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Time-limit in anti-dumping reviews in India – Rule 23 analyzed

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In the Indian context, the scheme of anti-dumping provisions under the Customs Tariff Act, 1975 ("the Act") and the Anti-Dumping Rules ("AD Rules")[1] broadly divide the proceedings into two forms – original investigation and reviews. The procedure followed by the Designated Authority, Anti-Dumping ("DA") in a review is more or less similar to that followed in original investigation as the DA examines dumping and injury de-novo in a review in addition to examining likelihood of recurrence of dumping and injury. In view of similarity of procedure followed, the DA considers the time limit in both the proceedings as same, even though the anti-dumping provisions provide for different time periods for both kind of proceedings.

Section 9A (5) of the Act and Rule 23(1B) of the AD Rules provides that anti-dumping duty once imposed shall be in force for a period not exceeding five years from the date of imposition. The Designated Authority may also initiate and conduct a mid-term review before the expiry of the five year period, say after two years or three years from the date of imposition of Anti-dumping Duty, wherein duty may be continued, modified or revoked as the case may be. In case of sunset review, the DA is required to initiate the review before the expiry of existing anti-dumping duty. In such a case, second proviso to Section 9A(5) empowers the Central Government to extend the levy of anti-dumping duty for a period of one year, if the sunset review is not concluded before the expiry of five years from the date of imposition of the duty.

Rule 23(1) of the Anti-Dumping Rules is pari-materia to Article 11.1 of ADA, which provides that *"an antidumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."* Article 11.1 does not impose independent obligations upon Members, but rather, establishes the general principle that duties may only continue to be imposed so long as they remain necessary, which principle is operationalized in Articles 11.2 and 11.3[2]. Articles 11.2 and 11.3 which relate to mid-term reviews and sunset reviews respectively, are similar to Rule 23(1A) and 23(1B) of the Anti-Dumping Rules respectively. Thus, in terms of interpretation by WTO Panel, the general principle enshrined in Rule 23(1) has to be read in conjunction with Rules 23(1A) and 23(1B), as the case may be.

It is interesting to note that though the law-makers introduced Rules 23(1A) and 23(1B) in 2011 by suitably modifying Rule 23(1), they omitted to amend Rule 23(2), which had reference to Rule 23(1). Resultantly, Rule 23(2) which was framed with respect to old Rule 23(1) continues to apply to new Rule 23(1)

[1] Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules 1995.

[2] United States - Anti-Dumping Measures on Certain Shrimp from Viet Nam, (DS-429) Panel Report

only but not to recently introduced Rule 23(1A) and Rule 23(1B). Resultantly, though the time limit prescribed under Rule 23(2) should have been applicable to all types of review covered under Rules 23(1A) and 23(1B), however, in the absence of specific mention of both the rules, Rule 23(2) is only applicable to new Rule 23(1), which does not even mention the term "review".

Given the inadvertent omission on the part of the legislators to amend Rule 23(2) suitably, there is now an anomaly as explained above subsisting in the Anti-Dumping Rules with regard to time limit applicable to reviews. The present article examines the relevance of Rule 23(2) *considering the rule as it should have been* and the pari-materia provisions under Rule 23(3), that are to apply in case of reviews.

Time-limits in reviews – The law

Unlike original investigations, where the time limit under Rule 17 prescribed is positively worded; in case of reviews (Mid-Term Review or SSR), Rule 23(2) of Anti-Dumping Rules is negatively worded by providing that such reviews shall be concluded within a period *"not exceeding* twelve months from the date of initiation of such review".

The scheme of the anti-dumping duties and proceedings as a whole also substantiates the same considering the fact that the extension of period of anti-dumping duty during the pendency of sunset review is also for "one" year under the second proviso to Section 9A(5). Considering the fact that the Central Government may also take substantial time to take a decision on the recommendation of the DA, Rule 23(2) requires that the reviews shall be concluded within a period not exceeding twelve months from the date of initiation of such review.

The importance of adhering to the prescribed time limit of 12 months for completion of review is also buttressed by the communication[3] from Central Government to the DA, which requires the DA to initiate the sunset review, send the proposal for extension of anti-dumping duty for one year and conclude the review well in advance, so as to enable the Central Government to take a decision on the recommendations; and in case of affirmative decision, continue the anti-dumping before expiry of extended anti-dumping duty.

Whether time limit in review extendable beyond 12 months?

Rule 23(2) of Anti-Dumping Rules specifically provides for a time limit for completion of review initiated and conducted by the Designated Authority. However, Rule 23(3) also provides that the provisions of, inter-alia, Rule 17 shall be mutatis mutandis applicable in case of review. Rule 17(1) provides the period within which the DA is required to conclude the *original investigation*. Rule 23(2) provides the time period for the investigating authorities for the concluding *reviews*. Rule 23(2) prohibits any extension of the period to conclude the review. Application of proviso to Rule 17 in case of reviews may result in

[3] Office Memorandum F. No. 354/179/2002-TRU (Pt-V) dated August 4, 2014

following issues:

Issue 1: If the proviso to Rule 17(1) is borrowed for the purpose of Rule 23, it would render the provision of Rule 23(2) as redundant. If Rule 17(1) and its proviso are borrowed in-toto for the purpose of Rule 23, then there would not have been any requirement to frame Rule 23(2) for the completion of review separately.

Issue 2: Rule 23(2) is worded negatively and states that the any review shall be concluded within a period 'not' exceeding twelve months. Thus, while Rule 17(1) positively specifies a time period of one year because such time period is subject to extension under the proviso, Rule 23(2) on the other hand, stresses on the strictness of the time period available for review by clearly stating that it is shall 'not' exceed twelve months. It is settled position in law that if the rule is clear and does not present any ambiguity then such meaning has to be adopted.

Issue 3: Rule 23(3) borrows certain other rules from the AD Rules such as Rules 6, 17, 19, 20 including Rule 17 which are applicable mutatis mutandis in case of review. However, by specifically inserting a provision prescribing a time limit in case of reviews, the requirement under Rule 17 in as much as it relates to period available for the conclusion of the investigation will not be applicable for conclusion of a review.

The term "mutatis mutandis", which means *"All necessary changes having been made; with the necessary changes"*[4] used in Rule 23(3) of the Anti-Dumping Rules does not mean to apply the borrowed rules to amend the substantial provisions in the rule which borrowed. The term is to be understood as the rule of 'adaptation' and not a rule of 'adoption'[5]. Thus, Rule 17 is required to be borrowed for the purpose of Rule 23 with necessary changes and read in conjunction with Rule 23(2), which will make it clear that with the specific timeline for the review provided under Rule 23(2), Rule 17 will not be applicable.

Practice adopted by India

The Designated Authority invariably extends the time limit beyond 12 months in case of review proceedings despite Rule 23(2) specifically prohibiting to do so. The DA has continuously adopted proviso to Rule 17(1) to justify extension of time in case of review. Even the Tribunal in *Grauer & Weil (I) Ltd.* v. *Designated Authority*[6] held that time limit in case of a review may be extended. However, the Tribunal in that case did not go into the time limit prescribed under Rule 23(2) of the Anti-Dumping Rules as well as whether the term '*mutatis mutandis*' in Rule 23(3) allowed borrowing of extension of time under proviso to Rule 17(1) of the Anti-Dumping Rules.

The practice adopted by the DA to extend the time limit by wholly borrowing proviso to Rule 17(1) of Anti-Dumping Rules, is contrary to its practice. In case of a sunset review, the DA '*mutatis mutandis*' applies other provisions

[4] Black's Law Dictionary (9th ed. 2009)

[5] *University of Cochin* v. *Dr. N. Raman Nair & Ors.* (1975) 3 SCC 628

[6] 2011 (271) E.L.T. 112 (Tri. - Del.)

by suitably modifying them but in case of time limit, the proviso to Rule 17(1) is applied as it is, without any change. For example, though Rule 17(1)(b) provides that the anti-dumping duty to be imposed should be equivalent to the lesser of dumping margin or injury margin, however, contrary to the aforesaid rules, on several occasions, the Designated Authority has recommended continued imposition of anti-dumping duty, irrespective of the dumping margin or injury margin so determined in the review.[7, 8] The Designated Authority in these cases, in light of the specific provision under Rule 23(1B) overcame the application of Rule 17(1)(b) while recommending anti-dumping duty.

Perhaps the only way by which DA extends the time period in case of review is by considering that Rule 23(3) will be applicable to all kind of reviews. Thus once Rule 17(1) is applied mutatis mutandis, its proviso also gets applied, which is linked to Rule 17(1). But this interpretation is also debatable as it will give way to new questions such as (i) whether with Rule 17(1), its proviso may also be borrowed; (ii) If both may be borrowed, then whether Rule 23(2) have any significance; and (iii) If time limit under Rule 17(1) may not be borrowed, then whether only its proviso may be borrowed and be read with Rule 23(2)?

Effect & Conclusion

Anti-Dumping provisions mandate that unless there is dumping by exporters leading to injury to the established industry in India, there cannot be any anti-dumping duty imposed. Review proceedings require that in case sufficient evidence exists for non-continuation of anti-dumping duty in a sunset review or for termination/reduction of anti-dumping duty in a mid-term review, the DA is required to make appropriate recommendation in time so that the duty may be terminated/reduced accordingly at the earliest. In other words, if the period to conclude the review is allowed to be extended, collection of anti-dumping duty will continue illegally in an unjustified manner for longer period, though there may not be a need for anti-dumping duty.

Even in case of domestic industry, if the review is extended for a further period of six months and if the existing anti-dumping duty lapses, there would not be an anti-dumping duty protection to the domestic industry after the end of one year as it would break the continuity of the anti-dumping duty, prejudicing the continuation of duty in case of likelihood of continuation of dumping and injury, for a further period of five years.

As said earlier, by not amending Rule 23(2) at the time of amendment of Rule 23(1), Rule 23(2) is *stricto-sensu* not applicable to Rules 23(1A) and (1B). However, if both the rules are read in conjunction with Rule 23(1), it will be clear that Rule 23(2) is applicable in case of Rules 23(1A) and (1B) as well. The issue thus remains open ended, which may only be clarified upon a suitable amendment to the rules. Until then, the time limit for reviews in India will remain a hotly contested topic.

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[7] Acrylonitrile Butadiene Rubber imported from Korea (2008)
[8] Nonyl Phenol originating in or exported from Chinese Taipei

Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
1,1,1,2 - Tetrafluoro-ethane or R-134a	China	F. No. 15/27/2014-DGAD	10-4-2015	ADD Sunset review initiated
Acetone	Japan and Thailand	F.No.15/29/2014-DGAD	7-4-2015	ADD Sunset review initiated
		16/2015-Cus. (ADD)	22-4-2015	Anti-dumping duty extended up to 8-4-2016
	Chinese Taipei and Saudi Arabia	13/2015-Cus. (ADD)	16-4-2015	Anti-dumping duty imposed
Barium Carbonate	China	15/2015-Cus. (ADD)	22-4-2015	Anti-dumping duty extended up to 22-3-2016
Coumarin	China	8/2015-Cus. (ADD)	7-4-2015	Anti-dumping duty extended up to 22-3-2016
Emulsion Poly Vinyl Chloride Resin or Poly Vinyl Chloride Paste Resin	Norway and Mexico	10/2015-Cus. (ADD)	7-4-2015	Definitive anti-dumping duty imposed
Electrical Insulators of Glass or Ceramics/ Porcelain	China	11/2015-Cus. (ADD)	11-4-2015	Definitive anti-dumping duty imposed
Flexible Slabstock Polyol	Australia, EU, Singapore	9/2015-Cus. (ADD)	7-4-2015	Definitive anti-dumping duty imposed
Methylene Chloride	China and Russia	F. No. 14/33/2014-DGAD	7-4-2015	Anti-dumping investigation initiated
Nylon Tyre Cord Fabric (NTCF)	China	F. No. 15/32/2013-DGAD	13-4-2015	Anti-dumping duty continuation recommended in sunset review
Phenol	Thailand and Japan	14/2015-Cus. (ADD)	17-4-2015	Anti-dumping duty extended up to 18-4-2016
Poly Vinyl Chloride (PVC) Paste/ Emulsion Resin	Korea RP, Taiwan, China, Malaysia, Thailand, Russia and EU	F. No.15/19/2014-DGAD	27-4-2015	ADD Sunset review initiated
Purified Terephthalic Acid (PTA)	China, EU, Korea RP and Thailand	F. No. 14/7/2013-DGAD	7-4-2015	ADD recommended on imports from Korea RP and Thailand. Imports from China and EU found to be *de minimis*.
Recordable Digital Versatile Disc [DVD-R]	Vietnam, Thailand and Malaysia	12/2015-Cus. (ADD), effective from 12-4-2015	11-4-2015	ADD extended up to 11-4-2016 on imports from Vietnam and Thailand. ADD withdrawn on imports from Malaysia.

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Commodity Matchbooks	USA	[A-533-848 and C-533-849] 80 FR 24232	30-4-2015	ADD and CVD Orders to continue
Lined Paper Products	USA	[A-533-843] 80 FR 18373	6-4-2015	ADD Changed Circumstances Review determined that M/s. Kokuyo Riddhi Paper Products Private Limited is successor-in-interest to M/s. Riddhi Enterprises.
Lined Paper Products	USA	[A-533-843] 80 FR 19278	10-4-2015	ADD Administrative Review for Sep 1, 2012 - Aug 31, 2013 - Final weighted-average dumping margin for M/s. Super Impex determined to be 0%.
Lined Paper Products	USA	[C-533-844] 80 FR 19637	13-4-2015	CVD Administrative Review for Jan- Dec 2012 - Final net subsidy rate for M/s. A.R. Printing & Packaging India Pvt. Ltd determined to be 37.43% ad valorem.
Polyethylene Terephthalate Resin	USA	[C-533-862] 80 FR 18369	6-4-2015	CVD investigation initiated
Polyethylene Terephthalate Resin	USA	[A-122-855] 80 FR 18376	6-4-2015	ADD - Initiation of Less-Than-Fair-Value Investigations
Pre-stressed Concrete Steel Wire Strand	USA	[A-533-828 and C-533-829] 80 FR 22708	23-4-2015	ADD and CVD Orders to continue

WTO News

China files dispute against EU over poultry meat products

On 8 April 2015, China has notified the WTO Secretariat of a request for consultations with the European Union on measures adopted by the latter to modify its tariff concessions on certain poultry meat products (DS492). The European Union had earlier modified its concessions in 2007 and 2012 following negotiations under Article XXVIII of the GATT 1994 along with Thailand and Brazil, which the EU considered to have a principal or substantial supplying interest in products concerned. According to the modification,

EU reserved tariff-rate quotas for Brazil and Thailand, while out-of-quota bound rates were significantly in excess of the pre-modification bound rates. China considers these measures to be inconsistent with the obligations of the EU under Articles I, II, XIII and XXVIII of the GATT 1994.

Panel established in dispute between US and China over alleged subsidies

The Dispute Settlement Body (DSB) of the WTO has, on 22-4-2015, established a panel to examine a dispute between the United States and China over latter's alleged subsidies (DS489). The United States has alleged that China is providing export subsidies through a programme establishing the "Foreign Trade Transformation and Upgrading Demonstration Bases and the Common Service Platforms". It is contended that China identified enterprises based on export performance and provides export-contingent subsidies to these enterprises in the Demonstration Bases (industrial clusters) through free or discounted services or through grants, while also providing certain other export-contingent subsidies to Chinese manufacturers, producers, and farmers. According to the consultation document, some 182 Chinese measures are being disputed alleging violation of Article 3.1(a) and 3.2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). China however has noted that finding a mutually agreed solution was the preferred approach to dispute settlement, in particular at a time when the system was resource-constrained.

Safeguard investigations launched by Egypt and Turkey

Egypt has, on 15-4-2015, notified the WTO's Committee on Safeguards that it would initiate on 16-4-2015 a safeguard investigation relating to imports of white sugar. Similarly, Turkey has also notified on 28-4-2015, the WTO's Committee on Safeguards that it has initiated on 25-4-2015 a safeguard investigation on porcelain and ceramic tableware and kitchenware.

Local content requirement – Concerns over investment measures favouring local products

On 16 April, the Committee on Trade-Related Investment Measures (TRIMs), considered 14 complaints about investment measures that have raised concerns on allegedly favouring domestic over imported products through local-content requirements. While five of these complaints were made in relation to measures by Indonesia, three concerned measures by the Russian Federation, two of the complaints addressed measures taken by India. The EU expressed concerns about India's local content requirements in solar power generation projects and certain preferences of India to domestically manufactured electronic goods and telecommunications products. Japan, US and Canada further shared the EU's concerns on electronic goods. India however has stated that the measures are consistent with the GATT and TRIMS Agreement.

Seychelles becomes WTO's 161st member

On 26 April 2015, Seychelles became the 161st WTO member. By becoming a member

of the WTO, Seychelles has hence committed to improve market access opportunities for all WTO Members, under the MFN principle which mandates that countries cannot discriminate between their trading partners. On goods, Seychelles has undertaken tariff concessions and commitments that "bind" tariff rates for all products on average at 9.5%. For agricultural products, this average is 16.9% while for non-agricultural products the average is 8.3%.

Ratio Decidendi

ADD interim review – Lasting effect of changed circumstances, required

Noting that the objective of the interim review is to verify the need for continued imposition of the anti-dumping measures, the General Court (Second chamber) of the European Union has held that if the review is to result in a decision to amend the anti-dumping duty originally imposed, such examination would require the finding not only of a significant change of circumstances regarding dumping, but also that the change is of a lasting nature. Further, observing that the authorities had concluded that there was no such lasting nature, it was held that the fact that the dumping might have been at a lower level during the review period vis-a-vis at the end of the original investigation, would not be sufficient as a basis for amending the measure in force. The court also held that none of the evidence, namely (i) the level of the dumping margin calculated following the refund procedure during IP1, (ii) the level of export prices observed at most during the review procedure and, (iii) the approximate assessment of the dumping margin during the review procedure, makes it possible to assess or a fortiori to demonstrate the lasting nature of the alleged change of circumstances.

The court in this regard also noted that the authorities had wide discretion in respect of an interim review pursuant to Article 11(3) of the EU's basic regulation, limited to dumping, and if they consider it appropriate to do so, can begin with the prospective examination and then, if they conclude that the change of circumstances which resulted in a reduction or elimination of dumping found at the end of the original investigation is not lasting, then they can refrain in the review procedure from precisely calculating the dumping margin. [*Chelyabinsk Electrometallurgical Integrated Plant OAO v. Council of the European Union* - Case T-169/12, decided on 28-4-2015, EU General Court (Second Chamber)]

CVD Investigation – 'Meaningful control' and 'significant distortion' of market

The United States Court of International Trade has remanded back to the International Trade Commission, a matter relating to CVD investigation on imports of Oil Country Tubular Goods from Turkey. The court was of the view that lower authority's analysis only supports a finding that two companies accounted for at least a "substantial portion" of the HRS market (an input for OCTG) in Turkey, and that the Turkish government had some sort of nebulous, but apparently perceivable, "meaningful control" over those companies. The court noted that from here, the analysis simply leaped, from

"substantial portion of the HRS market in Turkey" attributed to the Turkish government, to finding "significant" distortion of that market as a result of a policy to improve Turkey's balance of payments. It was hence held that Department of Commerce did not adequately explain its interpretation of the record that would support such leap, and neither do the defendant's recitation of "longstanding practice" in this regard. Turkish government had in the case claimed it does not hold any shares in the two companies and that there is no government proclamation, regulation, law or policy defining any government objectives with regard to the two companies. According to the Turkish government, the fact that the military pension fund OYAK is a majority shareholder in the two companies does not render them government authorities. [*Borusan Mannesmann Boru Sanayi* v. *United States* - Slip Op. 15 – 36, dated 22-4-2015, US CIT]

ADD sunset review - Cumulation of imports

The European Union's General Court (Fifth Chamber) has held that in an expiry review of anti-dumping measure, in order to determine the volume of imports being dumped, the authorities are entitled to use the likely volume of imports from exporting countries instead of the actual volume of imports during the specified period and to cumulate them in order to establish the likelihood of recurrence of injury. It was noted that the conditions set out in Article 3(4) of Regulation No. 1225/2009 — specifically that relating to the fact that the volume of imports from each country is not negligible — are not automatically applicable in the case of such a review, since the risk of recurrence of injury in such cases is determined through prospective analysis of dumped imports. The applicants had submitted that the Council had breached Article 3(4) of said Basic Regulation by cumulating imports from Russia and from Ukraine, even though imports from Russia were negligible, since they amounted to less than 1% of the EU market during the RIP.

Relying on a WTO panel report, the court in this regard also noted that Article 3.3 of the Anti-Dumping Agreement does not provide for a country-by-country analysis of the potential negative effects of volumes, their development and the prices of dumped imports as a prerequisite for a cumulative assessment of the effects of all dumped imports [*Volžskij Trubnyi Zavod OAO* v. *Council of the European Union* - Case T-432/12, decided on 30-4-2015, EU General Court (Fifth Chamber)]

News Nuggets

Anti dumping and fair competition

Perfect competition is far from practical and a large measure of business strategy, market penetration and marketing boils down to price wars. Whether anti-dumping sometimes dubbed as protectionism and anti-trust work in harmony towards maintaining fair competition are certain evergreen debates. The CJEU, recently, had an occasion to examine whether anti-competitive behaviour

by the domestic industry was a relevant factor in deciding whether the overseas supplier was in fact in fact dumping goods into the EU or the price difference which warranted imposition of anti-dumping duty (ADD) was merely a mirage of figures.

The exporter argued that the injury and causation findings of Regulation (EC) No 2320/97 imposing definitive ADD was not correct since at the time an investigation into the anti-competitive behaviour by some of the companies infringing Article 81(1) of the EC Treaty, should have been considered. Further after the decision on the anti-competitive activities was taken, the ADD was suspended by European Commission. The exporter therefore contended that this was sufficient proof that the injury which was established as having been caused by was attributable at least in part to the domestic industry itself.

Interestingly, while the CJEU opined that such factors 'other than those relating to imports' could be relevant, it held that the exporter did not have a valid case against the imposition of ADD. The CJEU held that it was for the party to prove that factors other than those relating to imports could have been so significant as to call into question the existence of a causal link between the harm suffered by Community industry and the dumped imports. Since on the date of the imposition the decision as such on anti-competitive conduct had not been taken, it could not be held as a 'known factor' which had to be duly considered by the EC while determining injury.