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Article

De-minimis dumping margin: Termination of an anti-dumping investigation?

By Harsh Mittal

Introduction

On 7 May 2021, the Directorate General of Trade Remedies ('**DGTR**') concluded the anti-dumping investigation concerning imports of '*Plain Medium Density Fibre Board having thickness 6mm and above*' ('**subject goods**') produced by Kim Tin MDF Joint Stock Company, Vietnam ('**Kim Tin**') by terminating the investigation. Though the termination of this investigation is not unusual, the reasons for the termination of the investigation are interesting. The DGTR terminated the investigation for the reason that the purpose would be served by undertaking a review rather than conducting a fresh investigation, as was done in this case.

Before discussing the DGTR's termination order, since the subject investigation is connected to the original anti-dumping investigation on imports of the subject goods from Vietnam, it would be relevant to first provide a brief background of this previous investigation.

Background of the previous anti-dumping investigation

Subsequent to an application filed by the domestic industry, the DGTR initiated an original anti-dumping investigation concerning imports of the subject goods from Indonesia and Vietnam on 7 May 2015 ('**original investigation**'). By Final Findings dated 5 May 2016, the DGTR recommended the imposition of definitive anti-dumping duty ('**ADD**') on imports of the subject goods from these countries.

Kim Tin MDF Joint Stock Company was a producer/exporter of the subject goods from Vietnam which had participated in the original investigation. On examining Kim Tin's data, the DGTR had determined that the dumping margin of this party was de-minimis. Accordingly, the DGTR recommended 'nil' anti-dumping duty in respect of Kim Tin. However, it is important to note that the DGTR had not terminated the original investigation against this party.

Subsequent to the DGTR's recommendations, the Ministry of Finance *vide* Notification No. 34/2016-Customs (ADD), dated 14 July 2016 imposed definitive ADD on imports of the subject goods from Indonesia and Vietnam as per the rates recommended by the DGTR. The ADD is effective till 13 July 2021.

At a later date, aggrieved by alleged dumping of subject goods produced by Kim Tin, the domestic industry filed an original anti-dumping application with the DGTR. In their application, the domestic industry requested for imposition of ADD on the imports of the subject goods produced by Kim Tin. Subsequent to this application, the DGTR initiated a separate original anti-dumping investigation only to investigate Kim Tin's transactions *vide* Notification dated 11 May 2020. It is important to note that the subject investigation was initiated under Rule 5 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 ('**AD Rules**'), which pertains to initiation of original investigations.

During the investigation, Kim Tin vehemently objected to the maintainability of the subject investigation being initiated under Rule 5 of the AD Rules. Kim Tin contended that since the previous original investigation against it was not terminated, only a review investigation against under Rule 23 could be initiated and not an original investigation.

The domestic industry on the other hand contended, *inter alia*, that as per decisions of the WTO panels in *Mexico-Beef and Rice* and *Ukraine-Ammonium Nitrate*, the investigation against Kim Tin stood terminated. Therefore, only an original investigation could be initiated against Kim Tin. The domestic industry also cited the practice in other countries such as the European Union where the investigation against parties having de-minimis dumping margins was terminated.

After considering all the arguments, the DGTR held that the investigation against Kim Tin was not terminated in the previous investigation. The DGTR further observed that its practice is of assigning 'nil' anti-dumping duty to such party having de-minimis dumping margin. Further, the DGTR referred to the CESTAT's decision in *Robin Resources v. Union of India*, [2016 (342) E.L.T. 118 (Tri. - Del.)] which upheld such practice of the DGTR. On this basis, the DGTR concluded that the subject investigation could not be conducted as an original investigation under Rule 5 but only as a review investigation under Rule 23. Accordingly, the DGTR terminated the subject investigation vide its Termination Order dated 7th May 2021.

However, interestingly, at para 3 of the Initiation Notification of the subject investigation, the DGTR had noted that the original investigation against Kim Tin was terminated since its dumping margin was determined to be de-minimis. The DGTR had at the initiation stage stated that it did not consider it appropriate to

initiate a review investigation against Kim Tin. Effectively, the DGTR has overturned its observation in the Initiation Notification *vide* its Termination Order.

De minimis who? country or producer?

The key issue is whether an investigation initiated against a party having de-minimis dumping margin is to be terminated. Reference is made to Rule 14(c) of the AD Rules, which provides for immediate termination of an investigation in a scenario where, *inter alia*, it determines that the dumping margin is less than two per cent of the export price.

It may be noted that Rule 14 is based on the second sentence of Article 5.8 of the WTO's Anti-Dumping Agreement ('**AD Agreement**') which states that: "*There shall be immediate termination in cases where the authorities determine that the margin of dumping is de-minimis, or that the volume of dumped imports, actual or potential, or the injury, is negligible.*"

While both the AD Agreement and the AD Rules require the immediate termination of an investigation where the dumping margin is found to be *de-minimis*, both texts are silent as to whether the finding of *de-minimis* margin has to be in respect of the subject country being investigated or in respect of the particular producer, or both.

WTO jurisprudence on the subject is clear. Panel decisions such as in *Mexico-Beef and Rice* and *Ukraine-Ammonium Nitrate* have very clearly held that investigations where a *de-minimis* dumping margin is determined in respect of an individual party will have to be terminated immediately. However, practice across different WTO members is different.

In India, it is the consistent practice of the DGTR not to terminate investigations against a party but instead assign a 'nil' duty against such

party having *de-minimis* dumping margin. Some of these investigations are *Electronic Calculator from China PR*¹, *2-Ethyl Hexanol from EU, Indonesia, Korea RP, Malaysia, Taiwan and USA*², *Caustic Soda from China PR and Korea RP*³. The European Commission in investigations such as *Stainless Steel Cold-Rolled Flat Rolled Products from the People's Republic of China and Taiwan*⁴ and *Certain Stainless-steel Tube and Pipe Butt-Welding Fittings, whether or not finished, from the People's Republic of China and Taiwan*⁵ and the Turkish investigating authority have also followed the same practice⁶.

Conclusion

The DGTR in the instant investigation has not treated *de-minimis* dumping margin as termination of investigation against Kim Tin. It is also pertinent to note that DGTR in the Final Findings dated 5 May 2016 of the original investigation had not *terminated* the investigation against Kim Tin. This clearly demonstrates that the DGTR has followed its consistent practice. Thus, the domestic industry had the option of filing a review application under Rule 23 for either a mid-term review or a sunset review if the existing ADD were due to expire.

¹ Original final finding dated 13 April 2015 issued *vide* Notification No. 14/19/2013-DGAD and Sunset review finding dated 26 March 2020 issued *vide* Notification No. 7/15/2019-DGTR.

² Original final finding dated 18 February 2016 issued *vide* Notification No. 14/24/2014-DGAD and Sunset review finding dated 8 March 2021 issued *vide* Notification No. 7/28/2020-DGTR.

³ Original final finding dated 4 August 2003 issued *vide* Notification No. 14/10/2002-DGAD; 1st Sunset review finding dated 21 November 2008 issued *vide* Notification No. 15/11/2007-DGAD; 2nd Sunset review finding dated 18 June, 2015 issued *vide* Notification No. 15/23/2013-DGAD and 3rd Sunset review finding dated 29 October, 2020 issued *vide* Notification No. 7/1/2020-DGTR.

⁴ Commission Implementing Regulation (EU) 2015/1429 of 26 August 2015

⁵ Commission Implementing Regulation (EU) 2017/141 of 26 January 2017

⁶ Notification on the prevention of unjust competition in imports (Notification No. 2019/36).

It is pertinent to note the jurisprudence in *Robin Resources* where the CESTAT has held as under:

9. We note that the DA can consider where an exporter was awarded zero duty in the original investigation and has now found to be dumping which is likely the cause injury to DI, then AD Duty can be considered for imposition with reference to dumping margin and injury margin established during the review. We note that the DA followed the requirements of Articles 2 and 3 of the ADA and the relevant provisions of AD Rules. We also note that regarding appellants, the DA has examined and reviewed all the aspects of original investigation and in addition examined whether expiry of initial notification is likely to lead a recurrence of dumping/injury to the DI. As already noted that this is like a fresh investigation insofar as appellant is concerned and we find no legal infirmity in such action by the DA.”

(emphasis supplied)

Though an appeal is pending against the CESTAT's Order in *Robin Resources* before the Supreme Court, the CESTAT's Order has not been stayed, and hence remains good law.

The DGTR's Termination Order makes it clear that there where *de-minimis* margin has been determined against a particular party, the proper procedure is to seek a review under Rule 23 and not an original investigation under Rule 5.

This order also supports the understanding that invocation of Rule 14(c) of the AD Rules for termination of an investigation where a *de-minimis* dumping margin is determined, does not pertain to an individual party but a country which is under investigation, at least as far as India is

concerned. Further, in no case has the DGTR terminated an investigation only in respect of an individual party where a de-minimis dumping margin has been determined for such party.

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Trade Remedy News

Trade Remedy actions by India

Product	Country	Notification No.	Date of notification	Remarks
1, 1, 1, 2 Tetrafluoroethane or R-134a	China PR	30/2021-Cus. (ADD)	24 May 2021	Anti-dumping duty extended till 10 January 2022
Acrylonitrile Butadiene Rubber (NBR)	China PR, European Union, Japan and Russia	F. No. 6/18/2020-DGTR	12 May 2021	Anti-dumping duty recommended
Fiberboards	Indonesia, Malaysia, Thailand, Vietnam, Sri Lanka	F. No. 6/17/2019-DGTR	3 May 2021	Definitive countervailing duty recommended
Methyl Acetoacetate	China PR	31/2021-Cus. (ADD)	29 May 2021	Anti-dumping duty continued after sunset review
Newsprint in rolls or sheets, excluding glazed newsprint	Australia, Canada, European Union, Hong Kong, Russia, Singapore and UAE	F.No. CBIC-190354/30/2021-TO(TRU-I)-CBEC	18 May 2021	Ministry of Finance decides not to impose anti-dumping duty though DGTR had recommended imposition
Nonyl Phenol	Chinese Taipei	F. No. 354/117/2007-TRU (Pt-II)	7 April 2021	Ministry of Finance decides not to continue anti-dumping as recommended in sunset review

Product	Country	Notification No.	Date of notification	Remarks
Phenol	Thailand	F. No. 354/121/2020-TRU	28 April 2021	Finance Ministry decides not to impose anti-dumping duty as recommended
Phthalic Anhydride	China PR, Indonesia, Korea RP, Thailand	F. No. 6/16/2020-DGTR	19 May 2021	Imposition of anti-dumping duty recommended
Plain medium density fibre board having thickness 6mm and above	Vietnam (specified company from Vietnam)	F. No. 6/9/2020-DGTR	7 May 2021	DGTR decides not to undertake fresh investigation under Rule 5 and instead do review investigation under Rule 23
Seamless tubes, pipes and hollow profiles of iron	China PR	29/2021-Cus. (ADD)	7 May 2021	Anti-dumping duty extended till 31 October 2021 consequent to initiation of sunset review
Soda Ash	UAE, Russia	F. No. 6/5/2021-DGTR	27 May 2021	Anti-dumping investigation initiated
Solar cells	China PR, Thailand and Vietnam	F. No. 6/56/2020-DGTR	15 May 2021	Anti-dumping investigation initiated
Uncoated Copier Paper	Indonesia, Singapore	F. No. 7/8/2021-DGTR	19 May 2021	Sunset review of anti-dumping duty initiated
Viscose Spun Yarn	China PR, Indonesia, Vietnam	F. No. 354/154/2020-TRU	6 April 2021	Finance Ministry decides not to impose anti-dumping duty as recommended

Trade remedy actions against India

Product	Investigating Country	Document No.	Date of Document	Remarks
Cold-Rolled Steel Flat Products	USA	Investigation Nos. 701-TA-540-543 and 731-TA-1283-1287 and 1290 (Review)	24 May 2021	Institution of Five-Year Reviews

Product	Investigating Country	Document No.	Date of Document	Remarks
Corrosion-Resistant Steel Products	USA	86 FR 25844	11 May 2021	DoC amends countervailable subsidy rate assigned to Uttam Galva
Corrosion-Resistant Steel Products	USA	Investigation Nos. 701-TA-534-537 and 731-TA-1274-1278 (Review)	24 May 2021	Institution of Five-Year Reviews
Fine Denier Polyester Staple Fiber	USA	86 FR 26903	18 May 2021	DoC determines that Reliance Industries Limited received countervailable subsidies
Grinding media	Canada	Canada Border Services Agency	14 May 2021	Preliminary determination of dumping and subsidization
Polyethylene Terephthalate Film, Sheet, and Strip	USA	86 FR 26700	17 May 2021	DoC determines that Jindal Poly Films Limited received countervailable subsidies
Raw Honey	USA	86 FR 26897	18 May 2021	Initiation of Less-Than-Fair-Value Investigations
Utility Scale Wind Towers	USA	86 FR 27829	24 May 2021	Preliminary Affirmative Determination of Sales at Less Than Fair Value



WTO News

Tariff values – EU asks India to notify Rules under Customs Section 14(2) to Committee on Customs Valuation

India had in a document circulated in WTO on 21 February 2019 titled 'Information on implementation and administration of the Agreement on Customs Valuation' stated that Section 156(2)(a) of the Customs Act, 1962 empowers the Central Government to make rules providing for the manner of determining the

transaction value of the imported goods under Section 14 of Customs Act, 1962. The European Union has now on 25 May 2021 asked India to clarify if any such rules have been adopted with respect to Section 14(2) of the Customs Act, 1962. As per document G/VAL/W/379 circulated in the WTO's Committee on Customs Valuation on 25 May 2021, the European Union also requests India to notify such rules, if any, to the Committee on Customs Valuation.

Canadian measures for feed ingredient imports from countries posing potential concern of African Swine Fever – India in list since 2020

The Canadian Food Inspection Agency had implemented new import requirements for select feed ingredients imported from countries identified as posing a potential concern with respect to African Swine Fever. The identified products will require an import permit prior to importation from the specified countries and the conditions in the implementing order and the import permit will need to be met. These conditions may include certification of origin, heat

treatment and/or hold times (depending on the product in question) designed to mitigate the risk of contamination of certain specified products with the African Swine Fever virus. As per the latest revised list circulated in the WTO on 7 May 2021, India is still in the list of regions or countries likely to be affected by this measure. It may be noted that the measures were notified to the WTO on 3 April 2019 and India was included in the list only in 2020 (the inclusion was notified to the WTO on 26 May 2020). The products covered are certain specified goods of Chapters 10, 12 and 23 and all goods of Chapter 11 of the HS Codes.



India Customs & Trade Policy Update

Covid-19 – Relaxations under Customs and Foreign Trade Policy

The Central Board of Indirect Taxes and Customs ('**CBIC**') under the Indian Ministry of Finance and the Directorate General of Foreign Trade ('**DGFT**') under the Ministry of Commerce have recently issued number of notifications, trade notices to provide exemption or reduced rate of duty to imports of various Covid-19 related medical items. Similarly, relaxations have been provided in respect of mandatory declaration under the Legal Metrology (Packaged commodities) Rules, 2011 and by the Central Drugs Standard Control Organisation in respect of deemed approval of licence for import / manufacture of specified medical devices. A detailed Update is available [here](#).

Chip Import Monitoring System to be effective from 1 August 2021

Import of specified Electronic integrated circuits would be governed by compulsory prior registration under Chip Import Monitoring System ('**CHIMS**') with effect from 1 August 2021. Importers of electronic integrated circuits falling under HS Codes 8542 3100, 8542 3200, 8542 3300, 8542 3900 and parts falling under 8542 9000 would be liable to mandatorily submit advance information in an online system for import of items and obtain an automatic registration number. As per new Policy Condition No. 6 inserted in Chapter 85 of ITC (HS), 2017, the importers will have to enter the registration number and its expiry date (75 days from date of

registration) in the Bill of Entry to enable Customs department to grant clearance of import consignment. Notification No. 5/2015-20, dated 10 May 2021 amends Chapter 85 in Schedule-I of ITC (HS), 2017 for this purpose.

EPCG – Applications for relaxations in policy or procedures to be submitted online

The applications for seeking relaxations under Para 2.58 of the Foreign Trade Policy 2015-20 in

respect of EPCG scheme would be accepted now only through online mode. Members of the trade are now required to fill in the requisite form, upload necessary documents and submit application after paying requisite fees. The deficiency letters issued by the DGFT would also be required to be relied online. As per Trade Notice No. 5/2021-22, dated 19 May 2021, the entire processing of the applications and communication of the decision of the EPCG Committee would be through online mode only.



Ratio Decidendi

Valuation – Actual cost of transportation till place of import when not includible

The Court of Justice of the European Union has held that transaction value need not be adjusted to include all the costs ‘actually’ incurred by the exporter in transportation till the place of import when the price paid by the importer correspond to the real value of goods even if that price was insufficient to cover all transportation costs. The

CJEU in this regard was of the view that the fact that the cost of transporting the imported goods as incurred by the exporter/producer exceeded the price actually paid by the importer is not capable of altering that conclusion, provided the price reflects the real value of the goods. [*Lifosa UAB v. Muitines departamentas prie Lietuvos Respublikos Finansu Ministerijos* – Judgement dated 22 April 2021 in Case C-75/20, CJEU]



News Nuggets

India and EU announce Connectivity Partnership

India and the European Union have on 8 May 2021 launched an ambitious and comprehensive 'Connectivity Partnership' which is focused on enhancing digital, energy, transport and people-to-people connectivity. As per reports, the Partnership will catalyse private and public financing for connectivity projects and will also foster new synergies for supporting connectivity initiatives in third countries, including in Africa, Central Asia and the Indo-Pacific. According to the Indian

Ministry of External Affairs' website, the Connectivity Partnership will include cooperation in normative regulations, standards and physical projects, and will incentivise private sector actions and investments in all dimensions of the sustainable connectivity partnership, including with the European Investment Bank (EIB) and public and private financial institutions of the EU Member States and India. The implementation of the partnership will be aligned with that of the EU-India 2025 Roadmap..

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