

Procedural issues and Dumping and Injury Determinations

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Antidumping - Processes

- Step I
 - Application
 - Initiation
 - Investigation
- Step II
 - Preliminary findings
 - Disclosure of essential facts
 - Final Findings

Application

- Rule 5 (1) :
 - Upon receipt of an application; or
 - suo moto by DA
- Rule 5 (3)
 - Application to contain sufficient evidence

Case laws on : Application

- *Vitrified Porcelain Tiles from China PR and UAE*
 - No evidence was presented
 - normal value, deductions from export price
 - DA held that dumping was not disputed as there was no response
- *Acyclic-Alcohols from Singapore, Brazil, Romania, Malaysia and South Africa*
 - Covered NBA, IBA, 2EHA, Sabutol, Hexanol, Octanol, etc.
 - Application indicated negative dumping margins
 - NBA from South Africa [-21.29%],
 - IBA from Malaysia [-46.25%] and
 - IBA from Singapore [-26.01%].
 - Yet, investigation covered them also

Application

- *Butter Oil from New Zealand*
- Application
 - did not identify domestic producers on whose behalf the application was made
 - did not identify domestic producers manufacturing the 'Ghee' – the domestic like product to butter oil;
 - Constructed normal value based on
 - Butter prices prevalent in Oceania region plus
 - Difference between prices of butter and butter oil prevalent in Western Europe (and not of New Zealand);
 - Showed imports fell during past three consecutive years;
 - merely stated that the domestic prices of Ghee had crashed, though the graph given did not support the same;
 - did not contain any other data regarding the 15 mandatory injury parameters;
 - no evidence regarding causal link
- Yet, investigation was initiated; after three public hearings, terminated

Who can file the petition?

- *X-ray Baggage Information Systems from European Union*
 - application was filed not by the producer
 - but by a company engaged in the sales of the product concerned
 - US law allows even employees unions

Preliminary findings

- *Trimethoprim from China PR*
 - PF issued on 46th day from initiation
 - Initiation on 23 July 2001
 - PF on 7 Sep 2001
 - Provisional duty imposed on 9 Jan 2002

verification

- Normally undertaken by the authority
- *Flexible Slabstack Polyol from USA*
 - Exporter did not provide all the details
 - DA did not undertake a verification visit
 - CESTAT
 - no purpose would be served by verification visit when the exporter had not made available the required data
 - Dow Chemicals Vs DA, MOF - 2004 (163) ELT 30

Confidentiality

- *Optical Fibre from Korea*

- Rule 7, DA is treating all material submitted to it as confidential merely on a party asking for it and that is not the purport of it
- DA has to be satisfied as to the confidentiality of that material.
- Even if the material is confidential DA has to ask the parties to furnish a non-confidential summary
- The party may give reasons as to why summarization is not possible.
- DA can come to the conclusion that confidentiality is not warranted and it may, in certain cases, disregard that information.
- Not making relevant material available to the other side affects the other side as they get handicapped in filing an effective appeal.
- Therefore, confidentiality under Rule 7 is not something which must be automatically assumed.
- Of course, in such cases there is need for confidentiality as otherwise trade competitors would obtain confidential information which they cannot otherwise get.
- Whether information supplied is required to be kept confidential has to be considered on a case to case basis.
- It is for the Designated Authority to decide whether a particular material is required to be kept confidential.
- Even where confidentiality is required, it will always be open for the appellate authority, namely, CESTAT to look into the relevant files.
 - *Sterlite Industries (India) Ltd Vs Designated Authority 2003 (158) E.L.T. 673 (S.C.)*

Dumping Issues

- Exporters' operations reg. subject goods alone to be considered
- OCT Test to be conducted based on COP of the goods sold and not wt.AVG COP
- Comparable domestic sale price shall be as nearly as possible at the same time
- Wt.Avg to Wt.Avg. comparison shall be made

Operations reg.subject goods alone to be considered

- Volznsky Pipe Plant v DA – 2001 (129) ELT 408 (Tri)

The overall business operations of the exporters are of no relevance or consequence. Investigations are to be carried out with regard to the alleged dumping of goods only.

OCT Test

- Thai Acrylic Fibre Co Ltd Vs DA [2001(128) ELT 537]
 - In conducting OCT test
 - COP of goods sold to be considered
 - Not wt.AVG. COP for the entire POI
 - DA had wrongly varied the POI while making comparisons

Price comparison

- Oxo Alcohols Industries Assn Vs DA [2001(130) ELT 58]
 - Export price and Normal value to be compared 'as nearly as possible the same time'
 - Export consignment sent on 1st July was compared with normal value assessed on COP of May
 - Indent months not to be considered
 - Wt.Avg to Wt.Avg Comparison shall alone be carried out

Normal Value

- *Borax Decahydrate from Turkey*
 - Constructed normal value based on cost of production
 - though the exporter had reported export sales to third countries and sought determination of dumping margin based on exports to third countries.

Reliance Industries Ltd VS DA

- Normal value
 - not exporter specific but exporting country specific
 - One normal value to be determined for the exporting country irrespective of the manufacturer
 - Single NV for the country shall be compared with individual export prices of the exporters to arrive at individual dumping margin
- Law amended Section 9A(6A) introduced

Margin of dumping in relation to an article, exported by an exporter or producer, under inquiry shall be determined on the basis of records concerning normal value and export price maintained, and information provided, by such exporter or producer.

NME Status

- *Induction Hardened Forged Steel Rolls originating in or exported from Russia, Ukraine and Korea RP*
 - DA treated Russia as a Non Market Economy Country.
 - Exporter from Russia filed communications from the Russian Chamber of Commerce stating that Russia was a market economy country. It was not accepted by DA.
 - CESTAT held
 - exporter should have provided information and evidence to the designated authority that on the basis of the criteria specified in sub-paragraph (3) of Paragraph 8, Russia was not a non-market economy. Since the exporter did not do so, decision of the DA was upheld.
 - Urals Heavy Machine Building Plant Vs DA [2005 (187) ELT 194]

Injury Issues

- DI for injury determination
- De minimis volume of imports
- Cumulation of imports from more than one country
- Injury in relation to 'like article' alone to be seen
- Calculation of NIP
- If landed value is higher than NIP, no causal link
- Closure of domestic industry's plant caused increase imports, no causal link
- 15 injury parameters
- Threat of injury
- Causal link

DI for injury determination ...1

- *Mulberry Raw Silk from China P.R.*
 - DA considered the macro level statistics provided by
 - a few producer associations and
 - Central Silk Board
 - with no details whatsoever with regard to the individual producers.

DI for injury determination..2

- *Poly Iso Butylene from Korea, Brazil, Japan and Singapore*
 - Applicants' accounted for 31% of total domestic production
 - Another producer accounting for 40% did not cooperate
 - CESTAT held
 - term 'major proportion' is capable of being construed as to mean a significant proportion or important part of the total production which may not necessarily exceed 50%.
 - This finding is also in line with the finding of the WTO Panel in Poultry from Brazil.
 - (Lubrizol (India) Pvt Ltd Vs DA 2005 (187) ELT 402)

Injury for Like Article

- Injury is to be seen only in relation to the 'like article' and not for any other article
 - ATMA Vs DA [2000 (117) ELT 625]

De minimus volume

- Lead Acid Batteries from Bangladesh
 - Authority
 - Volumes less than 3% but value more than 3%
 - Volume may be measured in terms of value and hence above de minimis
 - CESTAT
 - volume includes value
 - SC
 - Volume refers only to quantity and not value
 - Duty was set aside
 - S&S Enterprise Vs DA [2005(1810ELT 375]

De minimis volume & termination

- DebraJ Dey Vs UOI [2003 (156) ELT 951]
 - Upon finding de minimis volume of imports
 - No need to terminate the investigation
 - One can continue the investigation and come out with final findings
 - May also levy duty, if in the final findings, it is found warranted

15 Mandatory injury parameters

- *Poly Iso Butylene from Korea, Brazil, Japan and Singapore*
 - CESTAT observed
 - evaluation of 15 injury parameters is not a mechanical check-list approach but a meaningful assessment of relevant factors having a bearing on the existence and consequence of injury by import of dumped articles on the established domestic industry
 - (Lubrizol India Pvt Ltd Vs DA 2005 (187) ELT 402)

Cumulation

- Non-dumped imports cannot be cumulated
 - BASF Vs DA [2010 (253) ELT 554]
 - Forum of Acrylic Fibre Mfrs. Vs DA [2006(202)ELT 257]
- The phrase ‘conditions of competition between imported products’ is missing in Indian law & it makes a lot of difference
 - Rishiroop Polymers Ltd Vs DA [2000(119) ELT 157]

Injury Analysis

- *Polyester Staple Fibre from Korea R.P., Malaysia, Taiwan and Thailand,*
- CESTAT held
 - DI had a positive rate of return on capital employed (ROCE) but they claimed that it was less than 22% but claim was not justified
 - Domestic selling prices were higher than import prices
 - DI was able to raise selling prices by 11% during POI; Selling prices of PSF were higher than the increases in raw material prices.
 - Claim that DI was not “able to raise the selling price to a level to recover its full cost of production and to achieve a reasonable return” did not fit in with the actual numbers.
 - Two prices were moving somewhat independently. Domestic prices remained reasonably higher than import prices for more than two third of the time. May be, there was a gravitational pull on each other. Clearly it was not one way, that the imported goods (price) dictated domestic prices.
 - Overall position of DI during IP was that it had excellent capacity utilization, very low inventory, modest sale price rise and good return on investment. This was the over all position projected in the balance sheets of the major manufacturers also as pointed out during the hearing by the importers.
- Order was set aside Indian Spinners Association Vs DA [2004(170) ELT 144]

PSF decision on Threat of material injury

- CESTAT held
 - mere existence of surplus production capacity cannot be taken as posing a clearly foreseen and imminent threat of injury

Causal Link

- *HR Coils from Russia, Ukraine and Kazakhstan*
 - DI were selling HR coils at a price much lower than LV of imports
 - DA held :
 - PF : No causal link
 - FF : Causal link was established
 - CESTAT held : No Causal Link
 - [Jai Corp Ltd Vs DA 2000 (116) ELT 356
 - Supreme Court Remanded the matter to CESTAT
 - [SAIL Vs CEGAT 2001 (132) ELT 520 SC]
 - CESTAT on remand held [Jai Corporation Ltd Vs DA 2002 (140) ELT 283]
 - increased domestic supply (due to coming into being of new domestic producers) puts pressure on prices;
 - however, such a pressure will be within limits of efficiency differences among the domestic units;
 - but the nature of competition gets ugly when dumped sales from abroad gets into the fray, because dumping is outside the scheme of normal trade and resultant competition;
 - dumped prices served as bench mark prices and drove the domestic industry to meet the prices of the dumped supplies;
 - therefore, causal link was found to have been established”.

Injury and Causal Link

- No proper analysis made by DA for evaluating causal link as to how position of DI was worse because of dumped import
- Annual report stated
 - Due to operational constraints and uneconomic market pricing
 - Authority did not examine ‘operational constraints’
- Order was set aside

Calculation of NIP

- Reliance Industries Ltd Vs DA [2006(202)ELT 23 SC]
 - NIP importing country specific
 - Single NIP for DI as a whole
 - Actual capacity utilisation shall be used for allocating fixed costs
 - Single NIP for one product
 - Market price of captively generated inputs (electricity) to be considered and not actual cost incurred in producing them
- Indian Spinners Assn Vs DA [2004(170)ELT 144]
 - Actual ROCE was less; Granting 22% is wrong

Landed Value higher than NIP

- When LV was higher than NIP, casual link between the dumping and material injury was absent.
 - *Hindustan Lever Limited v. Designated Authority* [2006 (200) E.L.T. 39 (T)]
 - *Jindal Stainless Ltd Vs DA* [2006 (204) ELT 267]
 - *Forum of Acrylic Fibre Manufacturers Vs DA* [2006 (202) ELT 257]



Thank you very much