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Article

Technical specification based product exclusion in mid-term reviews

By **Shubhi Khare**

Provisions concerning the review of anti-dumping measures imposed under the Customs Tariff Act, 1975 ('**Act**') are contained, *inter-alia*, in Rule 23 of the Anti-Dumping Rules, 1995 ('**AD Rules**'). Rule 23(1) provides that any anti-dumping duty imposed under Section 9A of the Act shall remain in force, so long as and to the extent necessary, to counteract dumping, which is causing injury. Rule 23(1A), however, recognizes the possibility of reviewing the continued need for such anti-dumping duty.

As per Rule 23(1A), the Directorate General of Trade Remedies ('**DGTR**') shall review the need for continuation, modification or revocation of anti-dumping duty and upon completing such review, the DGTR shall recommend to the Central Government accordingly, if it comes to a conclusion that the injury to the domestic industry is not likely to continue or recur if the anti-dumping duty is removed or varied and is therefore no longer warranted. These reviews are better known as Mid-Term Review ('**MTR**') or Changed Circumstances Review.

Though the grounds for seeking or initiating an MTR are not specified in the Act or AD Rules, the DGTR in its decision of *Cold-Rolled Flat Products of Stainless Steel*¹ (Final Findings dated 08-06-2011) noted that nothing in Rule 23 suggests that the powers of the DGTR under the said Rule needs to be read in a restrictive or

limited manner. Nonetheless, one may get some guidance regarding specific factors constituting changed circumstances from the application proforma for MTRs available on the DGTR's official website.²

The factors stated in the application proforma include, but are not limited to, change in Non-Injurious Price of the domestic industry, change in normal value, export value, landed value, domestic production pattern, change in legal status of the domestic producer or exporter, change in condition of the domestic industry/producers or *any other relevant factors*.

MTRs can even be requested by the user industry for excluding certain products from the scope of the product under consideration on which anti-dumping duty has been recommended, where such product is of a technical grade that is not or cannot be produced by the domestic industry for the specific user requirements. Such an exclusion was recently permitted in the final findings dated 14-10-2020 issued by the DGTR in the *MTR concerning product scope of definitive Anti-Dumping duty imposed on Dimethylacetamide* [*N,N-Dimethylacetamide*] ('**DMAC**') from China PR and Turkey.

In this MTR, Indorama Industries Ltd., ('**Applicant**') an importer/user of DMAC in India, had requested the DGTR to initiate an MTR limited to the scope of the product under consideration defined in the original anti-dumping

¹ F.No. No. 15/16/2010DGAD, Final Findings in the Anti-dumping (Mid-term Review) investigation limited to the product scope of definitive Anti-dumping Duty imposed on '*Cold-Rolled Flat Products of Stainless Steel of the width of 600 mm upto 1250mm of all series further worked then Cold Rolled (cold reduced) with a thickness of up to 4mm*', originating in or exported from China PR, Japan, Korea, European Union, South Africa, Taiwan, Thailand and USA.

² Available at: http://www.dgtr.gov.in/sites/default/files/APPL_FORMAT_MID_TERMS_REVIEW_ANTI_DUMPING_DUTY.pdf, Last visited on 20-10-2020.

investigation against imports of DMAC from China PR and Turkey, wherein the DGTR had recommended the imposition of anti-dumping duty by its final findings dated 21-2-2018. In its MTR application, the Applicant requested the DGTR to exclude DMAC of a specific grade having *all* of the following technical specification:

- i. Minimum Purity (99.9% min.) and Maximum Alkalinity level (0.003% max)
- ii. Maximum Acidity level (0.005% max)
- iii. Maximum iron ppm as (0.05)
- iv. Maximum Water (0.01% max)
- v. Conductivity (0.1 micro-semens/cm max)

In the MTR, the Applicant submitted that the above grade was not produced by the domestic industry and was critical to the Applicant's manufacturing of elastomeric yarn (spandex) in the textile segment. The domestic industry on the other hand argued that it was possible for the domestic producers to produce the required technical grade of DMAC sought by the Applicant by fine tuning their manufacturing capabilities.

In its findings, the DGTR analysed relevant commercial and technical factors because of which it was necessary for the Applicant to import the particular grade of DMAC rather than source it domestically.

- a. In examining the **commercial aspects**, the DGTR considered the selling prices of the like article sold by the domestic industry in India (pre and post levy of anti-dumping duty) and the landed value of the particular grade of DMAC imported by the Applicant from subject and non-subject countries. The DGTR found that the Applicant had made considerable number of imports from non-subject countries too. In this regard, the DGTR noted that the Applicant's imports were not exactly 'commercial decisions' of the Applicant

but in fact a necessity owing to the technical inability of the domestic producers.

- b. In examining the **technical aspects**, the DGTR noted that the DMAC produced by the domestic industry contains micro-level impurities which results into higher conductivity of the subject goods, thereby leading to certain undesirable chemical reactions that may affect the criticality of the spandex manufacturing process. Interestingly, in its investigation, the DGTR had requested the Indian Institute of Technology – Delhi to analyse the technical specification of DMAC required for manufacturing elastomeric yarn through spandex process, which indicated that the production of fibre grade polyurethane requires specific technical parameters of DMAC.

It is also relevant to note that the domestic industry argued that the particular grade exclusion may lead to circumvention of the anti-dumping duty by other users/importers of the product under consideration in India who could also use the specific technical grade of DMAC required by the Applicant. The DGTR addressed this issue by referring to the anti-circumvention investigation concerning imports of *Cold Rolled Flat Products of Stainless Steel* (Final Findings dated 18-08-2017). In that investigation, the DGTR cautioned against saddling bonafide users of the product grade included in the product scope with the anti-dumping duty. On this basis, the Authority implicitly noted that as long as the requirement for a specific product grade was genuine and bonafide, the same merited exclusion from the scope of the product scope.

It is important to point out the slight difference in the present findings and *Cold-Rolled Flat Products of Stainless Steel* (Final Findings dated 08-06-2011).³ In the present case, the

exclusion had to be *carved out* from the product scope on the basis of technical specification for a textile segment. In the anti-circumvention findings stated above, the issue was one of product scope clarification and not exclusion, with regard to which the domestic industry wanted the product scope to also specify the tolerance level for the width of the product under consideration.

On the basis of the foregoing analysis, the DGTR was convinced that the product scope exclusion sought by the Applicant was genuine and accordingly allowed the same. However, it is important to note that the product exclusion has been granted only to actual users of the said technical grade, who would be spandex yarn manufacturers, when imported for spandex yarn manufacturing.

The DGTR has in its findings specifically stated that the actual user eligibility shall be assessed at the time of import when the user is required to provide declarations to Customs. The

DGTR has recognized the possibility of verification of actual user requirement by requiring the actual users to maintain monthly records in the form of consumption register which can be verified by the concerned authorities at any time. Besides ensuring only bonafide users avail of this exclusion, this requirement would also address the anti-circumvention concerns raised by the domestic industry.

It is relevant to note that though the Applicant did not participate in the original investigation, the DGTR nonetheless did not object to the Applicant's MTR request. This confirms the understanding that participation in an MTR in case of product scope exclusions is not limited only to those parties who had participated in the original investigation.

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Trade Remedy News

Trade Remedy actions by India

| Product | Country | Notification No. | Date of Notification | Remarks |
|--|--------------------------------------|---------------------------|----------------------|---|
| Acetone | Korea RP, Taiwan, Saudi Arabia | F. No. 7/09/2019- DGTR | 29-09-2020 | ADD sunset review recommends continuation of duty – Duty table to be substituted. |
| All Fully Drawn or Fully Oriented Yarn/Spin Draw Yarn/Flat Yarn of Polyester | China and Thailand | 32/2020-Cus. (ADD) | 19-10-2020 | Anti-dumping duty extended till 30-11-2020. |

³ Supra note 1.

| Product | Country | Notification No. | Date of Notification | Remarks |
|--|--|------------------------|----------------------|---|
| Caprolactam | European Union, Korea RP, Russia and Thailand | F. No. 6/39/2020-DGTR | 30-09-2020 | Initiation of anti-dumping investigation. |
| Ceramic Tablewares and Kitchenwares | China | F. No. 7/33/2020-DGTR | 25-09-2020 | Initiation of ADD anti-circumvention investigation concerning imports from Malaysia |
| Cold-Rolled Flat Products of Stainless Steel of width 600 mm to 1250 mm and above 1250mm of non bonafide usage | China, Korea, European Union, South Africa, Taiwan, Thailand and USA | F. No. 7/18/2020-DGTR | 30-09-2020 | Initiation of ADD sunset review investigation. |
| Copper Tubes and Pipes | Malaysia, Thailand and Vietnam | F. No. 04/10/2020-DGTR | 25-09-2020 | Initiation of anti-subsidy investigation. |
| Decor Paper | China | F. No. 6/38/2020-DGTR | 30-09-2020 | Initiation of anti-dumping investigation. |
| Dimethyl acetamide/ DMAC | China and Turkey | F. No. 7/11/2019-DGTR | 14-10-2020 | ADD mid-term review – Product of specific technical specification recommended to be excluded. |
| Elastomeric Filament Yarn | Singapore | F. No. 6/44/2020-DGTR | 30-09-2020 | Initiation of anti-dumping investigation. |
| Flat products of Stainless Steel | Indonesia | 02/2020- Cus. (CVD) | 9-10-2020 | Imposition of provisional countervailing duty. |
| Fluoro elastomers (FKM) | China | F. No. 7/03/2020-DGTR | 19-10-2020 | ADD sunset review recommends continuation of duty. |
| Fluoro elastomers (FKM) | China | 33/2020-Cus. (ADD) | 27-10-2020 | Anti-dumping duty extended till 27-11-2020. |
| Front Axle Beam and Steering Knuckles for heavy and medium commercial vehicles | China | 31/2020-Cus. (ADD) | 16-10-2020 | Anti-dumping duty extended till 30-11-2020. |

| Product | Country | Notification No. | Date of Notification | Remarks |
|---|--|-----------------------|----------------------|---|
| Glass Fibre | China PR | F. No. 7/17/2019-DGTR | 3-10-2020 | ADD mid-term review – Non-exclusion of Glass Fibre Roving recommended. |
| Hydrofluoro carbon (HFC) Blends | China | F. No. 6/34/2020-DGTR | 30-09-2020 | Initiation of anti-dumping investigation. |
| Low Density Polyethylene (LDPE) | Qatar, Saudi Arabia, Singapore, Thailand, United Arab Emirates and United States of America. | F. No. 6/30/2020-DGTR | 23-10-2020 | Initiation of anti-dumping investigation. |
| Methyl Acetoacetate | China | F. No. 7/40/2020-DGTR | 30-09-2020 | Initiation of sunset review of anti-dumping duties. |
| Plain Medium Density Fibre Board of thickness 6mm and above | China, Malaysia, Sri Lanka and Thailand | 30/2020-Cus. (ADD) | 13-10-2020 | Anti-dumping duty extended till 20-01-2021. |
| Polybutadiene Rubber | Korea RP | F. No. 22/7/2019-DGTR | 22-10-2020 | Bilateral safeguard measures recommended under India-Korea Comprehensive Economic Partnership Agreement (Bilateral Safeguard Measures) Rules, 2017. |

Trade remedy actions against India

| Product | Country | Notification No. | Date of Notification | Remarks |
|------------------------------|--------------------------|------------------|----------------------|---|
| Carbazole Violet Pigment 23 | United States of America | 85 FR 61928 | 1-10-2020 | ADD and CVD sunset reviews initiated. |
| Common Alloy Aluminium Sheet | United States of America | 85 FR 65377 | 15-10-2020 | Preliminary Affirmative Determination of Sales at Less than Fair Value. |

| Product | Country | Notification No. | Date of Notification | Remarks |
|---|--------------------------|------------------------------|----------------------|---|
| Forged Steel Fittings | United States of America | 85 FR 66306 | 19-10-2020 | Final Affirmative Determination of Sales at Less than Fair Value. |
| Forged Steel Fittings | United States of America | 85 FR 66535 | 20-10-2020 | Final Affirmative Countervailing Duty Determination. |
| Fresh, chilled or frozen blueberries | United States of America | Investigation No. TA-201-77 | 6-10-2020 | Initiation of safeguard investigation. |
| Frozen Warmwater Shrimp | United States of America | 85 FR 63252 | 07-10-2020 | Initiation of Anti-dumping duty Changed Circumstances Review. |
| Stainless Steel Cold-Rolled Flat Products | European Commission | 2020/C 322/06 | 30-09-2020 | Initiation of anti-dumping investigation. |
| Steel products | United Kingdom | Transition Review No. TF0006 | 1-10-2020 | Initiation of a Transition Review of Safeguard Measures |



WTO News

USA appeals Panel's report on additional duties on certain Chinese goods

The United States of America has decided to appeal issues of law covered in the report of the Panel in *United States – Tariff Measures on Certain Goods from China* (DS543) and legal interpretations developed by the Panel. It may be noted that the Panel had in its report released on 15-09-2020 held that the USA's tariff measures in respect of certain Chinese goods were inconsistent with Articles I:1, II:1(a) and II:1(b) of the General Agreement on Tariffs and Trade 1994 ('GATT 1994'). The United States had

imposed additional duties pursuant to the findings of a Report under Section 301 of the Trade Act of 1974 addressing China's practices related to technology transfer, intellectual property, and innovation, which according to the USA were unfair and distortive policies of state-sanctioned theft. The Panel had rejected USA's contention that the measures were justified under Article XX(a) of the GATT 1994 as were necessary to protect US public moral. It had held that USA did not meet its burden of demonstrating that the measures are provisionally justified under Article XX(a).

EU authorized to impose countermeasures against USA

The WTO members have agreed on 26-10-2020 to a request from the European Union for authorization to impose countermeasures on US goods and services trade with the EU up to a value of USD 4 billion annually. The WTO arbitrator had earlier on 13-10-2020 issued its decision in the '*United States — Measures Affecting Trade in Large Civil Aircraft — Second Complaint*' (DS353) dispute on the level of countermeasures which can be requested by the European Union in the Boeing Subsidy dispute. It held that the countermeasures must be commensurate with the 'degree and nature of the adverse effects' which have been determined to exist. It may be noted that USA meanwhile at the last meeting of the Dispute Settlement Body, stated that the arbitrator's decision was only in respect of certain tax breaks which were eliminated more than six months ago and that hence EU's countermeasures would be contrary to WTO Rules.

Trade Facilitation Agreement – Members themselves are best placed to determine when to implement their commitments: India

Reacting to the joint call by the United States of America, Brazil, Colombia and Japan for accelerated implementation of the Trade Facilitation Agreement ('TFA'), at a meeting of the WTO's Committee on Trade Facilitation, India has stated that it believed that members themselves were best placed to determine when to implement their commitments. It may be noted that the TFA entered into force on 22-02-2017, and while the developed countries committed to

apply the substantive portions of the TFA from the date it took effect, developing countries and least developed countries ('LDCs') were given flexibility to indicate which substantial provisions they intended to apply immediately and which provisions would be implemented following a transition period they themselves designate.

Safeguard investigations notified in WTO

Articles of apparel and clothing accessories – Indonesia initiates investigation: Indonesia has on 1-10-2020 initiated safeguard investigation against imports of articles of apparel and clothing accessories, under Harmonized System (HS) Codes 6101, 6102, 6103, 6104, 6105, 6106, 6109, 6110, 6111, 6117, 6201, 6202, 6203, 6204, 6205, 6206, 6209, and 6214.

Blue berries – USA initiates investigation: The United States of America has on 6-10-2020 initiated a safeguard investigation on fresh, chilled, or frozen blueberries. For Customs purposes, the blueberries covered by the investigation are provided for under Harmonized Tariff Schedule of the United States ('HTSUS') 0810.40.0024, 0810.40.0026, 0810.40.0029, 0811.90.2010, 0811.90.2024, and 0811.90.2030.

Cigarette paper – Indonesia initiates investigation: Indonesia has on 26-10-2020 initiated investigation concerning safeguard duty on Cigarette paper. According to document circulated in WTO on 27-10-2020, the specifications are Cigarette paper and plug wrap paper non-porous in form of rolls, whether or not coated, under Harmonized System (HS.) codes ex. 4813.20.00, ex. 4813.90.10 and ex. 4813.90.90.



India Customs & Trade Policy Update

Faceless assessment on holidays including on Saturdays and Sundays:

Observing that prompt and timely assessment of Bills of Entry and clearance of imported consignments are key objectives of *Turant* Customs and the Faceless assessment, the Central Board of Indirect Taxes and Customs ('**CBIC**') has introduced continuous assessment of goods on Saturdays and Sundays. According to Circular No. 45/2020-Cus., dated 12-10-2020, CBIC has decided to make all Saturdays (except second Saturday) as working day for all the faceless assessment groups across the country. Further, the Co-Convenor of the National Assessment Commissionerate ('**NAC**') may get the NAC to draw up official rosters among Faceless Assessment Groups ('**FAGs**') / Port Assessment Groups ('**PAGs**') so as to have adequate number of officers, depending on the volume of B/Es, working on Sundays and other holidays including second Saturdays.

Rebate of State Levies on export of garments and made-ups Scheme notified under scrip mechanism:

The DGFT has notified the procedure for application and issuance of scrips under the Scheme for Rebate of State Levies ('**RoSL**'). The RoSL scrips would be available for export of garments and made-ups exported by shipping bills prior to 07-03-2019 which have been transmitted from the ICEGATE server to DGFT server and for which the exporters have not received any RoSL amount. DGFT Public Notice No. 25/2015-20, dated 13-10-2020 inserted Para 4.97 and 4.98 in the Handbook of Procedures for this purpose. Consequently, the CBIC has also issued Notifications Nos. 38/2020-Cus. and 07/2020-

C.E., both dated 21-10-2020, for conditional exemption from whole of Customs duty including additional duty and Central Excise duty, respectively, when such scrips are used.

Air conditioners with refrigerants – Import prohibited: The import policy of air conditioners with refrigerants, falling under ITC HS Code 84151010 and 84151090 has been amended from 'Free' to 'prohibited'. DGFT Notification No. 41/2015-2020, dated 15-10-2020 amends import policy of said items for this purpose.

Alcohol based hand sanitizers (in any packaging) are freely exportable: Alcohol based hand sanitizers in any form or packaging are now freely exportable with effect from 15-10-2020. Hitherto, export of alcohol based hand sanitizers with dispenser pumps was prohibited. Export of these products have now been made free by DGFT Notification No. 40/2015-20, dated 15-10-2020 amending Notification No. 8/2015-20, dated 01-06-2020 with immediate effect.

Masks (all types) are freely exportable: Export Policy of N-95/FFP-2 masks or its equivalent is now 'free', with effect from 06-10-2020. After this amendment by DGFT Notification No. 36/2015-20, dated 06-10-2020 in Notification No. 29/2015-20, dated 25-08-2020, all types of masks are now freely exportable.

Nitrile/NBR gloves – Export Policy relaxed: Export Policy of Nitrile/NBR gloves has been revised from 'prohibited' to 'restricted' with effect from 22-10-2020. Amendments in this regard have been made in Notification No. 29/2015-20, dated 25-08-2020 by DGFT Notification No. 42/2015-20, dated 22-10-2020.

Tyre imports not allowed under DFIA:

Import of tyres is now not allowed under Duty Free Import Authorisation ('DFIA') scheme. DFIA is issued to allow duty free import of inputs, oil and catalyst which are required for production of

export product. Para 4.25 of the Foreign Trade Policy 2015-20 has been amended by inserting clause (d) to it by Notification No. 38/2015-20, dated 06-10-2020.



Ratio Decidendi

EU's Anti-dumping duty on Ammonium Nitrate – Presumption that product with nitrogen exceeding 28% by weight has ammonium nitrate exceeding 80% by weight, correct: In a case concerning imposition of definitive anti-dumping duty by the European Union on imports of ammonium nitrate fertilisers [with an ammonium nitrate content exceeding 80% by weight], the Court of Justice of the European Union has held that presumption that a product with a nitrogen content exceeding

28% by weight has an ammonium nitrate content exceeding 80% by weight, is correct. The Court however also held that the presumption cannot be maintained if proof is provided that, despite a nitrogen content exceeding 28% by weight, the fertiliser concerned in fact has an ammonium nitrate content not exceeding 80% by weight. [*Linas Agro AB v. Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos* – Judgement dated 15-10-2020 in Case C-117/19, CJEU]

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