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CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

COURT NO. 1

ANTI DUMPING APPEAL NO. 53285 OF 2018

[Arising out of final findings No. 7/7/2017-DGAD dated 11.06.2018 of the Additional Secretary and Designated Authority and Custom Notification No. 36/2018 dated 13.07.2018]

M/S Magotteaux Co. Ltd., Thailand (Exporter) .....Appellant
(410, 4th Floor, Surya Kiran Building,
19 Kasturba Gandhi Marg, New Delhi-110001)

Versus

The Directorate General of Trade Remedies through the Designated Authority .....Respondent
(4th Floor, Jeevan Tara Building, 5,
Parliament Street, New Delhi- 110001)

Appearance

Shri Dinesh Aggarwal & Shri Mayank Jain, Advocates for the Appellant
Shri Ameet Singh and Ms. Albeena Walia, Advocates for the Designated Authority.
Shri Rakesh Kumar, Authorised Representative for the Revenue Respondent.
Ms. Reena Khair, Shri Rajesh Sharma Ms. Shreya Dahiya and Ms. Priyamvada Sinha, Advocates for the Respondent- 3 and 4.

With

ANTI DUMPING APPEAL NO. 53586 OF 2018

[Arising out of final findings No. 7/7/2017-DGAD dated 11.06.2018 of the Additional Secretary and Designated Authority and Custom Notification No. 36/2018 dated 13.07.2018]

AIA Engineering Limited .....Appellant
Plot No. 235-236
Gujarat Vyapari Mahamandal Estate
Odhav, Ahemedabad

Versus

The Union of India Through the Secretary, Ministry of Finance, ...Respondent
(Department of Revenue,
North Block, New Delhi-110001)

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Appearance

Ms. Reena Khair, Shri Rajesh Sharma, Ms. Shreya Dahiya and Ms. Priyamvada Sinha, Advocates for the Appellant.
Shri Ameet Singh, Amar Anand and Ms. Albeena Walia, Advocates for Designated Authority.
Shri Rakesh Kumar, Authorised Representative for the Revenue
Shri Dinesh Aggarwal, Chartered Accountant and Shri Mayank Jain, Advocate for the Respondent.

CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C L MAHAR, MEMBER (TECHNICAL)
HON'BLE MS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing: 07 January, 2020
Date of Decision: 14 July, 2020

FINAL ORDER NO. 50720/2020 - 50720/2020

JUSTICE DILIP GUPTA:

Anti-Dumping Appeal No. 53285 of 2018 has been filed by Magotteaux Co. Limited[1] to assail the final findings Notification dated June 11, 2018 of the Designated Authority, by which a recommendation has been made for continuation of the anti-dumping duty on imports of "Grinding Media Balls" (excluding forged grinding media balls)[2] originating in or exported from China PR and Thailand, on a sunset review investigation initiated at the instance of the domestic producers, namely M/s AIA Engineering Limited and M/s Welcast Steels Limited[3]. The Appellant has also assailed the Notification dated July, 13, 2018 issued by the Government of India imposing anti-dumping duty for a period of five years on the subject goods on the basis of aforesaid recommendation of the Designated Authority.

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1. **foreign exporter**
2. **subject goods**
3. **Domestic Industry**

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2. **Anti-Dumping Appeal No. 53586 of 2018** has been filed by M/s AIA Engineering Limited, a Domestic Industry, for a direction that the recommendations made in the final findings and the Notification issued by the Central Government may be modified by enhancing the quantum of anti-dumping duty and to consider the participating Thailand exporter as non-cooperative so that the residual duty under the Notification dated July 13, 2018 issued by the Central Government may be levied on this exporter.

3. It transpires that earlier, the Designated Authority in its final findings dated May 22, 2012 had recommended imposition of anti-dumping duty on the subject goods exported from the subject countries on an application filed by the Domestic Industry. The Designated Authority had found that there existed positive dumping margins and that material injury was caused to the Domestic Industry by such dumped imports. Thereafter, the Central Government by Notification dated July 16, 2012, on the basis of the aforesaid findings of the Designated Authority, imposed anti-dumping duty on the subject goods from the subject countries. This anti-dumping duty was levied for a period of five years from the date of publication of the Notification in the Official Gazette.

4. The first proviso to section 9A(5) of the Customs Tariff Act, 1975[4] stipulates that if the Central Government, in a review, is of the opinion that the cessation of anti-dumping duty is likely to lead to continuation or recurrence of dumping

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4. the Tariff Act.

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and injury, it may extend the period of such imposition for a further period of five years and such further period shall commence from the date of such order of extension. The Domestic Industry filed an application seeking initiation of a sunset review of the anti-dumping duty in force on import of such goods and for extending the levy of anti-dumping duty for a further period of five years, alleging likelihood of continuation or recurrence of dumping and injury on the subject goods originating in or exported from the subject countries.

5. The Designated Authority, finding that a duly substantiated application had been filed by the Domestic Industry, initiated investigation to review the need for a continued imposition of the anti-dumping duty in force by Notification dated July 04, 2017. The Designated Authority considered the period from April, 2016 to March, 2017 as the period of investigation. The injury investigation period was considered as 2013-14, 2014-15, 2015-16 and the period of investigation. The known exporters in the subject country, the Government of subject countries through their Embassy in India, the importers and users in India known to be concerned with the product were separately asked to submit relevant information in the form and manner prescribed to make their views known to Designated Authority. It was further provided that any information relating to the review and any request for hearing should be sent in writing so as to reach the Designated Authority not later than forty days from the date of publication of the Notification. It was also stated that in case any interested party refuses access to and otherwise did not provide

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necessary information within a reasonable period, or significantly impedes the investigation, the Designated Authority may declare such interested party as non-cooperative and record its findings on the basis of the facts available and make such recommendations to the Central Government as may be deemed fit.

6. The Designated Authority held an oral hearing on March 16, 2018 to provide an opportunity to the interested parties to present relevant information. The representatives who presented their views orally were advised to file written submission of the views expressed by them. The interested parties were also provided an opportunity to offer rejoinder submissions to the views expressed by the opposing interested parties. A disclosure statement was issued on May 30, 2018 containing the essential facts under consideration of the Designated Authority and time was given to the parties up to June 6, 2018 to furnish comments, if any, on the disclosure statement. The relevant portions of the disclosure statement are as follows:

(i) The scope of the **"product under consideration"** in the sunset investigation would be the same as in the original investigation.

(ii) Under the head **"scope of Domestic Industry and standing**", the Designated Authority noticed that only the Domestic Industry had made submissions and none of the producers/ exporters/ importers/ other interested parties made any submission. The Designated Authority also

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noticed that the Domestic Industry had given statement of Indian production in their application as follows:

SN	Name of unit	UOM	Particulars			
			2013-14	2014-15	2015-16	POI
1	Petitioner Companies					
a	AIA Engineering Ltd	MT	***	***	***	***
b	Welcast Steels Ltd.	MT	***	***	***	***
c	Total of Petitioner companies	MT	***	***	***	***
2	Other Indian producers	MT	***	***	***	***
a	Total Indian Production	MT	1,66,618	1,90,021	1,74,349	2,13,292
SN	Name of unit	UOM	Share (%)			
			2013-14	2014-15	2015-16	POI
1	Petitioner Companies					
a	AIA Engineering Ltd.,	%	61%	69%	73%	70%
b	Welcast Steels Ltd.,	%	23%	17%	12%	17%
c	Total of Petitioner companies	%	84%	86%	85%	88%
2	Other Indian producers	%	16%	14%	15%	12%
a	Total Indian Production	%	100%	100%	100%	100%

(iii) The Designated Authority then noted that the Applicants account for 88% of the total Indian production, which would be major proportion of the total Indian production. Further, the Applicant had not imported the subject goods during the period of investigation and was not related to any exporter or producer of the subject goods in the respective subject countries or any importer or user of the product under consideration. The Designated Authority, therefore, held that Applicants constituted Domestic Industry.

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(iv) Under the head **"miscellaneous issues",** the views expressed by the Designated Authority are as follows:

> "25. **With regard to the submission that customs duty should be considered at 10% as against 0% because the exporter enjoys the same under the ASEAN Agreement, the Authority notes that the law is very clear in this regard that the custom duty will be taken as it is.**
>
> 26. The Authority notes that the law clearly envisages that the anti dumping duty can be extended further from time to time, if it is found that dumping and consequent injury to the Domestic Industry is likely in the event of cessation of anti-dumping duty. Anti-dumping law is for removing unfair trade practice and providing a level playing field to the domestic industry. The Authority recommends anti-dumping duty only after following the requirements prescribed under the laws.
>
> 27. On the issue of monopolistic behaviour of the domestic industry, it is noted that the purpose of anti-dumping duty, in general, is to eliminate dumping which is causing or likely to (in case of SSR) cause injury to the Domestic Industry and to re-establish a situation of open and fair competition in the Indian market which is in general interest of the country. From the anti-dumping rules, it is not borne out that a company, even if monopolistic, is prohibited from requesting to the Authority actions against the unfair imports."
>
> **(emphasis supplied)**

(v) The Designated Authority computed the **normal value, export price** and **determined the dumping margin** in the following manner:

S No.	Exporter/producer	Normal value USD/MT	Export Price USD/MT	Dumping Margin USD/MT	Dumping Margin (%)	Range
1.	M/s Magotteaux Co. Ltd. Thailand	***	***	***	***	30-40
2.	All exporters/producers from Thailand	***	***	***	***	30-40
3.	All exporters/ producers from China	***	***	***	***	0-10

(vi) In regard to the **injury determination,** the Designated Authority noted that the demand had shown increase over

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the injury period. In regard to the volume effect of dumped imports and impact on Domestic Industry, the Designated Authority prepared a table to summarize the factual position with regard to import volume and market share. On the basis of above analysis, the Designated Authority noted that imports had increased since the base year and the imports remained low in relation to Indian demand and consumption. The Table is as follows:

Particulars	**Unit**	**2013-14**	**2014-15**	**2015-16**	**2016-17**
Imports-volume					
Subject Countries as a whole	MT	***	***	***	***
Trend		100	550	299	241
Other countries	MT	–	–	–	–
Total Imports	MT	***	***	***	***
Trend		100	550	299	241
Subject country imports in relation to					
Consumption	%	0.19%	1.03%	0.54%	0.43%
Total imports	%	100%	100%	100%	100%
Indian production	%	0.06%	0.29%	0.17%	0.11%

(vii) In regard to **price effect of the dumped imports on the Domestic Industry**, the Designated Authority noted that the landed price of imports of subject goods from subject countries was below the net selling price of the domestic industry. The Designated Authority also noted that the imports from subject countries were undercutting the selling price of the Domestic Industry.

(viii) The **magnitude of "injury and injury margin"** was also examined by the Designated Authority. It compared the 'non-injurious price' of the subject goods produced by

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the Domestic Industry with the landed value of the exports from the subject countries for determination of injury margin during the period of investigation. The injury margin so worked out is indicated in the table prepared by the Designated Authority:

Table of Injury Margin.

S. No	Exporter/ producer	NIP USD/ MT	Landed value USD/MT	Injury Margin USD/MT	Injury Margin (%)	Range
1.	M/s Magotteaux Co Ltd., Thailand	***	***	***	***	0-10
2.	All exporters/ producers from Thailand	***	****	***	***	0-10
3.	All exporters/ producers from China	***	***	***	***	0-10

(ix) On the **likelihood of continuation or recurrence of dumping and injury**, the Designated Authority made the following disclosure:

> "81. This parameter for ascertaining the threat of material injury requires evaluation of existing surplus capacities and capacity addition, if any, to explore the possibility of diversion of disposable quantity to Indian market. Domestic Industry has claimed that the producers in subject countries are already faced with significant surplus capacities. Further, these producers have accepted that they are exporting the products to a large number of countries, currently a very small proportion is being exported to India which is being exported at a price below the prices in respect of India, thus showing likelihood of diversion of these exports to India in the event of withdrawal of Anti-Dumping duty. The Domestic Industry has furnished copies of a web articles showing recent expansion made by the exporter and information with regard to present demand in Thailand. The same has been taken on record.
>
> 82. **On the basis of the questionnaire response filed by M/s Magotteaux Co. Ltd., Thailand and information made available by the Domestic Industry from the website of the exporters as also the exporter questionnaire response filed by the exporter it can be seen that M/s Magotteaux have ample production capacities with them. They area also exporting Grinding media Balls around the world**. No other interested party has either controverted

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the information or provided any counter-factual information. **Analysis of questionnaire response of the responding exporter shows that the exporter has not provided all relevant information in the form and manner prescribed with regard to transaction wise details of its exports to third countries, as prescribed in the questionnaire and, therefore, the Designated Authority has carried out analysis on the basis of available information. These capacities are in themselves more than the total demand and third country exports and can be considered as freely disposable capacities. The importance of such huge production capacities and exports by the producers/ exporters cannot be ignored. The Thailand exporter has also expanded the capacities despite the fact that the existing capacities were much more than the total demand of the exporting country."**

(emphasis supplied)

(x) The Designated Authority also examined the **post disclosure submissions** which were received from the interested parties and the relevant examination by the Designated Authority is reproduced below:

"94. **Regarding, the impact of the agreement between India and Thailand, the Authority has evaluated the Landed Value as per the applicable customs duties**. The Authority notes that on the one hand the preferential trade agreements provisions might lower the landed value, but at the same time the exporters could leverage this to increase their export realisation by factoring the zero import duty advantage in export price as compared to other competitiors which would though increase the landed value to some extent on the one hand and also decrease the dumping margin due to increase in export price. Therefore, these aspects may also warrant an adjustment. Therefore, the Authority has adopted its consistent practice of evaluating the landed value with applicable customs duties.

95. The Authority observes that the exporter has contended that the exports have been made at a price higher than the DI price and at the same time it has contended that the Domestic Industry has earned high profit and the profitability thereof, has improved. It is clarified that, the petitioner itself has not claimed that the imports are causing continued injury to the DI. **The Authority observes that there exists a strong likelihood of continued dumping and consequently, the dumping of the product is likely to cause injury to the domestic industry. Since the present determination is based on threat to likelihood/ recurrence of dumping, the actual parameters relevant to actual injury are not substantially relevant.**

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96. Regarding the contention that the cost of production should be compared with international price to determine the injury margin and not rely on realised prices of the DI, the Authority has considered net sales realisation and compared the same with landed price of imports. Further, the Authority has compared NIP with landed price of imports. The contention that the petitioner is also exporting at comparable prices to several countries is beyond the scope of the present likelihood of injury determination.

97. It is noted that the exporter has not sufficiently identified the product type involved either in domestic sales or exports to their countries. It is noted in this regard that cost and price of the product varies with a chrome content and size of the balls. The exporter, however, has not identified size of the ball as a relevant consideration for identifying and segregating the imports. It is also noted that the exporter has not provided cost of production for all the grades which has been sold by the exporter in the domestic market or exported to third countries. **It is thus noted that exporter has itself decided not to provide all relevant information to the Authority and has partially segregated the product into different types. Such being the situation, the only option with the Authority is to proceed on the basis of weighted averages.**

98. Regarding, determination of grade-wise dumping and injury margin, it is noted that the responding exporter has not provided the requisite data for the same in the exporter questionnaire response. Neither, they have sought any clarification with the Authority with regard to the separate information that is required to be provided for different product types even during the oral hearing and have raised the issue only at the stage of post-disclosure comments. This is despite the fact that the questionnaire prescribed by the Authority clearly requires the exporters to provide separate information for different product types. Further, even during the table verification, such information was not provided readily and the same had to be called for through reminder**. It is thus noted that exporter had made a conscious choice to not provide all relevant information to the Authority for grade wise determination. In the event of grossly inadequate exporter questionnaire response, the best available information had led the Authority to proceed on the basis of weighted averages**.

99. As regard the contention that the volume of import is quite low in absolute terms or in relation to production and consumption, the Authority notes that in the present investigation petitioner itself has not claimed that imports are causing material injury. Nor has authority examined the case on the ground of continuation of injury. The present investigation has been conducted to determine whether dumping of the PUC is likely to cause injury to the domestic industry. Since the Authority is required to determine recurrence of injury in the present case, the actual volume of import in any case is not the sole relevant information for analysis of likelihood of injury. It is noted in this regard that the exporter has very significant exports of the products to a

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large number of countries as examined from the details of the questionnaire response filed by the exporter."

(emphasis supplied)

7. The **conclusions** arrived at by the Designated Authority are as follows:

"101. Having regard to the contentions raised, information provided and submissions made by the interested parties and facts available before the Authority as recorded in the above findings and on the basis of the above analysis of the likelihood of recurrence of dumping and consequent injury, the Authority concludes that:

a) The subject goods are likely to enter the Indian market at dumped prices if the anti-dumping duties in force cease to operate.

b) The situation of Domestic Industry is likely to deteriorate if the existing anti-dumping duties are allowed to cease.

c) The deterioration in the performance of the Domestic Industry is likely to be because of dumped imports from the subject countries. Thus the anti-dumping duties are required to be extended."

8. The **recommendations** of the Designated Authority are as follows:

"102. Having concluded that there is likelihood of recurrence of dumping and injury, if the existing anti-dumping duties are allowed to cease, the Authority is of the opinion that the measure is required to be extended in respect of imports from subject countries.

103. Having examined the likelihood of dumping and injury to be imminent in case of expiry of the current measure in place, the Authority recommends continued imposition of Anti-Dumping Duty in place as recommended by the Authority vide Final Findings Notification No. 14/34/2010-DGAD dated, 22nd May 2012 published in the Gazette of India, Extraordinary, Part-I, Section-I and notified by the Central Government vide Notification No. 36/2012-Customs (ADD) dated the 16th July, 2012 for a period of five years."

9. The Central Government, in exercise of the powers conferred by sub-section (1) read with sub-section (5) of section 9A of the Tariff Act, imposed anti-dumping duty on the subject goods by Notification dated July 13, 2018 for a period of five

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years from the date of publication of the Notification in the Official Gazette.

10. Anti-Dumping Appeal No. 53285 of 2018 has been filed by the exporter from Thailand to assail the final findings of the Designated Authority as also the Notification issued by the Central Government.

11. Shri Dinesh Aggarwal, learned Chartered Accountant appearing for the Appellant, which is an exporter from Thailand, made the following submissions:

(i) The application filed for initiation of investigation by Domestic Industry is not duly substantiated;

(ii) The Designated Authority has incorrectly computed the landed value by considering the Preferential Rate of Duty (Nil Rate), as applicable under the ASEAN Agreement;

(iii) The Domestic Industry is earning superlative profits and its "Return on Capital Employed" is in excess of 22% and, therefore, there is no need to continue the anti-dumping duty. In support of this contention, reliance has been placed on the following decisions.

a. Alkali Manufacturers Association vs. Designated Authority[5].

b. Merino Panel Products Ltd. vs. Designated Authority[6].

c. Qingdao Doublestar Tyre Industrial & Co. Ltd. vs. Union of India[7].

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5. 2006 (194) ELT 161 (Tri.-Del.)
6. 2016 (334) ELT 552 (Tri.-Del.)
7. 2018 (364) ELT 852 (Tri.-Del.)

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(iv) The Domestic Industry has a monopoly and has abused its dominant position in the Indian market. It is exploiting the situation by raising the prices above the international level by taking advantage of the anti-dumping duty. In support of this contention, reliance has been placed on the decision of the Tribunal in **Indian Graphite MFRS. ASSCN. Vs. Designated Authority[8];**

(v) Non disclosure of "Non-Injuries Price" calculation sheet has resulted in a denial of natural justice. In this connection, reliance has been placed on a decision of the Gujarat High Court in **Nirma Limited vs. Union of India[9]**;

(vi) Insignificant imports could not have caused any injury to the Domestic Industry warranting extension of duties in the sunset review;

(vii) Erroneous findings have been recorded by the Designated Authority on the issue of likelihood of continuation or recurrence of dumping injury;

(viii) Rate of duty was required to be modified having regard to the current margin and injury margin; and

(ix) The Designated Authority did not examine the causal link.

12. Ms. Reena Khair, learned Counsel appearing for the Domestic Industry assisted by Shri Rajesh Sharma submitted

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8. 2006 (199) ELT 722 (Tri.-Del.)
9. 2017 (358) ELT 146 (Guj.)

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that the aforesaid contentions made on behalf of the Thailand exporter have no merit. The submissions are as follows:

(i) The Appellant did not take any ground in the memo of appeal that the application filed by the Domestic Industry for initiation of investigation was not duly substantiated and, therefore, the Appellant cannot be permitted to raise this ground during the course of hearing of the Appeal. In any case, the application filed by the Domestic Industry was duly substantiated with regard to the likelihood of continuation or recurrence of dumping and injury;

(ii) The Designated Authority correctly computed the landed value by taking note of the preferential rate of duty since in terms of the ASEAN treaty, import of subject goods from Thailand are chargeable to nil rate of duty on production of a certificate to establish that the goods are of Thailand origin;

(iii) It is incorrect to suggest that the Domestic Industry is earning superlative profits and its "Return on Capital Employed" is in excess of 22%. In fact, it is 13% which is below the bench mark of 22% that has been regularly adopted by the Designated Authority. The profits are also below 10%, which, therefore, cannot be termed as "superlative". The decisions on which reliance has been placed by the Appellant on this issue are not relevant as they relate to original investigations, where the current injury is relevant for imposition of duty, whereas in a

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sunset review, the issue that has to be examined is the likelihood of recurrence of injury;

(iv) The Domestic Industry is not a monopoly. There are eight producers of the subject goods in India, out of which two are the applicant industry. The remaining producers enjoyed 47.3 % of market share demand during the period of investigation, whereas the applicant Domestic Industry had 52.19% of market share.

(v) The decision of the Gujrat High Court in **Nirma Limited** is not applicable since in that case the calculation was required to be disclosed to the Domestic Industry, on whose data the computation of "non-injuries price" was carried out. In the present, case the Designated Authority was justified in not disclosing the confidential costing information of the Domestic Industry, that formed the basis for determination of non-injurious price, to the foreign exporter.

(vi) Low volume of import is not a relevant consideration in a sunset review;

(vii) It is incorrect to suggest that the Designated Authority committed an error in recording findings on the issue of likelihood of continuation or recurrence of dumping and injury;

(viii) When an affirmative order for extension of anti-dumping duty is made on the basis that there is a likelihood of recurrence of dumping and injury, the rigours

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of section 9A(1) of the Tariff Act would not be attracted; and

(ix) In a sunset review, the Designated Authority is required to examine whether the expiry of the period for which duty is imposed is likely to lead to continuation or recurrence of dumping and injury to the Domestic Industry. The causal link in a sunset review is not required to be re-established as the same has already been established at the time of original investigation. In support of this contention, reliance has been placed on the decision of World Trade Organisation Appellate Body in **United States-Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico[10].**

13. Shri Ameet Singh, learned Counsel appearing on behalf of the Designated Authority also submitted that there is no merit in the appeal filed by the foreign exporter. The submissions advanced by the learned Counsel are more or less identical to the submissions advanced on behalf of the Domestic Industry and, therefore, are not being repeated.

14. Shri Rakesh Kumar, learned Authorised Representative of the Department appearing for the Revenue also supported the submissions advanced on behalf of the Domestic Industry.

15. The submissions advanced on behalf of the parties have been considered.

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10. WT/DS282/AB/R dated November 2, 2005.

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16. As noticed above, for the subject goods, anti-dumping duty in the original investigation had been levied by the Central Government by Notification dated July 16, 2012, on the basis of the final findings of the Designated Authority that were notified on May 22, 2012. This anti-dumping duty was levied for a period of five years from the date of publication of the Notification in the Official Gazette. Before the expiry of the aforesaid period of five years, the Domestic Industry, at whose instance the original investigation was carried out and which resulted in the imposition of anti-dumping duty, moved an application under section 9A(5) of the Tariff Act read with rule 23 (1B) of Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995[11] for extending the period of imposition of duty by five years for the reason that there was a likelihood of continuation or recurrence of dumping and injury on the subject goods originating in or exported from the subject countries. The Designated Authority initiated the investigation by Notification dated July 4, 2017, as it found the application filed by the Domestic Industry to be duly substantiated. After examination of the comments submitted by the interested parties to the disclosure statement earlier issued by the Designated Authority, the Designated Authority gave its final findings on June 11, 2018 recommending continuation of imposition of anti-dumping duty and the Central Government, by Notification dated July 16, 2018, imposed anti-dumping duty on the subject goods for a period of five years.

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11. 1995 Rules

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17. In order to appreciate the contentions advanced by learned Counsel for the parties, it would be appropriate to first examine the provisions of the Act and the 1995 Rules relating to sunset review.

18. Section 9A of the Tariff Act deals with anti-dumping duty on dumped articles. Sub-section (1) of section 9A provides that where any article is exported by an exporter or producer from any country or territory to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.

19. Sub-section (5) of section 9A of the Tariff Act provides that the anti-dumping duty imposed under section 9A shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition. However, the proviso to sub-section (5) section 9A provides for extension of the period of such imposition. Section 9A(5) with the two provisos is reproduced below:

> **"9A (5)** The anti-dumping duty imposed under this section shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition:
>
> **Provided** that if the Central Government, in a review, is of the opinion that the cessation of such duty is likely to lead to continuation or recurrence of dumping and injury, it may, from time to time, extend the period of such imposition for a further period of five years and such further period shall commence from the date of order of such extension.
>
> **Provided** further that where a review initiated before the expiry of the aforesaid period of five years has not come to a conclusion before such expiry, the anti-dumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year. "

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20. Rule 23 of the 1995 Rules deals with review. Sub-rule (1B) of rule 23 provides that any definitive anti-dumping duty shall be effective for a period not exceeding five years from the date of its imposition, unless the Designated Authority comes to a conclusion, on a review initiated before the expiry of the period of anti-dumping duty on its own initiative or upon a duly substantiated request made by or on behalf of the Domestic Industry within a reasonable period of time prior to the expiry of that period, that the expiry of the said anti-dumping duty is likely to lead to continuation or recurrence of dumping and injury to the Domestic Industry. The relevant provisions of rule 23(1B) of 1995 Rules are reproduced below:

> **"23 (1B)-** Notwithstanding anything contained in sub-rule (1) or (1A), any definitive anti-dumping duty levied under the Act, shall be effective for a period not exceeding five years from the date of its imposition, unless the Designated Authority comes to a conclusion, on a review initiated before that period on its own initiative or upon a duty substantiated request made by or on behalf of the Domestic Industry within a reasonable period of time prior to the expiry of that period, that the expiry of the said anti-dumping duty is likely to lead to continuation or recurrence of dumping and injury to the domestic industry.
>
> **(2)** xxx xxx xxx
>
> **(3)-** The provisions of rules 6,7,8,9,10,11,16,17,18,19 and 20 shall be mutatis mutandis applicable in the case of review"

21. At this stage, it may also be appropriate to refer to the relevant provisions of Annexure-II to the 1995 Rules that deal with the "Principles for Determination of Injury" and clauses (ii) and (vii), which are relevant, are reproduced below:

> "(ii) While examining the volume of dumped imports, the said authority shall consider whether there has been a significant increase in the dumped imports, either in absolute terms or relative to production or consumption in India. With regard to the affect of the dumped imports on prices as referred to in sub-rule (2) of rule 18 the Designated Authority shall consider whether there has been a

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significant price under cutting by the dumped imports as compared with the price of like product in India, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increase which otherwise would have occurred, to a significant degree.

(vii) A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the Designated Authority shall consider, inter alia, such factors as:

(a) a significant rate of increase of dumped imports into India indicating the likelihood of substantially increased importation;

(b) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to India markets, taking into account the availability of dumped exports to Indian markets, taking into account the availability of other export markets to absorb any additional exports;

(c) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(d) inventories of the article being investigated."

22. It will also be appropriate to refer to Article 11.3 of "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994"[12]. The same is reproduced below:

"**11.3.** Notwithstanding the provisions of paragraph 1 and 2, any definitive antidumping duty shall be determined on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the Domestic Industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review."

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12. GATT

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23. In exercise of the powers conferred by sub-section (6) of section 129 C of the Customs Act, 1962, the "CEGAT Countervailing Duty and Anti-Dumping Duty (Procedure) Rules, 1996"[13] have been framed by the Tribunal. Rule 7 applies certain provisions of the "Customs Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982"[14] to the 1996 Procedure Rules. It is reproduced below:

> **"7.** The provisions of Rules 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 35, 38, 39, 40 and 41 of the Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982 shall be deemed to be a part of these rules."

24. Rule 10 of the 1982 Procedure Rules is reproduced below:

> **"10.** Grounds which may be taken in appeal: The appellant shall not, except by leave of the Tribunal urge or be heard in support of any grounds not set forth in the memorandum or appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or those taken by leave of the Tribunal under these rules."

25. It is clear from the aforesaid provisions that though the anti-dumping duty imposed under the original investigation shall cease to have effect on the expiry of five years from the date of such imposition, but if the Central Government, in a review, is of the opinion that cessation of such duty is likely to lead to continuation or recurrence of dumping and injury, it may extend the period of such imposition of duty for a further period of five years. Under rule 23 (1B) of the 1995 Rules, a duly substantiated request can be made by or on behalf of the Domestic Industry within a reasonable period of time prior to the

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13. **1996 Procedure Rules.**
14. **1982 Procedure Rules**

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expiry of the period for which duty has been levied in the original investigation and the Designated Authority can make a recommendation to the Central Government for extension of the period of imposition of duty, if it comes to a conclusion that the expiry of the said anti-dumping duty is likely to lead to continuation or recurrence of dumping and injury to the Domestic Industry. The principles for determination of injury have been enumerated in Annexure-II to the 1995 Rules and they have been reproduced above. Article 11.3 of GATT is similar to the provisions of rule 23 (1B) of the 1995 Rules.

26. At this stage, it also needs to be remembered that the nature of exercise that has to be undertaken in a sunset review is different from the exercise that is undertaken in the original investigation for determining whether anti-dumping duty is to be levied. This is what was observed by the Supreme Court in **Union of India vs. Kumho Petrochemicals Company Limited**[15]. The Supreme Court pointed out that when it comes to review, the focus is on the issue as to whether withdrawal of anti-dumping duty would lead to continuation or recurrence of dumping as well as injury to the Domestic Industry.

27. The Tribunal in **Thai Acrylic Fibre Co. Ltd. vs. Designated Authority**[16], while disposing of an anti-dumping appeal, also had an occasion to examine the scope of a sunset review, and the relevant paragraphs are reproduced below:

> **"13.** Unlike original investigations, sunset reviews are prospective in nature, as they focus on the likelihood of the continuation or recurrence of dumping and injury, in case antidumping duties are

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15. 2017 (351) ELT 65 (SC)
16. 2010 (253) ELT 564 (Tri.-Del.)

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removed. With respect to the question whether dumping is likely to occur in the event that the anti-dumping duties are removed, the D.A. has to consider relevant economic facts which might indicate that in the event the anti-dumping duty is removed, dumping will recur. With respect to the injury determination, if the anti-dumping duty has had the desired effect, the condition of the Domestic Industry would be expected to have improved during the period the anti-dumping duty was in effect. Therefore, the assessment whether injury will continue, or recur, would entail a counter-factual analysis of future events, based on projected levels of dumped imports, prices, and impact on domestic producers. Thus the D.A. has to address the question as to whether the Domestic Industry is likely to be materially injured again, if duties are lifted.

14. Sunset review entails a likelihood determination in which present levels of dumping is obviously not so relevant as is the likelihood of continuance or recurrence of dumping. Moreover, during the investigation period, the anti-dumping duty would be in force and hence, the current level of dumping may be non-existent or minimal. The exporters under investigation may also sell at a non-dumped price during this period knowing fully well that a sunset review would be in progress. Hence, the criteria under Section 9A(1) that the anti-dumping duty should not exceed the dumping margin would have no practical application for continuance of the duty under Section 9A(5). There is also no such warrant in law under the said Section 9A(5) to do so.

28. The Tribunal in **Borax Moraji Limited vs Designated Authority**[17] also examined the scope of a sunset review in an anti-dumping appeal and the observations are:

"Section 9A(1) contemplates imposition of anti-dumping duty, which does not exceed the margin of dumping and sub-section (6) of Section 9 contemplates that such margin of dumping, as is referred to in sub-section (1) or in sub-section (2) of Section 9A, shall from time to time be pertained and determined by the Central Government after such enquiry, as it may consider necessary. However, as per sub-section (5) of Section duration of anti-dumping duty imposed under Section 9A is to be of unless revoked earlier. If the anti-dumping duty imposed is not revoked earlier and no review is undertaken before the expiry of the five years, it would cease to have effect by efflux of the statutory period. If, however, the review is undertaken as per the first proviso to sub-section (5) of Section 9A for extending the period of such imposition beyond five years, i.e., for a further period of five years, as contemplated by the said proviso, but the review so initiated is not concluded before the period of five years, the anti-dumping duty would statutorily continue to remain in force for a period not exceeding one year, as per the proviso to sub-section (5) of Section 9A. The scheme of these two provisos is primarily intended for undertaking a review to examine whether the cessation of duty on the expiry of five years is likely to lead to continuance or recurrence of dumping and injury. Such exercise can be undertaken from time to time for extending the period for further period of five years from the date of the order of extension. The guideline for such review is ingrained in the first proviso to sub-section (5) of Section 9A and the test adopted, for extending the period of imposition beyond five years, is to form an opinion whether the cessation of such duty was likely to lead to continuation or recurrence of dumping and injury; in other words, if the duty period is not extended, both dumping and injury will continue or recur. The expression "likely to lead to recurrence" would take within its fold

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17. 2007 (215) ELT 33 (Tri.-Del.)

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> situation where the dumping and injury may not exist at the time of review due to the imposition and continuance of anti-dumping duty which, if allowed to cease to have effect on the expiry of five years, is likely to lead to recurrence of dumping and injury. The said two provisos do not specifically deal with the situation where the anti-dumping duty is revoked earlier than the period of its normal duration of five years. It is, however, clear that even for such earlier revocation the review has to be undertaken, and it is in this context that, the provisions of Rule 23 assume significance. As noted above, sub-section (6) of Section 9 in its opening part contemplates ascertaining and determining the margin of dumping from time to time. Rule 23(1) enables the designated authority to undertake review from time to time as regards the need for the continued imposition of anti-dumping duty."

29. It is keeping in mind the above mentioned principles that the contentions advanced by learned Chartered Accountant for the Appellant and learned Counsel for the respondent have to be examined.

30. **The first** contention advanced by learned Chartered Accountant for the Appellant is the application that had been filed by the Domestic Industry for initiation of sunset investigation was not duly substantiated.

31. It is not possible to accept this submission. Such a ground has not been taken in this anti-dumping appeal filed by the Thailand exporter and, therefore, we find substance in the submission advanced by learned Counsel for the Respondents that in such a situation the Appellant should not be permitted to raise this issue in this Appeal. As noticed above, rule 7 of the 1996 Procedure Rules applies rule 10 of the 1982 Procedure Rules to anti-dumping appeals and rule 10 of the 1982 Procedure Rules provides that the Appellant shall not, except with the leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal. The Appellant has not sought any leave of the Tribunal to urge or to be heard in

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support of this ground not taken in the memorandum of appeal. It, however, needs to be noted that the Designated Authority in the initiation Notification dated July 4, 2017 has recorded a categorical finding that a duly substantiated application had been filed by the Domestic Industry.

32. **The second** submission advanced by learned Chartered Accountant for the Appellant is that the Designated Authority incorrectly computed the landed value of the dumped goods by considering the preferential rate of duty which was nil under the ASEAN Agreement.

33. It is also not possible to accept this submission. The landed value of the dumped imports is computed by taking the assessable value with the applicable basic duty of customs. Under the ASEAN Treaty, imports of subject goods from Thailand are chargeable to nil rate of duty, provided a certificate to establish that the goods are of Thailand origin is submitted. The Appellant has also not placed any material to show that any basic duty of customs was actually paid on the subject goods exported by the Appellant. The Designated Authority examined this aspect in paragraph 94 of the final findings and this paragraph has been reproduced in paragraph 6(x) of this order. A finding has been recorded that the Designated Authority adopted its consistent practice of evaluation of the landed value with the applicable customs duty. The applicable customs duty in the present case is "nil" in view of the ASEAN Treaty.

34. **The Third** submission of learned Chartered Accountant for the Appellant is that there is no necessity for

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continuation of anti-dumping duty since the Domestic Industry is earning "superlative" profits and its "Return on Capital Employed" is in excess of 22%. In support of this contention learned Counsel for the Appellant has placed the figures given in the Profit and Loss Account and the balance sheet of the Domestic Producers and the figures for "Earnings before Interest Depreciation Taxes and Amortisation"[18] have been taken as reflection of the profit and return on capital employed.

35. Apart from the fact that EBIDTA is not one of the listed injury parameters in Annexure-II of the 1995 Rules, the figures in the annual report contain details of all the products, including the product under consideration, and, therefore, the figures in the annual report cannot be made the basis for determining the profitability of the product under consideration in the domestic market. It needs to be noted that the anti-dumping investigations are confined to the product under consideration and, therefore, the profitability of the company as a whole has not to be seen. The Domestic Industry has also stated that the sales of the product under consideration in the domestic market constitute only 9% of the total sales of AIA Engineering Limited. On behalf of the Domestic Industry, it has also been stated that actually the capital employed of the Domestic Industry is 13%, which is well below the bench mark of 22% that has been consistently adopted by the Designated Authority. It has also been stated by the Domestic Industry that the profits are below 10%, which cannot be termed to be "superlative".

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18. EBIDTA

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36. The Appellant has relied upon decisions of the Tribunal in **Alkali Manufacturer Association, Merino Panel Products Ltd**. and **Qingdao Doublestar Tire Industry & Co. Ltd.** to contend that where the return of capital employed is 22%, there is no warrant for continuation of the anti-dumping duty.

37. These decisions do not help the Appellant for the reason that the return of capital employed in the present case is less than 22%. Even otherwise, these decisions relate to original investigations where the current injury is relevant for imposition of duty. In a sunset review, as noticed above, what is required to be seen is "likelihood of recurrence of injury".

38. Thus, there is no merit in the third submission advanced by the learned Chartered Accountant for the Appellant.

39. **The fourth** submission advanced by the learned Chartered Accountant for the Appellant is that the Domestic Industry is a monopoly and is exploiting the situation by abusing its dominant position in Indian market by taking advantage of anti-dumping duty and raising the prices above the international level.

40. To appreciate this submission, it is necessary to examine whether the Domestic Industry has a monopoly in the Indian market.

41. It is seen from the records that there are eight producers of the subject goods in India out of which two are the applicant domestic industry. From a perusal of the chart

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contained in paragraph 65 of the final findings of the Designated Authority, it is clear that for year 2016-17 the market share in demand of the Domestic Industry (the applicant) is 52.19%, whereas the market share in demand of the remaining six producers is 47.37 %. It cannot, therefore, be said that applicant Domestic Industry is a monopoly since term monopoly envisages existence of a sole producer/seller in the market. This apart, the Appellant has not been able to substantiate that the Domestic Industry has been exploiting the Indian market or that its selling prices are higher than international prices. In **Indian Graphite MFRS ASSCN,** on which reliance has been placed by learned Counsel for the Appellant, the Tribunal made the following observations;

> "6……The Designated Authority has to frame opinion whether cessation of such duty is likely to lead to continuation or recurrence of dumping and injury. Thus, the test required for framing the opinion whether the cessation of anti-dumping duty is likely to lead to continuation or recurrence of dumping and injury, the relevant factors to come to such conclusion have to be taken into consideration. The relevant factors may be the change in the pattern of the production, demand and requirement of the dumped product in the importing country since the imposition of anti-dumping duty. The change in the prices in the exporting countries and International market has also to be considered. The prescribed parameter for injury to the domestic industry and also whether domestic industry is exploiting the situation by raising the prices above the International level by taking advantage of anti-dumping duty, is also required to be considered."

42. This decision will not come to the aid of the Appellant as no factual foundation has been laid by the Appellant to substantiate that the Domestic Industry has been exploiting the Indian market.

43. The fourth submission of the Appellant cannot, therefore, be accepted.

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44. **The fifth** submission advanced by learned Chartered Accountant for the Appellant is that non-disclosure of "non-injurious price" calculation sheet has resulted in denial of principles of natural justice and in this connection, reliance has been placed on the decision of the Gujarat High Court in **Nirma Ltd.**

45. It is not possible to accept this submission of the Appellant. The "non-injurious price" computation is based on the confidential cost of production of the Domestic Industry. It would be a serious breach of the confidentiality provisions contained in rule 7 of the 1995 Rules if the same were to be disclosed to the foreign exporter. The judgment of the Gujarat High Court in **Nirma Ltd**. does not help the Appellant on this issue. The High Court held that calculation is required to be disclosed to the Domestic Industry on whose data the computation of "the non-injurious price" is carried out for there can possibly be no bar of confidentiality in relation to a party which has provided the information. In the present case, the information was provided by the Domestic Industry and it is the foreign exporter who is demanding "the non-injurious price" computation. The Designated Authority was, therefore, justified in not disclosing the confidential costing information of the Domestic Industry, that formed the basis for calculation of the "non-injurious price", to the foreign exporter.

46. **The sixth** submission advanced by learned counsel for the Appellant is that insignificant imports could not have

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caused any injury to the Domestic Industry so as to warrant an extension of anti-dumping duty in the sunset review.

47. It is correct that the imports from Thailand had less than 1% market share and hence were negligible. It is under rule 14 of the 1995 Rules that this factor could have been considered, but rule 14 has not been made applicable to a sunset review under rule 23(1B) of the 1995 Rules, as is clear from rule 23(3) of the 1995 rules. Thus, even if there is a low volume of import of the subject goods, this would not be a relevant consideration in a sunset review. The test to be applied in a sunset review is the likelihood of continuation or recurrence of dumping and injury. This aspect has been considered by the Designated Authority in Paragraph 99 of the final findings. The Designated Authority has recorded a categorical finding that since it was required to determine recurrence of injury, the actual volume of import would not be relevant for analysis of likelihood of injury. It is, therefore, not possible to accept the sixth submission of the Appellant.

48. **The seventh** submission advanced on behalf of the Appellant is that an erroneous finding has been recorded by the Designated Authority on the issue of likelihood of continuation or recurrence of dumping and injury. It has been submitted that though there was surplus capacities, no examination has been carried out by the Designated Authority to consider the price attractiveness of the Indian market. This submission cannot be accepted.

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49. In this connection, it needs to be noted that relevant parameters have been prescribed in clause (vii) of Annexure-II to the 1995 Rules. This clause (vii) has been reproduced above. The Designated Authority has examined this aspect at length and the findings have been reproduced above. The Designated Authority noted that it was required to evaluate the existing surplus capacities of the foreign exporter to explore the possibility of diversion to the Indian market. The Designated Authority found as a fact that the Thailand exporter had ample production capacities and it was also exporting the product under consideration to other countries in the world.

50. On a consideration of the materials on record, the following factual position would amply indicate the likelihood of recurrence of dumping and injury, in the event the anti-dumping duty is not continued:

(a) Even a small quantity of exports made to India, during the period of investigation by the Appellant, have been made at dumped prices. The dumping margin determined for such exports by the Authority is 30% to 40%, as is clear from the table drawn in paragraph 6(v) of this order.

(b) The exports to India by the Appellant have been made at prices below the "non-injurious price" of the Domestic Industry. In the event of cessation of the anti-dumping, there is a strong likelihood of increased exports to India, causing material injury to the Domestic Industry.

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This is clear from the table in paragraph 6(viii) of this order.

(c) The Thailand exporter had sufficient freely disposable capacity. Their capacities also expanded from 80,000 to 140,000 MT, whereas the demand in the domestic market of Thailand is only 2900 MT per year. This expansion has been made, despite the fact that the Appellant has unutilized capacities, during the injury period.

(d) There are possibly no alternate markets to absorb the unutilized and expanded capacities. The Appellant is a multi-national company having production facilities in many countries around the world. For catering to the demand in North American market, the Appellant has plants in USA and Canada, plants in Brazil and Chile for the South American market, a plant in Belgium for the European market, and a plant in South Africa for the African market. The Thailand factory is, therefore, principally meant to cater to the demand of the Asian market. There are many large indigenous producers of subject goods in China, and therefore, the most attractive market for the Appellant, in the event of revocation of duty, would be India.

(e) The Appellant is exporting to countries, other than India, at dumped prices. Any diversion of exports from third countries to India, would necessarily be at dumped prices, indicating the likelihood of future dumping.

(f) The fact that the exports to India and third countries have been made at dumped prices, coupled with the

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unutilized capacity and substantial inventories, leaves no manner of any doubt that India is an attractive market for the Appellant

(g) The Appellant has failed to provide transaction wise export information for third countries, which information was necessary to establish that the exports to other countries were not being made at dumped/ injurious prices

51. **The eighth** contention of learned Chartered Accountant for the Appellant is that the rate of duty was required to be modified, having regard to the current dumping margin and injury margin in terms of section 9A of the Tariff Act.

52. Section 9A(1) of the Tariff Act, therefore, needs to be reproduced and it is as follows:

> **"9A(1).** Where any article is exported by an exporter or producer from any country or territory (hereinafter in this section referred to as the exporting country of territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article."

53. The issue, that arises for consideration is whether in a sunset review, where an affirmative order for extension of anti-dumping duty is made on the basis that there is a likelihood of recurrence of dumping and injury, the rigours of section 9A(1) of the Tariff would still apply.

54. The scope of a sunset review was examined by the Supreme Court in **Kumho Petrochemical** and by the Tribunal in **Thai Acrylic Fibre Co. Ltd.** The Supreme Court pointed out that in a sunset review, focus is on the issue whether withdrawal

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of anti-dumping duty would lead to continuation or recurrence of dumping and injury to the Domestic Industry. Paragraphs 13 and 14 of the decision of the Tribunal in **Thai Acrylic Fibre** have also been reproduced in paragraph 27 of this order. The Tribunal observed that since a sunset review entails a likelihood determination, the present levels of dumping are not that relevant as the likelihood of continuance or recurrence of dumping. Further, since during the period of investigation, the anti dumping duty is in force, the current level of dumping may be non-existent or minimum. Thus, the criteria under section 9A(1) that anti-dumping duty should not exceed the dumping margin would have no practical application for continuance of the anti-dumping duty under section 9A(5) of the Tariff Act. This position was reiterated by the Tribunal in **Borex**.

55. The eighth submission advanced on behalf of the Appellant, therefore, cannot be accepted.

56. **The ninth** submission advanced by learned Chartered Accountant for the Appellant is that the Designated Authority did not examine the causal link between the dumped imports and the injury to the Domestic Industry.

57. This submission of learned counsel for the Appellant cannot also be accepted. It is in an original investigation, where the determination is based on the existence of current dumping and current injury, that it is necessary for the Designated Authority to establish that the injury is not on account of any factors, other than the dumped imports. In fact, clause (v) of Annexure-II to the 1995 Rules gives a list of factors which are

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required to be examined for this purpose. In a sunset review the Designated Authority is required to examine the likelihood of recurrence of dumping and injury on the expiry of the anti-dumping duty. Thus, causal link in a sunset review is not required to be re-established, as the same had been established at the time of original investigation.

58. In this connection, it would be useful to refer to the report dated November 2, 2005 of the Appellate Body in **United States- Anti-Dumping Measures**. The said report refers to Article 3 and Article 11.3 of GATT. It needs to be remembered that Article 3 of GATT relates to "determination of injury", while Article 11 of GATT refers to "duration and review of anti-dumping duty and price undertakings".

59. Rule 11 of the 1995 Rules deals with "determination of injury", while duration of anti-dumping duty and review of anti-dumping duties is contained in the rule 23(1B) of the 1995 Rules. Article 11.3 of GATT is similar to rule 23 (1B) of the 1995 Rules.

60. The report of the Appellate Body extensively deals with "causation in sunset reviews". Mexico argued before the Panel that the USITC's likelihood-of-injury determination with respect to the anti-dumping duty order on OCTG from Mexico was inconsistent with several provisions of Article 3 of the Anti-Dumping Agreement. Based on its analysis, the Panel found that "the obligations set out in Article 3 are not directly applicable in sunset reviews". Mexico challenged this interpretation of Article 11.3 of the Anti-Dumping Agreement and its failure to address

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the "inherent" causation requirements under that Article. The Appellant Body noticed that on its face, Article 11.3 does not require investigating authorities to establish the existence of a "causal link" between likely dumping and likely injury. Instead, by its terms, Article 11.3 requires investigating authorities to determine whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. Thus, in order to continue the duty, there must be a nexus between the "expiry of the duty", on the one hand, and "continuation or recurrence of dumping and injury", on the other hand, such that the former "would be likely to lead" to the latter. This nexus must be clearly demonstrated. In this respect, the Appellate Body further noted that under Article 11.3 of the Anti-Dumping Agreement, the termination of the anti-dumping duty at the end of five years is the rule and its continuation beyond that period is the "exception". The Appellate Body noted that a causal link between dumping and injury to the Domestic Industry is fundamental to the imposition and maintenance of an anti-dumping duty under the Anti-Dumping Agreement in the original investigation. However, this did not mean that a causal link between dumping and injury is required to be established anew in a "review" conducted under Article 11.3 of the Anti-Dumping Agreement. This is because the "review" contemplated in Article 11.3 is a "distinct" process with a "different" purpose from the original investigation. The Appellate Body underlined that the nature of the determination to be made in a sunset review differs in certain essential respects from "the nature of the determination to be made in an original investigation", and that

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"the disciplines applicable to original investigations cannot, therefore, be automatically imported into review processes".

61. The Appellate Body then observed:

> "As we stated earlier, in a sunset review determination under Article 11.3, the nexus to be demonstrated is between "the expiry of the duty" on the one hand, and the likelihood of "continuation or recurrence of dumping and injury" on the other hand. We note that Article 11.3, in fact, expressly postulates that, at the time of a sunset review, dumping and injury, or either of them, may have ceased, but that expiration of the duty may be likely to lead to "recurrence of dumping and injury". Therefore, what is essential for an affirmative determination under Article 11.3 is proof of likelihood of continuation or recurrence of dumping and injury, if the duty expires. The nature and extent of the evidence required for such proof will vary with the facts and circumstances of the case under review. Furthermore, as the Appellate Body has emphasized previously, determinations under Article 11.3 must rest on a "sufficient factual basis" that allows the investigating authority to draw "reasoned and adequate conclusions". **These being the requirements for a sunset review under Article 11.3, we do not see that the requirement of establishing a causal link between likely dumping and likely injury flows into that Article from other provisions of the GATT 1994 and the Anti-Dumping Agreement.** Indeed, adding such a requirement would have the effect of converting the sunset review into an original investigation, which cannot be justified. Our conclusion, that the establishment of a causal link between likely dumping and likely injury is not required in a sunset review determination does not imply that the causal link between dumping and injury envisaged by Article VI of the GATT 1994 and the Anti-Dumping Agreement is severed in a sunset review. In only means that re-establishing such a link is not required, as a matter of legal obligation, in a sunset review."
>
> **(emphasis supplied)**

62. Thus, in view of the nature of the exercise that has to be undertaken in a sunset review and in view of the aforesaid decision of the Appellate Body in **United States- Anti Dumping Measures**, it is not possible to accept the contention of learned Chartered Accountant for the Appellant that the Designated Authority was obliged in law to examine the causal link between the dumped imports and the injury to the Domestic Industry.

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63. Thus, as none of the submissions advanced on behalf of the foreign exporter have any merit, the appeal filed by the foreign exporter deserves to be dismissed.

64. Anti-dumping Appeal No. 53586 of 2018 has been filed by the Domestic Industry for enhancing the quantum of anti-dumping duty and for considering the participation of the foreign exporter as non-cooperative so that the residual duty under the notification dated July 13, 2018 issued by the Central Government may be levied on the foreign exporter.

65. The submission of Ms. Reena Khair learned counsel appearing for the Domestic Industry is that the foreign exporter should have been treated as non-cooperative since the foreign exporter failed to provide all the relevant information in the form and manner prescribed by the Designated Authority. It has been submitted that the Designated Authority committed an error in treating the foreign exporter as cooperative despite excessive confidentiality claimed in the non-confidential version of the export questionnaire response and despite there being suppression of facts and misleading statements.

66. Shri Dinesh Aggarwal learned Chartered Accountant appearing for the foreign exporter has, however, submitted that the facts and circumstances did not warrant the foreign exporter to be treated as a non-cooperative exporter and the Designated Authority committed no ill-legality in not treating the foreign exporter as non-cooperative.

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67. The principles governing investigations are contained in rule 6 of the 1995 Rules. Under rule 6(4), the Designated Authority issues a notice calling for information, in such form as may be specified by it, from the exporter, foreign producers and other interested parties and such information shall be furnished by such persons in writing within 30 days from the date of receipt of the notice or within such extended period as the Designated Authority may allow on sufficient cause being shown. Rule 6(8) provides that in a case where an interested party refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes the investigation, the Designated Authority may record its findings on the basis of the facts available to it and make such recommendations to the Central Government as it deems fit under such circumstances.

68. In paragraph 82 of the final findings, after noticing that the foreign exporter had not provided all relevant information in the form and manner prescribed with regard to transaction wise detail of its export to third countries as prescribed in the questionnaire, the Designated Authority itself carried out an analysis on the basis of available information. Paragraph 82 of the final findings of the Designated Authority has been reproduced in paragraph 6(ix) of this order. In paragraphs 97 and 98 of the final findings, the Designated Authority also noted that because of grossly inadequate exporter questionnaire response, the best available information led the Authority to proceed on the basis of weighted averages. Paragraphs 97 and

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98 of the final findings have also been reproduced in paragraph 6(x) of this order.

69. Thus, once the Designated Authority had exercised its discretion in recording findings on the basis of the facts available to it and there is no perversity in the exercise of this discretion, it is not possible to accept the submission of the Domestic Industry that the foreign exporter should have been treated as non-cooperative and residual duty under the Customs Notification dated July 13, 2018 issued by the Central Government should have been levied on the foreign exporter. The Appeal filed by the Domestic Industry, therefore, deserves to be dismissed.

70. Thus, for all the reasons stated above, Anti-Dumping Appeal No. 53285 of 2018 filed by the foreign exporter and Anti-Dumping Appeal No. 53586 of 2018 filed by the Domestic Industry are dismissed.

(Pronounced in the open court on 14 July, 2020)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C L MAHAR)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Archana