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An e-newsletter from
Lakshmikumaran & Sridharan, India

March 2022 / Issue – 128

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March
2022



Article

Standard of review in sunset review investigation – CESTAT shines new light

By Devinder Bagia and Jayant Raghu Ram

Introduction

In a sunset review investigation, the objective of the review carried out by the investigating authority is to determine whether there is a likelihood of continuation or recurrence of dumping *and* injury upon cessation of Anti-Dumping Duty ('ADD'). Only if there is a likelihood, can the investigating authority recommend the continuation of ADD.

Neither the WTO's Anti-Dumping Agreement nor the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 ('AD Rules') prescribes the parameters that are required to be examined for determining this likelihood. The investigating authority therefore places reliance on the parameters prescribed for determination of threat of material injury in Rule 14 of the AD Rules.

However, unlike in original investigations, where the investigating authority examines the existence of dumping and injury in a defined period of investigation, sunset reviews require the investigating authority to examine whether dumping and injury will continue or recur in the future. For making such a determination, it becomes necessary for the investigating authority to have reliable evidence, which is all the more important in a sunset review since continuation of ADD in a sunset review is the exception and not the norm.

This begs the question as to what is the standard of evidence that is required to be considered by an investigating authority: an issue

which was recently examined by the CESTAT in the decision of *All India Laminated Fabrics Manufactures Association v. Designated Authority & Ors.* (decision of 28 February 2022).

Factual Background

The appeal under discussion was filed by the All India Laminated Fabric Manufacturers Association ('Appellant'), an association of domestic producers of PVC Flex Film ('PUC'), who sought extension of ADD in a second sunset review investigation on imports of the PUC from China PR. In the original investigation on imports of PUC from China PR, ADD was first imposed *vide* Customs Notification dated 30 July 2010. Thereafter, pursuant to the Directorate General of Trade Remedies ('Authority') recommendation to continue ADD in the first sunset review investigation, the Finance Ministry extended the ADD *vide* Customs Notification dated 8 August 2016 for a period of five years till 7 August 2021.

However, in the second sunset review, by final findings dated 28 October 2021, the Authority concluded that the likelihood of continuation/recurrence of injury to the domestic industry in the event of revocation of duty could not be conclusively established due to lack of sufficient independent corroborative evidence from the Appellant. The Authority therefore, recommended withdrawal of ADD on the import of PUC from China PR. Aggrieved by the Authority's findings, the Appellant approached the CESTAT for setting aside the final findings of the Authority.

Tribunal's key findings regarding standard of review

One of the key findings which formed the basis of the Authority's conclusion was that the reliability and authenticity of a market research report relied upon by the Appellant to establish likelihood was suspect because neither the name of the author/publishing agency that prepared the report was mentioned nor any reference to the original source of data was cited in the report. The Authority therefore held that any conclusion with regard to likelihood of continuation/recurrence of dumping and injury could not be made on the basis of this report.

In this regard, the Appellant submitted that the Authority committed an error in rejecting this report and if the Authority had called upon the Appellant to disclose the name of the agency, the Appellant would have done so on a confidential basis. The Tribunal however outrightly rejected this contention by holding that it was the Appellant's obligation to have made a duly substantiated request that contained cogent evidence and was therefore the Appellant's duty to have provided the name of the report's author.

Another important aspect of the CESTAT's judgment is that it held that it is not incumbent upon the Authority to give its conclusions on likelihood, having regard to the adequacy of evidence, in the disclosure statement which is issued under Rule 20 of the AD Rules. A disclosure statement is issued before the final findings and requires only disclosures of essential facts under consideration on which the decision of Authority would be based. The CESTAT held that the burden was on the petitioner to place on record sufficient and reliable evidence during the course of investigation to justify the likelihood of continuation of dumping and injury upon cessation of ADD. The CESTAT held that the determination cannot be based on guess work or

on mere assumption or presumption but should be based on some tangible and positive evidence.

The CESTAT also noted that since the report did not give the source of the data contained in the report, such a report could not, therefore, have been relied upon by the Authority in view of the Rule 8 of the AD Rules, which requires the Authority to satisfy itself as to the accuracy of the information supplied by the interested parties upon which its findings are based, during the course of investigation. The CESTAT was supported in its findings by relying on its own decision, and later affirmed by the Supreme Court in *Dye Stuff Manufacturers Association v. Govt. of India*, which had similar facts regarding the evidence before the investigating authority.

The CESTAT observed that a sunset review requires the Authority to conduct a rigorous examination of evidence, which requires an appropriate degree of diligence on the part of the Authority since continuation of duty is an exception to the general rule of its cessation at the end of five years. Further, the investigating authority must have sufficient factual basis to support any affirmative determination of likelihood. In support of its findings, the CESTAT extensively relied on WTO panel decisions in *US – Corrosion-Resistant Steel Sunset Review* (WT/DS/244), *US – Anti-Dumping Measures on Oil Country Tubular Goods* (WT/DS/282) and *Pakistan – BOPP Film (UAE)* (WT/DS/538), decisions which establish important jurisprudence regarding examination of likelihood by the investigating authority.

Conclusion

It is a settled position of law that to prevail in an allegation brought before a court of law or even a quasi-judicial authority, it is important for the party alleging a fact, to prove the allegation. This legal standard is no different in proceedings

before the investigating authority in ADD proceedings.

The CESTAT has established some critical jurisprudence regarding the standard of evidence that the petitioning industry is required to bring forward to justify its request to continue ADD in a sunset review. This judgment reinforces the notion that the evidence which the domestic industry brings forward regarding likelihood of continuation of dumping must be strong and not superficial.

The CESTAT decision also puts the spotlight on the Authority's decision-making process. By

holding that the Authority was justified in holding, *inter-alia*, that there was no reliable evidence to justify likelihood, the CESTAT has validated the Authority's decision making as fair and reasonable.

[The authors are Partner and Principal Associate, respectively, in WTO and International Trade practice team at Lakshmikumaran & Sridharan Attorneys, New Delhi. Both attorneys were part of the team that represented one of the Respondents in the appeal under discussion in this article.]



Trade Remedy News

Trade Remedy actions by India

Product	Country	Notification No.	Date of notification	Remarks
Aluminium Foil 5.5 Micron to 80 Micron	China PR	F. No. 7/27/2021 - DGTR	14 March 2022	Continuation of anti-dumping duty recommended after sunset review
Ceramic Tableware and Kitchenware, excluding Kitchen Knives and Toilet items	China PR	F. No. 7/20/2021- DGTR	10 March 2022	Continuation of anti-dumping duty recommended after sunset review
Fluoro Backsheet	China PR	F. No. 6/3/2021- DGTR	29 March 2022	Definitive anti-dumping duty recommended
Glass fibre and articles thereof	Bahrain and Egypt	F. No. CBIC – 190354/124/2021-TO(TRU-I) - CBEC	3 March 2022	Central Government decides not to impose recommended anti-dumping

Product	Country	Notification No.	Date of notification	Remarks
Glazed/Unglazed Porcelain/Vitrified tiles with less than 3% water absorption	China PR	9/2022-Cus. (ADD)	24 February 2022	Definitive anti-dumping duty continued after sunset review
Hydrogen Peroxide	Bangladesh and Thailand	F. No. 7/22/2021-DGTR	11 March 2022	Continuation of anti-dumping duty recommended after sunset review
Jute products	Bangladesh and Nepal	10/2022-Cus. (ADD)	24 February 2022	Anti-dumping duty extended till 30 June 2022
Melamine	EU, Japan, Qatar and UAE	F. No. 6/1/2021 - DGTR	25 February 2022	Definitive anti-dumping duty recommended
N, N'-Dicyclohexyl Carbodiimide (DCC)	China PR	F. No. 06/53/2020-DGTR	24 February 2022	Definitive anti-dumping duty recommended
Saccharin	China PR	F. No. 7/05/2022-DGTR	17 March 2022	Anti-circumvention investigation initiated for countervailing duty
Uncoated copier paper	Indonesia and Singapore	F. No. CBIC – 190354/143/2021-TO(TRU-I) - CBEC	3 March 2022	Central Government decides not to impose recommended anti-dumping

Trade remedy actions against India

Product	Investigating Country	Document No.	Date of Document	Remarks
Barium Chloride	USA	87 FR 12486	4 March 2022	ADD and CVD - Determination of reasonable indication of material injury
Cold-drawn mechanical tubing of carbon and alloy steel	USA	87 FR 12084	3 March 2022	Preliminary Affirmative Countervailing Duty Determination in Administrative Review; 2020

Product	Investigating Country	Document No.	Date of Document	Remarks
Fine denier polyester staple fiber	USA	87 FR 12936	8 March 2022	Preliminary determination in Administrative Review 2020 that countervailable subsidies were received by Reliance Industries Ltd.
Finished carbon steel flanges	USA	87 FR 13701	10 March 2022	Final determination in Administrative Review 2019-20 of no sales at less than fair value
Frozen warmwater shrimp	USA	87 FR 11413	1 March 2022	Preliminary affirmative determination of sales at less than fair value, in Administrative Review; 2020-2021
Granular Polytetrafluoroethylene Resin	USA	87 FR 14509 and 87 FR 14514	15 March 2022	ADD and CVD Orders issued
Graphite electrode systems	EU	2022/C 113/03	9 March 2022	Expiry reviews initiated for anti-dumping and anti-subsidy duties
Oil country tubular goods	Canada	OCTG2 2021 UP1	9 March 2022	Canada Border Services Agency concluded a normal value review
Organic Soybean Meal	USA	87 FR 16453 and 87FR 16458	23 March 2022	Final affirmative countervailing duty determination and final affirmative determination of sales at less than fair value issued
Sodium Nitrite	USA	87 FR 12487	4 March 2022	ADD and CVD - Determination of reasonable indication of material injury
Stainless steel bar	USA	87 FR 12428	4 March 2022	Preliminary determination of sales at less than fair value, Administrative Review; 2020-21
Stainless steel cold-rolled flat products	EU	Commission Implementing Regulation (EU) 2022/433	15 March 2022	Definitive countervailing duties imposed and definitive anti-dumping duty amended
Steel Nails	USA	87 FR 12080	3 March 2022	CVD - Postponement of preliminary determinations
Steel products	EU	Commission Implementing Regulation (EU) 2022/434	15 March 2022	Safeguard measures adjusted after ban on imports from Belarus and Russia



WTO News

4 nations reach tentative consensus on TRIPS waiver for Covid-19 vaccines

India along with USA, European Union and South Africa have reached a tentative consensus on waiver of the Trade Related Intellectual Property ('TRIPS') Agreement for the production of vaccines against the Covid-19 pandemic. As per reports, the tentative agreement among the four World Trade Organization members still needs formal approvals from the parties before it can be considered official.

It may be noted that the proposal at present covers only vaccines and excludes lifesaving treatments, medicines and diagnostics for testing Covid-19. This agreed proposal has also been largely criticized because it fails to address the problem of technology transfer—access to confidential information, data, trade secrets, and manufacturing know-how, essential to quickly enable the development of vaccine manufacturing capacity.

EU challenges UK's measures for allocation of contracts for difference in low carbon energy generation – Alleges violation of national treatment clause

The European Union has on 28 March 2022 requested consultations with the United Kingdom on latter's certain measures relating to the allocation of contracts for difference in low carbon energy generation. According to the European Union, the measure while incentivising investments in renewable energy by providing developers of projects that have high upfront costs with a predictable income that protects them from volatile high wholesale prices, incorporates United Kingdom local content as a criterion for the eligibility of applicants for all low carbon electricity generation projects. As per document circulated in the WTO on 30 March, EU alleges that the UK is acting inconsistently with the national treatment obligation under Article III:4 of the GATT by making local content a criterion of eligibility for, and payment of, subsidies, thereby according less favourable treatment to imported goods than to like domestic goods.



India Customs & Trade Policy Update

Rice exports – Policy condition revised for exports to Europe

Exports of rice, both basmati and non-basmati, to EU member states and to United Kingdom, Iceland, Liechtenstein, Norway and Switzerland would require certificate of inspection from Export

Inspection Agency or Export Inspection Council. For other European countries, such certificate will be required with effect from 1 July 2022. Notifications Nos. 60 and 61/2015-20 have been issued for the purpose.

Hydrofluorocarbons – Import and Export Policies revised to ‘restricted’

Import and Export Policies of Hydrofluorocarbons have been revised from ‘free’ to ‘restricted’. It may be noted that while the Indian import restrictions are effective from 9 March 2022, exports from India are now under the restricted

category from 23 March 2022. Further, import and export authorisations will now be issued subject to NOC from the Indian Ministry of Environment, Forest and Climate Change. Notifications Nos. 59/2015-20 and 62/2015-20 have been issued by the Indian Ministry of Commerce to amend Chapters 29 and 38 of the Schedule I and II of ITC(HS) Classifications.



Ratio Decidendi

Sunset review of anti-dumping duty – Existence of sufficient factual material is mandatory to apply exception of continuation of duty

The Anti-dumping Bench of the CESTAT has upheld the final findings of the Designated Authority (‘DA’) in the Directorate General of Trade Remedies (‘DGTR’), in the sunset review, for non-continuation of anti-dumping duty on PVC flex films from China PR.

Dismissing the appeal filed by the domestic industry, the Tribunal observed that the DA was justified in holding that there did not exist sufficient factual material to allow it to conclude that there was a likelihood of continuation or recurrence of injury in case of cessation of anti-dumping duty. The Tribunal in this regard also noted that there was no ‘duly substantiated request’ made by the domestic industry for the purpose.

Relying on certain WTO’s DSB panel and appellate panel reports, the Tribunal in the case was of the view that the determination in a sunset review cannot be based on guesswork or on mere assumption or presumption but it should be

based on some tangible evidence. It observed that the DA must conduct a rigorous examination in a sunset review before the exception, that duty should be continued, can apply. [*All India Laminated Fabrics Manufactures Association v. Designated Authority – Final Order No. 50171/2022, dated 28 February 2022, CESTAT Anti-dumping Bench*]

Non-consideration of unauthenticated market research report is correct

The Anti-dumping Bench of the CESTAT has also held that no conclusion could be arrived at likelihood of continuance or recurrence of injury based on a report [*Report of Special Research and Investment Feasibility Assessment on China Polyvinyl Chloride Flexible Film/Sheet Market 2021-2025*] relied upon by the appellant (domestic industry), since the name of the author or the agency which prepared the report was not mentioned in the report nor the data source for the report was provided.

Plea that the appellant was barred from sharing the name of the author/agency of the marketing intelligence report due to the Data Secrecy Law [in China], was also rejected by the Tribunal while

it observed that the ground was not raised in the appeal memorandum nor any permission was sought from the Tribunal to raise this plea. The anti-dumping bench in this regard also noted that the Chinese law was enacted in September 2021, after the report was shared with the designated authority, and it was not the case of the appellant that this law had any retrospective application. Contention that in case the designated authority had asked, the appellant would have shared the name of the author, was also hence rejected observing that according to the appellant, it was prevented earlier to do so.

It also noted that the appellant did not provide the non-confidential summary of the report to other interested parties nor did it give any reason for not providing the same, though respondent no. 8 (the Chinese exporter) had raised this issue in the legal submissions. [*All India Laminated Fabrics Manufactures Association v. Designated Authority* – Final Order No. 50171/2022, dated 28 February 2022, CESTAT Anti-dumping Bench]

Non-submission of Exporters Questionnaire-Part II when not fatal

Rejecting the contention that the exporter had not filed 'Exporters Questionnaire-Part II- Further Information Concerning the Sunset Review', the CESTAT Anti-dumping Bench has found considerable force in the submissions of the Chinese exporter that the exporter had not exported the subject goods to India during the period of investigation or during the injury period and the DA or the interested parties had, in the sunset review, not objected to such non-

submission. The Tribunal also noted that nothing was brought on record to indicate that if Questionnaire (Part-I) is not required to be filed, it is still necessary to file (Part-II) of the Questionnaire. [*All India Laminated Fabrics Manufactures Association v. Designated Authority* – Final Order No. 50171/2022, dated 28 February 2022, CESTAT Anti-dumping Bench]

Digital still image video cameras – Exemption under ITA bound notification – Issue referred to Larger Bench

The CESTAT New Delhi has observed that digital still image video cameras would be entitled to BCD exemption under the notification dated 1 March 2005, as amended on 17 March 2012, whereby an 'Explanation' was added to the original notification. Allowing exemption, the Tribunal was of the view that the ITA bound notification must be interpreted in a manner so as to promote the obligation undertaken by India. It also noted that as long as the user cannot record a video clip of 30 minutes or more in a single sequence using maximum (included expanded) capacity, the cameras imported by the appellant shall be covered by the exemption. The issue was however referred to the Larger Bench because the view was contrary to the view taken by the Division Bench of the Tribunal in the earlier round of proceedings arising out of the show cause notice. [*Nikon India Pvt. Ltd. v. Commissioner* - Interim Order No. 04/2022, dated 8 March 2022, CESTAT New Delhi]

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