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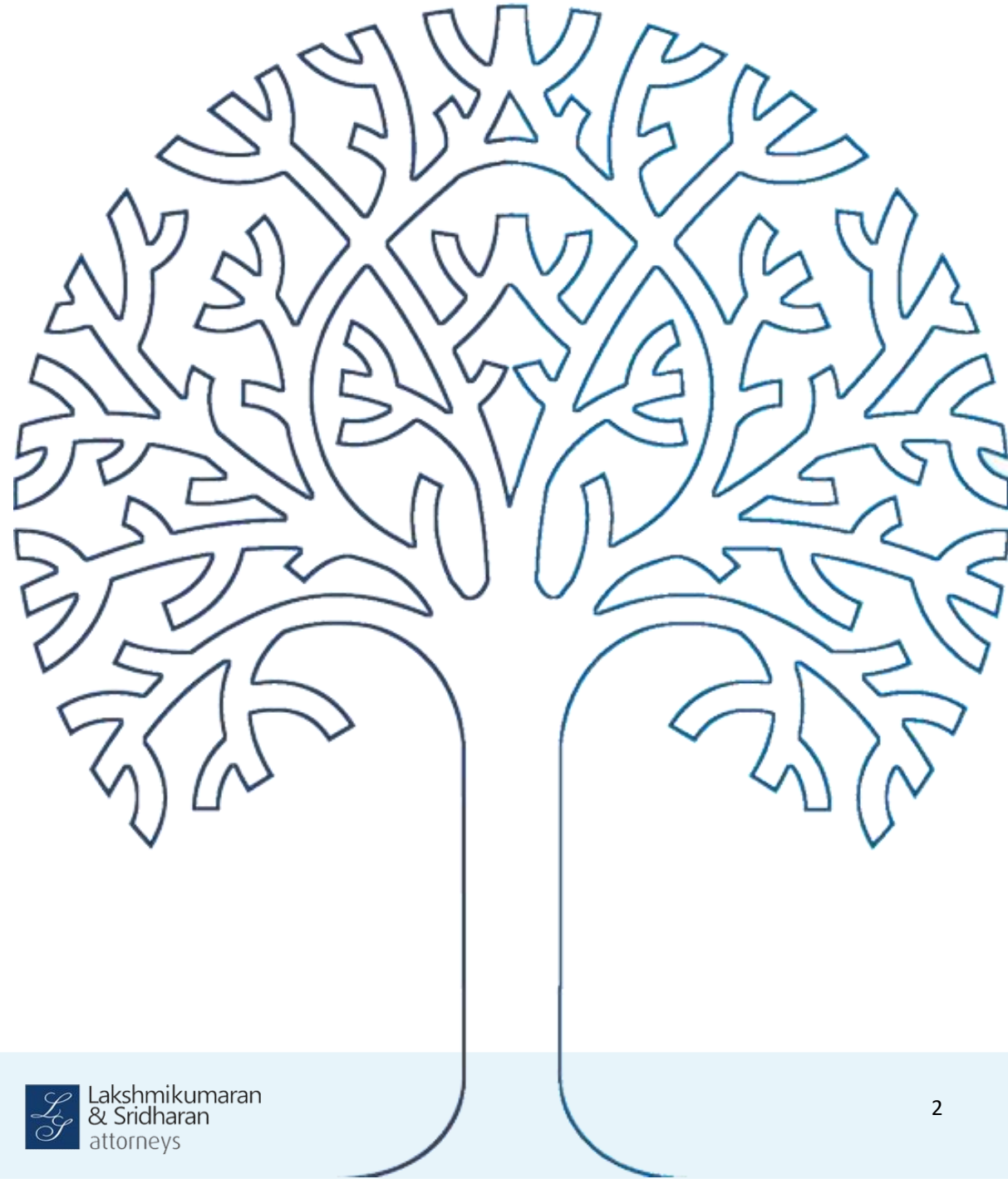


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Article

Is export restraint a countervailable subsidy? – Strict to liberal approach

By **Baratwaj Viswanathan**

This article in this issue of International Trade Amicus discusses as to whether a government action in the form of an export restraint on the export of a product results in a subsidy to the domestic producers of downstream products. It elaborately analysis WTO Panel report in United States - Measures treating export restraints as subsidies and the Appellate Body report in the dispute United States-Countervailing duty investigation on dynamic random-access memory semiconductors ('DRAMs') from Korea, and discuss how the trade authorities in various jurisdictions like USA, European Union and India have dealt with this issue. According to the author, the answer to this question is not a simple yes or no, and a demonstrable link has to be established for determination of subsidy. The article concludes by stating that it will be interesting to see how the future WTO jurisprudence develops on the legal standard of 'responsibility' or 'authority' laid down in the appellate body report.

Is export restraint a countervailable subsidy? – Strict to liberal approach

By Baratwaj Viswanathan

Introduction

Countervailing Duty ('**CVD**') investigations are conducted to determine the existence of a subsidy which causes material injury to the domestic industry. In simple terms, 'subsidy' is a grant, whether monetary or non-monetary, provided by a government to enterprises within its jurisdiction. The outcome of a CVD investigation is the imposition or otherwise of a countervailing duty on imports of subject goods into a country. It is imposed to offset any subsidies granted by a government to its exporters, the effect of which is to economically injure the domestic producers in the importing country.

As per the WTO's Agreement on Subsidies and Countervailing Measures ('**ASCM**'), not all subsidies provided by a government are 'countervailable'. In other words, the effect of only those subsidies which satisfy certain conditions can be offset by imposing a CVD. The following are the basic requirements under Article 1 of the ASCM for a subsidy to be countervailable:

- a. There must be a financial contribution
- b. Such financial contribution shall be provided by a government or a public body
- c. A benefit is conferred because of such financial contribution
- d. The subsidy is specific to an enterprise, group of enterprises or region.

A subsidy which does not fulfill all the aforesaid conditions cannot be offset by imposition of CVD. Rule 2 of the Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on

Subsidized Articles and for Determination of Injury) Rules, 1995 ('**CVD Rules**') provides to the same effect.

A subsidy can be directly provided by the government, for instance, a cash transfer to an enterprise is a form of direct subsidy. Subsidies can also be provided indirectly, for instance, when the government directs a private bank to provide loans at lower rate of interest to certain industry sectors. Both types of subsidies can be countervailed by imposition of a CVD. In this regard, the provisions relating to 'financial contribution' *inter alia* provide that it may take the form of payments to a funding mechanism, or 'entrustment' or 'direction' by the government to a private body to carry out the enumerated functions.

This article will discuss whether a government action in the form of an export restraint on the export of a product result in a subsidy? Let's take an example. A government imposes an export tax on export of a commodity the effect of which is to discourage its export from the country by making it internationally uncompetitive. This action may result in increasing the domestic supply of the restrained commodity which in turn may benefit the domestic producers of downstream products. Can it be said that the downstream product is indirectly subsidized by the government?

The WTO's dispute settlement bodies have examined this aspect in some of its reports. The trade remedy authorities in different jurisdictions have also rendered some decisions on these aspects. The approach has been strict to liberal interpretation of provisions which this article discusses in below paragraphs.

Decision of the WTO Panel in United States - Measures treating export restraints as subsidies¹

This decision of the WTO panel is the first about countervailability of export restraints. WTO consultations were initiated on a complaint filed by Canada against the US measures that treated export restraints as a subsidy. USA was of the view that the terms 'entrust' or 'direct' used in Article 1 of the ASCM ought to be interpreted by applying the 'effects' approach. As per the 'effects' approach, the 'effect' of an export restraint is to be considered to see if there is 'entrustment' or 'direction' by the government in providing the alleged subsidy. As per US, since export restraints increased the domestic supply of restrained product, thereby reducing its prices domestically, the element of 'entrustment' or 'direction' by the government was present.

The WTO panel took a strict textual interpretation and held as follows:

- a. The ordinary meaning of 'entrust' and 'direct' is an action of the government which must contain an express delegation (in the case of entrustment) or an express command (in the case of direction)
- b. That apart, the act of entrusting and directing should be addressed to a particular party and the object of it is to induce a particular task or duty.

¹ WT/DS194/R- *United States - Measures treating exports restraints as subsidies*, panel report dated 29 June 2001.

- c. Entrustment or direction is different from a mere government intervention in the market which may or may not have a particular effect or result based on the given factual circumstances and the exercise of free choice by the actors in that market.
- d. The existence of a financial contribution by a government must be proven by reference to the action of the government and not based on reaction to that measure.

It is clear that the WTO panel took a strict approach towards interpretation of the terms 'entrust' and 'direct'. The essence of WTO panel's decision is that a mere imposition of 'export restraint' should not be regarded as a countervailable subsidy. In effect, it is the government's 'action' and not a mere 'reaction' to an export restraint which results in a countervailable subsidy.

Decision of the WTO Appellate Body in the United States- Countervailing duty investigation on dynamic random-access memory semiconductors ('DRAMs') from Korea²

The issue in question in this case was whether the Government of Korea had 'entrusted' or 'directed' financial institutions to provide financial support to the exporter in Korea. In the said case the USDOC had found that the Government of Korea pursued a policy of

² WT/DS296/AB/R *United States – Countervailing duty investigation on dynamic random-access memory semiconductors (DRAMs) from Korea*, Appellate Body report dated 27th June 2005

preventing the financial collapse of the exporter. However, the WTO panel followed its earlier decision cited above to hold that in the absence of an express 'delegation' or 'command', there was no subsidy.

The WTO appellate body differed from the WTO panel's interpretation in this case. The appellate body held that interpretation of the terms 'entrust' as 'delegate' and 'direct' as 'command' was too narrow. The appellate body adopted a liberal approach towards interpretation of these terms and reduced the threshold set by previous panel rulings. It held as follows:

- a. There may be other means by which governments can give responsibility to or exercise authority over a private body that may not fall within the ordinary meaning of 'delegation' and 'command'.
- b. Entrustment or direction requires that the government give 'responsibility' to a private body or exercise its 'authority' over a private body in order to effectuate a financial contribution.
- c. The intent of the ASCM is to ensure that governments do not breach their obligations under the WTO by using private bodies to take actions that would otherwise fall within the ambit of subsidies. In other words, the provision on 'entrustment' or 'direction' to private body, in essence, is an anti-circumvention provision.
- d. To show that there is 'entrustment' or 'direction' there must be a 'demonstrable link'

In effect, WTO's appellate body reduced the threshold laid earlier by panel rulings to show the existence of 'entrustment' or 'direction' in a government action. The appellate body's view was based on the reasoning that 'entrustment' or 'direction' by the government to a private body as subsidy is an anti-circumvention measure and should be interpreted in a liberal manner. If it was not interpreted liberally, it may allow governments to breach their obligations under ASCM by providing indirect subsidies.

While the appellate body did not provide a specific definition for 'entrustment' or 'direction' like the WTO panels, the essence of the ruling is that 'entrustment' or 'direction' can be in any manner and that the examination is fact specific.

It is also relevant to understand how the trade authorities in various jurisdictions have dealt with this issue.

A. USA

In USA, the US Department of Commerce ('**USDOC**') in a countervailing duty investigation on *biodiesel from Argentina*³ applied the decision of WTO appellate body in DRAMS case and concluded that there was a countervailable subsidy provided to Argentinian biodiesel producers since the export taxes on soybeans has resulted in supply of soybeans in the domestic market at less than adequate remuneration. It was held as follows:

- a. Through imposition of export taxes, the soybeans were supplied at less than adequate remuneration to the biodiesel producers. Therefore, the Government of Argentina entrusted or directed the private producers to supply soybeans at less than adequate remuneration.

³ Issues and Decision Memorandum dated 06th November 2017 for the Final Determination in the Countervailing Duty Investigation of Biodiesel from the Republic of Argentina

- b. If it was not held so, it would lead to permitting indirect provision of a subsidy which injures the US biodiesel industry.
- c. If there is no direct legislation by Argentina to prove entrustment or direction to private parties, the 'circumstantial information' can be relied on to prove the same.
- d. The test of 'demonstrable link' was applied as laid by the WTO appellate body in *DRAMS*.

Similar view was taken by the USDOC in imposing CVD on biodiesel from Indonesia on account of export taxes imposed by Indonesia on *palm oil feedstock*⁴.

B. European Union

The European Union, in separate CVD investigations on *biodiesel from Argentina*⁵ and *Indonesia*⁶, took a similar view and held that imposition of export tax on soybeans and crude palm oil, respectively, had resulted in supply of soybeans and crude palm oil in the domestic market at less than adequate remuneration which is countervailable. The European Union relied upon the decision of the WTO appellate body in *DRAMS* and applied the same principles while rendering the aforesaid decision.

C. India

Recently, the Directorate General of Trade Remedies ('DGTR') investigated the countervailability of export taxes / levy on crude palm kernel oil ('CPKO') imposed by Indonesia and Malaysia on imports of *saturated fatty alcohols*⁷. The DGTR held that Indonesian/Malaysian Government used export restraints as a means or tool to provide CPKO

at subsidized prices to downstream producers of fatty alcohols and that the provision of CPKO at less than adequate remuneration is countervailable. In arriving at the said decision, the DGTR applied the principles laid down by the WTO appellate body in *DRAMS*.

Conclusion

Are export restraint measures a countervailable subsidy? The answer to this question is not a simple yes or no. For any measure to be a countervailable subsidy, there must be a financial contribution by the government which can take the forms of 'entrustment' or 'direction' to private parties. The latest WTO jurisprudence suggests imparting a liberal meaning to the said terms. If the Authorities in a particular case are able to establish that the effect of export restraints (such as export taxes / levies) imposed by the government is to induce the private raw material suppliers to supply the raw material at reduced prices in the domestic market as compared to international prices, it may amount to a countervailable subsidy in the hands of downstream producers. In other words, a demonstrable link has to be established.

The WTO appellate body in *DRAMS* case also held that not all government actions necessarily amount to an entrustment or direction. In the context of export restraints, it will be interesting to see how the future WTO jurisprudence develops on the legal standard of 'responsibility' or 'authority' laid down in the appellate body report.

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⁴ Issues and Decision Memorandum dated 06th November 2017 for the Final Determination in the Countervailing Duty Investigation of Biodiesel from the Republic of Indonesia

⁵ Commission Implementing Regulation (EU) 2019/244 of 11 February 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Argentina

⁶ Commission Implementing Regulation (EU) 2019/2092 of 28 November 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia

⁷ Final Findings dated 7th February 2023 in Anti- subsidy investigation concerning imports of Saturated Fatty Alcohol from Indonesia, Malaysia, and Thailand.

Trade Remedy News



- Barium Chloride from India – USA issues countervailing duty order
- Ceramic Tiles from India – European Union imposes definitive anti-dumping duty
- Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from India – USA issues preliminary finding that countervailable subsidies were provided during 1 January 2021 till 31 December 2021
- Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from India – USA issues affirmative finding in anti-dumping sunset review
- Finished Carbon Steel Flanges from India – USA determines sales at less than normal value during 1 August 2020 till 31 July 2021
- Flat Base Steel Wheels from China PR – India initiates sunset review of anti-dumping duty
- Flexible Slabstock Polyol from China PR and Thailand – India initiates anti-dumping investigation
- Frozen Warmwater Shrimp from India – USA issues preliminary determination that goods are being or are likely to be sold in the USA at less than normal value during the period of review 1 February 2021 till 31 January 2022
- Paper File Folders from India – USA issues preliminary determination that countervailable subsidies were being provided during 1 January 2021 till 31 December 2021
- Plates and tiles of fine stoneware porcelain stoneware for paving or cladding, from India – Argentina initiates expiry review of anti-dumping duty
- Stainless Steel Bar from India – USA determines no sale at less than normal value during 1 February 2021 till 31 January 2022
- Stainless Steel Flanges from India – USA determines sales at prices below normal value during the period of review – 1 October 2020 till 30 September 2021, absence of reviewable shipments by M/s. Emerson Process Management and M/s. Echjay Forgings Private Limited



Trade Remedy actions by India

Product	Country	Notification No.	Date of notification	Remarks
Flat Base Steel Wheels	China PR	F. No. 7/02/2023-DGTR	24 March 2023	Sunset review of anti-dumping duty initiated
Flexible Slabstock Polyol	China PR and Thailand	F. No. 6/17/2022-DGTR	29 March 2023	Anti-dumping investigation initiated

Trade remedy measures against India

Product	Investigating Country	Document No.	Date of Document	Remarks
Barium Chloride	USA	2023-04604	7 March 2023	Countervailing duty order issued
Ceramic Tiles	EU	Commission Implementing Regulation (EU) 2023/265	9 February 2023	Definitive anti-dumping duty imposed
Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel	USA	2023-04567	7 March 2023	Preliminary finding that countervailable subsidies were provided during 1 January 2021 till 31 December 2021.
Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel	USA	2023-05619	20 March 2023	Affirmative finding in anti-dumping sunset review

Product	Investigating Country	Document No.	Date of Document	Remarks
Finished Carbon Steel Flanges	USA	2023-05149	14 March 2023	Sales at less than normal value during 1 August 2020 till 31 July 2021
Frozen Warmwater Shrimp	USA	2023-04437	3 March 2023	Preliminary determination that goods, are being or are likely to be, sold in the USA at less than normal value during the period of review 1 February 2021 till 31 January 2022
Paper File Folders	USA	2023-05553	20 March 2023	Preliminary determination that countervailable subsidies were being provided during 1 January 2021 till 31 December 2021
Plates and tiles of fine stoneware porcelain stoneware natural or unpolished, polished, even semi-polished (satin) and varnished or glazed (even lapped and / or polished), for paving or cladding	Argentina	Resolution of the Ministry of Economy No. 123/2023	14 February 2023	Expiry review of the anti-dumping measures initiated
Stainless Steel Bar	USA	2023-04574	7 March 2023	No sale at less than normal value during 1 February 2021 till 31 January 2022
Stainless Steel Flanges	USA	2023-04666	7 March 2023	Sales at prices below normal value during the period of review – 1 October 2020 till 30 September 2021. No reviewable shipments by M/s. Emerson Process Management and M/s. Echjay Forgings Private Limited.



WTO News

- Safeguard measures under India and Mauritius Comprehensive Economic Cooperation and Partnership Agreement – India and Mauritius clarify
- Seychelles formally accepts Fishing Subsidies Agreement – First WTO member from Africa to do so

Safeguard measures under India and Mauritius Comprehensive Economic Cooperation and Partnership Agreement – India and Mauritius clarify

Replying to a question posed by Brazil, India and Mauritius have, in a communication dated 13 March 2023, stated that there is no transitional period in respect of safeguard measures that can be triggered under the Comprehensive Economic Cooperation and Partnership Agreement (CECPA, Agreement) between India and Mauritius. They have however stated that transitional period of one year is available in respect of triggering automatic safeguard mechanism, which may only be triggered when the imports of a product not covered by a TRQ reaches a threshold of 3% as compared to global imports of the said products. Further, on a specific question from United Kingdom, India and Mauritius, in this joint response, have stated that the safeguard measure can apply throughout the life of the Agreement under the circumstances specified therein, as the domestic industry can be impacted at any time due to a sudden surge in imports and not during a specified timeframe. In respect of absence of provision for compensation in the bilateral safeguard measures, it has been stated that since the CECPA is a bilateral Agreement, and not a multilateral one, the need for compensation was not considered important. It was however stated that the Agreement however contains a chapter on Dispute Settlement which covers compensation issues.

Seychelles formally accepts Fishing Subsidies Agreement – First WTO member from Africa to do so

On 10 March 2023, Seychelles became the first African country and the third WTO member country behind Switzerland and Singapore, agreeing to the Fishing Subsidy Agreement. By depositing the Instrument of acceptance, Seychelles reinforced its commitment to multilateralism and ensuring that concrete steps are taken towards limiting harmful subsidies that contribute to overfishing as set out in Target 14.6 of the UN Sustainable Development Goals whilst empowering and supporting coastal communities as they transition toward truly sustainable practices.

With the growing importance of sustainable development, the 12th Ministerial Conference held at Geneva on 12th -17th June 2022 had adopted the Fishing Subsidies Agreement providing impetus to the issue of environmental sustainability. This agreement sets a new binding Multilateral rule to curb harmful subsidies, which are a key factor in the widespread depletion of the world's fish stocks.

The Fishing Subsidies Agreement primarily revolves around the subsidies given for the marine related activities, however, at the same time prohibiting such subsidies for Illegal (I), Unreported (U) and Unregulated (U) fishing (commonly termed as 'IUU fishing'). The Agreement helps to set a tone for holistic development of trade and environment.

India Customs & Trade Policy Update



- Foreign Trade Policy 2023 announced – Highlights
- India-Australia FTA – Origin procedures clarified
- RoDTEP – 18 new entries in Heading 5208 made eligible for RoDTEP from 28 March 2023
- Milk, fish and pork, and their products – Requirement of health certificate for import deferred
- Crude soya-bean oil and crude sunflower seed oil – Tariff Rate Quota exemption now limited only till 31 March 2023
- Tur whole exempted from BCD
- Cashew kernel – EOUs/SEZs allowed to import without Minimum Import Price condition
- Marble imports from Bhutan – Specified quantity allowed without MIP condition
- Biofuel exports for fuel purpose allowed from EOUs and SEZs



Foreign Trade Policy 2023 announced – Highlights

With the new approach of tax remission instead of incentives; greater trade facilitation through technology, automation, and continuous process re-engineering; export promotion through collaboration; and focus on emerging areas like e-commerce exports, developing districts as export hubs, streamlining SCOMET policy, etc., the Indian Ministry of Commerce and Industry, has on 31 March 2023 unveiled Foreign Trade Policy 2023. Certain highlights of the new Policy which is effective from 1 April 2023 are provided below.

- The new Policy will continue till its withdrawn. That is, the new Policy has no usual sunset clause of 5 years, as was being provided till now.
- All authorisation redemption applications will be paperless.
- Export performance threshold for recognition of exporters as Status Holders has been rationalized, thus enabling more exporters to achieve higher status.
- Four new towns of export excellence declared – Faridabad for apparel, Moradabad for handicrafts, Mirzapur for handmade carpet and dari, and Varanasi for handloom and handicraft.
- Districts as export hubs initiative has been introduced with the aim to boost India's foreign trade by decentralizing export promotion. The initiative involves identification of products/services in all the districts, and creation of institutional mechanisms at the State and District level to strategize exports.
- All FTP benefits to be extended to e-Commerce exports.
- Value limit for exports through courier has been increased to INR 10,00,000 per consignment.
- Processing time to be reduced to one day for approval of applications under automatic route for exporters, for advance authorisation, EPCG issuance, and for revalidation of authorisations and extension of export obligation period.
- Application fee is to be reduced for advance authorization and EPCG schemes, for MSMEs.
- Dairy sector has been exempted from maintaining average Export Obligation under EPCG scheme.
- **Amnesty scheme for one time settlement of default in export obligation by Advance and EPCG authorisation holders**, has been introduced. The scheme will be available for a limited period, up to 30 September 2023. It may be noted that only authorisations issued under FTP 2009-14 till 31 March 2015, and those issued under FTP 2004-2009 or before where the export obligation period was valid beyond 12 August 2013, will only be eligible for the scheme. According to Public Notice No. 2/2023, dated 1 April 2023, all defaults can be regularised by payment of all customs duties and 100% interest on such duties. No interest is however payable on the portion of Additional Customs duty and Special Additional Customs duty.
- Policy for export of dual use items under SCOMET has been consolidated at one place for ease of understanding and compliance by the industry.

India-Australia FTA – Origin procedures clarified

The Ministry of Finance has clarified on various aspects of rules of origin (ROO) and operational certification procedures (OCP) of the India-Australia Free trade Agreement. As per Instruction No. 10/2023-Cus., dated 10 March 2023,

- printed copy of e-COO (electronic certificate of origin) needs to be presented to the Customs officer in lieu of defacing the original hard copy of a certificate of origin.
- affixing of QR Code on the COO/e-COO is not a requirement for valid COO/e-COO.
- absence of Overleaf Notes on the COOs received from Australia may not be a ground for initiating verification or denial of preferential benefit.
- so long as the details on the COO and the transport documents match, putting 'any ports in India' in the Port of Destination field of the COO by Issuing Bodies of Australia may not be a ground for initiating verification or denial of preferential benefit.

RoDTEP – 18 new entries in Heading 5208 made eligible for RoDTEP from 28 March 2023

18 new entries have been inserted under Heading 5208 dealing with woven fabrics of cotton containing 85% or more by weight of cotton, weighing not more than 200 g/m². These products will be eligible for the benefit of RoDTEP in respect of exports made from 28 March 2023

onwards. Ministry of Commerce Notification No. 63/2015-20, dated 25 March 2023 has amended Appendix 4R for this purpose.

Milk, fish and pork, and their products – Requirement of health certificate for import deferred

The Food Safety and Standards Authority of India (FSSAI) has deferred till further orders the requirement of health certificate issued by competent authority of the exporting country for import of milk and milk products, fish and fish products, and pork and pork products. The requirement was to come into effect from 1st of March 2023. Instruction No. 8/2023-Cus., dated 3 March 2023 shares FSSAI Order dated 24 February 2023 for this purpose.

Crude soya-bean oil and crude sunflower seed oil – Tariff Rate Quota exemption now limited only till 31 March 2023

The exemption from basic customs duty (BCD) and agriculture infrastructure and development cess (AIDC), in respect of import of 20 lakh MT/financial year of crude soya-bean oil and crude sunflower seed oil each, under Notification No. 30/2022-Cus. is now limited only till 31 March 2023. The benefit was earlier available till 31 March 2024. Notification No. 15/2023-Cus., dated 3 March 2023 has been issued for the purpose. It may be noted that as per DGFT Public Notice No. 60/2015-20, dated 1 March 2023, no TRQs will be allocated for import of these products. The Public Notice however also states that imports

of these products through Bills of Lading dated on or before 31 March 2023 will be allowed under TRQs till 30 June 2023.

Tur whole exempted from BCD

The Ministry of Finance has reduced the basic customs duty on Tur whole from 10% to nil, with effect from 4 March 2023. Notification No. 16/2023-Cus., dated 3 March 2023 amends Notification No. 50/2017-Cus. for this purpose.

Cashew kernel – EOUs/SEZs allowed to import without Minimum Import Price condition

The Ministry of Commerce has relaxed the conditions for import of cashew kernel, both broken and whole. Accordingly, EOUs and SEZ units are now allowed to import the product without following the condition of Minimum Import Price (MIP). These units will however not be allowed to sell these imported goods into the domestic tariff area. It may be noted that MIP for broken cashew kernel is INR 680 per kg, while that for whole cashew kernel, it is INR 720 per kg. Notification No. 59/2015-20, dated 21 February 2023 has been issued for the purpose.

Marble imports from Bhutan – Specified quantity allowed without MIP condition

Import of 10000 MT per year of marble falling under ITC (HS) Codes 2515 and 6802 has been allowed from Bhutan without the condition of Minimum Import Price, subject to valid Registration Certificate issued by the DGFT. Ministry of Commerce Notification No. 60/2015-20, dated 14 March 2023 amends certain Policy conditions in Chapters 25 and 68 of Import Policy of ITC (HS), 2022. It may be noted that DGFT has since then also specified the procedure for application or issuance of registration certificate for import of said product. DGFT Public Notice No. 61/2015-20, dated 20 March 2023 has been issued for the purpose.

Biofuel exports for fuel purpose allowed from EOUs and SEZs

Export of Bio-fuel from SEZ or EOUs has been allowed for fuel as well as non-fuel purposes without any restriction, when these goods are produced using only imported feed stock. It may be noted that otherwise the export of specified goods falling under TI 2207 20 00, 2710 20 00, and 3626 00 00, is permitted under licence only, for non-fuel purposes. Notification No. 62/2015-20, dated 22 March 2023 has been issued for the purpose.



Ratio

Decidendi

- Aluminium alloy coil when eligible for exclusion from anti-dumping duty under Notification No. 23/2017-Cus. (ADD) – CESTAT New Delhi
- Anti-dumping Rules are not inconsistent with RTI Act – Disclosure of 'confidential information' is not possible – Delhi High Court
- GoPro digital camera for use while surfing, skydiving, etc. is classifiable under TI 8525 80 20 – CESTAT Mumbai
- Stepper motor classifiable under Tariff Item 8501 10 12 – Customs AAR

Aluminium alloy coil when eligible for exclusion from anti-dumping duty under Notification No. 23/2017-Cus. (ADD)

The CESTAT New Delhi has allowed benefit of exclusion clause (vii) of Notification No. 23/2017-Cus. (ADD) imposing anti-dumping duty on Aluminium foil, originating or exported from China PR. The product in the present dispute was Aluminium alloys coils. The Tribunal in this regard noted that non-clad or unclad aluminium coils were exempted from anti-dumping duty under the said clause, and that there was no dispute that the present goods were not clad. It also noted that neither clause (vii) provided that it excluded alloys of particular composition, nor the letter of the DG stipulated that the exclusion clause was available only to a particular type of alloy.

Allowing the assessee-importer's appeal, the CESTAT also relied upon the Bombay High Court decision in the case of *Mahle Anand Thermal Systems Pvt. Ltd. v. Union of India*, and rejected the Department's contention that the nature of goods before the High Court in the said decision was different. The Court also rejected the contention that the relief provided to the importer before the High Court was in a writ petition, and hence not applicable here. The Tribunal noted that the relief provided to the petitioner by the High Court was in a ruling regarding interpretation of the notification, and therefore its benefit will equally apply. [*Hanon Climate Systems India Private Ltd. v. Commissioner* – 2023 VIL 195 CESTAT DEL CU]

Anti-dumping Rules are not inconsistent with RTI Act – Disclosure of 'confidential information' is not possible

In an interesting dispute involving interplay of anti-dumping proceedings under the Customs Tariff Act, 1975 and the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 ('**Anti-dumping Rules**') with the Right to Information Act, 2005 ('**RTI Act**'), the Delhi High Court has held that there is no inconsistency between the provisions of the RTI Act and the Anti-dumping Rules. According to the Court, the entire purpose of having a complete and self-sufficient scheme for disclosure of confidential information under the Anti-dumping Rules would be defeated if persons who are participating in anti-dumping investigation are permitted to tangentially seek information under the RTI Act.

The High Court hence set aside the order of the Central Information Commission, directing the Anti-dumping Authority to provide the information regarding a note sheet relating to initiation of anti-dumping investigation, containing various portions of information which, according to the Court, may be confidential to the Applicants who had asked to initiate anti-dumping investigations.

It was of the view that the Anti-dumping Authority is vested with specialised knowledge relating to the trade as also the exclusive knowledge in respect of anti-dumping proceedings, and that such knowledge would enable the said Authority to take a considered decision as to whether the particular information is to be disclosed or not. It also noted that such expertise does not vest with the CPIO/PIO or other authorities under the RTI Act.

The High Court was also of the opinion that the imposition of anti-dumping duty and confidential information disclosed in such proceedings would have a significant impact on the economic interest and trade relations of India, as also would constitute information received by the authority in confidence, in the course of adjudication, which cannot be subjected to disclosure. It observed that the level of recognition accorded to preserving confidentiality of information in the larger interest of global trade, countries involved, entities from different countries who could be exporters, importers and other stakeholders, cannot be ignored and deserves to be protected and recognized. [*Union of India v. Arvind M Kapoor* – Judgement dated 23 March 2023 in W.P.(C) 8381/2016 and 2603/2017, Delhi High Court]

GoPro digital camera for use while surfing, skydiving, etc. is classifiable under TI 8525 80 20

The CESTAT Mumbai has held that GoPro digital camera (action camera) for use while surfing, skydiving, etc. is classifiable under TI 8525 80 20 of the Customs Tariff Act, 1975. The Tribunal in this regard noted that the cameras were undisputedly digital cameras and would merit classification under TI 8225 80 20 only which is more specific rather than the residual entry at 8515 80 90. Further, the Tribunal

allowed the benefit of Notification No. 50/2017-Cus. (Sl. No. 502) to the said goods, while it observed that an Explanation (in some other notification) defining the phrase 'Digital Still Image Video Camera', as also used in present notification, cannot be used to restrict the phrase used in the notification under consideration. Department's contention that Notification No. 25/2005-Cus. is more specific, was also rejected. [*Creative Newtech Ltd. v. Commissioner* – 2023 (3) TMI 180-CESTAT Mumbai]

Stepper motor classifiable under Tariff Item 8501 10 12

The Authority for Advance Ruling Customs has held that stepper motor (3800-B07F-0000) proposed to be imported by the applicant for use in manufacture of idle air control valve for two wheelers will be classifiable under Tariff Item 8501 10 12 of the First Schedule of the Customs Tariff Act, 1975. Tariff Items 8409 91 99, 8409 99 90, and 8481 90 90 were the other contesting entries. The AAR in this regard relied upon Rule 3(a) of the General Rules of Interpretation, Note 2 (f) of Section XVII of the Customs Tariff, and that the subject goods were brushless direct current (DC) motor that generated output power not exceeding 37.5W. M.F.(D.R.) Instruction No. 1/2022-Cus. dated 5 January 2022, was also referred here. [In RE: *Hitachi Astemo FIE Private Limited* – 2023 VIL 07 AAR CU]

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