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Article

Respite for Indian domestic industry: “Negative” final findings of Designated Authority appealable

By Neeraj Chhabra

In an anti-dumping investigation, the Designated Authority may or may not recommend imposition of anti-dumping duties and where such recommendation is “positive”, the Ministry of Finance makes a policy decision regarding the same and issues customs notification where duty is to be imposed. However, in case of “negative” findings by the Designated Authority, no further action is required from the Ministry of Finance. The law laid down by Customs, Excise, Service Tax Appellate Tribunal (“CESTAT”) in the case of *M/s Panasonic Energy India Co. Ltd., v. Union of India* (2017), left the domestic industry remediless in the case of a negative determination. In such cases, the domestic industry was left with no option but to approach the courts under writ jurisdiction.

Section 9C of the Customs Tariff Act, 1975 (“the Act”) provides that an appeal against the order of determination, regarding the existence, degree and effect of any subsidy or dumping in relation to import of any article shall lie before the Appellate Tribunal constituted under Section 129 of the Customs Act, 1962 i.e. CESTAT.

The Supreme Court, in *Saurashtra Chemicals Limited v. Union of India & Ors.* (2000), held that an order of the Designated Authority recommending imposition of duties was “recommendatory” and an appeal lies against the “order of determination” which is to be made by Central Government through a customs notification issued by the Ministry of

Finance. Owing to this judgment, CESTAT in *Panasonic Energy* (Supra) refused to entertain appeals in cases where the Designated Authority did not recommend any duties and no customs notification was issued by the Central Government.

The question as to whether the appellate remedy under Section 9C of the Act can be invoked against the “negative findings” of the Designated Authority was considered by High Court of Delhi recently in the case of *Jindal Poly Film Ltd. v. Designated Authority & Anr.* [W.P. (C) No. 8202/2017]. The High Court in this case has held that in cases of “negative” final findings of the Designated Authority, parties shall have the right to approach the Appellate Tribunal i.e. CESTAT.

The key observations of the High Court are as under:

- i. The Designated Authority is not different from the Central Government but part and parcel of the Central Government. Designated Authority acts for and on behalf of the Central Government.
- ii. A quasi-judicial determination is made by the Designated Authority, which gives and submits its final finding report to the Central Government. The said report is binding and becomes final for the Central Government in case of a negative determination deciding not to recommend imposition of anti-dumping duty. Therefore, the order of the Designated

Authority is final and no further examination is mandated and required by the Central Government in case of a negative determination.

- iii. Section 9C of the Act does not state and provide that an appeal is maintainable against customs notification. However, an appeal would lie against the “order of determination” regarding existence, degree and effect of dumping. In case of negative opinion or termination of investigation, the order passed is the “order of determination”, as it is passed by the Central Government and no further “determination” is required and necessary. Therefore, in such cases, the determination made by Designated Authority becomes the determinative order which is appealable before CESTAT.

The decision of the High Court is a welcome respite for the domestic industry for the following reasons:

- i. The judgment provides the domestic industry with a suitable “appellate” remedy rather than a highly limited “writ” remedy.
- ii. It ensures that the appeals arising from “positive” recommendations and “negative” recommendations are treated at par and follow the same appellate procedure.
- iii. It ensures that the domestic industry aggrieved by the “negative” findings of the Designated Authority would be able to approach the CESTAT’s Anti-Dumping Bench to get the matters adjudicated. The Anti-Dumping Bench has three members - the President, one technical member and one judicial member. This ensures that the litigants have access to a technical forum with specific expertise in trade remedy matters.

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Trade Remedy News

Trade Remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
1, 1, 1, 2-Tetrafluoroethene or R-134a	China	47/2018-Customs (ADD)	14-09-2018	Notification directing provisional assessment for specific entities rescinded
Continuous cast copper wire rods	Indonesia, Malaysia, Thailand, Vietnam	F. No. 6/17/2018-DGTR	3-10-2018	CVD – Time for filing questionnaire response extended till 9-11-2018

Product	Country	Notification No.	Date of Notification	Remarks
Ductile Iron Pipes	China	51/2018-Customs (ADD)	09-10-2018	ADD extended for 6 months up to 9 April, 2019 in the interim of Sunset Review Investigation
Flax yarn below 70 Lea count	China	53/2018-Customs (ADD)	18-10-2018	Definitive anti-dumping duty imposed
Fluroelastomers	China	F.No. 6/21/2018-DGAD	3-10-2018	CVD – Time for filing questionnaire response extended till 31-10-2018
High Speed Steel	Brazil, China, Germany	F.No. 6 / 23 / 2018-DGTR	01-10-2018	Extension of time for the submission of the questionnaire response till October 22, 2018
Linear Alkyl Benzene	Iran, Qatar, China	49/2018-Customs (ADD)	25-09-2018	Amendment to the duty table published vide Notification No. 12/2017-Customs (ADD) - Change of Name of Producer/ Exporter
Nylon Filament Yarn	European Union, Vietnam	50/2018-Customs (ADD)	05-10-2018	Definitive anti-dumping duty imposed
Phthalic Anhydride	Korea RP, Taiwan, Israel	52/2018-Customs (ADD)	15-10-2018	Anti-Dumping duty rescinded
Saturated Fatty Alcohols	Indonesia, Malaysia, Thailand	48/2018-Customs (ADD)	25-09-2018	Amendment to the duty table published vide Notification No. 28/2018-Customs (ADD)
Straight Length Bars and Rods of Alloy Steel	China	54/2018-Customs (ADD)	18-10-2018	Definitive anti-dumping duty imposed
Sun/dust control film	China, Chinese Taipei, Hong Kong, Korea	F.No. 6 / 44 / 2017-DGAD	28-9-2018	Final Findings issued without recommendation for imposition of anti-dumping duties

Trade Remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Carbon steel welded pipe	Canada	Expiry Review No. RR-2017-005	15-10-2018	ADD – Affirmative finding in sunset review
Frozen Warmwater Shrimp	United States of America	83 FR 49909 [A-533-840]	03-10- 2018	Notice of Final Results of Antidumping Duty Changed Circumstances Review
Lined Paper Products	United States of America	83 FR 50886 [A-533-843]	10-10-2018	Preliminary Results of ADD Administrative Review and Preliminary Determination of No Shipments; 2016-2017
Lined Paper Products	United States of America	83 FR 50896 [C-533-844]	10-10-2018	Preliminary Results of Countervailing Duty Administrative Review; Calendar Year 2016
Polyethylene Terephthalate (PET)	European Union	Commission Implementing Regulation (EU) 2018/1468 [Case R664]	02-10-2018	Amendment to Council Implementing Regulation (EU) No 461/2013 imposing a definitive CVD
Polytetrafluoroethylene Resin	United States of America	83 FR 48594 [A-533-879]	26-09-2018	Final Affirmative Determination of Sales at Less Than Fair Value
Stainless Steel Bar	United States of America	83 FR 49910 [A-533-810]	3-10-2018	Anti-dumping duty Order continued after affirmative sunset review
Stainless Steel Flanges	United States of America	83 FR 50639 [A-533-877]	09-10-2018	Antidumping Duty Order issued
Stainless Steel Flanges	United States of America	83 FR 50336 [C-533-878]	05-10- 2018	Countervailing Duty Order issued
Stainless Steel Wires	European Union	Commission Implementing Decision (EU) 2018/1306 [AD591a]	28-09-2018	Termination of the anti-dumping proceeding



WTO News

Safeguard investigations around the world

Safeguard investigations initiated around the world as notified recently to the WTO's Committee on Safeguards are

- Investigation on imports of certain **steel products** by Canada – Notified to WTO on 12-10-2018.
- Investigation on imports of **aluminium foil** by Indonesia – Notified to WTO on 11-10-2018.
- Investigation on imports of **pasta and blanket** by Madagascar – Notified to WTO on 8-10-2018.
- Investigation on imports of **cement** by Philippines – Notified to WTO on 19-9-2018.
- Investigation on imports of certain **flat-rolled steel products** by Eurasian Economic Union (Kyrgyz Republic, Russian Federation, Kazakhstan and Armenia) – Notified to WTO from 4th till 10th September 2018.

Steel Pipes – Ukraine disputes anti-dumping duties imposed by Armenia and Kyrgyz Republic

Ukraine has, on 17th of October, sought consultations with Armenia and Kyrgyz Republic, both part of the Eurasian Economic Union, with respect to certain anti-dumping measures taken by the two countries against import of steel pipes from Ukraine. According to the document circulated in WTO on 22nd of October, the results of sunset review were applied on unjustified level which exceeded the established margin of dumping. Ukraine pleads that the measures violate Article 9.1 of the Anti-dumping Agreement because the anti-dumping duties exceed the

adequate level that could remove injury to the domestic industry. Similarly, violation of Articles 9.3, 11.1, 11.2, 11.4 and 12.2.2 of the said Agreement have also been alleged.

Sugar – Brazil disputes certain Chinese measures

Brazil has sought consultations with China on 16th of October on certain measures put in place by China restricting import of sugar from Brazil. The measures disputed are safeguard measures on imports of sugar, tariff-rate quota for sugar and automatic licensing scheme for import of out of quota sugar. China's safeguard measure, as per the document circulated on 22nd of October, appears to be inconsistent with China's obligations under the GATT 1994 and the Agreement on Safeguards, Paragraph 1.2 of Part I of the Accession Protocol, Article X:1 of the GATT 1994, etc.

Intellectual property rights protection - Qatar requests consultations with Saudi Arabia

On October 4, the WTO circulated to its members, a request for consultation with Saudi Arabia filed by Qatar. The request pertains to certain Saudi measures concerning intellectual property rights owned by Qatari nationals. As per the communication dated 1-10-2018 by the delegation of Qatar, Saudi Arabia has failed to protect intellectual property rights, held (or applied for) by Qatari entities or Qatari individuals. The consultation request states that there is violation of Article 3.1, 4, 9, 14.3, 16.1, 41.1, 42 and 61 of the TRIPS Agreement.

US safeguards on solar cells and washers, and Canadian wine measures – DSB Panels established

Amidst the stand adopted by the United States against appointment of new members in the Appellate Body, the DSB on September 26, at a meeting, agreed to requests from Korea for establishment of two panels to determine whether safeguards imposed by the United States on import of solar cells and large residential washers are compatible with WTO rules. India has reserved its third party rights for participation in both the disputes. The DSB also agreed to a request from Australia for a panel to rule on Canada's measures affecting the sale of wine.

Colombian measures on textiles, apparel, footwear – Compliance panel report issued

On 5th of October the WTO circulated compliance reports in the dispute “*Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear — Recourse to Article 21.5 of the DSU by Panama and Recourse to Article 21.5 of*

the DSU by Colombia” (DS461). The dispute originally arose out of certain compound tariffs maintained by Colombia and the compliance proceedings were concerned with certain measures adopted by Colombia after the adoption of the DSB's rulings and recommendations in the original proceeding.

In its challenge, Panama claimed that along with the introduction of an *ad valorem* tariff within bound limits, Colombia had also introduced certain other measures such as the specific bond and the special import regime, both provided for in Decree No. 1745/2016, applicable to import of apparel and footwear priced at or below the thresholds established by Colombia. These measures, Panama argued, were inconsistent with Article XI:1 of the GATT 1994, provisions of Article X:3(a) of the GATT 1994 and certain provisions of the Customs Valuation Agreement. The Compliance Panel, after assessing the claims brought forward by Panama determined that Colombia had implemented the recommendations and rulings of the DSB to bring its measure into conformity with its obligations under the WTO Agreement.



India Customs & Trade Policy Update

Customs duty increased on 19 products to narrow CAD

India has increased basic customs duty on import of 19 products with effect from 27-9-2018. This increase, according to the Finance Ministry Press Release, aims at narrowing the current account deficit. Products covered include air conditioners, household refrigerators, washing machines less than 10 Kg, compressor for air conditioners and refrigerators, speakers, footwears, radial car tyres, certain plastic articles, travel bags, ATF and certain diamonds and articles of jewellery.

Notification Nos. 67 to 70/2018-Cus., were issued on 26-9-2018 for this purpose.

Retaliatory measures against USA postponed again

India has again postponed implementation of its retaliatory tariff measures against the USA which are aimed to counter USA's certain measures on import of steel and aluminium from India. The higher basic customs duty (BCD) in respect of imports of commodities such as almonds, fresh apples and other diagnostic reagents, etc., will

now be effective from 2nd of November 2018. It may be noted that the higher duty was initially scheduled to come into force from 4-8-2018 but was postponed to 18-9-2018. Notification No. 62/2018-Customs, dated 17-9-2018 has been issued for this purpose.

EOU, Advance authorisation and EPCG imports - IGST and Cess exemption extended

Ministry of Finance has again extended the exemption from Integrated GST and Compensation Cess in respect of imports under

Advance Authorisations, Special Advance Authorisations and EPCG authorisations. The exemption would now be eligible till 31st of March 2019 instead of 1st of October 2018. Such exemption has also been provided in case of imports by Export Oriented Units (EOUs). Notification Nos. 65/2018 and 66/2018-Cus. have been issued making amendments in Notification Nos. 52/2003-Cus., 16, 18, 20 and 22/2015-Cus., and 45/2016-Cus. It may be noted that DGFT has also amended Foreign Trade Policy for this purpose.

News Nuggets

WCO holds 62nd Session of HS Committee, for classification

WCO Harmonized System Committee, held its 62nd Session from 17 to 28 September 2018. It was attended by more than 170 participants from 85 contracting parties. The HS Committee took 43 classification decisions relating to products, including a novel tobacco product, several petroleum products and a quadcopter. It also adopted 3 sets of amendments to current Explanatory Notes and approved 21 new Classification Opinions. The Committee also provisionally adopted 16 sets of amendments to the Nomenclature and 2 sets of amendments to the future Explanatory Notes.

Modernisation of WTO – EU proposes some ideas

Observing that world has changed while WTO has not, EU on 18-9-2018 released a concept paper for modernisation of WTO. Ideas relate to 3 key areas - updating rule book on international trade to capture present economy, strengthening monitoring role of WTO and overcoming deadlock on dispute settlement system. Proposals aim at disciplining use of industrial subsidies and activities of state-owned enterprises and establishing new rules to address barriers to services and investment. Special and differential treatment in future agreements is also discussed.

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