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Article

Price undertaking and discretion to authority– Rule 15.3 analyzed

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The objective of imposing anti-dumping duty is not to penalize an exporter for selling goods at less than fair value, but to only create a level playing field for domestically produced articles to compete with imported articles. Anti-dumping provisions encourage exporters to fully participate and avail a favorable order including suspension of investigation, which will be sufficient to remove injurious effects caused by low priced imports. Article 8 of the WTO: Agreement on Anti-Dumping (WTO:ADA) provides for one such mechanism, whereby an investigation may be terminated or suspended based on an undertaking given by the exporter.

Article 8, in sum and substance, provides discretion to the investigating authority to accept or reject price undertaking given by an exporter to revise its prices or cease its exports at dumped prices, in order to eliminate injury to the domestic industry. Such revision in prices should preferably be less than the margin of dumping, enough to remove injury [Article 8.1]. However, Article 8.3 vests discretionary power with the investigating authorities to decline the price undertaking, wherever found impracticable. Article 8.3 further adds as illustrations that where the number of actual or potential exporters is great or for *other reasons, including reasons of general policy,* the investigating authority may reject the price undertaking application of the exporter. The generic wordings of Article 8.3 give the investigating authorities wide discretion to accept or reject the price undertaking.

This article endeavors to find the extent of discretion that Indian investigating authority uses, while deciding the issue of price undertaking under Rule 15 of the Indian anti-dumping rules[1], which is pari-materia with Article 8 of WTO:ADA.

Before coming to Indian practice, it is worth looking at the jurisprudence developed under WTO framework. On the issue of discretionary power under Article 8, there has been only one dispute. In *US — Offset Act (Byrd Amendment) [DS 217, 234]*, the Panel gave almost a free hand to the investigating authorities in deciding the issue of price undertaking. Panel held that Article 8.3 does not require an objective analysis of price undertaking so offered. The investigating authorities may ascribe manifold reasons to decline price undertaking including by reason of general policy. Thus the Panel report has only acknowledged and approved the wide discretionary power vested in investigating authorities. However, the Panel Report fails to shed light on the limit, if any, of such discretionary power.

In terms of Rule 15(3), Indian investigating authority (DGAD) may reject the request for price undertaking where it considers acceptance of such undertaking is 'impractical' or is unacceptable for '*any other reason*'. Unlike Article 8.3, wherein the principle of ejusdem generis could still be applied for the phrase "for other reasons", which follows the specific illustration provided, i.e., "if the number of actual or potential exporters is too great", there is no scope for such interpretation in the Indian provisions. However, the practice of DGAD through its various final determinations throws some light on

[1] Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules 1995

the interpretation of Rule 15(3).

There have been 23 anti-dumping investigations since 1998, wherein the issue of price undertaking has come before DGAD. Of these, investigations were suspended for 12 exporters in 10 different investigations as their price undertaking proposals were accepted. It is also to be noted that for 3 of the exporters[2], price undertaking were subsequently revoked as DGAD found violation of terms of price undertaking. One price undertaking was subsequently set aside by Tribunal on appeal[3]. In remaining 13 investigations, the proposals of 15 exporters were rejected for one reason or another.

In the case of *Newsprint from Russia, Canada and USA (1998)*, the price undertaking proposals of 2 exporters from Russia were accepted, even though they did not provide sufficient information with respect to cost of production and normal value. In 2000, however, DGAD went against its own practice in the case of *Thermal Sensitive Paper from European Union*. In this case, even though the export price was accepted and a separate dumping margin was determined for the exporter requesting for price undertaking, however, DGAD rejected the application on the ground that since normal value had to be constructed, price undertaking could not be accepted. Again in 2011, same practice was continued in *PTFE from China PR*, wherein DGAD rejected the proposal of price undertaking made by an exporter on the ground that the exporter did not claim market economy treatment and as a result, there was no requisite information for normal value and resultant dumping margin. It was also held that in such a scenario, there would be practical difficulty in monitoring price undertaking.

In *Nylon Tyre Cord Fabrics from China PR (2005)*, however, DGAD adopted a totally new approach. In this case, DGAD provided a detailed price undertaking proforma to the intending exporters as well a personal hearing. Of the two exporters applying for price undertaking, DGAD accepted price undertaking proposal for only one exporter. The only reason for accepting one proposal while rejecting the other was for the fact that while one exporter agreed to revise its prices periodically in line with changes in raw material prices, the other refused to accept this condition. Moreover, the other exporter, whose proposal was declined, did not provide separate prices for different grades of the product concerned.

The practice of DGAD to reject the price undertaking offer of exporter is crystal clear in such cases where even though exporter had shown interest but failed to provide requisite information[4]. Similarly, where exporter was treated as non-cooperative on account of deficient questionnaire response and no separate dumping margin was determined, proposal of price undertaking was rejected[5]. But again, there have been cases, where DGAD considered the price undertaking request 'in detail' and accepted them as it removed the injurious effect of dumping[6].

Constant technological changes leading to new product development[7], undertaking linked to several conditions such as variation in raw material prices, export duty on the product, value addition norms,

2 Fully Drawn yarn from Korea (2006); Potassium Carbonate from Taiwan (2004) and Hexamine from Iran (2003)
3 Association of BOPP Manufacturers versus Designated Authority [2004 (167) ELT 185 (Tri-Del)]
4 Graphite Electrodes from China PR (2000); Acrylic Fibre from Turkey (2000) and Partially Oriented Yarn from Indonedia (2002)
5 Thermal Sensitive Paper from Indonesia (2005)
6 Plain Medium Density Fibre Board from China PR, Malaysia, New Zealand, Thailand and Sri Lanka (2009)
7 Cathode Ray Colour Television Picture Tubes from China, Malaysia, Korea RP and Thailand (2009)

reselling price[8], etc have also been considered as reasons to reject price undertaking proposals apart from the fact that once price undertaking has been accepted, it can be later revoked, if the terms of price undertaking are violated[9].

While past practices of DGAD shows instances and reasons, for which price undertaking was accepted or rejected, Tribunal had a chance to examine in detail the practice adopted by DGAD with respect to price undertaking. In *PT Polysindo Eka Parkasa v. Designated Authority*[10], exporter challenged the determination of DGAD on the ground that the price undertaking proposal was rejected arbitrarily without objectively examining the proposal and without ascribing any reason as to why acceptance was not 'practicable'. The Tribunal while accepting the arguments of exporter, held that while considering the acceptance of price undertakings, following aspects are relevant for consideration:

- Whether the injury caused by dumping can be eliminated;
- Whether there exist effective measures to monitor its fulfillment;
- Whether such acceptance is consistent with public interest;
- Whether there exists any possibility of circumvention of the undertaking in any way; and
- Any other relevant factor that the Designated Authority may consider necessary to examine.

Furthermore, it was held by Tribunal that wherever DGAD found it impracticable or unacceptable, it should notify the concerned exporter of the reasons for such non acceptance and give an opportunity to offer their comments. The reason for non-acceptance should be explicitly stated in the final determination made by the DGAD. In fact, according to Tribunal, *the consideration of the price undertaking under Rule 15 is, therefore, a most crucial exercise to be undertaken by the Designated Authority for deciding whether to suspend or terminate the investigation or to reject it and impose the anti-dumping duty and that any arbitrary action of a non-acceptance of a price undertaking will amount to flouting the scheme of the Rules that contemplates a fair consideration of an offer of a price undertaking.*

The above practices of DGAD show that it indeed has a lot of discretion to accept or reject the price undertaking proposal. However, such practice has rarely been abused since in most of the cases, logical and cogent reasoning have been given. Though the wordings of Rule 15.3 are generic in nature, but the practice of DGAD along with appellate forum has tried to do justice with the object and purpose underlying the concept of price undertaking.

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[8] Acrylic yarn from Nepal (2002).

[9] Fully Drawn Yarn from Korea (2006), Potassium Carbonate from Taiwan (2004) and Hexamine from Iran (2003)

[10] 2005 (185) ELT 358 (Tri-del)

Trade Remedy News

Anti-dumping actions by India

Product	Country	Notification No.	Date of Notification	Remarks
Barium arbonate	China	14/18/2009-DGAD	28-2-2013	Change of name of particular exporter
Flat Base Steel Wheels	China	3/2013-Cus. (ADD)	26-3-2013	ADD re-imposed after sunset review
Meta Phenylene Diamine	China	2/2013-Cus. (ADD)	22-3-2013	Provisional ADD imposed for 6 months.
Peroxosulphates	China and Japan	15/9/2011-DGAD	12-3-2013	ADD recommended to be continued in sunset review

Safeguard action by India

Product	Country	Notification No.	Date of Notification	Remarks
Hot rolled flat products of stainless steel of 304 grade	China	D-22011/06/2012	14-3-2013	Public hearing scheduled for 11th April 2013

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Polypropylene Resin	Brazil	Circular SECEX 16	25-3-2013	Initiation of anti-subsidy investigation
Synthetic Fibre Ropes	EU	2013/C85/09	23-3-2013	Notice of impending expiry of ADD measures

WTO News

WTO discusses amendment in Agriculture Rules

The World Trade Organisation last week discussed the proposals floated by India along with 32 other countries (popularly known as G-33) in November last year. Developing countries are asking for permission for public stockholding for food security purposes and for domestic food aid which would also support large number of small and poor farmers in these countries. The group

believes that administered prices are needed for governments to compete with private sector to buy the produce, to stimulate production and to ensure availability of food and fair price to farmers to shield them from the effects of rapidly rising and falling prices. As per reports, though all members support the need for stockholding to improve food security, they differ over the means of achieving this. Some want to discuss ways of disciplining market intervention to avoid distortion and ensuring the programmes are really targeted at poor farmers and consumers.

Good Regulatory Practice – TBT committee begins work on guidelines

WTO's Technical Barriers to Trade (TBT) Committee has begun working on guidelines for regulations in a trade friendly manner i.e. Good Regulatory Practice (GRP). In the meeting held on 6-7 March, China, European Union, Indonesia and USA made their representations with particular case studies. According to the moderator to the session, it focused on some of the key mechanisms and principles of GRP, particularly openness, transparency, internal coordination, stakeholder consultation, balancing stakeholders' interest, regulatory impact assessments and legislative reviews. As part of the TBT Committee meeting, India's Electronics and Information Technology Goods (Requirements for Compulsory Registration) Order, 2012 and proposed amendment to 2008 Hazardous Waste Law, were also discussed for the first time along with other non-tariff barriers of various countries. India's prohibition on manufacture, sale, distribution, import or storage of pneumatic tyres not conforming to the specified standards and mandatory certification for steel products were also discussed again on concerns from EU, Japan and China.

"EC-Seal products" dispute opened to the public

The WTO Panel, at the request of parties to the Dispute in "European Communities – Measures Prohibiting the Importation and Marketing of Seal Products" (DS400 and DS401), has agreed to open its second substantive meeting with the parties to public viewing. The meeting is scheduled for 29 and 30 April 2013 at the WTO Headquarters in Geneva. Public viewing will take place via a real time CCTV broadcast. Members of the public as well as accredited journalists and non-governmental organizations can attend the public viewing.

News Nuggets

Concretising BRICS initiatives

The recently concluded summit of BRICS countries, though devoid of stellar announcements saw some progress in creation of a counterweight as it being called, to the dominance of developed countries. The proposal for a development bank, funded and managed by BRIC countries was discussed and the Brazil, Russia, India, China, South Africa will try to sort out the issues over funding, voting pattern and ensuring that the bank serves as a viable alternative to the IMF or the World Bank. It was also decided to establish a self-managed Contingent Reserve Arrangement to help countries stabilise their domestic currencies to serve as a financial safety net. The move towards

formation of a BRICS Joint Business Council has also received support. Prior to the start of the summit, China and Brazil signed an agreement to make bulk of their trade in their own (domestic) currencies rather than the US dollar. It remains to be seen how far the BRICS will get into concerted action resolving difference of size and economic power. Dissenting voices have stated that though classed together as emerging powers, the different economies have little in common.

Promoting healthy trade

'Agreeing to agree' perhaps best describes the efforts of member nations to evolve good or trade friendly regulatory practices. The 6th Triennial review of operation and implementation of TBT agreement which concluded last November agreed on greater exchange of information, transparency and setting of standards. The recently concluded Technical Barriers to Trade (TBT) committee meeting saw a host of issues being discussed. Most of them questioned the WTO compliance of other members. For instance Malawi protested against the new EU Tobacco products directive enjoining requirements of combined health warnings (text and pictures) on 75% of the front and back of cigarette, prohibition of characterising flavours, equipping packages with a unique identifier that allows their tracking and tracing across the EU as well as with a security feature. Chile's proposed regulations to place a STOP sign along with warnings of 'high in sugar', ' high in calories' to tackle obesity in young people also drew protests. These join the list of disputes on US flavoured cigarettes, Australia's plain packaging laws and India's ban on import of US poultry.

New Saudi law may hit Indian jobs

About 250,000 companies are yet to meet 'Saudization' requirements, the last date for which expired on 27th of March, as prescribed by Saudi Arabia's Ministry of Labour. This may result in at least 2 million expatriates working in Saudi Arabia losing their jobs. In 2011 the Labour Ministry passed Ministerial Resolution No. 4040 and announced 'Saudization' initiative known as the *Nitaqat* Programme. This programme introduced a more prescriptive system for encouraging employment of Saudi locals, particularly women and youths, with rewards for those who comply and punitive measures for those who do not. The programme classifies registered firms into four categories on the basis of compliance. Companies with more than nine workers should have a minimum of 10% Saudi nationals and their appointment should be under the employment conditions, including payment, prescribed by the Saudi Government. Asian workers, a majority of whom are from India employed in the small and medium enterprises in Saudi Arabia, are likely to be hit hard as the Kingdom goes ahead with its plans to expand employment avenues for its own nationals in the backdrop of Arab Spring.

FTA News

Dairy major requests for a relook at EU-India FTA

India's largest dairy co-operative has requested the Commerce Ministry to relook at the European Union (EU)-India Free Trade Agreement (FTA). The co-operative strongly opposes any kind of advantage in import duties on dairy products falling under Chapter 4 of Harmonised System of Nomenclature (HSN). According to the co-operative, EU does not permit import of dairy products from India in the name of Sanitary and Phyto Sanitary (SPS) measures and that EU also subsidizes milk farmers by giving various incentives on export of their dairy products which actually make their products cheaper than the cost. The Indian Commerce Ministry has been requested not to agree to any demand for lowering the customs duties on dairy products as it would adversely affect the livelihood of 80 million poor and marginal farmers who produce milk in India.

Ratio decidendi

US Court upholds Countervailing duty on NMEs

The US Court of International Trade has on 12-3-2013 upheld the constitutional validity of the USA's new law directing US Commerce department to impose CVDs on goods from Non-Market Economy (NME) countries retrospectively from 2006. The court held that the law was supported by a rational basis and therefore does not violate equal protection of rights and due process guarantees. It was also held that the ex post facto clause was also not violated as it was not demonstrated that the law was penal in nature. It noted that trade duties are remedial and not punitive, that ADs and CVDs are separate remedies that counteract different anti-competitive behaviors and that imposition of one type of duty does not obviate the need for the other. On merits of the case the court held that the plaintiffs overstated the level of separation between government ownership and government control under Chinese law and that DoC's determination of state control was supported by substantial evidence. [Guangdong Wireking Housewares & Hardware Co. Ltd. v. *United States* - United States Court of International Trade Order dated 12-3-2013].