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Revisiting India's Flawed Approach Towards De-Minimis Dumping Margins and Termination of Investigations

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On May 12, 2020, the Indian Directorate General of Trade Remedies ('**DGTR')** initiated a new anti-dumping investigation against a specific exporter from Vietnam, Kim Tin MDF Joint Stock Company, for alleged dumping of 'Plain Medium Density Fibre Boards'. Because this product is already subject to anti-dumping duties in India, the second case is of interest. Kim Tin avoided duty in the original investigation because its exports as investigated, fell below the *de-minimis* dumping margin of 2%; starting a new case is unique because it deviates from the common practice of assigning a NIL duty to exporters falling below the *de minimis* margin in the final findings.

The application of NIL duty rate is problematic for two reasons. *First*, zero duty on exporters below the 2% dumping margin ensures that the investigation against such exporters is not terminated. *Second*, due to this non-termination, DGTR often proceeds to include such exporters in subsequent reviews. Based on jurisprudence of the WTO Dispute Settlement Body ('**DSB**'), the current exporter-specific approach is a welcome change.

According to Article 5.8 of the Anti-dumping Agreement and the Customs Tariff (Identification, Assessment and Collection of Antidumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 ('**Anti-Dumping Rules'**) an investigation must be *immediately* terminated when the margin of dumping is *de minimis* or if the volume of dumped imports is negligible. Rule 14(c) of the Anti-dumping Rules, which is similar to Article 5.8, further clarifies that a dumping margin of less than 2%, expressed as a percentage of the export price will be considered as *de minimis.*

This is important because in the case of *Mexico – Definitive Anti-dumping measures against Beef and Rice*, Mexico, the respondent, argued that the term 'margin of dumping' in Article 5.8 referred to a country-wide dumping margin, and not a producer-specific dumping margin. However, the Panel rejected this, relying on Article 6.10 of the Anti-dumping Agreement, which obliges the national authorities to determine an *individual* margin of dumping for each known exporter of the product under investigation.

At the Appellate Body. Mexico contended that the Panel had erroneously interpreted Article 5.8 and submitted that Article 5.8 should be read in conjunction with Article 3.3. Article 3 of the Anti-dumping Agreement discusses determination of injury and consequently, Article 3.3 establishes conditions for cumulation of effects of imports from more than one country. This cumulative

analysis is logically premised on a recognition that the domestic industry may face the impact of the 'dumped imports' as a whole and that it may be injured by the total impact of the dumped imports, even though those imports originate from various countries. The Appellate Body, in this case, stated that dumping margin under Article 3.3 for purposes of cumulation is unrelated to termination of investigation envisaged under Article 5.8 and the only reason the provision is mentioned is to re-direct readers to the *de minimis* threshold of dumping margins. It also relied on the Appellate Body Report in *US – Hot-Rolled Steel* which confirms that 'margin of dumping' is determined separately for each investigated exporter of the product. The observations of the Panel and Appellate Body in *Mexico – Definitive Anti-Dumping Measures against Beef and Rice* have also been supported by numerous other DSB Reports [**[i]**].

Why is an exporter-specific dumping margin a pivotal point of contention? It is because it is directly related to the investigating authority's obligation to *immediately* terminate investigation against a particular exporter when the dumping margin falls below *de minimis* threshold. As established by the Appellate Body in *Mexico – Anti-dumping measures against Beef and Rice* case, an investigation is terminated as to a specific exporter when its exports fall below the *de minimis* limit, Article 5.8 contemplates *excluding* such exporter from the scope of the order. As stated by the Appellate Body;

An investigating authority does not, of course, impose duties—including duties at zero per cent—on exporters excluded from the definitive anti-dumping measure….the 'logical consequence' of this approach is that such exporters cannot be subject to administrative and changed circumstances reviews, because such reviews examine, respectively, the 'duty paid' and 'the need for the continued imposition of the duty'. (para 305)

With respect to anti-dumping investigations in India, DGTR has maintained a practice of assigning a 'NIL' rate of duty, rather than terminating investigation against those exporters or producers who fall below the *de minimis* threshold of dumping margin. For instance, in 2018, the final findings of the anti-dumping investigation against imports of 'Nylon Filament Yarn' attached a NIL duty amount for Hyosung Dong Nai Co., Ltd. Similarly, certain exporters from Korea were given a NIL duty rate in the anti-dumping investigations against imports of Poly Vinyl Chloride as they were well within the *de minimis* threshold. In the final findings of anti-dumping investigations against imports of Sodium Cyanide from Korea RP, DGTR confirmed that dumping margin of Hanwah Corporation was below 2% and hence NIL duty amount was awarded. However, in the Sunset Review of the same, DGTR included this exporter in its review and imposed a substantial duty on it. DGTR terminates an investigation by relying on the *de minimis* dumping margin only when there is only a single exporter for the product under investigation. Although this approach of the Indian authorities has been documented consistently in numerous other investigations, it has not been settled before Indian courts**[[ii]].**

Consider the sunset review investigation regarding imports of Phthalic Anhydride from Korea, Taiwan and Israel. Here, a particular exporter, Aekyung Petrochemical Co., Ltd., was assigned a NIL rate because it fell below *de minimis*. This exporter contended that under Article 5.8, it should be excluded from the sunset review. Peculiarly, DGTR commented that sunset reviews can 'include complete *de novo* determination of dumping margin and injury analysis' and can cover even those producers which were assigned a zero duty in the original investigation. Similarly, in the 2015 Sunset Review of anti-dumping duty imposed on imports of Plain Medium Density Fibre Boards, Robin Resources, an exporter from Malaysia, opposed its inclusion in the review by relying on Article 5.8 of the Anti-dumping Agreement and Rule 14(c) of the Anti-dumping Rules

because it was well below margined minimis in the original investigation. However, DGTR categorically stated that an exporter which was awarded zero duty in an original investigation can be subjected to a sunset review. It further ruled that if such an exporter is later found to be dumping and causing injury then duties must be imposed. On basis of this the DGTR levied a duty on Robin Resources.

Although the observations of DSB lack precedential value in domestic investigations, it is essential for DGTR to reassess its approach to producers and exporters with negligible dumping margins **[[iii]]**. It should avoid contradiction with the interpretation of Article 5.8 preferred by the DSB in *Mexico – Rice* and *Ukraine – Ammonium Nitrate.*

On that note, the latest update of initiation of investigation against Kim Tin Company points towards a positive change. A fresh investigation by DGTR against a specific exporter is compliant with Article 5.8 and similar to the practice adopted by the European Union (‘**EU’**) [**[iv]**]. The DGTR has acknowledged that no subsequent review can be undertaken against the exporter/producer if it falls below the *de minimis* threshold.

Although this is a step in the right direction, certainty and predictability can only be found in an amendment to the Rules. DGTR should adopt the use of clear notices of termination under Rule 14(c) of the Anti-dumping Rules to terminate investigation against an exporter/producer falling under the *de minimis* threshold, rather than resorting to a zero-duty rate.

[i] Panel Report, *Ukraine – Anti-dumping measures on Ammonium Nitrate* (20 July 2018) WT/DS493/R; Panel Report, *Canada – Welded Pipes* (21 December 2016) WT/DS482/R

[ii] Poly Vinyl Chloride Paste Resin (PVC Paste Resin) from Taiwan, China PR, Indonesia, Japan, Korea RP, Malaysia, Thailand and Russia – Final Finding No. 14/36/2009 dated 2-5-2011; Textured Tempered Coated and Uncoated Glass originating in or exported from Malaysia – Final Finding No. 6/45/2017 dated 17-1-2019 and Caustic Soda from China PR and Korea RP– Final Findings No. 14/10/2002 dated 4-8-2003.

[iii] Phthalic Anhydride originating in or exported from Korea RP, Taiwan and Israel- Final Finding of Sunset Review Investigation No. 7/19/2017 dated 13-9-2018 and Plain Medium Density Fibre Board originating in or exported from China PR, Malaysia, Thailand and Sri Lanka-reg – Final findings of Sunset Review Investigations No. 15/28/2013 dated 17-8-2015.

[iv] The General Court of EU in *Hardware (Guangzhou)* v. *Council*, had confirmed that a new investigation against a particular exporter who was previously excluded from the anti-dumping order by virtue of the *de minimis* threshold is permissible under the Anti-dumping Agreement.

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