
Digital Offset Printing Plates	China, Japan, Korea RP, Taiwan, Vietnam	21/2020-Cus. (ADD)	29-07-2020	Definitive anti-dumping duty imposed.
Diketopyrrolo Pyrrole Pigment Red 254 (DPP Red 254)	China	24/2020-Cus. (ADD)	14-08-2020	Anti-dumping duty extended till 16-11-2020.
Dimethyl Formamide	China and Saudi Arabia	F. No. 6/37/2020-DGTR	18-08-2020	Provisional anti-dumping duty recommended.
Flat Products of Stainless Steel	Indonesia	F.No. 6/16/2019-DGTR	07-08-2020	Provisional countervailing duty recommended.
Flax Fabric	China and Hong Kong	F. No. 7/26/2019-DGTR and 23/2020-Cus. (ADD)	17-08-2020 and 11-08-2020	Anti-dumping sunset review investigation recommends continuation of duty, while anti-dumping duty extended till 11-11-2020.

Product	Country	Notification No.	Date of Notification	Remarks
Front Axle Beam and Steering Knuckles meant for heavy and medium commercial vehicles	China	F. No. 7/26/2020-DGTR	18-08-2020	Anti-dumping duty sunset review initiated.
Glass Fibres and articles	Bahrain and Egypt	F. No. 6/24/2020-DGTR	04-08-2020	Anti-dumping investigation initiated.
Naphthalene in both its forms	China, EU, Russia, Iran, Japan, Taiwan	F. No. 14/35/2015-DGAD	04-08-2020	Anti-dumping investigation terminated.
Phenol	Thailand and USA	F. No. 6/3/2020-DGTR	20-08-2020	Provisional anti-dumping recommended.
Phosphoric Acid (excluding Agriculture/Fertilizer Grade)	Korea RP	26/2020-Cus. (ADD)	21-08-2020	Definitive anti-dumping duty continued after sunset review.
Poly Vinyl Chloride (PVC) Pastei Emulsion Resin	Korea RP, Taiwan, China, Malaysia, Thailand, Russia, and EU	F. No. 712312020-DGTR	03-08-2020	Anti-dumping duty mid-term review initiated.
Polythylene Terephthalate	China	F. No. 6/24/2019-DGTR	05-08-2020	Provisional anti-dumping duty recommended.
Single Mode Optical Fibre	-	F. No. 22/5/2019-DGTR	21-08-2020	Final Findings issued recommending safeguard duty.
Soda ash	Turkey, USA	F.No.6/39/2019-DGTR	21-08-2020	Provisional anti-dumping duty recommended.
Solar Cells whether or not assembled in modules or panels	-	2/2020-Cus. (SG)	29-07-2020	Definitive safeguard duty continued after review.
Toluene Di-isocyanate (TDI)	China, Japan, Korea RP	F. No. 7/22/2020-DGTR	05-08-2020	Anti-dumping mid-term review initiated.

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Common Alloy Aluminium Sheet	USA	85 FR 49631 [C-533-896]	14-08-2020	Preliminary Affirmative Countervailing Duty Determination and Preliminary Negative Critical Circumstances Determination.
Preserved mushrooms	USA	85 FR 47185 [A-533-813]	04-08-2020	Anti-dumping expiry review initiated
Oil country tubular goods	Canada	Canada Border Services Agency Press Release	07-08-2020	Affirmative anti-dumping duty expiry review.
Single Mode Optical Fibre	China	MOFCOM Notice No. 29 of 2020	13-08-2020	Anti-dumping duty continued after expiry review.



WTO News

Indian tariffs on ICT products – Panels established at request of Japan and Chinese Taipei

In line with the establishment of panel to review Indian tariffs on certain information and communications technology (ICT) goods, as requested by the European Union in June, the DSB has on 29-07-2020 agreed to establish the panels in the similar second requests by Japan and Chinese Taipei. It may be noted that India has not agreed to the establishment of a single panel to review the complaints of Japan, Chinese Taipei and the EU, stated that there were vast differences in the three complaints. India also reiterated that the complaints essentially sought to get India to take on commitments under the expanded Information Technology Agreement (ITA-II) which it never signed, and to take advantage of an error made by India when

transposing its tariff lines to the updated Harmonized System (HS) of tariffs. The United States, Turkey, the United Kingdom, Norway, Singapore, Thailand, Russia, Brazil, Korea, China, Canada and Indonesia have reserved their third party rights to participate in both of these proceedings.

USA's countervailing measures on softwood lumber from Canada violate WTO rules

In its report circulated on 24-08-2020, the WTO's panel has held that USA's countervailing measures on softwood lumber from Canada violate various provisions of the WTO's Subsidies and Countervailing Measures Agreement (SCM Agreement). The Panel upheld Canada's claim under the chapeau of Article 14 of the SCM Agreement as it found that an objective and

unbiased investigating authority would not have relied on a particular survey for determining the benchmark price. Amongst various other findings, the panel was of the view that the USDOC acted inconsistently with Article 14(d) of the SCM

Agreement by improperly setting-to-zero the results of certain comparisons between the prices of examined transactions and the benchmark price in determining the adequacy of remuneration for certain timber.



India Customs & Trade Policy Update

Ventilators – Export Policy revised

Export of all ventilators including artificial respiratory apparatus, oxygen therapy apparatus and any other breathing appliance or device is now free. Notification No. 23/2015-2020, dated 04-08-2020, issued for this purpose amends Notification No. 53, dated 24-03-2020.

Personal Protection Equipment and masks – Export Policy revised

Export Policy of 2/3 ply surgical masks, medical coveralls of all classes and categories (including medical coveralls for Covid-19) has been amended from Restricted to Free. Accordingly, coveralls (including gowns and aprons of all types) are now freely exportable. Further, as per Notification No. 29/2015-20, dated 25-08-2020, the Export Policy of N-95/FFP2 masks or its equivalent masks has been revised from Prohibited to Restricted category, with a monthly export quota of 50 lakh units. It may be noted that as per the notification, medical goggles continue to remain in restricted category, with monthly quota of 20 lakh units and export of Nitrile/NBR gloves remains prohibited.

Colour television sets – Import Policy revised

Import Policy of colour television sets falling under ITC (HS) Code 8528 7211 to 8528 7219 has been amended to 'restricted' from 'free'. Further, as per DGFT Notification No. 22/2015-20, dated 30-07-2020, amending Chapter 85 of ITC (HS), actual user condition would not be applicable for importers applying for an authorisation to import said goods.

Rice – Policy conditions for export of rice revised

The export of rice, both non-basmati rice (falling under HS codes 1006 2000, 1006 30, 1006 3010, 1006 3090, 1006 4000) and basmati rice (falling under HS Codes 1006 3020) under Sr. No. 55 and 57 of Schedule 2 of ITC (HS) respectively to EU member states and European countries namely, Iceland, Liechtenstein, Norway and Switzerland will require certification of inspection issued by the Export Inspection Agency/Export Inspection Council. Export of the said products to other European countries will mandatorily require certificate from EIA/EIC from 01-01-2021. Notification No.24/2015-2020, dated 10-08-2020 issued for this purpose amends Notification No. 41/2015-20, dated 09-01-2020.

Faceless assessment – 2nd phase launched with inclusion of Delhi and Mumbai

Central Board of Indirect Taxes and Customs (CBIC) has from 03-08-2020 begun the 2nd phase of all India roll-out of faceless assessment. While Delhi and Mumbai Customs Zones have been included, the scope of faceless assessment at Chennai and Bengaluru Customs Zones have been extended. Now, while Bengaluru, Chennai and Delhi Customs Zones will cover faceless assessments for imports under Chapters 50 to 71, 84, 85, and 89 to 92, Mumbai will cover import of goods falling under Chapter 29 of the Customs Tariff Act, 1975.

FTAs – Administration of Rules of Origin under Trade Agreements – Guidelines

Central Board of Indirect Taxes and Customs (CBIC) has issued guidelines regarding implementation of Section 28DA of the Customs Act, 1962 and the Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 (“CAROTAR, 2020”) which will come into force on 21-09-2020. Observing that CAROTAR, 2020 provides a form, containing list of basic minimum information which an importer is required to obtain while importing goods under claim of preferential rate of duty, the Circular No. 38/2020-Cus., dated 21-08-2020 states that in case of doubt with regard to origin of goods, information should be first called upon from the importer of the goods before initiating verification with the partner country. However, it also notes that the compulsory verification of assessment (in case the importer fails to provide information) should be discontinued once the importer demonstrates that he has established adequate system of controls to exercise reasonable care. The Circular also lays down certain SOPs for forwarding of requests for verification to the Board.

Gold, silver, other precious and semi-precious metals and articles – Regulations notified for manufacture in special warehouse

The Ministry of Finance has notified the Manufacture and Other Operations in Special Warehouse Regulations, 2020 which have come into force from 17-08-2020. These regulations allow manufacturing and other operations in a special warehouse licensed under Section 58A of the Customs Act, 1962 with regard to warehoused goods specified in clause (1) of Notification No. 66/2016-Cus. (N.T.), i.e. gold, silver, other precious metals and semi-precious metals and articles thereof. Circular No. 36/2020-Cus., dated 17-08-2020 while explaining the Regulations, specifies procedures and documentation for such warehouse in a comprehensive manner including application for seeking permission under Section 65, provision of execution of the bond and security by the licensee, receipt, storage and removal of goods, maintenance of accounts, conduct of audit, etc. Consequential amendments have also been made in Manufacture and Other Operations in Warehouse (no. 2) Regulations, 2019 and Special Warehouse (Custody and Handling of Goods) Regulations, 2016.

Import of pets or live animals – Procedure revised

In line with the Ministry of Fisheries, Animal Husbandry & Dairying, Department of Animal Husbandry & Dairying Office Memorandum dated 15-07-2020 prescribing procedure for import of live animals in general and also for import of pets (only dogs and cats) as baggage/personal imports by passengers, the CBIC has also revised the procedure to be followed for clearance of pets/live animals including dogs and cats. As per Circular No. 35/2020-Cus., dated 10-08-2020, passengers have to obtain advance NOC from Animal Quarantine and Certification Service as the airline will not lift the live animals until advance NOC from AQCS is obtained by the passenger.



Ratio Decidendi

Anti-dumping duty mid-term review – Selection of surrogate country and natural justice

The Anti-dumping Bench of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) has upheld the final findings of the Designated Authority (“DA”) in a mid-term review relating to export of melamine from China by specified producer/exporter. Observing that the producer/exporter did not, at the initial stage itself, inform the DA whether the normal value should be determined on the basis of a non-market economy country or market economy country and which of the three options under paragraph 7 of Annexure-I to the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 should be adopted, the Tribunal held that the producer/exporter cannot contend that hearing should have been granted before the issue of the disclosure for taking Qatar as a surrogate country. It held that it was always open to the producer/exporter to raise grievance about it in response to the disclosure statement. Similarly, the contention that third country should have been selected by the DA at the stage of initiation itself, was also rejected. Further, rejecting the plea of violation of natural justice, the CESTAT observed that though copy of the rejoinder submission should have been exchanged between the interested parties, but since reference of the details of the rejoinder submissions were provided in the disclosure statement, no prejudice was caused to the producer/exporter on this account.

The Tribunal also upheld the determination of normal value by the DA by resorting to second

method (third surrogate country). It noted that exports from Qatar were next to China in terms of quantum and neither any anti-dumping duty was being imposed nor was there any anti-dumping investigation in process on such goods from Qatar. In respect of choice of Qatar, the Tribunal also rejected the plea that the level of development of Qatar was not similar to China. It held that the level of development would be relevant only if the domestic sale price or cost of production of a market economy third country is adopted.

Lastly, observing that the exporter had substantially raised the price of the subject goods in order to reduce the anti-dumping duty, it held that the ex-factory price of the producer would be relevant for determination of export price. [*Kuitun Jinjiang Chemical Industry Co. Ltd. v. Union of India* - Final Order No. 50740-50743/2020, dated 05-08-2020, CESTAT Anti-dumping Bench]

Water signal/sensors, pressure sensors, heart film air mass meters/air mass sensors and temperature sensors are classifiable under Heading 9026 and not Heading 9032

CESTAT Bengaluru has held that water signal/sensors, pressure sensors, heart film air mass meters/air mass sensors and temperature sensors are classified under Heading 9026 and not under Heading 9032 of the Customs Tariff Act, 1975 as contended by the department. The Tribunal was of the view that the goods were only measuring instruments and did not have any control on the operation of the main engines. Going through the literature submitted by the Revenue department, the Tribunal observed that it was not clear that the goods were capable of triggering the stop or start of the engine and were

capable of controlling the main machines. Chapter Note 7(a) to Chapter 90 and HSN Explanatory Notes to Chapter 90 were also relied upon. Allowing the assessee's appeal, the Tribunal stated that the Revenue department could not establish the controlling feature of instruments and hence not discharged its responsibility to establish the correctness of the classification proposed by them. [*Bosch India Ltd. v. Commissioner* - Final Order No. 20376 /2020, dated 02-07-2020, CESTAT Bengaluru]

Digital cameras for capturing still images and videos classifiable under Tariff Item 8525 80 20

CESTAT Mumbai has held that goods 'GoPro HERO5 Black' Action Camera is classifiable under Tariff Item 8525 80 20 of the Customs

Tariff Act, 1975 and eligible for exemption under Notification No. 50/2017-Cus. Revenue department's claim of classification under TI 8525 80 90, solely for the reason that the cameras were capable of capturing still as well as moving images, was dismissed observing that description under said TI as 'others' was more of general type. Allowing the appeal and the exemption, the Tribunal held that the embargo created in the earlier Notification 15/2012-Cus. in terms of the criterion of quality and capacity to record images/events, will not impact eligibility under the superseding Notification 50/2017-Cus. Exemption provided for "digital still image video camera" was held to be available. [*Creative Peripherals & Distribution Ltd v. Commissioner* – 2020 TIOL 1146 CESTAT MUM]

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