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Article

Application of lesser duty rule in anti-dumping investigations

By **Edouard Descotis**

The Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (the “WTO Anti-Dumping Agreement”) provides that anti-dumping duties can be imposed on dumped imports that cause injury to the domestic industry. It also provides guidance to determine the level of remedy which, in any case, cannot be higher than the margin of dumping.

Lesser duty rule in WTO Anti-Dumping Agreement

Article 9 of the WTO Anti-Dumping Agreement dealing with the application and collection of the anti-dumping duties provides for the possibility to limit the amount of duty that can be applied to remedy dumping to the amount necessary to remove injury to the domestic industry, i.e. to limit the level of duty to the injury margin. This rule is known as the lesser duty rule and is not binding upon WTO Members.

A thorough analysis of Article 9.1 of the WTO Anti-Dumping Agreement demonstrates that the imposition of anti-dumping duties is governed by three general principles:

- First, it leaves it to the discretion of the Authority whether or not to impose an anti-dumping duty in cases where all

requirements for the imposition have been fulfilled;

- Second, the question whether the amount of anti-dumping duty to be imposed shall be the full dumping margin or less is decided by the Authority;
- Third, it states that the duty may be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

In EC – Fasteners (China), the Appellate Body observed that the second sentence of Article 9.1 expresses a “*preference [...] for duties lesser than the margin of dumping, if lesser duties are adequate to remove the injury to the domestic industry. To express such a preference, Article 9.1 uses the expression ‘it is desirable’.*”¹

Article 9.1 of the WTO Anti-Dumping Agreement thus establishes a mandatory maximum (the full dumping margin) and a recommended minimum (the injury margin) for determining the level of anti-dumping duty and leave WTO Members with the option to choose whether to apply the lesser duty rule.

Lesser duty rule in India

The level of anti-dumping duties is recommended by the Designated Authority

¹ Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (DS397)*, para. 336.

and the decision to impose anti-dumping duties is decided by the Ministry of Finance. In determining the appropriate level of duties, the Designated Authority has to follow the so-called lesser duty rule.

The lesser duty rule was introduced in India in 1999 with Customs Notification No. 44/99-Cus. (N.T.), dated 15-7-1999. A paragraph (d) was added to Rule 4 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (the “AD Rules”) which provides that “[i]t shall be the duty of the designated authority in accordance with [the anti-dumping] rules”

“(d) to recommend the amount of anti-dumping duty equal to the margin of dumping or less, which if levied, would remove the injury to the domestic industry, and the date of commencement of such duty”.

India has long been a strong supporter of the mandatory application of the lesser duty rule. In 2005, India submitted a proposal on the mandatory application of the lesser duty rule to WTO Members.² However, the discussions have been stalled and the lesser duty rule still remains optional for WTO Members.

In accordance with Rule 4(d) of the AD Rules, the Designated Authority is therefore under the obligation to recommend an amount of anti-dumping duty equal to the dumping margin or the injury margin, whichever is

the lowest. The AD Rules provide for a strict application of the lesser duty rule and no exception is foreseen.

Example of utilization of the lesser duty rule

As mentioned above, the lesser duty rule is not binding upon WTO Members and its application is optional. A majority of WTO Members apply the lesser duty rule with two notable exceptions: the United States and China. Other countries like Australia and Canada have chosen a middle of the road approach and apply the lesser duty rule with limitations. For instance, Australia modified its anti-dumping legislation in 2013 to restrict the application of the lesser duty rule in specific cases. The lesser duty rule may be disregarded where the Australian industry includes at least two small-medium enterprises, and/or, where the normal value of the goods cannot be determined by reference to the exporting country’s market.³ In Canada, the duties are generally set at a level equal to the dumping margin. However, the application of a lesser duty is possible pursuant to a public interest test, i.e., if the authority is of the opinion that the imposition of anti-dumping duties in the full amount might not be in the public interest. Other countries like the European Union, Brazil and India strictly apply the lesser duty rule and do not provide for any exceptions. However, it is worth mentioning that the EU has been engaged in a process to modernize its trade defence legislation since 2013. The European

² Proposal on mandatory application of the lesser duty rule – Communication from India, 9 February 2005, TN/RL/W/170.

³ Customs Tariff (Anti-Dumping) Amendment Act 2013, No. 94, 2013.

Commission has proposed to remove the lesser duty rule in cases of circumvention, subsidization or where structural raw material distortions have been found to exist.⁴ This proposal is currently debated by the European

Parliament and the European Union might soon have exceptions to the lesser duty rule.

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Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
1-Phenyl-3-Methyl-5-Pyrazolone	China	47/2016-Cus. (ADD)	19-8-2016	ADD extended till 23-8-2017 consequent to initiation of Sunset Review
Caustic Soda	Chinese Taipei, Thailand and Norway	46/2016-Cus., (ADD)	19-8-2016	ADD on goods from Chinese Taipei extended till 22-8-2017 while those from Thailand and Norway, allowed to lapse
Cold-Rolled flat products of alloy or non-alloy steel	China, Japan, Korea RP & Ukraine	45/2016-Cus. (ADD)	17-8-2016	Provisional ADD imposed
Glass Fibre and articles thereof	China	48/2016-Cus. (ADD)	1-9-2016	ADD continued after sunset review
Hot Rolled flat sheets and plates (excluding hot rolled flat products in coil form) of alloy or non-alloy steel	Not Applicable	F.No.D-22011/ 47/2015/ Pt-V	2-8-2016	Safeguard Duty recommended
Hot-rolled flat products of alloy or non-alloy steel	China, Japan, Korea RP, Russia, Brazil and Indonesia	44/2016-Cus. (ADD)	8-8-2016	Provisional ADD imposed
N-Butyl Alcohol	Saudi Arabia	F.No.14/20/2016-DGAD	2-9-2016	ADD investigation initiated

⁴ Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1225/2009 on protection against dumped imports from countries not members of the European Community and Council Regulation (EC) No 597/2009 on protection against subsidised imports from countries not members of the European Community, 10 April 2013.

Product	Country	Notification No.	Date of Notification	Remarks
Rubber chemicals – (MBTS) Dibenzothiazole disulphide	China	40/2016-Cus. (ADD)	8-8-2016	ADD extended till 19-10-2017 consequent to initiation of sunset review
Para Nitroaniline	China	49/2016-Cus. (ADD)	7-9-2016	ADD extended till 8-9-2017 consequent to initiation of sunset review
PVC Flex Films	China	42/2016-Cus. (ADD)	8-8-2016	ADD continued after sunset review
Sodium Nitrite	China	39/2016-Cus. (ADD)	8-8-2016	ADD extended till 16-8-2017 consequent to initiation of sunset review
Viscose Staple Fibre excluding Bamboo Fibre	China & Indonesia	43/2016-Cus. (ADD)	8-8-2016	ADD continued after sunset review

Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Finished Carbon Steel Flanges	USA	81 FR 62098 [C-533-872]	8-9-2016	CVD investigation – Preliminary determination postponed
Flat Hot-Rolled Carbon and Alloy Steel Sheet and Strip	Canada	Canadian International Trade Tribunal, News Release	12-8-2016	ADD rescinded but Countervailing duty continued after sunset review
New Pneumatic Off-the-Road Tires	USA	[A-533-869] 81 FR 55431	19-8-2016	Nil dumping margin determined in Preliminary determinations
Polyethylene Terephthalate Film, Sheet, and Strip	USA	[A-533-824] 81 FR 50684 [C-533-825] 81 FR 51186	2-8-2016 3-8-2016	Preliminary dumping margin determined between 0.56% to 0.82% Preliminary subsidy rates determined for two companies, between 2.16% to 5.10%

Product	Country	Notification No.	Date of Notification	Remarks
Resealable can end closures	Australia	Anti-dumping Notice No. 2016/88	5-9-2016	Extension of time granted to issue Statement of Essential Facts
Sulfanilic Acid	USA	81 FR 60343 [A-533-806 & C-533-807]	1-9-2016	ADD&CVD–Sunset reviews initiated

WTO News

India disputes USA's domestic content requirement in renewable energy sector

India has on 9-9-2016 sought consultations with USA under the WTO's dispute settlement system. According to India, USA's domestic content requirement, as practised by 8 US States, violates various WTO Agreements. As per reports, India alleges that states of Washington, California, Montana, Massachusetts, Connecticut, Michigan, Delaware and Minnesota also provide illegal subsidies in the renewable energy sector.

It may be noted that the DSB panel had, in February this year, found India's domestic content requirements for solar products to be in violation of the GATT provisions. India has appealed against the report however the result is still awaited. The panel then had held that Indian measures accord "less favourable treatment" to imports within the meaning of Article III:4 of the GATT 1994 and are inconsistent with Article 2.1 of the TRIMs Agreement.

Russian import restrictions on pigs and pork products and increased tariffs on certain agricultural products, violate

WTO Agreements

On 19 August, 2016, WTO issued the panel report in the case brought by the EU regarding Russia's measures on the importation of live pigs, pork and other pig products from the EU (DS 475). The dispute related to import restrictions imposed by Russia finding outbreaks of African swine fever (ASF) in the EU. According to the requirement, the whole of the EU's territory, except for Sardinia, had to be ASF free for three years in order for the products at issue to be imported into Russia. The Panel however found that the EU-wide ban and the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are inconsistent with Article 6.1 of the SPS Agreement.

It was held that Russian measures are inconsistent because they were applied in a manner which constituted a disguised restriction on international trade. Furthermore, the measures arbitrarily and unjustifiably discriminated between Members where identical or similar conditions prevail. Russia's measures were similarly found to be inconsistent with various provisions of the Agreement on the Application of Sanitary and Phytosanitary

Measures (SPS Agreement).

Similarly in a separate dispute (DS 485), Russia's certain measures which lead to application of customs duties in excess of those set forth in its Schedule of Concessions, were also found to be inconsistent with first sentence of Article II:1(b) of the GATT 1994. The products involved here were paper and paperboard, palm oil and its fractions, refrigerators and combined refrigerator-freezers. The Panel was of the view that Article II:1(b), first sentence, prohibits duties imposed in excess of a bound duty, even if these duties are balanced or offset (at the same time or later) by duties imposed on identical products that are below the bound duty.

Certain anti-dumping measures of USA violate WTO provisions

Appellate Body of the WTO DSB has upheld

the Panel's findings that zeroing under the W-T comparison methodology is inconsistent with Articles 2.4, 2.4.2, and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. It may however be noted that, in this Report circulated on 7-9-2016, one of the Appellate Body Members, disagreed with this finding. Further, the Appellate Body, while reversing the finding of the Panel, was also of the view that USDOC acted inconsistently with the USA's obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by not assessing all the arguments and evidence submitted by interested parties and other relevant facts surrounding the bestowal of the tax credits. The dispute concerns anti-dumping and countervailing duties imposed by USA on imports of large residential washers from Korea (DS 464).

Ratio Decidendi

Anti-dumping duty – Constructed value profit calculation

The United States Court of International Trade has upheld department of Commerce's determination that non-OCTG pipe is not in the same general category of products as OCTG, for the purpose of calculation of constructed value profit. The department had in the remand proceedings explained that line pipe, standard pipe, and other non-OCTG pipe are not in the same general category of products as OCTG, as they should be of sufficient quality to be used in 'down hole' applications.

The Court in this regard was of the view that the unique pressures to which OCTG is

subjected, and its highly specialized nature support Commerce's determination that the products are too dissimilar to be considered in the same general category. It was observed that testing and certification requirements of OCTG further highlighted the fundamental differences between the products themselves. The dispute involved anti-dumping duties by the US authorities on OCTG from Korea RP.

Further reliance on data given by two companies was also upheld by the Court observing that as producers of predominantly OCTG, their business operations and products were most similar to that of concerned producers. The Court also upheld rejection of financial statements of six Korean companies,

since they represented sales of non-OCTG pipe. It was observed that based on the availability of data for producers of predominantly OCTG, it was not unreasonable for the authorities to reject using other data sources based on

differences in the companies' products and business operations resulting from the different relative significance of OCTG production. [*Husteel Co. Ltd. v. United States - Slip Op. 16-76*, dated 2-8-2016, US CIT]

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