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Article

Exclusion of Standard-Compliant Products from the scope of the PUC – Final Findings in *Welded Stainless Steel and Pipes*

By **Baratwaj Viswanathan**

Introduction

Requests for product exclusions made to the Directorate General of Trade Remedies ('**DGTR**') are a salient aspect of trade remedies investigation process. Most often, the request for product exclusion is made on the basis that the domestic industry does not produce a particular product. Depending on the merits of the request, the Authority decides whether or not to exclude the particular product from the scope of the product under consideration ('**PUC**').

This article examines the recent Final Findings dated 8 February 2022 issued by the DGTR in the Mid-Term Review ('**MTR**') of countervailing duty on imports of Welded Stainless-Steel Pipes and Tubes (product under consideration, **PUC**) from China PR and Vietnam. While the DGTR recommended the imposition of countervailing duty on the subject imports *vide* final findings dated 31 July 2021, the Finance Ministry imposed countervailing duty on the subject imports *vide* Customs Notification dated 17 September 2021.

Applicant's request for product exclusion

The MTR was initiated subsequent to an application filed by Kunshan Kinglai Hygienic Materials Co., Ltd. ('**Applicant**'), a producer/exporter of the PUC from Vietnam. The Applicant requested for exclusion of specific grades of the PUC compliant with American Society of Mechanical Engineers-Bioprocessing Equipment (ASME-BPE) standards.

The Applicant requested for exclusion of this particular product on the basis that the domestic industry in India did not produce ASME-BPE compliant PUC, which the Applicant contended was a special grade used in bioprocessing and pharmaceutical sectors that was required to possess specific and unique qualities and designs serving high level of hygiene requirements for bioprocessing and pharmaceutical sectors. The Applicant contended that the said product was neither technically nor commercially substitutable to the product of the Indian industry and that the cost and the price of this product was much higher than that produced by the producers in India.

Analysis of the Authority's findings on product exclusion

Before delving into the Authority's decision on merits of the application, it is relevant to note that the Authority rejected the submissions / comments made by the domestic producers on the MTR request of applicant for the reason that domestic producers had not registered themselves as an 'interested party' with the Authority and had filed the submissions belatedly. The Authority had taken a strict view that these interested parties should have adhered to the timelines prescribed by the Authority.

This is an aspect that remains to be tested for its validity given the Supreme Court's decision of extending limitations and timelines in all judicial and quasi-judicial matters all over the

country in light of the constraints caused due to the pandemic.

Proceeding to the merits, it may be noted that the Authority rejected the Applicant's request for product exclusion for three main reasons, as discussed below.

Firstly, the Authority observed that the only distinguishing feature that the Applicant was able to identify between ASME-BPE certified and non-certified product is the price of the product. The Authority considered that significant difference in the price alone cannot be a relevant parameter for exclusion of this product from the scope of the PUC. The Authority clarified that any request for product exclusion must be based on criterion which distinguishes such product in terms of technical specifications and characteristics.

Secondly, apart from the price, the Authority observed that the only other difference between the certified and non-certified product was in processing of such product. In this regard, the Authority was of the view that the Applicant provided no verifiable evidence to substantiate that the additional processing requirements are so high as to justify a price differential of 10 times.

What emerges from this finding is that it becomes critical to establish the technical differences in products with relevant evidences resulting in the price difference. It is this technical difference due to which the product is not competing and substitutable with the product of the Indian industry. Mere price difference does not suffice since a high-priced product may still be substitutable to the product of the domestic industry.

Thirdly, the Authority observed that the Applicant was not able to provide any evidence that ASME-BPE compliant products are mandatorily required in the bio-pharmaceutical industry. The Authority observed that there is no

governmental regulation which necessitates the use of only ASME-BPE products for use in bio-processing and pharma industry. This reason flows from the understanding that if any law requires ASME certification, then the law should recognize the technical differences and make certification mandatory.

In connection to the third reason, the Authority observed that the absence of participation by the actual users validated the notion that there is no mandatory requirement for these AMSE-BPE compliant products.

What flows from the above reasons is the reiteration of the age-old principle that 'direct competition' and 'substitutability' is pre-requisite to show that the product is a 'like article'. The findings in the above case provides certain ways in which the same can be proved i.e., by establishing the technical differences, or showing legal requirements or showing that the user industry is only using a specific item and not the others. These findings are relevant especially since product exclusions are being argued by the interested parties in various investigations before the DGTR.

Conclusion

Determinations issued by the investigating authority concerning product scope are important in that they are most often peculiar to the facts and circumstances of the case. In this case as well, the Authority has established some interesting jurisprudence regarding requests for product exclusion.

While holding that the Applicant's submissions regarding price difference, however significant, could not be the reason for product exclusions, the Authority has correctly emphasized on the need for evidence to substantiate differences between the exclusion product and the PUC on the basis of technical and physical characteristics of such products.

Such determination is in line of the Authority's own jurisprudence and also WTO's jurisprudence on the notion of 'like article'.

The Authority's findings in this MTR are also important in that it highlights the importance of user participation in trade remedial proceedings, particularly when requests for product exclusion are to be made. As the users are the ones who

are directly affected by the imposition of trade remedial measures, their participation in investigations to determine product exclusions is of utmost importance.

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Trade Remedy News

Trade Remedy actions by India

Product	Country	Notification No.	Date of notification	Remarks
Aluminium foil	China PR	8/2022-Cus. (ADD)	14 February 2022	Anti-dumping duty extended till 15 June 2022
Aluminium primary foundry alloy ingot in different forms	Malaysia	F. No. 6/43/2020-DGTR	31 January 2022	Countervailing duty recommended to be imposed
Amoxicillin Trihydrate	China PR	F. No. 7/29/2021-DGTR	15 February 2022	Sunset review recommends continuation of anti-dumping duty
Caustic Soda	Japan, Iran, Qatar and Oman PR	F. No. CBIC-190354/26/2022-TO(TRU-I)-CBEC	23 February 2022	ADD – Central government decides not to impose anti-dumping duty as recommended by DGTR
Clear float glass	Iran	F. No. 7/15/2021-DGTR	11 February 2022	Sunset review recommends continuation of anti-dumping duty
Copper tubes and pipes	Malaysia, Thailand and Vietnam	F. No. 04/10/2020-DGTR	31 January 2022	Countervailing duty recommended to be imposed

Product	Country	Notification No.	Date of notification	Remarks
Elastomeric filament yarn	China PR, South Korea, Taiwan and Vietnam-	F. No. 7/14/2021 - DGTR	1 February 2022	Sunset review recommends continuation of anti-dumping duty
Flat rolled product of steel, plated or coated with alloy of Aluminium and Zinc	China PR, Vietnam and Korea RP	7/2022-Cus. (ADD)	1 February 2022	ADD – Notification imposing anti-dumping duty rescinded
High-speed steel of non-cobalt grade	Brazil, China PR and Germany	6/2022-Cus. (ADD)	1 February 2022	ADD – Notification imposing anti-dumping duty rescinded
Hot rolled and cold rolled stainless steel flat products	China PR	1/2022-Cus. (CVD)	1 February 2022	CVD – Notification imposing countervailing duty rescinded
Plastic processing machines	China PR	F. No. 6/54/2020-DGTR	16 February 2022	Anti-dumping duty recommended
Polyurethane Leather which includes any kind of textile coated one sided or both sided with Polyurethane	China PR	F. No. 6/55/2020-DGTR	21 February 2022	Anti-dumping duty recommended
Saturated fatty alcohols	Indonesia, Malaysia and Thailand	F. No. 7/01/2022-DGTR	3 February 2022	Sunset review of anti-dumping duty initiated
Saturated fatty alcohols	Indonesia, Malaysia and Thailand	F. No. 6/18/2021-DGTR	8 February 2022	Countervailing duty investigation initiated
Straight length bars and rods of alloy steel	China PR	5/2022-Cus. (ADD)	1 February 2022	ADD – Notification imposing anti-dumping duty rescinded
Styrene butadiene rubber	European Union, Korea RP and Thailand	F. No. 7/31/2021-DGTR	10 February 2022	Sunset review of anti-dumping duty initiated

Product	Country	Notification No.	Date of notification	Remarks
Welded stainless steel pipes and tubes	China PR and Vietnam	F. No. 7/45/2020-DGTR	8 February 2022	ADD mid-term review rejects exclusion of ASME-BPE certified product
Wire rod of alloy or non-alloy steel	China PR	F. No. CBIC-190354/137/2021-TO(TRU-I)-CBEC	7 February 2022	ADD – Central government decides not to impose anti-dumping duty as recommended by DGTR

Trade remedy actions against India

Product	Investigating Country	Document No.	Date of Document	Remarks
Barium Chloride	USA	87 FR 7094 and 87 FR 7100	8 February 2022	Countervailing duty and less-than-fair-value investigations initiated
Off-the-road tires	USA	87 FR 5467	1 February 2022	ADD and CVD sunset reviews initiated
Sodium Nitrite	USA	87 FR 7108 and 87 FR 7122	8 February 2022	Countervailing duty and less-than-fair-value investigations initiated
Steel nails	USA	87 FR 9378	18 February 2022	ADD and CVD – Determination of material injury due to less than fair value and subsidization
Welded carbon steel standard pipes and tubes	USA	87 FR 9571	22 February 2022	Circumvention inquiry on the anti-dumping duty Order initiated
Welded stainless pressure pipe	USA	87 FR 5460 and 87 FR 5466	1 February 2022	CVD and ADD – Affirmative sunset reviews issued



WTO News

USA's safeguard measures on large residential washers from Korea RP not consistent with WTO provisions

The WTO's DSB panel has on 8 February 2022 circulated its report in the case brought by the Republic of Korea in *'United States — Safeguard measure on imports of large residential washers'* (DS546). The Panel has held that USITC acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards because its report did not contain a reasoned and adequate explanation on 'unforeseen developments' and the 'obligations incurred'. According to the Panel, the US authorities' action was inconsistent with Article 4.1(c) of the Agreement on Safeguards because it included parts in the definition of the domestic industry based on its finding of likeness without any competitive relationship between imported and domestically produced parts of large residential washers. The Panel also noted that US authorities failed to provide a reasoned and adequate explanation in support of its finding on increased imports and for excluding the profit and loss data of the producer of belt-driven washers from the profit data used to determine the profitability of the domestic industry. In respect of causation determination, the Panel noted that there was

absence of reasoned and adequate explanation to support the finding that subject imports depressed and suppressed prices of the domestic like product as a whole.

EU initiates dispute regarding Chinese intellectual property enforcement

The European Union has on 18 February requested WTO dispute consultations with China concerning alleged latter's measures adversely affecting the protection and enforcement of intellectual property rights. As per the document circulated to the WTO members on 22 February 2022, the European Union claims that the certain specified Chinese measures are inconsistent with the provisions under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights and China's Protocol of Accession to the WTO. According to EU, China has introduced and maintains a policy which in the context of judicial procedures concerning the enforcement of intellectual property rights in China prohibits patent holders from asserting their rights in other jurisdictions by commencing, continuing or enforcing the results of legal proceedings before a non-Chinese court. This prohibition materialises through Chinese courts issuing so called 'anti-suit injunctions' enforced through daily penalties in case of infringement.



India Customs & Trade Policy Update

Drones – Import in CBU/CKD/SKD form prohibited with certain exceptions

The new edition of ITC (HS), which is in sync with the changes made by the Finance Act, 2021 in

the Customs Tariff Act, 1975 with effect from 1 January 2022, has also revised the import policy of certain drones. Import Policy of drones imported in CBU/CKD/SKD form under HS Code

8806 is now prohibited with exceptions provided for R&D, defence and security purposes. It may be noted that import of drone components is however 'free'.

Flat panel display modules – Import restrictions removed

Import restrictions have been removed in respect of flat panel display modules falling under Heading 8524 of the Customs Tariff Act. The goods falling under Heading 8524 are now importable freely with effect from 24 February 2022. Similarly, goods falling under 8525 89 00 of the Customs Tariff Act and the ITC (HS) are also now feely importable. Notification No. 55/2015-20, dated 24 February 2022 amends Chapters 84 and 85 of Schedule I to the ITC (HS).

Syringes – Export restrictions removed

The export policy of all kinds of syringes falling under ITC(HS) Code 9018 31 00 or any other HS

code has been made 'free' with immediate effect. DGFT Notification No. 52/2015-20 dated 31 January 2022 in this regard amends Notification No. 38/2015-2020 dated 14 October 2021 pertaining to Chapter 90 of Schedule 2 of ITC (HS) Export Policy, 2018.

Remdesivir Injection and API, Amphotericin-B Injections, Enoxaparin (Formulation and API) and Intra-Venous Immunoglobulin (IVIG) (Formulation and API) – Export Policy relaxed

Restrictions on export of Remdesivir Injection and API, Amphotericin-B Injections, Enoxaparin (Formulation and API) and Intra-Venous Immunoglobulin (IVIG) (Formulation and API) have been removed with effect from 24 February 2022. The exports of these products is now 'free'. Notification No. 56/2015-20, dated 24 February 2022 has been issued for the purpose.



Ratio Decidendi

Anti-dumping duty leviable on clearance of goods imported and warehoused before issuance of ADD notification

The CESTAT Bench at Chennai has upheld the view that anti-dumping duty is leviable on clearance of goods which had been imported and warehoused before the issue of notification imposing anti-dumping duty. The Tribunal was however of the view that interest, if any, for the delayed payment, is to be paid from the date of ex-bonding, as payment of interest is

consequential to the demand of duty in respective manner. Further, setting aside the confiscation and redemption fine, the Tribunal observed that there was nothing that the appellant-importers had consciously suppressed or misrepresented. The assessee had pleaded that the provisions of Section 15 of the Customs Act, 1962, being machinery provision and not a charging section, cannot be applied to the goods on which the levy was not in force on the date of its import. [*LSML Private Ltd. v. Principal Commissioner – 2022 VIL 126 CESTAT CHE CU*]

Valuation – Commercially interchangeable goods must be of the same commercial level and substantially same quantity

Rule 5 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 requires that the comparable imports must be at the same commercial level and in substantially

the same quantity as the goods being valued to determine value of imported goods. However, none of the two conditions were satisfied in the case under consideration. Thus, the Tribunal held that the declared value of the imported goods cannot be rejected under Rule 12 of said Rules. [*National Steel & Agro Pvt. Ltd. v. Commissioner* – 2022 VIL 121 CESTAT MUM CU]

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