Lakshmikumaran & Sridharan attorneys

International Trade

amicus

An e-newsletter from
Lakshmikumaran & Sridharan, India

May 2020 / Issue – 107

Contents

May
2020

Article

Introduction of Significant Distortions Methodology in the EU's anti-dumping laws

By **Vikrant Nehra**

Anti-dumping duty on the import of product cannot exceed the margin of dumping. Dumping margin is the difference between normal value and export price and is specific to the exporter concerned. Normal value means selling price in the domestic market of the exporting country in the ordinary course of trade. However, for some WTO member countries where non-market economy conditions prevail, normal value may not be determined based on actual domestic selling price of the exporter. Normal value for such countries would be determined based on 'non-market economy methodology'.[1]

China became a member of the WTO on 11th December 2001 and agreed for application of 'non-market economy methodology' for the purpose of anti-dumping investigations conducted by importing members. Paragraph 15(a) of Protocol on the Accession of the People's Republic of China ('Accession Protocol') allowed use of:

> "*a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry*"

Application of non-market economy methodology normally results in higher dumping margin and may lead to higher anti-dumping duty rate on imports. Articles 2(1) to 2(6) of the EU Regulation 2016/1036 of 8th June 2016 ('the Basic Anti-dumping Regulation') provided rules for determining normal value in anti-dumping proceedings. Article 2(7) of the Basic Anti-dumping Regulation provided for use of the non-market economy methodology for the calculation of normal value for imports from China and other specific countries.[2] As per the non-market economy methodology provided under Article 2(7)(a), normal value for export shall not be determined based on actual prices and cost in the exporting country but on the basis of prices or constructed value in a market economy third country or other methods prescribed therein. Article 2(7)(a) noted:

> "*In the case of imports from non-market-economy countries (1), the normal value shall be determined* ***on the basis of the price or constructed value in a market economy third country****, or the price from such a third country to other countries, including the Union, or, where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Union for the like product, duly adjusted if necessary to include a reasonable profit margin*."

[1] 'Non-market economy' term is not defined in Anti-dumping Agreement. However, Ad Note to Article VI of GATT 1994 recognizes that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

[2] Article 2(7) of the EU Basic Regulation also provided for Albania, Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Kazakhstan, Moldova, Mongolia, North Korea, Tajikistan, Turkmenistan and Uzbekistan, Vietnam as non-market economy countries.

On 12th December 2016, China initiated WTO Dispute Settlement proceedings against the EU and claimed that Articles 2(1) to 2(7) of the EU Regulation are inconsistent with the Articles 2.1 and 2.2 of the Anti-Dumping Agreement, which provides for the determination of normal value based on actual domestic selling price and cost of the exporter.[3] China contended that Paragraph 15(a)(ii) of the accession protocol, which allowed the application of the non-market economy methodology, expired on 11th December 2016.[4]

To overcome the issue of the alleged expiry of Paragraph 15(a)(ii) and the probable illegality of the continuation of non-market economy methodology *vis-à-vis* China, the EU amended its Basic Anti-dumping Regulation on 12th December 2017.[5] Through this amendment, the EU introduced Article 2(6a) and amended Article 2(7). The amendment revised the rules permitting application of non-market economy methodology *vis-à-vis* specific countries including China. The new Article 2(6a) provided that:

> *"In case it is determined, when applying this or any other relevant provision of this Regulation,* ***that it is not appropriate to use domestic prices and costs in the exporting country due to the existence in that country of significant distortions within the meaning of point (b), the normal value shall be constructed*** *exclusively on the basis of costs of production and sale* ***reflecting undistorted prices*** *or benchmarks"*

Thus, in accordance with Article 2(6a) of the EU Basic Regulation, normal value will not be determined based on actual domestic selling price if there is evidence of 'significant distortions'. Point (b) of Article 2(6a) defines 'significant distortions' as:

> "*those distortions which occur* ***when reported prices or costs, including the costs of raw materials and energy, are not the result of free market forces*** *because they are affected by substantial government intervention".*

For determination of undistorted normal value, Article 2(6a) permitted use of information on prices obtained from a market economy third country as it did in the case of the non-market economy methodology under erstwhile Article 2(7)(a). It notes:

> *"The sources the Commission may use include:*
>
> ***— corresponding costs of production and sale in an appropriate representative country with a similar level of economic development as the exporting country****, provided the relevant data are readily available; where there is more than one such country, preference shall be given, where appropriate, to countries with an adequate level of social and environmental protection*."

Thus, by way of the 12th December 2017 amendment, the EU has effectively created a possibility whereby actual domestic selling price information can be rejected for determining normal value in case of anti-dumping investigations against imports from any country where there are significant distortions of prices and costs. The revised EU Regulations does not

[3] WT/DS516

[4] Panel Report is not issued in this dispute because China requested the panel to suspend its proceedings on 7th May 2019 in accordance with Article 12.12 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

[5] Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 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 338, 19.12.2017, p. 1–7).

single out China owing to specific provisions in its Accession Protocol.

Existing anti-dumping duties in force on imports from any country including China by the EU based on Article 2(7) were not withdrawn as a result of this amendment. For this purpose, saving clause in Articles 11(3) and 11(4) of the EU Basic Anti-dumping Regulation was introduced, which provided that the anti-dumping duty already in force based on the normal value calculated pursuant to the erstwhile Article 2(7) will not be affected until the initiation of the first expiry review proceedings.

While, it remains unclear from the text of Article 2(6a) itself that how analysis of 'significant distortions' would be carried out in case of anti-dumping investigations, it is clear that the revised EU law aims to achieve the same end-result indirectly because it may no longer be permissible under the WTO obligations to do it directly.[6] The revised EU law also opens up a possibility whereby exports from other countries, for example, export from countries like India, can also be subject to this unfavourable methodology traditionally reserved for countries like China. Another important change in the EU Basic Anti-dumping Regulation and cause of concern for exporting countries is the linking of the use of 'lesser duty rule' to the 'distortions' rule, which was introduced in the EU Basic Anti-dumping Regulation on 30th May 2018.[7]

The EU, like India, follows a lesser duty rule in case of anti-dumping investigations. As per this rule, the amount of anti-dumping duty on import should not exceed the margin of dumping or margin of injury, whichever is lesser. There were no exceptions to the application of this lesser duty rule prior to 30th May 2018.[8] However, Point (2a) was inserted in Article 7, 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"*

Thus, the lesser duty rule may not be applied by the EU if there is distortion of raw material prices. As already noted, 'significant distortions' under Article 2(6a) can occur due to distortion of raw material prices. Thus, it seems that in anti-dumping investigations, the EU may determine the existence of 'significant distortions' and may construct normal value based on market economy third country or other methodology not based on actual costs and prices of the exporter. In such cases, the EU may also determine that the benefit of lesser duty rule would not be available to exporters and duty equal to the

[6] The consistency of revised EU law with WTO obligations is not known and cannot be assured in absence of any WTO Panel or Appellate Body Report on this aspect.

[7] Regulation (EU) 2018/825 of the European Parliament and of the Council of 30 May 2018 (OJ L 143, 7.6.2018, p. 1–18).

[8] The application of lesser duty rule allowed exporting countries like China, which were subject to non-market economy methodology for dumping margin determination, to escape high anti-dumping duty based on dumping margin when the injury margin was lower.

dumping margin would be imposed on imports even if injury margin is lesser than the dumping margin.

It requires to be seen how the EU has implemented the revised rules in recent anti-dumping determinations against China and other countries and is there any visible change in obligations of the exporters, determinations of dumping margin and consequent imposition of anti-dumping duty on imports from China and other countries.

[The author is an Associate in International Trade Practice, Lakshmikumaran & Sridharan, New Delhi]

Trade Remedy News

Trade Remedy actions by India

Product	Country	Notification No.	Date of Notification	Remarks
Carbon Black	China PR and Russia	F. No. 7/15/2020-DGTR	20-05-2020	Second Sunset review of anti-dumping duty initiated.
Digital Offset Printing Plates	China PR, Japan, Korea RP, Taiwan, Vietnam	F.No. 6/7/2019-DGTR	15-05-2020	Definitive anti-dumping duty recommended.
Natural Mica based Pearl Industrial Pigments excluding Cosmetic Grade	China PR	F. No. 6/8/2020-DGTR	09-05-2020	Anti-dumping investigation initiated.
Phthalic Anhydride	Korea RP	F. No. 22/8/2019-DGTR	11-05-2020	Preliminary Findings issued under India-Korea Comprehensive Economic Partnership Agreement (Bilateral Safeguard Measures) Rules, 2017. Customs duty provisionally recommended to be increased to level of MFN duty.
Phthalic Anhydride	China PR, Indonesia, Korea RP and Thailand	F.No. 6/16/2020-DGTR	21-05-2020	Anti-dumping investigation initiated
Phthalic Anhydride	Japan and Russia	F. No. 7/11/2020-DGTR	11-05-2020	Sunset Review of anti-dumping duty initiated.

Product	Country	Notification No.	Date of Notification	Remarks
Plain Medium Density Fibre Board having thickness 6mm and above	M/s. Kim Tin MDF, Joint Stock Company, Vietnam	F. No. 6/9/2020-DGTR	11-05-2020	Anti-dumping investigation initiated against single exporter.
Polybutadiene Rubber	Korea RP	F. No. 22/7/2019-DGTR	12-05-2020	Preliminary Findings issued under India-Korea Comprehensive Economic Partnership Agreement (Bilateral Safeguard Measures) Rules, 2017. Customs duty provisionally recommended to be increased to MFN level.
Polyester Yarn (Polyester spun yarn)	China PR, Indonesia, Nepal and Vietnam	F.No. 6/10/2020-DGTR	21-05-2020	Anti-dumping investigation initiated
Polytetrafluoroethylene	Korea RP	F. No. 07/07/2020-DGTR	8-05-2020	Termination of Anti-Circumvention Investigation concerning alleged circumvention of anti-dumping duty on goods originating from Russia by imports from Korea RP.
Sodium Citrate	China RP	08/2020-Cus. (ADD)	19-05-2020	Anti-dumping duty continued for 5 more years after affirmative sunset review.

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Common Alloy Aluminium Sheet	United States of America	85 FR 29930 [C-533-896]	19-05-2020	Postponement of Preliminary Determinations in Countervailing Duty Investigations

Product	Country	Notification No.	Date of Notification	Remarks
Forged Steel Fluid End Blocks	United States of America	85 FR 31452 [C-533-894]	26-05-2020	Preliminary Affirmative Countervailing Duty Determination
Large Diameter Welded Pipe	United States of America	85 FR 26930 [A-533-881; C-533-882]	6-05-2020	Final Results of Anti-dumping Duty and Countervailing Duty Changed Circumstances Reviews
Quartz Surface Products	United States of America	85 FR 25391 [A-533-889]	1-05-2020	Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances
Quartz Surface Products	United States of America	85 FR 25398 [C-533-890]	1-05-2020	Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, In Part

WTO News

WTO Director General, Roberto Azevêdo cuts his second term short by one year: To step down on 31-08-2020

On 14-05-2020, the Director General of WTO declared that he would step down from his position on 31-08-2020. In his statement, the DG emphasized that the decision was based on personal reasons. In his time with the WTO, he witnessed the negotiation and completion of the Trade Facilitation Agreement, expansion of the Information Technology Agreement, decisions on food security, and elimination of export subsidies. It may be noted that on 20-05-2020, nomination window for DG Selection has been opened, in which candidates seeking to succeed the current DG may submit their nomination bids. The appointment process for the next DG would formally commence on 8-06-2020.

World merchandise trade contracts due to COVID-19

Consistent with the WTO's trade forecast issued in April 2020, which estimated that world merchandise trade could decline by between 13% and 32% in 2020, depending on the duration of the pandemic and the effectiveness of policy responses, the WTO's goods trade barometer currently stands at 87.6, suggesting a sharp contraction in the world trade.

As per WTO reports, all of the barometer's component indices are currently well below trend with the automotive products index (79.7) being weakest of all, due to collapsing car production

and sales in major economies. Further, declines in the container shipping (88.5) and air freight (88.0) indices reflect weak demand for traded goods as well as supply-side constraints arising from efforts to suppress COVID-19. Only the indices for electronic components (94.0) and agricultural raw materials (95.7) showed signs of stability, although they too remain below trend.

Safeguard investigations

South Africa has on 15-05-2020 launched safeguard investigation on imports of bolts with hexagon heads of iron and steel, covered under tariff sub-heading 7318.15.43. The period of investigation for data evaluation for the purposes of determining the allegation of serious injury is 1-07-2016 to 30-06-2019.

India Customs & Trade Policy Update

Validity of existing Export Performance Certificates for FY 2019-20 extended up to 30-09-2020

CBIC has made amendments in various conditions under Notification No. 50/2017-Cus. (Jumbo exemption notification) to extend the validity of existing Export Performance Certificates for the financial year 2019-20, up to 30-09-2020. Notification No. 23/2020-Cus., dated 14-05-2020 issued in this regard amends Condition Nos. 10, 21, 28, 32, 33, 36 and 101 of the basic notification. Accordingly, Export Performance Certificates issued for the FY 2019-20 and valid till 31-03-2020 will now be eligible for import of unutilised value and quantity of goods specified in the certificate, till 30-09-2020.

Relaxation from submitting Bonds extended till 30-05-2020

Vide Circular No. 17/2020-Cus., dated 03-04-2020, the CBIC had relaxed requirement to submit bonds prescribed under Sections 18, 59 and 143, and under notifications issued under Section 25 of the Customs Act, 1962 in order to expedite Customs clearance of goods during the COVID-19 pandemic. The aforesaid relaxation is available against submission of an undertaking having the same contents as those of a prescribed bond. Earlier, the requirement from submission of bond was relaxed till 15-05-2020 *vide* Circular No. 21/2020-Cus., dated 21-04-2020 and the undertaking submitted in lieu of bond was required to be replaced with a proper bond by 30-05-2020. However, in light of extension in the lockdown period, the CBIC has by Circular No. 23/2020-Cus., dated 11-05-2020 extended the period of relaxation till 30-05-2020. Now, the undertaking submitted in lieu of bond will have to be replaced with a proper bond by 15-06-2020.

Advance authorisations/DFIAs - Procedure for extension in import validity period and export obligation period, prescribed

Vide Notification No. 57/2015-20, dated 31-03-2020 and Public Notice No. 67/2015-20, dated 31-03-2020, the DGFT had extended the import

validity period and the export obligation period for existing Advance Authorizations (AAs) / DFIA expiring during 01-02-2020 to 31-07-2020 by a period of six (6) months. Now, the DGFT has prescribed procedural formalities and timelines which should be followed by Regional Authorities (RAs) while considering extension of import validity period and the export obligation period for existing AAs/DFIAs.

Accordingly, the RAs have been instructed to grant automatic extension of six (6) months in case of AAs/DFIAs where no revalidation or export obligation period extension has been granted till date. In case of AAs/DFIAs where revalidation or export obligation extension has previously been granted, automatic extension will not be possible due to architectural issues in the DGFT / ICEGATE system. In such cases, the authorisation holders will be required to file an amendment request with the RA, who in turn, will grant the extension after verifying the eligibility of the amendment request. The procedure for filing of amendment request will also have to followed in cases where the AAs/ DFIAs are physical (non-EDI) in nature. Policy Circular No. 35/2015-20, dated 23-04-2020 has been issued for the purpose.

Interest Equalisation Scheme (IES) for Pre and Post shipment Rupee Export Credit extended by one year

The IES for Pre and Post shipment Rupee Export Credit has been further extended for one year, i.e., up to 31-03-2021 with the same scope and coverage. DGFT Trade Notice 11/2020-21, dated 14-05-2020 in this regard reiterates notification issued by Reserve Bank of India on 13-05-2020.

Sanitizers - Export policy of sanitizers, other than alcohol-based hand sanitizers, relaxed

Vide Notification No. 53/2015-20, dated 24-03-2020 export of sanitizers [Sr. No. 207D of Schedule 2 of ITC (HS)] with HS Codes 3401, 3402, 30049087 and 380894 was prohibited. However, said notification has now been amended by DGFT Notification No. 4/2015-20, dated 06-05-2020 to prohibit export of only alcohol-based hand sanitizers falling under HS codes 3004, 3401, 3402 and 380894.

Masks - Export policy revised

DGFT Notification No. 44, dated 31-01-2020 and Notification No. 52 dated 19-03-2020 have been amended by the DGFT *vide* Notification No. 6/2015-20, dated 16-05-2020 to allow the export of non-surgical and non-medical masks of all types (cotton, skill, wool and knitted) falling under ITC (HS) Codes 392690, 621790, 630790, 901890 and 9020. It may be noted that export of all other masks, falling under any ITC(HS) Code including the abovementioned, continues to remain prohibited.

Metallic scrap and waste - Submission of scanned copy of Pre-shipment Inspection Certificate

Scanned copy of Pre-shipment Inspection Certificate (PSIC) along with an undertaking in a specified format is now acceptable till 30-06-2020, in place of a physical copy, for Customs clearance of metallic scrap and waste. According to Trade Notice No. 9/2020-21, dated 06-05-2020, which also specifies the undertaking, the original PSIC needs to be submitted to the Customs within 60 days of the clearance.

Ratio Decidendi

Valuation – Turnkey contracts – Value of drawings and designs for post importation activities when not includible

Supreme Court has upheld the CESTAT decision accepting the importer's plea for segregating the value of equipments and the other fees on services covered by the same contracts, where the latter charges were meant for post-importation phase of the arrangement between the contracting parties. Revenue's contention that these were turnkey contracts and hence import of designs and drawings, etc., even for post-importation activities should be treated as condition of import of the equipments as those intangible items formed an integral part of the arrangement, was thus rejected. The Court observed that an importer of equipments of a plant could always choose to obtain drawings and designs for undertaking post importation activities from an overseas supplier of the equipments and it may confer on such arrangements attributes of a turnkey contract, but that fact by itself would not automatically attract the "condition" clause contained in Rule 9(1)(e) of the Valuation Rules, 1988. The Apex Court also noted that the Revenue had not made out a case that the disputed items of contract did not relate to post-importation activities. The Court was of the view that just because different components of a contract or multiple contracts gave the shape of turnkey project to the imported items, without specific finding on existence of "condition" as contemplated in Rule 9(1)(e), value of all these components could not be added to arrive at the assessable value of equipment. [*Commissioner* v. *Steel Authority of India Ltd.* – Judgement dated 27-04-2020 in Civil Appeal No. 6398 of 2009, Supreme Court]

NEW DELHI
5 Link Road, Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014
Phone : +91-11-4129 9811

B-6/10, Safdarjung Enclave
New Delhi -110 029
Phone : +91-11-4129 9900
E-mail : lsdel@lakshmisri.com

MUMBAI
2nd floor, B&C Wing,
Cnergy IT Park, Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

CHENNAI
2, Wallace Garden, 2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU
4th floor, World Trade Center
Brigade Gateway Campus
26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Ph: +91(80) 49331800
Fax:+91(80) 49331899
E-mail : lsblr@lakshmisri.com

HYDERABAD
'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church,
Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail :lshyd@lakshmisri.com

AHMEDABAD
B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE
607-609, Nucleus, 1 Church Road,
Camp, Pune-411 001.
Phone : +91-20-6680 1900
E-mail :lspune@lakshmisri.com

KOLKATA
2nd Floor, Kanak Building
41, Chowringhee Road,
Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH
1st Floor, SCO No. 59,
Sector 26,
Chandigarh -160026
Phone : +91-172-4921700
E-mail :lschd@lakshmisri.com

GURUGRAM
OS2 & OS3, 5th floor,
Corporate Office Tower,
Ambience Island,
Sector 25-A,
Gurgaon-122001
phone: +91-0124 - 477 1300
Email: lsgurgaon@lakshmisri.com

PRAYAGRAJ (ALLAHABAD)
3/1A/3, (opposite Auto Sales),
Colvin Road, (Lohia Marg),
Allahabad -211001 (U.P.)
phone . +91-0532 - 2421037, 2420359
Email:lsallahabad@lakshmisri.com

KOCHI
First floor, PDR Bhavan,
Palliyil Lane, Foreshore Road,
Ernakulam Kochi-682016
Tel: +91 (0484) 4869018; 4867852
E-mail: lskochi@laskhmisri.com