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Article

To exclude or not to exclude: Practice on product exclusions

By Devinder Bagia and Jayant Raghu Ram

Introduction

The defining feature of any trade remedial investigation is the product under consideration ('PUC'). The PUC is not just the starting point of a trade remedial investigation but also the heart of it. In fact, when an application for initiation of an original investigation or even a review investigation is to be filed, the first aspect that needs to be clarified to the investigating authority is the scope of PUC. Therefore, the definition of PUC is of extreme importance.

Where an investigation is initiated based on a petition filed by the domestic industry, the investigation authority defines the scope of the PUC in the initiation notification primarily based on the definition given in the petition. To avoid any ambiguities in identifying import/export transactions concerning the PUC that may arise due to the tariff codes, primacy is given to the description of the PUC given in the initiation notification.

However, sometimes, it may so happen that the PUC is such that there are many types and grades of the PUC in question which are imported *vis-à-vis* the types and grades produced by the domestic industry. The domestic industry may not be producing all types and grades of the PUC, particularly if the domestic industry is a recent entrant in the market. Therefore, it becomes necessary for the other interested parties to assist the investigating authority in clarifying the scope of the PUC and identifying product exclusions. This article is intended to discuss certain general aspects of the practice of

investigating authorities in defining the scope of the PUC and identifying the product exclusions.

General basis for requesting product exclusions from PUC

In order to ascertain the scope of the PUC and identify the product exclusions, certain criteria have to be kept in mind. Firstly, the product produced by the domestic industry does not have to be identical to the subject goods under import, but only '*like article*' to the subject goods. Though there are no criteria either in the Customs Tariff Act, 1975 or the AD/CVD rules made thereunder for establishing likeness, some of the criteria recognized under WTO jurisprudence for establishing likeness are similarity of product characteristics, user/consumer preferences or choices; tariff classification; commercial and technical interchangeability of the products and its applications.

Secondly, the examination of the scope of the PUC and the product exclusions/inclusions is always made in relation to the period of investigation ('POI') defined by the Authority in the subject investigation. In this regard, it needs to be ascertained whether the domestic industry produced and sold the particular product in the POI defined for the particular investigation.

Thirdly, it needs to be ascertained whether the domestic industry produced the particular product in commercial quantities. Therefore, even if the domestic industry had installed capacity for producing a particular product, if that product was not produced in commercial quantities during the

POI, such product can be excluded from the scope of the PUC considering the user industry's interests.

It is important to ascertain whether the like article was produced and sold by the domestic industry in commercial quantities to demonstrate that injury to the domestic industry has been caused by unfair competition between such imported product and the like article.

It is also important to note that the need to prove commercial production and sale of a product for which exclusion has been requested are relevant only where the domestic industry has made an allegation of material injury or threat of material injury due to the subject imports. These conditions are not required to be proven where the domestic industry has made an allegation of material retardation due to the subject imports.

Other considerations for product exclusions

One of the grievances often made by the user/importers of a PUC against the inclusion of particular product(s) from the scope of the PUC is that such product(s) manufactured by the domestic industry is of inferior quality. However, past experience shows that the investigating authority has generally not entertained such requests for exclusion since quality is a subjective criterion that cannot be used to distinguish a like article from the PUC.

Sometimes even if the domestic industry has produced and sold the like article during the POI, it needs to be examined whether the domestic industry is producing the same in *sufficient* quantities to cater to the domestic demand. Such aspect was examined in the recent anti-dumping investigation on imports of *Newsprint from Australia, Canada, EU, Hong Kong, Russia,*

Singapore and the UAE (Final Findings dated 19 January 2021), where the user industry vehemently argued for the exclusion of a particular grade of newsprint (viz. 42 gsm) from the scope of the PUC on the ground that the domestic industry did not produce this product.

Though the Designated Authority ('**Authority**') did not initially exclude this grade from the scope of the PUC since the domestic industry had produced sufficient evidence of production and sale of the same during the POI, the Authority noted that the domestic supply of this grade was not sufficient to match the domestic demand.

On this basis, the Authority cited user interest and excluded this product from the scope of its recommendation for the levy of anti-dumping duty. Thus, while the Authority did not initially exclude this product from the scope of the PUC or for the purposes of determination of dumping margin, injury margin, and injury analysis, the Authority excluded this grade of the PUC from the scope of levy of anti-dumping duty as part of its final recommendation.

Role of importer/user in influencing product exclusions

Trade remedial investigations usually pit importers/users of the PUC against the domestic producers of the like article. Though importers/users do not have any role in determining the margin of dumping¹/subsidization or injury that the investigation authority ascertains, the importers/users can play an important role in assisting the investigating authority to define the scope of the PUC.

¹ In case of anti-dumping investigations, the participation of related importers is important for completing the value chain when determining the dumping margin.

Submissions made by the importers/users are vital in assisting the Authority in determining whether or not to exclude a particular product from the scope of the PUC.

Sometimes it may so happen that a particular product may not have been produced by the domestic industry during the POI of a particular investigation. However, unless the domestic industry itself admits that it is not producing the particular product, or a request for exclusion is made by an interested party during the investigation, the Authority may not *suo moto* exclude that product from the scope of the PUC. Therefore, the participation of importers/users in an investigation is vital when requests for particular product exclusion is made.

Most often, importers/users usually request the exclusion of a particular product(s) from the scope of the PUC for various reasons. The most common reason cited by importers/users for requesting product exclusion is the absence of production and/or sale of the particular grade of PUC by the domestic industry during the POI. In this regard, importers/users may also need to prove that the PUC produced by the domestic industry is not *like* the imported product.

In order to substantiate the request for a product exclusion, importers/users may be required to provide empirical evidence of non-production or non-sale of such product by way of rejection/refusal to supply emails/letters issued on behalf of the domestic industry. They would also need to substantiate the absence of likeness by way of product brochures, evidence of usage, etc. Based on the requests made for exclusions, the Authority is also required to verify such claims by asking the domestic industry to show the evidence of production and sale of claimed grades in commercial quantities.

Importers/users also frequently cite quality as an issue when requesting product exclusions. However, since quality is a very subjective criterion, the investigating authority usually does not consider quality as a parameter for determining product exclusions.

Conclusion

The process of defining the scope of the PUC and identifying product exclusions is an important exercise in any trade remedial investigation, particularly where there is a universe of the types and grades of the PUC that are imported and produced domestically. This exercise is important in order to ensure that products not commercially produced and sold by the domestic industry during the POI are not included within the scope of the PUC.

This is also important since the scope of the PUC is usually not revised during review investigations, unless it is a mid-term review initiated specifically to determine a product exclusion. In absence of such valid product exclusions, the importers/users may have to pay anti-dumping duty/countervailing duty on such products for the next five years. This would provide the domestic industry protection more than that is required to be provided under the scheme of the trade remedial framework.

Therefore, where products of different types and grades can be produced, importers/users of the PUC must pay attention to the description of the scope of the PUC and make timely submissions with necessary evidence to demonstrate that the domestic industry is not producing a particular type or grade of a PUC.

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Trade Remedy News

Trade Remedy actions by India

Product	Country	Notification No.	Date of notification	Remarks
(4R-Cis)-1,1-Dimethylethyl-6-cyanomethyl-2,2-dimethyl-1,3-dioxane-4-acetate [ATS-8]	China PR	F. No. 6/11/2021-DGTR	2 August 2021	Anti-dumping duty initiated
Acrylonitrile Butadiene Rubber (NBR)	China PR, EU, Japan and Russia	F.No. CBIC-190354/97/2021-TO(TRU-I)-CBEC	20 July 2021	Finance Ministry decides not to impose anti-dumping duty as recommended by DGTR
Barium Carbonate	China PR	F. No. 7/46/2020-DGTR	20 July 2021	Removal of anti-dumping duty recommended after sunset review
Clear Float Glass	Bangladesh and Thailand	F. No. 6/10/2021-DGTR	30 June 2021	Anti-dumping investigation initiated
Colour coated pre-painted flat products of alloy or non-alloy steel	China PR and EU	F. No. 7/16/2021-DGTR	26 July 2021	Sunset review of anti-dumping duty initiated
Copper & Copper alloy flat rolled products	China PR, Korea RP, Malaysia, Nepal, Sri Lanka, and Thailand	F. No. CBIC-190354/57/2021-TO(TRU-I)-CBEC	2 July 2021	Finance Ministry decides not to impose anti-dumping duty as recommended by DGTR
Elastomeric Filament Yarn	China PR, South Korea, Taiwan and Vietnam	F. No. 7/14/2021-DGTR	30 June 2021	Sunset review of anti-dumping duty initiated
Phenol	EU and Singapore	F. No. 7/41/2020-DGTR	30 July 2021	Sunset review recommends continuation of anti-dumping duty only on imports from EU

Product	Country	Notification No.	Date of notification	Remarks
Plain medium density fibre board of thickness 6 mm and above	Vietnam	40/2021-Cus. (ADD)	30 June 2021	Anti-dumping duty extended till 13 March 2022
Plain Medium Density Fibre Board of thickness less than 6mm	Vietnam, Malaysia, Thailand and Indonesia	F.No. CBIC-190354/95/2021 -TO(TRU-I)-CBEC	20 July 2021	Finance Ministry decides not to impose anti-dumping duty as recommended by DGTR
Polytetrafluoro ethylene	Russia	41/2021-Cus. (ADD)	31 July 2021	Anti-dumping duty extended till 30 November 2021
PVC Flex Film	China PR	38/2021-Cus. (ADD)	30 June 2021	Anti-dumping duty extended till 31 January 2022
PVC Suspension Grade Resin	Japan	F. No. 20/6/2020-DGTR	23 July 2021	Bilateral safeguard investigation terminated
Rubber Chemical PX-13	China PR and Korea RP	F.No.6/20/2020-DGTR	26 July 2021	Definitive anti-dumping duty recommended
Seamless Tubes, Pipes & Hollow Profile of Iron, Alloy or Non-Alloy Steel	China PR	F. No. 7/43/2020-DGTR	30 July 2021	Sunset review recommends continuation of anti-dumping duty
Viscose stable fibre excluding bamboo fibre, dyed fibre, modal fibre and fibre retardant fibre	China PR and Indonesia	F. No. 7/03/2021-DGTR	31 July 2021	Sunset review of anti-dumping duty recommends to withdraw duty
Wire Rod of alloy or non-alloy steel	China PR	F. No. 07/17/2021-DGTR and 42/2021-Cus. (ADD)	28 July 2021 and 1 August 2021	Sunset review of anti-dumping duty initiated and anti-dumping duty extended till 31 January 2022

Trade remedy actions against India

Product	Investigating Country	Document No.	Date of Document	Remarks
Fine Denier Polyester Staple Fiber	USA	86 FR 38683	22 July 2021	Preliminary Results of Antidumping Duty Administrative Review; 2019-20
Glycine	USA	86 FR 37738	16 July 2021	Preliminary Results of Countervailing Duty and Administrative Review; 2018-19
Glycine	USA	86 FR 35733	07 July 2021	Preliminary Results of Antidumping Duty Administrative Review; 2018-2020
Granular Polytetrafluoroethylene Resin	USA	86 FR 35479	6 July 2021	Preliminary determination of countervailable subsidies
Polyethylene Terephthalate Resin	USA	86 FR 38982	23 July 2021	Affirmative sunset review of countervailing duty by Department of Commerce
Polyethylene Terephthalate Resin	USA	86 FR 41009	30 July 2021	Affirmative sunset review of anti-dumping duty by Department of Commerce
Utility Scale Wind Towers	USA	86 FR 38274	20 July 2021	Final determination of sales at less than Fair value investigation postponed
Zinc Coated (Galvanised) Steel	Australia	Anti-dumping Notice No. 2021/089	9 July 2021	Initiation of exemption inquiry



WTO News

EU seeks consultations with Russia on certain measures alleged to be part of Russian import substitution programme

The EU has requested for a consultation with the Russian Federation in accordance with Article 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) of the WTO. According to the EU's request for consultations as circulated in the

WTO on 22 July 2021, Russia's measures relating to the activities of certain state-related entities, and laws and regulations regulating these activities, are inconsistent with various provisions under the WTO's General Agreement on Tariffs and Trade (GATT) 1994, the General Agreement on Trade in Services, and Russia's Protocol of Accession to the WTO. Broadly the measures, according to the EU, include, price

preference applied to procurements by State-related entities favouring Russian origin products and services from Russian entities, requirement to obtain prior authorisation for the purchase of certain engineering products and minimum quotas for domestic products in procurement procedures of certain State related entities favouring Russian origin products.

EU alleges USA on continuation of transfer of anti-dumping and countervailing duties to US domestic industries

Observing that USA's continuation of transfer of anti-dumping and countervailing duties to the US domestic industries was in violation of the DSB Rulings in the disputes DS217 and DS 234, the European Union has reiterated its request asking USA to cease from doing so. However, it may be noted that USA has, in the DSB meeting held on 26 July, stated that it has taken all actions necessary to implement the ruling.

Interestingly, the USA also stated that once a member has said that it has complied with a ruling, that member should no longer be required to submit status reports on implementation. It may also be noted that during talks involving another dispute between EU and US also, the

USA has stated that under Article 21.6 of the DSU, once a responding member announces to the DSB that it has complied, there is no further 'progress' on which it can report, and so there is no further obligation to provide a status report.

Moroccan anti-dumping duties on exercise books from Tunisia are inconsistent with WTO provisions

A WTO Panel in its recent report has held that the definitive anti-dumping measure applied by Morocco to school exercise books from Tunisia are inconsistent with the various provisions of the WTO's Anti-dumping Agreement. According to the Report, circulated in WTO on 27 July 2021, Morocco failed to examine the accuracy and adequacy of the evidence of the export price, the normal value and the adjustment for transportation costs. It also noted that there was violation of Articles 2.2, 2.4, 3.1, 3.2, 3.5, 5.3 and 12.2.2 of the Anti-dumping Agreement. It may be noted that the Panel however rejected the request by Tunisia to suggest that Morocco revokes the measures in dispute. The Panel in this regard was of the view that Article 19.1 of the DSU allows, but does not require, the Panel to suggest ways in which the Member concerned could implement the Panel's recommendations.



India Customs & Trade Policy Update

Rice exports – Requirement of Certificate of Inspection for export to specified European countries postponed: The Notification No. 51/2015-2020 dated 29 December 2020 has been amended to

provide that export of rice (both basmati and non-basmati) to EU member states and other European Countries namely Iceland, Liechtenstein, Norway and Switzerland only will require Certificate of Inspection from Export

Inspection Council/Export Inspection Agency. Export to 'remaining' European countries will require Certificate of Inspection from such agencies for export from 1 January 2022. It may be noted that as per the earlier notification, Certificate of Inspection for exports to remaining European countries was mandatory from 1 July 2021. DGFT Notification No. 12/2015-20, dated 1 July 2021 has been issued for the purpose.

Palm oil – Customs duty reduced till 30 September 2021 while import restrictions relaxed till 31 December 2021:

Duty of customs on import of crude palm oil (Tariff Item 1511 10 00) has been reduced to 10%. Duty of customs on import of palm oil other than crude palm oil (sub-heading 1511 90) has been reduced to 37.5%. Such reduced rates are applicable from 30 June 2021 till 30 September 2021. Notification No. 34/2020-Cus., dated 29 June 2021 has been issued for this purpose. Further, goods falling under sub-heading 1511 90 are now freely importable till 31 December 2021. Import Policy of items under HS Codes 1511 9010, 1511 9020 and 1511 9090 has been amended from restricted to free by DGFT Notification No. 10/2015-20, dated 30 June 2021. Imports are however not permitted through any port in Kerala.

Covid – Specified inputs for medicines and raw materials for Covid test kits exempted:

Import of certain specified active pharmaceutical ingredients/ excipients falling under Tariff Items 2923 2090 and 2906 1310 for Amphotericin B, have been exempted from Basic Customs Duty till 31 August 2021. Also, raw materials falling under any chapter of the Customs Tariff, for manufacturing Covid test kits, have been exempted from BCD till 30 September 2021. The exemption is available subject to the importer following the procedure set out in the

Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017. Notification No. 35/2020-Cus., dated 12 July 2021 has been issued for the purpose.

Lentils (masur) – Basic Customs duty and Agriculture Infrastructure Development Cess reduced on imports:

The Ministry of Finance has reduced Basic Customs duty and Agriculture Infrastructure Development Cess on imports of lentils (*masur*) classifiable under TI 0713 40 00, including those originating in or exported from USA. Amendments in this regard made in Notification No. 50/2017-Cus. and Notification No. 11/2021-Cus. by Notification No. 38/2021-Cus., dated 26 July 2021 are effective from 27 July 2021.

Deemed exports – Module introduced for submission of specified applications online:

Applications for refund of Terminal Excise duty, grant of duty drawback as per All Industry Rates and for fixation of brand rate of duty drawback, in respect of deemed exports have now to be filed online through the importer/exporter dashboard on the DGFT website. It may be noted that as per Trade Notice No. 12, dated 28 July 2021, the applicants will have to submit the corresponding supporting physical documents as prescribed under ANF-7A to the concerned Regional Authority within 7 days of online submission.

SCOMET items – New online module introduced for filing applications for export authorisations:

The Directorate General of Foreign Trade (DGFT) has introduced a new online module for filing of electronic, paperless applications for export authorisations for SCOMET items with effect from 5 August 2021. The new module will now also cover applications for authorisation for site visit by the foreign entity, type of IEC to check production

processes and for post-reporting of export of SCOMET items in specified cases. Trade Notice No. 11/2021-22, dated 28 July 2021 has been issued for the purpose.

Maldives – Export of certain products allowed without restrictions: The Ministry of Commerce has allowed export of eggs, potatoes, onions, rice, wheat, flour, sugar, dal, stone aggregate and river sand to the Republic of

Maldives under the bilateral trade agreement between the governments of India and Maldives. Notification No. 14/2015-20, dated 12 July 2021, issued for this purpose, also indicates the quantities for each item that can be exported in 2021-22, 2022-23 and 2023-24. Further, it is mentioned that export of these items to Maldives will be exempted from any existing or future restrictions or prohibitions.



Ratio Decidendi

Anti-dumping duty – Computation of normal value – Inclusion of SG&A costs incurred in first leg while supplying in domestic market through related company

The European Union's General Court has rejected the plea of the Ukrainian exporters that the Selling, General & Administrative Costs ('SG&A') incurred by the manufacturer-exporters, in the first leg of the transaction in supplying the product in the Ukrainian domestic market through indirect sales, were not to be considered for calculation of normal value. The Ukrainian manufacturer had supplied the goods to a related entity who had in turn supplied in the Ukrainian domestic market. The contention of the manufacturer-exporter was that since the first supply was not in the 'ordinary course of trade', the SG&A costs incurred therefor were not includible. The Court was of the view that indirect sales cannot be divided into two components and that addition of the SG&A costs relating to the two stages, in case of indirect sales, and taking

into account only the price charged at the second stage, for the purpose of test for ordinary course of trade, was consistent with the EU provisions and the economic reality.

The EU's Court also distinguished the DSB reports in the three WTO disputes while it held that DS 141 and DS 460 concerning EU and DS 488 by Korea, did not concern situations of indirect sales. As per the WTO rulings, the sales which do not fall within the ordinary course of trade are to be excluded from calculation of SG&A costs. [*Interpipe Neco Tube LLC v. European Commission* – Judgement dated 14 July 2021 in Case T-716/19, General Court of the European Union]

Notification mandating BIS standards mandatory

Relying on Rule 7(7)(b) of the Bureau of Indian Standards Rules, 1987, the Andhra Pradesh High Court has held that conformity with BIS Standards is not mandatory unless it is referred to in a legislation or so pronounced by a specific

order of the Government. Observing that no such notification/order was brought before the Court by the Revenue department, the Court held that the Customs authorities were not legally justified in demanding production of BIS certificate for imported High Alumina Refractory Cement. The High Court in this regard also rejected the contention that the product is covered in the definition of 'cement' by use of phrase 'any other variety of cement' in Cement (Quality Control) Order, 2003. [*Kerneos India Aluminate Technologies Private Limited v. Union of India* – 2021 VIL 498 AP CU]

Apple HomePod classifiable under TI 8517 62 90 based on 'essential character' test

The Customs Authority for Advance Ruling at Mumbai has held that the Apple HomePod is essentially a home entertainment device which connects user wirelessly to internet via Wi-Fi or Bluetooth. Hence, it is classifiable based on its 'essential character' under TI 8517 62 90 of the Customs Tariff Act, 1975 which covers 'machines

for reception, conversion and transmission or regeneration of voice, images, other data, including switching and routing apparatus'. The Authority noted that device is capable of receiving voice commands and covert such voice commands into text to perform multiple tasks. [In RE: *Apple India Pvt. Ltd.* – 2021 TIOL 01 AAR CUS]

Drones having zoom-in and video recording facilities classifiable as 'drones' on application of GRI Rule 1

In the present case, the subject goods were designed to capture still images and record videos in zoom. The Advance Ruling Authority while disregarding the application of decision of 55th Session of HS Committee of WCO under tariff heading 8525 wherein GRI Rule 3(b) was applied, instead classified the subject goods under Tariff Entry 8802 11 00 which covers 'other aircrafts' by applying GRI Rule 1. [In RE: *Ingram Micro India Pvt. Ltd.* - Ruling No. CAAR/Mumbai/ARC/15/2021, decided on 25 June 2021]

News Nuggets

Anti-dumping investigations – DGTR simplifies questionnaires for exporters, importers and user industry

The Directorate General of Trade Remedies has simplified the questionnaires for exporters/foreign producers, unrelated importers and that for the user industry, in respect of anti-

dumping investigations. Affirming the objective to reduce the compliance burden for citizens and business, the Trade Notices Nos. 6 and 7, both dated 29 July 2021, issued for the exporters and importers state that the new questionnaires dispense with the requirement of non-essential and repetitive information. Similarly, according to Trade Notice No. 8 of the same date, issued

notifying the questionnaire for the user industry, the simplification was necessary for greater participation by the user industry in the anti-dumping investigations.

WTO dispute brewing as Russia prohibits use of ‘Champagne’ in Cyrillic by foreign producers, instead asks to add ‘sparkling wine’

Russia has recently introduced a law according to which the foreign producers of Champagne would be required to add the words ‘sparkling wine’ in the labels of the bottles, while Russian producers of ‘*shampanskoye*’, are exempted. Interestingly, the French producers can still use the word in French but will also have to write ‘sparkling wine’ in Cyrillic on the back of the bottles. It seems that the denial to write the word in Cyrillic is concerning the French wine industry which is pressurising the France and the European Union to even take the issue to the World Trade Organisation (WTO). Champagne is a region in the northeast of France and is famous for the sparkling wine produced there. The name ‘Champagne’ is protected under Geographical Indications (GI) in EU and recognised in many countries. It may be noted that Article 23 of the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS

Agreement) provides for ‘Additional Protection for Geographical Indications for Wines and Spirits’.

UK and Singapore start negotiations on digital trade agreement

The United Kingdom and Singapore have recently launched negotiations on Digital Trade Agreement (‘DEA’). As per reports, the negotiations will focus on securing open digital markets for exporters, allowing them to expand into new markets and sell traditional products in new ways. The agreement will also ensure free and trusted cross-border data flows, while upholding high standards of personal data protection and will cut the red tape for businesses by promoting digital trading systems such as digital customs and border procedures. The new agreement between the two global leaders in digital economy and service exports, will also deepen their cooperation in sectors like fintech and lawtech and will strengthen their collective cybersecurity capabilities. Notably, both the countries have recently also announced the launch of a new Financial Partnership. As per the website of Ministry of Trade and Industry Singapore, Singapore has already concluded negotiations on two DEAs - Digital Economy Partnership Agreement with Chile and New Zealand, and the Singapore-Australia Digital Economy Agreement.

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