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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 146/2017 & C.M.No.721/2017 (stay)

Reserved on: September 20, 2017

Date of decision: November 08, 2017

KESORAM RAYON

..... Petitioner

Through: Mr. Sandeep Sethi, Senior Advocate
with Mr. Rajesh Sharma, Ms. Rita Jha, Ms. Shreya
Dahiya, Advocates.

Versus

THE DESIGNATED AUTHORITY & ORS.

..... Respondents

Through: Mr. Kirtiman Singh, Advocate.

WITH

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W.P.(C) 147/2017 & C.M.No.722/2017 (stay)

GUJARAT ALKALIES & CHEMICALS LTD.

..... Petitioner

Through: Mr. Sandeep Sethi, Senior Advocate
with Mr. Rajesh Sharma, Ms. Rita Jha, Ms. Shreya
Dahiya, Advocates.

versus

THE DESIGNATED AUTHORITY & ORS.

..... Respondents

Through: Mr. Kirtiman Singh, CGSC, with
Waize Ali Noor, Advocate.

WITH

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W.P.(C) 247/2017 & C.M.No.1194/2017 (stay)

GRASIM INDUSTRIES LTD. Petitioner
Through: Mr. Sandeep Sethi, Senior Advocate
with Mr. Rajesh Sharma, Ms. Rita Jha, Ms. Shreya
Dahiya, Advocates.

versus

THE DESIGNATED AUTHORITY & ORS. Respondents
Through: Mr. Jasmeet Singh, CGSC with
Mr. Srivats Kaushal, Advocate.

WITH

+ **W.P.(C) 640/2017 & C.M.No.2928/2017 (stay)**

TECHFAB INDIA INDUSTRIES LTD. Petitioner
Through: Mr. Sandeep Sethi, Senior Advocate
with Mr. Rajesh Sharma, Ms. Rita Jha, Ms. Shreya
Dahiya, Advocates.

versus

THE DESIGNATED AUTHORITY & ORS. Respondents
Through: Mr. Kirtiman Singh, Advocate.

WITH

+ **W.P.(C) 641/2017 & C.M.No.2929/2017 (stay)**

STRATA GEOSYSTEMS (INDIA) PVT. LTD. Petitioner
Through: Mr. Sandeep Sethi, Senior Advocate
with Mr. Rajesh Sharma, Ms. Rita Jha, Ms. Shreya
Dahiya, Advocates.

versus

THE DESIGNATED AUTHORITY & ORS. Respondents
Through: Mr. Dev P. Bhardwaj, CGSC with
Mr. Satya Prakash Singh, Advocates.

WITH

+ **W.P.(C) 1847/2017 & C.M.No.8092/2017 (stay), C.M.No. 24787/2017 (amendment)**

VVF (INDIA) LIMITED Petitioner
Through: Mr. Sandeep Sethi, Senior Advocate
with Mr. Reena Khair, Mr. Rajesh Sharma, Ms.
Rita Jha, Ms. Shreya Dahiya, Advocates.

Versus

THE DIRECTOR GENERAL OF
SAFEGUARDS & ORS. Respondents
Through: Mr. Neeraj Jain, Advocate.

WITH

+ **W.P.(C) 5088/2017 & C.M.No.21799/2017 (stay)**

STRATA GEOSYSTEMS (INDIA)
PVT LTD. & ANR. Petitioner
Through: Mr. Sandeep Sethi, Senior Advocate
with Mr. Rajesh Sharma, Ms. Rita Jha, Ms. Shreya
Dahiya, Advocates.

Versus

UNION OF INDIA & ANR. Respondents
Through: Mr. Kirtiman Singh, CGSC.

WITH

+ **W.P.(C) 5089/2017 & C.M.No.21800/2017 (stay)**

GRASIM INDUSTRIES LTD. Petitioner

Through: Mr.Sandeep Sethi, Senior Advocate
with Mr. Rajesh Sharma, Ms. Rita Jha, Ms. Shreya
Dahiya, Advocates.

versus

UNION OF INDIA & ANR. Respondents
Through: Mr.Kirtiman Singh, CGSC, with Waize
Ali Noor, Advocate.

WITH

+ **W.P.(C) 5095/2017 & C.M.No.21808/2017 (stay)**

KESORAM RAYON Petitioner
Through: Mr.Sandeep Sethi, Senior Advocate
with Mr. Rajesh Sharma, Ms. Rita Jha, Ms. Shreya
Dahiya, Advocates.

versus

UNION OF INDIA & ANR. Respondents
Through: Mr.Kirtiman Singh, CGSC, with Waize
Ali Noor, Advocate.

AND

+ **W.P. (C) 7464/2017**

AARTI DRUGS LTD Petitioner
Through: Mr. Sandeep Sethi, Senior Advocate
with, Mr. Rajesh Sharma, Ms. Rita Jha, Ms.
Shreya Dahiya, Advocates.

versus

THE DESIGNATED AUTHORITY & ORS. Respondents
Through: Mr Sanjeev Narula, CGSC with Ms.
Anumita Chandra, Advocate.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH

J U D G M E N T

08. 11. 2017

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Dr. S. Muralidhar, J.

Introduction

1. These petitions raise an important question of law concerning the initiation of Sunset Review ('SSR') by the Designated Authority ('DA') under Section 9A of the Customs Tariff Act, 1975 ('CTA') read with Rule 23 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 ('ADD Rules'). They also raise a question regarding the continuation of the notification issued by the Central Government of the anti-dumping duty ('ADD'), pending the conclusion of the SSR. There are ten writ petitions in all.

2. Six of the writ petitions, i.e. W.P.(C) Nos. 146 of 2017, 147 of 2017, 247 of 2017, 640 of 2017, 641 of 2017 and 7464 of 2017 question the decision of the DA not to initiate SSR and consequently, not extend the period for which the ADD would be enforced. Three of the writ petitions, i.e. W.P. (C) Nos. 5088 of 2017, 5089 of 2017, 5095/2017 question the issue of the DA not extending the imposition of ADD whilst SSR was being undertaken pursuant to this Court's order.

3. W.P.(C) No. 1847 of 2017 by VVF (India) Limited questions the decision of the Central Government not to continue the safeguard duty (SGD) under

Section 8B (4) read with Rules 16 and 18 of the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 ('Safeguard Rules').

Facts regarding Kesoram Rayon

4. Kesoram Rayon ('KR'), a unit of Cygnet Industries Limited (CIL) is the Petitioner in W.P. (C) Nos. 146 and 5095 of 2017. CIL is a wholly-owned subsidiary of Kesoram Industries Limited ('KIL') and has its registered office in Kolkata.

5. In the year 2005, KR made an application for initiation of anti-dumping investigation with regard to imports of Cellophane Transparent Film ('CTF') originating in or exported from China PR. In relation to CTF, KR is the domestic industry. Pursuant to the above application, on 27th September 2005, the DA initiated anti-dumping investigation. The DA issued on 28th July 2006 its Final Findings and recommended the imposition of ADD on import of CTF from China PR. On 7th September 2006, on the recommendation of the DA, the Central Government (Respondent No. 2) issued notification No. 94/2006 imposing definitive ADD for a period of five years.

6. Towards the end of the five year period, on 1st December 2010, KR filed an application under Section 9A (5) of the CTA read with Rule 23 of the ADD Rules before the DA seeking initiation of SSR. The DA issued a public notice to review the need for continued imposition of ADD and to examine whether the cessation of ADD is likely to lead to continuation or recurrence of dumping and injury.

7. On 7th February 2011, the DA issued Notification No. 05/2011-Cus amending Notification No. 94/2006-Cus, extending the imposition of ADD for the period during which the investigation in terms of Section 9A (5) of the CTA remained pending. The DA, on 30th November 2011, gave its Final Findings and recommended the continuation of ADD with a different quantum. Accepting the said recommendation, the Central Government issued notification No. 05/2012-Cus dated 13th January 2012, continuing the ADD for a period of five years from that date i.e. till 12th January 2017.

8. On 29th September 2016, KR filed a ‘duly substantiated application’ before the DA for the initiation of the second SSR. With regard to said application, the DA sought substantiation on the following aspects and required KR to attend an oral hearing on 15th December 2016:

- i. the imports are increasing even though ADD is in place;
- ii. the demand for the product was falling along with sales; and
- iii. the financial parameters, including profits, appear to be adverse.

9. KR maintains that by a reply dated 22nd December 2016 it addressed all the concerns raised by the DA and further explained that the likelihood of dumping and injury on account of withdrawal of the ADD is to be determined in accordance with the *qua litum test* in an SSR case and that, in view of the judgment of this Court, the SSR was to be mandatorily conducted.

10. On 26th December 2016, the DA issued the impugned letter declining to initiate an SSR investigation. This letter led to the filing of W.P. (C) No. 146

of 2017.

11. At the hearing of the said petition on 11th January 2017, this Court issued directions to the Respondents to initiate the SSR during the course of the day and issue notifications in that regard with the stipulation that the proceedings would be subject to the final outcome of the writ petition.

12. Thereafter, KR sought an extension of the imposition of the ADD during the pendency of the SSR in terms of the second *proviso* to Section 9A (5) of the CTA. The DA declined to extend the ADD. This led to filing by KR of the second writ petition i.e. W.P.(C) 5095 of 2017 seeking a mandamus to the Respondents to extend the ADD and claiming that irreparable loss was being suffered by it as a result of such non-extension of ADD.

Facts regarding GACL and GIL

13. W.P. (C) Nos. 147 and 247 of 2017 arise from the same factual matrix. The Petitioners, Gujarat Alkalies & Chemicals Ltd. ('GACL') and Grasim Industries Ltd. ('GIL') respectively, have challenged the decision of the DA not to initiate SSR with respect to imposition of ADD on imports of Phosphoric Acid ('PA') of all grades and all concentrations originating in or exported from Israel and Taiwan.

14. During 2011, GACL, on behalf of the domestic industry, sought initiation of an anti-dumping investigation with regard to imports of 'Phosphoric Acid of all grades and all concentrations (excluding agriculture/fertilizer grade) ('subject goods') originating in or exported from Israel and Taiwan (subject country).' The anti-dumping investigation was initiated by the DA on 4th February 2011. A preliminary finding was issued

by the DA on 25th October 2011, recommending provisional ADD on the import of PA from Israel and Taiwan. The Central Government issued notification No. 4/2012-Cus dated 13th January 2012, imposing the provisional ADD. Thereafter, on 2nd February 2012, the DA issued its Final Findings and found that the imports were at dumped prices and such imports were a cause of injury to the domestic industry. Thus, it was recommended that definitive ADD be imposed on such imports. On that basis, the Central Government issued Notification No. 19/2012-Cus on 4th April 2012, imposing definitive ADD for a period of five years from the date of provisional duty, i.e. up to 12th January 2017.

15. Towards the end of the fifth year, on 10th October 2016, GACL along with GIL filed a duly substantiated application on behalf of the domestic industry under Section 9A (5) of the CTA read with Rule 23 of the ADD Rules before the DA regarding initiation of SSR. On 18th November 2016, the DA issued a deficiency letter, calling for certain clarifications. A detailed reply was filed on 28th November 2016, answering the above clarifications. An updated petition was filed on 2nd December 2016. Another reply dated 30th December 2016 was addressed to the DA offering to provide further information, if so needed.

16. The case of the Petitioners before the DA was that the very fact that there were no known imports of the subject good from Israel while the ADD notification was in force indicated that there was a likelihood of dumping and injury in the event of revocation of duty. Further, it was argued that what was to be determined during the course of the SSR was the likelihood

of dumping and injury recurring in the event of cessation of the ADD. It was submitted that dumping from Taiwan remained substantial and the surplus capacity of Israeli industry in the subject good suggested a strong likelihood of dumping resuming upon cessation of the ADD. The case made out by the Petitioners in this writ petition is along similar lines.

17. On 2nd January 2017, by way of the impugned letter, the DA refused to initiate SSR. The grounds for refusal to initiate SSR were as under:

- i. In respect of Israel: that there are no known imports during the proposed period of investigation.
- ii. In respect of Taiwan: that the condition of the domestic industry has improved significantly in the last 4 years and, in the absence of sufficient data in support of likelihood parameters, assumption of likelihood of injury does not appear to be correct.
- iii. In the absence of any database, it cannot be ascertained whether the same grades are being imported to fill the demand-supply gap.

18. The DA's refusal to initiate SSR with respect to PA upon an application made under Section 9A (5) of the CTA prompted the present petitions, i.e. W.P.(C) Nos. 147 of 2017 and 247 of 2017. On 11th January 2017, this Court directed that SSR be initiated in the case of the Petitioners and, pursuant to said direction, Respondent No. 2 initiated the same by way of its notification dated 12th January 2017. Thereafter, representations were made to the DA requesting issuance of extension notification under the second proviso to Section 9A (5) of the CTA, pending outcome of the SSR. The DA failed to issue such notification. As a result, GIL filed the second writ petition i.e., W.P. (C) 5089 of 2017.

Facts concerning TIIL and SGIL

19. Techfab India Industries Ltd. ('TIIL') and Strata Geosystems (India) Ltd. ('SGIL') are the Petitioners in W.P. (C) Nos. 640 and 641 of 2017, respectively. The subject goods are Geogrids/Geostrips/Geostraps made of Polyester or Glass Fibre in all its forms originating in or exported from China PR. Both petitions seek the quashing of the letter dated 20th January 2017 issued by the DA expressing its decision not to initiate SSR.

20. The facts as far these writ petitions are concerned are that, in 2010, a petition was filed on behalf of the domestic industry seeking initiation of anti-dumping investigation with regards to import of the subject goods originating in or exported from China. The DA initiated such investigation on 20th December 2010.

21. On 19th December 2011, the DA issued its Final Findings, recommending ADD on import of the subject goods from China. The Central Government issued notification No. 11/2012-Customs (ADD), dated 24th January 2012, imposing definitive ADD on imports of the subject goods from China PR.

22. On 24th October 2016, TIIL and SGIL filed a duly substantiated application before the DA seeking initiation of SSR on the ground that there is a likelihood of continuation or recurrence of dumping and injury. On 20th January 2017, by way of the impugned letter, the DA rejected the request for initiation of SSR on the ground that as per the import data, there

are no imports of the subject goods during the injury period and period of investigation and therefore, there was no justification for initiation of SSR investigation.

23. Thereafter, the present petitions were filed in which this Court, by its order dated 23rd January 2017, directed initiation of SSR and issuance of notification pursuant thereto which would state that proceedings thereunder would be subject to the final outcome of the petitions.

24. On 20th February 2017, the Petitioner in W.P.(C) 5088 of 2017 made a representation before the DA seeking issuance of extension notification under the second proviso to Section 9A (5) of the CTA.

Facts regarding ADL

25. Aarti Drugs Ltd. ('ADL') has filed W.P.(C) 7464 of 2017 questioning the decision of the DA to not initiate SSR in respect of the imports of 'Metronidazole' originating in or exported from China PR.

26. In the year 1999, an application for initiation of anti-dumping investigation was filed by ADL and Aarey Drugs and Pharmaceutical Ltd. on behalf of the Domestic Industry. The DA initiated such investigation on 29th July 1999. Preliminary findings were issued by the DA on 21st February 2000, recommending provisional ADD. On that basis, the Central Government issued notification No. 44/2000-Cus dated 17th April 2000 imposing interim ADD for a period of six months.

27. On 14th July 2000, the DA issued its Final Findings, recommending

definitive ADD on import of the subject good from China. Said definitive ADD was imposed by notification No. 115/2000-Cus dated 31st August 2000 which was to be valid up to 14th July 2005.

28. On 8th April 2005, ADL, along with Unichem Laboratories Ltd., Mumbai ('ULL') as Domestic Industry filed an application under Section 9A (5) of the CTA read with Rule 23 of the ADD Rules asking the DA to initiate SSR. On 5th April 2006, the DA issued its Final Findings, recommending the imposition of definitive ADD. Pursuant to the recommendation made by the DA, the Central Government issued notification No. 61/2006-Cus levying the definitive ADD for a period of five years till 14th June 2011.

29. On 30th May 2011, the 2nd SSR was initiated by the DA, on the basis of the application filed by ADL along with ULL. The Final Finding was issued on 29th June 2012 recommending imposition of ADD, acting on which, the Central Government issued Notification No. 40/2012-Cus, dated 30th August 2012, imposing the definitive ADD for a period of five years, i.e. up to 29th August 2017.

30. On 29th May 2017, ADL, on behalf of the Domestic Industry, filed an application seeking SSR to determine whether the ADD should be extended further. The DA demanded explanations and clarifications by its letters dated 2nd July 2017, 18th July 2017 and 2nd August 2017, addressed to ADL. On 18th August 2017, the DA granted an opportunity to ADL to justify why the investigations should be initiated. The ADL provided such clarification. However, by the impugned letter dated 22nd August 2017, the DA disagreed

with the stand of ADL and declined to initiate SSR.

31.1 The DA, after presenting a tabular analysis of domestic selling price and cost of production, returns earned by the domestic industry and the sales value of the domestic industry, came to the following conclusions:

“It is evident from the above table that the domestic selling price has increased from Rs. 655/- per kg during 2013-14 to Rs. 730/- per kg during POI. At the same time the cost of production has also reduced from Rs. 657/- to Rs. 596/- during the corresponding period as a result the profitability has increased.”

(...)

“It is evident from the above analysis that the domestic industry is earning high return compared to 2013-14. Investment in fixed assets and working capital has increased manifold.”

(...)

“Sales value has increased by 60% compared to the base year. Export by M/s Aarti has increased by more than three times to the world.”

31.2 Furthermore, after undertaking a detailed profit/loss analysis, the DA states:

“The above table shows that there is all round improvement of the domestic industry. DGCIS imports data also shows that there is no injury to the domestic industry even after secession of anti-dumping duty.

It is evident from the above analysis that the domestic industry is in sound footing when the production, sale, export to other country, capacity utilisation, profitability, capital employees, etc.

In spite of 16 years’ protection given to the domestic producer

and all round improvement of performance it is established that extension of Anti-dumping duty for further period is not at all required for public interest.”

31.3 Regarding the excess capacity of Chinese exporters the DA made the following observation:

“Regarding the likelihood analysis of Chinese exporters capacity, it is well known that China is exporting to the whole world and that they are inherently export oriented. Their installed capacities aren’t targeting India only. Therefore, the installed capacity in China is NO indicator of their available capacity to export to India. The steadily declining Chinese exports to India over the past few years with same amount of ADD duty in place can be seen as an indicator of their declining interest in India.

Similarly, the ability of Indian manufacturers of the same drug to export to foreign markets which are competitive and open to Chinese as well does show the inherent competitiveness of the Indian industry. No data is available to the effect that they are vulnerable.”

Orders of this Court in the ADL petition

32. When W. P. (C) No. 7464 of 2017 filed by ADL was listed first on 25th August 2017, this Court passed the following order:

“1. Notice. Mr. Sanjeev Narula, learned CGSC, accepts notice for the Respondents.

2. The issue raised in the present petition, which is a challenge the decision of the Designated Authority (‘DA’) declining to initiate a Sun Set Review (‘SSR’), is already being considered by this Court in W.P. (C) No. 146/2017 and batch. In that case, on 11th January 2017, by way of an interim direction, the Court had directed the Respondents to initiate SSR in both the Petitioner’s cases in the course of the day as the period of the original Anti Dumping Duty (ADD) notification was expiring

on that very day. The Court further stipulated that, the SSR notification shall clearly state that the proceedings would be subject to the final outcome of the writ petition. The said writ petitions are, in fact, being finally heard by this Court. They are listed for further hearing on 6th September 2017.

3. Considering that the date of expiry of the Anti Dumping Duty ('ADD') in the present case is 29th August 2017, the Court directs the Respondents to initiate the SSR in the Petitioner's case not later than 29th August, 2017. The SSR notification shall clearly state that the proceedings would be subject to the final outcome of the writ petition. This order is without prejudice to the rights and contentions of the parties and will continue till further orders.

4. As regards the question of continuation of the ADD, Mr. Sandeep Sethi, the learned Senior Counsel for the Petitioner, relies on the decision of the Supreme Court in ***Union of India v. Kumho Petrochemicals Company Limited 2017 (351) ELT 65 (SC)***. Learned counsel for the Respondents seeks time for instructions.

5. List on 29th August 2017.

6. Order *Dasti* under the signature of the Court Master.”

33. Thereafter, W. P. (C) No. 7464 of 2017 was listed on 29th August 2017 when a question arose as regards to the non-extension of ADD. The relevant portion of the said order reads as under:

“3. The present application was listed today to consider whether the ADD that was imposed by the Notification No. 40/2012-Customs dated 30th August 2012 and which expires today, i.e. August 2017, should be continued as a consequence of this Court having directed the Respondents to initiate the SSR.

4. In the impugned order dated 22nd August 2017, the DA has,

after examining the Petitioner's application under the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 ('Anti Dumping Rules'), observed *prima facie* as under:

“(a) the subject good has been imported in significant amounts by the applicant during the POI;

(b) the information and data provided in the application regarding injury; threat of injury, and causal link between dumped import and injury and taking into account other relevant factors, including the volume of dump imports, their effect on the price, etc., in accordance with the principles set out in Annexure-II of the Rules - do not evidence any injury to the DI;

(c) sufficient evidence has not been provided to conclude that there was a likelihood of injury recommencing if the existing Anti-dumping duty is allowed to lapse.”

5. The DA *inter alia* concluded that:

(i) There does not exist any “significant rate of increase of dumped imports into India indicating the likelihood of substantially increased importation”

(ii) There is scant evidence of substantial increase in the capacity of the exporter indicating the likelihood of substantially increased dumped exports to the Indian market, taking into account the availability of other export markets to absorb any additional exports.

(iii) The present data available with the DA showed that "there is no price suppression or depression impact" if the ADD were to cease to operate.

(iv) Adequate/dependable data is not available with the DA "about the stock in hand with the exporters in China PR."

6. Mr. Sandeep Sethi, learned Senior Counsel appearing for the Petitioner, submits that, under the second proviso to Section 9A (5) of the Customs Tariff Act, 1975 ('CTA'), where the SSR is initiated before the expiry of the period of five years of the ADD being in force and such SSR has not come to a conclusion before such expiry, the ADD shall be deemed "to remain in force pending the outcome of such a review for a further period not exceeding one year". He places considerable reliance on the decision of the Supreme Court in ***Union of India v. Kumho Petrochemicals Company Limited 2017 (351) ELT 65 (SC)*** (hereinafter ***Kumho***) to contend that where the SSR is initiated by the Central Government then "in all likelihood the Central Government would make use of second proviso and issue notification for continuing the said Anti Dumping Rules".

7. Mr. Sethi submits that the mere fact that the Petitioner is also an importer of the product would not come in the way of the Petitioner being considered as a 'domestic industry' within the meaning of Rule 2(b) of the Anti Dumping Rules. He refers to the fact that in the earlier SSR undertaken at the request of the Petitioner, the DA had in the Final Findings dated 5th April 2006 held that the mere fact that there were imports made by the Petitioner under a Duty Free Advance Licence which were used for export purpose only will not disqualify the domestic producers like the Petitioner for being considered as 'domestic industry' under Rule 2(b) of the Anti Dumping Rules.

8. Mr. Sethi further points out that in the petition filed by it seeking initiation of the SSR, the Petitioner had given sufficient details to show what impact of the cessation of ADD is likely to be on the domestic industry. In particular, he refers to Table 6 which sets out dumping margin in past investigations and Table 7 regarding "capacity with Chinese importers" to demonstrate that the surviving domestic industry which is essentially the Petitioner, which is both manufacturing and exporting Metronidazole will be snuffed out if the ADD were to be withdrawn. To make good this point, Mr. Sethi has presented to

the Court in a tabular form what might be the result of the cessation of ADD on the price at which Metronidazole is made available by the domestic industry. According to these statistics, there will be a price undercutting to an extent of Rs.71.73 per g. if the ADD were cease to operate. In terms of market share held by China PR in the Indian market, the data shows how during the period of inquiry with the ADD being in place, the market share of China PR entities had dropped to 36%. However, if the ADD is lifted, it is bound to go back to its previous share of around 55%.

9. Mr. Sethi adds out that of the three known domestic manufacturers of Metronidazole, in view of the dumping of the product by China PR, only the Petitioner survives. The two other domestic manufacturers have ceased to do so and have resorted to importing of the product in order to survive. Mr. Sethi also places reliance on the decision of this Court in ***Indian Metal and Ferro Alloys Ltd. v. Designated Authority, 2008 (224) ELT 375 (Del)*** and urges that in order to balance the equities, this Court may direct that in the event it is ultimately found that the decision not to initiate the SSR was justified in law, then the ADD collected during the period of the SSR could be refunded to the importers of the product from China PR. He points out that on the contrary if the ADD were not to be continued, the loss to the domestic industry would be such that cannot be compensated at all.

10. Mr. Sanjeev Narula, learned Standing Counsel for the Union of India, also refers to the observations of the Supreme Court in Kumho. Mr Narula points out that the decision in Kumho proceeded on the basis that there is no automatic continuation of the ADD only because an SSR is initiated. According to him, if the ADD is to automatically continue, then the word 'may' in the second proviso to Section 9A (5) of the CTA would be rendered meaningless. According to him, that is not the legislative intent and which is why the Supreme Court declined to read the word 'may' as 'shall' in para 32 of its decision in Kumho.

11. Mr. Narula also points out that it is only because of the interim order of this Court that the SSR has now been initiated but as far as the Central Government is concerned, unless there is a proper notification both for the purposes of initiating the SSR and for continuation of the ADD, there is no automatic continuation of the ADD only because the Central Government has decided that a SSR must be initiated. According to him, the factors that should weigh with the Central Government for continuation of ADD need not be the same for initiating the SSR.

12. The above submissions have been considered. At the outset, this must be noted that in all earlier instances when the domestic industry came to the court seeking relief against a decision of the Central Government declining to initiate the SSR for some reason, it was not prior to the expiry of the notification imposing the ADD. In fact, in *Kumho* there was a considerable gap between the expiry of the notification imposing ADD and the decision of the Central Government extending the validity of the imposition of the ADD. It was in those facts and circumstances that the Supreme Court had to observe as under in paras 30 and 32 of its decision as under:

"30. From the scheme of Section 9A of the Act, it becomes clear that though the Notification for anti dumping duty is valid for a maximum period of five years, the said period can be extended further with the issuance of fresh notification. For this purpose, it is necessary to initiate the review exercise before the expiry of the original notification, which review is commonly known as 'sunset review'. There may be situations where the sunset review is undertaken but the review exercise is not complete before the expiry of the period of original notification. It is because of the reason that the exercise of sunset review also demands complete procedure to be followed, in consonance with the principles of natural justice that was followed while imposing the anti

dumping duty in the first instance. To put it otherwise, this exercise contemplates hearing the views of all stakeholders by giving them adequate opportunity in this behalf and thereafter arriving at a conclusion that the continuation of the anti-dumping duty is justified, otherwise injury to the domestic industry is likely to continue or reoccur, if the said anti-dumping duty is removed or varied. Since this exercise is likely to take some time and may go beyond the period stipulated in the original notification imposing anti-dumping duty, in order to ensure that there is no vacuum in the interregnum, second proviso to sub-section (5) of Section 9A of the Act empowers the Central Government to continue the anti-dumping duty for a further period not exceeding one year, pending the outcome of such a review. The question, however, is as to whether this extension to fill the void that may be created during the pendency of the sunset review is exercised is automatic, once the decision is taken to have sunset review of the anti-dumping duty or the continuation of such an anti-dumping duty has to be by a proper notification. As noted above, the High Court has held that second proviso is only an enabling provision and, therefore, power vested in the Central Government under the said proviso has to be specifically exercised, without which the anti-dumping duty cannot continue to remain in force with the lapse of original notification.

32. We are conscious of the fact that once sunset review is initiated, such initiation takes place only after a substantiated application/request is filed by the indigenous industry which is examined and a prima facie view is formed by the Central Government to the effect that such a review is necessitated as withdrawal of anti-dumping duty or cessation thereof may be prejudicial to the indigenous industry. Once such an opinion is formed and the sunset review is initiated, in all likelihood the Central Government would make use of second proviso

and issue notification for continuing the said anti dumping duty. At the same time, it cannot be said that without any overt act on the part of the Central Government, there is an automatic continuation. The learned counsel for respondent rightfully pointed out that the legislature has consciously used the expression 'may' and 'shall' at different places in the same Section, i.e.. Section 9A of the Act. In such a scenario, it has to be presumed that different expressions were consciously chosen by the Legislature to be used, and it clearly understood the implications thereof, therefore, when the word 'may' is used in the same Section in contradistinction to the word 'shall' at other places in that very Section, it is difficult to interpret the word 'may' as 'shall'. Therefore, it is difficult to read the word 'may' as 'shall'. Our conclusion gets strengthened when we keep in mind following additional factors."

13. In the present case, however, the Petitioner representing the domestic industry has approached the Court prior to the actual cessation of the ADD under the original notification which is why the Court has placed the matter for hearing today itself. There is no delay in the Petitioner approaching the Court. The impugned order is dated 22nd August 2017 and the present petition was filed immediately thereafter and heard first on 25th August 2017.

14. Having, by an interim order, directed the initiation of the SSR subject to the final outcome of the writ petition, the question that arises is whether again by an ad interim order, the Court should direct the continuation of ADD. The Court is conscious that under Section 9A of the CTA, it is the Central Government that has to take a call whether it wants to initiate the SSR and again whether it wants to continue the ADD. However, that very decision of the Central Government taken in the context of Section 9A of the CTA is undoubtedly subject to judicial review.

15. The question that then arises is whether the Petitioner having made out a prima facie case which weighed with the Court to persuade it to direct the initiation of the SSR as an interim measure, can be refused the consequential relief of continuation of ADD in the circumstances that the Petitioner points out.

16. On a perusal of the impugned order dated 22nd August, 2017, the Court finds that the conclusions reached by the DA, which have been summarised hereinbefore, do not prima facie appear to have accounted for the detailed statistics placed before the DA by the Petitioner some of which have been referred to earlier by the Court. In particular, the possibility of the undercutting of the price at which the product may be sold by the domestic industry has not been adverted to by the DA. Also, the present annual capacity of the entities in China PR which are unutilized and which far exceed the Indian demand of 2200 MT per year does not appear to have been discussed by the DA.

17. The other ground, viz., that Petitioner having itself imported the product, cannot be considered to be a domestic industry appears to be contrary to the DA's own conclusion in the earlier SSR which culminated in the Final Findings dated 4th April, 2006.

18. It appears to the Court that the factors that should weigh with the Central Government both for the initiation of the SSR and for continuation of ADD cannot be said to be unconnected. The Court is satisfied that a *prima facie* case does exist in favour of the Petitioner for continuation of the ADD.

19. Also of some significance is the question of balance of convenience. Mr. Sethi is right in his submission that the loss that the domestic industry might suffer on account of the cessation of the ADD cannot possibly be compensated if later it is held that the SSR ought to have been initiated by the Central Government and the ADD ought to have been continued. In this

context, it must be understood that the continuation of the ADD is not for an indefinite period. Even in terms of the 2nd proviso to Section 9A (5) of the CTA, the ADD can continue only for a period extending one year pending the outcome of the SSR. The hiatus that might be caused as a result of the SSR not coming to a conclusion and there being no possibility of further continuation of the ADD has been touched upon by the Supreme Court in its decision in Kumho.

20. Further, as far as the present case is concerned, the Court is satisfied that the balance of convenience in directing continuation of the ADD pending the conclusion of the SSR subject, of course, to the outer limit of one year as stipulated in the 2nd proviso to Section 9A(5) of the CTA, is in favour of the Petitioner. The Court would like to add that, by way of balancing the equities, in the event ultimately it is found that the decision of the Central Government not to initiate the SSR was correct, the ADD collected from the importers of the product from China PR during the period of the SSR can be refunded to such importers.

21. Accordingly, the Court directs that the ADD that was initiated by Notification No.40/2012 dated 31st August, 2012 will continue till the conclusion of the SSR initiated by the Central Government on the direction of this Court by the order dated 25th August, 2017. Needless to state that the continuation of the ADD will be only till such time, the SSR continues and in any event will not exceed the one year period stipulated in the 2nd Proviso to Section 9A(5) of the CTA. In other words, if the SSR concludes earlier than 1 year, obviously, the ADD will not continue beyond that. Consequential notification in terms of this order will be issued by the Central Government today itself.

22. The application is disposed of.”

34. The Court is informed that pursuant to the above order, the Central Government has issued notification initiating SSR and has also extended the

imposition of ADD.

Facts regarding VVF

35. VVF (India) Limited ('VVF') has filed W.P. (C) 1847 of 2017. The background facts are that VVF is a major domestic producer of fatty alcohols with a carbon chain length of C8, C10, C12, C14, C16 and C18 (not including branched isomers) including single, blends and unblended (not including branched isomers) which includes blends of carbon chain lengths, C12-14, C12-16, C12-18, C16-18, and C14-16 (commonly categorized as C12-14) excluding pure C8. A safeguard duty (SGD) was imposed on the subject goods by Notification No. 01/2015-Cus (SG) expiring on 27th February 2017.

36. It is stated that in the last few years, there has been a surge in imports of fatty alcohols into India especially from ASEAN countries which has adversely affected VVF's business. It is pointed out that the imports from countries such as Indonesia, Thailand and Malaysia, of the subject goods is free of duties of customs in India.

37. In 2013, the Domestic Industry filed a petition seeking initiation of safeguard investigations regarding the import of 'saturated fatty alcohols' with carbon chain length of C8, C10, C12, C14 C16 or C18 (not including branched isomers) including single blends and unblended which includes the combination of carbon chain length C12-14, C12-16, C12-18, C16-18 and C14-16 excluding pure C8. The investigations were commenced by the Directorate General of Safeguards ('DGS') (Respondent No.1) on 13th February 2013.

38. The Director General ('DG') rendered the preliminary findings on 26th May 2014. A provisional SGD was imposed by Notification No. 3/2014-Cus (SG) dated 28th August 2014. Thereafter, the Final Findings recommending imposition of SGD on the import of the subject goods was issued on 9th October 2014. Pursuant thereto, the Central Government (Respondent No. 2) issued a Notification on 13th March 2015 imposing SGD.

39. Towards the expiry of the period of two years on 21st November 2016, VVF filed an application before the DGS for initiation of the review investigation under Section 8B of the CTA, to examine the need for continued imposition of SGD and to extend the period of levy.

40. The DGS, by its letter dated 24th January 2017, called for further information and this was provided by VVF by its letter dated 30th January 2017. Thereafter, by the impugned letter dated 21st February 2017, the DGS rejected the request as a result of which the present writ petition was filed.

41. The prayer in the writ petition is for initiation of SSR and for continuation of the SGD. In the present writ petition notices were issued on 27th February 2017 and thereafter, pleadings were completed.

ADD and SGD

42. At the outset, it is important to note that an important feature distinguishing SGD from ADD or countervailing duty is that safeguard

measures are applied uniformly on all imports irrespective of their source whereas ADD and countervailing duties are source specific and may vary in amounts, depending on the source.

43. In accordance with the provisions of the Safeguard Rules and the Customs Tariff (Transitional Product Specific Safeguard Duty) Rules, 2002 ('TPSSD Rules'), SGD can be imposed on any product imported into the country in such increased quantities, absolute or relative to domestic production, and under such conditions so as to cause or threaten serious injury to the domestic producers of like or directly competitive products, irrespective of the source of origin of the imported product. Safeguard measures can be imposed only after the DG arrives at a finding, after due investigations, that the increased import of a particular product is causing or threatening to cause serious injury to the domestic producers or like or directly competitive articles.

Section 9A CTA

44. As far as the provisions concerning SSR are concerned, the entire scheme is contained in Section 9A of the CTA which reads as under:

“Section 9A. Anti-dumping duty on dumped articles.—

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

Explanation - For the purposes of this section, -

(a) "margin of dumping", in relation to an article, means the difference between its export price and its normal value;

(b) "export price", in relation to an article, means the price of the article exported from the exporting country or territory and in cases where there is no export price or where the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported articles are first resold to an independent buyer or if the article is not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as may be determined in accordance with the rules made under sub-section (6);

(c) "normal value", in relation to an article, means –

(i) the comparable price, in the ordinary course of trade, for the like article when [destined for consumption] in the exporting country or territory as determined in accordance with the rules made under sub-section (6); or

(ii) when there are no sales of the like article in the ordinary course of trade in the domestic market of the exporting country or territory, or when because of the particular market situation or low volume of the sales in the domestic market of the exporting country or territory, such sales do not permit a proper comparison, the normal value shall be either –

(a) comparable representative price of the like article when exported from the exporting country or [territory to] an appropriate third country as determined in accordance with the rules made under sub-section (6); or

(b) the cost of production of the said article in the country of origin along with reasonable addition for administrative, selling and general costs, and for profits, as determined in accordance

with the rules made under sub-section (6):

Provided that in the case of import of the article from a country other than the country of origin and where the article has been merely transhipped through the country of export or such article is not produced in the country of export or there is no comparable price in the country of export, the normal value shall be determined with reference to its price in the country of origin.

(1A) Where the Central Government, on such inquiry as it may consider necessary, is of the opinion that circumvention of anti-dumping duty Imposed under sub-section (1) has taken place, either by altering the description or name or composition of the article subject to such anti-dumping duty or by import of such article in an unassembled or disassembled form or by changing the country of its origin or export or in any other manner, whereby the anti-dumping duty so imposed is rendered ineffective, it may extend the anti-dumping duty to such article or an article originating in or exported from such country, as the case maybe.

(2) The Central Government may, pending the determination in accordance with the provisions of this section and the rules made thereunder of the normal value and the margin of dumping In relation to any article, impose on the importation of such article into India an anti-dumping duty on the basis of a provisional estimate of such value and margin and if such anti-dumping duty exceeds the margin as so determined:-

(a) the Central Government shall, having regard to such determination and as soon as may be after such determination, reduce such anti-dumping duty; and

(b) refund shall be made of so much of the anti-dumping duty which has been collected as is in excess of the anti-dumping duty as so reduced.

(2A) Notwithstanding anything contained in sub-section (1) and sub-section (2) a notification issued under sub-section (1) or any anti-dumping duty imposed under sub-section (2), shall not apply to articles imported by a hundred per cent, export-oriented undertaking unless, —

(i) specifically made applicable in such notifications or such impositions, as the case may be; or

(ii) the article imported is either cleared as such into the domestic tariff area or used in the manufacture of any goods that are cleared into the domestic tariff area, and in such cases anti-dumping duty shall be levied on that portion of the article so cleared or so used as was leviable when it was imported into India.

Explanation —For the purposes of this sub-section, the expression "hundred per cent export-oriented undertaking" shall have the meaning assigned to it in Explanation 2 to sub-section (1) of section 3 of the Central Excise Act, 1944 (1 of 1944)

(3) If the Central Government, in respect of the dumped article under inquiry, is of the opinion that —

(i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury; and

(ii) the Injury is caused by massive dumping of an article imported in a relatively short time which in the light of the timing and the volume of imported article dumped and other circumstances is likely to seriously undermine the remedial effect of the anti-dumping duty liable to be levied, the Central Government may, by notification in the Official Gazette, levy anti dumping duty retrospectively from a date prior to the date of imposition of anti dumping duty under sub-section (2) but not beyond ninety days from the date of notification under that

sub-section, and notwithstanding anything contained in any law for the time being in force, such duty shall be payable at such rate and from such date as maybe specified in the notification.

(4) The anti-dumping duty chargeable under this section shall be in addition to any other duty imposed under this Act or any other law for the time being in force.

(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.

(6) The margin of dumping as referred to in sub-section (1) or sub-section (2) shall, from time to time, be ascertained and determined by the Central Government, after such inquiry as it may consider necessary and the Central Government may, by notification in the Official Gazette, make rules for the purposes of this section, and without prejudice to the generality of the foregoing, such rules may provide for the manner in which articles liable for any anti dumping duty under this section may be identified, and for the manner in which the export price and the normal value of, and the margin of dumping in relation to, such articles may be determined and for the assessment and collection of such anti-dumping duty.

(6A) The margin of dumping in relation to an article, exported by an exporter or producer, under inquiry under sub-section (6) shall be determined on the basis of records concerning normal value and export price maintained, and information provided, by such exporter or producer:

Provided that where an exporter or producer fails to provide such records or information, the margin of dumping for such exporter or producer shall be determined on the basis of facts available.

(7) Every notification issued under this section shall, as soon as may be after it is issued, be laid before each House of Parliament.

(8) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder. Including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.

Section 9AA. Refund of anti-dumping duty in certain cases.

(1) Whereupon determination by an officer authorised in this behalf by the Central Government under clause (ii) of sub-section (2), an importer proves to the satisfaction of the Central Government that he has paid anti-dumping duty imposed under sub-section (1) of section 9A on any article. In excess of the actual margin of dumping in relation to such article, the Central Government shall, as soon as may be, reduce such anti-dumping duty as is in excess of actual margin of dumping so determined, in relation to such article or such importer, and such importer shall be entitled to refund of such excess duty:

Provided that such importer shall not be entitled to refund of so much of such excess duty under this sub-section which is

refundable under sub-section {2) of section 9A.

Explanation - For the purposes of this sub-section, the expressions, "margin of dumping", "export price" and "normal value" shall have the same meaning respectively assigned to them in the Explanation to sub-section (1) of section 9A.

(2) The Central Government may, by notification in the Official Gazette, make rules to-

(i) provide for the manner in which and the time within which the importer may make application for the purposes of sub-section (1);

(ii) authorise the officer of the Central Government who shall dispose of such application on behalf of the Central Government within the time specified in such rules; and

(iii) provide the manner in which the excess duty referred to in sub-section (1) shall be -

(A) determined by the officer referred to in clause (ii); and

(B) refunded by the Deputy Commissioner of Customs .or Assistant Commissioner of Customs, as the case may be, after such determination.”

45. As noticed from the above quoted provision, Section 9A (5) states that the ADD imposed thereunder, unless revoked earlier, ceases to have effect upon the expiry of five years from the date of such imposition. In the present case, the notification concerning imposition of ADD on imports of CTF (in the case of Kesoram Rayon) from China was due to expire on 12th January 2017.

Rule 23 of ADD Rules

46. The procedure that had to be followed was laid out in Rule 23 of the ADD Rules which underwent a slight change by notification No. 15/2011-Cus (N.T). Rule 23 (1) of the ADD Rules was substituted as under:

“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 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 antidumping 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.”

47. Trade Notice No. 2/2011, issued by the DA on 6th June 2011, states in para 3 that:

“3. It has been decided that reasonable period of time for the purpose of sub-rule 23(1B) shall be 90 days prior to the date of

expiry of the anti-dumping duty.”

48. The DA is expected to initiate a SSR investigation to review the need for continued imposition of the ADD in respect of the subject goods in accordance with Section 9A (5) of the CTA read with Rule 23 of the ADD Rules. The second proviso to Section 9A (5) envisages the contingencies where the review exercise, though initiated earlier, cannot be concluded during the currency of the ADD period specified in the notifications.

49. The question that arises is whether a combined reading of Section 9A (5) of the CTA read with Rule 23 of the ADD Rules envisages a two-step process, as is sought to be contended by the Central Government. According to the Central Government, the DA must first take a decision as to whether an SSR should be initiated in the first place. Secondly, if such an SSR is decided to be undertaken, the DA has to determine whether, on merits, the imposition of ADD requires to be continued.

Submissions of counsel

50. However, Mr. Sandeep Sethi, the learned Senior Counsel appearing on behalf of the Petitioners, contests the above understanding of the Central Government. According to him, there was no warrant for a two-stage procedure. As long as the application filed is duly substantiated, the DA cannot avoid initiating the SSR in terms of Rule 23 of the ADD Rules. Without such a procedure being adopted, according to Mr. Sethi, it is not possible for the DA to come to the conclusion that the claim made by the Petitioner is not duly substantiated.

51. According to Mr. Sethi, the use of the phrase ‘duly substantiated application’ in Rule 23 (1) (b) did not mean that a domestic industry was required to provide material for conclusively establishing the likelihood of recurrence of dumping and injury prior to the initiation of the investigation. Whether or not the application is substantiated can itself be determined only by a detailed investigation. Mr. Sethi submits that such a procedure would account for the fact that much of the information relevant for likelihood analysis is in the exclusive possession and knowledge of the foreign exporters. Such information is not available with the DA unless called for in terms of Rule 6 of the ADD Rules. It is pointed out that if the Rules had provided for a petition conclusively establishing the likelihood of recurrence of dumping and injury, there would have been no need for an investigation or to undertake the elaborate process laid down in Rule 6. It is pointed out that the DA has completely misconstrued the expression ‘duly substantiated application’.

52. The relevant parameters for continuation of duties in an SSR include the following:

- i. Sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to Indian markets, taking into account the availability of other export markets to absorb any additional exports;
- ii. 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
- iii. Inventories of the article being investigated.

- iv. Dumping in third countries.
- v. Likely impact of the imports (in the absence of duty), on the economic parameters for the domestic industry, including production, sales, capacity utilization, etc.
- vi. Export orientation of the foreign producers/exporters.

53. It is pointed out that in other jurisdictions, like the European Union ('EU'), the USA, Canada, Australia, etc., a whole host of other factors weighed in favour of affirmative expiry review including evidence of third-country dumping, significant investments in future production by the domestic industry, inventories of exporters, worldwide over-capacity, export orientation of the exporters and price attractiveness of the domestic market.

54. It is submitted by Mr Sethi that even with the ADD in place, the volume of imports of the PUC (in the case of Kesoram) increased from 550 MT to 686 MT in the period of investigation. The exports were also being made at a price significantly below the selling price of the domestic industry. In a tabular form, the relevant statistics are sought to be presented setting out the injury margin (the difference between non-injurious price of domestic industry and landed price of imports without ADD) for imports from China which is seen to be positive and significant at 44%. The said table reads as under:

S.No.	Particulars	UOM	POI
1.	Landed price without anti-dumping duty	Rs./Kg	264
2.	NIP	Rs./Kg	379

3.	Injury margin	Rs./Kg	115
4.	Injury margin	%	44%

55. It is submitted that the landed value of imports without ADD is Rs. 264/kg. It is pointed out that, at that price, the domestic industry would become loss-making and would not be able to get a favourable return on investment. It is submitted that the likely injury on the domestic industry is clear and imminent on account of the price effect. It is further submitted that the freely disposable pricing and potential capacity of 19,500 MT in China with export orientation in excess of 60% is indisputable. Thus, the surplus capacity in China was ten times the demand in India.

56. On behalf of the Respondents, Mr. Kirtiman Singh and Mr. Sanjiv Narula, the learned Senior Standing Counsel, point out that in terms of Section 9A (5) read with Rule 23 it is in the discretion of the DA to decide whether an SSR should be initiated given the facts and circumstances outlined hereinbefore. If the DA is satisfied from the materials placed before it that there is no threat or likely injury to the domestic industry as a result of the non-continuation of the ADD, the DA is not under a compulsion to nevertheless initiate the SSR. Both sides have placed considerable reliance on the decision in *Union of India v. Kumho Petrochemicals Co. Ltd. (2017) 8 SCC 307* (hereafter '*Kumho*') in support of their respective contentions on this aspect. The Court, therefore, proceeds to examine the said decision.

The decision in Kumho

57. In *Kumho*, the Supreme Court was called upon to interpret Section 9A of the CTA read with Rule 23 of the ADD Rules. On the facts of said case, after an SSR, a second notification dated 2nd January 2009 was issued imposing ADD on import of ‘Acrylic Nitro Butadiene Rubber’ originating from Korea RP. The said ADD was to come to an end on 1st January 2014. The notification proposing the SSR was issued only on 6th January 2014. Since the above notification was issued after the expiry of the original notification, a question arose as to whether the exercise of undertaking an SSR was impermissible. The notification was dated 31st December 2013 but was sent to Kitab Mahal Book Store for publication only on 6th January 2014. The further question therefore was whether 31st December 2013 is the date of reckoning or 6th January 2014? In this context, the Supreme Court in *Kumho* observed:

“16. First proviso to Section 9A(5) of the Act, when read along with Rule 6 of the Rules, do not lead to the conclusion that the intention to review and extend the antidumping duty, in the facts of a given case, have to be necessarily published and made available to all, before the expiry of the original notification. Requirement of Section 9A (5) of the Act is that the sunset review is to be initiated before the expiry of the original period for which the anti-dumping duty prevails. There is no additional requirement of making it public as well, necessarily before the said expiry date.

17. We, thus, agree with the conclusion of the High Court that insofar as requirement of public notice or a Gazette Notification is concerned, no such stipulations made in Section 9A(5) and its proviso. On the other hand, Section 9A (1), which deals with imposition of anti-dumping duty, specifically refers to such an imposition by way of publication in an Official Gazette. Therefore, as far as initiation of review is concerned, once a decision is taken by the Government on a particular date, that

would be the relevant date and not the date on which it is made public.

18. As a result, the appeals filed by the writ petitioners in which the finding of the High Court on the aforesaid question is challenged, are dismissed as without any merits.”

58. The Supreme Court in *Kumho* considered whether the word ‘may’ used in the second proviso to Section 9A (5) had to be read as ‘shall’ and whether if it was not so read, the object of the provision would be frustrated? The plea that the word ‘may’ had to be read as ‘shall’, was not accepted by the Supreme Court. It observed as under:

“30. From the scheme of Section 9A of the Act, it becomes clear that though the Notification for anti-dumping duty is valid for a maximum period of five years, the said period can be extended further with the issuance of fresh notification. For this purpose, it is necessary to initiate the review exercise before the expiry of the original notification, which review is commonly known as 'sunset review'. There may be situations where the sunset review is undertaken but the review exercise is not complete before the expiry of the period of original notification. It is because of the reason that the exercise of sunset review also demands complete procedure to be followed, in consonance with the principles of natural justice that was followed while imposing the anti-dumping duty in the first instance. To put it otherwise, this exercise contemplates hearing the views of all stakeholders by giving them adequate opportunity in this behalf and thereafter arriving at a conclusion that the continuation of the anti-dumping duty is justified, otherwise injury to the domestic industry is likely to continue or reoccur, if the said anti-dumping duty is removed or varied. Since this exercise is likely to take some time and may go beyond the period stipulated in the original notification imposing anti-dumping duty in to vacuum in the interregnum, second proviso to sub-section (5) of Section 9A of the Act

empowers the Central Government to continue the anti-dumping duty for a further period not exceeding one year, pending the outcome of such a review. The question, however, is as to whether this extension to fill the void that may be created during the pendency of the sunset review is exercised is automatic, once the decision is taken to have sunset review of the anti-dumping duty or the continuation of such an anti-dumping duty has to be by a proper notification. As noted above, the High Court has held that second proviso is only an enabling provision and, therefore, power vested in the Central Government under the said proviso has to be specifically exercised, without which the anti-dumping duty cannot continue to remain in force with the lapse of original notification.

31. After giving due consideration to the arguments advanced by the learned counsel for the parties, we are inclined to agree with the High Court that proviso to sub-section (5) of Section 9A of the Act is an enabling provision. That is very clear from the language of the said provision itself. Sub-section (5) of Section 9A gives maximum life of five years to the imposition of anti-dumping duty by issuing a particular notification. Of course, this can be extended by issuing fresh notification. However, the words 'unless revoked earlier' in sub-section (5) clearly indicate that the period of five years can be curtailed by revoking the imposition of anti-dumping duty earlier. Of course, provision for review is there, as mentioned above, and the Central Government may extend the period if after undertaking the review it forms an opinion that continuation of such an anti-dumping duty is necessary in public interest. When such a notification is issued after review, period of imposition gets extended by another five years. That is the effect of first proviso to sub-section (5) of Section 9A. However, what we intend to emphasise here is that even as per sub-section (5) it is not necessary that in all cases anti-dumping duty shall be imposed for a full period of five years, as it can be revoked earlier. Likewise, when a review is initiated but final conclusion, is not arrived at and the period of five years

"stipulated in the original notification expires in the meantime, as per second proviso 'the anti-dumping duty may continue to remain in force.' However, **it cannot be said that the duty would automatically get continued after the expiry of five years simply because review exercise is initiated before the expiry of the aforesaid period.** It cannot be denied, which was not even disputed before us, that **issuance of a notification is necessary for extending the period of anti-dumping duty.** Reason is simple. There no duty or tax can be imposed without the authority of 'law'. Here, such a law has to be in the form of an appropriate notification and in the absence thereof the duty, which is in the form of a tax, cannot be extracted as, otherwise, it would violate the provisions of Article 265 of the Constitution of India. As *a fortiori*, it becomes apparent that the Government is to exercise its power to issue a requisite notification. In this hue, the expression 'may' in the second proviso to sub-section (5) has to be read as enabling power which gives discretion to the Central Government to determine as to whether to exercise such a power or not. It, thus, becomes an enabling provision.

32. We are conscious of the fact that once sunset review is initiated, such initiation takes place only after a substantiated application/request is filed by the indigenous industry which is examined and a prima facie view is formed by the Central Government to the effect that such a review is necessitated as withdrawal of anti dumping duty or cessation thereof may be prejudicial to the indigenous industry. Once such an opinion is formed and the sunset review is initiated, in all likelihood the Central Government would make use of second proviso and issue notification for continuing the said anti-dumping duty. At the same time, **it cannot be said that without any overt act on the part of the Central Government, there is an automatic continuation.** The learned counsel for respondent rightfully pointed out that the legislature has consciously used the expression 'may' and 'shall' at different places in the same Section, i.e. Section 9A of the Act. In such a scenario, it has to be presumed that different expressions were consciously chosen

by the Legislature to be revised, and it clearly understood the implications thereof, therefore, **when the word 'may' is used in the same Section in contradistinction to the word 'shall' at other places in that very Section, it is difficult to interpret the word 'may' as 'shall' therefore, it is difficult to read the word 'may' as 'shall'.** Our conclusion gets strengthened when we keep in mind following additional factors.” (emphasis supplied)

59. It was further observed as under:

“33. The anti-dumping duty may continue, pending the outcome of the review, for a further period not exceeding one year. Thus, maximum period of one year is prescribed for this purpose which implies that the period can be lesser as well. The Government is, thus, to necessarily form an opinion as to for how much period it wants to continue the anti-dumping duty pending outcome of such a review. Moreover, since the maximum period is one year, if the review exercise is not completed within one year, the effect of that would be that after the lapse of one year there would not be any anti-dumping duty even if the review is pending. In that eventuality, it is only after the review exercise is complete and the Central Government forms the opinion that the cessation of such a duty is likely to lead to continuation or recurrence of dumping and injury, it would issue a notification extending the period of imposition of duty. Therefore, **there may be a situation where even when the power is exercised under second proviso and duty period extended by full one year, the review exercise could not be completed within that period. In that situation, vacuum shall still be created in the interregnum beyond the period of one year and till the review exercise is complete and fresh notification is issued. This situation belies the argument that extension under second proviso is to be treated as automatic to avoid the hiatus or vacuum in between.**” (emphasis supplied)

60. In the circumstances, where there was a gap between the expiry of the

earlier ADD notification and issue of the new notification not prior to the expiry date but only on 23rd January 2014, the Supreme Court held as under:

“40. Two things which follow from the reading of the Section 9A(5) of the Act are that not only the continuation of duty is not automatic, such a duty during the period of review has to be imposed before the expiry of the period of five years, which is the life of the Notification imposing anti-dumping duty. Even otherwise Notification dated January 23, 2014 amends the earlier Notification dated January 02, 2009, which is clear from its language, and has been reproduced above. However, when Notification dated January 02, 2009 itself had lapsed on the expiry of five years, i.e. on January 01, 2014, and was not in existence on January 23, 2014 question of amending a non-existing Notification does not arise at all. As a sequitur, amendment was to be carried out during the lifetime of the Notification dated January 02, 2009. The High Court, thus, rightly remarked that Notification dated January 02, 2009 was in the nature of temporary legislation and could not be amended after it lapsed.”

61. Consequently, the decision in **Kumho** is categorical that there was no automatic initiation of the SSR and even if it is so initiated, there was no automatic extension of the earlier notification.

62. The judgment in **Kumho** was delivered on 9th June 2017, i.e. nearly five months after the interim order was passed by this Court in some of the matters on 11th January 2017. Consequently, at the time when this Court was faced with the situation where the ADD notification was going to expire on the very next date, the Court had to take a *prima facie* view whether there could be an interim order whereby the SSR could be asked to be initiated even before the expiry of the ADD. At that stage, the Court had not ordered automatic extension of the notification of the ADD. This led to the second

round of writ petitions in some of these petitioners, i.e. Kesoram Rayon, GIL and SGIL, seeking mandamus to the Respondents to extend the imposition of ADD in terms of the second proviso to Section 9A (5).

63. When it came to the writ petition filed by ADL, i.e. W.P.(C) 7464 of 2017, it asked for not only the initiation of the SSR but, by an interim application, the continuation of the ADD. There, the Court, after noting the decision in **Kumho**, took a *prima facie* view regarding extension of the ADD notification. This was, however, made subject to the final outcome of the writ petition.

64. Now, the Court has had the benefit of the reports prepared by the DA on the basis of the applications made to it seeking initiation of the SSR. In this context, where the exercise of judicial review of the decisions of the DA are undertaken by the Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution, it is necessary to delineate the scope and ambit of such power of judicial review.

65. The general principles of administrative law would apply in such instance. The Court is concerned essentially with the decision-making process and will not usually sit in appeal over the decision itself. To understand the scope of judicial review in the specific context of challenge to the decisions of the DA under the CTA, the decisions of the Courts earlier to the one in **Kumho** require to be examined.

Decisions earlier to Kumho

66.1 In **Rishiroop Polymers v. Designated Authority (2006) 4 SCC 303**, the Supreme Court was concerned with a case where the domestic industry

(represented by the Respondent No. 3 therein) filed an anti-dumping petition before the DA under Section 9A of the CTA stating that the import of Acrylonitrile Butadiene Rubber ('ABR') from specified countries was causing injury to its production. After it was satisfied that such was indeed the case, the DA recommended the levy of ADD. Consequent thereto, the Central Government imposed the ADD under Rule 18 of the ADD Rules. After the importer, who was the sole agent of the ABR manufactured by the foreign exporters failed before the CESTAT, it approached the Supreme Court. It was contended by the Appellant that while assessing injury, the DA had not followed the principles contained in para (iv) of Annexure-2 of the Rules. It was pointed out on behalf of the Respondents that such a contention was not raised before the CESTAT and could not, therefore, be raised for the first time before the Supreme Court.

66.2 The Supreme Court agreed with the Respondents that the Appellant could not be permitted to raise the plea. However, since the issue was of mid-term review, the question whether all the 14 parameters mentioned in para (iv) to Annexure-2 had to mandatorily be considered, the Supreme Court observed as under:

“36. Otherwise also, we are of the opinion that the 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 suffers.

37. It is of vital importance to note that in the initial imposition of duty, the appellant has accepted the position that determination of injury by the Designated Authority was proper and in conformity with the requirements of Annexure II of the Anti-Dumping Rules. The appellant did not challenge the final finding of the Designated Authority before the Tribunal that parameters mentioned in para (iv) of Annexure II had not been considered or satisfied. We have declined the permission to the appellant to raise this point before this in Civil Appeals Nos. 773 and 774 of 2001 which were directed against the final findings recorded by the Designated Authority based on which the a Government of India had imposed the anti-dumping duty for a period of five years. Under Section 9-A (5), the said initial imposition of anti-dumping duty is ordinarily contemplated to be continued, and remain in effect for a total period of five years, at the end of which it would be subject to Sunset Review, the possible consequence of which would be the extension of time operation of the period of anti-dumping duty for another period of five years. This is subject to the provisions of sub-rule (1) of Rule 23 of the Anti-Dumping Rules under which the Designated Authority is empowered to review the anti-dumping duty imposed from time to time. Having regard to the scheme of the abovementioned provisions of the statute, once anti-dumping duty has been initially imposed, it would be ordinarily continued for five years unless on a review it is found by the Designated Authority that there has been such a significant change in the facts and circumstances, that it is considered necessary either to withdraw or modify, appropriately the anti-dumping duty which has been imposed. **It is, therefore, clear that unless the Designated Authority suo motu or the**

applicant for review is in a position to establish clearly that there has been, a significant change in the facts and circumstances relating to each of the basic requirements or conditions precedent for imposing duty, the finding given by the Designated Authority at the time of initial imposition of anti-dumping duty must be considered to continue to hold the field.

38. The final findings recorded by the Designated Authority at the time of initial imposition of anti-dumping duty, on the existence of injury to the domestic industry must be considered to continue to remain valid, unless it is proved to be otherwise, either by the Designated Authority in suo motu review or by the applicant seeking review. In the present case, the review had been initiated by the Designated Authority. Neither the Designated Authority nor the appellant had placed any material on record which could possibly displace the findings given by the Designated Authority at the stage of initial anti-dumping duty. In the absence of any new material, the Designated Authority is not required to apply fresh all particular or criteria enumerated in para (iv) of Annexure II, which had already been done at the initial stage of imposition of anti-dumping duty. There is no material on record to show that there was a change in the parameters or the criteria relating to the injury which would warrant withdrawal of anti-dumping duty. Nevertheless, the Designated Authority has still analysed the issue of injury in detail in the Mid-Term Review findings and has considered all the criteria or parameters enumerated in Annexure II. There is, therefore, no merit or substance in the appellant's contention regarding non-compliance with Annexure II.” (emphasis supplied)

67.1 In *Reliance Industries v. Designated Authority* (2006) 10 SCC 368, the Appellant-company (‘RIL’) was engaged in the business of Pure Terephthalic Acid (‘PTA’) which was used for the manufacture of polyester yarn, which in turn was used for the manufacture of textiles. For the

manufacture of PTA, it drew electricity partly from its own power plant and partly from the grid. The unit cost of electricity, therefore, formed a significant part of the cost of production.

67.2 RIL filed an application in October, 1998 seeking imposition of ADD on PTA originating in or exported from Japan, Malaysia, Spain and Taiwan. The DA found that, in fact, there was dumping by manufacturers from Japan, Malaysia and Spain and that there was material injury to the domestic industry in India. However, it was held that the imports from Japan and Malaysia were above the Non-Injurious Price ('NIP') and, therefore, there was no causal link between the dumped imports from those countries and the injury to the domestic industry. In arriving at this conclusion, the DA compared the landed value of the imports and the NIP.

67.3 The Central Government, on the basis of the above final findings, imposed ADD on PTA originating from or exported from Spain at a certain rate. It declined to impose ADD on the imports from other countries. RIL filed an appeal before the CESTAT seeking enhancement of the ADD in the case of exports from Spain and imposition of ADD on exports from other countries. However, the CESTAT declined the plea and, therefore, RIL approached the Supreme Court.

67.4 Before the Supreme Court, the two main issues for determination were: (i) whether the NIP of PTA was correctly determined; and (ii) the scope of Rule 7 of the ADD Rules.

67.5 The Supreme Court noted that the NIP was determined by the DA on

the basis of cost of production (less interest), general and administrative Expenses (SGA) and a fixed rate of return on the capital employed by the domestic industry. However, it was observed that the DA had erred in law because it was required to carry out the determination of injury and computation of NIP for “the domestic industry as a whole”, and not in respect of any particular company or enterprise. The Court went to the definition of ‘domestic industry’ under Rule 2(b) of the ADD Rules. It was held that the DA was always required to take into consideration the transfer price (market value) of the imports and not their actual cost of capital production. It was observed that, “once dumping of specific goods from a country is established, anti-dumping duty can be imposed on all exports of those goods from that country to India under Section 9A, irrespective of the exporter. The rate of duty may vary from exporter to exporter depending upon the export price.”

67.6 Likewise, with regards to NIP, the resale price at which the subject goods could be produced by the domestic industry as a whole was relevant. It was specifically stated that since there are special advantages and disadvantages that a domestic producer may have as a result of manufacture of raw material or utilities that go into production of the PUC “should be ignored for determination of the NIP for the domestic industry as a whole.”

67.7 Importantly, it was observed in paras 38 and 39 as under:

“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.

39. We do not agree with the Tribunal that the notification of the Central Government under Section 9-A 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 the basis is subject to an appeal before CESTAT. This also makes it clear that the proceedings before the DA are quasi-judicial.”

67.8 In that case, it was found, on facts, that the DA had failed to provide RIL detailed costing information on the basis of which it computed the NIP and that was held to be contrary to the Rule 7 of the ADD Rules.

Other decisions

68. As far as this Court is concerned, the question whether the SSR was mandatory was considered by it in *Indian Metal and Ferro Alloys Ltd. v. Designated Authority* (*supra*). The Court answered the question with reference to Articles 11.1, 11.2 and 11.3 of the General Agreement on Tariffs and Trade, 1994 and concluded that there was a statutory requirement of an SSR recognized both by the CTA and the ADD Rules and that such SSR may be conducted by the DA *suo motu* or on an application made by the Domestic Industry.

69. The same approach was adopted in *Kalyani Steels Ltd. v. Revenue Secretary 2008 (224) ELT 47 (Del)*. The correctness of the decision of this Court in *Indian Metal and Ferro Alloys Ltd. v. Designated Authority*

(*supra*) was questioned by the DA by filing a Special Leave Petition in the Supreme Court. In an order passed in *Designated Authority v. Indian Metal Alloys and Ferro Ltd. (2009) 2 SCC 510*, the Supreme Court was of the view that the decision in *Reliance Industries v. Designated Authority (supra)* requires a re-look. However, the scope of the reference to the larger Bench was limited to the following two questions:

“(1) Whether the interpretation that anti-dumping duty is country-specific rather than exporter-specific is in consonance with the provisions of Rules 12, 15, 17(3), 18, 19(3) and Annexure I to the Rules.

(2) Whether the interpretation placed upon Rule 7 of the Rules is correct insofar as it diminishes the rule of confidentiality statutorily provided for under Rule 7.”

70. The above questions were ultimately considered by the Supreme Court in *Union of India v. M/s Meghmani Organics Ltd. (2016) 340 ELT 449*, at a time when the issues on merits had been rendered academic. It was clarified that the decision in *Reliance Industries v. Designated Authority (supra)* did not run counter to the decision in *Sterlite Industries (India) Ltd. v. Designated Authority 2003 (158) ELT 673* wherein it was, *inter alia*, held that in the garb of unclaimed confidentiality, “the DA cannot shirk from its responsibility to act fairly in its quasi judicial role and refused to indicate reasons for its findings.” It was further observed as under:

“25...The DA will do well to remember not to treat any information as confidential unless a claim of confidentiality has been made by any of the parties supplying the information. In cases where it is not possible to accept a claim of confidentiality. Rule 7 hardly leaves any option with the DA but to ignore such confidential information if it is of the view

that the information is really not confidential and still the party concerned does not agree to its being made public. In such a situation the information cannot be made public but has to be simply ignored and treated as *non est*.”

71. However, as far as the present cases are concerned, none of the above issues directly arise for consideration. It must also be noted that the issues considered by this Court in ***Indian Metal and Ferro Alloys Ltd. v. Designated Authority*** (*supra*) was at a time when it did not have the benefit of the decision in ***Kumho*** which is now the authoritative pronouncement of the Supreme Court and is binding upon this Court.

Summary of case law

72. The summary of the above decisions may be set out as under:

- i. The proviso to Section 9A (5) is an enabling provision.
- ii. The continuation of ADD, as and when the Central Government decides to initiate the SSR, is not automatic. In other words, when an SSR is initiated but a final conclusion is not arrived at, “it cannot be said that the duty would automatically get continued after the expiry of five years simply because a review exercise is initiated before the expiry of the aforesaid period.
- iii. No duty or tax can be imposed without the authority of law. It has to be in the form of an appropriate notification and in the absence thereof, ADD cannot be imposed. The expression ‘may’ in the second proviso to Section 9A (5) gives a discretion to the Central Government to determine “as to whether to exercise such a power or not. It, thus, becomes an enabling provision.”

73. The Court notes that in para 32 of the decision in ***Kumho***, the Supreme Court did say that once the Central Government is of the view that an SSR should be initiated, “in all likelihood the Central Government would make use of second proviso and issue notification for continuing the said ADD.” At the same time, the Supreme Court clarified that, “it cannot be said that without any overt act on the part of the Central Government, there is an automatic continuation.” A collective reading of paras 31 and 32 indicates that the Supreme Court declined to interpret the word ‘may’ occurring in Rule 23 (6) as ‘shall’.

The two issues in the present cases

74. It is time to return to the two central issues that arise in the present cases: (i) whether the DA was justified in declining to initiate the SSR in the cases where ADD was in place and declined to initiate the investigation where the SGD was in place (as in the case of VVF India Limited); and (ii) even if it is held that an SSR had to be initiated, whether the DA is justified in not issuing a notification extending the ADD or the SD, as the case may be.

75. The parameters of judicial review, as already noticed, is limited to examining whether the DA followed the procedure outlined under Section 9A (5) of the CTA read with Rule 23 of the ADD Rules and in the case of the SGD under Section 8B of the CTA read with the corresponding rules. A further aspect is whether, in the exercise of such discretionary power, the DA took into account all the relevant materials and avoided materials which were not relevant to the determination.

76. As far as the first aspect of the procedure to be adopted is concerned, it is plain that the DA can initiate the SSR either on its own initiative or upon the request of an interested party. In all these cases, there was a request by the interested party, namely the Domestic Industry, for initiation of the SSR for the ultimate purpose of continuing the ADD. Rule 23 (1A) further requires such party to submit “positive information substantiating the need for such review” and upon such review, the DA shall recommend to the Central Government the withdrawal of the ADD where it comes to a conclusion that injury to the domestic industry “is not likely to continue or recur if the said ADD is removed or varied and is, therefore, no longer warranted.” This is an instance where the DA decides not to continue the ADD.

77. Rule 23 (1B) applies to the converse situation. It begins with the non-obstante clause that notwithstanding anything contained in sub-rule (1) or (1A), the ADD shall be effected for a period not exceeding five years from the date of its initial imposition, unless the DA 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” that the expiry of the ADD “is likely to lead to continuation or recurrence of dumping and injury to the domestic industry.”

78. From sub-rule (1B) it appears that there has to be a “duly substantiated request made by or on behalf of the domestic industry”. The conclusion that has to be reached by the DA is upon a review initiated before the expiry of the initial notification.

79. The initiation of the SSR is in terms of Rule 23 (1). It states that ADD imposed under the provision of Section 9A of the Act would remain in force “so long as and to the extent necessary, to counteract dumping, which is causing injury”. The question that arises is whether, under Rule 23 (1B), the conclusion can be reached by the DA only upon a review, i.e. a review undertaken in terms of Rules 6 to 11 and 16 to 20 of the ADD Rules, which in terms of Rule 23 (3), applies “*mutatis mutandis*” to the SSR. In other words, is it a two-stage process whereby, first the DA must be satisfied that, *prima facie*, some case is to be made out for the purpose of initiating the SSR by undertaking the entire process of the SSR or can it, at the threshold itself, without going through the process of the SSR, come to such conclusion?

80. The difference in the two is that as far as forming a view not to initiate an SSR merely upon consideration of the applications made to it is concerned, the DA does not actually conduct hearings in which all interested parties participate. The DA comes to a conclusion without undertaking such a hearing process. The question is whether such a procedure is contemplated and is permissible for the DA to adopt. For this, one has to again examine the procedure that is otherwise followed during any investigation undertaken. Rule 6 sets out the principles governing the investigations. That procedure, however, envisages that the DA shall, “after it has decided to initiate investigation to determine the existence, degree and effect of any alleged dumping of articles,” issue a public notice notifying its decision and such public notice shall, *inter alia*, “contain adequate information on the

following...” Rule 6 (1), therefore, does envisage the DA first deciding to initiate investigation. As already noticed, in Rule 23 (3) of the ADD Rules, Rule 6 will *mutatis mutandis* apply to an SSR. On this interpretation, the Court is therefore inclined to agree with the learned counsel for the Respondents that it is indeed a two-stage process where the DA has to first be satisfied that it requires to initiate an SSR and after it so decides then it proceeds to issue a public notice and then the entire procedure as envisaged in Rules 6 to 11 and 16 to 20 would then apply. The Court is, therefore, unable to accept the submission put forth on behalf of the Petitioners that there is no two-staged procedure involved in this determination and that once a request for initiating an SSR is made, the DA is left with no option but to go through the entire process of following the procedure under Rules 6 to 11 and 16 to 20 and only thereafter, comes to a conclusion as to whether the ADD requires to be continued. This, therefore, answers the first question.

81. Now turning to the next question as to whether the DA was justified in coming to such a conclusion, this Court has carefully examined the records placed before it and which were also present before the DA in each of the cases. It was not as if the DA simply examined the applications without any further enquiry. The DA did send a questionnaire to the Petitioners eliciting clarifications and inputs in support of the applications made by each of them. The Court is, therefore, satisfied that as far as the procedure to be adopted by the DA was concerned, it cannot be said that an adequate opportunity was not granted to the Petitioners to place their respective cases before the DA.

82. In a sealed cover, the detailed report prepared by the DA was presented to the Court. From it, the Court could make out what was in fact considered by the DA. The detailed working of the NIP in each of the cases in relation to the net fixed assets, the working capital, the capital employed, the return on investments has been considered. Likewise, the selling price, the costs of sales, the profit and loss during the period of enquiry has been considered. A very detailed analysis has been undertaken by the DA in arriving at its conclusions. There is a complete substantiation for the conclusions reached by the DA.

83. Merely because it is possible to take another view based on the same material which was placed before the DA does not mean that the Court will interfere with the ultimate decision reached by the DA. It is trite that while the scope of a judicial review will extend to examining the process of the decision-making in order to ensure that it is in conformity with the ADD Rules and the general principles of natural justice, the Court will not, in exercise of its jurisdiction under Article 226 of the Constitution, sit in appeal over the decision of the DA on merits, unless the decision is shown to be either mala fide or so utterly perverse and shocking to the judicial conscience that no reasonable person could have arrived at such a conclusion. That threshold has not been met by any of the Petitioners. While the Court does agree that it is ultimately the public interest and the purposes and objects for which the ADD provisions have been introduced in the CTA that have to govern the decision-making exercise, the Court would not like to interfere with such a decision arrived at by the DA unless it is shown to

be utterly perverse and shocking to the judicial conscience.

84. In none of these cases, has the Court been persuaded by the Petitioners to hold that the DA has based its decision on wholly irrelevant considerations or that it failed to take into account the relevant materials placed before it by the Petitioners. At the risk of repetition, it must be pointed out that while it is possible that there may be more than one view possible based on the materials placed before the DA, that by itself will not be a ground for interfering with its ultimate decision.

85. There are also certain practical difficulties that arise where the Court interferes in matters of this nature which have to be necessarily time bound. Although the notification placed before the Court urges that all requests for the SSR should be made at least three months prior to the expiry of the notification, it is not always possible to direct that the DA should take its decision thereon within a certain period, although that would be desirable. In these cases, the DA did not arrive at its decision till the point at which only one day was left for the expiry of the previous ADD notification. That left the Petitioners with very little time and the only option was for them to approach the Court to question the decision of the DA not to initiate the SSR. From the Court's point of view, if the Court failed to take a decision one way or the other on whether the SSR should be initiated, then precious time would be lost as a result of judicial delays. That was perhaps what weighed with the Court when, on 11th January 2017, it decided by an extraordinary interim order, to direct the DA to initiate SSR. This was, of course, subject to the final outcome of the writ proceedings.

86. If these writ petitions are not dealt with within a short time period, then they may all be rendered infructuous. This is the danger that exists in such matters. Some procedure will have to be devised to ensure that the entire exercise is completed much before the expiry of the initial ADD notification. How that should be done has to be left to the authorities to determine and perhaps that would require a further refining of the existing ADD Rules and Safeguard Rules. The Court, however, would not like to opine any further on this aspect.

87. Further, considering the question of extending the notification imposing the ADD is not an easy task to perform at the interim stage with all the relevant materials that are placed before the Court. Where the Petitioners are compelled to approach the Court at virtually the 'last minute', the Court has to proceed on the basis of the materials placed before it by the Petitioners without the benefit of the detailed reports and analysis undertaken by the DA. It is in those circumstances, like for instance in the case of ADL [the Petitioner in W.P. (C) 7464 of 2017], that the Court had passed an interim order directing that the ADD should be continued.

88. However, as it now transpires, having had the benefit of the reports of the DA, the Court is now satisfied that the DA was not in error in declining to initiate the SSR. Consequently, regardless of whatever stage the SSR has reached, it will have to now be terminated by virtue of the Court not agreeing with any of the Petitioners in these cases. Likewise, the Court's interim order by which the ADD was asked to be continued will also hereby stand terminated. The consequential refunds would be made available to the

persons who in fact paid the ADD, without passing on the burden, in accordance with law.

Conclusion

89. With the above observations, all the writ petitions herein are dismissed and the interim orders are vacated but, in the circumstances, with no orders as to costs. All pending CMs are also disposed of.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

NOVEMBER 08, 2017

Rm/rd