

International Trade

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Rule 22 and jurisprudence: Duty margins for new shippers in case of sampling in original investigation

By Greetika Francis

Rule 22 of the Indian Anti-Dumping Rules provides that the Authority shall carry out a new shipper review to determine individual margin of dumping for a new producer or exporter if (i) the producer or exporter has not exported the product to India during the period of original investigation and (ii) the exporter or producer is not related to any of the exporters or producers in the exporting country who are subject to the antidumping duties on the product. Thus, the legal requirements for a new shipper to obtain an individual dumping margin are limited and clear. The Designated Authority in India has consistently carried out new shipper reviews in alignment with Rule 22 of the Indian Anti-Dumping Rules, and in pursuance of its commitment in terms of Article 9.5 of the WTO AD Agreement.

An emergent issue with respect to the conduct of new shipper reviews and the assignment of individual dumping margins arose in the case of "Jute products viz- Jute Yarn/Twine (multiple folded/cabled and single), Hessian fabric, and Jute sacking bags" ("Jute Products") from Bangladesh and Nepal. In Jute Products, the Original Investigation was conducted using the sampling methodology provided under Rule 17(3) of the Indian Anti-Dumping Rules. Thereafter, the Designated Authority received various applications for the conduct of new shipper reviews. These were initiated over the course of this year, starting in January upto July of 2018, as below:

Name of Applicant	Date of Initiation of NSR	Date of Conclusion
M/s Janata Jute Mills Limited	01-01-2018	22-11-2018
M/s Natural Jute Mill	18-01-2018	Ongoing; expected to conclude by 22-01-2019
M/s Aman Jute Fibrous Ltd.	23-01-2018	22-11-2018
M/s Roman Jute Mills Ltd.	27-03-2018	Ongoing; expected to conclude by 26-03-2019
M/s Natore Jute Mills	02-07-2018	Ongoing; expected to conclude by 01-07-2019
M/s Aziz Fibres Limited	02-07-2018	Ongoing; expected to conclude by 01-07-2019

As can be seen above, only two new shipper reviews, arising out of an original investigation concluded using the sampling methodology, have been concluded to-date. Of these, the investigation *qua* M/s. Aman Jute Fibrous Ltd. was terminated owing to withdrawal of their application and a complete lack of exports during the period of investigation, resulting in an inability on the part of the Designated Authority to determine any individual dumping margin with respect to them.



Thus, at present, there is only one final finding issued by the Designated Authority with respect to a new shipper review in a case where the original investigation was concluded using the sampling methodology, i.e., the final findings with respect to M/s. Janata Jute Mills Ltd.

In the final findings qua M/s. Janata Jute Mills Ltd. dated 22 November, 2018, the Designated Authority established the satisfaction of the two conditions precedent in terms of Rule 22 of the Indian Anti-Dumping Rules. The Applicant, M/s. Janata Jute Mills Ltd., had not exported the products concerned to India during the period of investigation of the original investigation and were unrelated to any of the other producers and exporters that were subject to the anti-dumping duty in force. Yet, the Designated Authority did not determine an individual dumping margin for the Applicant citing that M/s. Janata Jute Mills Ltd. had transacted only once during the entire POI and therefore, the credibility of the export price presented was not sufficiently established. Accordingly, it was considered appropriate to recommend an antidumping measure as recommended for the nonsampled category of exporters in the original investigation.

Thus, Indian practice is completely unform and with no precedent on whether in case of sampling, the Authority would assign an individual dumping margin or whether it would resort to the dumping margin at the rates assigned to the non-sampled, cooperative category of exporters in the original investigation, akin to the law and practice of the EU. This question remains open to interpretation and will find more certainty as the remaining *Jute Products* new shipper reviews are determined. The Designated Authority's stance in this regard



would also impact the pending new shipper review with respect to "New/unused pneumatic radial tyres with or without tubes and/or flap of rubber (including tubeless tyres) having nominal rim dia code above 16" used in buses and lorries/trucks".

At this juncture, it is essential to take another look at the clear language and intent of Article 9.5 of the WTO AD Agreement from where Rule 22 of the Indian Anti-Dumping Rules flows. Article 9.5 of the WTO AD Agreement provides that:

If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the antidumping duties on the product. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member.

Evidently, Article 9.5 requires that an investigating authority shall carry out a review for determining individual margin of dumping for any exporters or producers in the exporting country in question upon fulfilment of two express conditions: (i) it did not export the subject merchandise to the importing member during the period of investigation, and (ii) it demonstrates that it is not related to a foreign producer or exporter already subject to anti-dumping duties. As such, Article 9.5 is mandatory in nature. The use of the word "shall" indicates that there is no



room for any discretion for the investigation authority. Thus, if the conditions under Article 9.5 of the WTO AD Agreement are satisfied, it is mandatory for the authority to not only carry out a review but also determine individual margin of dumping for such exporter.

Moreover, it is relevant to examine the provisions of Article 6.10 of the WTO AD Agreement, which lay down the provisions for sampling, in exceptional cases. It states:

"The authorities **shall, as a rule,** determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated."

The primary "rule" under Article 6.10 of the WTO AD Agreement is that an Authority shall determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. Thereafter, by way of exception, it provides that "in cases where the number of exporters, producers, importers or types of products involved is so large as to make such determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples...". By itself, Article 6.10 of the WTO AD Agreement is completely silent regarding its applicability to cases of new



shipper review. However, as a matter of simple deduction, it appears that the condition precedent for resorting to sampling (i.e., a case where the number of exporters, producers, importers or types of products involved is so large as to make the determination of individual dumping margins impracticable) would not be made out in the case of a new shipper review, where only one applicant is present before the Authority.

Interestingly, even Rule 17 of the Indian AD Rules which lays down the sampling provisions, provides in its second proviso, that the Designated Authority shall determine individual margin of dumping for even non-sampled producers who submit necessary information. Thus, when the Designated Authority is obliged to consider request for individual margin of dumping for producer or exporter in the original investigation in which methodology for sampling is adopted, there can be no rationale for denying such right to a new exporter in a new shipper review.

Thus, the Designated Authority is at a critical point in determining the future course of Indian AD investigations. With increasing participation in anti-dumping investigations, and the resultant increased reliance on the use of sampling methodologies in the past three years, the Designated Authority may find itself facing such situations more frequently. Clarity and guidance regarding the handling of such situations would emerge with the conclusion of the remaining new shipper reviews or through the issuance of a guidance note or trade notice regarding the question.

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Trade Remedy News

Trade Remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Flax Yarn of below 70 Lea Count	China	F.No.6/3/2018- DGAD	20-11-2018	Corrigendum correcting Duty Table. Name of exporter corrected.
Jute Products viz. Jute Yarn/Twine (multiple folded/cabled and single), Hessian fabric and Jute sacking bags	Bangladesh	F.No.7/10/2017 -DGAD	22-11-2018	Final Findings issued recommending assignment of individual anti-dumping duty for sacking bags produced or exported by M/s. Janata Jute Mills Ltd.
Jute Products viz. Jute Yarn/Twine (multiple folded/cabled and single), Hessian fabric and Jute sacking bags	Bangladesh	F.No.7/23/2017 -DGAD	22-11-2018	Final Findings issued terminating the New Shipper Review for assignment of individual anti-dumping duty for subject goods produced by M/s Aman Jute Fibrous Ltd. and exported by M/s IB Jute Corporation
Low Ash Metallurgical Coke	Australia and China	F. No. 7/37/2018- DGAD	12-12-2018	Anti-dumping duty Mid-term Review initiated
Metaphenylene Diamine	China	F. No. 7/2/2018- DGAD	13-12-2018	Sunset review recommends continuation of anti-dumping duty
Methylene Chloride	European Union, United States	F.No.7/15/2018 -DGAD	22-11-2018	Final Findings in sunset review issued recommending continuation of anti-dumping duty
O-Esters (Circumvention of Duties	China	55/2018-Cus. (ADD)	15-11-2018	Imposition of Anti-Dumping Duty notified





Product	Country	Notification No.	Date of Notification	Remarks
against O-Acid)				
Peroxosulphate	China and USA	F.No.7/5/2018- DGAD	14-12-2018	Sunset review recommends non- continuation of anti-dumping duty
Purified Terephthalic Acid	Korea RP and Thailand	F. No. 7/36/2018- DGTR	11-12-2018	Time for filing questionnaire response extended till 31-12-2018
PVC Suspension Grade Resin	China, Thailand, USA	F.No.7/34/2018 -DGTR	12-12-2018	Extension of time for filing of Questionnaire response up to 8-1-2019
Soda Ash	China, European Union, Kenya, Pakistan, Iran, Ukraine and USA	F.No. 7/5/2017- DGAD	14-12-2018	Sunset review recommends non- continuation of anti-dumping duty
Uncoated Copier Paper	Indonesia, Thailand, Singapore	56/2018-Cus. (ADD)	04-12-2018	Definitive anti-dumping duty imposed
Zeolite 4A	China	57/2018-Cus. (ADD)	13-12-2018	Definitive anti-dumping duty imposed

Trade Remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Ductile Cast Iron Tubes and Pipes	European Union	2018 / C 437 / 08	04-12-2018	Notice of initiation of a partial interim review of the applicable countervailing measures
Large Diameter Welded Pipe	United States of America	83 FR 56819 [C-533-882]	14-11-2018	Final Affirmative Countervailing Duty Determination



Product	Country	Notification No.	Date of Notification	Remarks
Oil Country Tubular Goods	United States of America	83 FR 59360 [A-533-857]	23-11-2018	Notice of Correction to the Amended Final Determination and Amendment of the Antidumping Duty Order



Indian safeguard duties on steel products – India appeals panel rulings

India has on 14-12-2018 filed an appeal in the case brought by Japan in "India - Certain Measures on Imports of Iron and Steel Products" (DS518). India has appealed the panel's finding that the said safeguard measure applied by India on imports of iron and steel products continue to 'lingering effects' despite its expiry. According to India, the Panel's finding with respect to the obligations incurred under the GATT 1994 and the effect of the obligations incurred under the GATT 1994 is erroneous. The document circulated on 18th of December also alleges that the Panel erred in stating that the annualization of data done by Indian authority was inconsistent with Article 4.2(a) and 4.2(b) of the Agreement on Safeguards.

Panels established to review US tariffs on steel and aluminium, and countermeasures imposed by China, Canada, EU and Mexico

On December 4, at a meeting of the WTO's Dispute Settlement Body (DSB), WTO members agreed to requests from India and Switzerland for the establishment of panels to examine tariffs

imposed by the United States on steel and aluminium imports. India and Switzerland requested the establishment of a single panel, in combination with the other seven panels already established, to review the claims against the US. Earlier, on November 21, DSB had agreed to requests from seven members (China, European Union, Canada, Mexico, Norway, Russia and Turkey) for the establishment of panels to examine the US tariffs on such imports. The DSB has also agreed to four requests from USA for establishment of panels review the to countermeasures imposed by China, Canada, EU and Mexico on US imports in response to the steel and aluminium tariffs. Similarly, a request from the United States for a panel to review increased duties imposed by the Russian Federation on certain US imports was also taken note of by the DSB.

Disputes initiated by Thailand and Argentina against Turkish duties on air conditioners and Peruvian measures on biodiesel imports, respectively

On December 10, the WTO circulated to the WTO members a request for consultation with Turkey filed by Thailand. The request pertains to the imposition of an additional duty by Turkey on



imported air conditioners from Thailand. The additional duty was imposed by Turkey from 5-9-2017 as suspension of concessions under Article 8.2 of the WTO's Safeguards Agreement in response to the safeguard measure imposed by Thailand on imports of non-alloy hot-rolled steel flat products. Thailand alleges that Turkey is not an "affected" WTO Member with a "substantial interest" in the safeguard measure and that Additional Duty exceeds what constitutes "substantially equivalent" concessions.

Meanwhile on December 5, a request filed by Argentina against Peru was circulated. This request pertains to certain anti-dumping and countervailing measures imposed by Peru against biodiesel imports from Argentina. According to Argentina, Peru's measures appear to be inconsistent with its obligations under various provisions of the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement.

US duties on Turkish pipe and tube products – Panel report issued

WTO has on 18th of December 2018 circulated the panel report in the case brought by Turkey in "United States — Countervailing Measures on Certain Pipe and Tube Products" (DS523). According to the report, United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement, because the USDOC failed to apply the correct legal standard and failed to provide a reasoned and adequate explanation for its public body determinations. United States was also found to violate provisions of Articles 2.1(c), 2.4, 12.7 and 15.3 of the SCM Agreement. Turkey's 'as such' claim with respect to Article 14(d), was however rejected.



On December 3, the WTO members received UK's draft schedule outlining its WTO commitments for services post-Brexit. If no objections are made by any of the members within a 45-day period of review, the UK's services schedule will be considered to be 'certified'. The UK will continue to trade on current EU terms while the separate EU withdrawal negotiating process between the UK and the EU is ongoing.

WTO members adopt roadmap for reducing technical barriers to trade – 6 Indian TBT measures discussed

On 14-15 November, at a meeting of the Committee on Technical Barriers to Trade (TBT), WTO members achieved agreement with respect to about 30 recommendations that aim at reducing obstacles to trade and improving implementation of the WTO's TBT Agreement. The recommendations approved by members cover transparency, testing, inspection and certification, standards, marking and labelling, and organizing debates / raising trade concerns in the TBT committee.

Members also discussed 62 specific trade concerns at the committee meeting, including six concerns directed towards India's TBT measures. Indian measures taken note of at the meeting were, new Telecommunications related Rules; Electronics and Information Technology Goods (Requirements for Compulsory Registration) Order, 2012; Stainless Steel Products (Quality Control) Order, 2015; Draft Food Safety and Standards (Alcoholic Beverages Standards) Regulations, 2015; Amended regulation on toy imports; Testing and the Certification of Telegraph (The Indian telegraph (Amendment) Rules, 2017).



Import restrictive measures by countries rise seven-fold: WTO report

WTO's Trade Policy Review Body has recently issued a report on overview of developments in the international trading environment. According to the report, though trade coverage of import-facilitating measures has risen significantly during



16 October 2017 to 15 October 2018, trade coverage of import-restrictive measures is more than seven times larger than that recorded in the previous annual overview. It also states that proliferation of trade-restrictive actions and the uncertainty created by such actions could place economic recovery in jeopardy.



India Customs & Trade Policy Update

Scrutiny of applications for antidumping and countervailing investigations

DGTR has issued a Trade Notice to state that the Authorised Officer will henceforth do prima facie scrutiny of the applications for anti-dumping and countervailing duties with respect to completeness of documents as per the checklist and only a complete application would be accepted while incomplete applications would be returned for compliance of deficiencies. A revised checklist in this regard is also attached to the Trade Notice No. 15/2018, dated 22-11-2018 issued for this purpose. This Trade Notice supersedes earlier Trade Notice No. 3/2018, dated 1-2-2018.

India once again postpones retaliatory measures against USA

India has once again postponed implementation of retaliatory Tariff measures against USA which are aimed to counter USA's certain measures on import of steel and aluminium from India. Higher basic customs duty (BCD) in respect of imports of almonds, apples fresh and other diagnostic reagents, etc. will now be effective from 31-1-2019. It may be noted that the higher duty was initially scheduled for 4-8-2018 but has been postponed number of times, last being till 17-12-2018. Notification No. 80/2018-Cus., dated

15-12-2018 has been issued for this purpose.

Re-export/return of imported SCOMET items – Procedure prescribed

DGFT has prescribed procedure for re-export/return of imported SCOMET items due to reasons of obsolescence of technology of imported items, cancellation of order by Indian buyer/end user, dead on arrival, etc. Public Notice No. 59/2015-20, dated 12-12-2018 inserts Para 2.79E in FTP Handbook of Procedures Vol. 1. While no end-use details are required, the application must accompany documents as proof of import of items, proof of obsolescence/cancellation of order. proof of obligation for re-export/return, and an elaborate undertaking from the applicant firm.

Documents for online IEC applications, clarified

DGFT has clarified that if IEC must be issued in the name of the firm, the application must be made in the name of the firm. Further, email address and phone number of the person submitting the application on behalf of the firm will be used for verification and subsequent login, and cannot be changed at any point of time. Trade Notice No. 39/2015-20, dated 12-12-2018 issued for the purpose also explains on documents acceptable as proof of address while also clarifying on bank certificate and pre-printed cancelled cheque.



AEO – Online T1 applications and timeperiod for review and audit

CBIC has launched a website for online filing of AEO T1 applications by applicants and for Customs officials to process and deliver digitized AEO certificate. Manual filing and processing of such applications will however continue till 31-3-2019. Circular No. 51/2018-Cus., dated 7-12-2018 also amends Master Circular No. 33/2016-Cus., to revise the time-period for review and OSPCA of AEO T1 certified entities. Now, both review and audit of such entities would be done once in 3 years. This will synchronise this with that of validity of the certificate.



EOUs - Customs and Central Excise notifications amended to align with FTP

Both Customs and Central Excise notifications governing provisions for EOU scheme have been amended to align them with the present FTP provisions. B-17 Bond (General Surety/Security) being submitted by EOUs has also been updated. Amendment also provide for re-import of specified goods by EOUs within 7 years of export, for repair and reconditioning. Further, as per Circular No. 50/2018-Cus., dated 6-12-2018, the new B-17 bond will be applicable to the new EOUs, and the existing EOUs shall continue with the earlier one already executed by them.



Anti-dumping - Classification of parts of imported articles

CJEU has reiterated that a general part presented separately with an imported article does not constitute that article and hence is to be classified under appropriate heading under the EU's Combined Nomenclature. The Court in this regard observed that an article which allows the child safety gate to be mounted on the wall does not constitute part of a gate and must be classified under Heading 7318 as screws, bolts & nuts. The goods were held liable to anti-dumping duty imposed on imports of iron and steel fasteners imported from China. [Skatteministeriet v. Baby Dan – Judgement dated 15-11-2018 in Case C-592/17, CJEU]

DFIA exports – Specifications of imported inputs to be declared on Shipping Bills

Delhi High Court allowed has Revenue department's appeal in a case involving DFIA exports. Department's plea that the exporter was required to make declaration of technical characteristics, quality and specification on the shipping bills if its inputs, and not the export products, are listed in Para 4.55.3 of FTP Handbook of Procedures, was upheld. Court in this regard observed that the condition in paragraph (i) of Notification No. 40/2006-Cus. must be read harmoniously with the provision of the HBP to which it expressly [Commissioner v. Kothari Foods & Fragrance -CUSAA 147/2018, decided on 26-11-2018, Delhi High Court





News Nuggets

SAWTR Annual Conference on International Trade

The Federation of Indian Chambers of Commerce and Industry ("FICCI") in collaboration with Lakshmikumaran & Sridharan organized a seminar on the theme From Calm to Chaos: Contemporary Challenges in the International Trading System. The current global trade climate and the recent developments in the world trading system made the theme of the seminar very topical.

This seminar was organised on 19th of November on the side lines of the annual conference of the **Strategic Alliance for WTO and Trade Remedies Law and Practice** (SAWTR) members in New Delhi.

Hon'ble Union Minister of Commerce and Industry Shri Suresh Prabhu was the Chief Guest, who was welcomed by Mr. Rashesh Shah, President. FICCI and Mr. R. Parthasarathy, **Principal** Partner, Lakshmikumaran & Sridharan. In his address. Minister Prabhu expressed that while the WTO must remain intact, it was capable of being reformed for the better. In taking the negotiating agenda forward, Minister Prabhu stated that while the "new issues" had to be addressed, the "old issues" could not be ignored.

The conference was attended by over a hundred participants from commerce and industry, the legal fraternity, research organizations, and consultancy firms. The conference had four sessions.

Session 1 was on "Winds of Change – from Subtle Protection to Overt Protectionism". Mr. James Nedumpara, Head and Professor, Centre for Trade and Investment Law was the moderator while Mr. R Parthasarathy, Principal Partner, Lakshmikumaran & Sridharan, Ms. Paola Arnolt,

International Trade Consultant, Mr. Alok Sahay, Director, Steel Authority of India Ltd. and Mr. Jayant Dasgupta, Former Ambassador, Permanent Mission of India to the WTO, were the speakers.

Session 2 titled "Winter Has Come, and Now What? China's Non-Market Economy Status at the WTO" was moderated by Mr. Mukesh Bhatnagar, Professor, Centre for WTO Studies, Indian Institute of Foreign Trade, while Mr. Edwin Vermulst, Partner, VVGB Advocaten, Mr. Dhruv Gupta, Partner, Lakshmikumaran & Sridharan and Mr. Gary Horlick, Law Offices of Gary N. Horlick were the speakers.

Session 3 on "Rulemaking for the 21st Century: Who, What, When, How and Where?" was moderated by Mr. V. Lakshmikumaran, Managing Partner, Lakshmikumaran & Sridharan, while Mr. Abhijit Das, Head & Professor, Centre for WTO Studies, Indian Institute of Foreign Trade, Mr. Gary Horlick, Law Offices of Gary N. Horlick and Mr. Juan Barbosa, Partner, PHR Legal, spoke on the topic.

Session 4 on "WTO Dispute Settlement – Cracks in the Crown Jewel or Deep Fissures?" was moderated by Mr. Jason Teoh, Principal, Jason Teoh & Partners, while Ms. Andrea Balassiano, Partner, Mundie Advogados, Mr. Baha'a Armouti, Managing Counsel, Armouti Advocates and Mr. Daniel Moulis, Partner Director, Moulis Legal, were the speakers for the session.

The vote of thanks and concluding remarks were delivered by Mr. V. Lakshmikumaran, who noted that cross-border trade between nations was at a crossroads and the world was facing several challenges in this regard. However, Mr. Lakshmikumaran expressed optimism that the best brains in the world would find a solution in these difficult times.



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