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RTI Act & disclosure of information in Anti-dumping investigations

By **T D Satish**

Access to information is a cornerstone in any administrative or quasi-judicial proceeding and non-availability of the relied upon documents to the affected parties have been condemned for long by the highest Court of this country.

Designated Authority is a quasi-judicial authority, which conducts anti-dumping investigations in India, based on evidences gathered by it during the course of the investigation. Being a quasi-judicial authority , it is obligated to follow the principles of natural justice, which inter-alia, includes making available the relied upon information. Not making the same available to affected parties may render the order passed by it as void, being in violation of the principles of natural justice.

In an antidumping investigation, the disclosure of information by the Designated Authority is regulated to a large extent by Rule 6(7) as well as Rule 7 of the AD Rules. Rule 6(7) provides that the Designated Authority shall make available the evidence presented to it by one interested party to the other interested parties, participating in the investigation. This rule, however, seems restrictive in the sense that it relates only to such evidence, which are provided by interested parties, who are participating in the investigation. Thus, an interested party may find it difficult to get information obtained by the Designated Authority from a third party, though there is nothing confidential about the same. Rule 7(1) on the other hand allows Designated Authority to treat certain information provided by the parties as confidential subject to fulfillment of conditions prescribed. Rule 7(2) further provides that Designated Authority may ask the party submitting confidential information to submit non-confidential summary and if such information is not amenable to summarization, then a statement of reasons for claiming confidentiality may be filed.

Hon'ble Supreme Court has held in the case of *Reliance Industries* vs *the Designated Authority* that Designated Authority does not have the right to claim confidentiality on its own volition and unless the party claims confidentiality. It has also been made clear by the Hon'ble Supreme Court that where confidentiality has been claimed, party has to provide a non-confidential summary or a statement of reason for claiming confidentiality, as the case may be, since not making the relevant material available handicaps other side in filing an effective appeal.

Though Hon'ble Supreme Court has had a chance to interpret Rule 7, the debate still goes on in anti-dumping investigations as to who can seek information from the Designated Authority and whether Designated Authority can refuse to share such information which has been

obtained from a third party. If the information provided by or obtained from the third party contains no confidential information, whether the Designated Authority would be compelled to make available such information to the interested parties is a question for which there can be only one answer. The answer is yes and the authority shall share such information to facilitate transparency in the investigation and to protect the rights of interested parties who may be adversely affected by the use of such information. Whether the law mandates the same positive answer needs to be considered in the light of the various provisions. The information in question may contain both business sensitive information as well as non-sensitive information, which can easily be shared. Whether in such cases, Designated Authority may provide such information in a redacted form (i.e. authority will prepare and make available a non-confidential version that gives the gist of the information obtained confidentially) is a question. AD Rules to not have a direct answer.

So, should a party interested in such information be at the mercy of the Designated Authority's discretionary power and remain confined to the boundary walls of AD Rules?

One need not venture too far to find an answer. The Right to Information Act 2005 (Hereinafter "RTI Act") may perhaps answer a few of the problems indicated above if the same is pressed into service by any party seeking information from the Designated Authority.

At the outset, a question may arise that since a specific law and provision has been enacted in the form of AD Rules to regulate anti-dumping investigations, whether RTI Act will still be applicable?

We may find an answer in Section 22 of the RTI Act, which provides that the provisions of this Act shall have overriding effect over any other law for the time being in force or in any instrument having effect by virtue of any law other than the RTI Act. Thus, where a party has applied for information under the RTI Act and if such information is available for disclosure and is required to be provided by a public authority, then in such a case, Rule 7 or any other provision of AD Rules may not protect the Designated Authority. One needs to keep in mind that both the laws provide a mechanism for obtaining information and hence, a party's request will be governed by that law, under which such party has sought information.

Assuming an application is filed before the Designated Authority under Section 6 of the RTI Act, let us apply the provisions of RTI Act and see if the above lingering questions arising out of anti-dumping proceedings can be answered independently by the RTI Act.

Whether anyone can seek information from Designated Authority or only the interested parties are allowed to seek information?

While Section 3 provides that all citizens have the right to information, Section 6 provides that a person, desirous of obtaining

information may make a request in writing in the prescribed mode and manner. Thus, if application is made in terms of RTI Act, then it is immaterial whether the party is an interested party to the investigation or has notified its interest to the Designated Authority. Further, though Section 3 uses the word "citizen", Section 6 provides that "a person" may make a request. Interpretation of both the provisions seems to suggest that Section 6 is wider in its ambit than Section 3 . Thus, a bare reading suggests that though an Indian party can claim to have a right to information, an exporter based out of India, may also file an application under Section 6 but not seek information as a right.

Whether despite being a public authority, Designated Authority can keep relied upon information as confidential?

Designated Authority constitutes a public authority in terms of Section 2(h) and thus a person is entitled to seek information from Designated Authority. However, there may be two impediments – Section 8 and Section11.

Among other things, Section 8(1)(d) provides that there is no obligation to disclose, *inter-alia*, information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information.

Section 11 relates to third party information. The section covers information that relates to or has been supplied by a third party and has been treated as confidential by that third party. In such cases, Section 11 requires that such third party should be given notice and time period to respond. Any submission made by such third parties shall be kept in view while taking a decision about disclosure of the information in question.

It is interesting to note that while Section 8(1)(d) does give a wide scope to public authority to treat information such as commercial confidence, trade secrets or intellectual property, there are two conditions which need to be taken care of by the public authority-

1) Would the disclosure harm the competitive position of a third party? and;

2) The decision to treat information as confidential or not has to be taken by 'competent authority'.

'Competent Authority' has been defined under Section 2(e) to mean – (a) speaker in case of Lok Sabha or Legislative Assembly in case of State or Union Territory and Chairman in case of Rajya Sabha or Legislative Council in case of States; (b) Chief Justice of India in case of Supreme Court; (c) Chief Justice of High Court in case of High Court, (d) the President or the Governer, as the case may be, in case of other authorities established or constituted by or under the Constitution and (e) administrator appointed under Article 239 of the Constitution, i.e., in regards to Union Territories.

Applying the above definition, it remains to be seen as to who will be the 'competent authority' where public authority is Designated Authority and it will be interesting to see how this provision gets applied.

Resultantly, unless public authority is able to show that disclosure would harm the competitive position of a third party concerned, the information would have to be disclosed. Even if the disclosure would harm the competitive position of the third party, but if larger public interest warrants disclosure of information, the same may be disclosed. The competent authority has to be satisfied as to the harm to the competitive position and/or the larger public interest while taking a decision regarding disclosure of information.

As regards Section 11, it relates to third party information and it is that third party alone, which can oppose the disclosure of information. Public Authority cannot decide the issue on its own.

Thus, it seems that where an application is made by any person, Designated Authority will have to disclose the information, if Section 8 and Section 11 are not attracted. Such a person need not be an interested party to the investigation conducted by Designated Authority.

Can the confidential information be severed into two parts – redaction of confidential information and disclosure of rest of the information?

Section 10(1) gives a direct answer regarding severability of information. Section 10 reads as follows:

"10(1). Where a request for access to information is rejected on the ground that it is in relation to information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information."

This section provides that where a request for access to information is rejected on the ground that it is in relation to information which is exempt from disclosure, then, notwithstanding anything contained in the Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure and can reasonably be severed from any part that contains exempt information.

Thus, Section 10(1) seems to a very useful provision insofar as those information are concerned, which contain both confidential and non-confidential information.

It is also relevant to note that RTI Act has specifically obligated the public authority to provide reasons for its administrative or quasi-judicial decisions to the affected persons in terms of Section 4(1)(c) of the Act.

To conclude, with RTI Act coming into picture, a quasi-judicial authority may find it increasingly difficult to withhold publicly available information from the parties. As the

preamble of RTI Act says, the purpose of the Act is to set out a practical regime of right to information to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority.

In short, apart from in-built provisions under AD Rules and the principles of natural justice coming to play, RTI Act seems to be an additional tool in the hands of the affected parties to ensure transparency and accountability in the functioning of Designated Authority.

[The author is a Principal Associate, International Trade Practice, Lakshmikumaran & Sridharan, Delhi]

Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
2-Ethyl Hexanol	EU, Indonesia, Korea R.P., Malaysia, Saudi Arabia, Chinese Taipei and USA	F. No. 14/24/2014 - DGAD	18-2-2016	Anti-dumping duty recommended for countries other than Saudi Arabia
Barium Carbonate	China	F. No. 15/27/2014 - DGAD	23-2-2016	Anti-dumping duty recommended to be continued
Castings for wind operated electricity generators/ Windmills	China	F. No. 14/28/2013 - DGAD	1-2-2016 and 4-3-2016	Anti-dumping investigation initiated and date for submission of questionnaire, extended
Caustic Soda	Iran, Saudi Arabia and USA	F. No. 15/19/2015 -DGAD	4-3-2016	ADD mid-term review - Date for submission of Questionnaire Responses extended
Cold Rolled Flat Products of Stainless Steel	China PR, Korea, EU, South Africa, Taiwan, Thailand and USA	F. No. 14/1/2014 - DGAD	19-2-2016	Anti-circumvention investigation initiated
Coumarin	China	F. No. 15/26/2014 - DGAD	2-3-2016	Anti-dumping duty recommended to be continued
Diclofenac Sodium	China	F. No. 14/22/2014 - DGAD	17-2-2016	Anti-circumvention investigation initiated

Product	Country	Notification No.	Date of Notification	Remarks
Flexible Slabstock Polyol	Thailand	F. No. 14/34/2015 - DGAD	24-2-2016	Anti-dumping investigation initiated
Methyl Acetoacetate	USA and China PR	F. No. 14/07/2014 - DGAD	2-3-2016	ADD investigation extended till 6-4-2016
Normal Butanol	EU, Malaysia, Singapore, South Africa and USA	F. No. 14/4/2013 - DGAD	19-2-2016	Anti-dumping duty recommended
Phenol	European Union, Singapore and Korea RP	6/2016-Cus. (ADD)	8-3-2016	Definitive anti-dumping duty imposed
Polypropylene	Singapore	7/2016-Cus. (ADD)	8-3-2016	Anti-dumping duty continued
SDH Transmission Equipment	China PR and Israel	F. No. 15/20/2014 - DGAD	5-2-2016	Anti-dumping duty recommended to be continued

Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Cold-Rolled Steel Flat Products	USA	81 FR 11741 [A-533-865]	7-3-2016	ADD – Affirmative Preliminary Determination of Sales at Less Than Fair Value
Hollow Structural Sections	Australia	2016/18	22-2-2016	Preliminary determination affirms W. Avg. dumping margin from India at 13.7%
Lined Paper Products	USA	[A-533-843] 81 FR 5707	3-2-2016	Anti-dumping administrative review 2014-15 partially rescinded
		[A-533-843] 81FR 5986	4-2-2016	Anti-dumping margin determined pursuant to Administrative Review 2013-14
		[C-533-844] 81 FR 7082	10-2-2016	CVD Administrative Review 2014 partially rescinded

Product	Country	Notification No.	Date of Notification	Remarks
New Pneumatic Off-the-Road Tires	USA	[C-533-870] 81 FR 7067	10-02-2016	CVD investigation initiated
		[A-533-869] 81 FR 7073	10-02-2016	Anti-dumping investigation initiated
Polyethylene Terephthalate Film, Sheet, and Strip	USA	[A-533-824] 81 FR 7750	16-2-2016	Anti-dumping margin determined pursuant to Administrative Review 2013-14
		[C-533-825] 81 FR 7753		Preliminary Countervailable subsidy rate determined pursuant to CVD Administrative Review 2013
Silico-manganese	EU	Commission Implementing decision (EU) 2016/299	2-3-2016	Anti-dumping proceedings terminated
Welded Stainless Pressure Pipe	USA	81 FR 11179 [A-533-867]	3-3-2016	ADD investigation – Preliminary determination postponed

WTO News

India's domestic content requirements for solar products violate GATT provisions

On 24 February 2016, the WTO issued the panel report in the case brought by the United States against India on certain measures relating to domestic content requirements (DCR measures) under the Jawaharlal Nehru National Solar Mission for solar cells and solar modules. The claims brought by the United States related to measures imposed by India in the initial phases of its ongoing National Solar Mission. The Panel has found that India failed to demonstrate that the challenged measures are justified under Articles XX(d) and (j) of the GATT 1994. It was also found that the measures do accord 'less favourable treatment' to imports within the meaning of Article III:4 of the GATT 1994 and are inconsistent with Article 2.1 of the TRIMs Agreement, and not covered by the government procurement derogation in Article III:8(a) of the GATT 1994. It may be noted that request for consultations was made in 2013 and Brazil, Canada, China, European Union, Japan, Korea, Malaysia, Norway, Russia, Turkey, Ecuador, Saudi Arabia and Chinese Taipei participated in the

dispute as third parties.

Meanwhile, India has disputed USA's non-immigrant temporary working visa fees. The fee was hiked (nearly doubled) last year and was under severe criticism from Indian IT companies who depend largely on Indian talent for their businesses in USA (DS503). According to some reports, India considers that the treatment accorded to juridical persons of India with a commercial presence in the US under GATS Mode 3 was less favourable than that accorded to juridical persons of the US engaged in providing similar services.

Safeguard Investigation on Structural Hot Rolled H-Beam with Alloy, initiated by Thailand

On 4 February 2016, Thailand has launched a Safeguard investigation on structural hot rolled H-Beam with alloy. The product concerned is classifiable in the Thai Customs Tariff Code at subheadings: 7228.70.10000 and 7228.70.90000. According to the document G/SG/N/6/THA/5 communicated by Thailand, import volumes of the product showed increase in absolute terms from 10 tons in 2010 to 2,180 tons in 2012, to 3,376 tons in 2013 and to 35,506 tons in 2014.

Statutory Update

New Safeguard Rules notified for imports from ASEAN

Indian Ministry of Finance has notified new set of Rules namely, India-ASEAN Trade in Goods Agreement (Safeguard Measures) Rules, 2016 to counter increase in imports from the member States of the Association of Southeast Asian Nations (ASEAN). The Director General (Safeguard) has been empowered to investigate the existence of serious injury or threat of serious injury to the domestic industry as a consequence of increased imports of a good into India in terms of the Trade Agreement. Notification No. 37/2016-Cus. (N.T.), dated 4-3-2016 has been issued in this regard.

Ratio Decidendi

ADD/CVD – Scope of the product covered – Exclusion to sub-assemblies

Deliberating on the question as to whether complete curtain wall, unitized and imported in phases pursuant to a sales contract, is within the scope of the anti-dumping and countervailing duty orders relating to aluminium extrusions, the United States Court of International Trade (USCIT) set aside the Department of Commerce Order denying exclusion to the product concerned. The AD&CVD Orders provided exclusion to 'finished goods' that contain aluminium extrusions and are imported 'unassembled in a 'finished goods kit', and to sub-assemblies (partially assembled merchandise), from the scope of the order. Remanding the matter back to the Department of Commerce (DOC), the court observed that

DOC's reliance as to whether all the parts for the complete product are present at the time of importation, fails to account for the exclusion of sub-assemblies. The department had declined to consider the concerned goods under sub-assemblies, observing that curtain wall units have no identity of their own other than as a part of a curtain wall. The Court however rejected the view and the contention that sub-assembly is a 'unique subsidiary component of a larger finished product'. It was also held that parts for curtain walls are included within the scope only when they otherwise meet the definition of aluminium extrusions. [*Shenyang Yuanda Aluminium Industry Engineering Co.* v. *United States* - Slip Op. 16-11, dated 9-2-2016, US CIT]

WTO Anti-Dumping Agreement when cannot be relied upon

The Court of Justice of the European Union has held that WTO Anti-Dumping Agreement cannot be relied upon to contest the legality of the definitive regulation. The Court in this regard relied upon earlier judgement which held that though according to the basic regulation, the language of the WTO Anti-Dumping Agreement should be brought into EU legislation 'as far as possible', there was no intention of transposing each of the WTO provisions in the regulation. Reliance on the two DSB panel reports was also rejected by the Court in this regard holding that the EU judicature cannot review the legality or validity of EU measures in the light of the WTO rules as long as the reasonable period granted to the EU for complying with rulings and recommendations of the DSB, finding non-compliance with those rules, has not expired. It was also held that the mere fact that the period has expired does not mean that EU has exhausted the possibilities under that dispute settlement system of finding a solution to the dispute between it and other parties, and hence there was a need to review the legality or validity of the EU measures concerned in the light of the WTO rules. The Court observed that one of the DSB report [*European Union — Anti-Dumping Measures on Certain Footwear from China (WT/DS405/R)*], made no specific recommendation relating to the regulations in dispute. It was also held that there was nothing to hold that the EU legislature intended to assume a particular obligation as regards the regulations in dispute following *footwear* report or the DSB report in *'European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (WT/DS397/R)*. The regulation in the dispute was Council Regulation (EC) No 1472/2006 imposing a definitive anti-dumping duty on imports of certain footwear with uppers of leather originating in China and Vietnam. [*C&J Clark International Ltd.* v. *Commissioners for Her Majesty's Revenue & Customs* – Judgement dated 4-2-2016 in joined cases C-659/13 and C-34/14]

News Nuggets

The Economic Survey on India's participation in FTAs

As per the Economic Survey for 2015 - 2016 released on 26-2-2016, India should undertake a review of its FTAs considering their impact on its trade. Based on various studies, the Survey records that India may not have made the most effective use of the trade agreements to increase its exports and it has to grapple with distance costs which is a huge barrier to trade. Overall effect on trade of an FTA is positive and statistically significant though increased trade has been more on the import than export side. It is suggested that India must continue to participate in PTAs while also strengthening its ability to respond with WTO-consistent measures such as anti-dumping and conventional duties and safeguard measures. On regional trade agreements like the TPP, the Survey advances a view that while they are broadly supportive of the WTO process, they tend to discriminate against non-members and India may lose out both in terms of exports as well as being an investment destination if it is not part of the TPP. Some of India's concerns as regards the TPP which imposes higher standards for goods and services trade, more stringent IPR, labour and environment protection standards are; import competition, role of socially owned enterprises, definite commitment on government procurement, rise in labour costs to comply with the labour standards besides harming the market for generic drugs.

EU and Canada move towards Dispute Settlement Tribunal

After the proposal to establish a court to strengthen the ISDS (Investor State dispute Settlement) mechanism was put forth during the EU-USA negotiations on trade, there was demand for a similar arrangement under the EU-Canada Comprehensive Economic and Trade Agreement (CETA) which had already been finalised. As per the European Commission's press release on 29-2-2016, it has been decided to include a new approach on investment protection and investment dispute settlement in the CETA. Both parties have agreed to establish permanent Tribunal of fifteen Members which will be competent to hear claims for violation of the investment protection standards established in the agreement. The tribunal will have five members each from EU and Canada and five from other countries. The members will have demonstrated expertise in public international law. A division of three members will hear a particular case. An Appellate Tribunal will also be established to review awards rendered.

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

B-6/10, Safdarjung Enclave
New Delhi - 110 029
Phone : +91-11-4129 9811
E-mail : 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

CHENNAI
2, Wallace Garden,
2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : 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

HYDERABAD
'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church, Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail : 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

PUNE
607-609, Nucleus, 1 Church Road,
Camp, Pune – 411 001. Maharashtra
Phone : +91-20-6680 1900
E-mail : lspune@lakshmisri.com

KOLKATA
2nd Floor, Kanak Building
41, Chowringhee Road, Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH
1st Floor, SCO No. 59, Sector 26,
Chandigarh - 160026
Phone : +91-172-4921700
E-mail : lschd@lakshmisri.com

GURGAON
OS2 & OS3, 5th floor,
Corporate Office Tower,
Ambience Island, Sector 25-A,
Gurgaon- 122001
Phone: +91- 0124 – 477 1300
Email: lsgurgaon@lakshmisri.com

EUROPE
Lakshmikumaran & Sridharan SARL
35-37, Avenue Giuseppe Motta, 1202 Geneva
Phone : +41-22-919-04-30
Fax: +41-22-919-04-31
E-mail : lsgeneva@lakshmisri.com