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Hearing in anti-dumping investigation – A comparative analysis

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One of the most sacrosanct principles of natural justice – the legal maxim of *audi alteram partem,* requires that no person shall be condemned or punished unless such person is heard. Oral hearing or one to one meetings with adverse parties forms an important part of this principle, which also finds its way in anti-dumping investigations conducted by member countries of WTO. The Supreme Court of India in *Automotive Tyre Manufacturers Assn.* v. *Designated Authority*[1] has noted the relevance of holding an oral hearing by observing that *"…Even written arguments are no substitute for an oral hearing. A personal hearing enables the authority concerned to watch the demeanor of the witnesses etc. and also clear up his doubts during the course of the arguments."*

However, the provision relating to conduct of oral hearing has been couched in different countries in different manner regulating, through specific provision, the right of parties to an opportunity of making their submissions during such hearing/meetings. Broadly, hearings conducted by different countries cover two aspects:

a) Personal hearing with the investigating authorities; and

b) Hearing/meetings with adverse parties and making written submissions subsequently.

This article seeks to compare the anti-dumping law enacted by few of the Member countries, namely, European Community ("EC"), Republic of South Africa and Pakistan in respect of conducting oral hearing and conclude by comparing the law in these countries with the law adopted by India, to try and understand where India stands in comparison to other Member countries.

European Community

Article 6 of Council Regulation[2] provides for manner in which anti-dumping investigations are to be conducted by EC. Article 6.5 imposes two pre-conditions for grant of hearing by EC. These are (i) making a written request by an interested party, likely to be affected by the result of the proceeding and (ii) such written request should contain particular reasons why an interested party should be heard. Thus, grant of hearing by EC is not automatic and not generic in nature but puts an onus on the interested parties to justify grant of hearing. The hearing contemplated under Article 6.5 is a personal hearing between EC and the party requesting for such a hearing.

In addition to the hearing under Article 6.5, EC law under Article 6.6 also provides for an opportunity to interested parties to meet parties with adverse interests, so that opposing interests may be presented and rebutted. For

[1] 2011 (263) E.L.T. 481 (S.C.)

[2] Council Regulation (EC) No 1225/2009 of 30th November 2009 on protection against dumped imports from countries not members of the European Community

such a meeting, interested parties need not state reasons for requesting such meeting. It is also made clear that not attending such meeting shall not adversely affect such absent parties and that any oral submission made during the meeting shall be taken into account when it is subsequently confirmed in writing. Article 6.6 also provides an opportunity to interested parties to offer their rebuttals to the submissions of the other party – a provision not provided in other countries.

Republic of South Africa

Similar to EC law, the Anti-Dumping Regulations in terms of Notice 3197 of 2003 issued by South Africa also envisage two types of hearing/meetings – oral hearing and an adverse party meeting/hearing. The South African law also requires a written reasoned request from an interested party and subsequent submissions in written form akin to EC. However South African law differs from EC law inasmuch as the South African law provides that such a request for hearing can be made by an interested party during (i) preliminary investigation phase (ii) final investigation phase or (iii) both [Regulation 5.1]. This peculiar provision is not found in laws of other selected countries. The omission to provide for time line for requesting a hearing increases the probability of requesting multiple number of hearings in such other countries, whether in preliminary phase or final phase or even at the fag-end of the investigation phase. The Commission may restrict the duration of such hearing and the South African law also requires the party making the request for hearing to provide a detailed agenda and information to be discussed at the oral hearing. [Regulations 5.4 and 5.5]

The process of conducting adverse party meeting is quite similar to the process of conducting an oral hearing, with slight difference being that in case of former, it is the Commission, which decides the final agenda of the meeting. In case of both oral hearing and adverse party meetings, the Commission will not consider any request more than 60 days and no hearing/meeting will be held more than 90 days, after the publication of preliminary findings [Regulation 5.2].

Pakistan

Similar to EC and South Africa, Pakistan's anti-dumping law[3] also requires a request by an interested party for conduct of hearing and requires putting the oral submissions into writing subsequent to hearing [Rule 14]. Similar to South African Regulations, Pakistan's law provides for a time line for holding such meeting or hearing[4].

But Pakistan's law seems to be much more interactive than others inasmuch as Rule 14 specifically provides for accommodating the

[3] Notification S.R.O. 203(I)/2001, dated 31st March 2001

[4] Rule 14(1) - Requesting hearing not later than 30 days after publication of preliminary determination; Conduct of such hearing not later than 60 days prior to the date of proposed final determination.

convenience of interested parties [Rule 14(3)] and ensuring that all parties participating get adequate opportunity to present their views [Rule 14(5)]. Pakistan's law also scores high on account of a rule requiring the authorities to maintain a record of the hearing and place the non-confidential version of the record of the hearing in the public file [Rule 14(6)]. Pakistan's law also provides that where there is no request for any hearing, an interested party may within 45 days before the date of proposed final determination, submit its written submissions.

Unlike EU and South Africa, though there is no separate law in respect of oral hearing and adverse party meeting here however, Rule 14(7) does allow interested parties to make oral submissions to the Commission during meetings with officials of Commission.

Comparison with Indian law

In comparison to anti-dumping laws of EC, South Africa and Pakistan, the wording of Indian Anti-Dumping law[5] relating to conduct of oral hearings is obscure and devoid of detailed procedure. The only provision which allows an interested party to make oral submission is Rule 6(6) of Anti-Dumping Rules, which provides that an interested party can present the information orally and also puts a condition that such oral submission will be considered only when it is put in writing.

Just like Pakistan, there is no distinction between personal oral hearing and adverse party meeting. But compared to laws of EC, South Africa and Pakistan, Indian anti-dumping law on hearing does not provide/clarify the following:

(i) Whether a request for hearing has to be made or not.

(ii) When a hearing will take place, i.e., whether it will be conducted before or after preliminary determination.

(iii) There is no provision to maintain minutes of hearing, unlike Pakistan.

(iv) There is no provision for providing opportunities to all the parties to offer their rebuttal, unlike EC.

(v) There is no provision to request oral hearing at preliminary stage.

But, despite the lack of procedural clarity about the conduct of oral hearings, India scores over EC, South Africa and Pakistan by requiring a compulsory hearing, whether or not it is requested by any interested party. The principle of nature justice in the form of *Audi Alteram Partem* is too holy a concept to be messed with, as failure of grant of hearing may lead to setting aside of entire investigation!

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[5] Section 9A of Customs Tariff Act, 1975 read with Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 ["Anti-Dumping Rules"]

Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
2-Ethyl Hexanol	EU, Indonesia, Korea RP, Malaysia, Saudi Arabia, Chinese Taipei and USA	F.No.14/24/2014-DGAD	20-11-2014	ADD investigation initiated
Diclofenac Sodium	China	44/2014-Cus. (ADD)	21-11-2014	Anti-dumping duty re-imposed for five years
Digital Printing Plates	China	F.No.15/25/2013-DGAD	13-11-2014	ADD mid-term review - Extension of time period up to 5-12-2014 for submission of questionnaire responses
Digital Versatile Discs – Recordable	China, Hong Kong and Chinese Taipei	45/2014-Cus. (ADD)	21-11-2014	ADD re-imposed for five years (only on DVD-R and not on DVD-RW)
Graphite Electrodes of all diameters	China	F.No.14/2/2013-DGAD	19-11-2014	ADD recommended to be imposed
Normal Butanol or N-Butyl Alcohol	EU, Malaysia, Singapore, South Africa and USA	F.No.14/4/2013-DGAD	20-11-2014	ADD investigation initiated
Plastic Processing Machines or Injection Moulding Machines	Chinese Taipei, Philippines, Malaysia and Vietnam	F.No.14/03/2014-DGAD	19-11-2014	ADD investigation - Extension of time period up to 8-12-2014 for submission of questionnaire responses

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Commodity Matchbooks	USA	A-533-848 and C-533-849, 79 FR 65186	3-11-2014	ADD and CVD – Sunset review initiated
Prestressed Concrete Steel Wire Strand	USA	A-533-828 and C-533-829, 79 FR 65186	3-11-2014	ADD and CVD – Sunset review initiated

WTO News

Agriculture disputes between India and USA

Agriculture and the disputes relating to it were at the centre of attention between India and United States last month. India and the US made a joint request to the Dispute Settlement Body (DSB) to agree to provide additional time for adoption of or appeal against the panel report in dispute *India - Measures Concerning the Importation of Certain Agricultural Products* (DS430). The DSB has agreed that before 26th January, 2015, it would adopt the report of the panel in the dispute unless either party to the dispute notified the DSB of its decision to appeal against the same. In its report released in October, this year, the DSB panel had found the Indian provisions as being in violation of Articles 2.2, 2.3, 3.1, 5.1, 5.2, 5.6, 6.1 and 6.2 of the SPS Agreement. As per reports, India is preparing itself to file appeal against the panel report.

In respect of stock piling of food products by India and its effect on the Agreement on Trade Facilitation, India and US have agreed on certain terms which would allow moving forward with the TFA. It seems that India's concerns on sunset provisions for the "peace clause" have been taken care of. According to the decision dated 27-11-2014 of the General Council circulated in WTO on 28th [WT/L/939], until a permanent solution is agreed and adopted, Members shall not challenge through the Dispute Settlement Mechanism, compliance of a developing Member with its obligations under Articles 6.3 and 7.2(b) of the Agreement on Agriculture (AoA) in relation to support provided for traditional staple food crops in pursuance of public stockholding programmes. The deal has paved way for implementation of the agreements reached in WTO Ministerial Conference in Bali, in December last year.

Peru's additional duty on certain agricultural products violate WTO provisions

On 27 November 2014, DSB of the WTO issued the panel report in the case brought by Guatemala concerning *"Peru — Additional duty on imports of certain agricultural products"* (DS457). This dispute concerns additional duties imposed by Peru on imports of certain agricultural products such as dairy products, corn, rice and sugar. These duties imposed by Peru are determined using a mechanism known as Price Range System (PRS), which operates on the basis of: (i) a range constituted by a floor price and a ceiling price, which reflect international prices over the last 60 months; and (ii) a reference price published every two weeks, reflecting the average international market price for each product concerned. An additional duty is applied if the reference price of the affected product is lower than the floor price.

The Panel found that Peru acted inconsistently with its obligation under Article 4.2 of the Agreement of Agriculture by enacting measures that were required to be converted into ordinary customs duties. The Panel found that additional duties resulting from the PRS are "other duties or charges imposed on, or in connection with, importation", within the meaning of the second

sentence of Article II:1(b) of the GATT 1994. Due to the fact that Peru had not registered any such "other duties or charges" in its Schedule of Concessions, the Panel held that Peru was acting inconsistently with its obligations under the second sentence of Article II:1(b) of the GATT 1994.

USA's anti-dumping measures on shrimp from Viet Nam violate ADA

A panel report in the dispute brought by Viet Nam concerning certain anti-dumping measures applied by the United States to Vietnamese shrimp (DS429) was issued by the DSB of the WTO on 17-11-2014. The measure concerned anti-dumping duties and US laws or practices concerning the imposition of such measures. The Panel held that USA's actions violated a number of provisions, including but not limited to Articles 6.10, 9.2, 11.2 and 11.3 of the Anti-Dumping Agreement.

Though Viet Nam's "as such" claim concerning zeroing in administrative reviews was rejected by the panel, it allowed the "as applied" claim, finding that USDOC had used zeroing to calculate the dumping margins of individually-examined Vietnamese producers/exporters in the three administrative reviews at issue. USDOC's NME-wide entity rate practice was further found to be in violation of Articles 6.10 and 9.2 of the WTO's Anti-Dumping Agreement.

Brazil rejects panel request by EU over tax measures

Brazil has, at the DSB meeting on 18th November 2014, rejected the request by EU for a panel to study the dispute over taxation and charges applied by Brazil to the automobile, information technology and other sectors. EU alleges that Brazil has number of programmes in automobile, information and communication technology and automation sectors that granted domestic producers certain tax advantages consisting of exemption from, or reduction of, taxes and charges levied on the sale of goods. It is alleged that these advantages resulted in a higher tax burden on imported goods and created incentives to source locally in Brazil and were thus discriminatory.

Pakistan files dispute against EU over CVD on Polyethylene terephthalate

Pakistan has filed a request for consultations with EU regarding imposition of countervailing measures by EU on imports of polyethylene terephthalate (PET) from Pakistan and additional aspects of the investigation in respect of the same. According to the Pakistan's communication dated 28-10-2014 and circulated in WTO on 7-11-2014, EU appears to have acted inconsistently with Articles 1, 3, and 19 of the Subsidies and Countervailing Measures (SCM) Agreement and Article VI of the GATT 1994, in determining that Pakistan's tax law and other schemes constitute a subsidy that are contingent upon export performance. The schemes listed in this regard are, Manufacturing Bond Scheme, Long-Term Financing of Export-Orientated Projects, and Imports of Plant, Machinery and Equipment in Manufacturing Bond scheme.

US appeals panel reports in US-COOL dispute

USA has, on 28-11-2014, filed a Notice of Appeal in the dispute *US – Certain Country*

of Origin Labelling (COOL) Requirements (DS384, DS386) against the compliance panel report circulated in the WTO in October this year. The compliance panel had found that USA's amended measure was still in violation of Article 2.1 of the Agreement on Technical Barriers to Trade and Article III:4 of the GATT, 1994. *[Please refer to Article published in International Trade Amicus-November 2014 issue, elaborately dealing with the issues involved and the possible outcome of the dispute.]*

Ratio Decidendi

ADD – Polyester coated ceramic mugs covered under ceramic tableware and kitchenware

Court of Justice of the European Union has rejected the plea of exclusion of polyester coated ceramic mugs from the levy of anti-dumping duty covering ceramic tableware and kitchenware from China. The Court in this regard noted that in order to determine inclusion or not of plain polyester coated ceramic mugs within the definition of the product concerned here, it was important to examine characteristics of those mugs in the light of characteristics of ceramic tableware and kitchenware and not solely with that of ceramic mugs with no such coating. It was held that inclusion, for the purpose of ADD, must be assessed in the light of the general definition of the 'product concerned', and not a specific sub-category thereof. It was also observed that though the imported mugs in question are to be processed further in the EU and may be intended as gifts or souvenirs, the same had no bearing on their potential end-use after processing i.e., those mugs may, ultimately, be aimed at being in contact with food, the criterion of use which was considered relevant by the authorities for the definition of the 'product concerned'.

Similarly, argument of physical, technical and chemical differences between plain polyester coated ceramic mugs and other ceramic tableware and kitchenware, was also rejected by the court noting that the applicant failed to show that the difference drove consumer perception and, thus, competitive relationships with other products. Further, contentions of separate channels of distribution and mandatory consideration of twofold interchangeability test, were also rejected by the court which also rejected pleas of infringement of Articles 2(10), 3(7) [adverse effect of the practices at issue on the macroeconomic factors] and 3(2) of the EU's Basic Regulation. *[Photo USA Electronic Graphic Inc.* v. *Council of the European Union* - Judgment of the General Court (Third Chamber) dated 18-11-2014 in Case T394/13]