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Article

Analysis of "Material Retardation": A WTO jurisprudential perspective on DGTR's recent findings

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The Directorate General of Trade Remedies (DGTR) in India has had scant opportunity to address situations of injury in the form of "material retardation to the establishment of an industry". In fact, since 1995, there have been less than twenty investigations into such situations, and of these, a majority were conducted and concluded during 2017 and 2018. We examine some findings of the DGTR in view of recent jurisprudential guidance provided by the WTO Panel in *Morocco-Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey* (DS 513) in a Panel Report issued on 31 October, 2018. Specifically, the Final Findings with respect to the following investigations are examined:

- Final Findings dated 13 February 2018 with respect to Veneered Engineered Wooden Flooring from China PR, Malaysia, Indonesia and European Union;
- Final Findings dated 2 September 2017 with respect to Non-Woven Fabrics from Malaysia, Indonesia, Thailand, Saudi Arabia and China PR;
- Final Findings dated 12 July 2017 with respect to Styrene Butadiene Rubber of 1500 Series and 1700 Series from European Union, Korea and Thailand; and
- Final Findings dated 23 May 2017 with respect to O-Acid from China PR.

The Panel in *Morocco-AD measures on Steel from Turkey* (DS 513) examines the situation wherein an Investigating Authority while assessing injury in the form of material retardation to the establishment of an industry, determines or relies on a determination that a particular producer is "unestablished". The Panel holds that in relying on such a determination, in terms of Article 3.1 of the WTO Anti-Dumping Agreement, an investigating authority must base its assessment on positive evidence. It went on to note that while no specific methodology for such assessment is recorded, the same must be based on "substantiated" facts or inferences. In this regard, the Panel's observations, as reproduced below, are relevant:[1]

"Similar to the Appellate Body's views, our view is that Article 3.1 does not prescribe a particular methodology that an investigating authority must follow in assessing whether a domestic industry is established.[229] While an investigating authority enjoys a certain degree of discretion in adopting a methodology to guide its analysis, it may, within the bounds of that discretion, have to rely on reasonable assumptions or draw inferences. The exercise of this discretion must nonetheless comply with the requirements of Article 3.1. Accordingly, when an investigating authority's determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified. An investigating authority that uses a methodology premised on unsubstantiated assumptions does not conduct

[1] *Morocco-Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey (DS 513),* Para 7.155

an examination based on positive evidence. An assumption is not properly substantiated when the investigating authority does not explain why it would be appropriate to use it in the analysis.[230]

Original Footnote 229: Appellate Body Report, Russia – Commercial Vehicles, para. 5.52.

Original Footnote 230: Appellate Body Report, Russia – Commercial Vehicles, para. 5.52 (referring to Appellate Body Report, Mexico – Anti-Dumping Measures on Rice, paras. 204-205

In light of this, an examination of the DGTR's Final Findings in investigations involving claims of material retardation to the domestic industry displays a woeful lack of analysis with respect to the status of the Domestic Industry as "established" or "unestablished". At the same time, the assessment of the injury parameters rely on a repeated and absolute reliance on the fact of "unestablishment"- often depicted in the form of an unachieved- but expected- import substitution or increased capacity utilization, etc.

This is particularly notable in the investigation pertaining to *Veneered Engineered Wooden Flooring* where the Authority's injury examination opens with "*The Authority has taken note of the submissions made by the interested parties and the Authority has examined the injury- both material injury and material retardation to the establishment of the domestic industry in accordance with the Anti-dumping Rules and considering the submissions made by the interested parties*." This is neither preceded nor followed by any determination regarding the status of the domestic industry under consideration. In response to claims regarding the nascency of the domestic industry, the Authority sets up a vague standard for determining the same, without any meaningful assessment or evidence to establish even such a vague standard. The Authority notes, at paragraph 78 therein, "*As regards the contention that the petitioner's business is not in nascent stage, the Authority notes that the domestic industry commenced its production of the subject goods in August, 2014 only and despite reporting capacity on one shift basis (as against three shift basis working for which capacities have been installed), the capacity utilization of the domestic industry is quite low. The domestic industry is not able to operationalize its production on three shift basis and utilising production capacities to the extent the petitioner had envisaged while setting up the plant based on its projection.*" As such, the standard for nascency which can be devolved from a reading of this paragraph is:

- How long the domestic industry had been producing the domestic like product?
- Is the domestic industry able to achieve capacity utilization as projected?

However, even on this perfunctory and basic standard, the Authority did not discuss nor disclose any evidence with respect to the reliability or underlying facts as contained in the projections put forward by the Petitioner. This very issue, the confidentiality of certain projected "threshold", was discussed by the Panel in its Report on *Morocco-AD Measures on Steel from Turkey*. Owing to limitations of the challenge raised by Turkey, the Panel limited the finding to the nature of evidence considered by the Moroccan Authority in its assessment of the status of the domestic industry in consonance with Article 3.1 of the WTO Anti-Dumping Agreement. The Panel noted:[2]

"In the underlying investigation, the MDCCE's finding that the domestic industry was unestablished, and that the establishment of the domestic industry was materially retarded, formed part of the MDCCE's inquiry into the

[2] *Morocco-Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey (DS 513),* Para 7.148

impact of dumped imports on domestic producers. In particular, the MDCCE proceeded to examine whether the domestic industry had suffered injury in the form of material retardation of its establishment, rather than material injury, only upon finding that the domestic industry was unestablished.[original footnote omitted] *Given that the MDCCE, in examining the impact of dumped imports on domestic producers, relied on its finding that the domestic industry was unestablished, we consider that Article 3.1 required the MDCCE to base that finding on positive evidence and objective examination.* [original footnote omitted] *In the event that the record of the underlying investigation shows that the MDCCE did not base that finding on positive evidence and objective examination, we will then conclude that the MDCCE acted inconsistently with Article 3.1.*

Coming back to the facts and analysis of the DGTR in *Veneered Engineered Wooden Flooring,* we note that the Authority simply did not assess the status of the domestic industry at all, but rather, proceeded to injury assessment on the basis of *both*, "material injury" and "material retardation to the establishment of the industry". The Authority did not consider or present any "evidence", much less positive evidence, that the projected capacity utilization claimed by the domestic industry was reliable or the context pertaining to the same. In some sense, the temporal condition regarding how long the said producer had been producing the subject goods was considered. However, even then the Authority did not consider what the "start-up" period for producers in the subject industry was and whether the subject domestic industry was within that period or not.

It is noted that the Indian Anti-Dumping Rules, at paras. (i) and (vii) of Annexure II provide the principles for determination of injury and threat of material injury, respectively. However, no such principles exist for the determination of material retardation. Therefore, it is critical for the Authority to disclose the standard and mechanism it would rely on to examine material retardation in every case. Material Retardation is a unique standard in which neither actual injury nor threat of material injury is considered but the injury to the establishment of the domestic industry needs to be determined by the Authority.

Interestingly, while the Indian Authority does not enter into an assessment of whether or not the domestic industry is "established" or not, the assumed determination in this regard colours the entire injury assessment of the Authority. Similar trends can be noted in the other named Final Findings as well. In the Final Findings pertaining to *Styrene Butadiene Rubber of 1500 Series and 1700 Series*, the Authority split the domestic industry based on constituents, treating one part of the industry as established and examining "material injury" with respect thereto and the other part of the industry as unestablished and examining "material retardation to the establishment of the industry" with respect thereto.

Finally, while the Panel's Findings in *Morocco-Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey (DS 513)* clear the murky waters, requiring investigating authorities to first examine the status of the domestic industry, the Panel Report itself has been appealed by Morocco. On 15 January 2019, the Appellate Body (AB) expressed its inability to issue the AB Report by 19 January 2019 and stated that the expected date of issue for the same will be notified to participants at a later date.[3]

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[3] *Morocco-Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey (DS 513)- Communication from the Appellate Body dated 15 January 2019 and circulated on 20 February 2019, WT/DS513/6*

Trade Remedy News

Trade Remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Ethylene Vinyl Acetate (EVA) Sheet for Solar Module	China, Malaysia, Saudi Arabia, South Korea and Thailand	F.No.6/9/2018-DGAD	21-2-2019	Anti-dumping duty recommended on imports from China, Malaysia, Saudi Arabia and Thailand. Investigation against South Korea terminated due to below de-minimus level imports
Fluoroelastomers	China	F.No. 6/21/2018-DGTR	5-2-2019	Termination of CVD investigation pursuant to request by the Applicant
Fluoroelastomers	China	6/2019-Cus. (ADD)	28-1-2019	Definitive ADD imposed for 18 months
Metaphenylene Diamine	China	5/2019-Cus. (ADD)	24-1-2019	Definitive ADD continued after sunset review
Non-Plasticized Industrial Grade Nitrocellulose Damped in Isopropyl Alcohol having Nitrogen content in the range of 10.7% to 12.2%	Brazil, Indonesia and Thailand	7/2019-Cus. (ADD)	7-2-2019	Definitive ADD imposed
Paracetamol	China	F. No. 7/16/2018-DGAD	29-01-2019	ADD Sunset Review – Non-recommendation of continuance of anti-dumping duty
Peroxosulphates (Persulphates)	China and Japan	11 /2019-Cus. (ADD)	12-2-2019	Notification No. 11/2013-Cus. (ADD), rescinded

Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Corrosion-resistant flat-rolled steel sheet products of carbon steel	Canada	Inquiry No. NQ-2018-004	Findings issued on 21-2-2019	Determination that imports are threatening to cause injury to the domestic industry
Corrosion-Resistant Steel Products	USA	84 FR 1061 [A-533-863]	1-2-2019	Preliminary determination of weighted average dumping margin for specific entity
Hot rolled carbon steel flat products	USA	84 FR 1705 [A-533-820 and C-533-821]	5-2-2019	ADD and CVD – Sunset review initiated
Polyester Textured Yarn	USA	84 FR 1062 [C-570-098]	1-2-2019	Preliminary determination in CVD investigation postponed
Steel products	EU	Commission Implementing Regulation (EU) 2019/159	31-1-2019	Definitive safeguard measures imposed

Statute Update

New Shipper Review investigations – Streamlining of procedures: The DGTR has issued Trade Notice 01/2019 dated 29th January 2019 streamlining the procedure for New Shipper Review (NSR) investigations. This Trade Notice contains guidelines concerning, *inter-alia*, the timing of filing of an NSR application; the period of investigation; sampling; and the timeline for issuing the final determination. According to the Trade Notice, the Authority shall make its final determination in an expeditious manner within one year from the date of initiation, except in exceptional cases where the period may be extended by six months. The Trade Notice would be applicable to all NSR applications filed after the date of issue of the trade notice.

WTO News

Korea and US dispute on large residential washers - Arbitrator issues decision

The WTO arbitrator, on 8 February 2019, issued a decision on the level of trade suspension Korea may request against the United States in the dispute *United States — Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea* (DS464). The Arbitrator determined that the level of nullification or impairment caused by the "as applied" inconsistent anti-dumping and countervailing duty measures imposed by the United States on imports of large residential washers in 2012 from Korea was USD 74.40 million and USD 10.41 million, respectively. In both instances, it was determined that the level of suspension that Korea is entitled to impose may be adjusted for inflation on an annual basis. For Korea's request pertaining to non-large residential washers, the Arbitrator devised a formula that Korea may use to determine the level of nullification or impairment in any future instance of application of the inconsistent anti-dumping measures.

US anti-dumping and countervailing duties on olives from Spain – EU initiates dispute

European Union has on 28th of January 2019 sought consultations with the United States on imposition of countervailing and anti-dumping duties by the latter on ripe olives from Spain. EU in this regard alleges violation of various provisions of the Subsidies and Countervailing Measures, the Anti-dumping Agreement and GATT 1994. According to the EU, their subsidy measures do not explicitly limit access to certain enterprises but operate on the basis of objective criteria or conditions that are automatic and strictly adhered to, as well as being clearly spelled out in official documents. The EU's document circulated in WTO on 31st of January also states that the injury determination by US authorities is not based on positive evidence and does not involve an objective examination of the volume of the subsidized imports and their effects on prices, and the consequent impact on the domestic producers, and hence appear to be inconsistent with the WTO rules.

New TRIPS notification system launched

The WTO Secretariat has announced the launch of a new TRIPS notification submission system, an optional online tool for members to submit notifications, review materials and reports. Through the e-TRIPS NSS, members will be able to submit newly passed laws and regulations relevant to TRIPS, responses to the questionnaires established by the TRIPS Council, and regular reports on technical assistance and measures for technology transfer filed by some members and some international intergovernmental organizations. The announcement was made at the meeting of the TRIPS Council on 13 February.

Slower trade growth in first quarter of 2019 - WTO trade indicator

WTO on 19-2-2019 released its latest World Trade Outlook Indicator (WTOI), according to which the global trade weakness is likely to extend into the first quarter of 2019. The recent

report signals below-trend trade expansion into the first quarter. It may however be noted that below-trend growth in an index does not necessarily imply a decline in the underlying data. It is also stated that this sustained loss of momentum highlights the urgency of reducing trade tensions, which together with continued political risks and financial volatility could foreshadow a broader economic downturn.

India Customs & Trade Policy Update

Basic Customs duty on goods from Pakistan increased to 200%: The Indian Ministry of Finance has amended Schedule I of the Customs Tariff Act, 1975 to impose basic customs duty at an *ad valorem* rate of 200% on imports of all goods originating or exported from Pakistan into India. Tariff Item 9806 00 00 has been inserted in this regard by Notification No. 5/2019-Cus., dated 16-2-2019.

All Industry Rates of duty drawback amendments effective from 20-2-2019: Indian Ministry of Finance has clarified amendments made to All Industry Rates (AIRs) of duty drawback by Notification No. 12/2019-Cus. (N.T.), effective from 20-2-2019. Changes include enhanced AIRs/caps of drawback on leather sofa cover including automobile upholstery, synthetic filament tow, carpets, silk articles, boots, gold jewellery and mobile phones. Drawback has been rationalised for silver jewellery/articles. Certain new tariff items have been created to allow better differentiation of exports. CBIC Circular No. 5/2019-Cus., dated 20-2-2019 has been issued.

Clubbing of Authorisations issued only within 18 months: HoP amended: DGFT has amended Para 4.38 of the FTP Handbook of Procedures relating to Facility of Clubbing of Authorisations. Only authorisations issued within 18 months from the date of earliest authorisation can be clubbed subject to condition that imports are made within 30 months of the earliest authorisation. Any import made beyond 30 months of earliest authorisation shall be regularised as per Para 4.49 of HoP. All cases clubbed as per earlier provisions would not to be reopened. Public Notice No. 70/2015-2020, dated 30-01-2019 has been issued for the purpose.

MEIS benefit on exports directly from EOU/SEZ on behalf of DTA unit: Export of goods produced by EOU/SEZ unit in India and exported directly from EOU/SEZ to the foreign consumer, with the name of DTA unit on whose behalf the exports are made, are eligible for benefits under Merchandise Exports from India Scheme (MEIS). According to DGFT Policy Circular No. 20/2015-20, dated 22-2-2019, MEIS benefits may be taken by SEZ/EOU or DTA unit and not both, based on disclaimer from the other firm. Certain criterion as specified in the circular, however, need to be fulfilled for the purpose of availing such benefit.

Printing of Advance/EPCG Authorisation on security paper to be discontinued: Directorate General of Foreign Trade (DGFT) under Indian Ministry of Commerce will discontinue printing of advance authorisations and EPCG Authorisations where port of registration is an EDI port. The system would be applicable for authorisations issued

from 1-3-2019 onwards. Details of authorisation will be available on ICES and process of registration of authorisations and taking bond/bank guarantee remains unchanged. According to CBIC Circular No. 7/2019-Cus., dated 21-2-2019, no physical copy of even amendment will be sought from authorisation holder. TRA facility would however not be available for such authorisations.

Ratio Decidendi

Demand of anti-dumping duty for imports under Advance Authorisation

Rejecting the plea that bond/LUT executed by assessee-importer did not cover the anti-dumping duty leviable on material imported under Advance Authorisation, CESTAT Mumbai has upheld the demand of anti-dumping duty in a case of non-fulfilment of EO. The Tribunal observed that the bond executed did not make any distinction between the duties leviable. Larger Bench Order in *Caprihans* and Bombay High Court decision in *Dharampal Lalchand Chug* were distinguished. The case was also found fit for category (d) of Explanation 1 of Customs Section 28 (relevant date). [*Kopran Ltd*. v. *Commissioner* - Order No. A/85037/2019, dated 10-1-2019, CESTAT Mumbai]

Demurrage not includible – Explanation to Valuation Rule 10(2) is bad

Observing that demurrage is a kind of penalty and that the legislature did not intend to include it in value of goods under Section 14 of the Customs Act, 1962, Orissa High Court has held that the provisions therefor in the Valuation Rules are *ultra vires* Customs Section 14. Explanation to Rule 10(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, providing for inclusion of ship demurrage in the value of goods, was hence struck down. The High Court was of the view that since provisions in Customs Act were silent about demurrage, it is beyond the legislative powers to include same in the rules for customs valuation. Supreme Court judgements in the cases of *Wipro Ltd.*, *Essar Steel Ltd.* and *Mangalore Refinery and Petrochemicals Ltd.* were relied on for the purpose. [*Tata Steels* v. *UOI* – W.P. No. 7917 of 2009 and Ors., decided on 30-1-2019, Orissa High Court]

Restricted imports without authorisation can be cleared on redemption fine

In a case involving import of restricted goods without authorisation, Larger Bench of Supreme Court has held that merely because earlier similar consignments were cleared by Customs on payment of redemption fine, parity cannot be demanded for present consignment. The Court however, observing that Multi-Function Devices (Digital Photocopiers and Printers) were not prohibited but restricted from import, upheld the view that importer was entitled to redemption of MFDs having a utility period, on payment of market price.

It upheld the High Court order classifying the goods as 'other wastes' under Rule 3(1)(23) of the Waste Management Rules, as they had utility at the time of import. [*Commissioner* v. *Atul Automation* - Civil Appeal No. 1057 of 2019, decided on 24-1-2019, Supreme Court]

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