

# amicus

An e-newsletter from  
Lakshmikumaran & Sridharan, India

January 2018 / Issue – 79

Lakshmikumaran & Sridharan wishes you a very happy and prosperous New Year 2018

## Contents

### Article

Sunset Reviews: Whether mandatory . 2

### Trade Remedy News

Trade remedy measures by India ..... 4

Trade remedy measures against  
India..... 6

WTO News ..... 6

India Tariff update..... 8

Ratio Decidendi..... 8



**January**  
2018



## Article

### Sunset Reviews: Whether mandatory

By Darpan Bhuyan

Anti-dumping duty can be levied in India for a period not exceeding five years in terms of Section 9A(5) of the Customs Tariff Act, 1975. This levy can be extended for a further period of five years only if a conclusion is arrived at by the Designated Authority pursuant to a sunset review that removal of the anti-dumping duty shall result in continued dumping and injury. The question as to whether a sunset review is mandatorily required to be undertaken was considered by the Delhi High Court in the case of *Indian Metal and Ferro Alloys Ltd. v. Designated Authority* [2008 (224) E.L.T. 375 (Del.)] wherein it was held that a sunset review needs to be conducted mandatorily.

In the year 2017, the concerned domestic industries, for whom the anti-dumping duty protection was set to expire, submitted applications to the Designated Authority seeking initiation of sunset reviews. One such case was the anti-dumping duty levied on cellophane transparent film from China PR which was set to expire on the 12th of January, 2017. Accordingly, the concerned domestic industry, filed an application for initiation of sunset review. However, the Designated Authority refused to initiate the sunset review as it was of the view that the facts of the case did not reveal any injury or likelihood of injury to the company. Being aggrieved by non-initiation of the sunset review, the company representing domestic industry filed a writ petition in the Delhi High Court and prayed for a direction to the Designated Authority to

initiate the sunset review. It was contended that it was mandatory on the part of the Designated Authority to initiate a sunset review in view of the earlier judgment in the case of *Indian Metal and Ferro Alloys*.

Pending final hearing of the writ petition, the Delhi High Court gave the domestic industry interim relief and directed the Designated Authority to initiate and conduct the sunset review. Directions were also issued that pending the sunset review, the anti-dumping duty would be extended for a further period of 1 year in terms of the second proviso to Section 9A(5) of the Customs Tariff Act, 1975. However, the Delhi High Court also clarified that the outcome of the investigation would be contingent on its final decision in the matter and the duties collected from importers would be refunded in case the contention of the domestic industry was rejected.

While the case was still pending before the Delhi High Court, the Designated Authority refused to initiate sunset reviews on certain other products as well such as Phosphoric Acid, Geostraps made of polyester or glass fibre, and Metronidazole. Consequently, the domestic industries of these products also approached the Delhi High Court and all these matters were tagged along with the earlier writ petition. Interim relief in the same nature as that given to the petitioner in the case of cellophane transparent film was also given to the domestic industries of these products.

The questions with which the Delhi High Court was finally confronted with were whether:

1. The Designated Authority must be satisfied that *prima facie* some case is made out before initiating the sunset review and thereby, answer it in the negative without having actually conducted the investigation?
2. In the facts and circumstances of the present cases, the Designated Authority was justified in doing so?

While answering the first question, the Delhi High Court opined that a sunset review involved a two-step process. The first step was to form a *prima facie* opinion that a sunset review is required on the basis of the material furnished by the domestic industry in its application. The second step involved actually conducting the sunset review.

Having answered the first question in the affirmative, the Delhi High Court proceeded to examine whether the Designated Authority was justified in refusing to initiate the sunset reviews. The Delhi High Court however noted that the scope of such examination under writ jurisdiction would not involve a scrutiny on whether the refusal to initiate the sunset reviews was correct but rather, whether the same was reasoned and based on relevant considerations. The Delhi High Court noticed the fact that the Designated Authority had sent questionnaires to the various domestic industries to elicit further information, clarifications and inputs regarding their applications, had calculated their non-injurious price by considering all the relevant parameters and overall, had undertaken a very detailed analysis in arriving at its conclusions. Therefore, the Delhi High Court held that the Designated Authority had acted within its jurisdiction in refusing to initiate the sunset reviews.

In reaching the conclusion regarding the first question, the Delhi High Court placed reliance upon Rule 23 of the Anti-Dumping Rules, 1995, which lays down the manner in which sunset reviews are to be conducted and its requirements. Rule 23(3) provides that Rules 6 to 11 and 16 to 20 are *mutatis mutandis* applicable in the case of a sunset review. The Delhi High Court took note of the fact that Rule 6, which sets out the principles for conducting an original investigation, started with the phrase “The Designated Authority shall, after it has decided to initiate the investigation to determine the existence, degree and effect of any alleged dumping of articles,...”. Accordingly, it held that the Designated Authority has to first decide whether or not the sunset review is required to be undertaken.

However, in the case of an original investigation, the decision to initiate it is taken by the Designated Authority under Rule 5 which is not applicable to sunset reviews. Rule 5 provides that the Designated Authority shall not initiate an investigation unless it examines the accuracy and adequacy of the evidence provided in the application and satisfies itself that it is sufficient to justify the initiation of the investigation.

As the application of the *mutatis mutandis* rule contemplates making necessary changes in detail for adaptation without sacrificing the main point at issue which, in the case of Rule 6, are the principles to be followed while conducting the investigation, the fact that it starts with the phrase “after it has decided” may not have much relevance in the absence of the application of Rule 5 to sunset reviews. In the present case, the Delhi High Court did consider the views expressed in the case of *Indian Metal and Ferro Alloys* whereby it had held that a sunset review had to be mandatorily conducted, and opined

that it was rendered at a time when the judgment of the Supreme Court in the case of *Kumho Petrochemicals v. Union of India & Ors* [(2017) 8 SCC 307] was not in existence which is now the authoritative judgment on the issue. In the case of *Kumho Petrochemicals*, the Apex Court had dealt with the question of whether a sunset review could be initiated and notification extending the levy pending the review could be issued after expiry of the original anti-dumping duty. However, the question of whether the initiation of a sunset review involved a two-step procedure was not an issue either directly or incidentally in *Kumho*.

In view of the fact that the Delhi High Court had earlier considered sunset review to be mandatory and the Supreme Court decision in *Kumho Petrochemicals* did not expressly overrule the law laid down in *Indian Metal Ferro Alloys*, it could perhaps have been more appropriate if the matter was referred to a Larger Bench for deciding the said issue.

However, the decision of the Delhi High Court in the present case cannot be faulted with

though the reasons given for arriving at the said conclusion may not be entirely adequate. Rule 23(1B) of the Anti-Dumping Rules 1995 and Article 11.3 does provide that the request for a sunset review by the Domestic Industry must be 'duly substantiated'. This indicates that there should indeed be an application of mind by the Designated Authority before initiating the sunset review to decide whether the request for review is substantiated in a given case. Otherwise, in case a sunset review is considered to be mandatory despite all indicators to the contrary, it would waste precious time and effort of not only the interested parties who would be required to participate in the investigation, but also the Designated Authority, who is saddled with the responsibility of conducting a massive number of investigations with India being one of the largest users of anti-dumping measures.

**[The author is an Associate, International Trade Practice, Lakshmikumaran & Sridharan, New Delhi]**



## Trade Remedy News

### Trade Remedy measures by India

| Product  | Country         | Notification No.       | Date of Notification | Remarks  |
|--|-----------------|------------------------|----------------------|--|
| Caustic Soda                                   | Japan and Qatar | F. No. 14/31/2015-DGAD | 10-1-2018            | Final Findings issued <i>not</i> recommending ADD  |
| Clear Float Glass of nominal thickness ranging | Pakistan        | 1/2018-Cus. (ADD)      | 12-1-2018            | Notification No.30/2017-Cus. (ADD), dated 16-06-2017 giving a separate rate of duty to the new |

| Product   | Country  | Notification No.       | Date of Notification | Remarks  |
|---|--|------------------------|----------------------|--|
| from 4mm to 12mm (both inclusive)                         |  |                        |                      | shipper from Pakistan, made effective  |
| Fluoroelastomers (FKM)                                    | China  | F.No.6/25/2017-DGAD    | 2-1-2018             | ADD investigation initiated  |
| Metronidazole   | China  | 2/2018-Cus. (ADD)      | 17-1-2018            | Notification imposing definitive ADD rescinded                               |
| Ofloxacin   | China PR   | F. No. 14/06/2016-DGAD | 22-12-2017           | Final Findings issued recommending ADD                                       |
| Saccharin   | China PR   | F.No. 15/23/2016-DGAD  | 30-12-2017           | Final Findings in Sunset review issued recommending <i>cessation</i> of ADD  |
| Solar Cells whether or not assembled in modules or panels | All countries                                    | F. No. 22011/68/2017   | 5-1-2018             | Preliminary Findings issued recommending a provisional Safeguard Duty of 70% |
|   |  | F.No. 22011/68/2017    | 19-12-2017           | Initiation of Safeguard investigations                                       |
| Sulphonated Naphthalene Formaldehyde                      | China PR   | F. No. 14/15/2016-DGAD | 30-12-2017           | Final Findings issued recommending ADD                                       |
| Sun/Dust control film                                     | China PR, Chinese Taipei, Hong Kong and Korea RP | F. No. 6/44/2017-DGAD  | 17-1-2018            | ADD investigation initiated  |
| Zeolite 4A (Detergent Grade)                              | China  | F. No. 6/14/2017-DGAD  | 2-1-2018             | ADD investigation initiated  |

## Trade Remedy measures against India

| Product  | Country | Notification No.        | Date of Notification | Remarks   |
|--|---------|-------------------------|----------------------|---|
| Corrosion-Resistant Steel Products                     | USA     | 82 FR 60703 [A-533-863] | 22-12-2017           | ADD Administrative Review 2016-2017 - Rescission of review against five companies           |
| Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel | USA     | 83 FR 1021 [A-533-873]  | 9-1-2018             | ADD - Preliminary Determination of Sales at Less Than Fair Value amended                    |
| Fine Denier Polyester Staple Fiber                     | USA     | 83 FR 662 [A-533-875]   | 5-1-2018             | ADD - Preliminary Affirmative Determination of Sales at Less Than Fair Value                |
| Stainless Steel Flanges                                | USA     | 83 FR 25 [A-533-877]    | 9-1-2018             | ADD - Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations |



## WTO News

### India launches Safeguard investigation on solar cells

India has notified the WTO's Committee on Safeguards that on 19 December 2017 it initiated a safeguard investigation on solar cells, whether or not assembled in modules or panels. Through the notification to the WTO, all known interested parties including the known exporters in the subject countries have been invited to provide their views through the Indian Embassies in their respective countries within a period of 30 days from the date of notice issued by the Director General (Safeguards).

### US-India solar dispute – Matter referred to arbitration under Article 22.6

USA's request for authorisation to suspend concessions with respect to India in the dispute involving solar cells and modules, has been referred to arbitration under Article 22.6 of the WTO's Dispute Settlement Understanding. Objecting to the USA's request, India on 12-1-2018 emphasized that if US had any disagreement with India on compliance, it must first be addressed through compliance panel proceedings under Article 21.5 of the DSU. US has not indicated a specific monetary amount in its retaliation request.



## **Viet Nam initiates dispute against United States over anti-dumping duties on fish**

Viet Nam has on 8-1-2018 requested consultations with the United States concerning certain US AD laws, regulations, administrative procedures, practices and methodologies (DS536). The request covers the imposition of AD duties and cash deposit requirements pursuant to the final results of the AD determinations in the fifth, sixth, and seventh administrative reviews by the USA for the period from August 1 to July 31 of the years 2007, 2008, and 2009 respectively, in respect of imports of certain Frozen Fish Fillets from the Socialist Republic of Viet Nam. The request also includes any other ongoing or future AD administrative reviews, and the preliminary and final results thereof. Viet Nam contends that these measures are inconsistent with various provisions of the AD Agreement, and the GATT 1994.

## **Canada initiates dispute against United States over trade remedy measures**

Canada has on 20-12-2017 requested consultations with the United States on certain measures relating to US anti-dumping or countervailing duty investigations, reviews or other proceedings (DS535). Canada contends that these measures are inconsistent with US obligations under the AD Agreement, the SCM Agreement, and the GATT. Among the measures identified by Canada in its consultations request are the liquidation of final AD and CV duties in excess of WTO-consistent rates and the failure to refund cash deposits collected in excess of WTO-consistent rates. According to document WT/DS535/1, dated 10-1-2018, US policy which directs customs authorities to retroactively suspend liquidation of entries and collect provisional duties for 90-day period prior to preliminary anti-dumping or countervailing duty

determination, is also in violation of various provisions of the AD Agreement.

## **US-China disputes – Reasonable period of time determined in one dispute, while compliance report issued in another**

WTO panel has on 18-1-2018 issued its compliance report in the dispute “*China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States – Recourse to Article 21.5 of the DSU by the United States*” (DS427). According to the report, China failed to comply with the recommendations and rulings of the DSB to bring its measures into conformity with its obligations under the Anti-Dumping and SCM Agreements. It was held that China’s measures taken to comply with the DSB’s recommendations and rulings in the original dispute, are inconsistent with the relevant agreements.

In another dispute between US and China involving certain US Methodologies and their application to anti-dumping proceedings involving China, the WTO arbitrator has determined reasonable period of time for the US to implement the DSB’s recommendations and rulings. The reasonable period of 15 months, according to the report circulated on 19<sup>th</sup> of January, 2018, would expire on 22<sup>th</sup> of August 2018.

## **EU’s retaliation request against Russia in dispute involving pig products referred to arbitration**

At a special session on 3 January 2018, the Dispute Settlement Body (DSB) referred the European Union’s request to suspend concessions or other obligations (retaliation) against Russia to arbitration under Article 22.6 of the Dispute Settlement Understanding. The proceedings arise out of the dispute concerning Russia’s import restrictions on pig products from

the EU (DS475). The EU contended that Russia has failed to comply with all the rulings and recommendations of the DSB, and has requested retaliation to the tune of EUR 1.39 billion per year plus a yearly increase rate of 15 per cent.

### WTO's first Director-General Peter Sutherland passes away

Peter Sutherland, Director-General of the GATT (1993-95) and the WTO (1995), passed away on

7<sup>th</sup> January 2018, in Dublin. In his capacity as the first DG, he was instrumental in laying the foundation for the WTO and the multilateral trading system as we know it today, stated current DG Roberto Azevedo. A barrister by profession, Sutherland hailed from Ireland where he served as its Attorney General in 1981. He also served as the European Commissioner for Competition from 1985 to 1989.



## India Tariff update

### Customs duty on imports from Malaysia, ASEAN, Korea RP and Japan, reduced

India has reduced Customs duty on import of specified goods from Malaysia, Korea RP, Japan, and from countries which are part of Association of Southeast Asian Nations (ASEAN). This annual reduction, effective from 1st of January, 2018 is in line with India's commitments under the Comprehensive Economic Partnership Agreements with Korea RP and Japan and under the Comprehensive Economic Cooperation Agreement with Malaysia. India is similarly obliged under India-ASEAN Preferential Trade Agreement to gradually liberalise applied MFN tariff rates on specified imports from 10 ASEAN countries.

### Temporary import of broadcasting equipment and sport goods exempted:

India has on 18-1-2018 exempted certain specified goods - equipment for press, sound and television broadcasting equipment, sports goods and equipment for testing, measuring or calibration, from payment of Customs duties, when same are imported under Customs Convention on A.T.A. carnet for Temporary Admission of Goods. Exemption has been provided from whole of Basic Customs duty and from whole of IGST, subject to conditions including that such goods have to be exported within 2 months from the date of importation.



## Ratio Decidendi

### Anti-dumping duty – Scope of 'domestic industry'

Three Member Bench (Anti-dumping Bench) of the CESTAT at New Delhi has rejected the contention of one of the appellant that the foreign exporter (Solvay SA) was related to the Domestic Industry in terms of Explanation (ii) of Rule 2 (b)

of the AD Rules. Claim based on the fact that the foreign exporter held about 25.10% shares in the domestic industry (National Peroxide Limited), was rejected by the Tribunal after observing that in spite of the shareholding, Solvay SA had no person in Board of Directors of NPL, and that the foreign exporter had not attended any of the



meetings of Board of Directors or shareholders during relevant period. It was also noted that no EGM had taken place in NPL and that M/s Solvay SA had not participated in any of the AGM since 2013. The Tribunal in this regard also agreed with the findings of the Designated Authority that the provision of Companies Act or provision relating to special resolutions were not relevant for the present investigation.

Further, contentions including sickness and mismanagement of DI attributable to other reasons, selection of 15 months as POI, improper claim of confidentiality and error in calculation of freight of cooperating exporters, were also rejected by the Tribunal observing absence of any evidence,

precedents and the data being given by the exporters only. It was held that data relied upon by the DA was not contested even during the spot verification carried out by the officers of DA, and that any contest after the full disclosure is not tenable.

The Tribunal however remanded the matter to the Designated Authority for a limited purpose of verifying the correctness of the return on investment as arrived at by the DA based on optimum production of 15 months and again by adjustment in the net return. [*Solvay Peroxythai Limited v. Union of India* - Final Order No. 58470-58474/2017, dated 20-12-2017, CESTAT Delhi]

**NEW DELHI**

5 Link Road, Jangpura Extension,  
Opp. Jangpura Metro Station,  
New Delhi 110014

Phone : +91-11-4129 9811

-----

B-6/10, Safdarjung Enclave  
New Delhi -110 029

Phone : +91-11-4129 9900

E-mail : [lsdel@lakshmisri.com](mailto:lsdel@lakshmisri.com)

**MUMBAI**

2nd floor, B&C Wing,  
Cnergy IT Park, Appa Saheb Marathe Marg,  
(Near Century Bazar)Prabhadevi,  
Mumbai - 400025

Phone : +91-22-24392500

E-mail : [lsbom@lakshmisri.com](mailto:lsbom@lakshmisri.com)

**CHENNAI**

2, Wallace Garden, 2nd Street  
Chennai - 600 006

Phone : +91-44-2833 4700

E-mail : [lsmds@lakshmisri.com](mailto:lsmds@lakshmisri.com)

**BENGALURU**

4th floor, World Trade Center  
Brigade Gateway Campus  
26/1, Dr. Rajkumar Road,  
Malleswaram West, Bangalore-560 055.

Ph: +91(80) 49331800

Fax:+91(80) 49331899

E-mail : [lsblr@lakshmisri.com](mailto:lsblr@lakshmisri.com)

**HYDERABAD**

'Hastigiri', 5-9-163, Chapel Road  
Opp. Methodist Church,  
Nampally

Hyderabad - 500 001

Phone : +91-40-2323 4924

E-mail : [lshyd@lakshmisri.com](mailto:lshyd@lakshmisri.com)

**AHMEDABAD**

B-334, SAKAR-VII,  
Nehru Bridge Corner, Ashram Road,  
Ahmedabad - 380 009

Phone : +91-79-4001 4500

E-mail : [lsahd@lakshmisri.com](mailto:lsahd@lakshmisri.com)

**PUNE**

607-609, Nucleus, 1 Church Road,  
Camp, Pune-411 001.

Phone : +91-20-6680 1900

E-mail : [ls pune@lakshmisri.com](mailto:ls pune@lakshmisri.com)

**KOLKATA**

2nd Floor, Kanak Building  
41, Chowringhee Road,  
Kolkatta-700071

Phone : +91-33-4005 5570

E-mail : [lskolkata@lakshmisri.com](mailto:lskolkata@lakshmisri.com)

**CHANDIGARH**

1st Floor, SCO No. 59,  
Sector 26,

Chandigarh -160026

Phone : +91-172-4921700

E-mail : [lschd@lakshmisri.com](mailto:lschd@lakshmisri.com)

**GURGAON**

OS2 & OS3, 5th floor,  
Corporate Office Tower,  
Ambience Island,

Sector 25-A,  
Gurgaon-122001

phone: +91-0124 - 477 1300

Email: [lsurgaon@lakshmisri.com](mailto:lsurgaon@lakshmisri.com)

**ALLAHABAD**

3/1A/3, (opposite Auto Sales),  
Colvin Road, (Lohia Marg),

Allahabad -211001 (U.R)

phone . +91-0532 - 2421037, 2420359

Email:[lsallahabad@lakshmisri.com](mailto:lsallahabad@lakshmisri.com)

**Disclaimer:** *International Trade Amicus* is meant for informational purpose only and does not purport to be advice or opinion, legal or otherwise, whatsoever. The information provided is not intended to create an attorney-client relationship and not for advertising or soliciting. Lakshmikumaran & Sridharan does not intend to advertise its services or solicit work through this newsletter. Lakshmikumaran & Sridharan or its associates are not responsible for any error or omission in this newsletter or for any action taken based on its contents. The views expressed in the article(s) in this newsletter are personal views of the author(s). Unsolicited mails or information sent to Lakshmikumaran & Sridharan will not be treated as confidential and do not create attorney-client relationship with Lakshmikumaran & Sridharan. This issue covers news and developments till 22nd January, 2018. To unsubscribe, e-mail Knowledge Management Team at [newsletter.itrade@lakshmisri.com](mailto:newsletter.itrade@lakshmisri.com)

[www.lakshmisri.com](http://www.lakshmisri.com)

[www.gst.lakshmisri.com](http://www.gst.lakshmisri.com)

[www.addb.lakshmisri.com](http://www.addb.lakshmisri.com)

[www.lakshmisri.cn](http://www.lakshmisri.cn)