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Article

Participation in trade remedy investigations – First impressions matter

By Ankur Sharma

An important facet of trade remedy investigations, especially, anti-dumping and countervailing duty investigations is that if a producer/exporter from the country facing such investigation fully ‘cooperates’ and the investigating authority in India acknowledges this and awards a duty basis the data presented by such party. On the other hand, non-cooperation leads to rejection of data and the duty applicable would be the highest on such producer/exporter under the ‘All Others’ category.

The aim of this article is to broadly explain what constitutes ‘cooperation’ and what are the guidelines which a producer/exporter may keep in mind to ensure that their participation is treated as ‘cooperation’ by the Indian investigating authority, namely, the Directorate General of Trade Remedies (**DGTR**). The recent final findings issued by the DGTR in the anti-dumping investigation concerning imports of ‘New Pneumatic Radial Tyres of rubber for buses and lorries, with or without tubes and/or flaps’ from Thailand¹ would be useful for this discussion.

The DGTR initiated this investigation on 2 December 2019. Normally, interested parties are allowed 37 days from initiation to submit their responses. In this case, interested parties were granted an extension of time and allowed to submit their responses by 24 January 2020.

A producer/exporter is required to respond to two formats – i) a narrative format where certain questions are required to be answered

concerning the corporate structure of producer/exporter, transaction channels, description of the product produced by them and exported to India, accounting policies, cost of production, etc. and ii) an MS Excel format where data needs to be reported concerning the producer’s/exporter’s home market sales for the product under investigation, exports to India, cost of production, profitability statement, expenses incurred, etc. Trade remedy investigations are time-bound and therefore, it is very important that both the formats are responded to in a timely manner within the prescribed time-limit.

For determining dumping margin, the DGTR wants to ascertain the producer’s/exporter’s home market price at ex-factory level and the ex-factory export price to India. The difference between the two shall reveal the dumping margin. The DGTR also wants to ascertain the actual cost of production to find out whether the home market sales and export sales are above the cost of production and whether the producer/exporter are earning a reasonable profit on such sales. There are more intricacies as well, but for now, this basic understanding shall enable the reader to appreciate what weighs on the DGTR’s mind while considering whether to treat a producer/exporter as ‘cooperative’.

In the above case, many producers and exporters from Thailand had participated. Except for one, all the other producers and exporters from Thailand were treated as non-cooperative by the DGTR. Without naming the parties who

¹ Final Findings F. No. 6/30/2019-DGTR (Case No. OI-22/2019) dated 27 November 2020 available at <http://egazette.nic.in/WriteReadData/2020/223376.pdf>.

were treated as non-cooperative, for better appreciation, let us understand the facts and the DGTR's reasoning for treating such parties as non-cooperative.

Producer-Exporter value chain 1

Facts – In this value chain, there were two producers and one exporter. The authority found that both the producers had not filed responses separately to questionnaire formats. Rather, they had filed a single response. Both producers had not provided separate information for their respective home market sales as well. Further, both these producers had not provided any information regarding the cost of production and expenses. Further, their exporter had submitted blank formats.

DGTR's findings – As both the producers had not provided separate information and the exporter had submitted blank formats, the DGTR treated this value chain as non-cooperative. The DGTR also held that mere verification of information should not mean that the deficient data had been accepted by the DGTR.

Producer-Exporter value chain 2

Facts – In this value chain, the producer had provided information regarding its home market sales, export sales and cost of production. However, the unaffiliated exporters based in Dubai that accounted for more than 30% of exports to India had not submitted their responses in the investigation.

DGTR's findings – As the export value chain was incomplete due to no participation of Dubai-based exporters, the DGTR treated this value chain as non-cooperative. Even though the producer requested that it should not be penalised as it could not have forced the

exporters to cooperate, the DGTR refused to accept this reasoning by the producer.

Producer-Exporter value chain 3

Facts – In this value chain, the producer failed to provide cost of production data to the DGTR even though in the narrative response, the producer had made a statement that it had provided such information to the DGTR.

DGTR's findings – As the DGTR could not ascertain the cost of production and could not determine whether the home market sales were above the cost of production and profitable, the DGTR treated this value chain as non-cooperative. The parties, however, argued that they had submitted the relevant information within six months of initiation and since the DGTR had also verified such information, the belated information should not be rejected. The DGTR reasoned that it was during the verification of information that it had found that the cost of production data was not originally submitted within the extended timelines until 24 January 2020. The DGTR refused to accept such information at a belated stage and held that mere verification of information should not mean that the delay in submitting the information was condoned by the DGTR.

Producer-Exporter value chain 4

Facts – In this value chain, the DGTR found that the cost of production data reported by the producer was highly deficient. Further, the exporter had sold the goods to a related party in India and the related importer was required to provide information regarding resale to customers in India, which it had failed to report.

DGTR's findings – As the DGTR could not: i) ascertain the cost of production of the producer, ii) determine whether the home market sales were above the cost of production and profitable, and iii) ascertain the resale price of the goods in

India, the DGTR treated this value chain as non-cooperative.

Certain important aspects emerge from the DGTR's observations in this case, which are as follows:

1. Each producer and exporter must separately respond to both the questionnaire formats. While related parties may feel that consolidated information in a common response would help them better present their information, the DGTR on the other hand requires such information in separate responses.
2. It is imperative that cost of production data be provided to the DGTR by a producer. Failure to do so shall be fatal to its cooperative status.
3. It is vital that the questionnaire response is submitted with the DGTR within the prescribed timelines. Failure to do so shall be fatal to the cooperative status of such party. Any belated submission without permission from the DGTR would be treated as unsolicited and rejected by the DGTR.
4. Where exports are made through related or unrelated exporters/traders, it is imperative that they also separately respond to the questionnaire formats. Otherwise, the DGTR would treat the producer-exporter value chain as incomplete and non-cooperative.

5. Where exports are made to a related party in India, it is important that the importer in India also cooperates and provides data for resale of the goods.
6. Just because the DGTR decides to carry out verification of the data submitted by the producer/exporter, it does not automatically mean that the DGTR accepts such information and condones any delay in submitting such information.
7. Any responses that are submitted by a producer/exporter at a belated stage when the timelines have already lapsed are treated as unsolicited by the DGTR and there are very high chances that such belated information would be rejected.
8. Most important, it is imperative that the parties clarify right at the beginning of the investigation the relevant timelines and ensure that the questionnaire formats are submitted with the DGTR within such timelines.

While the above list is certainly not exhaustive, the author hopes that this discussion guides interested parties regarding the basic steps that must be taken to ensure that their efforts lead them to 'cooperative' status in trade remedy investigations.

[The author is a Joint Partner in International Trade Practice, Lakshmikumaran & Sridharan Attorneys, New Delhi]



Trade Remedy News

Trade Remedy actions by India

Product	Country	Notification No.	Date of Notification	Remarks
2-Ethyl Hexanol (2-EH)	Saudi Arabia and Singapore	F. No. 14/22/2016-DGAD	11 November 2020	Anti-dumping investigation terminated
2-Propylheptyl Alcohol (2-pH)	European Union	F. No. 14/22/2016-DGAD	11 November 2020	Anti-dumping investigation terminated
Acrylic fibre	Thailand	36/2020-Cus.	11 November 2020	Notification imposing anti-dumping duty rescinded
Acrylonitrile Butadiene Rubber	Korea RP	F. No. 7/5/2020-DGTR	24 November 2020	Anti-dumping duty sunset review recommends continuation of duty
All Fully Drawn or Fully Oriented Yarn/ Spin Drawn Yarn/ Flat Yarn of Polyester	China and Thailand	F. No.7/9/2020-DGTR	23 November 2020	Anti-dumping recommended to be continued on imports from China. Continuation of ADD on imports from Thailand was not recommended
Carbon Black used in rubber applications	China and Russia	34/2020-Cus.	9 November 2020	Anti-dumping duty extended till 31 December 2020
Caustic Soda	China and Korea RP	F. No. 7/1/2020-DGTR	29 October 2020	Anti-dumping duty sunset review recommends continuation of duty
Clear Float Glass	Malaysia	37/2020-Cus.	11 November 2020	Definitive anti-dumping duty imposed
Coated/Plated Tin Mill Flat Rolled Steel Products	European Union, Japan, USA and Korea RP	F.No.354/78/2020-TRU	20 November 2020	Central Government decides not to impose anti-dumping duty as recommended in final finding of DGTR
Fluoroelastomers (FKM)	China	40/2020-Cus.	27 November 2020	Anti-dumping continued after sunset review

Product	Country	Notification No.	Date of Notification	Remarks
Front Axle Beam and Steering Knuckles for heavy and medium commercial vehicles	China	41/2020-Cus.	27 November 2020	Anti-dumping duty extended till 31 January 2021
Fully Drawn or Fully Oriented Yarn/Spin Drawn Yarn/Flat Yarn of Polyester	China and Thailand	39/2020-Cus.	26 November 2020	Anti-dumping duty extended till 31 December 2020
Isononanol (INA)	European Union and Singapore	F. No. 14/22/2016-DGAD	11 November 2020	Anti-dumping investigation terminated
Mono Ethylene Glycol	Kuwait, Oman, Singapore and UAE	F. No. 6/29/2019-DGTR	20 November 2020	Anti-dumping investigation terminated
Nylon Tyre Cord Fabric	China	F.No.7/22/2019-DGTR	29 October 2020	Anti-dumping duty sunset review recommends continuation of duty
Phthalic Anhydride	Japan and Russia	38/2020-Cus.	19 November 2020	Anti-dumping duty extended till 31 January 2021
Poly Vinyl Chloride Paste Resin	China, Japan, Korea RP, Malaysia, Russia, Taiwan and Thailand	F. No. 7/23/2020-DGTR	29 October 2020	ADD mid-term review – Final findings issued to change of name of producer/exporter from Korea RP
Rubber Chemical PX-13	China, Korea RP and USA	F.No. 6/20/2020-DGTR	11 November 2020	Provisional anti-dumping duty recommended
Toluene Di-Isocyanate	China, Japan and Korea RP	F. No. 7/22/2020-DGTR	29 October 2020	ADD mid-term review – Final findings issued to change of name of producer/exporter from Korea RP
Woven Fabric (having more than 50% Flax content) commonly known as Flax Fabric	China and Hong Kong	35/2020-Cus.	10 November 2020	Anti-dumping continued after sunset review

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Commodity Matchbooks	USA	85 FR 71321	9 November 2020	ADD and CVD Orders continued after sunset reviews
Graphite electrode systems	European Union	Commission Implementing Decision (EU) 2020/1605	30 October 2020	ADD and CVD – Partial interim review terminated
Prestressed Concrete Steel Wire Strand	USA	85 FR 71311	9 November 2020	ADD and CVD Orders continued after sunset reviews
Utility Scale Wind Towers	USA	85 FR 73019	16 November 2020	Countervailing duty investigation initiated
Utility Scale Wind Towers	USA	85 FR 73023	16 November 2020	Less-Than-Fair-Value Investigations initiated



WTO News

Indian measures questioned at SPS Committee meeting

In the backdrop of the 25 years to the WTO and the Sanitary and Phytosanitary Agreement, the WTO members, in the Committee meeting held recently, raised 39 trade concerns, 19 of them addressed for the first time in the Committee. While Canada raised concerns regarding India's import requirements for pulses, the United States expressed its concern regarding India's requirement for certificates on non-genetically modified origin and genetically modified-free status.

It may be noted that as per reports, India's decision to extend import restrictions on pulses

till 31 March 2021 was earlier objected to by many WTO members in June 2020 also, where the members had asked India to explain how the measure conforms with the WTO Rules. According to India, the measure is intended to secure the livelihood of farmers amid domestic surplus. India had in June stated that the government continues to review the market situation. Regarding the requirement of certificates on non-genetically modified origin, the United States has, as per reports, asked India to postpone the mandatory certification. It is reported that the USA has submitted to the WTO that there is a lack of technical rationale for the measure.

Hong Kong disputes USA's 'China' origin marking requirement

Hong Kong, China has sought for consultation with the United States in respect to the latter's origin marking requirement. According to the U.S. Customs and Border Protection notice published on 11 August 2020, goods produced in Hong Kong must be marked to indicate that their origin is 'China'. Hong Kong points out that under Section 201(a) of the United States-Hong Kong Policy Act of 1992, the laws of the United States apply to Hong Kong, China in the same manner as those laws applied to Hong Kong prior to the resumption of the exercise of sovereignty by China on 1 July 1997, unless the President of the United States determines and issues an Executive Order that Hong Kong, China 'is not sufficiently autonomous to justify treatment under a particular law of the United States ... different from that accorded the People's Republic of

China'. Accordingly, it is alleged that the US measures are in violation of Articles I:1, IX:1 and X:3(a) of the GATT 1994 and Articles 2(c), 2(d) and 2(e) of the Agreement on Rules of Origin. Hong Kong also alleges violation of Article 2.1 of the Agreement on Technical Barriers to Trade.

Expansible Polystyrene – Indonesia launches safeguard investigation

Indonesia has on 18 November 2020 initiated safeguard duty investigation against imports of expansible polystyrene classifiable under Harmonized System Code 3903 11 10. As per notification circulated in WTO on the same day, those having substantial interest and wishing to be considered as interested parties in this investigation are required to submit written request to the Investigating Authority in Indonesia, within a period of 15 days from the date of initiation.



India Customs & Trade Policy Update

Manufacture and other operations in warehouse – Job work clarified:

The CBIC has clarified on various issues relating to job work for the unit working under the scheme of Manufacturing and Other Operations in Warehouse ('**MOOW Scheme**') under Section 65 of the Customs Act, 1962. The CBIC Circular No. 48/2020-Cus., dated 27 October 2020 also clarifies various issues in case where the job work activity is done by a unit working under the MOOW Scheme, for other units.

Job work for unit working under the MOOW Scheme

- GST provisions need to be followed in respect of procedures and time lines.
- Imported goods to be first deposited in premises before sending for job work.
- Only inputs can be sent out for job work.
- Capital goods can be sent out for repair after permission of bond officer.



- Moulds, jigs, tools, fixtures, tackles, instruments, hangers, patterns and drawings can be sent out for exclusive use by the job worker for concerned unit.
- For removal of goods from job worker's premises, Regulations 14 and 15 of the Manufacture and Other Operations in Warehouse (No. 2) Regulations, 2019 to be followed. Date of removal from job workers premises will deemed to be the date of removal from warehouse.
- Scrap, waste and remnants generated during job work to be either returned to MOOW Scheme unit or cleared from job work unit on payment of duty.
- In case of any violation, the goods will be deemed to be cleared for home

consumption on the date of clearance for job work.

Job work by MOOW Scheme unit

- MOOW Scheme unit, being a GST registered unit, can do job work for others.
- If imported inputs are used in job work, duty is required to be paid by filing Ex-bond Bill of Entry, only when job worked goods are returned to principal.
- No duty payable if job worked goods exported from premises of MOOW Scheme unit.

The Circular also states that MOOW Scheme unit can source capital goods and inputs from Special Economic Zones and Free Trade and Warehousing Zones.



Ratio Decidendi

No confiscation under Customs Section 111(o) in case of misdeclaration and non-payment of anti-dumping duty

CESTAT New Delhi has set aside the confiscation of imported goods under Section 111(o) of the Customs Act, 1962 in a case involving misdeclaration of goods and consequent non-payment of anti-dumping duty. The Tribunal in this regard observed that the Notification 14/2010-Cus. read with Notification No. 86/2011-Cus. was directed for levy of anti-dumping duty on the subject goods from subject countries/exporters and was not a post-import conditional exemption notification. It noted that

Section 111(o) will get attracted only in case of non-fulfillment of any post import condition. [*Stainox Alloys Pvt. Ltd. v. Commissioner* – 2020 VIL 510 CESTAT MUM CU]

Valuation – Amount paid for exclusive distribution rights, includible in value of import goods but not as royalty or license fee

The Court of Justice of the European Union has held that a payment made for a limited period of time by the buyer of imported goods to the seller of those goods, in return for grant of an exclusive right to distribute those goods in a given territory, calculated on the basis of the turn over achieved in that territory, must be included in the customs

value of those goods. The Court observed that since the seller (who was also the recipient of payment) would not have supplied those goods for exclusive distribution without that payment, such payment must be regarded as forming part of the 'conditions of sale' of those goods for the purposes of Article 29(3)(a) of the EU's Customs Code. The Court of Justice noted that although no provision of the Customs Code or of the Implementing Regulation provides a definition of the concept of 'condition of sale' within the meaning of Article 29(3)(a), in order to maintain the priority of the transaction value method, the

concepts which appear in Article 29 must be interpreted broadly. It may be noted that the Court however ruled out application of Article 32(1)(c) [royalty and license] and (5)(b) of the Customs Code as well as Article 157(2) of the Implementing Regulation. It observed that there was nothing to suggest that the payments would be due on the basis of the grant of a possible licence in respect of intellectual property rights by the seller. [*5th Avenue Products Trading GmbH v. Hauptzollamt Singen* – Judgement dated 19 November 2020 in Case C-775/19, Court of Justice of the European Union]

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.
Phone : +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 : ls pune@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 : +91-124-477 1300
E-mail : ls gurgaon@lakshmisri.com

PRAYAGRAJ (ALLAHABAD)

3/1A/3, (opposite Auto Sales),
Colvin Road, (Lohia Marg),
Allahabad -211001 (U.P.)
Phone : +91-532-2421037, 2420359
E-mail : lsallahabad@lakshmisri.com

KOCHI

First floor, PDR Bhavan,
Palliyil Lane, Foreshore Road,
Ernakulam Kochi-682016
Phone : +91-484 4869018; 4867852
E-mail : lskochi@lakshmisri.com

JAIPUR

2nd Floor (Front side),
Unique Destination, Tonk Road,
Near Laxmi Mandir Cinema Crossing,
Jaipur - 302 015
Phone : +91-141-456 1200
E-mail : lsjaipur@lakshmisri.com

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