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Confidentiality in anti-dumping investigations: Supreme Court interprets Rule 7

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A key feature of anti-dumping investigations is the protection available to commercially sensitive information that interested parties provide to an investigating authority. The idea is that such sensitive information should remain in the safe hands of the authority and must not fall in the hands of opposing parties, who may gain commercial advantage from such information. However, this protection is available with some conditions. Rule 7 of the Anti-dumping Rules[1] ("AD Rules") provides that a party may claim confidentiality on information, and further, the conditions to be fulfilled when such a claim is made. Rule 7 has been borrowed in the AD Rules from Article 6.5 of the WTO Anti-dumping Agreement. Before we discuss Rule 7, let us look at the following situations that may arise in anti-dumping investigations:

Situation 1: In an anti-dumping investigation, the investigating authority uses the domestic industry's confidential data to arrive at the non-injurious price of the domestic industry. The authority decides to withhold the calculations of non-injurious price from the domestic industry, stating that the calculations could not be disclosed as they were confidential.

Situation 2: In an anti-dumping investigation, the investigating authority decides to use international price of raw materials to construct normal value for an exporter. The authority procures such international raw material price from a third party that has no interest in the anti-dumping investigation. The authority decides to treat such international raw material price confidential from the exporter.

Situation 3: The domestic industry files a confidential version and non-confidential version of an anti-dumping complaint with the investigating authority. The domestic industry claims confidentiality on its annual financial reports and does not provide them with the non-confidential version of the complaint. The domestic industry is a public limited company and listed on the national stock exchange. Despite protests by opposing parties, the authority accepts the confidentiality claim of the domestic industry on the annual financial reports. Annual financial reports of the domestic industry are available in the public domain and can be accessed from the website of the Registrar of Companies on payment.

To assess the legality of the authority's actions in the above situations, it is relevant

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

to look at the Supreme Court judgment in *Union of India* v. *Meghmani Organics Ltd.*[2] ("Meghmani"). Meghmani presented an opportunity to the Supreme Court to interpret Rule 7 of the AD Rules. The Supreme Court's various observations in Meghmani are summarised below:

i. *Confidentiality under Rule 7 is not something which must be automatically assumed.*

ii. *The parties that provide information to the authority must claim that such information is confidential, and the authority must be satisfied that the information is indeed confidential, and disclosure of this information to other parties will cause adverse effects to the party claiming confidentiality.*

iii. *The authority will then require the party who is claiming confidentiality to give a meaningful non-confidential summary of such information so that the other party can reasonably and meaningfully rebut such summarised information. This will also aid the other party to make an effective appeal later.*

iv. *If it is not possible to provide the non-confidential summary of the confidential information, the party concerned should give reasons as to why such confidential information could not be summarised in non-confidential manner, and the authority should be satisfied with the reasons.*

v. *If the party that provided the information did not claim confidentiality on the information, the authority on its own cannot hold that the information is confidential in nature.*

vi. *In cases where it is not possible to accept the claim of confidentiality, Rule 7 hardly leaves any option with the authority but to ignore such confidential information if it is of the view that the information is not confidential and still the party concerned does not agree to it being made public. In such a situation, the information cannot be made public but has to be simply ignored and treated as non est.*

vii. *The reasons or findings of the authority cannot be equated with the information supplied by a party claiming confidentiality in respect of such information. Rule 7 does not empower the authority to claim any confidentiality in respect of reasons for its finding given against a party.*

viii. *When the authority duly accepts confidentiality claim of a party providing information, the authority can take precautions in not disclosing such information. But the authority can adopt a sensible approach in indicating reasons on major issues so that other parties in general terms have the knowledge as to why their case or objection has not been accepted in*

[2] (2016) 10 SCC 28.

preference to a rival claim.

ix. *In the garb of unclaimed confidentiality, the authority cannot shirk from its responsibility to act fairly in its quasi-judicial role and refuse to indicate reasons for its findings.*

x. *When two competing public interests are involved, one is to supply all relevant information to the parties concerned and the other not to disclose information which is held to be confidential, it would be better to take an approach that is least restrictive of individual's rights.*

Now, let us revisit the three situations and see if the authority's hypothetical actions would confirm with the above Meghmani principles.

Situation 1: The authority's action is illegal. Calculations of non-injurious price are based on the confidential data provided by the domestic industry. Such data may be confidential, which means opposing parties do not have access to such data. But the authority cannot keep calculations based on such data confidential from the domestic industry, which had provided such data to the authority in the first place.

Situation 2: If the facts show that the third party, even though non-interested in the investigation, has claimed confidentiality on the international raw material price, it is to be seen if a non-confidential summary of such price was provided to the authority. In the absence of a non-confidential summary, it is to be seen that reasons for not providing a non-confidential summary were provided by the third party. If not, request for confidentiality must be rejected and the information is to be simply ignored. In a different scenario, if the third party has not claimed confidentiality on the international raw material price, the authority has no locus to treat this information as confidential on its own account.

Situation 3: The authority's action is illegal. Confidentiality claim on annual financial reports which are in public domain, that too of a listed public limited company, is unwarranted. The authority should not have allowed the confidentiality claim of the domestic industry. Further, the logic that opposing parties can easily access the annual financial reports of a listed public limited company from the website of the Registrar of Companies is no excuse to let patent illegality prevail in an anti-dumping investigation.

Meghmani has settled the law on Rule 7. The investigating authority, Directorate General of Anti-dumping & Allied Duties, will do well to follow the *Meghmani* principles. The author hopes that the case specific-officer specific approach to confidentiality issues followed in anti-dumping investigations is soon replaced by a consistent approach that confirms to the principles laid down by the Apex Court in the above discussed case.

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Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Acrylic Fibre	China, Belarus, Ukraine, European Union, Peru	F.No.14/50/2016-DGAD [Case No. OI-22/2017]	C19-4-2017	Anti-dumping investigation initiated
Aluminium Foil	China	23/2017-Cus. (ADD)	16-5-2017	Definitive anti-dumping duty imposed
Aluminium Radiators for use in used or on road vehicles and generator sets	China	20/2017-Cus. (ADD)	12-5-2017	Definitive ADD imposed
Amoxycillin (Amoxycillin Trihydrate)	China	21/2017-Cus. (ADD)	16-5-2017	Definitive anti-dumping duty imposed
Castings meant for Wind-operated electricity Generators / Windmills	China	F.No.14/28/2016-DGAD	17-4-2017	Time for completing investigation extended up to 30-7-2017
Caustic Soda	Iran, Saudi Arabia, USA	F.No.15/19/2015-DGAD	17-4-2017	Time for completing MTR investigation extended up to 21-7-2017
Ceramic Rollers	China	No.14/52/2016-DGAD [Case No. OI/26/2017]	19-4-2017	Anti-Dumping Investigation initiated
Ceramic Tableware and Kitchenware, excluding knives and toilet items	China	F. No. 14/05/2016-DGAD	4-5-2017	Provisional ADD recommended
Clear Float Glass	Pakistan	F.No.15/16/2015-DGAD	10-4-2017	New Shipper Review recommends ADD on imports from Tariq Glass Industries Ltd.
Clear Float Glass of nominal thickness	Iran	19/2017-Cus. (ADD)	12-5-2017	Definitive ADD imposed

Product	Country	Notification No.	Date of Notification	Remarks
Cold-Rolled flat products of alloy or non-alloy Steel	China, Japan, Korea RP or Ukraine	18/2017-Cus. (ADD)	12-5-2017	Definitive ADD imposed
Digital Offset Printing Plates	China	F.No.15/24/2016-DGAD [Case No-SSR-01/2017]	25-4-2017	ADD Sunset Review Investigation initiated
Fishing Net	Bangladesh, China	F.No.14/44/2016-DGAD [Case No. OI 23/2017]	31-3-2017	Anti-dumping investigation initiated
Glazed/Unglazed Porcelain/Vitrified tiles	China	No.14/14/2014-DGAD	8-4-2017	Definitive ADD recommended to be imposed
Hot rolled and cold rolled stainless steel flat products	China	F.No.354/56/2017-TRU	10-4-2017	Time for completion of CVD investigation extended till 11-7-2017
Hot-rolled flat products of alloy or non-alloy steel	China, Japan, Korea RP, Russia, Brazil or Indonesia	17/2017-Cus. (ADD)	11-5-2017	Definitive ADD imposed
Hydrogen Peroxide	Bangladesh, Taiwan, Korea RP, Pakistan, Thailand	F.No.14/03/2015-DGAD	11-4-2017	Definitive ADD recommended to be imposed
New/unused pneumatic radial tyres with or without tubes and/ or flap of tuber	China	F.No.354/66/2017-TRU	28-4-2017	Time for completion of ADD investigation extended till 2-8-2017
Partially Oriented Yarn (POY)	China	16/2017-Cus. (ADD) and F. No.07/01/2017-DGAD [Case No-SSR-07/2017]	9-5-2017 and 28-4-2017	ADD extended till 1-5-2018, consequent to initiation of sunset review
Pentaerythritol	China	F.No.15/01/2016-DGAD	12-5-2017	ADD sunset review recommends continuation of duty
Playing Cards	China	No.14/43/2016-DGAD [Case No. OI 21/2017]	30-3-2017	Anti-dumping investigation initiated

Product	Country	Notification No.	Date of Notification	Remarks
Polytetrafluoro-ethylene (PTFE)	Russia	22/2017-Cus. (ADD)	16-5-2017	ADD enhanced
Saturated Fatty Alcohols	Indonesia, Malaysia, Thailand and Saudi Arabia	F.No.14/51/2016-DGAD [Case No. OI/24/2017]	24-4-2017	Anti-Dumping Investigation initiated
Sodium Chlorate	Canada, China and EU	F.No.354/74/2017-TRU	8-5-2017	Time for completion of ADD investigation extended till 11-8-2017
Viscose Filament Yarn	China	F.No.15/16/2016-DGAD [Case No- SSR – 10/2017]	24-4-2017	ADD Sunset Review Investigation initiated

Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel	USA	A-533-873 [82 FR 22491]	16-5-2017	ADD - Initiation of Less-Than-Fair-Value Investigations
Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel	USA	C-533-874 [82 FR 22486]	16-5-2017	CVD investigation initiated
Oxalic Acid	European Union	2017/C 117/12	12-04-2017	ADD - Initiation of an expiry review
Sulfanilic Acid	USA	A-570-815 and C-533-807 [82 FR 21520]	9-5-2017	ADD and CVD continued after sunset review
Zinc Coated (Galvanised) Steel	Australia	Anti-Dumping Notice No. 2017/65	8-5-2017	ADD and CVD - Extension of Time Granted to issue Statement of Essential Facts (SEF) and Final Report in relation to an investigation. SEF expected by 31-5-2017

WTO News

Appellate Body upholds panel's findings in US methodologies for anti-dumping duty

The WTO Appellate Body has upheld the panel's findings in the case *"United States — Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China"* (DS471). It upheld the finding that China had not established that the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in the *OCTG, Coated Paper* and *Steel Cylinders* investigations. It also held that the Panel did not err in its interpretation of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement in finding that investigating authorities are not required to examine the reasons for the relevant differences in export prices, or whether those differences are unconnected to "targeted dumping", in order to assess whether export prices differ "significantly". Similarly, USA's determination of the relevant pattern on the basis of average prices, was also upheld by the Appellate Body. The Appellate Body however, in its report released on 11-5-2017, reversed the panel's finding in respect of Adverse Facts Available norms, used by the US authorities. It was held that AFA Norm has general and prospective application that may be challenged "as such" in WTO dispute settlement.

Chinese anti-dumping measures on cellulose pulp, not correct : WTO Panel

WTO has on 25-4-2017 issued the panel report in the case *"China – Anti-Dumping Measures on Imports of Cellulose Pulp from Canada"* (DS483). The Canadian challenge pertained to the injury determination conducted by MOFCOM, China. Canada challenged the failure on the part of MOFCOM to fully examine "other factors", such as (a) changes in cotton and viscose staple fibre prices; (b) domestic industry overexpansion, overproduction and inventory build-up; (c) non-dumped imports; and (d) shortage of cotton linter. The Panel accepted Canada's submissions with respect to all of the above, excluding shortage of cotton linter. Canada also raised some related arguments, such as:

(i) China failed to consider "absolute increase" in light of factual factors such as domestic demand, volume of domestic like product and non-dumped imports. This claim was rejected by the Panel.

(ii) China failed to explain the role of parallel price trends in the decline of the domestic like product prices. China's analysis in this regard was found to be inconsistent with WTO ADA.

(iii) Canada made certain consequential claims of violation of Article 1 ADA and Article VI GATT. The Panel upheld these claims.

The Panel report has not been adopted by the DSU and is open to appeal as of now.

Tuna dispute – Arbitrator determines level of nullification for Mexico

On 25 April, a WTO arbitrator issued a decision on the level of retaliation that Mexico

can request in its dispute with the United States over US "dolphin safe" labelling requirements for tuna products (DS381). The Arbitrator determined the level of nullification or impairment suffered by Mexico as a result of the 2013 Tuna Measure is USD 163.23 million per annum. The Arbitrator concluded that Mexico could proceed to request authorization from the DSB to suspend concessions or other obligations as indicated in document WT/DS381/29 up to a level not exceeding USD 163.23 million per annum. It may be noted that in the still-ongoing compliance proceedings, the Chair of the compliance panel has informed the DSB that, due to the complexity of the issues in dispute, the compliance panel is expected to issue its final report to the parties by mid-July 2017.

In another dispute involving US where arbitrator was appointed to determine "reasonable period of time", the arbitrator in its report dated 13th of April has determined 15 months as the time for adoption of panel and appellate body reports in the dispute *"United States — Anti-dumping and Countervailing Measures on large residential washers from Korea"* (DS 464). The time is set to expire on 26th of December, 2017.

EU poultry import quotas – Panel report adopted

On 19 April 2017, the WTO's Dispute Settlement Body (DSB) has adopted the panel report in *"European Union – Measures Affecting Tariff Concessions on Certain Poultry Meat Products"* (DS 492). The dispute pertained to the European Union's allocation of tariff rate quotas to Brazil and Thailand on imports of poultry meat products, prejudicial to the Chinese interests and the Panel Report held the EU measure to be inconsistent with WTO commitments. Now, the Panel Report has been adopted by the DSB with recommendations to the EU to bring its measures into conformity.

Panels established to review EU ADD methodologies and Indian steel Safeguard duty

The Dispute Settlement Body (DSB) has agreed to the establishment of two new dispute panels: one to review a complaint filed by China against the European Union's measures related to price comparison methodologies in anti-dumping investigations titled *European Union — Measures Related to Price Comparison Methodologies* (DS 516); and the second to review a complaint from Japan regarding India's safeguard measure on imports of iron and steel products titled *India — Certain Measures on Imports of Iron and Steel Products* (DS 518).

E-commerce can help to improve livelihoods and boost development: DG Azevêdo

The Director-General Roberto Azevêdo recently while addressing the first Ministerial Meeting of the "Friends of E-Commerce for Development" (Argentina, Chile, Colombia, Costa Rica, Kenya, Mexico, Nigeria, Pakistan, Sri Lanka and Uruguay) stated that many members have expressed their desire to open discussions on e-commerce, to ensure that it

boosts growth and development. He however noted that the primary challenge remains the lack of connectivity for over four billion of the world population, and that e-commerce must be a way to level the development gap, not widen it.

This follows the Meeting of the Council for Trade in Goods on April 6th where several Members called for pragmatic outcomes regarding e-commerce regulation in negotiations to be made in time for the 11th Ministerial Conference to be held in December, 2017 in Buenos Aires. China and Pakistan had circulated joint paper on e-commerce, and expressed delight at the echo of the development dimension in interventions by other Members.

Safeguard duty - WTO members voice concerns while Turkey launches investigation on tyres & toothbrushes, and Vietnam on mineral or chemical fertilisers

In a SCM Committee meeting held on April 24, Canada, Japan, Australia, Korea and Chinese Taipei continued voicing concerns regarding the frequent recourse to Safeguard investigations and imposition of Safeguard measures by the WTO members. They noted that the number of actions notified to the Committee appeared to be down from the previous meeting in October 2016, where 26 notifications of action were reviewed.

Meanwhile on April 12, Turkey has notified the WTO's Committee on Safeguards of its Safeguard investigation relating to imports of pneumatic tyres, initiated on 6th of April. It has also initiated Safeguard investigation on 22-4-2017 on imports of toothbrushes. Vietnam has initiated Safeguard investigation in respect of imports of mineral or chemical fertilizer on 12th of May, 2017.

Ratio Decidendi

Dumping margin calculation on imports from NME – Exclusion of certain products types in absence of matching type, is fatal

European Union's Court of Justice has annulled Council Implementing Regulation (EU) No 924/2012, dated 4-10-2012 amending Regulation (EC) No 91/2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, in respect of two specified exporters. The EU authorities had in this case, while comparing the weighted average normal value and the weighted average export prices, excluded the transactions relating to the product types under consideration exported by the Chinese exporting producers (NME) for which no matching type was produced and sold by the Indian producer. Consequently, the CJEU set aside the impugned decision of the General Court which had held that while calculating dumping margin, under Article 2(11) of the basic regulation, the authorities were justified in excluding certain export transactions from the calculation in absence of 'comparable

prices' as long as the calculation was made on the basis of a 'significant representation' of the product types under consideration.

The Court in this regard observed that Article 2(11) refers to 'all export transactions to the European Union', and that the authorities are required to establish, in line with definition of 'the product under consideration', an overall dumping margin for 'the product under consideration' as a whole. It also observed that there is nothing in Article 2(11) to allow calculation of margin on basis of 'significant representation' of product types under consideration. [*Changshu City Standard Parts Factory* v. *Council of the European Union* – Judgement dated 5-4-2017 in joined cases C 376/15 P and C 377/15 P, CJEU]

Sunset review of anti-dumping duty – Consideration of relevant factors

European Union's General Court of the Court of Justice has annulled the decision of the EU Council to terminate the anti-dumping sunset review without imposing measures, in a case involving imports of Polyethylene Terephthalate (PET) from India, Taiwan and Thailand. Analyzing various factors, the court was of the view that the Council made manifest errors of assessment and did not give adequate reasons in the contested decision for relying on certain positive economic indicators, in particular on price increases, while not mentioning certain negative factors relevant to the analysis.

It was noticed that volume of investment, production and sales in the EU industry and the tendency to lose market share were relevant factors in assessing market trends in the context of the prospective analysis which had to be carried out by the Council. Explanations put forth by the Council in this regard before the court were not considered noticing that since they did not appear in the contested decision, they cannot therefore be taken into account in the context of an analysis of their merits. Similarly, it was also held that Council's conclusions in respect of insignificant volume of imports from subject countries during relevant time, were vitiated by manifest errors of assessment. It was finally held that lack of deflection of considerable trade flows to the EU, as noted by the Council, does not by itself establishes that the likelihood of recurrence of injurious dumping has not been demonstrated. [*Committee of Polyethylene Terephthalate (PET) Manufacturers in Europe* v. *Council of the European Union* – Judgement dated 5-4-2017 in Case T-422/13, CJEU]

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