

International Trade

# amicus

November 2023 / Issue –148

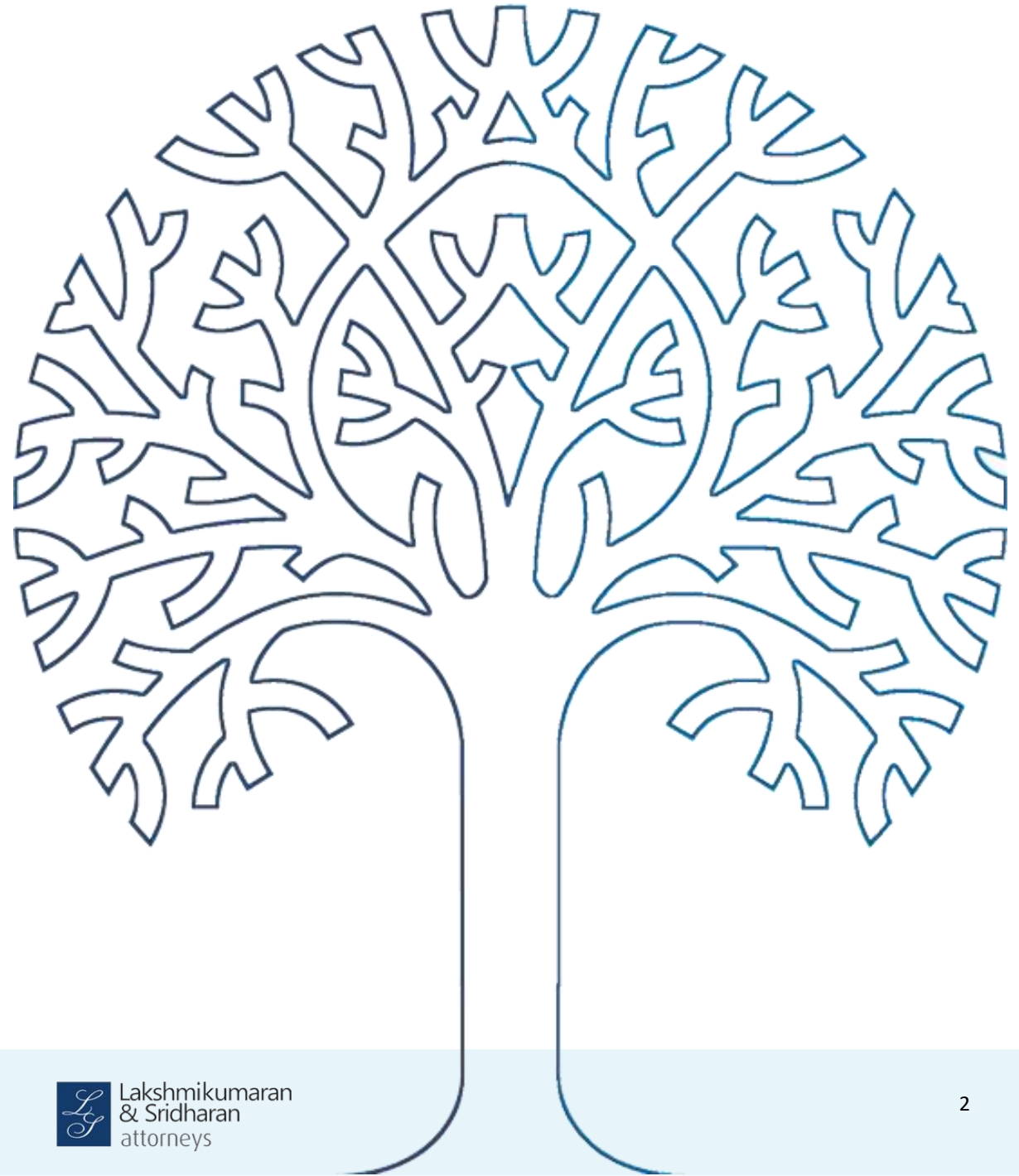


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# Table of Contents

<b>Article .....</b>	<b>3</b>
CJEU invalidates Non-Preferential Rules of Origin – A ray of hope for Indian exporters of seamless stainless-steel pipes and tubes to EU.....	4
<b>Trade Remedy News.....</b>	<b>7</b>
Trade remedy measures by India.....	8
Trade remedy measures against India.....	8
<b>WTO News .....</b>	<b>9</b>
<b>India Customs &amp; Trade Policy Update .....</b>	<b>13</b>
<b>Ratio Decidendi.....</b>	<b>15</b>





# Article

## **CJEU invalidates Non-Preferential Rules of Origin – A ray of hope for Indian exporters of seamless stainless-steel pipes and tubes to EU**

*By* **Gopakrushna Das**

The article in this issue of International Trade Amicus focuses on the implication of the recent judgement of the Court of Justice of the European Union ('**CJEU**') relating to the Non-Preferential Rules of Origin which are used to determine the origin of goods from a country not part of any trade agreements with the EU. The CJEU has held that the primary rule for CESH 7304 41 under the Rules of Origin is invalid to the extent it excludes the cold rolled processing performed on hot-rolled tubes or mother pipes classifiable under CESH 7304 49. The author here points out that in view of the decision of the CJEU, the European Anti-Fraud Office ('**OLAF**') must terminate its investigations, initiated suspecting evasion of anti-dumping duties, against Indian exporters, alleging that Indian exporters were involved in import into India of Chinese origin hot-finished products and after insufficient transformation by way of cold rolling, exporting it to the EU declaring such exports as Indian originating product. According to the author, as the EU market opens, this will give a significant boost to Indian exports from this sector.

# CJEU invalidates Non-Preferential Rules of Origin – A ray of hope for Indian exporters of seamless stainless-steel pipes and tubes to EU

By Gopakrushna Das

## Introduction

The European Union ('EU') Rules of Origin provide a comprehensive framework to ascertain the origin of goods for the purpose of compliance with regulations, trade agreements and trade measures. There are two types of Rules of origin in the EU namely Preferential and Non-Preferential Rules of Origin. The present article focuses on the implication of the judgement of Court of Justice of the European Union ('CJEU') on the Non-Preferential Rules of Origin which are used to determine the origin of goods from a country not part of any trade agreements with the EU.

Reference may be made to our last article wherein the Non-Preferential Rules of Origin ('ROO') of EU were analyzed in detail<sup>1</sup>. As per Article 60 of the EU's Customs Code ('UCC'), one of the fundamental principles under ROO is the test of 'substantial transformation.' This criterion assesses whether the processing or manufacturing conducted in the exporting country has significantly altered the product. If a substantial transformation has occurred, the product is deemed to originate from that country.

Article 62 of the UCC provides for delegation of power to the European Commission for making rules according to which last,

substantial, economically justified processing or working for manufacturing a new product is determined. In light of the above, for specific goods, legally binding rules have been laid down under Annex 22-01 of the ROO by the EU. These rules are specific for each chapter and tariff code and provide primary rules specific for a particular product to determine the true origin of that product.

## Matter before the CJEU

The validity of a specific ROO for goods falling under Customs Tariff Heading 7304 under Annex 22-01 was recently adjudged by the CJEU<sup>2</sup>. The Finance Court, Hamburg, Germany, had requested CJEU for a preliminary ruling under Article 267 of the Treaty on the Functioning of the EU on the validity and interpretation of the primary rule applicable under the Customs Tariff Sub-heading ('CTSH') 7304 41. Article 267 of the TFEU empowers the CJEU to give preliminary rulings on the interpretation of the EU law and on the validity of acts of the institutions, bodies, offices, and agencies of the EU.

The case stemmed from a request of a European importer for a binding origin information decision. This importer was importing seamless stainless-steel pipes and tubes under CTSH 7304 41 from

<sup>1</sup> [EU's Non-Preferential Rules of Origin: A tool for determining origin of goods and promote fair trade | Lakshmikumaran & Sridharan Attorneys \(lakshmisri.com\)](#)

<sup>2</sup> [C-210/22 - CURIA - Documents \(europa.eu\)](#)

South Korea. These pipes were produced in South Korea from hot rolled mother tubes or mother pipes imported from China. The Korean entity was first importing the mother tubes from China and performing cold rolling process to convert them to cold rolled pipes in South Korea.

In this decision, CJEU has noted that as per Article 62 of the UCC, the European Commission is empowered to adopt delegated acts laying down rules through which the country where the goods have undergone their last, substantial, economically justified processing or working resulting in the manufacture of a new product. The purpose of these rules is to specify how this abstract criterion must be interpreted and applied in specific situations.

As per the product specific rules listed under Annex 22-01, the specific non-preferential rule of origin for CTSH 7304 41 is as below:

<i>HS 2017 Code</i>	<i>Description of Goods</i>	<i>Primary Rules</i>
7304 41	--Cold-drawn or cold-rolled (cold-reduced)	CTH, or change from hollow profiles of subheading 7304 49

Annex 22-01 has put in place specific primary rules in order to determine and confer origin. For cold rolled pipes under CTSH 7304 41, apart from CTH, production of cold drawn or cold-rolled pipes from hollow profiles in the exporting country can also confer origin.

The CJEU noted that a cold-rolled pipe can be produced by processing a hot-rolled hollow profile or a hot-rolled tube or pipe through cold drawn or cold rolled process. The criterion for determination of the country of origin for products under CTSH 7304 41 is based on the type of treatment performed on the product, i.e., cold drawn or rolling on a hot-rolled hollow profile under CTSH 7304 49. As per the above product specific rule, cold rolling process on these hollow profiles has been considered as substantial process or working within the meaning of Article 60(2) of the UCC delegated Act. However, the rule does not consider the same processing performed on a tube or pipe classified under CTSH 7304 49 for changing the origin of a product.

The CJEU observed that origin must in any case be determined based on the decisive criterion of the 'last substantial processing or working' of the goods concerned. The cold forming of tubes and pipes of CTSH 7304 49 should therefore be considered as 'last substantial processing or working' according to the CJEU. The CJEU further refer to the final findings of the Anti-circumvention investigation against India<sup>3</sup> in which the Commission had found that tubes and pipes undergo substantial transformation because of their cold forming. Cold forming brings irreversible changes to the physical, mechanical, and metallurgical properties of the tubes and pipes, and such changes determine the origin of a product.

Considering this discrimination or contradiction, the CJEU held this primary rule for CTSH 7304 41 under the ROO to be invalid to the extent it excludes the cold rolled processing performed on hot-rolled tubes or mother pipes classifiable under CTSH 7304 49.

[3 Commission Implementing Regulation \(EU\) 2017/2093 of 15 November 2017 terminating the investigation concerning possible circumvention of the anti-dumping measures imposed by Council Implementing Regulation \(EU\)](#)

[No 1331/2011 on imports of certain seamless pipes and tubes of stainless steel originating in the People's Republic of China by imports consigned from India-EUR-Lex - 32017R2093 - EN - EUR-Lex \(europa.eu\)](#)

## *Fate of OLAF investigations*

In the recent past, the European Anti-Fraud Office ('**OLAF**') has initiated a number of investigations against several exporters from India suspecting evasion of anti-dumping duties imposed on certain seamless pipes and tubes of stainless-steel originating in China. The cases were opened by OLAF following information received from a trade source on imports of seamless pipes and tubes of stainless steel declared as originating in India. It was suspected to be of Chinese origin and therefore anti-dumping duties were alleged to be evaded. As per OLAF, one of the possible fraud *modus operandi* was in cases wherein Indian exporters are involved in import into India of Chinese origin hot-finished products and after insufficient transformation by way of cold rolling, exporting it to the EU declaring such exports as Indian originating product.

As per OLAF's understanding, such processing in India does not fulfill the rules of origin laid down in Annex 22-01 i.e., no cold processing is carried out by Indian exporters on hollow profiles and cold rolling on hot rolled tubes & pipes does not meet the condition of the primary rules in Annex 22-01. In other words, converting Chinese origin 'mother tubes' to cold-drawn seamless stainless pipes and tubes was held to be insufficient by OLAF to confer it Indian origin in the light of the EU's legally binding rules on non-preferential origin. This stand of OLAF was contradictory to the findings in the Anti-circumvention investigation conducted by the EU Commission which determined that cold processing in India of hot formed tubes originating from China represented a substantial transformation of the product.

Now, considering the CJEU's decision, the primary rule of determination of rule of origin for cold-drawn or cold-rolled (cold-reduced) under HS subheading 7304 41, would also include the cold-rolled processing performed on hot-rolled mother tubes/pipes.

Accordingly, the country of origin of cold-rolled pipes exported by an Indian exporter shall be Indian origin in cases where cold rolled processing on Chinese origin hot rolled mother tubes has been carried out by such exporter in India.

## *Opportunity for Indian exporters*

The investigations by the OLAF against Indian exporters of seamless stainless-steel pipes and tubes were a big barrier. Several customs administrations of different countries in the EU had decided to adopt OLAF's recommendations and claimed retroactive duties on these Indian imports. Therefore, many of the importers in the EU were deterred from buying from Indian exporters due to apprehension of evasion of duty. This decision of the CJEU comes as a big relief for the Indian exporters and their customers in EU. In view of the decision of CJEU which will be binding on OLAF, the OLAF must terminate the investigations against Indian exporters who are carrying out cold rolling process in India. In any case, the exporters facing OLAF investigations should reach out to them and request to drop the proceedings. As the EU market opens, this will give a significant boost to exports from this sector.

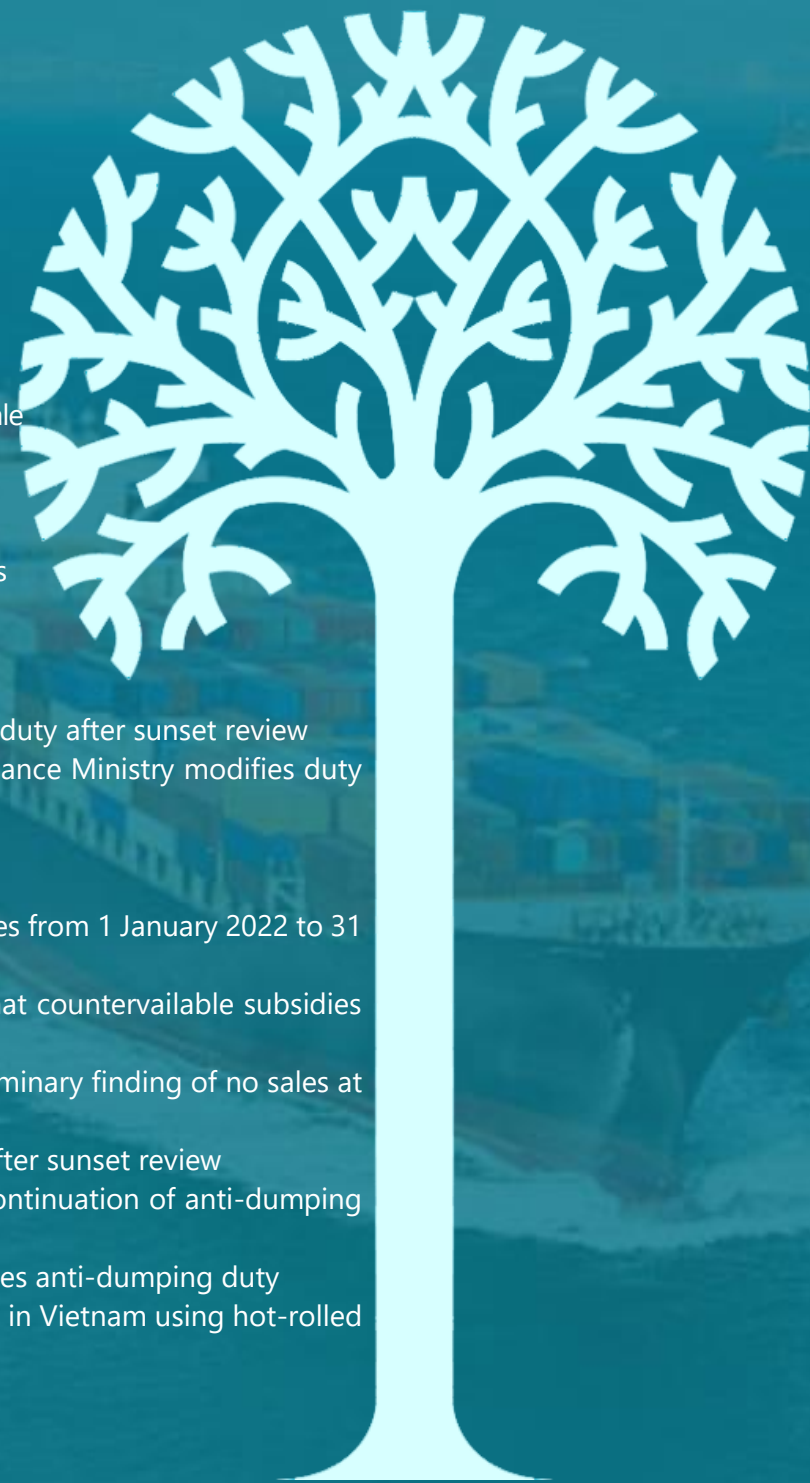
**[The author is an Associate Partner in WTO and International Trade Division in Lakshmikumar & Sridharan Attorneys, New Delhi]**

# Trade Remedy

## News



- Aluminum Extrusions from India – USA issues affirmative determination of material injury in anti-dumping investigation
- Carbon and Alloy Steel Threaded Rod from India – USA, during an ADD Administrative review, determines sale at below normal value during 1 April 2021 to 31 March 2022
- Common Alloy Aluminum Sheet from India – USA, during a CVD Administrative review, determines that Hindalco Industries Ltd. received countervailing subsidies from 14 August 2020 to 31 December 2021
- Common Alloy Aluminum Sheet from India – USA, during an ADD Administrative review, determines that goods were not sold at less than normal value from 15 October 2020 to 31 March 2022
- Frozen Warmwater Shrimp from India – USA initiates countervailing duty investigation
- Hot-rolled flat steel from India – Türkiye initiates anti-dumping investigation
- Meta Phenylene Diamine from China PR – India’s DGTR recommends continuation of anti-dumping duty after sunset review
- Natural mica-based pearl industrial pigments excluding cosmetic grade from China PR – India’s Finance Ministry modifies duty table after mid-term review
- Optical fibre cables from India – EU initiates anti-dumping investigation
- Paper File Folders from India – USA issues ADD and CVD orders
- Paper Shopping Bags from India – USA preliminarily determines provision of countervailable subsidies from 1 January 2022 to 31 December 2022
- Stainless Steel Flanges from India – USA, during a CVD Administrative review, preliminarily finds that countervailable subsidies were provided from 1 January 2021 till 31 December 2021
- Stainless Steel Flanges from India – USA, during an anti-dumping Administrative review, issues preliminary finding of no sales at prices below normal value from 1 October 2021 till 30 September 2022
- Synthetic Grade Zeolite 4A (Detergent Grade) from China PR – India continues anti-dumping duty after sunset review
- Textured Tempered Coated and Uncoated Glass from Malaysia – India’s DGTR recommends non-continuation of anti-dumping duty after sunset review
- Toughened Glass for Home Appliances, of specified thickness and area from China PR – India imposes anti-dumping duty
- Welded Carbon Steel Standard Pipes and Tubes from India – USA determines that goods completed in Vietnam using hot-rolled steel from India are circumventing ADD order.



## Trade Remedy actions by India

Product	Country	Notification No.	Date of notification	Remarks
Meta Phenylene Diamine	China PR	F. No. 7/06/2023-DGTR	23 October 2023	Sunset review recommends continuation of anti-dumping duty
Natural mica-based pearl industrial pigments excluding cosmetic grade	China PR	13/2023-Cus. (ADD)	22 November 2023	Duty table modified after mid-term review
Synthetic Grade Zeolite 4A (Detergent Grade)	China PR	12/2023-Cus. (ADD)	21 November 2023	Anti-dumping duty continued after sunset review
Textured Tempered Coated and Uncoated Glass	Malaysia	F. No. 07/11/2023-DGTR	25 November 2023	Sunset review recommends non-continuation of anti-dumping duty
Toughened Glass for Home Appliances, of specified thickness and area	China PR	11/2023-Cus. (ADD)	17 November 2023	Anti-dumping duty imposed

## Trade remedy measures against India

Product	Investigating Country	Document No.	Date of Document	Remarks
Aluminum Extrusions	USA	FR 88 82913	27 November 2023	ADD – Affirmative determination of material injury
Carbon and Alloy Steel Threaded Rod	USA	FR 88 75265	2 November 2023	ADD Administrative review – Determination of sale at below normal value during 1 April 2021 to 31 March 2022



Product	Investigating Country	Document No.	Date of Document	Remarks
Common Alloy Aluminum Sheet	USA	FR 88 76168	6 November 2023	CVD Administrative review – Determination that Hindalco Industries Ltd. received countervailing subsidies from 14 August 2020 to 31 December 2021
Common Alloy Aluminum Sheet	USA	FR 88 76724	7 November 2023	ADD Administrative review – Determination that goods not sold at less than normal value from 15 October 2020 to 31 March 2022
Frozen Warmwater Shrimp	USA	FR 88 81053	21 November 2023	Countervailing duty investigation initiated
Hot-rolled flat steel	Türkiye	DS - Communiqué No:2023/31	31 October 2023	Anti-dumping investigation initiated
Optical fibre cables	EU	C/2023/891	16 November 2023	Anti-dumping investigation initiated
Paper File Folders	USA	FR 88 81048	21 November 2023	ADD and CVD orders issued
Paper Shopping Bags	USA	FR 88 76185	6 November 2023	CVD – Preliminary determination of provision of countervailable subsidies from 1 January 2022 to 31 December 2022
Stainless Steel Flanges	USA	FR 88 76173	6 November 2023	CVD Administrative review – Preliminary finding that countervailable subsidies provided from 1 January 2021 till 31 December 2021
Stainless Steel Flanges	USA	FR 88 76176	6 November 2023	ADD Administrative review – Preliminary finding of no sales at prices below normal value from 1 October 2021 till 30 September 2022
Welded Carbon Steel Standard Pipes and Tubes	USA	FR 88 77279	9 November 2023	ADD – Determination that goods completed in Vietnam using hot-rolled steel from India are circumventing ADD order



# WTO News

- Global merchandise trade returning to normal though exports of intermediate goods fell during second quarter
- Steel standards principles for measuring greenhouse gas emissions endorsed
- EU's countervailing duties on biodiesel from Indonesia – WTO panel established
- Türkiye initiates safeguard investigation on import of wire rods
- Indonesia initiates safeguard investigations on imports of artificial filament yarn, cotton fabric, cotton yarn, and woven fabrics of artificial filament yarn

## Global merchandise trade returning to normal though exports of intermediate goods fell during second quarter

The volume of global merchandise trade is recovering. As per the WTO's Goods Trade Barometer Quarterly Report released on 27 November 2023, global goods trade is coming back to normal, with automobiles and electronic components trade leading the recovery. As per the report, the current reading of 100.7 is associated with above-trend trade volumes, with the biggest gains in the indices for automobile sales and production (110.0) and electronic components trade (109.8). The indices for air freight (100.3), export orders (99.4) and container shipping (98.0) finished on or slightly below trend, while the raw materials index (95.6) sank below trend.

It may be noted that as per another report by the WTO, world exports of intermediate goods (IGs) fell by 8% year-on-year in the second quarter of 2023. The Report states that this is because of stagnating commodity prices and contraction in global consumer demand due to high inflation and interest rates.

## Steel standards principles for measuring greenhouse gas emissions endorsed

During the recently concluded COP28, the group comprising of standard setting bodies, international organizations, steel producers and industry associations have endorsed the Steel Standards Principles relating to common emissions measurement methodologies to accelerate the transition to near zero. Recognizing the need for greater

alignment of the methodologies for comprehensively measuring greenhouse gas emissions and the importance of independent verification of the resulting data from the use of such measurement methodologies, the group has stated that the standards should be consistent with the WTO Technical Barriers to Trade (TBT) Agreement Code of Good Practice and the TBT Committee's Six Principles for the Development of International Standards, Guides and Recommendations (transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and the development dimension). The group has also endorsed that the standards should be consistent with the IEA 'Net Zero Principles' for emissions measurement and data collection in efforts to align and achieve interoperability between existing standards, methodologies, and frameworks, and those under development. It may be noted that the move has been welcomed by the WTO also.

## EU's countervailing duties on biodiesel from Indonesia – WTO panel established

The Dispute Settlement Body (DSB) of the WTO has, on Indonesia's second request, established a panel to determine whether countervailing duties imposed by the European Union on imports of biodiesel from Indonesia are in line with the WTO rules. According to Indonesia, the EU measures violate various provisions of the WTO's Subsidies and Countervailing Measures Agreement. USA, UK, Norway, Russia, Thailand, Singapore, Japan, Canada, China, Argentina and Türkiye have reserved their third party rights to participate in the panel proceedings.

## Türkiye initiates safeguard investigation on import of wire rods

Türkiye has on 3 November initiated a safeguard investigation on import of wire rods. The interested parties are required to fill in the questionnaires within 30 days from the date of publication of the Communiqué and forward it to the General Directorate of Imports, Türkiye.

## Indonesia initiates safeguard investigations on imports of artificial filament yarn, cotton fabric, cotton yarn, and woven fabrics of artificial filament yarn

Indonesia has on 27 October initiated safeguard investigations against import of artificial filament yarn, cotton fabric, cotton yarn and woven fabrics of artificial filament yarn.

# India Customs & Trade Policy Update



- Onions – Minimum Export Price notified for exports till 31 December 2023
- Courier Shipping Bills – Provision introduced for advance assessment



## Onions – Minimum Export Price notified for exports till 31 December 2023

The DGFT has superseded its Notification No. 42/2023, dated 28 October 2023 by Notification No. 45/2023, dated 23 November 2023 to impose Minimum Export Price of USD 800/MT FOB, on goods of ITC(HS) Code 0703 10 19 instead of onions falling under ITC(HS) Codes 0703 10 10 and 0712 20 00. This MEP will be applicable till 31 December 2023.

## Courier Shipping Bills – Provision introduced for advance assessment

The CBIC has provided for advance assessment of Courier Shipping Bills on the Express Cargo Clearance System ('ECCS'). Further, an Advisory No. 11/SYS/WZU/2023 dated 19 October 2023 has also been issued by DG (Systems), according to which suitable modifications have been made in the ECCS export workflow. The Courier Shipping Bills marked for assessment will be available in advance to the assessing officers before physical arrival of the export consignment at the ICT. CBIC Circular No. 28/2023-Cus. dated 8 November 2023 has been issued for the purpose.



# Ratio Decidendi

- Anti-dumping duty is not leviable on parts when Designated Authority conducted investigation only in context with complete machine – CESTAT Mumbai
- Description of goods as 'used' when machine used only for trial run, when correct – CESTAT Ahmedabad
- ASEAN FTA benefit not deniable when invoice raised by third-party country or for minor discrepancies in invoice number mentioned in the CoO certificate – CESTAT Chennai
- Clear Float Glass is classifiable under TI 7005 10 90 and not under TI 7005 29 90 – CESTAT Kolkata
- Goods used for positioning of patients on X-ray machines covered under Heading 9022 – CESTAT Ahmedabad

## Anti-dumping duty is not leviable on parts when Designated Authority conducted investigation only in context with complete machine

Observing that the Designated Authority during anti-dumping investigation did not identify 'Plastic Injection Moulding Machines (PIMM) in SKD condition' or 'parts and components of PIMM', the CESTAT Mumbai has set aside the demand of anti-dumping duty in a case where the Department had alleged import of complete PIMM after relying upon Rule 2(a) of the Interpretative Rules. The Tribunal noted that the Designated Authority had conducted the investigation based on representation of the domestic industry, only in context with complete plastic processing or injection moulding machines and not on any other article.

Allowing assessee's appeal, the Tribunal noted that the post importation activities in the present case did not merely involve assembly of the imported goods but domestic procurement of essential components/parts for ultimate manufacture of PIMM in India, as also seen from certificates from Chartered Engineers. The Tribunal in this regard also observed that Rule 2(a) will not be applicable for change in classification of imported goods when the process involved for completion of manufactured goods took place post importation of goods.

Setting aside the impugned order, the Tribunal took note of the fact that the Department had not disputed the manufacturing activity and payment of central excise duty by the assessee-importer on PIMM manufactured by them in India out of the imported parts. [*JH-Welltec Machines (India) Pvt. Ltd. v. Commissioner* – 2023 (11) TMI 1087-CESTAT Mumbai]

## Description of goods as 'used' when machine used only for trial run, when correct

The CESTAT Ahmedabad has set aside the confiscation and penalty on charge of misdeclaration, in case of import of machine with a description as 'used' goods. The description given by the importer in the bill of entry was disagreed by the Department through various opinions of experts, as well as committee specifically constituted by the Department because there were varied opinions, at various stages specially regarding the 'used' nature of the goods. The Tribunal in this regard was of the view that when there is conflict in the departmental examination reports of the machine being new or used to some extent in trial run, the benefit of doubt must go in favour of the importer. According to the Tribunal, even if the use was for trial run, as mentioned in some reports, same is sufficient to consider that the machine was used and therefore the description given by the assessee in the bill of entry was correct. It may be noted that the valuation as arrived by the Department was accepted by the assessee in this case. [*Ferromatik Milacron India Pvt. Ltd. v. Commissioner* – TS 548 CESTAT 2023 (Ahd) CUST]

## ASEAN FTA benefit not deniable when invoice raised by third-party country or for minor discrepancies in invoice number mentioned in the CoO certificate

In this case, the issue pertained to rejection of benefit under Preferential Trade Agreement on import of Steaming Non-cooking



coal. The CESTAT, Chennai observed that the Preferential Trade Agreement (ASEAN FTA) allows invoices to be issued by a third-party country hence the denial of benefit on the ground that invoice was raised by the third-party country was incorrect. Further, difference in the invoice number mentioned in the Country-of-Origin Certificate as compared to invoice issued by the supplier was due to the fact that the invoices were split into two for the convenience of the quantity of the goods exported and for issuing the Country-of-Origin Certificate respectively. According to the Tribunal, these discrepancies do not have any bearing to the benefit under the Preferential Trade Agreement. [*TCP Limited v. Commissioner – 2023 (11) TMI 530-CESTAT CHENNAI*]

## Clear Float Glass is classifiable under TI 7005 10 90 and not under TI 7005 29 90

The CESTAT Kolkata has held that Clear Float Glass, which is a non-wired glass, having microscopical layer of metal (tin), which is an absorbent layer as contemplated under Chapter Note 2(c) of Chapter 70 of the Customs Tariff Act, 1975, is correctly classifiable under Tariff Item 7005 10 90 and not under 7005 29 90. The Tribunal in this regard

also observed that the goods imported were absorbent and had non-reflective layer. [*Bagrecha Enterprises Ltd. v. Commissioner – 2023 (11) TMI 485-CESTAT Kolkata*]

## Goods used for positioning of patients on X-ray machines covered under Heading 9022

The CESTAT Ahmedabad has held that goods which are primarily used for positioning of the patient and his/her body parts on various machines including X-ray machines during the radiation treatment for cancer, are to be classified under Heading 9022 as accessories/apparatus used for X-ray or radio therapy. The Tribunal in this regard relied upon Chapter Note 2(b) and HSN Explanatory Note 4. It was also of the view that Heading 9018 is a general heading and has *prima facie* no connection with the items mentioned. Supreme Court decision in case of *Insulation Electrical (P) Ltd.* [2008 (224) ELT 512 (SC)] was held as not applicable here. [*Scan O Plan Systems v. Commissioner – 2023 VIL 1222 CESTAT AHM CU*]

<p><b>NEW DELHI</b> 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 : <a href="mailto:lsdel@lakshmisri.com">lsdel@lakshmisri.com</a></p>	<p><b>MUMBAI</b> 2nd floor, B&amp;C Wing, Cnergy IT Park, Appa Saheb Marathe Marg, (Near Century Bazar)Prabhadevi, Mumbai - 400025 Phone : +91-22-24392500 E-mail : <a href="mailto:lsbom@lakshmisri.com">lsbom@lakshmisri.com</a></p>
<p><b>CHENNAI</b> 2, Wallace Garden, 2nd Street, Chennai - 600 006 Phone : +91-44-2833 4700 E-mail : <a href="mailto:lsmds@lakshmisri.com">lsmds@lakshmisri.com</a></p>	<p><b>BENGALURU</b> 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 : <a href="mailto:lsblr@lakshmisri.com">lsblr@lakshmisri.com</a></p>
<p><b>HYDERABAD</b> 'Hastigiri', 5-9-163, Chapel Road, Opp. Methodist Church, Nampally Hyderabad - 500 001 Phone : +91-40-2323 4924 E-mail : <a href="mailto:lshyd@lakshmisri.com">lshyd@lakshmisri.com</a></p>	<p><b>AHMEDABAD</b> B-334, SAKAR-VII, Nehru Bridge Corner, Ashram Road, Ahmedabad - 380 009 Phone : +91-79-4001 4500 E-mail : <a href="mailto:lsahd@lakshmisri.com">lsahd@lakshmisri.com</a></p>
<p><b>PUNE</b> 607-609, Nucleus, 1 Church Road, Camp, Pune-411 001. Phone : +91-20-6680 1900 E-mail : <a href="mailto:ls pune@lakshmisri.com">ls pune@lakshmisri.com</a></p>	<p><b>KOLKATA</b> 2nd Floor, Kanak Building 41, Chowringhee Road, Kolkatta-700071 Phone : +91-33-4005 5570 E-mail : <a href="mailto:lskolkata@lakshmisri.com">lskolkata@lakshmisri.com</a></p>
<p><b>CHANDIGARH</b> 1st Floor, SCO No. 59, Sector 26, Chandigarh -160026 Phone : +91-172-4921700 E-mail : <a href="mailto:lschd@lakshmisri.com">lschd@lakshmisri.com</a></p>	<p><b>GURGAON</b> OS2 &amp; OS3, 5th floor, Corporate Office Tower, Ambience Island, Sector 25-A, Gurgaon-122001 phone: +91-0124 - 477 1300 Email: <a href="mailto:ls gurgaon@lakshmisri.com">ls gurgaon@lakshmisri.com</a></p>
<p><b>PRAYAGRAJ (ALLAHABAD)</b> 3/1A/3, (opposite Auto Sales), Colvin Road, (Lohia Marg), Allahabad -211001 (U.P.) Phone : +91-532-2421037, 2420359 E-mail : <a href="mailto:lsallahabad@lakshmisri.com">lsallahabad@lakshmisri.com</a></p>	<p><b>KOCHI</b> First floor, PDR Bhavan, Palliyil Lane, Foreshore Road, Ernakulam Kochi-682016 Phone : +91-484 4869018; 4867852 E-mail : <a href="mailto:lskochi@laskhmisri.com">lskochi@laskhmisri.com</a></p>
<p><b>JAIPUR</b> 2nd Floor (Front side), Unique Destination, Tonk Road, Near Laxmi Mandir Cinema Crossing, Jaipur - 302 015 Phone : +91-141-456 1200 E-mail : <a href="mailto:lsjaipur@lakshmisri.com">lsjaipur@lakshmisri.com</a></p>	<p><b>NAGPUR</b> First Floor, HRM Design Space, 90-A, Next to Ram Mandir, Ramnagar, Nagpur - 440033 Phone: +91-712-2959038/2959048 E-mail : <a href="mailto:lsnagpur@lakshmisri.com">lsnagpur@lakshmisri.com</a></p>

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