BEFORE THE HON'BLE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI

ANTI-DUMPING APPEAL NO. _____2021

IN THE MATTER OF:

M/s SI Group India Private Limited ..... Applicant

VERSUS

Union of India & Ors. ..... Respondent

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AN APPLICATION FOR EARLY HEARING OF THE APPEAL

MOST RESPECTFULLY SHOEWETH

1. The Applicant above named has filed this appeal against Office Memorandum F. No. 354/117/2007-TRU dated 07-04-2021, issued by Respondent No.1, (hereinafter referred to as the "impugned order"), being aggrieved by failure to levy Anti-dumping duty ("ADD") on imports of Nonyl Phenol (hereinafter referred to as "subject goods" or "product under consideration") from Chinse Taipei ("subject country"). The Respondent No. 1 ignored the elaborate quasi-judicial investigations carried out by Respondent No. 2 vide its final finding no. 7/20/2018-DGTR dated 07-01-2021 after considering the observation made by this Hon'ble Court vide Final Order No. 51566/2019 dated 28-11.2019. The Respondent No. 1, Ministry of Finance without any justification and rational declined to impose anti-dumping vide office memorandum F. No. 354/117/2007-TRU dated 07-04-2021.

2. That the applicant relies on the facts and submissions in the accompanying appeal and the same are not being repeated herein for the sake of brevity.

3. The Applicant has a strong and prima facie case and balance of convenience is also in its favor in as much the purpose of anti-dumping is to address the injury caused to domestic industry. The Respondent No. 2 after considering the observation made by this Hon'ble Court vide Final Order No. 51566/2019 dated 28-11.2019, issued the Final Findings F. No. 7/20/2018-DGTR dated 7th January, 2021 and concluded that:

   i. *There is continued dumping of the subject goods from the subject country.*

   ii. *The imports are below the cost of production of the domestic industry.*

   iii. *The idle capacity with the foreign exporters is significant, and more than total demand of subject goods in India.*

   iv. *On account of Export restrictions placed on subject goods in other international markets viz. USA, Canada and European Unions, and now China PR, the subject goods are likely to find its way in Indian market.*

   v. *There is growing Indian market in the sense that per capita consumption surfactant is expected to increase. Further, the export from Chinese Taipei to other countries have been made at dumped prices.*

   vi. *There has been no participation/response by the exporters of the subject goods on the proposed continuation of anti-dumping duty.*

   vii. *Despite anti-dumping duty, the return on capital employed of domestic industry is meagre 5% during the POI.*

viii. The expiry of duty is likely to lead to continuation of dumping and consequent injury to the domestic industry.

89. Having re-examined the likelihood of continuation/recurrence of dumping and injury to the domestic industry in case of expiry of the current measure in place. in view of the directions of Hon'ble CESTAT, and foregoing conclusions, the Authority recommends continuation of anti-dumping duty in force on imports of the product under consideration from the subject country.

The Designated Authority after following the lesser duty rule considers it necessary to recommend continuation of definitive anti-dumping duty and recommended continuation of definitive anti-dumping duties equal to the lesser of margins of dumping and margins of injury so established, so as to remove the injury to the domestic industry, in the form and manner described in the duty table, for a further period of five years.

4. However, Respondent No. 1 failed to appreciate the Final Findings issued by Respondent No. 2 and issued office memorandum F. No. 354/117/2007-TRU dated 07-04-2021.

5. That, in view of the above, it is most respectfully submitted that this Hon'ble CESTAT may be pleased to allow the present application for early hearing of the present appeal.

6. The appellant will suffer an irreparable loss and injury if the present application is not allowed.

PRAYER

In view of the foregoing, it is respectfully prayed that this Hon'ble Tribunal may be pleased to-

a. Grant an early hearing in the present appeal,

b. Pass such other order or orders as may be deemed fit and proper in the facts and circumstances of the case.

APPLICANT

VERIFICATION

I, _____, Authorised Signatory of the applicant do hereby verify and state that what is stated hereinabove is true to the best of my knowledge and belief.

Verified today, day of June 2021

APPLICANT

BEFORE THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI

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FORM OF APPEAL TO THE APPELLATE TRIBUNAL

UNDER SECTION 9C OF THE CUSTOM TARIFF ACT, 1975

1.No.AD/ of 2021	
2. Name and address of the applicant	M/s SI Group India Private Limited Plot no. D-2/1 TTC Industrial Area Opp. Juinagar Railway Station Thane Belapur Road, Mumbai 400705, India
3. Designation and address of the officer passing the decision or order appealed against and the date of the decision or order.	1. The Union of India Through the Secretary, Ministry of Finance, Department of Revenue, North Block,New Delhi-110001 2. Designated Authority, Directorate General of Anti – Dumping and Allied Duties Department of Commerce & Industry, Parliament Street, Jeevan Tara Building, 4th Floor, New Delhi-110001 3. India Glycols Limited Plot No. 2B, Sector 126, Noida, Distt. Gautam Budh Nagar, Uttar Pradesh-201304 4. Economic Division, Taipei Economic and Cultural Center in India 34, Pashchimi Marg, Vasant Vihar, New Delhi-110057
4. Particulars of order/Notification against which appeal is being filed.	Final findings [File No.7/20/2018-DGAD] dated 07.01.2021, issued by Respondent No. 2

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	Office memorandum F. No. 354/117/2007-TRU dated 07-04-2021, issued by Respondent No.1
5. Address and Fax number to which notices may be sent to the applicants.	M/s SI Group India Private Limited Plot no. D-2/1 TTC Industrial Area Opp. Juinagar Railway Station Thane Belapur Road, Mumbai 400705, India AND Rajesh Sharma, Advocate TPM Consultants J-209, Saket, New Delhi-110017 Email: rajesh@tpm.in Mobile No. +91-9560872227
6. Names, Fax number and postal addresses of the respondents in the appeal.	1. The Union of India Through the Secretary, Ministry of Finance, Department of Revenue, North Block, New Delhi-110001 jsrev@nic.in 2. Designated Authority, Directorate General of Anti – Dumping and Allied Duties Department of Commerce & Industry, Parliament Street, Jeevan Tara Building, 4th Floor, New Delhi-110001 dgtr-india@gov.in 3. India Glycols Limited Plot No. 2B, Sector 126, Noida, Distt. Gautam Budh Nagar, Uttar Pradesh-201304 iglho@indiaglycols.com 4. Economic Division,

	Taipei Economic and Cultural Center in India, 34, Pashchimi Marg, Vasant Vihar, New Delhi-110057 ind@mofa.gov.tw
7. Whether the applicants have served copies of Appeal-papers to the respondents in the appeal and have produced proof of service; if not, the period within which the same will be done.	A copy of the appeal has been served to all Respondents who participated in the investigations before the Respondent No. 1 and proof of service is enclosed.
8. Whether the applicants wish to be heard in person.	Yes
9. Relief claimed in appeal	As per prayer column of the memo of appeal

STATEMENT OF FACTS

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1. M/s SI Group – India Private Limited, Plot no. D-2/1 TTC Industrial Area, Opp. Juinagar Railway Station, Thane Belapur Road, Mumbai 400705 (hereinafter referred to as the "appellant" or "domestic industry"), is filing this appeal under Section 9C of the Customs Tariff Act, 1975 (the "Act") against final findings [File No.7/20/2018-DGAD] dated 07.01.2019 and Office Memorandum F. No. 354/117/2007-TRU dated 07-04-2021, issued by Respondent No.1, (hereinafter referred to as the "impugned order"), being aggrieved by failure to levy Anti-dumping duty ("ADD") on imports of Nonyl Phenol (hereinafter referred to as "subject goods" or "product under consideration") from Chinse Taipei ("subject country"). The Respondent No. 1 ignored the elaborate quasi-judicial investigations carried out by Respondent No. 2 vide its final finding no. 7/20/2018-DGTR dated 07-01-2021 after considering the observation made by this Hon'ble Court vide Final Order No. 51566/2019 dated 28-11.2019. The Respondent No. 1, Ministry of Finance without any justification and rational declined to impose anti-dumping vide office memorandum 354/117/2007-TRU dated 07-04-2021. A copy of the decision of Central Government vide office memorandum 354/117/2007-TRU dated 07-04-2021 and final finding F. No. 7/20/2018-DGTR dated 07-01-2021 are annexed hereto and marked as **Annexure-1 and 2,** respectively.

2. The brief facts leading to the appeal are given hereunder.

3. That earlier petition had been filed for imposition of anti-dumping duty on the imports of nonyl phenol originating from or imported from Chinese Taipei being aggrieved by the dumping of subject goods in India. On the basis of the application, an investigation was initiated by Respondent No. 1 (hereinafter also referred to as the "Designated Authority") on 29.06.2006 and pursuant to the investigation, the Designated Authority recommended imposition of anti-dumping duty on imports of subject goods from subject country vide Final Finding No. 14/13/2005 dated 25.06.2007. The recommendations of the Designated Authority were given effect

by Respondent No. 2 through Notification No. 94/2007 – Customs dated 22.08.2007.

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4. Before the expiry of a period of 5 years, a request for sunset review was filed by the appellant, which was initiated by the Designated Authority on 09.08.2012. On initiation of the review, Respondent No. 2 extended the imposition of duty for a period of one year under second proviso to Section 9A(5) through Notification No. 39/2012 – Customs dated 24.08.012. On completion of the investigation, the Designated Authority found that the situation of the domestic industry continued to be fragile and there is likelihood of continuation/resumption/intensification of dumping and injury on account of imports of the subject goods from the subject countries, if the duties are revoked. Therefore, the Designated Authority recommended extension of duties vide final findings [F.No.15/1007/2012-DGAD] dated 08.11.2013, which was implemented by Respondent No. 2 by way of Notification No. 05/2014 – Customs (ADD) dated 16.01.2014. The present anti-dumping duty shall expire on the completion of a period of five years on 15.01.2019.

5. Since there was continued dumping of subject goods, the appellant filed an application requesting initiation of a sunset review investigation. The Designated Authority, having satisfied itself, on the basis of the positive prima facie evidence submitted by the domestic industry indicating likelihood of continuation or recurrence of dumping and consequent injury, Respondent No. 2 / the Designated Authority initiated the sunset review investigation on 12.06.2018.

6. Pursuant to investigation, the Designated Authority forwarded a copy of the initiation notification to the known exporters of the subject goods, namely, Formosan Union Chemical Corporation (FUCC) and China Man Made Fibre Company (CMFC), in line with the provisions of Rule 6(2) of the Anti-Dumping Rules. However, the exporters did not participate in the investigation by filing a response to the exporter's questionnaire.

7. Post initiation, the Designated Authority conducted oral hearing on 05.09.2018 and directed the parties to file written submissions and rejoinder to other parties' submissions. The appellant filed written submissions dated 07.09.2018. Inter alia, the appellant submitted as under:

a. There was continued dumping of the subject goods in India. In fact, the dumping margin in the present investigation was higher than that in the earlier investigation.

b. Even in the period of investigation, the appellant was forced to reduce its selling price to compete with the imports. therefore, the profits and return on investment earned by the Petitioner continued to be low.

c. The producers in the subject country have significant idle capacities, way beyond the demand in India. These capacities could be used to flood the market in India in the event of expiry of duty.

d. India was a critical market for the exporters as there were barriers to import of subject goods in China PR, European Union, USA and Canada.

e. The producers in the subject country are also dumping the subject goods in other countries.

8. The Designated Authority also carried out verification of the data filed by the domestic industry on 15.11.2018 and 16.11.2018. The Designated Authority issued its Disclosure Statement on 24.12.2018, the appellant filed comments to the Disclosure Statement on 02.01.2019, submitting inter alia as under:

a. A number of submissions of the appellant had not been examined in the Disclosure Statement.

b. The dumping margin as per Disclosure Statement was higher than that in the previous investigations, indicating intensified dumping.

c. Further, the factors of injury and likelihood of continuation or recurrence of dumping or injury had not been properly examined.

d. While the domestic industry had performed well in volume parameters, it had not been able to achieve the desired level of profits and returns throughout the period.

e. There was clear likelihood of increase in imports and injury to the domestic industry in the event of expiry of duty.

f. Several factors establishing likelihood of continuation or recurrence of dumping or injury had not been analyzed.

g. There was no requirement to establish causal link in a sunset review investigation. Nevertheless, it was evident that the domestic industry is likely to suffer injury due to dumped imports, in the event of expiry of duty.

h. Certain deductions had been improperly made in the determination of non-injurious price.

9. On 11.01.2019, Respondent No. 2 issued the final findings [File No.7/20/2018-DGAD], disregarding the submissions of the appellant / domestic industry and concluded as under:

> *"i. The financial and economic parameters of Domestic Industry (both volume and price) are stable and not evidencing deterioration requiring extension of anti-dumping duty.*
> *ii. The Petitioners have performed well during the injury period including the POI in terms of its financial parameters.*
> *iii. Petitioners have not been able to establish likelihood of dumping and injury to the Domestic Industry in the event anti-dumping duty were to be revoked on the subject goods.*
> *iv. Capacity, production, domestic sales and overall profitability of the industry do not indicate existence of injury or a deteriorated economic condition.*
> *v. The factors submitted by the Petitioners on likelihood of recurrence of injury on withdrawal of ADD are not supported by the price realizations and price trends of the subject goods during the POI."*

Accordingly, the Designated Authority concluded that the continuation of anti-dumping duty was not warranted and did not recommend the extension of duties on the import of the subject goods from the subject country.

10. Aggrieved by the aforesaid final findings, the appellant had filed an appeal bearing no. Anti-dumping Appeal No. 50430 of 2019 before this Hon'ble Court. This Hon'ble Court vide Final Order No. 51566/2019 dated 28-11.2019 allowed the said appeal. This Hon'ble Court examined the impugned findings of the Designated Authority and evidence on record and found that the conclusions reached by the Authority were not appropriate. Accordingly, this Hon'ble Court remanded the matter with a direction that DA shall analyze the relevant data and after determining the anti-dumping duty which needs to be levied on the subject goods

when imported from Chinese Taipei, recommend the same to the Government of India. The relevant extract of the decision of this Hon'ble court is reproduced below:

> *"24. In view of above, we do not agree with the conclusions and the recommendations of the Designated Authority dated 11.01.2019. The same is liable to be set aside and consequently we set aside the conclusions and recommendations and remand the matter to the Designated Authority to calculate the appropriate anti-dumping duty while taking note of overall circumstances of the case. Since, we have set aside the conclusions and recommendation of the DA on merit, hence discussion of other ancillary issues raised in the Appeal would be more of academic, hence not delved into.*
>
> *25. In the result, the Appeal is allowed, and the matter is remanded with a direction that DA shall analyse the relevant data and after determining the anti-dumping duty which needs to be levied on the subject goods when imported from Chinese Taipei, recommend the same to Government of India. The Miscellaneous Applications stand disposed of accordingly."*

Copy of the Final Order No. 51566/2019 dated 28-11.2019 passed in Anti-dumping Appeal No. 50430 of 2019 is enclosed as **Annexure-3.**

11. The Designated Authority before implementing the decision of this Hon'ble court sought clarification by moving a Miscellaneous Application No. 50109 of 2020 before this Hon'ble Court on the ground that while the said decision of Hon'ble CESTAT came on 28.11.2019, the anti-dumping duty which was earlier imposed through Customs Notification no. 05/2014-Cus (ADD) dated 16.01.2014 had already expired on 15.01.2019, consequently this has resulted in a gap. The Designated Authority requested this Hon'ble Court to clarify that whether anti-dumping duty can be imposed after expiry of original duty notification in view of decision of the Hon'ble Delhi High Court in the matter of Forech India Ltd Vs Designated Authority. In the said judgement it has been held that "... the Act has fixed a period for completion of Sunset Review within one year from the date of expiry of the initial five-year levy and it is in this one-year period that the Government must form a view that the cessation of duty would lead to continuation or recurrence of dumping and injury. Therefore, it is only within this period that it may extend i.e. without breaking the continuity of the previous duty or its modified version, for a further period of five years ...."

12. This Hon'ble Court vide its Miscellaneous Order No. 50114/2020 dated 21st February, 2020 disposed the Miscellaneous Application No. 50109 of 2020 for clarification and held as under:

> *"25. In this view of the matter, the decision of the Delhi High Court in Forech India would not be applicable to the facts of the present case in as much as the said decision relates to the original determination by the Designated Authority and not to a determination when a remand is made by the Appellate Tribunal. The contention of the learned Counsel appearing for the importers cannot also be accepted for the same reason.*
>
> *26. The Application, accordingly, stands disposed of with the aforesaid clarification."*

Copy of the Miscellaneous Order No. 50114/2020 dated 21st February 2020 in Miscellaneous Application No. 50109 of 2020 is annexed as **Annexure-4.**

13. The Designated Authority thereafter issued the final findings F. No. 7/20/2018-DGTR dated 7th January, 2021 pursuant to the orders of this Hon'ble Court dated 28th November, 2019, and 21st February, 2020. The Designated Authority held as follows in the final findings F. No. 7/20/2018-DGTR dated 7th January, 2021;

> *87. Having regard to the contentions raised, information provided and submissions made by the interested parties, facts available before the Authority and observations and analysis of the Hon'ble CESTAT in the judgment as recorded above in respect of likelihood of recurrence of dumping and consequent injury, wherein the Hon'ble CESTAT has held as under:*
>
> *Para 21. ··it is impractical and also illogical to insist on the positive evidences on future events, for determination of the likelihood of dumping and injury in future on removal of duty."*
>
> *Para 22. In this back drop, we find that the Appellant domestic industry could reasonably establish through present and past evidence that most of these parameters are satisfied in the present case. The dumping margin is in the range of 10-15% and is positive and above de-minimis. Despite anti-dumping duty, the earning of domestic industry is meagre*

2% and return of capital is around 5% against the normal return of 22%. The landed value of import without anti-dumping duty are below the cost of production of domestic industry. The Appellant was able to show that there is a demand of around 17,216 MT in domestic market, whereas the ideal capacities of foreign exporters are around 24,376 MT. Export restrictions are placed on subject goods in other international markets viz. USA, Canada and European Unions, leaving major market only in Asia. The subject goods restriction in China PR being added to the list of restricted toxic substance would find its way in Indian market There is growing Indian market in the sense that per capita consumption surfactant is expected to increase. Further, they could show that the export from Chinese Taipei to other countries have been made at dumped prices. Besides, the most important factor is that there has been no participation/response by the exporters of the subject goods on the proposed continuation of anti-dumping duty. Therefore, cumulatively considering all these parameters which are normally adopted internationally and also in line with Annexure II (vii) of the Anti-Dumping Rules,1995, in Sun Set Review proceedings, we are of the view that removal of the anti-dumping duty, there will be likelihood of recurrence of dumping and injury to the domestic Industries", *the Authority concludes that:*

i. There is continued dumping of the subject goods from the subject country.

ii. The imports are below the cost of production of the domestic industry.

iii. The idle capacity with the foreign exporters is significant, and more than total demand of subject goods in India.

iv. On account of Export restrictions placed on subject goods in other international markets viz. USA, Canada and European Unions, and now China PR, the subject goods are likely to find its way in Indian market.

v. There is growing Indian market in the sense that per capita consumption surfactant
is expected to increase. Further, the export from Chinese Taipei to other countries have been made at dumped prices.

vi. There has been no participation/response by the exporters of the subject goods on the proposed continuation of anti-dumping duty.

vii. Despite anti-dumping duty, the return on capital employed of domestic industry is meagre 5% during the POI.

viii. The expiry of duty is likely to lead to continuation of dumping and consequent injury to the domestic industry.

89. Having re-examined the likelihood of continuation/recurrence of dumping and injury to the domestic industry in case of expiry of the current measure in place. in view of the directions of Hon'ble CESTAT, and foregoing conclusions, the Authority recommends continuation of anti-dumping duty in force on imports of the product under consideration from the subject country.

14. The Designated Authority after following the lesser duty rule considers it necessary to recommend continuation of definitive anti-dumping duty and recommended continuation of definitive anti-dumping duties equal to the lesser of margins of dumping and margins of injury so established, so as to remove the injury to the domestic industry, in the form and manner described in the duty table, for a further period of five years.

15. That section 9A read with Section 9A(5) of the Act envisages the imposition of ADD on an article which is dumped and is causing injury to the Domestic Industry. Section 9B of the Act provides that no ADD shall be imposed, unless the dumped imports are causing injury to the Domestic Industry. Further, the Rules have been notified by Respondent No. 1 in exercise of the powers provided under Section 9A and 9B of the Act. Appellant submit that as per Rule 18 of the Rules, Respondent No.1 was required to impose ADD in terms of recommendations of Respondent No. 2 within a period of three months from the date of publication of final findings.

16. However, the Respondent No. 1, the Ministry of Finance, without any justification and rationality and without providing any opportunity to the Appellant, domestic industry issued the impugned order vide office memorandum dated 7th April, 2021;

"The undersigned is directed refer to your office letter F.No. 08/04/2020-DGTR dated 23rd October, 2020 and the subject Final Findings issued by the Director General of Trade Remedies under F. No. 7/20/2018-DGTR dated 7th January, 2021 in the subject anti-dumping investigation and to inform that the Central Government has decided not to impose anti-dumping duty on Nonyl

Phenol originating in or exported from Chinese Taipei in the said Sunset Review Final Findings.

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17. That the Respondent No. 1 acted unilaterally, and did not call for any information, evidence or submissions from the Appellant or other Respondents. In fact, to the knowledge of the Appellant, Respondent No. 1 did not even call for the records of Respondent No. 2, before deciding to act contrary to its recommendations.

18. Aggrieved by the decision of the Respondent No. 1 not to levy Anti-dumping duty ("**ADD**") despite positive recommendation made by Respondent No. 2, which has caused significant prejudice to the Appellant, by exposing him to dumped imports from Chinese Taipei and likely injury as noted by Respondent No. 2 after detail investigation pursuant to direction given by this Hon'ble Court vide its final finding dated 7th January 2021. The Appellant herein, is filing this appeal on the following, amongst other, grounds each of which are set out herein below and urged without prejudice to one another.

Annexure-B

GROUNDS

I. **Refusal to impose duty despite positive recommendation by the DGTR is country to statutory provisions and in violation of principles of natural justice**

A. India is a signatory to the Marrakesh Agreement establishing the World Trade Organization in 1994. Pursuant to this, it has implemented the Agreement on Implementation of Article VI of the GATT 1994 referred to as the Anti-dumping Agreement (ADA), which is one of the Agreements that forms part of the WTO treaty. In terms of Article 18.4 of the ADA, each Member country is required to ensure the conformity of its laws, regulations and administrative

procedures with the provisions of the ADA. As a consequence, Sections 9A, Section 9AA, Section 9B and Section 9C of the Act were enacted.

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B. The proceeding in question is in relation to a trade remedial measure, viz. Anti-Dumping duty (ADD), which is imposed as per globally agreed laws and practices. The present proceedings do not relate to the imposition of a tax under the Constitution of India, as a sovereign act by the Government of India (GOI) in its sole discretion. ADD is imposed in a situation where dumped imports are causing injury to the domestic manufacturers of the product in question. The trade remedial measures are imposed in such circumstances as has been agreed by all the members of the WTO. Consequent to this, under the GATTs Agreement, a set of provisions, practices, and procedures to be made applicable uniformly in all the member countries were adopted. The Government of India (GOI), under Article 253 of the Constitution of India, legislated a law to give effect to the ADD provisions agreed at the WTO. The action of the Respondent No. 1 in the present case, of not accepting the positive recommendation of Respondent No. 2, is contrary to and beyond the ADD provisions.

C. The ADD laws are a globally agreed set of laws which require the following:

i. Various jurisdictional facts to be established with regard to "dumping", "injury", "causal link", "likelihood of continuation or recurrence of dumping and injury" "margin of dumping", and "margin of injury".

ii. A detailed investigative process undertaken by the DGTR in the manner prescribed, consistent with the principles of natural justice and due process of law, to ensure that all the interested parties are given the opportunity to provide evidence and to comment upon the evidence provided by any other parties.

iii. The law also provides for an opportunity to all interested parties of being heard orally.

iv. The DGTR follows a strict process to ensure full opportunity to all parties to defend their interests. 18

v. The proceedings culminate in a Final Findings, which deals extensively with whether or not the jurisdictional facts are satisfied, and examines the evidence on record and all legal submissions filed during the course of the investigation. The Final Findings issued by the Designated Authority satisfy the principles of natural justice, being a speaking order addressing all issues raised by the interested parties.

vi. In a situation where the Final Findings are that an ADD should be imposed, the findings are made as a recommendation to the Ministry of Finance.

vii. The Ministry of Finance may then notify the imposition of ADD.

In the present case, the investigation followed the aforementioned stages, duly observing the principles of natural justice, and culminated into Final Findings No. 7/20/2018-DGTR dated 07-01-2021 pursuant to remand made by this Hon'ble Court vide Final Order No. 51566/2019. All interested parties including the Domestic User Industry were given every opportunity to be heard and present their evidence. The Respondent No. 1, Ministry of Finance however, declined to accept the positive recommendation in the Final Findings, without providing an opportunity to any interested party to make submissions. The refusal to impose ADD by the Respondent No. 1is wholly contrary and in excess of jurisdiction, has been impugned in the present case.

D. The powers exercised by Respondent No. 1 are not Legislative and can only at best be described as quasi-judicial. In this regard, reliance is placed on the decision of Apex Court in case of *Reliance Industries Ltd. v. Designated Authority and others reported in (2006) 10 SCC 368 = 2006 (202) E.L.T. 23 (S.C.).* It is well-settled that a quasi-judicial decision, or even an administrative decision which has civil consequences, must be in accordance with the principles of natural justice, and hence reasons have to be disclosed

by the authority in that decision. In the present case, the Respondent No. 2, acting as a quasi-judicial authority, has recommended imposition of ADD on imports of the product, duly abiding by the principles of natural justice. Such recommendation has created valuable rights on the domestic industry. However, Respondent No. 1, without affording an opportunity of being heard to the domestic industry, has refused to impose ADD. Further, Respondent No. 1 has not explained the reasons and rationality behind the non-imposition of duty, having not passed a speaking order.

E. The Appellant submits that even if assuming that Respondent No. 1 has power to reject recommendations of Respondent No. 2 in such a manner, at the very least, it should also follow the principles of natural justice. Thus, Respondent No. 1 was required, at the very least, to provide an opportunity of being heard to the affected domestic industry before deciding against them and issuing a speaking order.

F. The Appellant submits that Central Government can decline to accept the recommendation of Respondent No. 2 only if, it has sufficient reasons to exercise its discretion and refuse to impose ADD, despite strong recommendations by the Respondent No. 2 but that discretion enjoyed by Respondent No. 1 is severely restricted considering the nature and purpose of ADD and its impact on domestic industry.

G. The Legislature has cast certain mandate on Respondent No. 1 to impose ADD to remove the injury when Respondent No. 2 concluded that there is dumping and that such dumping has caused injury to the domestic industry. The purpose of imposition of ADD is to provide a level-playing field and to protect and guard the domestic industry against unfair trade practice.

H. The Appellant submits that if a statute invests a public officer with authority to do an act in a specified set of circumstances, it is incumbent upon him to

exercise his authority in an appropriate manner. This is especially when a party having a right to a relief, requests the same, and the appropriate circumstances for exercise of authority are shown to exist. Respondent No. 1, in its discretion can refuse to accept the recommendation only for duly justified reasons, in public interest and that too after examining relevant record and providing opportunity of being heard to the affected party. Even the concept of "public interest" as constituting the interest of the user industry, to the exclusion of the consideration of the injury caused to the Domestic Industry is also wholly contrary to, and incompatible with the provisions of Section 9A of the Customs Tariff Act, 1975 and its related provisions.

I. The Respondent No. 1. has applied the provisions of Section 9A of the Customs Tariff Act in such a manner as is arbitrary, discriminatory, and unreasonable, therefore must be rejected. The Respondent No. 1 considers that Section 9A confers unfettered and unregulated discretionary power on Respondent No. 1 to decide on the levy of ADD per se. Legislative history behind incorporation of the statutory provisions, including the rules, international treaties and obligations cast therein would clearly show that the purpose of the provision is to address injurious dumping. The Respondent No. 1. has not considered the object and purpose of anti-dumping law, as interpretated by various courts in India. The Respondent No. 1 should have appropriately interpreted Section 9A and considered the that powers conferred under the Act are not unfettered.

J. The Appellant submits that even if Respondent No. 1 exercises its discretion not to accept the recommendations of Respondent No. 2, such powers cannot be exercised arbitrarily and, in a pick, and choose manner. The law cannot be construed to have been written in such a subjective manner that it affects the efficiency and transparent function of the Government. If the statute provides for pointless discretion to agency, it is in essence demolishing the accountability of the administrative process as the agency is

not under obligation from an objective norm, which can enforce accountability in decision-making process. All law-making, be it in the context of delegated legislation or primary legislation, has to conform to the fundamental tenets of transparency and openness on the one hand and responsiveness and accountability on the other. These are the fundamental tenets flowing from due process requirement, equal protection clause embodied in Article 14 and fundamental freedoms clause ingrained under Article 19 of the Constitution. The procedure prescribed by Section 9A of the Customs Tariff Act and the Rules, conform to the fundamental tenets of transparency, openness and also responsiveness and accountability. Thus, Respondent No. 1 without affording opportunities to the appellant cannot decide the matter arbitrarily by rejecting the positive recommendation of Respondent No. 2.

K. A plain reading of the Section and rules makes it very evident that the Central Government cannot consider any aspect that has been considered and dealt by the Designated Authority while recommending imposition of antidumping duty. The Designated Authority is a quasi-judicial authority. Designated Authority having recommended levy of ADD after a detailed fact finding exercise, Respondent No. 1 cannot sit in appeal over the such recommendation, and not levy duty in a non-transparent manner, without giving an opportunity of hearing to the interested parties or disclosing the reasons, rationale and basis of such decision by a detailed speaking order.

L. While it is appreciated that the Rules use the word recommend/ recommendation in so far as the order of the Designated Authority is concerned, the Final Findings notified by the Designated Authority are in the form of an order. Further, the order attains finality at the level of Designated Authority itself. While this order is appealable before CESTAT in the event of imposition of anti-dumping duty, in any case, the order is not open to review by the Central Government. Without prejudice, while the Central Government has discretion regarding whether to accept the recommendation of the

Designated Authority, the objective and purpose of legislation should not be ignored and the discretion should not be exercised against domestic industry unless there are compelling reasons in the larger public interests and for reasons to be disclosed in writing, and by way of a detailed speaking order.

M. It is relevant to note that Respondent No. 1 has in the past refused to accept the recommendation of the Respondent No. 2 for imposition of ADD only in two cases (**News Prints and Penicillin-G**) till 2019, out of more than 1000 cases, on the basis of valid reasons finding the duties to be contrary to public interest, as under:

i. imposition of duty would cause significant disadvantage to the consumer (anti-biotic manufacturers) and such exercise would increase price of Penicillin-G which eventually would increase prices of life saving drugs.

ii. Penicillin is the basic raw material for many antibiotics and is covered under Essential Commodes Act besides being under Price Control. It has been stated in the representations that imposition of the proposed anti-dumping duties which works out to 38% and 52% increase in the price of Penicillin and 6APA respectively would lead to increase in prices of medicines by more than 100%.

iii. The interest of the domestic industry in this case two units, Alembic Limited, Vadodara and Southern Petrochemical Industries Corporation Ltd. should not outweigh the interest of the bulk drug manufactures.

iv. Insufficient domestic supply of the subject goods in view of the domestic demand. While the total capacity of manufacture of Penicillin by the domestic industry is 4872 thousand BU, the demand is for 15365 thousand BU.

v. The global recession has caused downward performance of the two units instead of the alleged dumping of the products.

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However, in the present case none of the abovesaid valid reasons found to be in the public interest exist.

II. NATURE OF FUNCTION CARRIED OUT BY RESPONDENT NO. 2 AND RESPONDENT NO. 1 ARE QUASI-JUDICIAL IN NAUTURE

N. The powers exercised by Respondent No. 1 are not Legislative and can only at best be described as quasi-judicial. In this regard, reliance is placed on the decision of Apex Court in case of *Reliance Industries Ltd. v. Designated Authority and others reported in (2006) 10 SCC 368 = 2006 (202) E.L.T. 23 (S.C.).* It is well-settled that a *quasi-judicial* decision, or even an administrative decision which has civil consequences, must be in accordance with the principles of natural justice, and hence reasons have to be disclosed by the authority in that decision. Even the discretion conferred onto Respondent No. 1 is also severely restricted considering the nature and purpose of ADD and its impact on domestic industry.

O. The imposition of the ADD universally, and in India, is governed by elaborate statutory provisions and prescribed procedures for the relevant authority to satisfy itself (post consideration of arguments of all the parties concerned) that there is a material injury to the Domestic Industry from the dumped imports. Once the Domestic Industry satisfies all the relevant criteria to justify imposition of the ADD and the Respondent No. 2 issues its positive determination, the Respondent no.1 ought to impose the duty based on such recommendation. The legislature has cast certain mandate on Respondent No. 1, i.e., to impose ADD to remove the injury when Respondent No. 2 after conducting investigation concludes that dumping of a product has caused injury to the domestic industry. The purpose of imposition of ADD is to provide

a level-playing field and to protect and guard the domestic industry against unfair trade practice. Non-imposition of such duty has severely damaged the right to business conferred onto the domestic industry under Article 14, 19(1)(g) of the Constitution.

III. OBJECT, PURPOSE AND NATURE OF ADD IS NOT COMPARABLE TO ANY OTHER DUTY OF CUSTOMS:

P. Even though provisions for imposition of ADD have been incorporated under the Act, the ADD is levied pursuant to the treaty authority and obligation. Considering the scope and objective of ADD, manner of its imposition, ways in which the measure can be invoked and protection can be afforded; ADD cannot be considered comparable to a duty of customs. The purpose of ADD is to offset an unfair practice of dumping and to restore a situation of fair competition in the Indian market. The fact that the duty varies based on producer / exporter of the product, the product type and period and the provisions relating to price undertaking, review, refund etc. establishes that ADD is not synonymous with duty of customs, and its purpose is not collection of revenue.

Q. Other factors that distinguish ADD from customs duty are the broad and comprehensive procedural requirements relating to investigations, time periods for completion of investigation; access to information available to all interested parties, along with reasonable opportunities to present their views and arguments; offering, acceptance, and administration of price undertakings by exporters in lieu of the imposition of anti-dumping measures; timing of imposition of anti-dumping duties; the duration of such duties, and periodic review to examine the need for continuation of duties.

R. Anti-dumping proceedings are initiated by Respondent No. 2 based on an application made by or on behalf of the concerned domestic industry for an investigation into alleged dumping of a product into India. The interested parties to an anti-dumping investigation include the domestic industry on whose complaint the proceedings are initiated; the exporters or the foreign producers of the like articles subject to investigation; the importers of the same article allegedly dumped into India; the Government of the exporting country/countries and the trade or business associations of the domestic producers/ importers/ user industries of the dumped product. Therefore, the imposition of anti-dumping duty is distinct from and incomparable to a customs duty and accordingly, the powers of Respondent No. 1 *vis-à-vis* ADD cannot be compared to the powers of Respondent No. 1 regarding imposition of customs duty.

S. On consideration of the purpose for collection of Anti-dumping duty and the provisions made in this regard, it would emerge that the Legislature casts a certain mandate on the Central Government to impose Anti-dumping duty to redress the injury suffered by the domestic industry, when Designated Authority comes to the conclusion that there is dumping and that such dumping has caused injury to the domestic industry. The Respondent No. 1 failed to appreciate that the purpose of imposition of Anti-dumping duty is not collection of revenue, but to provide a level-playing field and to protect and guard the domestic industry against unfair trade practice. When an exporter undercuts the price of domestic industry through dumping, such practice damages and hampers the domestic industry. A strong case of protection arises and there is limited room for exercise of any discretion by the Respondent No. 1. Respondent No. 1 cannot claim an absolute discretionary right to act or not to act in such a situation.

IV. OBJECT AND PURPOSE OF ANTI-DUMPING LAW AS INTERPRETATED BY COURTS IN INDIA:

T. The purpose and object of Section 9A for levying anti-dumping duty has also been laid down by Hon'ble Supreme Court in the matter of ***Reliance Industries Ltd. v. Designated Authority [2006 (202) E.L.T. 23 (S.C.)]***.

> *"11. The result was that an industrial base was created in India after independence and this has definitely resulted in some progress. The purpose of Section 9A can, therefore, easily be seen. **The purpose was that our industries which had been built up after independence with great difficulties must not be allowed to be destroyed by unfair competition of some foreign companies. Dumping is a well-known method of unfair competition which is adopted by the foreign companies. This is done by selling goods at a very low price for some time so that the domestic industries cannot compete and are thereby destroyed, and after such destruction has taken place, prices are again raised.***
>
> *12. **The purpose of Section 9A is, therefore, to maintain a level-playing field and prevent dumping, while allowing for healthy competition.** The purpose is not protectionism in the classical sense (as proposed by the German Economist Friedrich List in his famous book 'National System of Political Economy' published in 1841) but to prevent unfair trade practices. **The 1995 Amendment to Section 9A was apparently made in pursuance to Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) which permitted anti-dumping measures as an instrument of fair competition.***

*13. The concept of anti-dumping is founded on the basis that a foreign manufacturer sells below the normal value in order to destabilize domestic manufacturers. **Dumping, in the short term, may give some transitory benefits to the local customers on account of lower priced goods, but in the long run destroys the local industries and may have a drastic effect on prices in the long run."***

U. The Hon'ble Supreme Court, in case of ***S & S Enterprise v. Designated Authority, 2005 (181) E.L.T. 375 (S.C.)*** held that to constitute dumping, there must be an import at price which is lower than the normal value of the goods in the exporting country; and such export must be sufficient to cause injury to the domestic industry and held as follows :

*"4....The imposition of anti-dumping duty is under Section 9-A of the Customs Tariff Act, 1975 and the Rules and is the outcome of the General Agreement on Tariff and Trade (GATT) to which India is a party. **The purpose behind the imposition of the duty is to curb unfair trade practices resorted to by exporters of a particular country of flooding the domestic markets with goods at rates which are lower than the rate at which the exporters normally sell the same or like goods in their own countries so as to cause or be likely to cause injury to the domestic market. The levy of anti-dumping duty is a method recognised by GATT which seeks to remedy the injury and at the same time balances the right of exporters from other countries to sell their products within the country with the interest of the domestic markets.** Thus the factors to constitute "dumping" are (i) an import at prices which are lower than the normal value of the goods in the exporting country; (ii) the exports must be sufficient to cause injury to the domestic industry[..]"*

V. The Madras High Court in case of ***Nirma Limited v. Saint Gobain Glass India Ltd. [2012 (281) E.L.T. 321 (Mad.)]*** held as under;

> *"35. **By going through the object of the Rules framed in accordance with Section 9A of the Act with the intention of preventing anti-dumping, which is in the economic welfare of the country, we can safely construe the Rules as an economic legislation rather than a fiscal law.** The law is well settled that the fiscal law should be construed strictly, while the economic legislation must be construed with an intention of developing the domestic industry."*

W. Thus, it is evident that the Courts have routinely held that the objective of anti-dumping duty is to provide a level playing field to the domestic industry, and to redress the injury caused by dumped imports. It is an economic law, introduced for the economic welfare of the domestic producers, and not a fiscal law. Therefore, Respondent No. 1 cannot exercise unfettered power in imposition of duties, as may have been allowed in a fiscal law. Rather, Respondent No. 1 must exercise its powers in a restricted and controlled manner, having regard to the objective of the law and after following the principle of natural justice through speaking order.

X. From the foregoing, it is evident that Respondent No. 1 has acted unilaterally and contrary to the principles of natural justice. Further, Respondent No. 1 has acted in a manner, which does not allow for transparency and is contrary to the objective of the law. This has rendered the impugned order bad in law. Thus, the impugned order deserves to be set aside and the anti-dumping duties on imports of product under consideration from Chinese Taipei need to be continued as recommended by the Designated Authority pursuant to this Hon'ble Court direction.

19. The appellant also craves leave to add, alter or amend the grounds taken in the appeal and/or to urge such other and further grounds as may be available to it at the time of hearing of this Appeal.

20. The Appellant has not filed any proceedings before the Hon'ble Supreme Court of India or any other Hon'ble High Court with respect to the subject matter of this Appeal.

PRAYERS

In view of the above facts and circumstances, the Appellant most respectfully prays that this Hon'ble Tribunal may be pleased to:-

(a) quash and set aside, decision taken by the Respondent No. 1, Ministry of Finance, vide office memorandum F. No. 354/117/2007-TRU dated 07-04-2021, not to accept the final finding No. 7/20/2018-DGTR dated 07-01-2021 issued by the Respondent No.2; and

(b) Direct the Respondent No. 1, Ministry of Finance to issue necessary notification imposing anti-dumping duty based on the recommendation made by Respondent No. 2 vide final finding No. 7/20/2018-DGTR dated 07-01-2021; and

(c) Direct the Respondent No. 1 to produce the original records/files in taking decision not to accept the final finding No. 7/20/2018-DGTR dated 07-01-2021 issued by the Respondent No.2, if any, on record; and

(d) Any other relief as may be considered appropriate by this Hon'ble Tribunal in the facts and circumstances of the present case.

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Signature of Appellant

Verification

I,_____, Authorized Signatory of the Appellant do hereby declare that what is stated above is true to the best of my knowledge and belief.

Verified today on June, 2021 at Mumbai.

Signature of the Appellant

Annexure – I

F. No. 354/117/2007-TRU (Pt-II)
Government of India
Ministry of Finance
Department of Revenue
(Tax Research Unit)

Room No. 156, North Block
New Delhi, 7th April, 2021

OFFICE MEMORANDUM

Subject: Final Findings dated the 7th January, 2021 in the Sunset Review investigation on anti-dumping duty on imports of 'Nonyl Phenol' originating in or exported from Chinese Taipei - regarding

The undersigned is directed to refer to your office letter under F.No. 8/4/2020-DGTR dated 23rd October, 2020 and the subject Final Findings issued by the Directorate General of Trade Remedies under F.No. 7/20/2018-DGTR, dated the 7th January, 2021 in the subject anti-dumping investigation, and to inform that the Central Government has decided not to impose the anti-dumping duty on Nonyl Phenol originating in or exported from Chinese Taipei, proposed in the said Sunset Review Final Findings.

07/04/21
(S.W.Haider)
O.S.D (TRU-I)

To,

Sh. Satish Kumar
Additional Director General Foreign Trade
Directorate General of Trade Remedies
Jeevan Tara Building
New Delhi 110001

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Annexure – 2

रजिस्ट्री सं. डी.एल.- 33004/99

REGD. No. D. L.-33004/99

भारत का राजपत्र
The Gazette of India

सी.जी.-डी.एल.-अ.-07012021-224275
CG-DL-E-07012021-224275

असाधारण
EXTRAORDINARY

भाग I—खण्ड 1
PART I—Section 1

प्राधिकार से प्रकाशित
PUBLISHED BY AUTHORITY

सं. 5] नई दिल्ली, बृहस्पतिवार, जनवरी 7, 2021/पौष 17, 1942
No. 5] NEW DELHI, THURSDAY, JANUARY 7, 2021/PAUSHA 17, 1942

वाणिज्य एवं उद्योग मंत्रालय

(वाणिज्य विभाग)

(व्यापार उपचार महानिदेशालय)

अधिसूचना

नई दिल्ली, 7 जनवरी, 2021

विषय : चीनी ताइपेई के मूल के अथवा वहां से निर्यात नोनाइल फिनोल के आयातों के संबंध में पाटनरोधी जांच की दूसरी निर्णायक समीक्षा में अंतिम जांच परिणाम –सेस्टैट के पुन: प्रेषण का मामला।

फा. सं. 7/20/2018-डी जी ए डी.—1995 में तथा उसके बाद यथा संशोधित सीमा प्रशुल्क अधिनियम, 1975 (इसके पश्चात् अधिनियम के रूप में भी संदर्भित) तथा समय समय पर यथा संशोधित सीमा प्रशुल्क (पाटित वस्तुओं पर पाटनरोधी शुल्क की पहचान, आकलन और संकलन तथा क्षति के निर्धारण के लिए) नियमावली, 1995 (इसके पश्चात पाटनरोधी अथवा नियमावली के रूप में भी संदर्भित) के संबंध में, महानिदेशक (इसके पश्चात प्राधिकारी के रूप में भी संदर्भित) ने चीनी ताइपेई (इसके पश्चात् संबद्ध देश के रूप में संदर्भित) के मूल के अथवा वहां से निर्यात किए गए 'नोनाइल फिनोल' (इसके पश्चात् संदर्भ वस्तुओं के रूप में भी संदर्भित) के आयातों के संबंध में पाटनरोधी जांच की दूसरी निर्णायक समीक्षा आरंभ की थी।

क. <u>पृष्ठभूमि</u>

1. जबकि, चीनी ताइपेई अथवा वहां से निर्यात किए गए संबद्ध वस्तुओं के आयातों के संबंध में मूल जांच प्राधिकारी द्वारा 29 जून, 2006 को शुरू की गई थी। प्राधिकारी ने, दिनांक 25 जून, 2007 के अंतिम जांच परिणाम संख्या 14/13/2005 – डी जी ए डी के माध्यम से संबद्ध देश से संबद्ध वस्तुओं के आयात पर पाटनरोधी शुल्क लगाये जाने की सिफारिश की जिसे दिनांक 22 अगस्त, 2007 की अधिसूचना सं. 94/2007 - सीमा शुल्क के माध्यम से लागू किया गया था।

शुल्क तालिका

क्रस.	प्रशुल्क शीर्षक*	वस्तु का विवरण	उद्गम का देश	निर्यात का देश	उत्पादक	शुल्क राशि	मुद्रा	माप की इकाई
1	2	3	4	5	6	7	8	9
1	2907 13 00	नोनाइल फिनोल	चीनी ताइपेई	कोई भी	कोई भी	52.56	यूएस डा.	मी.टन
2	2907 13 00	नोनाइल फिनोल	चीनी ताइपेई के अलावा कोई भी देश	चीनी ताइपेई	कोई भी	52.56	यूएस डा.	मी.टन

थ. आगे की प्रक्रिया

90. केंद्रीय सरकार के आदेशों के विरुद्ध कोई अपील, जो इस सिफारिश के कारण उत्पन्न हो सकती है, धारा 9ग सीमा शुल्क अधिनियम, 1975 के अंतर्गत सीमा शुल्क, उत्पाद और सेवा कर अपीलीय प्राधिकरण के समक्ष प्रस्तुत की जाएगी।

वी. वी. स्वेन, विशेष सचिव एवं निर्दिष्ट प्राधिकारी

MINISTRY OF COMMERCE AND INDUSTRY

(Department of Commerce)

(DIRECTORATE GENERAL OF TRADE REMEDIES)

NOTIFICATION

New Delhi, the 7th January, 2021

Subject: Final Findings in the Second Sunset Review of Anti-Dumping investigation concerning imports of Nonyl Phenol originating in or exported from Chinese Taipei – CESTAT Remand Case.

F. No. 7/20/2018-DGAD.—Having regard to the Customs Tariff Act, 1975 as amended in 1995 and thereafter (hereinafter also referred as the Act) and the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, as amended from time to time (hereinafter also referred as the Anti-Dumping Rules or Rules), the Director General (hereinafter also referred to as the Authority) had initiated 2nd sunset review of anti-dumping investigation concerning imports of 'Nonyl Phenol' (hereinafter also referred to as the subject goods), originating in or exported from Chinese Taipei (hereinafter referred to as the subject country).

A. BACKGROUND

1. Whereas, the original investigation concerning imports of the subject goods originating in or exported from Chinese Taipei was initiated by the Authority on 29th June, 2006. The Authority, vide Final Findings No. 14/13/2005-DGAD, dated 25th June, 2007, recommended imposition of anti-dumping duty on the import of the subject goods from the subject country, which was given effect to vide Notification No. 94/2007 – Customs dated 22nd August, 2007.

2. Whereas upon expiry of applicable duties at five years, the Authority initiated a sunset review, and vide Final Finding Notification No. 15/1007/2012-DGAD dated 8th November, 2013 recommended continuation of duty. The findings of the Authority were implemented by the Ministry of Finance (TRU) vide Notification No. 5/2014 dated 16th January, 2014.

3. Whereas M/s SI Group India Private Limited (hereinafter also referred to as the petitioner) filed an application requesting initiation of sunset review of the anti-dumping duties earlier imposed and seeking continuation of duties against imports from Chinese Taipei. The request was based on the grounds that the expiry of the measure was likely to result in continuation of dumping of the subject goods and consequent injury to the domestic industry.

4. In view of the duly substantiated application with prima facie evidence of likelihood of dumping and injury filed on behalf of the domestic industry and in accordance with Section 9A(5) of the Act, read with Rule 23 of the Anti-dumping Rules, the Authority initiated the second sunset review investigation vide Notification No. 7/20/2018-DGAD dated 12th June, 2018 to review the need for continued imposition of the anti-dumping duties in respect of the subject goods, originating in or exported from Chinese Taipei, and to examine whether the expiry of the said duty is likely to lead to continuation or recurrence of dumping and injury to the domestic industry.

5. The scope of the present review covers all aspects of the previous investigations concerning imports of the subject goods, originating in or exported from the subject country.

6. Vide Final Findings Notification No. 7/20/2018-DGAD dated 11th January, 2019, the Authority concluded as under.

> *"i. The financial and economic parameters of Domestic Industry (both volume and price) are stable and not evidencing deterioration requiring extension of anti-dumping duty.*
>
> *ii. The Petitioners have performed well during the injury period including the POI in terms of its financial parameters.*
>
> *iii. Petitioners have not been able to establish likelihood of dumping and injury to the Domestic Industry in the event anti-dumping duty were to be revoked on the subject goods.*
>
> *iv. Capacity, production, domestic sales and overall profitability of the industry do not indicate existence of injury or a deteriorated economic condition.*
>
> *v. The factors submitted by the Petitioners on likelihood of recurrence of injury on withdrawal of ADD are not supported by the price realizations and price trends of the subject goods during the POI."*

The Authority, thus, found that the continuation of anti-dumping duty was not warranted and accordingly, did not recommend extension of anti-dumping duty on imports of subject goods from the subject countries.

7. The aforesaid findings dated 11th January, 2019 were challenged by the domestic industry in appeal under Section 9C of the Act. The Hon'ble Customs, Excise and Service Tax Appellate Tribunal (CESTAT) allowed the said appeal vide its Final Order No. 51566/2019 dated 28th November, 2019. The Hon'ble CESTAT examined the impugned findings of the Authority and evidence on record, and found that the conclusions reached by the Authority were not appropriate. Accordingly, Hon'ble CESTAT remanded the matter with a direction that DA shall analyse the relevant data and after determining the anti-dumping duty which needs to be levied on the subject goods when imported from Chinese Taipei recommend the same to the Government of India. The relevant extract of the decision of the Hon'ble CESTAT is reproduced below:

> *"24. In view of above, we do not agree with the conclusions and the recommendations of the Designated Authority dated 11.01.2019. The same is liable to be set aside and consequently we set aside the conclusions and recommendations and remand the matter to the Designated Authority to calculate the appropriate anti-dumping duty while taking note of overall circumstances of the case. Since, we have set aside the conclusions and recommendation of the DA on merit, hence discussion of other ancillary issues raised in the Appeal would be more of academic, hence not delved into.*
>
> *25. In the result, the Appeal is allowed and the matter is remanded with a direction that DA shall analyse the relevant data and after determining the anti-dumping duty which needs to be levied on the subject goods when imported from Chinese Taipei, recommend the same to Government of India. The Miscellaneous Applications stand disposed of accordingly."*

8. While the said decision of Hon'ble CESTAT came on 28.11.2019, the anti-dumping duty which was earlier imposed through Customs Notification no. 05/2014-Cus (ADD) dated 16.01.2014 had already expired on 15.01.2019. This resulted in a gap and in view of the same a clarification was sought from Hon'ble CESTAT by moving miscellaneous application to clarify that whether anti-dumping duty can be imposed after expiry of original duty notification in view of decision of the Hon'ble Delhi High Court in the matter of ***Forech India Ltd Vs Designated Authority*** with regard to extension of duty after expiry of existing duty. In the said judgement it has been held that "*.... the Act has fixed a period*

for completion of Sunset Review within one year from the date of expiry of the initial five year levy and it is in this one year period that the Government must form a view that the cessation of duty would lead to continuation or recurrence of dumping and injury. Therefore, it is only within this period that it may extend i.e. without breaking the continuity of the previous duty or its modified version, for a further period of five years...."

9. The Hon'ble CESTAT vide its Miscellaneous Order No. 50114/2020 dated 21st February, 2020 disposed the Miscellaneous Application No. 50109 of 2020 for clarification and held as under:

> *"25. In this view of the matter, the decision of the Delhi High Court in Forech India would not be applicable to the facts of the present case in as much as the said decision relates to the original determination by the Designated Authority and not to a determination when a remand is made by the Appellate Tribunal. The contention of the learned Counsel appearing for the importers cannot also be accepted for the same reason.*
>
> *26. The Application, accordingly, stands disposed of with the aforesaid clarification."*

10. The present findings are therefore being issued pursuant to the orders of the Hon'ble CESTAT dated 28th November, 2019, and 21st February, 2020.

B. PROCEDURE

11. The procedure described herein below had been followed by the Authority with regard to the subject investigations before it was challenged in the CESTAT:

i. The Director General, under the Anti-Dumping Rules, received a written application from the petitioner on behalf of the domestic industry, requesting for continuation of anti-dumping duties against the imports of subject goods from Chinese Taipei.

ii. On receipt of a duly substantiated application, the Authority issued Initiation Notification No. 7/20/2018-DGAD dated 12th June, 2018, published in the Gazette of India, Extraordinary, initiating second sunset review of anti-dumping duty imposed on imports of the subject goods originating in or imported from Chinese Taipei.

iii. The Embassy of the subject country in New Delhi was informed about the initiation of the sunset review investigations in accordance with Rule 6(2) along with the copy of the initiation notification and non-confidential version of the petition.

iv. The Authority forwarded copies of the Notification to the following known producers / exporters in the subject country (whose names and addresses were made available to the Authority by the petitioner) and provided opportunity to make their views known in writing within forty days from the date of the letter in accordance with the Rule 6(2) and Rule 6(4) of the Anti-Dumping Rules.

a. Formosan Union Chemical Corporation, 14F, No. 206, Nanking East Road, Sec. 2, Taipei, Taiwan.

b. China Man Made Fibre Company, 10F, No. 50, Sec. 1, Hsin Sheng Road, Taipei, Taiwan.

v. Whereas none of the producer/ exporters have filed a response to the exporters' questionnaire.

vi. The Authority forwarded copy of Notification to the following known importers/ consumers of subject goods in India (whose names and addresses were made available to the authority by the applicants) and advised them to make their views known in writing within forty days from the date of issue of the letter, in accordance with the Rule 6(4):

a. India Glycols Limited

b. M/s Micro Inks Limited

c. Manali Chemicals

d. M/s C.J. Shah & Company

e. Leo Chemoplast Pvt. Ltd.

f. Lexicon Chemicals Pvt. Ltd.

g. Akshya Industries

h. Samnman Trade Impex Pvt. Ld.

i. M/s Sterling Auxiliaries Pvt. Ltd.

j. M/s Krishna Antioxidants Pvt. Ltd.

k. Star Orechem International Pvt. Ltd.

l. Jay Chemical Industries Ltd.

m. Unitop Chemicals P. Ltd.

n. Indian Chemicals Council

Only one user, namely, M/s India Glycols Limited filed the response to the users' questionnaire and also participated in the oral hearing and subsequently filed written submissions.

vii. The period of investigation (POI) for the purpose of the present review is January – December, 2017 (12 months). However, injury analysis period covers 2014-15, 2015-16, 2016-17 and the period of investigation.

viii. Transaction-wise imports data for the period of investigation and preceding three years was procured from the Directorate General of Commercial Intelligence and Statistics (DGCI&S) and the same has been relied upon for the purpose of analysis in this investigation.

ix. The submissions made by interested parties have been made available in the public file and also addressed appropriately in this final findings. Authority made available non-confidential version of the evidence presented by various interested parties in the form of a public file kept open for inspection by the interested parties.

x. The Authority has examined the information furnished by the domestic industry to the extent possible, on the basis of guidelines laid down in Annexure III of the Rules, to work out the cost of production and the non-injurious price of the subject goods.

xi. In accordance with Rule 6(6) of the Anti-Dumping Rules, the Authority also provided opportunity to the interested parties to present their views orally in an oral hearing held on 5th September, 2018. The parties were requested to file written submissions of the views expressed orally, followed by rejoinder submissions. The Government of Chinese Taipei, through the Taipei Economic and Cultural Centre in New Delhi also participated in the oral hearing and subsequently filed written submissions.

xii. The submissions made by the interested parties, arguments raised and information provided by various interested parties during the course of investigation, to the extent the same are supported with evidence and considered relevant to the present investigation, have been appropriately considered by the Authority in this final findings.

xiii. The Authority, during the course of investigation, satisfied itself as to the accuracy of the information supplied by the interested parties, which forms the basis of this final findings to the extent possible and verified the data / documents given by the domestic industry to the extent considered relevant and necessary.

xiv. A Disclosure Statement was issued on 24.12.2018 containing essential facts under consideration of the Designated Authority, giving time up to 02.01.2019 to furnish comments, if any, on Disclosure Statement. The Authority has considered post disclosure comments received from interested parties appropriately.

xv. Information provided by the interested parties on confidential basis were examined with regard to sufficiency of the confidentiality claims. On being satisfied, the Authority has accepted the confidentiality claims wherever warranted and such information has been considered as confidential and not disclosed to other interested parties. Wherever possible, parties providing information on confidential basis were directed to provide sufficient non-confidential version of the information filed on confidential basis.

xvi. Wherever an interested party has refused access to, or has otherwise not provided necessary information during the course of the present investigation, or has significantly impeded the investigation, the Authority considered such interested parties as non-cooperative and recorded this final finding on the basis of the facts available.

xvii. '***' in these final findings represents information furnished by an interested party on confidential basis, and so considered by the Authority under the Rules.

xviii. The exchange rate adopted by the Authority for the subject investigation is 1USS= Rs. 66.07.

xix. In compliance with the direction of the Hon'ble CESTAT, the Authority has determined the appropriate amount of anti-dumping duty, after re-analysing the relevant data as per CESTAT orders.

C. SCOPE OF PRODUCT UNDER CONSIDERATION AND LIKE ARTICLE

Views of the domestic industry

12. The domestic industry has made the following submissions with regard to the scope of the product under consideration and like article:

a. The product under consideration for the purpose of the present investigation is the same as in the earlier investigations, that is. Nonyl Phenol, which is also known as Para Nonyl Phenol.

b. It is a clear viscous liquid without sediments. The chemical formula and structure of Nonyl Phenol is $C_{15}H_{24}O$. It is produced from alkylation reaction of phenol with nonene.

c. As noted in the previous investigations, the product produced by the petitioning domestic industry is like article to that imported from the subject country.

Views of the opposing interested parties

13. No submissions were made by the other interested parties with regard to the product under consideration or like article.

Examination by the Authority

14. The product under consideration in the present sunset review investigation is Nonyl Phenol, commonly known as Para Nonyl Phenol.

15. Nonyl Phenol is a clear viscous liquid without sediments. The chemical formula and structure of Nonyl Phenol is C15H24O. It is used in the manufacture of nonyl phenol-ethylene oxide condensates for application as non-ionic surfactants after subsequent sulphonation, of oil soluble phenolic resin, of derivatives applied as corrosion inhibitors in lubricating oils and of ingredients for agro-chemical formulations. It is also used in flame-retardants and plasticizers.

16. Nonyl Phenol is classified under Chapter 29 of the First Schedule to the Customs Tariff Act, 1975 under the tariff code 2907 13 00. It is noted from the DGCI&S data that the product is also imported under other tariff codes. However, classification is indicative only and is in no way binding on the scope of the investigation.

17. The Authority notes that none of the interested parties have contested the meaning and scope of the product under consideration and the present investigation being a sunset review investigation, the scope of the product under consideration remains the same as that in the earlier investigations.

18. With regard to like article, as noted in the earlier investigations, there are no significant differences in the subject goods produced by the Indian industry and that exported from the subject country. They are comparable in terms of characteristics such as physical and chemical characteristics, manufacturing process and technology, functions and uses, product specifications, pricing, distribution and marketing, and tariff classification of the goods. The two are technically and commercially substitutable. The consumers are using the two interchangeably. None of the opposing interested parties have disputed the claims made by the domestic industry in this regard.

19. The subject goods produced by the petitioner companies are being treated by the Authority as like article to the subject goods imported from the subject country, within the meaning of Rule 2(d) of the Anti-Dumping Rules.

D. DOMESTIC INDUSTRY AND STANDING

Views of the domestic industry

20. The domestic industry submitted as follows with regard to scope of domestic industry and standing:

a. The application was filed by M/s SI Group India Private Limited. The applicant is the sole producer of the subject goods.

b. The applicant accounts for 100% of the domestic production. Therefore, the applicant company constitutes eligible domestic industry, as defined in Rule 2(b) of the Anti-Dumping Rules.

c. The applicant is not related to a producer/exporter of the product under consideration in subject country or an importer in India.

Views of the opposing interested parties

21. No submissions were made by the other interested parties with regard to the domestic industry or its standing.

Examination by the Authority

22. The petition has been filed by M/s SI Group India Private Limited. The applicant is the sole producer of the subject goods in India, accounting for 100% production of the subject goods. The applicant certified that it is not related to any producer or exporter of the product under consideration in subject country or an importer in India. Further, the applicant certified that it had not imported the subject goods into India. The Authority, therefore, considers that the applicant company constitutes eligible domestic industry within the meaning of Rule 2 (b) of the Anti-Dumping Rules and the application satisfies the criteria of standing in terms of Rule 5 (3) of the Rules.

E. ISSUES RELATING TO CONFIDENTIALITY

Views of the domestic industry

23. With regard to confidentiality, the data of the domestic industry has been adequately disclosed as trends, consistent with the requirements of Trade Notice No. 10/2018 dated 7th September, 2018. As regards the normal value, same being based on the cost of production of the domestic industry cannot be disclosed.

Views of the opposing interested parties

24. In view of excess confidentiality claimed by the domestic industry, it is very difficult to analyze whether the imports of product under consideration are on account of a demand supply gap.

25. The claims of confidentiality by the domestic industry are against the provisions of the Anti-Dumping Rules and without any justifiable reason. Instances of confidentiality are wages, constructed normal value, raw material, landed price, profit /loss trend, cost of production, net selling price.

Examination by the Authority

26. The Authority has examined the confidentiality claims of the interested parties. The Authority made available the non-confidential version of the evidences submitted by various interested parties in the form of public file. With regard to confidentiality of information, Rule 7 of Anti-Dumping Rules provides as follows: -

(1) Notwithstanding anything contained in sub-rules (2). (3) and (7) of rule 6, sub-rule (2) of rule 12, sub-rule (4) of rule 15 and sub-rule (4) of rule 17. the copies of applications received under sub-rule (1) of rule 5, or any other information provided to the Designated Authority on a confidential basis by any party in the course of investigation, shall, upon the Designated Authority being satisfied as to its confidentiality, be treated as such by it and no such information shall be disclosed to any other party without specific authorization of the party providing such information.

(2) The Designated Authority may require the parties providing information on confidential basis to furnish non-confidential summary thereof and if, in the opinion of a party providing such information, such information is not susceptible of summary, such party may submit to the Designated Authority a statement of reasons why summarization is not possible.

(3) Notwithstanding anything contained in sub-rule (2), if the Designated Authority is satisfied that the request for confidentiality is not warranted or the supplier of the information is either unwilling to make the information public or to authorize its disclosure in a generalized or summary form, it may disregard such information.

27. The provision for disclosure of essential facts before giving final findings has been laid down at Rule 16 of the Anti-Dumping Rules. Even under Rule 16, the confidential facts are required to be disclosed to "respective interested parties" only, while non-confidential facts are required to be disclosed to all interested parties. At no stage the Director General is empowered to disclose the confidential information to the parties with competing and conflicting interests.

28. The Authority notes that the information provided by the interested parties on confidential basis was examined with regard to sufficiency of the confidentiality claim. On being satisfied, the Authority has accepted the confidentiality claims, wherever warranted and such information has been considered confidential and not disclosed to other interested parties. Wherever possible, parties providing information on confidential basis was directed to provide sufficient non-confidential version of the information filed on confidential basis. The Authority made available the non-confidential version of the evidences submitted by various interested parties in the form of public file.

F. MISCELLANEOUS SUBMISSIONS

Views of the opposing interested parties

29. The following other miscellaneous submissions have been raised by the opposing interested parties:

a. The domestic industry has not established that the expiry of duty is likely to lead to continuation or recurrence of dumping as well as injury. The consequences of expiry of duty must be based on facts and not merely based on presumptions, assumptions and conjectures.

b. The duties imposed on two major products of the company, Phenol and Nonyl Phenol have helped the domestic industry to perform well. The company is trying to create a monopolistic position in the market by enjoying the protection of anti-dumping duty.

c. Anti-dumping duty on Phenol is allowing the domestic industry to gain an undue advantage in dumping the product under consideration in China PR. The compulsion of domestic industry to dump in foreign market is not understood, when they are performing well in the protected Indian market.

d. The petitioner has made some self-serving sketchy analysis of potential impact of expiry of duty on them which is not of any basis. The DI is dumping the material in China PR and wants the duty in India to be continued so that they can control the export markets with a protected domestic customer base. As against the conclusions on likelihood drawn by the petitioner, it is our submission that expiry of duty will not lead to recurrence of any dumping and injury.

e. The domestic industry is stage managing their business with the help of anti-dumping duty on the goods produced by them and is engaging in dumping in the foreign market, while the users have to pay more for the subject goods, leaving them uncompetitive in their business.

f. The domestic industry has raised a legal argument on mandatory nature of sunset review, without mentioning the judgment of Hon'ble Delhi High Court. The party has no choice to ignore a binding judgment irrespective of their privileges to make submission of their choice.

g. The petition does not contain any information to enable the Director General to decide that the expiry of duty is likely to lead to continuation or recurrence of dumping or injury.

h. The intent of the domestic industry is to unfairly curb imports and monopolize domestic market in India.

Views of the domestic industry

30. Responding to the arguments of the opposing interested parties, the domestic industry submitted as follows:

a. There is no basis in the allegation that the domestic industry is trying to create monopolistic position as the duty does not operate as a ban on imports.

b. In response to the contention of the interested parties that the domestic industry is gaining undue advantage due to duties in force against Phenol and Nonyl phenol, by dumping the subject goods in China, it was submitted that the argument was without merit. An anti-dumping duty levied by China on imports from India is based on their investigations and the facts pertaining to that country and therefore have no relevance to the present investigations as far economic parameters. In any case, there can be no benefit drawn by the petitioner from the duties imposed by China.

c. There is no evidence to show that the imposition of duty has rendered the users uncompetitive as their profits have increased during the period of investigation, when they had purchased the subject goods only from the domestic industry.

d. The argument of the interested parties regarding claims as to compulsory initiation of sunset reviews was irrelevant, as the Director General had noted in the Initiation Notification that the Authority prima facie satisfied itself regarding likelihood of continuation or recurrence of dumping and injury.

Examination by the Authority

31. The specific submissions made by the opposing parties and considered relevant, are addressed by the Authority as under:

a. 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 to recur in the event of cessation of anti-dumping duty. The Authority recommends anti-dumping duty only after following the requirements prescribed under the laws.

b. Insofar as the arguments regarding the monopolistic position of the domestic industry in the market is concerned, the Authority notes that the anti-dumping duty measure is to rectify unfair trade practices and the imposition of anti-dumping measures does not prevent or stop imports. The imports would continue to be available at fair prices and anti-dumping duty would help to maintain availability of wider choices to the consumers and to re-establish a situation of open and fair competition in the domestic market. Therefore, there is no question of monopoly of the domestic industry.

c. With regard to contention regarding the undue advantage taken by the domestic industry due to duties in force against phenol and Nonyl phenol in India, it is baseless and without any merits.

G. METHODOLOGY AND DETERMINATION OF NORMAL VALUE, EXPORT PRICE & DUMPING MARGIN

Views of the domestic industry

32. The domestic industry's submissions with regard to the determination of normal value, export price and dumping margin are summarized below:

a. Since there is no response from any exporters, the normal value may be based on available facts and evidence.

b. To calculate the net export price, ocean freight, marine insurance, commission, bank charges, port expenses and inland freight should be adjusted.

c. The dumping margin is not only positive, but also significant. Further, the dumping margin calculated is higher than that in the earlier investigations.

d. There is continued dumping of the subject goods from the subject country, as noted in the earlier investigations and the dumping margin is positive over the entire injury period.

e. India being the biggest market for the exporters and the only reason that they have not cooperated in the present investigation is that they have absorbed the existing duties and are thus, indifferent to continuation thereof; or that they are aware that the dumping margin is actually higher.

f. In the case of Automotive Tyre Manufacturer's Association Vs. Designated Authority, the Tribunal held that normal value at the time of initiation can be determined on the basis of cost of production of domestic industry.

Views of the opposing interested parties

33. With regard to normal value, export price and dumping margin, the other interested parties submitted that the domestic industry has determined substantial dumping margin on a hypothetical basis and has failed to prove the likelihood aspect based on the dumping margin determined in the original investigation and the current investigation.

Examination by Authority

34. The Authority sent questionnaires to the known producers/exporters from the subject country, advising them to provide information in the form and manner prescribed. However, none of the producers/exporters from Chinese Taipei have filed the response to the questionnaire, therefore the Authority is constrained to proceed, based on the principles of best available information. Therefore, the normal value and export price are determined as under:

I. NORMAL VALUE

35. The Authority has determined the normal value on the basis of the best available information, in terms of Rule 6(8) of the Anti-Dumping Rules. Accordingly, the normal value has been constructed considering optimum consumption norms of the domestic industry for raw materials and utilities, and best estimates of conversion costs, interest, selling, general and administrative expenses including reasonable profit on the cost of production.

II. EXPORT PRICE

36. The Authority has determined the export price in respect of imports from the subject country on the basis of best information available in accordance with the Rules. For this purpose, the Authority has adopted the transaction-wise data procured from the DGCI&S and determined the export price considering all imports of the product under consideration in India. The export price has been adjusted for ocean freight, marine insurance, commission, port expenses and inland freight expenses to determine ex-factory export price of the product under consideration.

III. DUMPING MARGIN

37. Considering the normal value and export price as above, the dumping margin for all exporters of the subject goods from the subject country is determined as below:

Particulars	Unit	Amount
Normal value	USD/MT	***
Export price	USD/MT	***
CIF	USD/MT	***
Dumping margin	USD/MT	***
Dumping margin	%	***
Dumping margin	Range	15-25%

38. It is seen that the dumping margin is positive and above the *de-minimis* levels.

H. METHODOLOGY FOR INJURY DETERMINATION

Views of the domestic industry

39. The domestic industry has submitted as follows with regard to injury and causal link:

a. There is continued injury to the domestic industry. While production, sales, capacity utilization of the domestic industry increased, resulting into increase in market share of domestic industry, this had been achieved at cost of reduced profitability, return on investment and cash profits.

b. The import volume in the period of investigation has dropped down as compared to preceding year, such decline is on account of the domestic industry constraining its prices to increase its sales. However, in the event of cessation of duties, the imports are likely to increase once again as the producers in the subject country are highly export oriented.

c. Despite the decline in imports, they occupy an important place in the market as they account for about one-fourth of consumption and are about one-third in relation to production.

d. Inspite of the domestic industry selling below the fair selling price, the imports are undercutting its prices. This clearly brings out that in the event of cessation of anti-dumping duty, the imports are likely to continue undercutting the prices of the domestic industry.

e. The imports have suppressed and depressed the prices of the domestic industry. When compared to 2015-16, it would be seen that the cost of sales has not changed in the period of investigation. Nevertheless, the landed price of imports declined, compelling the domestic industry to reduce its prices as well.

f. The landed price of imports is much below the non-injurious price. In the event of cessation of duty, the imports are likely to enter the market at injurious prices.

g. While the production, sales and capacity utilization have increased, in order to achieve the increase in sales, the domestic industry has been forced to sell at non-remunerative prices.

h. The capacity of the domestic industry is underutilized.

i. While the market share of the domestic industry has increased, in the event of expiry of duty, the imports would increase and the domestic industry would lose its place in the market.

j. Apart from underutilized capacity, the domestic industry has also suffered in terms of accumulation of inventories.

k. The profits of the domestic industry peaked in 2015-16, but have declined thereafter.

l. Likewise, the cash profits have declined by 60% and the return on investment of the domestic industry is one-third of the level in 2015-16.

m. Throughout the injury period, the domestic industry has not been able to earn adequate profits or returns.

n. There is no basis in the argument that if injury continues despite duties, it is self-inflicted. Such argument is contrary to facts, law and dumping margin in present and past cases. The fact that Section 9A (5) refers to likelihood of continuation or recurrence of dumping and injury makes it evident that the law recognizes that injury may continue despite duties.

Views of the opposing parties

40. The submissions made by the opposing interested parties with regard to injury are as follows:

a. Decline in price of imports is in line with decline in cost of domestic industry.

b. If the producers in Taiwan had unutilized capacities, the exports from Taiwan would not have declined.

c. Share of import in relation to production and also consumption declined and there is no imminent likely injury on these parameters if the duties expire.

d. Capacity utilization of domestic industry is not reflective of injury as the domestic industry has a common plant and plant utilization has improved.

e. Decline in selling price was less than decline in cost, indicating that there was no price suppression. Further, the profitability of the domestic industry improved and the return on capital employed was in the range of 0-10%.

f. The profitability of the domestic industry spiked in 2015-16, despite the import price showing a decline in the period.

g. Productivity of the domestic industry has declined in the period of investigation.

h. The data filed by the domestic industry demonstrates that there is no injury due to imports from the subject country.

i. The amount of capacity remaining unutilized with the domestic industry cannot be a reason for continued imposition of duty.

j. The petition shows no actual information about imports from subject country and therefore, claims of substantial market share held by the imports are not tenable.

k. The market share of the domestic industry has increased.

l. If the domestic industry has suffered injury after imposition of dumping, such injury is self-inflicted.

m. Contrary to the guidelines under Anti-Dumping Agreement as well as Section 9A(5) regarding likelihood of continuation or recurrence of dumping and injury, the domestic industry has claimed that imports have continued to be dumped in India. However, the data filed by the domestic industry shows that it is in a healthy and profitable state.

n. The imports from Taiwan have declined during the period.

o. The reason for the decline in capacity utilization is reduction in production of DOP.

p. The domestic industry is earning more than reasonable return on investment and cash profits are higher during the period of investigation.

q. The domestic industry has been able to earn non-injurious price during the period.

r. The claims of the domestic industry as regards its installed capacity does not match its annual report.

s. Since the domestic industry is captively manufacturing phenol, the actual cost of phenol should be charged to the cost of production of the subject goods.

t. The non-injurious price needs to be determined as per para (4) of the Annexure – III to the Anti-Dumping Rules.

u. Claims of decline in capacity utilization are erroneous as the domestic industry has been able to sell almost what it has produced.

Examination by Authority

41. The injury analysis made by the Authority hereunder addresses the various submissions made by the other interested parties.

42. Rule 11 of the Anti-Dumping Rules read with its Annexure – II thereto provides that an injury determination shall involve examination of factors that may indicate injury to the domestic industry, ".... taking into account all relevant facts, including the volume of dumped imports, their effect on prices in the domestic market for like articles and the consequent effect of such imports on domestic producers of such articles....". While considering the effect of the dumped imports on prices, it is considered necessary to examine whether there has been a significant price undercutting by the dumped imports as compared with the price of the like article in India, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.

43. Rule 23 of the Rules provide that the provisions of Rule 6, 7, 8, 9, 10, 11, 16, 17, 18, 19, and 20 shall apply mutatis mutandis in case of a review. In case the performance of the domestic industry shows that it has not suffered injury during the current injury period, the Authority shall determine whether cessation of the present duty is likely to lead to recurrence of injury to the domestic industry.

44. In consideration of the various submissions made by the interested parties in this regard, the Authority proceeds to examine the current injury, if any, to the domestic industry before proceeding to examine the likelihood aspects of dumping and injury on account of imports from the subject country. For this purpose, the Authority has considered such indices having a bearing on the state of the industry as production, capacity utilization, sales quantum, stock, profitability, net sales realization and the magnitude and margin of dumping in accordance with Annexure – II of the Rules.

I. ASSESSMENT OF DEMAND

45. The Authority has defined, for the purpose of the present investigation, demand or apparent consumption of the product concerned in India as the sum of domestic sales and captive consumption of the applicant and imports from all sources. Exports made by the applicant have been excluded from the computation in order to ascertain apparent consumption. The demand so assessed is given in the table below:

Particulars	UOM	2014-15	2015-16	2016-17	POI
Sales of domestic industry	MT	8,250	8,702	10,100	12,632
Imports from subject country	MT	7,246	6,826	6,145	4,512
Imports from other countries	MT	45	1,265	970	285
Captive Consumption	MT	***	***	***	***
Total demand	MT	***	***	***	***
Trend	Indexed	100	108	111	113

46. It is seen that the demand for the product under consideration has increased throughout the injury period.

II. VOLUME EFFECTS OF DUMPED IMPORTS

i. Import volumes and market share of imports

47. With regard to the volume of the dumped imports, the Authority is required to consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in India. For the purpose of injury analysis, the Authority has relied on the transaction wise import data procured from DGCI&S.

Particulars	UOM	2014-15	2015-16	2016-17	POI
Import Volume					
Subject country	MT	7,246	6,826	6,145	4,512
Other countries	MT	45	1,265	970	285
Total imports	MT	7,292	8,091	7,115	4,796
Subject Country Imports in relation to					
Indian production	%	81.01	62.00	53.21	32.39
Demand	%	46.62	40.65	35.70	25.89

48. It is seen that:

a. Imports from the subject country have decreased throughout the injury period.

b. Imports form subject country in relation to Indian production and consumption has also decreased with decrease in import volume.

III. PRICE EFFECT OF DUMPED IMPORTS

49. With regard to the effect of the dumped imports on prices, lays down as follows:

"With regard to the effect of the dumped imports on prices as referred to in sub rule (2) of rule 18 the Director General shall consider whether there has been a significant price undercutting 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."

50. In terms of Annexure II (ii) of the Rules, the Director General is required to consider the effect of the dumped imports on domestic prices in terms of price undercutting, price underselling, price suppression and price depression, if any.

i. Price Undercutting

51. In order to determine whether the imports are undercutting the prices, the domestic industry has given information for comparison between the landed value of the product and the average selling price of the domestic industry net of all rebates and taxes, at the same level of trade. Accordingly, the domestic prices and margin of undercutting is shown as per the table below:

Particulars	UOM	POI
Landed price of Imports	Rs/MT	96,361
Net sales realization of domestic industry	Rs/MT	***
Price Undercutting	Rs/MT	***
Price Undercutting	%	***
Price Undercutting	Range	0-10%
Average ADD	Rs/MT	16193
Landed Price after ADD	Rs/MT	1,12,554
Price Undercutting after ADD	Rs/MT	***
Price Undercutting after ADD	%	***
Price Undercutting	Range	NEGATIVE

52. It is noted that price undercutting is negative when calculated after taking into account the anti-dumping duty and is positive when calculated without anti-dumping duty. However, the difference is very minimal and is not considered to be creating any price pressure on the pricing process of the Domestic Industry

ii. Price Suppression and Depression

53. In order to determine whether the effect of imports is to depress prices to a significant degree or prevent price increases which otherwise would have occurred, the domestic industry has given information for the changes in the costs and prices over the injury period as below:

Particulars	UOM	2014-15	2015-16	2016-17	POI
Landed price of Imports with ADD	Rs/MT	1,36,329	1,22,757	99,105	1,12,554
Trend	Indexed	100	90	73	83
Landed price of Imports without ADD	Rs/MT	1,20,136	1,06,564	82,912	96,361
Trend	Indexed	100	89	69	80
Cost of sales of domestic industry	Rs/MT	***	***	***	***
Trend	Indexed	100	79	69	79
Selling price of domestic industry	Rs/MT	***	***	***	***
Trend	Indexed	100	86	73	80

54. It is seen that the landed price (with ADD) of the imports is above the selling price as well as the cost of the Domestic Industry. It is also seen that the cost of sales, selling price and import price declined till 2016-17 as compared to the base year but the same increased in the period of investigation. However, comparison of landed value without taking into account anti-dumping duty shows that the import prices are lower than the selling price.

55. In order to properly evaluate whether there has been price suppression or depression, the Authority has also considered the cost to sales ratio over the injury period.

Particulars	UOM	2014-15	2015-16	2016-17	POI
Cost to sales ratio	%	***	***	***	***
Trend	Indexed	100	92	94	99

56. It is seen that the cost to sales ratio in the period of investigation is moving in the same band and therefore, cannot be considered to be having any negative impact on the Domestic Industry.

iii. Price Underselling or Injury Margin

57. The price underselling has been evaluated by comparing the non-injurious price with the landed value of the subject goods to arrive at the extent of price underselling.

Particulars	UOM	Chinese Taipei
Import Volume	MT	4512
Landed price of Imports with ADD	Rs/MT	1,12,554
Non-Injurious Price	Rs/MT	***
Price Underselling	Rs/MT	***
Price Underselling	%	***
Price Underselling	Range	(5-15)
Landed price of Imports without ADD	Rs/MT	96,361
Price Underselling	Rs/MT	***

Particulars	UOM	Chinese Taipei
Price Underselling	%	***
Price Underselling	Range	0-10%

58. From a comparison of the landed value with the non-injurious price, it is noted that the price undersclling is positive without adding anti-dumping duties and negative after adding anti-dumping duties.

IV. ECONOMIC PARAMETERS OF DOMESTIC INDUSTRY

59. Annexure II to the Anti-Dumping Rules requires that the determination of injury shall involve an objective examination of the consequent impact of these imports on domestic producers of such products. With regard to consequent impact of these imports on domestic producers of such products, the Anti-Dumping Rules further provide that the examination of the impact of the dumped imports on the domestic industry should include an objective and unbiased evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments or utilization of capacity; factors affecting domestic prices, the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital investments. The various injury parameters relating to the domestic industry are discussed herein below:

i. Production, Capacity, Capacity Utilization and Sales Volumes

60. The performance of the domestic industry with regard to production, domestic sales, capacity and capacity utilization is as follows:

Particulars	UOM	2014-15	2015-16	2016-17	POI
Capacity	MT	24,315	24,315	24,315	24,315
Production	MT	8,945	11,008	11,550	13,928
Capacity Utilization	%	36.79	45.27	47.50	57.28
Domestic Sales	MT	8,250	8,702	10,100	12,632

61. It is seen that the capacity of the domestic industry has remained constant, while the production and capacity utilization of the domestic industry has increased throughout the injury period. The domestic sales of the domestic industry have also increased throughout the injury period.

ii. Market Share in Demand

62. The effects of the dumped imports on the market share in demand of the domestic industry have been examined as below:

Particulars	UOM	2014-15	2015-16	2016-17	POI
Sales of Domestic Industry	%	53.08	51.82	58.67	72.48
Imports from Subject Country	%	46.62	40.65	35.70	25.89
Imports from Other Countries	%	0.29	7.53	5.63	1.63
Total Demand	%	100	100	100	100

63. It is seen that the market share of domestic industry has increased over the injury period, while the share of imports from the subject country in demand has declined throughout the injury period.

iii. Inventories

64. The data relating to inventory of the subject goods are shown in the following table:

Particulars	UOM	2014-15	2015-16	2016-17	POI
Inventory as No. of days of Production	MT	***	***	***	***
Trend	Indexed	100	58	80	74

65. The Authority notes that the inventory as a number of days of production has decreased in the POI as compared to the base year.

iv. Profit or Loss, Cash Profits and Return on Investment

66. The profit/loss, cash profits and return on investment of the domestic industry are as follows:

Particulars	UOM	2014-15	2015-16	2016-17	POI
Profit/Loss	Rs Lacs	***	***	***	***
Trend	Indexed	100	1,164	856	290
Profit/Loss	Rs/MT	***	***	***	***
Trend	Indexed	100	1,103	699	190
Cash Profit	Rs Lacs	***	***	***	***
Trend	Indexed	100	504	397	200
Return on Capital employed - NFA	%	***	***	***	***
Trend	Indexed	100	935	998	291

67. It may be seen from the above table that the profits have decreased but are positive throughout the injury investigation period. As regards the trend relating to cash profit, it is noted that, it has increased and reached to a level of 200 during the POI as compared to the base year. The trend of Return on capital employed has also increased to a level of 291.

v. Employment, Wages and Productivity

68. The employment and wages are below:

Particulars	UOM	2014-15	2015-16	2016-17	POI
No of Employees	Nos	***	***	***	***
Trend	Indexed	100	97	95	97
Wages per Unit	Rs/MT	***	***	***	***
Trend	Indexed	100	103	99	102
Productivity per employee	MT/Nos	***	***	***	***
Trend	Indexed	100	127	135	161
Productivity	Kg/Person/Day	***	***	***	***
Trend	Indexed	100	127	135	160

69. It is seen that the number of employees has remained more or less constant throughout the injury period. The wages and wages per unit have remained in almost same region throughout the injury period. However, the productivity per employee and the productivity per day have increased throughout the injury period with the increase in production. However, they are not indicative of injury.

vi. Magnitude of Dumping

70. It is noted that the dumping margin is positive and above *de-minimis*.

vii. Growth

71. The Authority notes that the growth of the domestic industry in terms of production, domestic sales volume, capacity utilization and market share is positive as well as growth in terms of profits, cash profits and return on investment are also positive throughout the injury investigation period.

I. LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING AND INJURY

Views of the domestic industry

72. The submissions made by the Domestic industry with regard to the likelihood of continuation or recurrence of dumping and injury are as follows:

a. From the annual reports of the producers in the subject country, it is evident that the subject goods hold an important place for these exporters and that they are highly dependent upon exports.

b. The domestic demand in the subject country is sufficient to utilize only 13% of the capacity of the producers therein.

c. Further, nearly 40% of the capacities of the producers in the subject country are unutilized.

d. The idle capacities of the foreign producers are 24,376 MT, which is sufficient to take over the Indian market, having a demand of only 17,215 MT.

e. There are restrictions on the export of subject goods to other markets, including USA, Canada and European Union. Therefore, the producers in the subject country can find market only in Asia.

f. While China PR was a major market for the producers in Taiwan, it imposed anti-dumping duty on the goods exported from Taiwan. It may be noted that China PR has initiated second sunset review in March, 2018 against the imports from Taiwan.

g. Moreover, in 2011, China PR added the subject goods to the list of severely restricted toxic substances.

h. Taiwan is a hub of Asian transportation routes, which allows it to enjoy certain geographical advantages in terms of lower shipping cost of bulk shipping.

i. Other Asian countries such as Singapore and Malaysia do not offer a steady market for exports from the subject country.

j. Contrary to the claims of the interested parties, Korea does not offer a significant demand for the subject goods.

k. While the exports to USA have increased, the volume thereof is not comparable to the export volumes to India.

l. With the loss of China PR as a market, the producers in the subject country suffered a setback as the exports thereto fell from around 15,000 MT in 2010 to around 1,500 MT in 2016 and 2017.

m. Even with the decline in exports by 8,000 MT between 2010 to 2012, the exporters in the subject country nevertheless expanded capacity by 5,000 MT.

n. The importance of India as a market is accentuated by the fact that the demand in India is a growing one, as the per capita consumption of surfactants is expected to increase.

o. Imports to declined only because of the enhancement of duties.

p. The exporters were dumping not only in the earlier investigations, but there is continued dumping over the entire injury period. In fact, the dumping margin is higher than that in the earlier investigation.

q. 99% of the exports from Taiwan to other countries have been made at dumped prices. Further, the landed price of 87% of the exports is below the fair price, and 80% of the exports have been made at prices below the selling price in India. This brings out the pricing behavior of the exporters in that they resort to unfair competition.

r. If the potential impact of expiry of duties is seen, it would be seen that the imports are likely to increase both in absolute terms, as well as in relation to production and consumption. Further, the imports are likely to undercut and suppress or depress the prices of the domestic industry. In such a situation, the sales and market share of domestic industry are likely to decline, forcing the domestic industry to reduce production. The lower capacity utilization and lower prices are also likely to impact the profitability of the domestic industry, and it is likely to be forced into losses.

s. Responding to the allegations in this regard, it was submitted that the petitioner has provided all details establishing likelihood of continuation or recurrence of dumping or injury.

Views of the opposing interested parties

73. The submissions of the other interested parties, with regard to the likelihood of continuation or recurrence of dumping and injury are summarized hereunder:

a. The domestic industry has determined substantial dumping margin on a hypothetical basis and has failed to prove the likelihood aspect based on the dumping margin determined in the original investigation and the current investigation.

b. Domestic industry could not show any unutilized excess volume lying idle in Taiwan which may be diverted to India in the event of expiry of present duties. In fact, the petitioner claimed that the per capita consumption of surfactants in India is only 0.4Kg per person whereas the global average is 3.5Kg. This clearly shows that the subject goods which go into surfactants etc. will have a higher demand in rest of the world and it cannot be accepted that India is going to be the largest market for subject goods and Taiwanese exporters will send more material to India. Moreover, while the petitioner claims 39% idle capacity, the exports from Taiwan declined significantly in the last few years to India and also to the world. If the claims of such freely disposable capacities are true, then there was no reason for the exports to go down in the past few years. Taiwan exported much higher to India when AD duties were applicable in the past and the reduction in exports should be seen as a factor suggesting paradigm shift in the nature of exports to India from Taiwan which does not show any likelihood of dumping and injury.

c. It is claimed that the exporters of PUC in Taiwan are highly export oriented. The submission, however, does not establish likelihood as the exports from Taiwan to India and also world has decreased significantly in the last 4 to 5 years based on the data submitted by the petitioner itself. As against a claim of 54000 MT of exportable capacity, Taiwan was exporting less than 30000 MT in 2017 which shows the estimates given by the domestic industry are not reliable.

d. It is claimed that the exporters of PUC in Taiwan are impacted because of restrictions on use of nonyl phenol in various export market. The fact is that none of the countries have banned the use of nonyl phenol. In fact, the petitioner itself submitted that the world demand and also Indian demand for nonyl phenol will grow further. Certain regulations imposed on the use of the product are meant to avoid environmental issues and not to ban the product per se. Thus, the claims are unfounded.

e. Had India been a preferred destination, then export to India should have increased when the overall exports declined. In any case, exports to Korea, Malaysia, Singapore and USA increased substantially in this period, demonstrating that India is not the only location where demand is significant.

f. While the exports from Taiwan to world came down from 43,533 MT in 2010 to 29,264 MT in 2017, the exports to India came down from 7,477 MT to 4,893 MT. The trend of export to India is comparable to the rest of the world.

Examination by Authority

74. The Authority has examined the likelihood of continuation or recurrence of dumping and injury in case of cessation of anti-dumping duty, in terms of Annexure II (vii) of the Rules and other factors as below:

a. In relation to the annual reports of the producers in the subject country, it is noted that there is no evidence to prove that the excess capacities will be diverted into India in the event of revocation of anti-dumping duties.

b. In relation to the domestic sufficient demand in the subject country and huge unutilized capacity, it is noted that in the absence of any evidence that the same will be utilized to dump goods into India, no adverse impact can be drawn against the exporters from subject country.

c. In relation to exports restrictions by USA, Canada and European Union and therefore, Asia being the only market available, it is noted that in the absence of any evidence that the same will be utilized to dump goods into India, no adverse impact can be drawn against the exporters from subject country.

d. In relation to anti-dumping measures by China and its market share for exporters from Taiwan, it is noted that the facts and circumstances of both the investigations are different and therefore, both cannot be equated without appreciating the facts of that case.

e. In relation to Taiwan being hub of Asian transportation routes, which allows their exporters to enjoy certain geographical advantages in terms of lower shipping cost of bulk shipping, it is noted that the same cannot be held against them.

f. In relation to the submission of the Domestic Industry, that contrary to the claims of the interested parties, Korea does not offer a significant demand for the subject goods, it is noted that same do not have any impact on the financial situation of the Domestic Industry.

g. That the importance of India as a market is accentuated by the fact that the demand in India is a growing one, as the per capita consumption of surfactants is expected to increase. Therefore, revocation of duties will have no adverse impact.

h. From the above, it is noted that in case duties are revoked, it would be seen that the imports are not likely to increase both in absolute terms, as well as in relation to production and consumption.

J. CAUSAL LINK

Views of domestic industry

75. The submissions of the domestic industry, with regard to causal link are summarized hereunder:

a. In case of a sunset review, there is no requirement to establish a causal link between likely dumping and likely injury.

b. The injury to the domestic industry is not attributable to any other factor, and is attributable to dumping from the subject country.

c. The causal link is evident from the fact that the market shares of imports declined only because domestic industry reduced its selling price to match the landed price of imports.

d. Despite the decline, the imports continue to hold a major share of the market.

e. The increased sales of the domestic industry came at the cost of reduced profitability.

f. In the event of cessation of duty, the domestic industry is likely to suffer injury and its production, sales, capacity utilization, profits and other economic parameters are likely to deteriorate.

Views of the opposing parties

76. The submissions of the other interested parties, with regard to causal link are summarized hereunder:

a. There is absence of causal link between the subject imports and the injury to the domestic industry.

b. The profitability of the DI has shown some unusual spikes in the 2015-16 period. Profitability moved to a level of 1103 indexed points in 2015-16 from a 100 basis point. This shows the profitability is not directly driven by imports and such growths cannot be linked to import price. In fact, such profit was registered when the import price declined to Rs. 97/- per kg in 2015-16 from a level of Rs110/kg in the year 2014-15. This indicates existence of other reasons having a bearing on the performance of the DI which negates the causal link claims of the DI

Examination by the Authority

77. The Authority has examined the submissions on causal link as follows:

a. In relation to the submission that in case of a sunset review, there is no requirement to establish a causal link between likely dumping and likely injury, it is noted that the Authority as a matter of practice examines causal link in sunset review investigation also.

b. It is also noted that the performance of the Domestic Industry has improved, and price attractiveness of the Indian market is negative. Market shares of imports have also declined.

c. From the above analysis that it is noted that there is nothing to suggest that the Domestic Industry will suffer injury in case duties ceased to exist.

K. POST –DISCLOSURE COMMENTS

Views of domestic industry

78. The Domestic Industry submitted letters / emails dated 27th December, 2018 and 1st January, 2019 and also submitted comments on disclosure statement. The submissions made by the domestic industry are summarized hereunder:

a. That the certain essential facts, which would form basis of the decision of the Designated Authority, have not been disclosed in the Disclosure Statement. In view thereof, Domestic Industry requested the Authority to disclose constructed normal value, dumping margin, conclusion of the Authority on likelihood of dumping, injury, causal link and facts of injury. It is further submitted that in the absence of adequate disclosure, the Domestic Industry is prevented from offering any meaningful comments.

b. That the Authority has not fulfilled the requirements of Rule 16 of the Customs Tariff Rules 1995. To substantiate their submissions, Domestic Industry has submitted certain WTO judgements and decisions of CESTAT and High Courts.

c. That the Authority should consider the communications sent directly by the petitioner company post issuance of disclosure statement.

d. That the Designated Authority may kindly seek extension of present anti-dumping duties as the period of existing duties are expiring soon. It is further submitted by the Domestic Industry that in the event the Authority decides to extend the period by five years, then in that case higher authorities would not be left with enough time to extend the period.

e. That the facts submitted by the Domestic Industry have not been properly appreciated in the disclosure statement, having regard to the totality of facts and circumstances. Therefore, the Domestic Industry has provided its own interpretation of the essential facts disclosed by the Authority in the disclosure statement.

f. That the as per Article 6.9 of the Anti-Dumping Agreement and Rule 16 of the Anti-Dumping Rules "the authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures." Therefore, the Authority should have disclosed its conclusion in terms of causal link and likelihood of dumping and injury. Domestic Industry has cited WTO decisions and High Court decision in support of their contention.

g. That the Authority has not considered certain submissions made by the Domestic Industry in relation to intensified and continued dumping, price depression, reduced profitability, pricing behavior of exporters, potential volume and value impact on Domestic Industry and its profitability.

h. Similarly, Domestic Industry has submitted that the Authority has not examined its submission relating to relevance of causal link analysis in sunset review investigations. Therefore, Domestic Industry is not in position to offer its comments on the conclusion of the Authority.

i. That the domestic industry submits that the only reason for the exporters to not cooperate is either that they have been able to absorb the duties or that the actual dumping margin is in fact higher. Therefore, the non-cooperation of the exporters clearly demonstrates that the quantum of duties levied is in fact low and there is a need of continuation of duties.

j. That the Authority has overlooked the situation post expiry of the duties by merely comparing the injury parameters of POI by base year. It is also submitted that after revocation of duties, dumping will intensify and due to that pressure on the domestic prices will increase.

k. That although the domestic industry gained in terms of market share, its profitability has suffered. Therefore, if the duties will not be continued, the imports are likely to affect the economic and financial viability of the domestic industry.

l. That the Authority should consider freely disposable capacities present with the foreign producers, and their high export orientation and their exports to third country before it makes its final conclusion.

m. That the Authority has not appreciated the fact that decline in import volume is due to the increased duties and exporters from subject countries are still dumping the subject goods in India. Further, Domestic Industry has submitted that the exporters of subject goods resort to dumping, in case duties are revoked.

n. That since no conclusions have been drawn with regard to likelihood of continuation or recurrence of dumping or injury in the Disclosure Statement, the domestic industry is at a loss to understand the facts being considered in totality by the Designated Authority. The domestic industry reserves its right to make further submissions once all essential facts have been disclosed having regard to the provisions of Rule 16 of the Anti-Dumping Rules.

Views of the opposing parties

79. The submissions of the other interested parties, made post disclosure are summarized hereunder:

a. That as per the disclosure statement the domestic industry has a capacity of about 24,315 MT which is more than the demand in the country. Further, even assuming that Domestic Industry will cater complete demand in India, they will be left with unutilized capacity in the tune of 30%. Therefore, such unutilized capacity should not be considered to extend the anti-dumping period by further five years.

b. That even after such excess capacities, and after segregation of performance into domestic and export, the Domestic Industry is doing substantially well. Therefore, the Domestic Industry is not vulnerable to any injury from imports in the event of expiry of present duties.

c. That the purpose of anti-dumping duties is not to indemnify the excess capacities created by the Domestic Industry to cater to the foreign market. Further, the imports did not create any consequence on the performance of the Domestic Industry.

d. That the present investigation being an SSR likely injury margin determined is very important which is seen as not substantial in the facts of the present case. The Domestic Industry has been performing well in the entire injury period and the trend just continues even after the POI.

e. That the reduction in import coincided with decline in landed price was lower than the reduction in cost of Domestic Industry demolishes the theory of excess capacities in the subject country causing threat to the Domestic Industry. It is further submitted that if the theories of excess capacities waiting to be directed to India in the event of expiry of present anti-dumping duties were true, then India would have witnessed much higher imports at a lower price already with the given facts. The import price and volume during the injury period do not depict any such pressure on the exporters which rules out any likelihood of dumping and injury in the event of expiry of present duties.

f. That the Domestic Industry has recovered fully from the adverse situation found earlier and the DI is fairy placed to compete in the market. It is also submitted that the current anti-dumping duties should be allowed to expire in such a scenario. In-fact the DI is seeking further protection to cover its excess capacity so that they can target the export market which is not the intended purpose of ADD.

Examination by the Authority

80. The examination of post-disclosure comments is as under:

a. In relation to the submission made by the Domestic Industry that the Authority has not disclosed all the essential facts in the disclosure statement in terms of Rule 16, it is noted that it was not disputed by the Domestic Industry that the submissions made by them or by any other interested parties are not recorded as essential facts under consideration by the Authority in the disclosure statement in terms of Rule 16. Therefore, the contention of the Domestic Industry that the Authority has not disclosed essential facts is based on incorrect appreciation of facts and law, as the whole object of Rule 16 is to disclose all the facts gathered by the Authority deemed essential for its final conclusion in terms of Rule 17.

b. It is further noted that the object and purpose of disclosure under Rule 16 is to seek comments on disclosure statement and undertake necessary changes thereto based on such comments. It was also noted from the submission of the Domestic Industry through its legal representative or directly by them, that they want the Authority to communicate its decision on extension of duties.

They have also sought information like constructed normal value, dumping margin which was never disclosed to interested parties as a settled practice of the Authority in order to protect confidentiality of the information used by the Authority from the confidential information submitted by the interested parties. Therefore, the interpretation that is being resorted to by the Domestic Industry, that the disclosure statement should be exact replica of the final findings would frustrate the object and purpose of disclosure statement. Further, such an interpretation is unfounded in the Rules and also against settled principles of statutory interpretation. In any case, the interpretation given to Rule 16 by the Domestic Industry is neither legally nor logically correct.

c. In relation to the submissions sent directly by the petitioner company, it is noted that the same have been addressed at appropriate places in the final findings. Further, in relation to the WTO cases and judgements of the CESTAT and High Courts submitted by the Domestic Industry, it is noted that the WTO cases and judgements of Hon'ble High Courts and CESTAT cited by the Domestic Industry cannot be made *pari-materia* applicable to the facts and circumstances of the instant investigation, as the Authority has disclosed all the essential facts to all the interested parties as deemed essential in terms of Rule 16.

d. In relation to the submissions relating to Article 6.9 of the Anti-Dumping Agreement and Rule 16 of the Anti-Dumping Rules "the authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures, it is noted that the Authority has appropriately disclosed all the essential facts to be considered for its conclusion in final findings.

e. In relation to the submission of the Domestic Industry that the Authority has not considered certain submission made by the Domestic Industry, it is noted that the Authority has considered all the submissions of the Domestic Industry. It is also noted that the Domestic Industry was expecting final conclusion in the disclosure statement about extension of the duties, which is nowhere stipulated by the Rules. Therefore, there is no merit in the request of the Domestic Industry that the Authority should disclose its decision on extension of duties at the stage of disclosure statement. It is also important to note that, the Authority can reach to any conclusion, only after receiving comments on the disclosure statement by all interested parties and after satisfying itself on the facts and figures to be used for making final determination.

f. In relation to facts pertaining to likelihood of dumping and injury submitted by all the interested parties, it is noted that the same has been appropriately recorded in the final findings and therefore, no prejudice can be caused to any interested parties including Domestic Industry.

g. In relation to the submissions of the Domestic Industry that by not disclosing the conclusion by the Authority, purpose of the disclosure statement is defeated, it is noted that it would be inappropriate to disclose any conclusion without ascertaining the correctness and completion of the facts, which eventually would form basis of the conclusion. Moreover, the sole purpose of Rule 17 i.e. to submit the Final Findings, gets defeated and disclosure of such information at the stage of disclosure statement would defeat the object and propose of Rule 16 of AD Rules, 1995. Precisely, for this reason Rule 16 has provided provision of disclosing only essential facts under consideration by the Authority which will form the basis of its decision.

h. In relation to the submission of the Domestic Industry that the Authority has not examined its submission relating to relevance of causal link analysis in sunset review investigations, it is noted that the purpose of the disclosure statement is to seek comments on the appropriateness of the facts recorded by the Authority and the examination have been done at appropriate places in the final findings issued under Rule 17.

i. In relation to the submission of the Domestic Industry that the Authority has overlooked the situation post expiry of the duties, it is noted that the Authority has based its determination based on the facts and data submitted by the interested parties during the course of the investigation. The same has been appropriately disclosed in the disclosure statement. Therefore, contention of the Domestic Industry that the Authority has overlooked post expiry situation is factually incorrect.

j. In relation of the submission of the Domestic Industry that in case of revocation of the duties, their market share, profitability will suffer, it is noted that the Authority has based its conclusion based on the submissions made by all the interested parties and after appreciating the law and logic of the said submissions. Therefore, it would be incorrect to state that the Authority has not appreciated the facts in relation to financial condition of the Domestic Industry in the event of revocation of duties.

k. In relation to freely disposable capacities submitted by the Domestic Industry, it is noted that the Authority has appropriately analyzed the capacities freely disposable at appropriate place in the final findings.

l. In relation to the submissions relating to excess capacity and its impact on cost and likelihood, it is noted that the Authority has dealt with this issue at appropriate places in the final findings.

m. In relation to submission that the Domestic Industry is doing substantially well and is not vulnerable to any injury from imports in the event of expiry of present duties, it is noted that the same is analyzed at appropriate places in the final findings.

n. In relation to the submission that the purpose of anti-dumping duties is not to indemnify the excess capacities created by the Domestic Industry to cater to the foreign market, it is noted that the purpose of the anti-dumping duties is to create a level playing feel and in the sunset review investigation, the obligation of the Authority is to determine the likelihood of dumping and injury to the Domestic Industry in the event of cessation of anti-dumping duties. In view thereof, the contention of interested parties is misplaced.

o. In relation to the diversion of excess capacities to India, it is noted that the Authority will not solely base its determination on the availability of the excess capacity. Further, examination of excess capacities has already been made at appropriate places in the final findings.

p. In relation to the submissions that the Domestic Industry has fully recovered from the adverse situation, it is noted that the Authority has analyzed the same at appropriate places in the final findings.

L. EARLIER CONCLUSIONS AND RECOMMENDATIONS IN FINAL FINDINGS DATED 11TH JANUARY, 2019

81. Having examined the contentions of various interested parties and on the basis of the above facts, circumstances, and analysis, the Authority had earlier concluded in its Final Findings dated 11th January, 2019 that continuation of antidumping duty is not warranted and accordingly did not recommend extension of antidumping duty on the imports of subject goods from the subject countries.

M. CHALLENGE IN CESTAT AND CESTAT ORDERS

82. The aforesaid findings dated 11th January, 2019 were challenged by the domestic industry in appeal under Section 9C of the Act.

83. The Hon'ble CESTAT observed with regard to likelihood of continuation or recurrence of dumping and injury as under;

19. On the issue of likelihood of continuous or recurrence of dumping and injury in case of cessation of Anti-dumping duty, the DA observed that there is no evidence to prove that the excess capacities available with the exporters of the subject country would be diverted into India in the event of revocation of anti-dumping duty. Also, he has observed that insufficient demand in the subject country and un-utilised capacity will be utilised to dump goods into India cannot be a factor to draw adverse inference against the exporters from such country. Further, he has observed that export restrictions by USA, Canada and European Union on the subject goods would make Asia being the only market available and the goods would be dumped in India, in the absence of evidence cannot lead to an adverse impact against the exporters. With regard to anti-dumping measures initiated in China and its market for exporters from Chinese Taipei it is noted that the facts and circumstances of investigations are different, therefore cannot be equated in deciding the present case. He has also commented that being the hub of Asia transport routes Chinese Taipei enjoys lower shipping cost or bulk shipping cannot be held against them. Further

he has observed that importance of India as a market is accentuated by the fact that the demands in India is growing and is expected to increase, therefore revocation of duty will have no adverse impact. He has finally observed that imports are not likely to increase both in absolute terms as in relation to production and consumption in the event of anti-dumping duty is removed.

20. The domestic industry, on the other hand, has contended that dumping margin has been determined by the authority in the range of 15-25% when the duties were in force. Thus, there is likelihood on the expiry of the duty, the dumping of goods would further intensify. It is their contention that the domestic industry had not earned adequate profit even during the period when the dumping duty is in force as they had to match and manage the sales prices with the landed price of the imported goods even though the market share has been slightly improved. It is their contention that the profit is meagre at 2% while the returns on capital employed is merely 5% during the POI, when 22% on such return is considered as normal. Further, they have argued that in the circumstance of undercutting of the prices of domestic industry, the importers in India would have clear preference for the imported product being dumped which would result in surge in import. They have submitted that even though there is marginal improvement on certain fronts in the performance of the domestic industry, but if the duty is withdrawn, negative effect on production would be immediate and whatever benefit obtained would be wiped out. Further, laying emphasis on the surplus capacity with foreign exporters in absence of alternative market, they have argued that it is sufficient indicator in favour of likelihood of increase in dumping of goods in India on expiry of duty.

21. We find merit in the contention of the Advocate for the Appellant. In our view there is a fundamental fallacy in the approach of the DA in the determination of likelihood of recurrence of dumping and injury post removal of the duty on the subject goods from the subject country. There is no dispute of the fact that evidence of past and present circumstances is relevant and necessary to arrive at a reasonable and logical determination of continuation of same scenario in future warranting continuation of antidumping duty or otherwise. However, it is impractical and also illogical to insist on the positive evidences on future events, for determination of the likelihood of dumping and injury in future on removal of duty. The parameters to reach at the conclusion on likelihood of dumping and injury adopted in the Sunset Review proceeding by various countries mentioned above are: to name a few, current dumping and injury, significant production capacity and inventories of exporters, existence of barriers for import of such goods in other countries, failure of respondents to participate in review proceeding, declining demand in exporters domestic market, high degree of dependence on export market by exporters, etc.. We also find that more or similar parameters are appearing under the Annexure-II of the Anti-Dumping Rules,1995.

22. In this back drop, we find that the Appellant domestic industry could reasonably establish through present and past evidence that most of these parameters are satisfied in the present case. The dumping margin is in the range of 10-15% and is positive and above de-minimis. Despite anti-dumping duty, the earning of domestic industry is meagre 2% and return of capital is around 5% against the normal return of 22%. The landed value of import without anti-dumping duty are below the cost of production of domestic industry. The Appellant was able to show that there is a demand of around 17,216 MT in domestic market, whereas the ideal capacities of foreign exporters are around 24,376 MT. Export restrictions are placed on subject goods in other international markets viz. USA, Canada and European Unions, leaving major market only in Asia. The subject goods restriction in China PR being added to the list of restricted toxic substance would find its way in Indian market. There is growing Indian market in the sense that per capita consumption surfactant is expected to increase. Further, they could show that the export from Chinese Taipei to other countries have been made at dumped prices. Besides, the most important factor is that there has been no participation/response by the exporters of the subject goods on the proposed continuation of anti-dumping duty. Therefore, cumulatively considering all these parameters which are normally adopted internationally and also in line with Annexure II(vii) of the Anti-Dumping Rules,1995, in Sun Set Review proceedings, we are of the view that on removal of the anti-dumping duty there will be likelihood of recurrence of dumping and injury to the domestic Industries."

84. While the said decision of Hon'ble CESTAT came on 28.11.2019, the anti-dumping duty which was earlier imposed through Customs Notification no. 05/2014-Cus (ADD) dated 16.01.2014 had already expired on 15.01.2019. This resulted in a gap and in view of the same a clarification was sought from Hon'ble CESTAT by moving miscellaneous application to clarify that whether anti-dumping duty can be imposed after expiry of original duty notification in view of decision of the Hon'ble Delhi High Court in the matter of ***Forech India Ltd Vs Designated Authority*** with regard to extension of duty after expiry of existing duty. In the said judgement it has been held that "*... the Act has fixed a period for completion of Sunset Review within one year from the date of expiry of the initial five year levy and it is in this one year period that the Government must form a view that the cessation of duty would lead to continuation or recurrence of dumping and injury. Therefore, it is only within this period that it may extend i.e. without breaking the continuity of the previous duty or its modified version, for a further period of five years....*"

85. The Hon'ble CESTAT vide its Miscellaneous Order No. 50114/2020 dated 21st February, 2020 disposed the Miscellaneous Application No. 50109 of 2020 for clarification and held as under:

> "*25. In this view of the matter, the decision of the Delhi High Court in Forech India would not be applicable to the facts of the present case in as much as the said decision relates to the original determination by the Designated Authority and not to a determination when a remand is made by the Appellate Tribunal. The contention of the learned Counsel appearing for the importers cannot also be accepted for the same reason.*
>
> *26. The Application, accordingly, stands disposed of with the aforesaid clarification.*"

86. The Authority has re-examined the likelihood of continuation or recurrence of dumping and injury in case of cessation of anti-dumping duty in terms of the paragraph (vii) of Annexure-II, and observations made by the Hon'ble CESTAT vide its order dated 28.11.2019.

N. CONCLUSIONS

87. Having regard to the contentions raised, information provided and submissions made by the interested parties, facts available before the Authority and observations and analysis of the Hon'ble CESTAT in the judgment as recorded above in respect of likelihood of recurrence of dumping and consequent injury, wherein the Hon'ble CESTAT has held as under:

Para 21. "it is impractical and also illogical to insist on the positive evidences on future events, for determination of the likelihood of dumping and injury in future on removal of duty."

Para 22. In this back drop, we find that the Appellant domestic industry could reasonably establish through present and past evidence that most of these parameters are satisfied in the present case. The dumping margin is in the range of 10-15% and is positive and above de-minimis. Despite anti-dumping duty, the earning of domestic industry is meagre 2% and return of capital is around 5% against the normal return of 22%. The landed value of import without anti-dumping duty are below the cost of production of domestic industry. The Appellant was able to show that there is a demand of around 17,216 MT in domestic market, whereas the ideal capacities of foreign exporters are around 24,376 MT. Export restrictions are placed on subject goods in other international markets viz. USA, Canada and European Unions, leaving major market only in Asia. The subject goods restriction in China PR being added to the list of restricted toxic substance would find its way in Indian market. There is growing Indian market in the sense that per capita consumption surfactant is expected to increase. Further, they could show that the export from Chinese Taipei to other countries have been made at dumped prices. Besides, the most important factor is that there has been no participation/response by the exporters of the subject goods on the proposed continuation of anti-dumping duty. Therefore, cumulatively considering all these parameters which are normally adopted internationally and also in line with Annexure II(vii) of the Anti-Dumping Rules,1995, in Sun Set Review proceedings, we are of the view that on removal of the anti-dumping duty there will be likelihood of recurrence of dumping and injury to the domestic Industries", the Authority concludes that:

i. There is continued dumping of the subject goods from the subject country.

ii. The imports are below the cost of production of the domestic industry.

iii. The idle capacity with the foreign exporters is significant, and more than total demand of subject goods in India.

iv. On account of Export restrictions placed on subject goods in other international markets viz. USA, Canada and European Unions, and now China PR, the subject goods are likely to find its way in Indian market.

v. There is growing Indian market in the sense that per capita consumption surfactant is expected to increase. Further, the export from Chinese Taipei to other countries have been made at dumped prices.

vi. There has been no participation/response by the exporters of the subject goods on the proposed continuation of anti-dumping duty.

vii. Despite anti-dumping duty, the return on capital employed of domestic industry is meagre 5% during the POI.

viii. The expiry of duty is likely to lead to continuation of dumping and consequent injury to the domestic industry.

88. In accordance with the observations of the Hon'ble Tribunal, the Authority, after cumulatively considering all these parameters, concludes that there is likelihood of recurrence of dumping and injury to the domestic industry in the event of expiry of anti-dumping duty.

O. RECOMMENDATIONS

89. Having re-examined the likelihood of continuation/recurrence of dumping and injury to the domestic industry in case of expiry of the current measure in place, in view of the directions of Hon'ble CESTAT, and foregoing conclusions, the Authority recommends continuation of anti-dumping duty in force on imports of the product under consideration from the subject country. Having regard to the lesser duty rule followed by the authority, the Authority recommends continuation of definitive anti-dumping duties equal to the lesser of margins of dumping and margins of injury so established, so as to remove the injury to the domestic industry, in the form and manner described in the table below. The Authority, thus, considers it necessary to recommend continuation of definitive antidumping duty as modified, on all imports of the subject goods from the subject country, as per column 7 in the duty table below, for a further period of five years.

DUTY TABLE

S.No.	Tariff Heading*	Description of goods	Country of origin	Country of export	Producer	Duty amount	Currency	Unit Of Measurement
1	2	3	4	5	6	7	8	9
1	2907 13 00	Nonyl Phenol	Chinese Taipei	Any	Any	52.56	USD	MT
2	2907 13 00	Nonyl Phenol	Any country other than Chinese Taipei	Chinese Taipei	Any	52.56	USD	MT

P. FURTHER PROCEDURE

90. An appeal against this notification shall lie before the Customs, Excise, and Service Tax Appellate Tribunal in accordance with Section 9C of the Customs Tariff Act, 1975.

B. B. SWAIN, Spl. Secy. and Director General

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Annexure-3

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

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PRINCIPAL BENCH – COURT NO.1

Anti Dumping Appeal No.50430 of 2019
(with Miscellaneous Application No.50301 of 2019)

[Arising out of: Final findings (File No.7/20/2018-DGAD, dt.11.01.2019,passed by the Designated Authority, DGAD, Deptt. of Commerce & Industry, New Delhi]

M/s SI Group India Private Limited .....Appellant
Plot No.D-2/1, TTC Industrial Area,
Opp. Juinagar Railway Station, Thane-Belapur Road,
Mumbai 400 705

VERSUS

1. Designated Authority .....Respondents
Directorate General of Anti Dumping& Allied Duties,
Department of Commerce & Industry, Parliament Street,
Jeevan Tara Building, 4th Floor, New Delhi 110 001

2. The Union of India,
Through the Secretary, Ministry of Finance,
Department of Revenue, North Block,
New Delhi 110 001

WITH

Anti Dumping Appeal No.50430 of 2019
(with Miscellaneous Application No.50302 of 2019)

[Arising out of: Final findings (File No.7/20/2018-DGAD, dt.11.01.2019,passed by the Designated Authority, DGAD, Deptt. of Commerce & Industry, New Delhi]

M/s SI Group India Private Limited .....Appellant
Plot No.D-2/1, TTC Industrial Area,
Opp. Juinagar Railway Station, Thane-Belapur Road,
Mumbai 400 705

VERSUS

1. Designated Authority .....Respondents
Directorate General of Anti Dumping& Allied Duties,
Department of Commerce & Industry, Parliament Street,
Jeevan Tara Building, 4th Floor, New Delhi 110 001

2. The Union of India,
Through the Secretary, Ministry of Finance,
Department of Revenue, North Block,
New Delhi 110 001

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CORAM: HON'BLE JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. C.L. Mahar, MEMBER (TECHNICAL)

Appearance:

For Appellant : Ms.Reena Khair, Ms.Aastha Gupta, Ms.Rita Jha, Ms.Shreya Dhahiya and Mr.Rajesh Sharma -Advocates

For Respondent : S/Shri Ameet Singh and Amar Anand (Designated Authority), Shri Rakesh Kumar Rai, Authorised Representative, Shri Pramod Kumar & MS Pothal, CA.

FINAL ORDER NO.51566/2019

Date of Hearing: 28.05.2019
Date of Decision: 28.11.2019

PER: DR.D.M. MISRA

This appeal is filed by the Domestic Industry(DI), the Appellant herein against the Final Finding & Recommendation of the Designated Authority (DA), DGAD, Deptt. of Commerce & Industry, New Delhi(File No.7/20/2018-DGAD, dt.11.01.2019,).

Background Facts

2. The facts in brief relevant for consideration of the present Appeal are that on an application filed by the Domestic Industry, for imposition of Anti Dumping Duty on the imports of "Nonyl Phenol", the subject goods from Chinese Taipei, the subject country, investigation was initiated by the DA on 29.06.2006 and on completion of the investigation, anti-dumping duty on imports of Nonyl Phenol from Chinese Taipei was recommended vide Finding &

Recommendation dated 25.06.2007. The recommendations were given effect by issuance of Customs Notification No.94/2007-Cus, dated 22.08.2007 imposing anti dumping duty on the said goods on its import from the subject country. Before expiry of 5 years period, on an application for sun set review by the Appellant, necessary investigations were initiated by the DA on 09.08.2012 and the imposition of duty was extended for a further period of one year as per second proviso to Section 9A(5) of CTA,1975 through Notification No.39/2012, dated 24.08.2012, pending investigation. On completion of investigation, the DA recommended continuation of anti dumping duty for a further period of five years vide final Finding & Recommendation dated 08.11.2013. The said recommendation was implemented by the Government by issuance of Notification No.05/2014-Cus (ADD), dated 16.01.2014 by extending imposition of duty for a further period of 5 years.

2.1 Since there had been continued dumping of the subject goods, from the subject country, the Appellant filed another application requesting initiation of second sun set review investigation on 19.04.2018. The Appellant was allowed hearing on the said application on 06.06.2018. Consequently, the DA initiated the second sun set review investigation on 12.06.2018 by issuance of necessary notification. Pursuant to the said notification dated 12.06.2018, the DA forwarded a copy of the same to the known exporters of the subject goods in accordance with the Rule 6(2) of Anti Dumping Duty Rules,1995. But, the exporters did not participate in the investigation. The DA after considering the

submissions and verification of the data filed by the domestic industry on 15.11.2018 and 16.11.2018, issued disclosure statement on 24.12.2018. Thereafter considering the further submission of the Domestic Industry on the said Disclosure statement, the DA on 11.01.2019 issued the final finding where under he has concluded that continuation of anti dumping duty is not warranted and accordingly not recommended extension of anti dumping duty on the imports of the subject goods from the subject country. Aggrieved by the said finding, the present appeal is filed by the Domestic Industry.

Submission on behalf of the Appellant:

3. The learned Advocate Ms. Reena Khair for the Appellant has submitted that the Appellant is the sole producers of 'Nonyl Phenol' in India. It is her contention that *prima facie*, on being satisfied with the evidence placed by the Appellant of likelihood of anti dumping and injury, the DA initiated second sun set review investigation on 12.06.2018 and after conducting necessary investigation, a disclosure statement was issued by the DA on 24.12.2018, where under partial disclosure of essential facts was made. There was no disclosure as to whether any likelihood of continuation or recurrence of dumping and injury was made on the said statement. Consequently, the DA has passed the Final Order on 11.1.2019.

3.1 The learned Advocate assailing the impugned conclusion has submitted that the nature of exercise to be undertaken in the sun

set review proceedings is different from the initial exercise which is directed with the objective whether anti dumping duty is warranted or otherwise. She has contended that in original investigation for imposition of anti dumping duty, there must exist dumping, which cause injury to the domestic industry; whereas in the sun set review, the main objective is not to examine for imposition of duty on dumping and injury, but the analysis should be whether there is likelihood of continuation or recurrence of dumping and injury on the expiry of anti dumping duty. In support, she has referred to Section 9A(5) of the Customs Tariff Act,1975 and relevant judgments on the said issue, namely, Union of India Vs Kumho Petrochemicals Company Ltd – 2017 (351) ELT 65 (SC), Vinati Organics Ltd Vs DA – 2001 (127) ELT 629 (T), Hubei Tri-Ring Forging Co. Ltd Vs DA – 2016 (342) ELT 473 (T), P.T. Asahimas Chemicals Vs Designated Authority – 2015 (328) ELT 417 (T), Thai Acrylic Fibre Ltd Vs Designated Authority – 2010 (253) ELT 564 (Tri-Del.).

3.2. She has submitted that the principle in this regard laid down under various decisions is clear inasmuch as unlike original investigation sun set review are prospective in nature, therefore, the fact that current level of dumping is non-existent or minimal has no relevance. Similarly, the existing injury determination, the objective assessment is whether injury will continue or recover would entail counter-factual analysis of future events based on projected level of dumped imports, prices and impact of domestic producers. Thus, the authority is required to address the question whether the

domestic industry is likely to be materially injured again if the duties are discontinued. The test is not whether there is current dumping or injury, but whether there is likelihood of dumping and injury in future, in the absence of duty.

3.3 Further, she has submitted that normally the following parameters are adopted for an affirmative review determination in other jurisdictions viz. Canada, Australia, European Union and USA.

a. Significant production capacity with exporters;
b. Export orientation of the exporters;
c. Continued dumping or subsidization;
d. Failure of respondents to participate in a review;
e. Evidence of third country dumping;
f. Price undercutting by imports with measures (duties) in force;
g. Current injury or vulnerability of the domestic industry;
h. Price attractiveness of the Indian market;
i. Easy transportation distance to the Indian market;

3.4. She has submitted that DA in the present case, solely based its decision on the existing current situation of the domestic industry rather than adverting to likely scenario on the expiry of anti dumping duty on the basis of the present situation.

3.5. In a sunset review, the statutory requirement is to ascertain the likelihood of continuation or recurrence of dumping and injury, in absence of duty. Therefore, analysis of existing anti dumping duty is incorrect and flawed. Though in the present case, the DA has

examined the injury parameters, both with and without anti dumping duty, however, the conclusions are based on the current injury with anti dumping duty in force and not on the likely injury to the domestic industry in absence of duty.

3.6 The learned Advocate for the Appellant, rebutting the argument that they had been not able to establish the likelihood of dumping and injury to the domestic industry, submitted that the presence of following factors established likelihood of dumping and injury:-

a) Huge surplus production capacity with the exporters.

b) Non-availability of alternate markets for additional export, especially China has imposed anti dumping duty on the import from Chinese Taipei. Further, USA and EU have restrictions on the use of Nonyl Phenol. Therefore, India remains largest market for the exporters in Chinese Taipei.

c) The demand in India is growing and the price in Indian market is higher than the export price in other countries making India a very attractive market for the exporters from Chinese Taipei.

d) The domestic market of the foreign exporter is able to absorb only 13% of the capacity, the producer in Chinese Taipei have, therefore, a strong export orientation.

e) The fact of continued dumping despite imposition of duty, indicate strong likelihood that the dumping will continue unabated and may intensify.

f) The foreign producers participated in the first sunset review. Based on the information furnished by them, the Authority came to a conclusion that there was a likelihood continuation or recurrence of dumping and injury. The foreign exporters have failed to participate in the present review and have withheld the necessary information from the Authority, possibly because participation could lead to a result which is less favourable than if the exporter did not cooperate.

g) Evidence of third country dumping is also on record indicating the propensity of the foreign exporters to dump its products in export market as also the possibility of diversion of such goods to the Indian market on expiry of the duty.

h) The landed value of the imports (without anti dumping duty) is below the selling price of domestic industry.

i) The domestic industry continues to remain vulnerable as its profit and returns on investment remain well below adequate level for sustaining its operation in the long run.

j) The Indian market remains price attractive as substantial quantity of the export made to third country is below the export price to India.

k) There is ease of transportation of the goods from Chinese Taipei to India.

3.7 She has submitted that since the dumping continued during the relevant period, hence the current dumping is best possible indicator of future dumping on cessation of duty. The landed value of the import (without anti dumping duty) being below the cost of production of domestic industry, leads to an inevitable conclusion that to maintain the sales, they had to further reduce the prices incurring huge losses. Thus, the likelihood of dumping and injury on the expiry of duty is imminent.

3.8 Further, assailing the finding that the capacity productions to domestic sales and overall profitability of the industry do not indicate existence of injury or deteriorating economic conditions, the learned Advocate has submitted that it is factually incorrect. The overall profitability is inadequate and indicates injury; there is a clear causal link between the dumped import and decline in profitability of the domestic industry as the landed prices of import were below the cost of production and selling price of the domestic industry since 2016-17 and also during the period under investigation(POI). In any case, the deterioration in the condition of domestic industry is not *sine qua non* for the extension of duty in sun set review.

3.9 She has further submitted that the authorities have determined the dumping margin in the range of 15% to 25%. It is her contention that if with the duty in force, imports are coming into

India at significantly dumping prices, then there is every likelihood that on the expiry of duty, the dumping would further intensify. There can be no doubt regarding the continuation of dumping after the duty has expired.

3.10 She has further submitted that despite the anti dumping duty being in force, the domestic industry has not been able to earn adequate profit as they had been forced to match the landed price of import. Even though, the Appellant was able to increase its sales and improve the market share but its profit has gone down; the price at which the sales are made by the domestic industry, is only marginally higher than the cost of production. The profit is about 2%, while the return on capital employed is mere 5%; thus due to negligible returns and profit earned, the domestic industry continues to be fragile and vulnerable.

3.11 She has further submitted that even on volume front, with the import under-cutting the prices of domestic industry, the importers would have a clear preference for the imported product. This would eventually result in a surge in imports, eating into market share of domestic industry. Therefore, on the cessation of duty, the domestic industry would suffer material injury on account of high volume of imports at low prices resulting into significant losses, making production of Nonyl Phenol unviable in India.

3.12 She has also submitted that anti dumping duty is imposed to off-set the injurious effects of dumping. If the anti dumping duty has a desired effect, the condition of domestic industry would be

expected to improve during the period anti dumping duty in force. In the present case, the domestic industry remains vulnerable and any benefit that has been obtained will be wiped out, if it is forced to compete with significantly increased volume of dumping injury at prices that under-cut its domestic prices. In support, she has referred to the decisions delivered in various jurisdictions of other countries viz. New Zealand, Canada, European Unions etc. where the accepted parameters in sun set review are different than adopted by the DA.

3.13 In the context of likelihood of injury on expiry of the duty as per Para (vii) of Annexure- II to the Anti Dumping Rules, the learned Advocate referring to the table in the disclosure statement has submitted that :-

a) One of the producers viz. FUCC had enhanced its capacity from 25000 MT to 30,000 MT. The demand of subject goods in the subject country is only 8000 MT as against production capacity of 62,000 MT held by the producers therein, the demand being sufficient to utilise only 13% of the capacity, its evident that the foreign producers are heavily depending upon the export market

b) Even though there has been a decline in export to India during the period of investigation, India has been the biggest market for producers in Chinese Taipei since 2012.

c) Upto 2011, the biggest market for the producers in the subject country was China. However, since 2007, the subject goods

exported from Chinese Taipei and India, attract anti-dumping duty when imported into China. This duty has been continued for a further period of 5 years.

d) In 2011, China has added the subject goods to its list of severely restricted toxic substances. Since then, there has been a sharp fall in exports from the subject country to China from 14,559 MT in 2011 to 1,676 MT in 2017.

e) Apart from China, there are restrictions on the use of Nonyl Phenol and its derivatives in United States of America, Canada and the European Union. The European Union has introduced further regulations in July, 2017, which has further impacted the market for the subject goods in Europe.

f) The exporters in Chinese Taipei are exporting the subject goods to other countries at dumped prices with dumping margin in the range of 15-25%.

3.14 The learned Advocate has submitted that in spite of sufficient evidence on record indicating likelihood of continuation or recurrence of dumping, the DA has wrongly observed that there is no evidence to prove that excess capacity will be diverted into India in the event of revocation of anti-dumping duty. She has submitted that since there are huge excess capacity with the foreign exporters, and in absence of any alternate market, there is likelihood that additional exports will be diverted to India. As per sub-para (b) of Para (vii) of Annexure II to Anti Dumping Rules, 1995 , there is no requirement

whatsoever to prove the diversion; it is only necessary to establish existence of alternate market for which the evidence has been produced. She has contended that the authority on the one hand held that even with the duty imposed, dumping margin is in the range of 15 to 25%, whereas on the contrary he concludes that once duties are withdrawn, there is no likelihood of dumping of goods in India. She has vehemently argued that the current dumping itself indicates that not only dumping is likely to continue but may intensify on expiry of duty.

3.15 On the requirements of Para (viii) to Annexure-II to the Anti Dumping Rules, she submits that it has been met, as there is sufficient freely disposal capacity with the exporter. There are also no alternate market which can absolve the additional export; therefore, there is likelihood of substantially increased dumped export to Indian market. The landed value of import (without anti-dumping duty) is not only below the selling price of domestic market, but also its cost. The imports, therefore, would have a depressing or suppressing effect on domestic prices and would likely to increase the demand for further import. She has further submitted that the authority while accepting the fact that Asia is the only market available for the exporters of Taipei, but held that there is no evidence that the exporters will dump the subject goods into India.

3.16 She has submitted that the DA has failed to draw adverse inference on the non-participation of the foreign exporters. In terms

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of Rule 6(8) of anti dumping rules, as interpreted by Hon'ble Supreme Court in the case of Designated Authority Vs Haldor Topsoe – 2000 (120) ELT 11 (SC), the authority is required to draw an adverse inference against foreign exporter.

3.17 She has submitted that the Appellant in their plea before the DA never equated imposition of the anti dumping in China against Chinese Taipei, as a factor for continuation of anti dumping duty in India. On the other hand, the argument was that since the duties have been imposed on exports from Chinese Taipei to China, the Chinese market is not available for additional export from Chinese Taipei, hence it is likely that export in India would increase, in view of huge excess capacity in Chinese Taipei.

3.18 Further, she has submitted that the exporter in Chinese Taipei enjoy lower shipping cost, shows likelihood of increase in export to India post expiry of duty. The low paid cost of freight for exporters means that India would be an attractive market for exporters in Chinese Taipei who will incur less transportation charges for export of the goods to India. The authority failed to appreciate the argument of the Appellant that since Korea is also not an alternate market for absorbing additional export from Chinese Taipei, hence there is possibility of diversion of additional export to India.

3.19 Rebutting the argument of the learned Advocate for the DA that since the protective measures have been in force since 11 years, the market have realigned to such developments and the domestic industry ought to have demonstrated as to how the duty

imposed in 2007 would be a factor for making a likelihood analysis in 2018, it is submitted that the said written submissions are beyond the reasoning given in the impugned final finding and tantamount to supplementing the reasons recorded in the findings. Further, it is contended that there is no material on record to show that the market have realigned themselves and excess capacity of foreign exporter are no longer relevant for likelihood determination.

3.20 The learned Advocate has contended that the principles of natural justice have been violated. Under Rule 16 of anti dumping rules, the DA is required to inform all interested parties of the essential fact under consideration, which form the basis for its decision. The disclosure statement should contain the interim conclusion of the DA on the essential fact which would form the basis for the decision whether or not to apply the definitive measures. Since in a sunset review, the decision as to whether or not to apply measures depends on the fact of likelihood of continuation of recurrence of dumping or injury, the intermediate conclusion of the DA in this regard is required to be disclosed. The learned Advocate further submitted that the disclosure statement does not meet the requirement of Rule 6 of Anti Dumping Rules. In support, the learned Advocate has referred to the judgment of Hon'ble Gujarat High Court in the case of Nirma Ltd Vs UoI – 2017 (368) ELT 146 (Guj.).

3.21 The learned Advocate referred to the sunset review final findings by the Government of India in the following cases:-

i) Final finding concerning imports of 1-Phenyl-3-Methyl-5-Pyrazolone originating in or exported from China PR dt.29.06.2011

ii) Final finding concerning imports of Front Axel Beam and steering Knuckles meant for heavy and medium commercial vehicles originating in exported from China PR dt.11.09.2015.

iii) Final finding concerning imports of Sodium Nitrite originating in exported from China PR dt.01.12.2005.

iv) Final finding concerning imports of Acrylic Fibre originating in or exported from Korean and Thailand dt.23.03.2015.

v) Final finding concerning imports of Caustic Soda originating in or exported from Chinese Taipei dt.31.07.2017

3.22 The learned Advocate has further submitted that it is well settled position of law that this Tribunal in deciding the appeal filed under Section 9C of Customs Tariff Act,1975 may confirm, modify or annul the order. Therefore, this Tribunal is conferred with all the necessary powers, including remand of the case to render justice. In support, she has referred to the judgment of this Tribunal in the case of Huawei Vs DA – 2011 (273) ELT 293 (Tri-Del.)

3.23 The learned Advocate has finally submitted that the findings arrived at by the DA are un-sustainable in law. There is a strong likelihood of continuation or recurrence of the dumping and injury on expiry of anti dumping duty. Therefore, she prays that the anti dumping duty imposed vide Notification No.5/2014-Cus, dt.16.01.2014 be continued for further period of 5 years or in the alternative, when there is likelihood of dumping and injury, the DA be directed to issue final finding recommending imposition of anti dumping duty and Central Government to issue consequent notification imposing anti dumping duty.

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Submission on behalf of the Designated Authority

5. Per contra, the learned Advocate for the DA, referring to Section 9A(5) of CTA read with Rule 23 of Anti Dumping Rules,1995 submitted that the DA while conducting the sunset review, in an objective manner, to reach a conclusion i.e. as to whether to extend anti dumping duty or otherwise, examined the contention of the Domestic Industry whether there is likelihood of continuation or recurrence of dumping and injury with specific reference to the threat or material injury in terms of Annexure- II (viii) of Rules, read with the judgment of Hon'ble Gujarat High Court in the case of Nirma ltd Vs UOI – 2017 (346) ELT 228 (Guj.). He has contended that in a sunset review examination, several factors need to be considered which have been dealt in other countries, is summarised below:-

a) Economic factors required for determination of injury under Rule 9(2) read with Annexure-II of Anti Dumping Rules are not necessarily required to be evaluated. In support, he has referred to the WTO panel report in the case of Eu Footwear(China).

b) In the Appellant's argument, it is stated that the investigating authority has failed to examine the excessive capacity of the exporter while determining the likelihood of continuation or recurrence of injury under Rule 23. However, the Appellant has not disclosed before the DA any clear factual evidence to show the nexus with surplus capacities would be diverted into India in absence of

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anti dumping duty. It is submitted that merely because the exporter possesses the excessive or un-utilised capacity, it cannot reasonably be concluded that there is likelihood of dumping injury. In support, he has referred to the observation of WTO Appellate body in US Corrosion-Resistant Steel sunset review's case.

(c) In the said decision, the panel has also highlighted the need for sufficient positive evidence on which likelihood determination can be based. It is held that the requirement to make a determination concerning likelihood, therefore, precludes investigating authority from simply assuming that likelihood exists. The investigating authority must have a sufficient factual basis to allow it to draw reason and adequate conclusions concerning the likelihood of such continuation or recurrence. Therefore, in absence of clear factual evidence, the investigating authority cannot automatically assume excessive capacity of the exporter is likely to increase import of dumped product and cause injury to the domestic industry.

(d) It is submitted that in the present case, even though the investigating authority has considered the present state of domestic industry, it cannot be said that such analysis is inconsistent with Rule 23 of Anti Dumping Rules. The WTO panel in Ukrane-Ammonium Nitrate made distinction between injury on determination in the context of sunset review and considering the state of domestic industry following the imposition of Original duties, held that just because an investigating authority considered the existing status of domestic industries, based, inter alia, on various

factors & indices and includes showing the performance of that industry, does not mean that it was seeking to establish that domestic industry was suffering material injury during the period of review.

(e) It is also submitted that determination of likelihood of dumping or injury must be based on the present facts and circumstances. The WTO panel in US Corrosion-Resistant Steel sunset review, held that 'Future facts do not exist; the only type of facts that exists and that may be established with certainty and precision relate to the past and to that extent they may be accurately recorded and evaluated to the present. It is contended that during sunset review, the investigating authority can only focus on circumstances that can reasonably be expected to exist in near to medium term and not in the definite future.

(f) It is submitted that the argument of the domestic industry, that excessive capacity is indicative of likelihood of continuation or recurrence of dumping is merely presumptuous. There exists no factual evidence to reasonably conclude that there is clear casual link between such excessive capacity and likelihood of injury.

(g) Further, it is submitted that analysis of different factors conducted during sunset review are only indicative and cannot be held conclusive of likelihood of continuation or recurrence of dumping or injury. Therefore, undue reliance on a single factor of excessive capacity of the exporter cannot be placed in case of sunset review investigation. Further, there exists no sufficient factual basis

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in the present case for the investigating authority to draw a reasoned conclusion that excessive or un-utilised capacity is likely to lead to dumping and injury.

(h) It is further submitted that a sunset review is a forward looking analysis, however, there can be no presumption of injury in an expiry review and findings must be based on positive evidence. In the present case, excessive capacity of interested party or exporter must be likely to cause injury based on an analysis of present constraints of industry and therefore without factual evidence, affirmative determination of likelihood of continuance or recurrence of dumping cannot be drawn based on presumptuous assertion.

(i) Further, rebutting the contention of the Appellant, he has submitted that in the event of revocation of duty, there will be a sudden surge in import and Appellant would again suffer injury, is incorrect and against the intent of the legislature. If the imports will increase, the Appellant will have every right to approach the Directorate. Merely on presumption that imports will increase, duties cannot be extended for eternity.

(j) Further, it is submitted that if the Appellants had established the existence of surplus capacity, it was still required to substantiate that existence of such surplus capacity posed a clear and imminent threat or likelihood of recurrence of injury. In support, they have

referred to the judgment of this Tribunal in the case of Indian Spinners Association Vs 2004 (170) ELT 144 (Tri-Del.).

(k) It is submitted that the requirement of Section 9A(5) and Rule 23 (1B) is that the anti-dumping duty imposed under Section 9A shall cease to have effect on the expiry of 5 years from the date of its imposition. The first proviso to Section 9 A(5) is an exceptional and enabling provision, permitting deviation from the primary obligation under Section 9A(5) in limited and specified circumstances.

5.1 The learned Advocate in response to the arguments advanced by the Domestic Industry on the likelihood of dumping and injury, reiterating the finding of the D.A recorded in para 69 and 75 of the final findings; further submitted as:

(i) That existence of excess capacity in Chinese Taipei has been there for a long period and the domestic industry did not provide any information as to the impact of so called excess capacity factor by the markets over the years particularly after imposition of anti-dumping duty in China. He has further submitted that effect of duty imposed in 2007 on international market after more than 11 years could not be demonstrated by the domestic industry.

(ii) With regard to the issue of restrictions by markets like U.S.A, Canada and European Union he has submitted that the appellant has failed to provide details about the nature of restrictions or the timings of such restrictions.

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(iii)He has also argued that placing the subject case under restricted Toxic Substances by China in the year 2011 could not be justified by the domestic industry to show on its impact, the likely exports to India in the event duties are discontinued. It is his contention that though the domestic industry has argued that the export to China PR from Chinese Taipei fell from 15000 M.Ton in 2010 to around 1500 M.Ton in 2016 -17 no explanation or analysis to demonstrate that the event of 2011 are sufficient to conclude likelihood of injury in the event duties are discontinued.

(iv) On the argument that Chinese Taipei is the hub of Asian Transportation routes, he has submitted that any natural advantages to the purchasers of any country cannot be addressed through the mechanism of anti-dumping. Further he has submitted that the claim of the domestic industry that other Asian countries such as Singapore and Malaysia do not offer a steady market policy remains un-substantiated.

(v) He has further submitted that the domestic industry is required to demonstrate as to how each of the factors claimed to be relevant by them have linked to the conclusion. It is his further contention that there should be sufficient information and reasoning available with valid for each of the factors to come to a further conclusion regarding the likelihood for injury. In support he has referred to the decision of the Appellate Body in the G.3.4 A.4(BRAZIL)-Rethreaded Tyre Part 182/W.T/DS322/AB/R. He has also submitted that the domestic industry did not provide any/sufficient evidence regarding the likely prices that affects the case in the event the anti-dumping

duty is revoked and the impact of such prices on the final performance of the domestic industry.

5.2 Finally he has submitted that without sufficient factual analysis, investigating Authority in India or outside India have been reluctant to continue their findings in anti-dumping investigation during sunset reviews unless positive evidences are submitted with proper logical reasoning. Therefore it cannot be concluded that there would be any likelihood of recurrence of dumping and injury on removal of the duty.

Finding:

6. We have carefully considered the submissions advanced on behalf of the Appellant-Domestic Industry, the Designated Authority, the Revenue and perused the records. The limited question involved for determination in the present appeal is: whether the conclusions and the recommendations of the designated authority dated 11.01.2019 against continuation of anti dumping duty on the subject goods Nonyl Phenol from the subject country Chinese Taipei, pursuant to the sunset review, is correct in law or otherwise.

7. Needless to emphasize, the object of anti dumping duty is a remedial measure in relation to domestic industry to obviate the impact of dumping of goods from other export countries less than the normal value, resulting into injury to the domestic industry, which measure is in consonance with the WTO agreement, which is reproduced below:

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Article VI

Antidumping and Countervailing Duties

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

   (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

   (b) in the absence of such domestic price, is less than either

      i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

      ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

   Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

2. In order to offset or prevent dumping, a contradicting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

Pursuant to the above, necessary provisions in this regard are enacted under the Customs Tariff Act,1975 and Relevant Rules framed thereunder.

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8. In the present case, we are not concerned with the imposition of anti dumping duty on the subject goods(nonyl phenol) form the subject country(Chinese Taipei) which was initially imposed in 2007 and thereafter extended for a period of five years. The present proceeding is for second sunset review of the duty which was initiated at the behest of Appellant-domestic industry following the laid down procedures. Before proceeding to analyse various aspects of the case, it is necessary to have a glance of the provisions relevant to sunset review of duty under the Customs Tariff Act, Anti Dumping Rules and articles of WTO agreement, which are reproduced below:

Section 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.

Rule 23

(1) Any anti-dumping duty imposed under the provision of Section 9A of the Act, shall remain in force, so long as and to the extent necessary, to counteract dumping, which is causing injury.

(1A) The designated authority shall review the need for the continued imposition of any anti-dumping duty, where warranted, on its own initiative or upon request by any interested party who submits positive information substantiating the need for such review, and a reasonable period of time has elapsed since the

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imposition of the definitive anti-dumping duty and upon such review, the designated authority shall recommend to the Central Government for its withdrawal, where it comes to a conclusion that the injury to the domestic industry is not likely to continue or recur, if the said anti-dumping duty is removed or varied and is therefore no longer warranted.

(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 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.

(2) Any review initiated under sub-rule (1) shall be concluded within a period not exceeding twelve months from the date of initiation of such review.

(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.

Annexure (II):

.....

(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) to rule 18 the designated authority shall consider whether there has been a 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 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 Indian markets,

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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.

Article 11 : Duration and Review of Anti-Dumping Duties and Price Undertakings.

11.1 "An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated 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.

11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

11.5 The provisions of this Article shall apply *mutatis mutandis* to price undertakings accepted under Article 8."

9. The advocates appearing for the respective parties have fairly conceded that the requirement/conditions necessary for imposing anti dumping duty is quite different for the purpose of sunset review of the existing duty. We need not dwell much on the said issue, as

it has been considered by the Hon'ble Supreme Court in Kumoh Petorchemicals Company Ltd.'s case (supra). Their Lordships observed as :

> "**9.** It is not in dispute that in terms of Section 9A(5) of the Act, anti-dumping duty is effective for a period not exceeding five years from the date of its imposition. The Government is empowered to revoke the duty imposed even before the expiry of five years. In any case, such a duty admittedly ceases to be operative after five years from the date of imposition. At the same time, the Central Government is empowered to initiate review, called 'sunset review', and to investigate and decide as to whether it is necessary to continue the levy of anti-dumping duty. As in the case of original Notification imposing such a duty, the Central Government is to satisfy itself that if the period of anti-dumping duty is not extended, it is likely to lead to continuation or recurrence of dumping and injury to the domestic industry. The nature of exercise to be undertaken by the Central Government in a 'sunset review' is somewhat different from the initial exercise to determine whether anti-dumping duty is to be levied at all or not. When it comes to review, the focus would be 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. The nature and scope of this exercise is lucidly explained by this Court in *Reliance Industries* v. *Designated Authorities,* (2006) 10 SCC 368 = 2006 (202) E.L.T. 23 (S.C.) in the following manner :-
>
> > "38. We are of the opinion that the nature of the proceedings before the DA are quasi-judicial, and it is well settled that a quasi-judicial decision, or even an administrative decision which has civil consequences, must be in accordance with the principles of natural justice, and hence reasons have to be disclosed by the Authority in that decision vide *S.N. Mukherjee* v. *Union of India* [(1990) 4 SCC 594 : 1990 SCC (Cri) 669 : 1991 SCC (L&S) 242 : (1991) 16 ATC 445].
> >
> > 39. We do not agree with the Tribunal that the notification of the Central Government under Section 9A is a legislative act. In our opinion, it is clearly quasi-judicial. The proceedings before the DA are to determine the *lis* between the domestic industry on the one hand and the importer of foreign goods from the foreign supplier on the other. The determination of the recommendation of the DA and the government notification on its basis is subject to an appeal before CESTAT. This also makes it clear that the proceedings before the DA are quasi-judicial."

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10. This Tribunal in Thai Acrylic Fibre Ltd.'s case(supra) after analysing various judgments on the subject and relevant WTO agreement observed as follows:-

> "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 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."

11. A similar view was also expressed by the Tribunal in the case of P.T. Asima Chemicals vs DA, Ministry of Finance – 2015 (328) ELT 417 (Tri-Delhi). It observed :

> "...It is evident from the perusal of the above-quoted Section that 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 the event of revocation of duties. Sunset review entails a likelihood determination in which present levels of dumping are obviously not so relevant as is the likelihood of continuance or recurrence of dumping. In the case of *Rishiroop Polymers Pvt. Ltd.* v. *Designated Authority* - 2006 (196) E.L.T. 385 (S.C.), the Supreme Court held as under :

> "Otherwise also, we are of the opinion that scope of the review inquiry by the Designated Authority is limited to the satisfaction as to whether there is justification for continued imposition of such duty on the information received by it. By its very nature, the review inquiry would be limited to see as to whether the conditions which existed at the time of imposition of anti-dumping duty have altered to such an extent that there is no longer justification for continued imposition of the duty. The inquiry is limited to the change in the various parameters like the normal value, export price, dumping margin, fixation of non-injury price and injury to domestic industry. The said inquiry has to be limited to the information received with respect to change in the various parameters. The entire purpose of the review inquiry is not to see whether there is a need for imposition of anti-dumping duty but to see whether in the absence of such continuance, dumping would increase and the domestic industry suffer."

The WTO Panel in the case of CRCS Flat Products from Japan vide WT/DS244/R, dated 14-8-2003 (as quoted in CESTAT judgment in case of *Thai Acrylic Fibre Co. Ltd.* v. *Designated Authority* [2010 (253) E.L.T. 564 (Tri. - Del.)] observed as under :

> "7.168. We thus do not believe that the substantive disciplines in Article 2 governing the calculation of dumping margins in making a determination of dumping apply in making a determination of likelihood of continuation of recurrence of dumping under Article 11.3. To hold otherwise would mean that a new and full determination regarding the existence of dumping since the imposition of the order would be necessary in a sunset review. We find no such obligation in the text of Article 11.3 nor in Article 2 of the Anti-dumping Agreement."

In case of *APAR Industries Ltd.* v. *Designated Authority* - 2006 (200) E.L.T. 34 (Tri. - Del.), CESTAT also held as under :

> "It is to be borne in mind that the scope of the sunset review by the designated authority is limited. He has to satisfy himself as to whether there is justification for continued imposition of anti-dumping duty and that also based on the information received by him. It seems that the sunset review by its very nature, would be limited to see as to whether conditions which existed at the time of imposition of anti-dumping duty have altered to such an extent that there is no longer justification for continued imposition of duty or to ascertain that if such duty is revoked there is imminent danger of the material injury to the domestic industry. The inquiry is limited to the change in the various parameters like the normal value; export price, dumping margin, fixation of non-injurious price and injury to domestic industry. The sunset review is undertaken for the purpose of not for imposition of anti-dumping duty but to see whether the revocation of such anti-dumping duty, dumping would increase and whether the domestic industry will suffer."

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In the case of *Borax Morarji Limited* v. *Designated Authority* - 2007 (215) E.L.T. 33 (Tri. - Del.), CESTAT noted that :

> "Proviso to Section 9A(5) of Customs Tariff Act, 1975 primarily intends to undertake review to examine whether cessation of duty on the expiry of five years is likely to lead to continuance/recurrence of dumping and injury - Expression "likely to lead to recurrence" would cover situation where dumping and injury may not exist at time of review due to continuance of anti-dumping duty."

During the period of investigation, 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.

10. With respect to the injury determination, if the anti-dumping duty 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.

12. Thus, the object and purpose of the sunset review as explained in the aforesaid judgments, precisely is to examine as to whether on removal of anti dumping duty, there is *likelihood of recurrence of dumping and injury to the domestic industry*. It has also been held that the degree and extent of dumping and consequent injury to the domestic industry during the POI is not of much relevance.

13. The mandate or requirement under Section 9A(5) of CTA,1975 read with Rule 23 of Anti dumping Rules,1995 and Annexure-II (vii) is that the authority has to examine all relevant aspects to ascertain

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the likelihood of dumping and injury, once the present anti dumping duty is removed. It is obvious that such determination cannot be based on a guess work or on mere assumption & presumption, but definitely to rest on the past & present facts, influencing the trend of dumping, resultant injury, performance and other relevant economic and other factors relating to the domestic Industries as well as the exporting Industries/countries to analyse and arrive at a probable situation of continuation of dumping and injury in future to the domestic industry. There is no dispute or quarrel on the fact that it should be on the basis of some tangible evidence. Therefore, the procedure prescribed to address the interest of all interested parties for imposition of anti dumping duty are also applicable to the sun set review proceedings even though with different objective.

14. In the present case, admittedly there has been no participation by the exporting industries in the investigation conducted by the DA. The relevant data have been provided by the Domestic Industry and no serious dispute in this regard i.e. authenticity/correctness of the data raised by the DA or interested opposing parties and the data had been accepted without reservation.

15. The finding and conclusion of the designated authority, reproduced below, in nut shell indicates that since the health and condition of the domestic industry is not in bad shape during the relevant period and also as the Appellant could not prove/establish from the existing facts and evidences that there is any likelihood of

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dumping and injury to the domestic industry that would recur in future once the duty is removed extension of antidumping duty is not warranted.

> "I. **CONCLUSIONS AND RECOMMENDATIONS**
>
> 76. Having examined the contentions of various interested parties and on the basis of the above facts, circumstances, and analysis, the Authority concludes as under:
>
> i) The financial and economic parameters of Domestic Industry (both volume and price) are stable and not evidencing deterioration requiring extension of anti dumping duty.
>
> ii) The Petitioners have performed well during the injury period including the POI in terms of its financial parameters.
>
> iii) Petitioners have not been able to establish likelihood of dumping and injury to the Domestic Industry in the event anti dumping duty were to be revoked on the subject goods.
>
> iv) Capacity, production, domestic sales and overall profitability of the industry do not indicate existence of injury or a deteriorated economic condition."
>
> v) The factors submitted by the Petitioners on likelihood of recurrence of injury on withdrawal of ADD are not supported by the price realizations and price trends of the subject goods during the POI."

16. The Appellant has vehemently argued that the conclusion arrived at by the DA on the present condition of the domestic industries is contrary to facts and he also erred in requiring positive future evidence for the determination of likelihood of dumping and injury, in the event cessation of duty. According to the learned Counsel this is contrary to the principles & practice followed and the laid down parameters required to be analysed in a sunset review proceeding.

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17. We find that in the book "WTO Antidumping and Subsidy Agreements – A Practitioner's Guide to "Sunset" Reviews in Australia, Canada, the European Union, and the United States by Terence P. Stewart and Amy S. Dwyer, the summary of factors that typically weigh in favour of an affirmative expiry review in different countries has been explained :-

US

1	Dumping continued at any level above de minimis
2	Imports of the subject merchandise ceased after issuance of the order
3	Dumping eliminated and import volumes declined significantly
4	Low or de minimis dumping margins
5	Any likely increase in production capacity or existing unused production capacity in the exporting country
6	Existing inventories of the subject merchandise, or likely increases in inventories
7	Existence of barriers to the importation of the subject merchandise into countries other than the United States
8	Potential for product shifting if production facilities in the foreign country which can be used to produce the subject merchandise, are currently being used to produce other product
9	Conditions of Competition and the Business Cycle, like demand and supply conditions and substitutability
10	Export orientation

Canada

1	Current injury or vulnerability of the domestic industry
2	Significant production capacity and inventories of exporters
3	Worldwide overcapacity
4	Export orientation of the foreign producers
5	Price attractiveness of Canadian market
6	Easy transportation distance to the Canadian market
7	Inability of domestic producers to meet demand of market
8	Third country dumping on same or related merchandise
9	Level of continued dumping (Pup Joint case 84)
10	Evidence of sales below cost by exporters
11	Strong price competition in the Canadian market (Piling Pipe 75)
12	Significant investment in future production by domestic industry
13	Exporters have lost market share in their domestic market
14	Declining demand in exporters domestic market
15	High degree of dependence on export markets by exporters
16	Circumvention of the current measures

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17	Elimination of imports after finding

Australia

1	Increased or significant market share for imports
2	Significant rate of increased imports
3	Elimination of imports after measure
4	Evidence of third country dumping
5	Existence of price undercutting by imports
6	Significant production capacity of exporters
7	Continued dumping or subsidization
8	Current injury
9	Failure of respondents to participate in review
10	Exporter has retained distribution links in Australia
11	Anti dumping actions by other countries
12	Exporter retains an excess capacity that may be directed to Australia

European Union

1	Evidence of duty absorption
2	Third country dumping of the same merchandise
3	Current injury or vulnerability of the domestic industry
4	Significant investment in future production by domestic industry
5	Significant price undercutting by imports with current measures in force
6	Ample production capacity of exporters
7	Significant market share of imports
8	Significant rate of increased imports
9	Increased market share
10	Circumvention of the current measures
11	Community interest would be served by retaining measure
12	Failure of respondents to participate in review
13	Affirmative finding that dumping continued
14	Market conditions and circumstances of exporters
15	Level of current dumping margins
16	Affirmative finding that dumping margins have increased

18. The DA after analysing the data during the course of investigation, observed that the dumping margin is positive and is in the range of 15-25% and above de-*minimis* level. Also, he observed that there is an increase in the demand for the product throughout the injury period and the subject goods import has been reduced. Analysing the price effect, the authority has observed that the landed price of import without anti dumping duty is Rs.96,361/-

during POI and the price undercutting in the range of 0-10% which is positive when calculated without anti dumping duty and is negative when calculated after taking into account the anti dumping duty. On the aspect of price suppression and depression, he has remarked that the landed price (with anti dumping duty) of the import is above the selling price as well as the cost of domestic industry. The cost of sale, selling price and import price declined till 2016-17 as compared to the base year but increased in the POI. But, the landed value without antidumping duty shows that import prices are less than the selling price. Further, on the aspect of price underselling he has noted that on a comparison of the landed value of the subject goods with non-injurious price, price underselling is positive without adding anti dumping duty and negative after adding anti dumping duty. On Scrutiny of economic parameters of domestic industry by the DA, he has commented that the capacity of domestic industry has remained constant as the production and capacity utilisation increased throughout the injury period; also the market share of domestic industry has increased and the share of import from the subject country in demand has declined. On the current profit & loss, cash profits and returns on investment of the domestic industry, it is recorded that the profits have decreased but are positive.

19. On the issue of likelihood of continuous or recurrence of dumping and injury in case of cessation of Anti-dumping duty, the DA observed that there is no evidence to prove that the excess capacities available with the exporters of the subject country would

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be diverted into India in the event of revocation of anti-dumping duty. Also, he has observed that insufficient demand in the subject country and un-utilised capacity will be utilised to dump goods into India cannot be a factor to draw adverse inference against the exporters from such country. Further, he has observed that export restrictions by USA, Canada and European Union on the subject goods would make Asia being the only market available and the goods would be dumped in India, in the absence of evidence cannot lead to an adverse impact against the exporters. With regard to anti-dumping measures initiated in China and its market for exporters from Chinese Taipei it is noted that the facts and circumstances of investigations are different, therefore cannot be equated in deciding the present case. He has also commented that being the hub of Asia transport routes Chinese Taipei enjoys lower shipping cost or bulk shipping cannot be held against them. Further he has observed that importance of India as a market is accentuated by the fact that the demands in India is growing and is expected to increase, therefore revocation of duty will have no adverse impact. He has finally observed that imports are not likely to increase both in absolute terms as in relation to production and consumption in the event of anti-dumping duty is removed.

20. The domestic industry, on the other hand, has contended that dumping margin has been determined by the authority in the range of 15-25% when the duties were in force. Thus, there is likelihood on the expiry of the duty, the dumping of goods would further intensify. It is their contention that the domestic industry had not

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earned adequate profit even during the period when the dumping duty is in force as they had to match and manage the sales prices with the landed price of the imported goods even though the market share has been slightly improved. It is their contention that the profit is meagre at 2% while the returns on capital employed is merely 5% during the POI, when 22% on such return is considered as normal. Further, they have argued that in the circumstance of undercutting of the prices of domestic industry, the importers in India would have clear preference for the imported product being dumped which would result in surge in import. They have submitted that even though there is marginal improvement on certain fronts in the performance of the domestic industry, but if the duty is withdrawn, negative effect on production would be immediate and whatever benefit obtained would be wiped out. Further, laying emphasis on the surplus capacity with foreign exporters in absence of alternative market, they have argued that it is sufficient indicator in favour of likelihood of increase in dumping of goods in India on expiry of duty.

21. We find merit in the contention of the Advocate for the Appellant. In our view there is a fundamental fallacy in the approach of the DA in the determination of likelihood of recurrence of dumping and injury post removal of the duty on the subject goods from the subject country. There is no dispute of the fact that evidence of past and present circumstances is relevant and necessary to arrive at a reasonable and logical determination of continuation of same scenario in future warranting continuation of antidumping duty or

otherwise. However, it is impractical and also illogical to insist on the positive evidences on future events, for determination of the likelihood of dumping and injury in future on removal of duty. The parameters to reach at the conclusion on likelihood of dumping and injury adopted in the Sunset Review proceeding by various countries mentioned above are: to name a few, current dumping and injury, significant production capacity and inventories of exporters, existence of barriers for import of such goods in other countries, failure of respondents to participate in review proceeding, declining demand in exporters domestic market, high degree of dependence on export market by exporters, etc.. We also find that more or similar parameters are appearing under the Annexure-II of the Anti Dumping Rules,1995.

22. In this back drop, we find that the Appellant domestic industry could reasonably establish through present and past evidence that most of these parameters are satisfied in the present case. The dumping margin is in the range of 10-15% and is positive and above de-*minimis*. Despite anti dumping duty, the earning of domestic industry is meagre 2% and return of capital is around 5% against the normal return of 22%. The landed value of import without anti dumping duty are below the cost of production of domestic industry. The Appellant was able to show that there is a demand of around 17,216 MT in domestic market, whereas the ideal capacities of foreign exporters are around 24,376 MT. Export restrictions are placed on subject goods in other international markets viz. USA, Canada and European Unions, leaving major market only in Asia.

The subject goods restriction in China PR being added to the list of restricted toxic substance would find its way in Indian market. There is growing Indian market in the sense that per capita consumption surfactant is expected to increase. Further, they could show that the export from Chinese Taipei to other countries have been made at dumped prices. Besides, the most important factor is that there has been no participation/response by the exporters of the subject goods on the proposed continuation of anti dumping duty. Therefore, cumulatively considering all these parameters which are normally adopted internationally and also in line with Annexure II(vii) of the Anti Dumping Rules,1995, in Sun Set Review proceedings, we are of the view that on removal of the anti dumping duty there will be likelihood of recurrence of dumping and injury to the domestic Industries.

23. We find that, more or less, a similar approach has been adopted in sun set review cases in different countries. Few examples are reproduced below:-

(I)In the sunset review investigation by the Ministry of Business, New Zealand in relation to import of canned peaches from Greece, it was observed :-

> **" 4.9.3 Likelihood of injury if anti dumping duties are terminated**
>
> 282. In relation to the likelihood of a recurrence of material injury should anti dumping duties be removed, the Ministry concludes that:

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- A significant increase in import volumes from Greece is likely as market conditions are more favourable for any likely importers of canned peaches from Greece than they have been previously.

- If imports from Greece were to resume in significant volumes, they would likely significantly undercut HWL's prices. HWL is likely to ... resulting in depression and suppression of HWL's prices.

- Consequent upon the likely price and volume effects, if duties are removed and imports resume in significant volumes, HWL's sale volume is likely to remain stable while its revenue is likely to decline significantly.

- If HWL ...., it would likely also maintain its market share. However, if duties were removed HWL would .....

- As a result of the likely price effects, HWL's profits would likely decline.

- As a consequence of the adverse economic impacts set out above, including a significant decline in revenue, HWL is likely to experience adverse impacts on return on investments, cash flow, growth and ability to raise capital and investments.

- There is unlikely to be an adverse impact on productivity, utilisation of production capacity, inventories, employment and wages unless HWL .....

283. On the basis of the above considerations, the Ministry concludes that if the anti dumping duties were to be removed, material injury to the industry due to dumped imports of canned peaches from Greece is likely to recur."

(II) European Commission, while initiating the sunset review investigation of the anti dumping measures in force on the imports of bio-diesel originating from USA observed as follows:-

"5. **Likelihood of recurrence of injury**

(138) To assess the likelihood of recurrence of injury to the Union Industry should the existing measures be allowed to lapse, the Commission analysed the likely impact of imports from the USA on the Union market and on the Union industry pursuant to Article 11(2) of the basic Regulation. In particular, the Commission analysed the likelihood of recurrence of dumped imports, the volumes and the likely price levels thereof, spare capacity, the attractiveness of the union market and price behaviour of US producers.

(139) As concluded above (recital 92)), it is likely that dumped imports from the USA would recur should the existing measures be allowed to lapse. The Commission has established that producers of biodiesel in the USA are currently dumping at other third country markets at price levels that are below the Union prices. Since the Union prices are slightly higher than those in other third country markets it is likely that at least some of those exports may be redirected to the Union should the existing measures lapse.

(140) The Commission has established that US producers have a large space capacity amounting to around 2 678 000 tonnes equivalent to around 22 % of the total Union consumption.

(141) The spare capacity available in the USA is not likely to be absorbed by its domestic market. Already today, despite sufficient capacity, US producers are not supplying the full demand on the US market. It is also unlikely that the existing spare capacity would be used to increase exports to third countries other than the Union. Currently, as described in detail in recitals (42)-(63) above, the US export prices to third countries are on average 15% below the average domestic price on the US market and also below the average Union price even where transportation costs from the USA to the Union are taken into account. It is therefore likely that US producers would seek another outlet for their spare capacity.

(142) Given that the Union market is the biggest market for biodiesel worldwide and with biodiesel prices that are in parity or slightly above the price level on the US domestic market, the Union market would be very attractive for US producers of biodiesel.

(143) It is therefore very likely that US producers would use a large part of their spare capacity to re-enter the Union market should the existing measures be allowed to lapse. As established above (recital (46)), it is likely that the US producers will export biodiesel to the Union at dumped price levels in order to compete with Union producers on the Union market. Given their current pricing behaviour on other export markets (recitals (57)-(58) above) and the large spare capacity available it is very likely that significant volumes of US biodiesel would re-enter the Union market at dumped prices equal to, or below the Union prices.

(144) Such import s would exercise a significant pressure and even downwards price pressure on Union industry, which at current price levels, is only making a very small profit, which is significantly below its target profit. This would most likely result in a decrease of production and sales volumes, less profitability and loss of market share.

(145) Given the fragile economic situation of the Union industry, such likely scenario would have a significant adverse effect

on the ongoing recovery of the Union industry and would in all likelihood cause recurrence of material injury.

5.1 Conclusion

(146) On the basis of the above, the Commission has concluded that material injury to the Union industry would most likely recur should the existing measures against imports of biodiesel from USA be allowed to lapse."

(III) While initiating sunset review investigation on imports of certain aluminium wheels originating from Peoples Republic of China, the Commission observed as follows:-

"(241) The investigation showed that significant volumes of Chinese exports are likely to be re-directed to the Union given its attractiveness (recitals 75 to 88). In addition there are high spare capacities in China that could also be directed to the Union market. Therefore the Chinese exporting producers will be able to take over not only the increased consumption but also sales volumes of the Union producers. Consequently even under he scenario of increased consumption there is a high likelihood that the Chinese exports would take over sales volumes and market share to the detriment of the Union industry. Moreover, concerning prices, these are likely to be at a level lower than Union industry's prices between 8 to 30% as described in recital 191 and with the effects described in recital 192 that is resulting in a likely recurrence of material injury for the Union industry. This claim is therefore rejected.

(242) On the basis of the above, the Commission concluded that the repeal of the measures would in all likelihood result in a recurrence of injury to the Union industry."

24. In view of above, we do not agree with the conclusions and the recommendations of the Designated Authority dated 11.01.2019. The same is liable to be set aside and consequently we set aside the conclusions and recommendations and remand the matter to the Designated Authority to calculate the appropriate anti dumping duty while taking note of overall circumstances of the case. Since, we have set aside the conclusions and recommendation of the DA on

merit, hence discussion of other ancillary issues raised in the Appeal would be more of academic, hence not delved into.

25. In the result, the Appeal is allowed and the matter is remanded with a direction that DA shall analyse the relevant data and after determining the anti-dumping duty which needs to be levied on the subject goods when imported from Chinese Taipei, recommend the same to Government of India. The Miscellaneous Applications stand disposed of accordingly.

(Order pronounced in the open court on 28.11.2019)

(Justice Dilip Gupta)
President

(Dr. D.M. Misra)
Member (Judicial)

(C.L. Mahar)
Member (Technical)

Bahalkar

Annexure - 4

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

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PRINCIPAL BENCH - COURT NO. 1

ANTI DUMPING MISCELLANEOUS APPLICATION NO. 50109 OF 2020
(filed by the Respondent)
IN
ANTI DUMPING APPEAL NO. 50430 OF 2019

(Arising out of Notification No. 7/20/2018-DGAD dated 11.01.2019 passed by the Union of India through the Secretary, Ministry of Finance, Department of Revenue, North Block, New Delhi-110001)

SI GROUP INDIA PRVATE LIMITED ..... **Appellant**
Plot No. D-2/1 TTC Industrial Area
Opp. Juinagar Railway Station
Thane Belapur Road,
Mumbai 400705, India

VERSUS

DESIGNATED AUTHORITY, DIRECTORATE GENERAL OF ANTIDUMPING AND ALLIED DUTIES ..... **Respondent**
Department of Commerce & Industry,
5, Parliament Street, Jeevan Tara Building, 4th Floor,
New Delhi-110001

APPEARANCE:

Ms Reena Khair, Shri Rajesh Sharma, Advocate for the Appellant
Shri Ratheesh. M, Advocate for Respondent No. 3
Shri Ameet Singh and Shri Amar Anand, Advocate for the Designated Authority

CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

MISCELLANEOUS ORDER NO. 50114/2020

DATE OF HEARING/DECISION: 21 February, 2020

JUSTICE DILIP GUPTA

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1. The Appeal filed by the Appellant, a domestic industry, before the Tribunal under section 9C (1) of the Customs Tariff Act, 1975[1] to assail the final findings dated 11 January, 2019 of the Designated Authority was allowed by the Tribunal by order dated 28 November, 2019 and the matter was remanded to the Designated Authority for a fresh determination.

2. The Designated Authority had earlier on 25 June, 2007 recommended imposition of anti-dumping duty on the import of "Nonyl Phenol"[2] originating in or imported from Chinese Taipei and the Central Government issued a notification dated 22 August, 2007 imposing anti-dumping duty. Before the expiry of five years, the domestic industry made a request for a sunset review, which was initiated by the Designated Authority on 9 August, 2012, whereafter it recommended imposition of anti-dumping duty and the Central Government issued a notification on 16 January, 2014 for continuation of the anti-dumping duty. The domestic industry filed another application on 19 April, 2018 for a second sunset review. The second sunset review was initiated on 12 June, 2018 and ultimately the Designated Authority by order dated 11 January, 2019 concluded that continuation of anti-dumping duty was not warranted and, therefore, did not recommend any extension of anti- dumping duty on the imports of subject goods. The final findings were published in Gazette of India on 11 January, 2019. It is these final findings that were assailed in the Appeal that

1 the Tariff Act
2 Subject goods

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was decided by the Tribunal on 28 November, 2019 and a direction was issued to the Designated Authority for conducting a fresh determination.

3. The present application has been filed by the Deputy Director in the Directorate General of Trade Remedies, Department of Commerce, Ministry of Commerce and Industry (Respondent in the Appeal), to seek a clarification of the order dated 28 November, 2019 passed by the Tribunal. It has been stated that the anti-dumping duty earlier imposed by notification dated 16 January, 2014 came to an end on 16 January, 2019 and so, in view of the decision of the Delhi High Court in **Forech India Ltd. v/s The Designated Authority and others**[3], an appropriate clarification may be issued as to whether the anti-dumping duty can now be extended after the expiry of the period for which the anti-dumping duty was levied.

4. It would, therefore, be necessary to examine the dispute that was raised by Forech India in the Writ Petitions that were filed before the Delhi High Court. It transpires that anti-dumping duty imposed by a notification issued by the Central Government was to expire on 4 May, 2013, but four days prior this date, sunset review proceedings were initiated by the domestic industry on 30 April, 2018. The Central Government, after a gap of 60 days, issued a notification reviving the anti-dumping duty with effect from 5 May, 2013 for a period of one year up to 4 May, 2014 in terms of the second proviso to section 9A (5) of the Tariff Act. The Designated Authority gave its final findings on 29 April, 2014

3. 2018 (31) ELT 671 (Del.)

on the sunset review, which findings were published in the Gazette of India on 28 July, 2014. The Designated Authority recommended extension of the anti-dumping duty for a period of five years and the Central Government, by a notification dated 24 July, 2014, imposed anti-dumping duty for another period of five years. Thus, there was a gap of about 80 days between the expiry of the anti-dumping duty on 4 May, 2014 and the issue of a fresh notification on 24 July, 2014 by the Central Government imposing anti-dumping duty for a period of five years. The Writ petitioners had not only challenged the extension of anti-dumping duty for a period of one year pending the sunset review but had also challenged the continuation of anti-dumping duty for a period of five years pursuant to the sunset review determination on the ground that the anti-dumping duty could only have been continued before the expiry of the period for which they were levied and not afterwards.

5. In regard to the extension of anti-dumping duty by one year, after a gap of 60 days, the Delhi High Court observed that:-

> **"20. Applying the said principle to the facts of the present case, it is seen that the notification no. 17/2013 issued 60 days after the expiry of the levy of anti-dumping duty under the first five year period, would be non-est because it sought to extend a levy which had lapsed on 04.05.2013.** The second proviso to section 9A (5) of the Act is an enabling provision granting the Central Government the authority to continue anti-dumping duty pending the outcome of the sunset review for a further period not exceeding one year. The essential requirements for such continuation are: (i) the sunset review ought to have been initiated before the expiry of the five year period of levy anti-dumping duty; (ii) the inquiry has not concluded within the said period; (iii) a prima facie view is formed by the Government that continuance of the anti-dumping duty would be necessary, and (iv) such extended period would not exceed one year from the date on which the first five years expires. The **phrase "may continue to remain in force", assumes that there is a levy which exists and its continuance i.e. its carrying forward – without a break in its existence, is necessary. The moment the levy comes to an end or there is a break in continuance, it cannot be revived in the sunset**

> **review exercise.** Extending the levy is like stretching the fabric of the levy to cover the extended period for another year. In the present case, the original levy came to an end on 04.05.2013. The levy had a limited life and unless fresh life was infused in it before its predetermined expiry date, it could not be deemed to have been extended. Infusion of fresh life into the levy for a period of one year requires a fresh notification, in addition to the notification for initiation of the sunset review. **That not being so, in the present case the levy under impugned notification is without authority, hence it has to be and is set aside."**
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> **(emphasis supplied)**

6. In regard to the extension of anti-dumping duty for a period of five years on the second sunset review, after a gap of 80 days, the Delhi High Court observed as follows:-

> "21. **Likewise the second notification imposing anti-dumping duty for a period of five years too cannot be sustained because it has to be issued within the period of first five years or in the extended one year period of sunset review in which the earlier existing duty has been extended.** The first proviso of section 9A(5) of the Act stipulates that in a sunset review when the Central Government is of the opinion that cessation of such duty is likely to lead to continuation or recurrence of dumping or injury, it may extend the period of levy for a further period of five years. The degree of levy would be to the extent necessary to offset the injury. In other words, there would have to be a duty in existence for it to be extended. In the present case there was cessation of duty on 05.05.2013 and again on 05.05.2014, therefore, there was no duty on two dates which could have been extended."
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> **(emphasis supplied)**

7. Thus, in regard to both the extensions, the Delhi High Court observed that there cannot be a break in the continuation of anti-dumping duty and so any notification for continuation of anti-dumping duty has to be issued before the expiry of the period for which the anti-dumping duty was levied.

8. Shri Ameet Singh, learned Counsel appearing for the Applicant has pointed out that the period of five years for which the anti-dumping duty was imposed by notification dated 16 January, 2014 expired on 16 January, 2019 and, therefore, in view of the

aforesaid decision of the Delhi High Court in **Forech India,** the Tribunal may clarify whether the Designated Authority, on remand by the Tribunal, can make any recommendation for continuation of imposition of anti- dumping duty.

9. Ms. Reena Khair, learned Counsel appearing for the Appellant has contended that considering the powers conferred upon the Tribunal under sub-section (3) of section 9C of the Tariff Act, which includes the power to pass such orders in Appeal as the Tribunal thinks fit, confirming, modifying or annulling the order appealed against, the Designated Authority, on remand by the Tribunal, can make a recommendation for imposing anti-dumping duty even after the period for which anti-dumping duty was imposed had expired 16 January, 2019. In this connection, it has been pointed out that in case it is held that even after remand by the Tribunal, the notification has to be issued by the Central Government for continuation of anti-dumping duty on or before 16 January, 2019, the provisions of Appeal before the Tribunal under section 9C (1) would become redundant. Learned Counsel submitted that the decision of Delhi High Court in **Forech India** would not be applicable in a case where the Designated Authority is required to make a fresh determination pursuant to an order of remand by the Appellate Tribunal. To support this contention, reliance has been placed on certain decisions, to which reference shall be made at the appropriate stage.

10. Shri Pramod Kumar, learned Counsel appearing for the importers, however, submitted that in such a situation the domestic industry should have ensured, by filing appropriate

applications before the Designated Authority, that the proceedings were concluded by the Designated Authority in time so that enough time was left for the matter to be decided by the Designated Authority even on a remand by the Appellate Tribunal.

11. The contentions advanced by learned Counsel for the parties have been considered and to be able to appreciate the contentions, it would be necessary to refer to the relevant provisions.

12. Section 9A (1) of the Tariff Act deals with anti-dumping duty on dumped articles. It 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 anti-dumping duty not exceeding the margin of dumping in relation to such article. Sub-section (5) of section 9A provides that 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. The first proviso, however, stipulates 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. The second proviso further stipulates 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.

13. Section 9C (1) provides for an appeal to the Tribunal against the order of determination or review thereof regarding the existence, degree and effect of any subsidy or dumping in relation to import of any article. Sub-section (3) of section 9C deals with the orders to be passed by the Tribunal and it is reproduced below:-

> **"Section 9C (3):-** The Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the order appealed against."

14. It would be seen from a perusal of the aforesaid provision of sub-section (3) of section 9C of the Tariff Act that the Tribunal can pass such orders as it thinks fit, confirming, modifying or annulling the order appealed against.

15. In **Union of India v/s Umesh Dhaimode**[4], an issue arose whether such orders would also include the power of remand. Section 128(2) of the Customs Act 1962, as it then stood, also conferred on the Appellate Authority powers to pass such orders as it may deem fit, confirming, modifying or annulling the decision appealed against. It is in this context that the Supreme Court observed that an order of remand necessarily annuls the decision which is under Appeal before the Appellate Authority. The Appellate Authority is also invested with the power to pass such orders as it deems fit. Both these provisions, when read together, would mean that the Appellate Authority has the power to set aside

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4 1998 (98) ELT 584 (SC)

the decision which is under appeal before it and to remand the matter to the Authority for a fresh decision.

16. As noticed above, in the present case, while deciding the Appeal, the Tribunal had remanded the matter to the Designated Authority for a fresh decision. The point on which clarification has been sought is whether the Designated Authority can still make a recommendation to the Central Government for imposition of anti-dumping duty since the period for which anti-dumping duty was earlier imposed by notification dated 16 January, 2014 expired on 16 January, 2019. This clarification has been sought for the reason that the Delhi High Court in **Forech India** had held that a notification for continuation of anti-dumping duty has to be issued within a period of five years or the extended period of one year because there has to be a duty in existence for it to be extended.

17. The submission of learned Counsel for the domestic industry is that such a limitation provided for continuation of anti-dumping duty would not be applicable in a case where the Designated Authority is asked to make a fresh determination on remand by the Appellate Tribunal.

18. Such a situation was examined by the Supreme Court in **The Director of Inspection of Income Tax (Investigation), New Delhi and another v/s M/s Pooran Mal & Sons and another**[5] in a matter arising out of The Income Tax Act, 1961.[6] . The order passed by the Income Tax Officer under section 132 of the Income Tax Act was assailed in a writ petition filed on 12

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5. (1975) 2 SCC 568
6 Income Tax Act

January, 1972. The impugned order was set aside and the Department was permitted to look into the matter afresh. A fresh order was thereafter passed on 9 June, 1972 which was sought to be challenged on the ground that the Income Tax Officer did not have the jurisdiction to pass the impugned order after the period prescribed in section 132 (5) of the Income Tax Act expired. The Supreme Court held that if any direction is given by a Court, then an order issued in pursuance of such a direction would not be subject to the limitation prescribed under section 132 (5) of the Income Tax Act as such an interpretation would make section 132 of the Income Tax Act **ridiculous and useless and the powers of the Court wholly ineffective.** The relevant portion of the judgment of the Supreme Court is reproduced below:-

> "6. **Even if the period of time fixed under Section 132(5) is held to be mandatory that was satisfied when the first order was made. Thereafter if any direction is given under Section 132(12) or by a court in writ proceedings, as in this case, we do not think an order made in pursuance of such a direction would be subject to the limitations prescribed under Section 132(5). Once the order has been made within ninety days the aggrieved person has got the right to approach the notified authority under Section 132(11) within thirty days and that authority can direct the Income-tax Officer to pass a fresh order. We cannot accept the contention on behalf of the respondents that even such a fresh order should be passed within ninety days. It would make the sub-section (11) and (12) of Section 132 ridiculous and useless.** It cannot be said that what the notified authority could direct under Section 132 could not be done by a court which exercises its powers under Article 226 of the Constitution Article 226 wholly ineffective. The Court in exercising its powers under Article 226 has to mould the remedy to suit the facts of a case. If in a particular case a court takes the view that the Income-tax Officer while passing an order under Section 132(5) did not give an adequate opportunity to the party concerned it should not be left with the only option of quashing it and putting the party at an advantage even though it may be satisfied that on the material before him the conclusion arrived at by the Income-tax Officer was correct or dismissing the petition because otherwise the party would get unfair advantage. The power to quash an

> order under Article 226 can be exercised not merely when the order sought to be quashed is one made without jurisdiction in which case there can be no room for the same authority to be directed to deal with it. But in the circumstances of a case the Court might take the view that another authority has the jurisdiction to deal with the matter and may direct that authority to deal with it or where the order of the authority which has the jurisdiction is vitiated by circumstances like failure to observe the principles of natural justice the Court may quash the order and direct the authority to dispose of the matter afresh after giving the aggrieved party a reasonable opportunity of putting forward its case. Otherwise, it would mean that where a court quashes an order because the principles of natural justice have not been complied with it should not while passing that order permit the Tribunal or the authority to deal with it again irrespective of the merits of the case. "
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> **(emphasis supplied)**

19. This decision of the Supreme Court in **Pooran Mal** was followed by the Supreme Court in **Commissioner of Income Tax, Central Calcutta v/s National Taj Traders**[7] and **Bombay Metropolitan Region Development Authority, Bombay v/s Gokak Patel Volkart Ltd. and Others**[8]**.** In **Gokak Patel,** the Supreme Court observed that it was well settled that when the statute lays down the period of limitation for passing an order that requirement is fulfilled as soon as an order is passed within that period. If the order is set aside on appeal and the appellate order directs a fresh order to be passed then there is no requirement of law that the consequential order to give effect to the appellate order must also be passed within the statutory period of limitation. The observations are as follows:

> **"26.** In the instant case, there is no question of any inactivity. The appellant had passed an order within 60 days, which was ultimately quashed by the High Court. The deeming clause under Section 13(3) comes into operation only when the Metropolitan Authority fails to pass an order within a period of 60 days from the receipt of the application. But if an order is passed and that order is

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7. (1980) 1 SCC 370
8. (1995) 1 SCC 642

> quashed by the appellate authority or by the High Court, the deeming clause does not become operative straightaway. The appellate order will now hold the field and a fresh order will have to be passed in terms of the order of the Appellate Authority or the Court. "

20. It would also be pertinent to refer to a decision of the Delhi High Court in **Essar Steel Limited v/s Union Of India**[9]. The order dated 27 August, 2003 passed by the Designated Authority terminated the anti-dumping investigation. It was sought to be contended by the Respondent that since the period of 12 months statutorily prescribed for the investigation and submission of final findings under rule 17(1) of the Customs Tariff (Identification, Assessment and Collection of Antidumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995[10] would have ended on 29 March, 2004, the notification dated 27 August, 2003 could not be quashed at this stage and the matter be remanded in 2007 after the said period was over. The Delhi High Court relied upon the decisions of the Supreme Court in **National Taj Traders**, **Pooran Mal**, **National Taj Traders** and **Gokak Patel** and held that the submission of the Respondent that the Writ Petition must be dismissed since the period prescribed under rule 17 (1) of the Anti Dumping Rules was over cannot be sustained in the facts of the case.

21. In **Huawei Tech. Co. Ltd. v/s Designated Authority**[11], the final findings of the Designated Authority as well as the consequential notification issued by the Central Government imposing anti-dumping duty were assailed. The Tribunal allowed

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9 2008 (222) E.L.T. 161 (Del.)
10 Anti Dumping Rule
11 2011 (273) ELT 293 (Tri.-Del)

the Appeal and remanded the matter to the Designated Authority for affording a post decisional hearing and for making such modifications in the final findings as may be considered necessary. The contention that a fresh determination cannot be made after the expiry of the time limit was not accepted for the reason that for implementation of a decision of an Appellate Forum, the time limit prescribed for original anti-dumping investigation will not be applicable.

22. In this connection it would also be pertinent to refer to the **European Commission**[12] proposal for a Council Regulation re-imposing definitive anti-dumping duty on imports of ironing boards originating in the People's Republic of China manufactured by Foshan Shunde Yongjian Housewares and Hardware Co. Ltd., Foshan. The European Commission noticed that the introduction of deadlines to conclude anti dumping investigations would not be relevant for the implementation of a Court judgment for such deadlines only govern the completion of the original investigation and do not concern any subsequent action that may be taken as a result of judicial review. Any other interpretation would mean that a successful legal action brought by the domestic industry would be without any practical effect for that party, if it is accepted that the expiry of the time limit to conclude the original investigation would not allow the implementation of a Court judgment. This, in the opinion of the European Commission, would be contrary to the principle that all parties should have the possibility of an effective

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12 Brussels, 13.8.2010 COM(2010) 435 final 2010/0234 (NLE)

judicial review. The relevant paragraphs of the decision of the European Commission are reproduced below:-

> " (17) It is recalled that the CoJ has rejected all the substantive arguments of Foshan Shunde referring to the merits of the case. Thus, the Union institutions' obligation is focused on correcting the part of the administrative procedure where the irregularity occurred in the initial investigation.
>
> (18) **The claim that the introduction of deadlines (i.e. 15 months and 18 months respectively) to conclude anti-dumping investigations prevents the Commission from following the approach underlying the IPS case was found unwarranted. It is considered that this deadline is not relevant for the implementation of a Court judgment. Indeed, such deadline only governs the completion of the original investigation from the date of initiation to the date of definitive action, and does not concern any subsequent action that might have to be taken for instance as a result of judicial review.** Furthermore, it is noted that any other interpretation would mean that a successful legal action brought by the Domestic industry would be without any practical effect for that party if it is accepted that the expiry of the time limit to conclude the original investigation would not allow the implementation of a Court judgement. This would be at odds with the principle that all parties should have the possibility of effective judicial review.
>
> (20) Therefore, it is concluded that Article 6(9) of the basic Regulation applies to the initiation of proceedings and the conclusion of the investigation initiated pursuant to Article 5(9) of the basic Regulation only and not to a partial reopening of an investigation with a view to implementing an EU Court ruling.
>
> (21) This conclusion is in line with the approach taken for the implementation of WTO panels and Appellate Body reports rulings where it is accepted that institutions could amend deficiencies of a regulation imposing anti-dumping duties in order to comply with dispute settlement body reports, including in cases concerning the European Union[11]. In such cases it was felt necessary to adopt special procedures to implement WTO panel and Appellate Body reports because of the lack of direct applicability of such rulings in the EU legal order, by contrast with the decisions taken by the Court of Justice which are directly applicable.
>
> (22) With respect to the arguments submitted on the application of Article 6(1) of the basic Regulation it is noted that no infringement of Article 6(1) of the basic Regulation could be established since the Commission has not opened a new proceeding but reopened the original investigation to implement a Court judgement."

(emphasis supplied)

23. In **Borlem Sa-Empreedimentos Industriais Sa v. United States US**[13], the United States Court of Appeal also observed that the time frame set out for the original determination would not be applicable when a reconsideration is directed to be conducted pursuant to an order of a Court. The observations are as follows:-

> "19. -------- Reconsideration pursuant to court remand order seems clearly within the compass of section 2643(c)(1), provided the directions to the Commission do not contravene the statute or improperly infringe on the decision-making authority of the agency.
>
> 20. The Commission also argued that the antidumping statute requires it to base its determination on Commerce's original determination. It relies on the language of 19 U.S.C. Sec. 1673d(b)(1) (1980) which provides that "the Commission shall make a final determination ... with respect to which the administering authority has made an affirmative determination under subsection (a)(1) of this section." It interprets that section as limiting the right of the Commission to make a determination of injury based only on a Commerce determination made within the timetable of section 1673d(a) (1980).
>
> 21. We appreciate the Commission's desire to adhere to the time requirements of the statute. Nonetheless, we do not believe the trial court erred in considering that it had the authority to order a redetermination outside of that time frame. Congress clearly wanted prompt consideration of antidumping petitions and it set out a formula for the Commission and Commerce to accomplish that goal. **The statute, however, says nothing about redeterminations. It does not provide for them, nor does it forbid them. Redetermination of an injury finding on remand by a court in no way interferes with the statutory scheme.** Indeed, the Commission's interpretation would be inconsistent with other parts of the statute providing for judicial review. See 19 U.S.C. Sec. 1516a (1988)."
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> **(emphasis supplied)**

24. It is, therefore, clear from the aforesaid decisions that the requirement that the Designated Authority and the Central Government should issue a notification for continuation of the anti-dumping duty during the existence of the anti-dumping duty would

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13 913 F2d 933

not be applicable where the Designated Authority has been asked to conduct a fresh determination pursuant to an order passed by the Tribunal.

25. In this view of the matter, the decision of the Delhi High Court in **Forech India** would not be applicable to the facts of the present case in as much as the said decision relates to the original determination by the Designated Authority and not to a determination when a remand is made by the Appellate Tribunal. The contention of the learned Counsel appearing for the importers cannot also be accepted for the same reason.

26. The Application, accordingly, stands disposed of with the aforesaid clarification.

(Pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(DR. D.M. MISRA)
MEMBER (JUDICIAL)

(C.L. MAHAR)
MEMBER (TECHNICAL)

Rekha