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Article

Applicable time limit in Anti-dumping review proceedings

By **Bhargav Mansatta**

Three types of reviews are contemplated under the WTO Anti-dumping Agreement & Indian Anti-dumping Rules, 1995 namely (i) Mid-term review under Rule 23(1A) (ii) Sunset review under Rule 23(1B) and (iii) New Shipper review under Rule 22.

Relevant legal provisions under Anti-dumping Rules, 1995

Rule 23(2) of the Anti-dumping Rules provide that any review initiated under sub-rule (1) shall be concluded within a period not exceeding 12 months from the date of initiation of review.

Rule 23(3) of the Anti-dumping Rules further provide that provisions of rules 6, 7, 8, 9, 10, 11, 16, 17, 18, 19 and 20 shall be *mutatis mutandis* applicable in the case of review.

Rule 17(1) of the Anti-dumping Rules provide that the Designated Authority shall, within one year from the date of initiation of investigation, determine as to whether or not the article under investigation is being dumped in India and submit to the Central Government its final finding. Rule 17, first proviso further provides that Central Government may, [in its discretion in special circumstances] extend further the aforesaid period of one year by six months.

Rule 22 of the Anti-dumping Rules provide for new shipper review. However, Rule 22 does not specify any time period and does not refer to Rule 17 of the Anti-dumping Rules.

In this background, question arises regarding the applicability of Rule 17 of the Anti-dumping Rules in review proceedings.

Time period in sunset review and mid-term review proceedings

Extension of time period beyond 12 months period in sunset review proceeding was challenged before the Hon'ble Delhi High Court in *Fairdeal Polychem LLP and Ors. v. Union of India and Ors.* Petitioner contended that the use of the word 'shall' and 'not exceeding' in Rule 23(2) clearly implies mandatory character of the provision. Petitioner also argued that the rule of *mutatis mutandis* is one of adaptation and not adoption and therefore Rule 17 cannot be borrowed, and therefore extension of six months time period contemplated under Rule 17 is not available for sunset review proceedings.

The Court rejected the plea of the petitioners and observed that Central Government has the power to grant an extension of 6 months for concluding a review.¹ The High Court observed that proviso to Rule 17(1) can be pressed into service for extending the time of 12 months for concluding a review under Rule 23(2)². Delhi High Court observed that phrase *mutatis mutandis* implies that a provision contained in other part of the statute would have application as it is with certain changes in points in detail. Thus, Rule 17 of the said rules would apply to a case of review under Rule 23 "as it is with certain changes in points of detail".³

High Court also relied on Article 11.4 of the Anti-dumping Agreement which provides that the

¹ *Fairdeal Polychem LLP & Ors. Vs. Union of India*, 2016 (334) ELT 241 (Del.), para. 28

² *Ibid*

³ *Ibid.*, para. 23

review contemplated under Article 11 shall be carried out expeditiously and shall normally be concluded within 12 months. It observed that word “normally” implies that period of 12 months is not an inflexible period. Special leave petition is preferred against the decision of the High Court but the same is still pending before the Hon’ble Supreme Court.

Thus, unless the Supreme Court intervenes, it is now clear that maximum time period available for conducting mid-term review is 18 months.

Time period in new shipper review proceedings

Unlike Rule 23, Rule 22 of Anti-dumping Rules, which provides for the new shipper review does not prescribe any time period. In *Saint Gobain India Private Ltd. v. Union of India & Ors.*⁴, Petitioner challenged the continuation of new shipper review beyond 18 months time period. Petitioner contented that Rule 23 speaks of review and Rule 23(2) states that Rule 17 applies in case of review. Thus, as per Rule 17, final findings are to be rendered within one year from the date of initiation or if the time limit is extended than it has to be completed within 18 months but cannot be extended beyond 18 months.

Hon’ble High Court of Madras rejected the contention of the petitioner. It observed that Rule 22 and Rule 23 operate in different spheres and well-defined compartments and the plea that subject Rule 23(3) read with Rule 17 should be superimposed in Rule 22 to fix a time limit amounts to re-writing the Rule, which is impermissible.⁵

High Court also observed that the initiation notification in the instant case was issued on 23

September 2015. Period of review was fixed from 1st July 2015 to 31st March 2016. Therefore, all steps that are required to be taken, pursuant to the initiation can take place only after 1st April 2016. Therefore, according to the Hon’ble High Court, plea that Rule 23(3) be superimposed into Rule 22 and that period of limitation will commence from 23 September 2015 and end on 22 September 2016 is required to be rejected.⁶

Writ appeal filed before the division bench of the Hon’ble Madras High Court against the aforesaid decision is currently pending. Thus, unless the division bench of the High Court intervenes, it is clear that there is no time limit for completing new shipper review under the Anti-dumping Rules.

Conclusion

Thus, for the purpose of conducting mid-term review and sunset review proceedings, Rule 17 can be borrowed for extending the time limit by six months period owing to the specific provision under Rule 23(3). However, Rule 17 cannot be borrowed to restrict the time period available for new shipper review to 18 months.

As already noted, special leave petition before the Supreme Court against the decision of the Delhi High Court and the Writ Appeal before the division bench of Madras High Court are currently pending. Unless, these decisions are reversed in appeal, it is clear that sunset review and mid-term review proceedings can be completed within 18 months time period if central government grants extension of six months and that the maximum time period of 18 months is not applicable for new shipper review.

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⁴ *Saint Gobain India Private Limited Vs. Union of India*, 2017 Indlaw MAD 2812

⁵ *Ibid.*, para. 24

⁶ *Ibid.*, para. 25



Trade Remedy News

Trade Remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Ceramic Tableware and Kitchenware, excluding knives and toilet items	China	4/2018-Cus. (ADD)	21-02-2018	Definitive anti-dumping duty imposed
Coated Paper	China, EU, USA	F. No. 6/42/2017-DGAD	23-01-2018	Initiation of anti-dumping investigation
Di Methyl Formamide (DMF)	China, Saudi Arabia, Germany	F. No. 6/37/2017-DGAD	22-01-2018	Initiation of anti-dumping investigation
Flat Base Steel Wheels	China	F.No. 7/1/2018–DGAD [Case No. SSR 01/2018]	08-02-2018	Initiation of Sunset review investigation
Flax Yarn	China	F. No. 6/3/2018-DGAD	07-02-2018	Initiation of anti-dumping investigation
Fluoroelastomers (FKM)	China	F. No. 6/25/2017-DGAD	29-01-2018	Extension of time for the submission of questionnaire response till February 28, 2018
Glass Fibre from China PR	Thailand	F. No. 7/25/2017-DGAD	12-02-2018	Initiation of Anti-Circumvention Investigation
Melamine	EU, Iran, Indonesia, Japan	F. No. 7/14/2017-DGAD	19-02-2018	Final findings in Sunset Review issued recommending termination of investigation
Meta-Phenylene Diamene-4-Sulphonic Acid (MPDSA)	China	F. No. 6/35/2017-DGAD	24-01-2018/ 22-2-2018	Initiation of anti-dumping investigation. Time for filing questionnaire response extended till 19-3-2018.
Methyl Ethyl Ketone	China, Japan, South Africa and Taiwan	F. No. 14/26/2016-DGAD	01-02-2018	Final Findings issued recommending imposition of definitive ADD
Monoisopropylamine	China	F. No. 14/46/2016-DGAD	12-02-2018	Final Findings issued recommending imposition of definitive ADD

Product	Country	Notification No.	Date of Notification	Remarks
Polyester Staple Fibre	China, Indonesia, Malaysia, Thailand	F. No. 14/49/2016-DGAD	25-01-2018	Final Findings issued recommending termination of investigation
Solar Cells (Safeguards investigation)	All countries	F. No. 22011/68/2017	13-02-2018	The Preliminary Findings issued on 05-01-2018 challenged before the Madras High court.
Textured Tempered Glass	Malaysia	F. No. 6/45/2017-DGAD	05-02-2018	Initiation of anti-dumping investigation
Toluene Di-Isocyanate-(TDI)	China, Japan, Korea RP	3/2018-Cus. (ADD)	23-01-2018	Definitive anti-dumping duty imposed
Veneered Engineered Wooden Flooring	China, Malaysia, Indonesia and EU	F. No. 14/34/2016-DGAD	13-02-2018	Final Findings issued recommending imposition of definitive ADD. Imports from Malaysia were found not dumped.
Zeolite 4A	China	F. No. 6/14/2017-DGAD	08-02-2018	Extension of time for the submission of the questionnaire response till February 26, 2018

Trade Remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Cast iron articles	EU	Commission Implementing Regulation (EU) 2018/140	29-01-2018	Anti-dumping investigation terminated
Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel	USA	C-533-874 [83 FR 4637]	01-02-2018	Countervailing duty Orders issued
Large Diameter Welded Pipe	USA	C-533-882 [83 FR 7148]	20-02-2018	Countervailing duty investigation initiated
Large Diameter Welded Pipe	USA	A-533-881 [83 FR 7154]	20-02-2018	Initiation of Less-Than-Fair-Value Investigations
Welded Carbon Steel Pipes and Tubes	USA	A-533-502 [83 FR 5402]	07-02-2018	Anti-dumping duty Orders continued after sunset review

WTO News

India requests compliance panel in solar dispute

India has on 23-1-2018 requested establishment of a panel to determine its compliance with the Panel and Appellate Body findings in the dispute “*India - Certain Measures Relating to Solar Cells and Solar Modules*” (DS456). The request was considered by the WTO Members on 9th of February. According to India, request for a compliance panel has been necessitated as USA has sought suspension of concessions or other obligations. However, according to USA, India’s request for establishment of a Panel indicates that India will continue to apply [inconsistent] domestic content requirement contained in Power Purchase Agreements that India entered into before December 2016.

EU and Russia seek consultations over compliance in pig products dispute

European Union has on 7th of February 2018, requested consultations with the Russian Federation under Article 21.5 of the Dispute Settlement Understanding. The dispute (DS475) pertains to certain measures by the Russian Federation against imports of pig products from the EU. According to EU the measures still maintain import restrictions that were earlier found to be inconsistent with the WTO provisions by the DSB Panel and the Appellate Body. It may be noted that Russia has also on 25th of January requested for consultations with the EU in accordance with Article 21.5, and according to document WT/DS475/19, dated 30-1-2018

circulating the Russian communication, all measures found inconsistent have already been removed.

UAE disputes Pakistan’s anti-dumping measures on BOPP

United Arab Emirates has on 24th of January, 2018 requested consultations with Pakistan on measures relating to latter’s Anti-dumping measures on imports of Biaxially Oriented Polypropylene (“BOPP”) film from UAE (DS538). UAE contends that the measures are inconsistent with Pakistan’s obligations under various provisions of AD Agreement and the GATT. According to UAE, there was insufficient accurate and adequate evidence to justify initiation of anti-dumping investigation, and that the determination of dumping and resulting injury was not based on relevant and “positive” evidence.

Korea disputes US Anti-dumping and Countervailing measures

Korea has on 14th of February sought consultations with United States of America over latter’s certain anti-dumping and countervailing duty measures imposed on products from Korea. According to document WT/DS539/1, dated 20-2-2018, circulating the Korean request, certain US provisions regarding the use of facts available, and the United States’ practice of using adverse facts available as a rule or norm of general and prospective application in Anti-dumping and Countervailing duty investigations and reviews, are inconsistent with the GATT 1994, the Anti-Dumping Agreement, the SCM Agreement, and the Marrakesh Agreement.



India Update

Certificate of Origin for specified imports from Japan – Time limit revised

Certificate of Origin in respect of specified imports from Japan under Comprehensive Economic Partnership Agreement can be issued retroactively within 12 months from the date of shipment. Clause 3(b) in Appendix-A to Annexure-2 in Customs Tariff (DOGCEPA between India and Japan) Rules, 2011 is being amended for the purpose from 1st of March 2018 by Notification No. 14/2018- Customs (N.T.) dated 19-2-2018. It may be noted that at present the time limit for issuance of such certificate, in exceptional cases, is 9 months.

Basic Customs Duty reduced on motor cycles

Basic Customs Duty has been reduced on Motor cycles (including mopeds) and cycles fitted with auxiliary motor, and side cars, not registered anywhere prior to importation. According to Notification No. 26/2018-Cus., dated 12-2-2018, BCD is 25% on CKD kits where engine or gearbox or transmission mechanism is in pre-assembled form, but are not mounted on a body assembly. CKD kit when engine, gearbox and transmission mechanism are not in pre-assembled condition, would continue to attract BCD @15%. Further, imports other than in CKD condition are liable to BCD at the rate of 50%.

MEIS claims – Matching of SB description mostly not required

DGFT has directed its regional authorities to process applications for MEIS claims, other than in few specified cases, only on the basis of ITC

(HS) Code as specified in the Shipping Bill. The authorities however would continue to process claim applications in respect of some specified 154 ITC (HS) codes, after also matching the description in the Shipping Bill with Export Product Description in Table 2 of Appendix 3B of the FTP Handbook of Procedures. According to DGFT Public Notice No. 65, dated 16-2-2018 issued for the purpose, this will improve ease of doing business and cut down delays.

Import of edible/food products – Import conditions revised

Import of all edible/food products will now be allowed only if the product, at time of import, is having a valid shelf life of not less than 60% or 3 months before expiry, whichever is less. This condition will apply to the import products in addition to the provisions of Food Safety & Standards (Import) Regulation, 2017. According to DGFT Notification No. 49/2015-20, dated 5-2-2018, amending Para 4(A) of the General Notes in Schedule-I to ITC (HS) 2017, this condition is not applicable to re-import for export purposes under Para 2.46 of the current Foreign Trade Policy.

Finance Bill introduces Social Welfare Surcharge of 10% on imports

India's Finance Bill, 2018 has proposed a Social Welfare Surcharge as Customs duty on goods specified in the First Schedule to the Customs Tariff Act. The new levy which replaces Education Cess and Secondary and Higher Education Cess, will be levied on imports at the rate of 10% on aggregate of Customs duties. While certain goods are exempted, surcharge at

the rate of 3% will be levied on petrol, HSD and certain silver and gold. It may be noted that while Clause 108 of the Finance Bill proposing the surcharge has come into effect immediately, exemption, till the Bill receives the Presidential assent, has been provided from Education Cesses by Notification Nos. 7 and 8/2018-Cus., both dated 2-2-2018.

Customs Act – Scope to be expanded

The scope of Customs Act, 1962 is sought to be expanded to make it applicable to a person who commits any offence or makes any contravention thereunder outside India. Section 1 of the Customs Act is proposed to be amended in this regard by Clause 55 of the Finance Bill 2018. Further, according to Notes on Clauses of the Finance Bill, Section 17 of the Customs Act is proposed to be amended to broaden the scope of verification by the proper officer. Similarly, the

scope of re-assessment is also proposed to be broadened beyond valuation, classification and exemption or concession of duty.

TED Refund – Amendment in 2013 not retrospective

Delhi High Court has rejected plea that amendment in FTP on 18-4-2013, restricting TED refund only to cases where exemption is not available, is retrospective. The dispute in *Deepak Enterprises v. UOI* involved supplies to EOU, prior to the amendment. The Court noted that tenor of 2013 notification not showed that it was clarificatory, there was no ambiguity in earlier FTP Paragraph 8.3(c), amendment was substantive, and Central Government cannot change FTP retrospectively. Minutes of Policy Interpretation Committee dated 4-12-2012 and Policy Circular dated 15-3-2013 were also set aside by the Court.



Ratio Decidendi

Anti-dumping duty – Components of product whether separate like product

Answering the question as to whether Hydrofluorocarbon (HFC) Blends and HFC Components are a single domestic like product or two separate like products, US Court of International Trade has remanded the final determination (of affirmative material injury) of the US International Trade Commission (ITC) in respect of anti-dumping duty on HFC blends and components from China. The matter was remanded for reconsideration of the “dedicated for use” and “value added” prongs of the Commission’s semi-finished products analysis. According to the Court, ITC incorrectly relied upon a percent figure as the approximate percentage of HFC Components used in out-of-scope blends, and that this figure weighed

significantly in the ITC’s finding that HFC Components are not dedicated for use in the production of HFC Blends.

The ITC in its analysis considered as to whether the component is dedicated to the production of the downstream article or had independent uses; whether there are separate markets for the products; differences in physical characteristics and functions of upstream and downstream articles; differences in costs or value of articles; and extent of the processes used to transform components into the downstream articles. Observing that HFC Blends and Components are separate like products, ITC had held that imports of HFC Blends and not that of HFC Components, from China, were causing material injury to the US industry. [*Arkema, Inc. v. United States* - Slip Op. 18-12, dated 16-2-2018, US CIT]



News Nuggets

WCO releases classification decisions taken in 60th session of HS Committee

World Customs Organisation (WCO) has on 1-2-2018 released a list containing some 40 classification decisions taken by the Harmonized System Committee in its 60th Session-October 2017. Accordingly, frozen composite meal, put up in a cardboard box is

classifiable under sub-heading 1904.90 and not Heading 1602. Cleansing/moisturizing product to wash face and neck, moisturize the skin and then to be rinsed off with water is covered under Heading 3401 and not 3304. Specified smartphone covers of plastic, having magnet, are covered under Heading 4202 and not 3926.

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