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Article

DGAD sets straight procedures regarding Sunset Reviews

By Ankur Sharma

In the summer of 2017, the Supreme Court delivered a judgment that dealt with sunset reviews of anti-dumping duty. The case was *Union of India v. Kumho Petrochemicals Company Ltd.* (“Kumho”). To give some background, sunset review of an anti-dumping duty is conducted at the end of five years of an existing anti-dumping duty in terms of Section 9A of the Customs Tariff Act, 1975 read with Rule 23(1B) of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping duty on Dumped Articles and for Determination of Injury) Rules, 1995 (“AD Rules”).

In a nutshell, the above provisions mandate that the Directorate General of Anti-dumping & Allied Duties (“DGAD”) shall initiate a sunset review *suo motu* or upon receiving a duly substantiated petition from the domestic industry, before expiry of the five-year duty period, to decide whether in the absence of anti-dumping duty, dumping of an article and material injury to the domestic industry manufacturing the like article are likely to continue or recur. The provisions also allow anti-dumping duty to continue for a period not exceeding one year during which the sunset review is underway. Till here, all seems perfect with the scheme of things for sunset reviews.

However, *Kumho* presented a unique problem for the Apex Court. Apparently, the Designated Authority in practice had been initiating reviews for many products on the very last day of their respective five-year anti-dumping duty levy. Thereafter, Ministry of Finance would issue an amendment to the customs notification of the original five-year duty, extending the levy

for a full one year during the sunset review phase. On many occasions, it would result in a time-gap between the last day of the five-year levy and the extension notification of the duty. In the facts of *Kumho*, this gap was more than 20 days. Among other questions, the Supreme Court had to answer whether a Customs notification levying anti-dumping duty for five years could be amended to extend the duty for a further period, when the original five-year notification had already lapsed. To illustrate this question further, consider the following scenario:

1. Anti-dumping duty on an article commences on 1 January 2009 for a five-year period.
2. This duty shall lapse on 31 December 2014 i.e. at the end of five years.
3. DGAD initiates a sunset review on 31 December 2014 to decide whether the existing duty should continue for another five years.
4. A sunset review should ideally complete in twelve months as per the AD Rules.
5. The Ministry of Finance extends the duty for complete one year to cover the sunset review phase by amending notification dated 1 January 2009, but such extension notification is issued in the Official Gazette only on 20 January 2015. However, the original anti-dumping duty has already lapsed on 31 December 2014.

The Supreme Court in *Kumho* dealt with two questions among others:

- a. First, whether extension of anti-dumping duty is automatic during the sunset review



phase when such review is initiated before expiry of the five-year levy.

- b. Second, whether the Ministry of Finance is required to issue the extension notification before expiry of the original five-year period.

The Supreme Court answered the above questions as follows:

1. If a sunset review is initiated before expiry of five-year levy, extension of anti-dumping duty during the sunset review phase is not automatic.
2. The Ministry of Finance is required to issue the extension notification before expiry of the five-year levy. The duty that has already lapsed cannot be extended by another notification at a later date. Therefore, in the above illustration, the extension notification dated 20 January 2015 is illegal.

However, this decision raised several questions that remained unanswered until recently, viz. i) is the domestic industry required to be given protection for one full year during the sunset review phase?; ii) if a sunset review which is initiated on the last date of original anti-dumping duty is not completed in one year, the review phase gets extended under the AD Rules, but the extension of anti-dumping duty shall not exceed one year under the AD Rules. In such a scenario, should the domestic industry be left unprotected for the rest of the sunset review phase?; iii) why can't sunset reviews be initiated much before the expiry of the five-year levy so that they could be completed well within time, and definitely within the extended period of anti-dumping duty?

The DGAD has tried to address these questions in the Trade Notice No. 2/2017 issued on 12 December 2017 ("Trade Notice"). Before delving into the substance of the Trade Notice, let us look at the object and purpose clauses of the Trade Notice, which are extracted below:

*"2. Vide Trade Notice No. 1/2008 dated 10th March, 2008 and Trade Notice No. 2/2011 dated 6th June, 2011, Directorate General of Anti-Dumping & Allied Duties (DGAD) had prescribed procedure and timelines for initiating a Sunset Review investigations (SSR) under the aforesaid Rules. However, it has been observed that while sometime these timelines are not adhered to by the Domestic industry or else on account of petition being deficient requiring additional data/clarification, the decision on initiation of the requested SSR is delayed. **The delay in initiation adversely impacts timely completion of SSR and thereby invariably requiring extension of existing Anti-Dumping Duties on the product under consideration for complete one year beyond five years as permitted under Rules.***

3. Keeping in view the above situations and to ensure timely examination of SSR, the Authority hereby prescribes..."

Clearly, the DGAD acknowledges here that the delay in initiation of sunset reviews results in invariably requiring extension of anti-dumping duty for complete one year during the sunset review phase. This is a bold statement from the DGAD. Implicit here is the appreciation that if sunset reviews initiate on time, it may not be required to extend the duty for a complete one year to protect the domestic industry. To implement this, the DGAD has laid down the following key procedures in the Trade Notice for initiating a sunset review:

1. The domestic industry should file the sunset review petition 270 days before the expiry of anti-dumping duty.
2. The domestic industry can also file the sunset review petition 240 days before the expiry of anti-dumping duty on payment of late fee.

3. The DGAD shall not entertain sunset review petitions filed with less than 240 days remaining for the anti-dumping duty to expire.
4. The DGAD shall examine a petition within 15 working days and highlight deficiencies in the petition to the petitioner. The petitioner shall address such deficiencies within 5 working days from the date of issue of the deficiency letter from the DGAD.
5. On receipt of the petition, the DGAD shall issue an order in almost all cases within 45 days regarding initiation of the sunset review or rejection of the petition. In unavoidable circumstances due to administrative exigencies or policy/technical scrutiny, DGAD may not follow the above timeline.
6. The DGAD may also provide a personal hearing to the petitioner at a stipulated date and time before deciding whether to initiate the sunset review.
7. Final findings shall be issued at least 45 days before expiry of the existing anti-dumping duty.

If the procedures prescribed in the Trade Notice are fully implemented, it would ensure that:

1. The petitioner gets an opportunity to justify the claims in the petition in a personal hearing. This is the first time the DGAD has formally provided for a personal hearing during pre-initiation stage.
2. A petitioner can expect a written order from the DGAD detailing reasons for rejection of the petition in a defined timeline of 45 days from receipt of the petition by the DGAD. This again is a first for the DGAD in prescribing a timeline for issuing rejection orders. This will ensure predictability and consistency in the procedure.

3. Sunset reviews would be initiated at least six months prior to expiry of existing anti-dumping duty.
4. There is no time-gap between expiry of existing anti-dumping and extension of this duty for a further period during the review phase.
5. Final findings are issued well within time and in any case, at least 45 days before expiry of the existing anti-dumping duty. This again is a first for the DGAD to prescribe a timeline for issuing final recommendations in sunset reviews.
6. The anti-dumping duty extended upon completion of a sunset review gets implemented without much delay.

The industry will welcome the above changes and additions to the sunset review procedures. It is hoped that the DGAD issues a similar Trade Notice regarding fresh anti-dumping investigations as well.

However, the DGAD has also adopted a cautious approach in restricting application of the above procedures for anti-dumping measures expiring till 31 December 2018. As per the Trade Notice, the following timelines shall apply:

S.No.	Expiry date of anti-dumping duty	Last date to file sunset review petition
1.	Till 31 March 2018	31 December 2017
2.	1 April 2018 – 30 September 2018	31 January 2018
3.	1 October 2018 – 31 December 2018	31 March 2018

The DGAD has also introduced a few bones of contention in the Trade Notice. First is the 'late fee' on sunset review petitions that are filed 240 days prior to the expiry of existing anti-dumping duty. It would be a first for the DGAD to levy late fee on receipt of sunset review petitions. At present, the procedures do not require parties to provide any fee to DGAD at any stage of an

investigation. The second peculiarity is the introduction of 'application fee' in paragraph 7 of the Trade Notice. The aforesaid application fee will be levied as notified by the Designated Authority. It is not clear whether the 'application fee' is same as 'late fee' or if it is a separate fee on sunset review petitions. The legality of such fees is also questionable. Third, courts may also question DGAD's power to refuse to entertain sunset review petitions that are filed with less than 240 days from the date of expiry of existing anti-dumping duty on an article.

While the Trade Notice is a bold move to set straight the procedures regarding sunset reviews, it leaves much room for legal challenge. New Year 2018 will tell whether the DGAD's Trade Notice succeeds in its well-intentioned endeavour to address the gaps in sunset reviews or it faces legal challenge.

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Trade Remedy News

Trade Remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Ammonium Nitrate	Russia, Indonesia, Georgia, Iran	F.No. 14/1/2016-DGAD	19-12-2017	Corrigendum issued to correct Duty Table
Caustic Soda	Saudi Arabia, USA	55/2017-Cus. (ADD)	24-11-2017	ADD extended till 25-11-2018 in the interim of SSR
Ceramic Tableware and Kitchenware, excluding knives and toilet items	China PR	F.No.14/05/2016-DGAD	8-12-2017	Final Findings issued recommending imposition of definitive anti-dumping duty
Normal Butanol or 'N-Butyl Alcohol	Saudi Arabia	F.No. 14/20/2016-DGAD	28-11-2017	Final Findings issued terminating the AD Investigation
Naphthalene	Crude Naphthalene from China PR, European Union, Russia, Iran, Japan	F.No. 14/35/2015 - DGAD	29-11-2017	Notification clarifying timeline subject to outcome of the ongoing matters before Gujarat High Court in a related pending matter

	Refined Naphthalene from China PR, European Union, Taiwan			
O-Acid	China PR	F.No. 14/31/2016-DGAD	19-12-2017	Final Findings issued recommending definitive Anti-dumping duties
Ofloxacin	China PR	F.No. 14/06/2016-DGAD	22-12-2017	Final Findings issued recommending definitive Anti-dumping duties
Phosphoric Acid-Technical Grade and Food Grade (including Industrial Grade)	China PR	F.No. 15 / 5 / 2016 – DGAD	23-11-2017	Termination of New Shipper Review after application withdrawn by M/s Guangxi Qinzhou Capital Success Chemical Co. Ltd. (Producer)
Phthalic Anhydride	Korea RP, Chinese Taipei, Israel	56/2017-Cus. (ADD)	21-12-2017	ADD extended till 23-12-2018 in the interim of SSR
Polybutadiene Rubber	Korea PR, Russia, South Africa, Singapore, Iran	F.No. 14/40/2016-DGAD	11-12-2017	Final Findings issued terminating AD Investigation after finding that causal link was not conclusively established
Sodium Nitrite	European Union	F.No. 7/12/2017-DGAD	11-12-2017	ADD - Initiation of Mid-Term Review Investigation
Toluene Di-Isocyanate	China PR, Japan, Korea RP	F.No. 14/36/2016-DGAD	13-12-2017	Final Findings issued recommending Anti-dumping duties

Trade Remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Carbazole Violet Pigment 23	USA	82 FR 57205 [A-533-838]	4-12-2017	Preliminary Results of Antidumping Duty Administrative Review; 2015-2016

Product	Country	Notification No.	Date of Notification	Remarks
Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel	USA	82 FR 58172 [C-533-874]	11-12-2017	Final Affirmative Countervailing Duty Determination
Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel	USA	82 FR 55567 [A-533-873]	22-11-2017	Preliminary Affirmative Determination of Sales at Less Than Fair Value, in Part, Postponement of Final Determination, and Extension of Provisional Measures
Polytetrafluoroethylene Resin	USA	82 FR 57727 [C-533-880]	7-12-2017	Postponement of Preliminary Determination in the Countervailing Duty Investigation
Stainless Steel Bar	USA	82 FR 51601 [A-533-810]	7-11-2017	Preliminary Determination of No Shipments and Partial Rescission of the Anti-dumping Duty Administrative Review; 2016-2017



WTO News

Highlights of 11th Ministerial Conference held in Buenos Aires

The 11th Ministerial Conference (“MC’11”) was flagged off on 10 December, 2017 at Buenos Aires, Argentina. MC’11 has been held at a time when the Trade Facilitation Agreement has entered into force mandating (for the first time ever) a revision of the WTO Rule Book, the WTO Members have eliminated agricultural export subsidies, adopted measures to support LDCs (especially with respect to cotton trade) and expanded the Information Technology Agreement to eliminate substantial tariffs on trade.

MC’11 opened with declaration by four Latin American presidents of the countries of Argentina, Brazil, Paraguay and Uruguay,

pledging support for the WTO and its guardianship of the multilateral trading system. The pledge was also supported by representatives of Colombia, Guyana, Mexico, Peru and Suriname, who also signed the declaration at the conference’s opening ceremony. This was followed up by a larger, 44 Member Joint Statement reaffirming the centrality of multilateral negotiations and their support for the WTO.

On December 11, 2017, The World Trade Organization and the International Trade Centre (ITC) launched an on-line platform for market intelligence for cotton products, which will enable cotton producers, traders and policymakers to better harness market opportunities in the sector. In furtherance of cotton-related outcomes of the

Bali Ministerial in 2013 and the Nairobi Ministerial in 2015, the Cotton Portal provides a single online entry point for all the cotton-specific information available in WTO and ITC databases, including information on market access, trade statistics, country-specific contacts, as well as links to other relevant documents and webpages. On the same day, the ITC, the United Nations Conference on Trade and Development (UNCTAD) and the WTO unveiled a new online hub – HelpMeTrade.org – the Global Trade Helpdesk providing trade data and practical information on target markets.

The MC11 saw, for the first time ever, a “re-launch” of the WTO Rule Book to include rules pertaining to the Trade Facilitation Agreement as well as certain amendments to the Agreement on Trade Related Aspects of Intellectual Property (TRIPS). The new text also includes the revised text for Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement.

For the first time in the history of the World Trade Organization, WTO members and observers have endorsed a collective initiative to increase the participation of women in trade. In order to help women reach their full potential in the world economy, 118 WTO members and observers agreed to support the Buenos Aires Declaration on Women and Trade, which seeks to remove barriers to, and foster, women’s economic empowerment.

MC11 was wrapped up on 13 December with a commitment from members to secure a deal on fisheries subsidies which delivers on Sustainable Development Goal by the end of 2019. Additionally, three more decisions were taken by three proponent groups. These are:

- A Seventy-one Member proponent group (accounting for 77% of global trade) took the initiative to explore future WTO negotiations on trade-related aspects of electronic commerce.

- On investment facilitation, 70 WTO members (accounting for 73% trade and 66% inward FDI), recognizing the links between investment, trade and development, announced plans to pursue structured discussions with the aim of developing a multilateral framework on investment facilitation.
- On MSMEs, 87 WTO members (accounting for around 78% of world exports) issued a joint statement declaring their intention to create, multilaterally, an Informal Working Group on MSMEs at the WTO that would be open to all members.

Panel rejects Indonesia’s claims against USA’s AD & CVD measures on certain Coated Paper from Indonesia

WTO panel has on 6-12-2017 circulated its report in the dispute brought by Indonesia in “*United States — Anti-Dumping and Countervailing Measures on certain Coated Paper From Indonesia*” (DS491). Indonesia had challenged the procedural aspects of the CVD investigation conducted by the USDOC based on issues pertaining to benchmark pricing, use of facts available, specificity, non-attribution and threat of injury. All the claims were however rejected by the Panel. Indonesia also challenged a provision of US law that deems a tie vote of the USITC Commissioners in injury determinations to be an affirmative determination (“tie vote” provision) on the grounds that it violated provisions pertaining to “special care” in terms of Article 3.8 of the AD Agreement and 15.8 of the SCM Agreement. The Panel however found that requirements under Articles 3.8 and 15.8 are substantive requirements for a determination of threat of injury and that the subject agreements do not discipline Members’ voting procedures or the manner in which decisions to apply duties are made in anti-dumping or countervailing duty investigations.

USA's revised "dolphin-safe" tuna labelling measure - Mexico appeals compliance panel rulings

Mexico has on 1-12-2017 filed a notice of appeal in the cases brought by the United States and Mexico in "*United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States*" and "*United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico*" (DS381). The panel had circulated its reports on 26 October 2017. According to Mexico, the Panels erred in their findings while assessing as to whether the relevant regulatory distinctions in the labelling conditions of the 2016 Tuna Measure are consistent with Article 2.1 of the TBT Agreement.

Canada initiates dispute against US softwood lumber duties

On 30 November, 2017, Canada requested for WTO consultations with the United States

regarding Countervailing duties imposed by USA on imports of softwood lumber from Canada. According to Canada, the US measures violate Articles 1.1(a)(1)(iii) and (iv), 1.1(b), 10, 14(d), 11.2, 11.3, 19.3, 19.4, 21.1, 21.2, 32.1, and 32.5 of the SCM Agreement.

Panel established to review UAE measures on goods, services, IP rights

On 22 November, 2017, the WTO's Dispute Settlement Body (DSB) established a panel to examine measures imposed by the United Arab Emirates (UAE) on Qatar affecting trade in goods and services and the protection of intellectual property (IP) rights. According to Qatar, the measures adopted by UAE and some other members are discriminatory, prevented freedom of transit and frustrated the majority of trade between Qatar and those members. However, Bahrain, Saudi Arabia, Yemen and Egypt supported UAE's statement, that members had the sole right to determine whether measures were necessary to protect their essential security interests.



Statutory Update

FTP 2015-20 mid-term review unveiled: Indian Ministry of Commerce has, after a mid-term review, unveiled the revised Foreign Trade Policy and the Procedures, on 5th of December, 2017. While incentives under Merchandise Export from India Scheme (MEIS) had already been revised upwards for two sectors – readymade garments and made-ups from 2% to 4%, benefits under said scheme has also been revised for number of other items, broadly increasing the incentive by 2% points. Similarly, incentives under Services Export from India Scheme (SEIS) have also been increased by 2% points for certain notified services. A new trust based self-ratification

scheme for duty free import of raw material for export production has also been introduced wherein Authorised Economic Operators (AEOs) would be allowed to self-certify requirement of inputs and take an authorisation, instead of getting ratification of the Norms Committee. The scheme, according to Ministry of Commerce of India, will expedite export of new products, particularly in pharma, chemicals, textiles and engineering sectors, which have dynamic input requirement.

EPCG Scheme – Revisions: Capital goods installed at one unit have been permitted to be shifted to another unit as appearing in the IEC

and RCMC of the EPCG holder, subject to production of fresh installation certificate. Further, clubbing of authorisations have been allowed in cases where EO period has expired, provided these have been issued under the same policy period.

EOU Scheme – Revisions: Value limit of 50% of FOB value of exports, on DTA sale of goods by an EOU has been removed. Consequently, restrictions on DTA sale of motor cars, alcoholic liquors, books and tea, at concessional rate of duty, have been removed. However, DTA sale of pepper & pepper products and marble is not permissible. Notification No. 41/2015-20 and Public Notice Nos. 43 to 46/2015-20, all dated 5-12-2017 have been issued in this regard.

Basic Customs duties enhanced on many electrical/electronic goods: India has enhanced Basic Customs Duty (BCD) on number of electrical or electronic products, including on microwave ovens, telephones for cellular/wireless networks, CCTV or IP cameras, colour TVs, LED lamps and smart meters for electricity. BCD has also been enhanced on LCD, LED or OLED panels for TVs. Notification Nos. 91 and 92/2017-Cus., both dated 14-12-2017 have been issued by the Indian Ministry of Finance amending the First Schedule to the Indian Customs Tariff Act and the jumbo Notification No. 50/2017-Cus., providing for effective rate of Customs duties.



Ratio Decidendi

Anti-dumping duty – Risk of circumvention in case of related parties

The Court of Justice of the European Union has held that though the risk of circumvention of anti-dumping measures is higher in the case of related exporters on which different anti-dumping duties might be imposed, the authorities are nevertheless required to demonstrate that, in the light of the particular circumstances of the investigation concerned, that there is a genuine risk of circumvention of the AD measures.

Observation of the General Court below that any other interpretation would leave the grant of an individual anti-dumping duty to the sole discretion of the EU institutions, was hence upheld by the Court of Justice. The General Court had also held that the EU Council was not entitled to rely on the risk of circumvention to justify refusal to impose an individual anti-dumping duty on the Chinese producer. [*European Bicycle Manufacturers Association v. Giant (China) Co. Ltd.* – Judgement dated 14-12-2017 in Case C-61/16 P, CJEU]

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