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One step forward, two steps backward: Non-implementation of anti-dumping duty recommendations

By **Neeraj Chhabra**

Introduction

The objective of anti-dumping duty is to curb the ill effects of dumped imports on the domestic producers in the importing country. Under the WTO regime, each country is allowed to impose anti-dumping measures on dumped products to provide a level-playing field to domestic manufacturers *vis-a-vis* foreign producers and exporters.

However, the imposition of anti-dumping duty is often a cause of friction between the domestic industry on the one hand and the users/importers on the other. While it affords protection to the domestic industry, it can increase costs for the downstream users. Therefore, there may be some instances where the government may decide not to impose anti-dumping duty even though the necessary parameters for imposition of anti-dumping duty are met.

This article is intended to provide a brief overview of the legal framework in India and trend of non-imposition of anti-dumping duty in certain cases.

Framework for imposition of anti-dumping duties in India

Anti-dumping investigations in India are conducted by the Directorate General of Trade Remedies ('**DGTR**'), which is a quasi-judicial body functioning under the Ministry of Commerce and Industry. The DGTR conducts anti-dumping investigations by following a prescribed quasi-judicial procedure to determine whether there is dumping, injury to the domestic industry, and causal link between dumping and injury.

The relevant legal provisions empowering the DGTR to undertake anti-dumping investigations are contained in, *inter-alia*, the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 ('**AD Rules**'). However, the findings issued by the DGTR in the investigation is only in the nature of a recommendation. This is evident from the language in Rule 17(1) of the AD Rules, which empowers the DGTR to make a 'recommendation'.

After the findings are issued, they are forwarded to the Ministry of Finance ('**MOF**'), which is the nodal authority for imposing anti-dumping measures in India under the AD Rules and the Customs Tariff Act, 1975. After the findings have been issued by the DGTR, it is the MOF which has the discretion to determine to impose anti-dumping duty or not. However, such discretion must be exercised within three months from the date of the publication of the findings by the DGTR. This emerges from Rule 18(1) of AD Rules, which states:

> ***18. Levy of duty. -*** *(1) The Central Government **may**, within three months of the date of publication of final findings by the designated authority under rule 17, impose by notification in the Official Gazette, upon importation into India of the article covered by the final finding, anti-dumping duty not*

exceeding the margin of dumping as determined under rule 17.

(emphasis added)

The use of the term 'may' in Rule 18 (1) of AD Rules indicates that the final findings of the DGTR are not binding on the Central Government.

Further, even Section 9A(1) of the Customs Tariff Act, 1975, which empowers the Central Government to impose anti-dumping duty provides that *the Central Government **may**, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article*.

The above provisions of law clearly indicate that the final findings issued by the DGTR are purely recommendatory in nature and come into force only after acceptance thereof and issuance of gazette notification imposing the levy within three months from the date of publication of the final findings in the gazette by DGTR.

Jurisprudence regarding discretionary power of Ministry of Finance

The discretionary power of the MOF in imposing anti-dumping duty has been examined in various decisions. The Delhi High Court in *Eveready Industries India Ltd.* v. *Union of India*[1] observed that the use of the word 'may' and not 'shall', in both the Customs Tariff Act as well as the AD Rules, sufficiently evidences the legislature's intention to allow the Central Government to disagree with the DGTR's recommendation.

In the matter of *Alembic Ltd.* v. *Union of India*[2], the Gujarat High Court in para 35 of the judgment observed that:

"*task of DA is limited of ascertainment of various factors such as factum of dumping if at all, ascertainment of extent of dumping, injury to the domestic market and amount of dumping duty in his opinion would eliminate injury. These are issues which necessarily would be governed by material that may be brought on record and ascertainment of relevant factors on basis of facts presented. Designated Authority while examining these issues would not be involved in ascertaining other consequences of imposition or otherwise of Anti-dumping duty. It is necessarily the task of the Central Government to ascertain such factors and to come to conclusion whether despite such recommendations, Anti-dumping duty should be imposed or not*".

From the above it is clear that there are separate roles that the DGTR and the MOF perform in deciding whether to impose anti-dumping duty. In fact, the Delhi High Court in *Deepak Fertilizers* v. *Designated Authority* has clarified that, as per the AD Rules, the DGTR only assists the Central Government in making its determination.

Recent trends in non-implementation

While it is ordinarily the practice of the MOF to accept the DGTR's findings and impose anti-dumping duty, there have been instances where the MOF has not implemented such findings. Though the number of such instances in the past have been rather limited, the last one year has seen a much higher number of such instances, as can be seen from the table below:

S. No.	Product	Subject Country (ies)
1.	Acetone	Chinese Taipei and Saudi Arabia.
2.	Acrylic Fibre	Thailand

[1] W.P. (C) No. 8089/2017 decided on 27 March 2019.
[2] 2013 (291) ELT 327 (Gujarat).

S. No.	Product	Subject Country (ies)
3.	Acrylic Fibre	Belarus, Ukraine, EU and Peru
4.	Choline Chloride in all forms	China PR, Malaysia and Vietnam
5.	Coated/Plated Tin Mill Flat Rolled Steel Products	EU, Japan, USA and Korea RP
6.	Diketopyrrolo Pyrrole Pigment Red 254	China PR and Switzerland
7.	Dimethyl Formamide	China PR and Saudi Arabia
8.	Nylon Multi Filament Yarn	China PR, Korea RP, Taiwan and Thailand
9.	Nylon Tyre Cord Fabric	China PR
10.	Polystyrene of all types except expandable Polystyrene	Iran, Malaysia, Singapore, Chinese Taipei, UAE and USA

Interestingly, except for Dimethyl Formamide and Choline Chloride, most of these products are used as inputs either in industrial application or textile manufacturing. Also, no discernible trend is evident in favour of any particular country.

Conclusion

Anti-dumping investigations often pit domestic producers against users. Users and other interested parties most often argue that the imposition of anti-dumping duty would be against the public/general interests of the users and other stakeholders, depending on the nature of the subject goods and the industry concerned. However, it has been the standard practice of the DGTR to note these arguments rather than accord serious consideration on the reasoning *inter alia* that purpose of any anti-dumping measure is to merely correct the unfair trade and users are still free to import the goods at fair (un-dumped /non-injurious) prices. Notwithstanding, the MOF has intervened whenever it has thought necessary by not accepting positive recommendations.

The recent cases show that the MOF has been playing a more active role in exercising its discretion in deciding whether to impose anti-dumping duty. Wherever MOF decides not to implement a recommendation of DGTR towards imposing anti-dumping duty, it is understood that MOF sends a communication to this effect to the DGTR. What is most important is that in some of the recent cases of the non-implementation of positive findings, the DGTR has also been uploading the relevant Office Memorandum issued by the MOF onto the relevant investigation page of the DGTR website. Though the MOF clearly indicates its decision not to implement the findings through such Office Memoranda, it generally does not indicate the reasons for such non-implementation. Nonetheless, the public availability of such Office Memoranda is a welcome step towards transparency.

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Trade Remedy News

Trade Remedy actions by India

Product	Country	Notification No.	Date of Notification	Remarks
Aluminum primary foundry alloy ingot	Malaysia	F. No. 6/43/2020-DGTR	24 December 2020	Countervailing duty investigation initiated
Carbon Black	China and Russia	F. No. 7/15/2020-DGTR	22 December 2020	Anti-dumping duty recommended to be continued after sunset review
Caustic Soda	Japan, Iran, Qatar and Oman	F. No. 6/36/2020-DGTR	17 December 2020	Anti-dumping investigation initiated
Choline Chloride	China, Malaysia and Vietnam	F. No. 354/122/2020-TRU	14 December 2020	Finance Ministry decides not to impose anti-dumping duty
Clear Float Glass	Malaysia	F. No. 6/14/2019-DGTR	29 December 2020	Definitive Countervailing duty recommended
Cold-Rolled Flat Products of Stainless Steel	China, Korea RP, European Union, South Africa, Taiwan, Thailand and USA	F. No. 14/01/2014-DGAD	28 December 2020	Final findings in anti-circumvention (AD) investigation – DGTR confirms its earlier final finding recommending ADD prospectively
Cold-Rolled Flat Products of Stainless Steel	China, Korea RP, European Union, South Africa, Taiwan, Thailand and USA	44/2020-Cus. (ADD)	3 December 2020	Anti-dumping duty extended till 31 January 2021
Di Methyl Formamide	China and Saudi Arabia	F. No. 354/139/2020-TRU	1 December 2020	Finance Ministry decides not to impose provisional anti-dumping duty
Dichloro methane	China	42/2020-Cus. (ADD)	1 December 2020	Anti-dumping duty extended till 31 January 2021
Dimethyl	China and	47/2020-Cus.	15 December	Dimethylacetamide of specified

Product	Country	Notification No.	Date of Notification	Remarks
acetamide	Turkey		2020	specifications, for consumption in spandex yarn manufacturing, excluded from ADD
Faced Glass Wool in rolls	China	F. No. 6/23/2019-DGTR	22 December 2020	Definitive anti-dumping duty recommended
Flat Rolled Products of Stainless Steel	China, Korea RP, European Union, Japan, Taiwan, Indonesia, USA, Thailand, South Africa, UAE, Hong Kong, Singapore, Mexico, Vietnam and Malaysia	F.No. 6/12/2019-DGTR	23 December 2020	Anti-dumping duty recommended on goods from China, Korea RP, EU, Japan, Taiwan, Indonesia and Malaysia
Float Glass of specified thickness	China	46/2020-Cus. (ADD)	7 December 2020	Anti-dumping duty extended till 6 February 2021
Front Axle Beam and Steering Knuckle for heavy and medium commercial vehicles	China	F. No. 7/26/2020-DGTR	24 December 2020	Anti-dumping duty recommended to be continued after sunset review
Nylon Tyre Cord Fabric	China	45/2020- Cus. (ADD)	3 December 2020	Anti-dumping duty imposed in 2015 revoked
Phenol	South Africa	F. No. 7/25/2019-DGTR	22 December 2020	Anti-dumping duty recommended to be continued after sunset review
Phthalic Anhydride	Korea RP	44/2020-Cus.	18 December 2020	Provisional bilateral safeguard measure confirmed
Polyethylene Terephthalate (PET Resin)	China	F. No. 6/24/2019-DGTR	28 December 2020	Definitive anti-dumping duty recommended

Product	Country	Notification No.	Date of Notification	Remarks
Polytetra fluoroethylene (PTFE)	Russia	F. No. 7/10/2020-DGTR	18 December 2020	Mid-term review recommends modification of anti-dumping duty
Textured Tempered Glass	Malaysia	F. No. 6/13/2019-DGTR	11 December 2020	Definitive Countervailing duty recommended
Toluene Di-Isocyanate	European Union, Saudi Arabia, Chinese Taipei, UAE	43/2020-Cus. (ADD)	2 December 2020	Provisional anti-dumping duty imposed

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Finished Carbon Steel Flanges	United States of America	85 FR 79466	10 December 2020	Preliminary determination of receipt of countervailable subsidies by two entities
Forged Steel Fittings	United States of America	85 FR 80016 and 80014	11 December 2020	Countervailing duty and Anti-dumping duty orders issued
Forged Steel Fluid End Blocks	United States of America	85 FR 80003	11 December 2020	Final negative determination of sales at less than fair value
Forged Steel Fluid End Blocks	United States of America	85 FR 79999	11 December 2020	Final affirmative Countervailing duty determination
Grinding Media	Canada	GM 2020 IN	17 December 2020	Anti-dumping and Countervailing investigations initiated
Preserved Mushrooms	United States of America	85 FR 78306	4 December 2020	Affirmative final results of expedited sunset reviews of ADD orders

WTO News

Australia initiates dispute against Chinese duties on Australian barley

Amidst the trade tension between China and Australia, Australia has on 16 December 2020 has sought consultations with China against the latter's tariffs on imports of barley from Australia. According to Australia, the Chinese anti-dumping duties and countervailing duties on barley imported from Australia appear to be inconsistent with China's obligations including under the provisions of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ('Anti-Dumping Agreement') and the Agreement on Subsidies and Countervailing Measures ('SCM Agreement'). It may be noted that both the countries are part of the recently concluded Free Trade Agreement - Regional Comprehensive Economic Partnership ('RCEP') which as per reports is the world's largest trading bloc.

Indonesia appeals compliance panel report relating to Indonesian measures on chicken imports from Brazil

Indonesia has on 17 December 2020 notified the WTO's Dispute Settlement Body of its decision to appeal to the Appellate Body on certain issues of law and legal interpretation covered in the Compliance Panel Report entitled *Indonesia - Measures Concerning the Importation Of Chicken Meat and Chicken Products - Recourse to Article 21.5 of the DSU by Brazil* (DS484). According to Indonesia the compliance Panel's findings leading to its conclusion that the only way for Indonesia to comply with Article 8 and Annex C(1)(a) of the SPS Agreement solely by completing the approval procedure was a legal error. Indonesia also contends that the compliance panel failed to make an objective assessment under Article 8 and Annex C(1)(a) of the SPS Agreement and under Article III:4 of the GATT, 1994.

E-commerce – Update on Joint Statement Initiative

Australia, Japan and Singapore – co-conveners in the Joint Statement Initiative for E-commerce have released an update on the negotiations that were launched in 2019. According to the public statement released on 14 December 2020, the 86 participant countries have developed a consolidated negotiating text containing themes, including enabling electronic commerce; openness and e-commerce; trust and e-commerce; cross-cutting issues; telecommunications; market access; and scope and general provisions. The statement also highlights the fact that good progress has been made in small groups on issues such as e-signatures and authentication, paperless trading, customs duties on electronic transmissions, open government data, open internet access, consumer protection, spam and source code, among others.

MSMEs – Informal Working Group endorses various recommendations and declarations

The Informal Working Group on MSMEs has on 14 December 2020 released a declaration on Micro, Small and Medium-sized Enterprises ('MSMEs'). The declaration endorses the following recommendations and declarations:

- Recommendation on the collection and maintenance of MSME-related information;

- Declaration on access to information;
- Recommendation on trade facilitation and MSMEs;
- Recommendation on promoting MSMEs' inclusion in regulatory development in the area of trade;
- Recommendation on MSMEs and the WTO Integrated Database; and
- Declaration on addressing the trade-related aspects of MSMEs' access to finance and cross-border payments.

According to the document INF/MSME/4, the group has recommended that all WTO members voluntarily provide, during their trade policy review process, the MSME-related information as contained in the checklist (also provided in the declaration).

India Customs & Trade Policy Update

Coal imports to be mandatorily prior-registered

The Ministry of Commerce and Industry has *vide* Notification No. 49/2015-20, dated 22 December 2020 amended the import policy of coal falling under the Heading 2701 of the ITC (HS) 2017, from 'Free' to "Free subject to compulsory registration under Coal Import Monitoring System ('CIMS')''. A new Policy Condition No. 7 has been inserted under Chapter 27 of the ITC(HS) 2017 to prescribe the procedures and conditions. Effective from 1 February 2021, the CIMS will require importers to submit advance information in an online system and obtain an automatic registration number, after paying prescribed registration fees. The importer can apply for registration not earlier than 60th day and not later that 15th day before the expected date of arrival of import consignment. The Automatic Registration Number shall remain valid for a period of 75 days. Importer shall have to enter the Registration Number and expiry date of registration in the Bill of Entry to enable Customs for clearance of consignment. The facility of online registration will be available with effect from 31 December 2020. It may be noted that Steel Import Monitoring System ('SIMS'), introduced on similar lines to collect the data relating to import of steel, is also effective at present.

Faceless assessment – Mandatory uploading of supporting documents in e-Sanchit w.e.f. 15 January 2021

The CBIC has issued an elaborate circular to provide clarifications on various aspects of faceless assessment. Emphasizing that re-assessment should be in accordance with the principles of natural justice, the Circular also advises the importers and customs brokers to give complete description of the imported goods

while filing the Bill of Entry ('**B/E**'). Circular No. 55/2020-Cus., dated 15 December 2020 also states that with effect from 15 January 2021, importers would be required to mandatorily upload the supporting documents along with the B/E in e-Sanchit. Further, the Board has enhanced the monetary limit of assessment of B/E by the Appraising Officers. The new limit of INR 5 lakh is applicable from 21 December 2020.

COO issued with third party invoicing, under DFTP Scheme for LDC, for 'wholly obtained goods', acceptable

CBIC has clarified that Certificate of Origin ('COO') issued with the third party commercial invoice may be accepted in cases where the value of the goods does not have any impact on the originating status of goods which fall in 'wholly obtained' category, under the Duty Free Tariff Preference ('DFTP') Scheme for Least Developed Countries ('LDC') [Notification No. 29/2015 (N.T.)]. As per Circular No. 52/2020-Cus., dated 8 December 2020, this is subject to the condition that the goods in both Certificate of Origin and invoice correspond to each other and satisfy the applicable Rules of Origin.

Initiation of enquiry on origin of goods only on sufficient grounds

The Central Board of Indirect Taxes and Customs ('CBIC') has reiterated that enquiry on origin of imported goods should be initiated only where there are sufficient grounds to suspect origin of goods or where same has been identified as a risk by the Risk Management System. Instruction dated 17 December 2020, issued for this purpose, also states that where the reference for verification is made to the CBIC in terms of Rule 6 of the CAROTA Rules, 2020, same should be complete and follow the standard operating procedures, prescribed format and timelines. It reiterates that all proposals for verification should be duly vetted to ensure valid grounds for verification.

Crude palm oil – BCD reduced

Notification No. 50/2017-Cus. has been amended to reduce Basic Customs Duty from 44% to 27.5% on crude palm oil covered under Tariff Item 1511 10 00 of the Customs Tariff Act, 1975. Notification No. 43/2020-Cus., dated 26 November 2020 amends Sl. No. 57 of the original notification with effect from 27 November 2020 for this purpose.

Ratio Decidendi

Anti-dumping duty on imports from China – Application of analogue country methodology by European Union after December 2016, correct

The European Union's General Court has rejected the contention that according to Article 15(d) read with Article 15(a)(ii) of the Protocol of Accession of the People's Republic of China to the WTO, the analogue country methodology could no longer be applied to imports from China, fifteen years after the date of its accession to the WTO, i.e. from 11 December 2016. The case involved imposition of anti-dumping duty on imports of Tartaric acid from China. The EU

authorities had selected the analogue country for determination of normal value during the expiry review initiated after December 2016. The Court rejected the argument that in the event of a contradiction, the Accession Protocol will prevail over the EU's Basic Regulation.

The Court observed that the WTO agreements, including the Accession Protocol, were not, in principle, among the rules in the light of which the legality of measures adopted by the EU institutions may be reviewed. It noted that the applicant did not claim that the WTO agreements or the Accession Protocol had direct effect in general, and that the two exceptions (as discussed by the Court in various precedents), where the EU Courts could review the legality of the EU measures in the light of WTO agreements, were not applicable. The General Court also noted that the WTO dispute DS516 '*European Union – Measures Related to Price Comparison Methodologies*' brought by China against the EU, had expired without reaching any conclusions. [*Changmao Biochemical Engineering Co. Ltd.* v. *European Commission* – Judgement dated 16 December 2020 in Case T-541/18, European Union's General Court]

Seizure for overvaluation of exports – Valuation provisions to be considered at stage of confiscation and not seizure

The CESTAT New Delhi has held that provisions of Section 14 of the Customs Act, 1962 and Rule 3 of the Export Valuation Rules have to be applied only at the stage of considering liability to confiscation (in a case of alleged overvaluation), after providing an opportunity as contemplated in Section 124, and not at the stage of seizure. The Tribunal was of the view that it is only at the stage of confiscation it is determined whether the goods entered for exportation correspond in value or in any material particulars with the entry made in the shipping bill. Noting that for seizure of goods, the proper officer should only have reason to believe that the goods are liable to confiscation, the Tribunal set aside the Order of Commissioner (A) which in turn had set aside the seizure observing that transaction value can be challenged only in accordance with the Export Valuation Rules and that the procedure prescribed therein was not followed by the department. [*Commissioner* v. *Bushrah Export House* - 2020 (11) TMI 546-CESTAT New Delhi]

Redemption of confiscated goods – No condition of re-export envisaged under Customs Act

The Madras High Court has held that the imposing the condition of re-export on redemption of confiscated goods under Section 125 of the Customs Act, 1962, is not justified. The goods were confiscated for contravention of the provisions of Foreign Trade (Development and Regulation) Act, 1992 read with the Steel and Steel Products (Quality Control) Order, 2018 with a stipulation that the goods should be re-exported after payment of redemption fine. The High Court observed that imposition of condition of re-export was not envisaged under the Customs Act. [*Commissioner* v. *Magal Engineering Tech. Pvt. Ltd.* – 2020 TIOL 2114 HC MAD CUS]

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