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Article

Quality Control Orders – The recent surge and challenges

By **Saurabh Malpani**

In India, the Bureau of Indian Standards Act, 2016 (erstwhile BIS Act 1986) provides for the establishment of a national standards body of India for the harmonious development of the activities of standardization, conformity assessment and quality assurance of goods, articles, processes, systems and services. BIS has thus been created as a National Standards Body of India. BIS has issued several standards (which are documents that set out specifications, procedures and guidelines that aim to ensure products, services, and systems are safe, consistent, and reliable) for various goods, services and processes in terms of Section 10 of the BIS Act.

The standards issued by BIS for any goods are for voluntary compliance until a specific Quality Control Order is issued by the Central Government under Section 14 or 16 of the Act requiring its mandatory compliance. The Order may either require compliance through mandatory marking of product/packaging with Standard Mark (ISI mark in common parlance) after taking licence from BIS or taking certificate of conformity from the BIS.

Recent thrust on mandatory compliance with standards

In the year 2020-21, there has been a surge in the number of mandatory Indian Standards. It is understood that there are 346 categories of goods under mandatory compliance of prescribed standards currently. More than 250 categories of such goods have been covered under mandatory

compliance requirement since last year i.e. 2020 only. Under chemicals and fertilizer category, there were 6 quality control orders till 2019, however, 20 quality control orders have been issued in 2020 under this category. Further, there are quality control orders issued for various other categories viz., steel, cables, footwear, toys, safety glass, transparent float glass, domestic pressure cooker, aluminium foil, plain copier paper, etc.

Applicability on imported goods

Paragraph 2.03 of the Foreign Trade Policy, 2015-2020 ('FTP') provides for compliance of imports with domestic laws. It provides that domestic laws / Rules / Orders / Regulations / technical specifications / environmental safety and health norms applicable to domestically produced goods shall apply, *mutatis mutandis*, to imports, unless specifically exempted. It further provides that goods to be utilized/ consumed in manufacture of export products, as notified by DGFT, may be exempted from domestic standards/ quality specifications.

Further, the General Notes to the Import Policy also provide that imported goods need to comply with the mandatory Indian Standards if the same are applicable for domestically produced goods. In other words, if a product manufactured in India is subjected to compliance with mandatory standards, the said product if imported from outside India would also need to comply with those standards.

WTO laws in relation to applicability of mandatory standards on imported goods

Article XX of the General Agreement on Tariffs and Trade ('GATT') 1994 allows governments to take measures in order to protect human, animal or plant life or health, provided they do not discriminate or use this as disguised protectionism. Pursuant to the same, India has made compliance of mandatory standards applicable to imported goods along with domestically produced goods. Also, the principle of national treatment enshrined in Article III of GATT 1994, prohibits discrimination between imported goods and domestically produced goods with regard to internal taxation or regulation.

It is also pertinent to note that while formulating, adopting and applying technical regulations, standards, and conformity assessment procedures, India has to ensure compliance with the WTO Agreement on Technical Barriers to Trade ('TBT') which tries to ensure that these are non-discriminatory and do not create unnecessary obstacles to trade.

Challenges faced by industry

It seems that BIS has become an effective tool to curb the menace of cheap quality imports. Though, the issuance of quality control orders requiring for mandatory compliance of standards is a very effective tool, however, there are a few challenges that need attention.

(a) Import of raw material for use in manufacture of finished goods which would be exported

Generally, every order which prescribes mandatory compliance with standards has an exception for exports. It provides that goods meant for export which conform to any other

specification required by a foreign buyer would be excluded from the applicability of the order. For example, sub-para (3) of Para 1 of Steel and Steel Products (Quality Control) Order, 2020 states as under:

*(3) It shall apply to steel and steel products specified in column (3) of Table 1 and goods or articles specified in column (2) of Table 2, **except steel and steel products manufactured domestically for export which conform to any other specification required by a foreign buyer.***

Hence, it is clear that if a particular product which is prescribed under the order is exported, the said product would not require compulsory compliance with such prescribed standards if it is made as per the specification of the foreign buyer. Presently, the industry is facing a challenge in clearance of imported goods wherein the said goods are notified for compulsory compliance with prescribed standards, but which would be used as raw material in manufacturing finished products in India which would be ultimately exported outside India. The contention of the customs department is that such goods would not be excluded from the applicability of the standards, i.e., they need to comply with the Indian Standards, since the same are not exported as such but are used in goods which would be exported.

Ideally, the requirement to comply with the prescribed standards should arise only when the imported goods (in case of import) are cleared for home consumption and used for domestic purposes. If the said imported goods would be used in manufacture of products which will be exported out of India, then the goods imported should not be required to comply with BIS, i.e. prescribed Indian Standards. However, from the

perspective of BIS, it is pertinent to note that the Act or Rules do not provide any administrative mechanism to check whether the goods are used for the said purpose or not (i.e. export). In absence of the same, many importers are facing difficulties in getting clearance of such goods which are not manufactured as per standard but are imported into India as a raw material for use in export goods. This area of concern needs appropriate action from the government.

(b) Stock in hand as on the date of implementation of order

If any goods have been prescribed for mandatory compliance of relevant Indian Standards, then there is prohibition under Section 17 of the BIS Act on *manufacture, import, distribute, sell, hire, lease, store or exhibit for sale* of such goods if they do not comply with such standards or requirement of such standards like putting standard mark. In other words, if goods which require compliance with standards do not comply with the same, it is understood from the language of the section that such goods cannot be sold in India. The concern which industry is facing is whether such prohibition also applies to stock in hand as on date of implementation of order?

The intention of the government should be to prohibit those sales of goods which are manufactured and sold after the date of implementation of the order. However, the language of the provision leaves an ambiguity in

respect of stock in hand. It could be said that subordinate legislation should not have retrospective effect. However, considering the nature of the statute which intends to focus on health and wellbeing of consumers, the said arguments need to be tested in courts.

The BIS has time and again clarified in FAQ's (issued in respect of certain specific orders) that such orders are not applicable on stock in hand as on date of implementation of the order. However, the said clarifications are not legally binding and moreover such clarifications have been issued only for selected orders.

In Australia, it is observed that a transition period is provided to assist with the changeover to the new/amended mandatory standard. During that transitional period, old stock can be liquidated. It is pertinent to note that majority quality control orders issued in 2020 have a buffer period for implementation of said order, i.e. they are said to be effective from a later date. It needs to be clarified whether the old stock can be sold after the implementation of the order.

Concluding remarks

With the use of BIS increasing day by day for quality assurance, the Act and Rules need appropriate changes to cater to the emerging issues from the industry.

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Trade Remedy News

Trade Remedy actions by India

Product	Country	Notification No.	Date of notification	Remarks
2-Ethyl Hexanol	European Union, Indonesia, Korea RP, Malaysia, Taiwan and USA	17/2021-Cus. (ADD)	26 March 2021	Definitive anti-dumping duty continued after sunset review
Barium Carbonate	China PR	07/46/2020-DGTR	2 March 2021	Initiation of second ADD sunset review investigation
Black toner in powder form	China PR, Malaysia and Chinese Taipei	12/2021-Cus. (ADD)	5 March 2021	Definitive anti-dumping duty imposed
Ciprofloxacin Hydrochloride	China PR	13/2021-Cus. (ADD)	11 March 2021	Definitive anti-dumping duty imposed
Faced glass wool in rolls	China PR	14/2021-Cus. (ADD)	18 March 2021	Definitive anti-dumping duty imposed
Glazed/Unglazed Porcelain/Vitrified tiles	China PR	9/2021-Cus. (ADD)	25 February 2021	Anti-dumping duty extended till 28 June 2021
Melamine	European Union, Japan, Qatar and UAE	F.No.6/1/2021-DGTR	26 February 2021	Anti-dumping original investigation initiated
Melamine	China PR	10/2021-Cus. (ADD)	25 February 2021	Anti-dumping duty extended till 31 March 2021
N, N'-Dicyclohexyl Carbodiimide (DCC)	China PR	06/53/2020-DGTR	25 February 2021	Original Anti-dumping investigation initiated
New Pneumatic Radial Tyres with / without tubes and or flap of rubber (including tubeless tyres) having nominal rim dia above 16' for buses and lorries	China PR	F.No.7/8/2020-DGTR	4 March 2021	Termination of new shipper review of anti-subsidy investigation

Product	Country	Notification No.	Date of notification	Remarks
New pneumatic radial tyres of rubber for buses and lorries, with or without tubes and/or flaps	Thailand	Office Memorandum F.No.354/12/2021-TRU	1 March 2021	Ministry of Finance's decides not to impose ADD
Phenol	EU and Singapore	11/2021-Cus. (ADD)	3 March 2021	Anti-dumping duty extended till 7 June 2021
Polyethylene Terephthalate resin with intrinsic viscosity of 0.72 decilitres per gram or higher	China PR	18/2021-Cus. (ADD)	27 March 2021	Definitive anti-dumping duty imposed
Polytetrafluoroethylene	Russia	Office Memorandum F.No.354/106/2004-TRU (Pt-II)	17 March 2021	Ministry of Finance's decides to not amend ADD even after DGTR's positive findings in mid-term review for enhancement of duty
Polyurethane leather including any kind of textile coated one sided or both sided with Polyurethane	China PR	F.No.06/55/2020-DGTR	24 February 2021	Anti-dumping Original investigation initiated
PVC flex films	China PR	F.No.7/04/2021-DGTR	24 March 2021	Second sunset review of ADD initiated
Textured Tempered Glass	Malaysia	3/2021-Cus. (CVD)	9 March 2021	Definitive countervailing duty imposed
Tyre curing presses for tyres	China PR	F.No.7/37/2020-DGTR and 15/2021-Cus. (ADD)	26 February 2021 and 26 March 2021	Anti-dumping duty extended till 30 September 2021 as second sunset review initiated

Trade remedy actions against India

Product	Investigating Country	Document No.	Date of Document	Remarks
Common Alloy Aluminium Sheet	USA	86 FR 13285 [C-533-896] and 86 FR 13282 [A-533-895]	8 March 2021	Affirmative final determinations in the countervailing duty (CVD) and Final affirmative determination of sales at less than fair value
Granular Polytetrafluoroethylene (PTFE) Resin	USA	Preliminary Findings	15 March 2021	Affirmative Preliminary Determinations - Imposing anti-dumping duty
Grinding Media	Canada	Final Findings PI-2020-006	Determination issued 15 February 2021 Reasons issued 2 March 2021	Affirmative final determinations in the antidumping duty (AD) investigations
Preserved Mushrooms	USA	86 FR 14076 [A-533-813]	12 March 2021	Antidumping duty orders continued
Some long fiber products made from polyester	Vietnam	1079 / QD-BCT	11 March 2021	Extending the time limit for investigation and application of anti-dumping measures
Stainless steel cold-rolled flat products	European Union	Commission Implementing Regulation (EU) 2021/370	2 March 2021	Imports subject to registration
Tubes and pipes of ductile cast iron	European Union	Initiation 2021/C 90/06	17 March 2021	Initiation of expiry review of anti-subsidy measures
Tubes and pipes of ductile cast iron	European Union	Initiation 2021/C 90/07	17 March 2021	Initiation of expiry review of anti-dumping measures
Utility Scale Wind Towers	USA	86 FR 15897 [C-533-898]	25 March 2021	Preliminary affirmative countervailing duty determination



WTO News

Technical Barriers to Trade – 20 new specific trade concerns raised – Indian measures lead the table with 5 recent measures being questioned

Several of the Indian measures were questioned at the last meeting of the WTO's Committee on Technical Barriers to Trade. Amongst other concerns, India was asked by the Republic of Korea to align its measure on refrigerating appliances with international standards, while India asked the European Union to review why the Netherlands and Italy were not accepting test certificates for electrical equipment issued by the Central Power Research Institute, a widely recognized body.

India's 5 recent measures which were the new entrants in the list of measures being questioned by other Member countries were the Draft Food Safety and Standards (Import) Amendment Regulation, 2020 (questioned by USA and Mexico), Flat Transparent Sheet Glass and Safety Glass (Quality Control) Order and Refrigerating Appliances (Quality Control) Order, 2020 (both questioned by the Republic of Korea), Caustic Soda Quality Control Order, 2017 (quizzed by Chinese Taipei) and Plain Copier Paper (Quality Order) 2020 (questioned by Indonesia). In total 20 new specific trade concerns, as introduced/proposed by Members were questioned.

India on its part, other than questioning the EU on non-recognition test certificates as mentioned above, also questioned China on Inventory of Existing Chemical Substances Produced or Imported in China ('IECSC') requiring mandatory registration of certain chemicals for import and not notified at WTO. Nigeria's final measure for onerous testing and conformity requirements by Societe Generale de Surveillance, (SGS) for machinery and their parts was also questioned by India.

It may be noted that India's various other Quality Control Orders are already in the list of 61 previously raised specific trade concerns. India's share here is 12.

US duties on Korean products – USA appeals against panel report

The United States of America has appealed against the DSB panel report circulated earlier this year in the dispute "*United States — Anti-Dumping and Countervailing Duties on Certain Products and the Use of Facts Available*" (DS539). According to the document WT/DS539/9 as circulated in the WTO on 22 March, the United States will confer with the Republic of Korea, so the parties may determine the way forward in this dispute. This is required as at present there is no Appellate division available to deal with the appeal.



India Customs & Trade Policy Update

Online module introduced for adjudication, appeal and review proceedings under Foreign Trade (D&R) Act and Rules

The Directorate General of Foreign Trade ('DGFT') has implemented an online module for adjudication, appeal and review proceedings under the Foreign Trade (Development and Regulation) Act, 1992 and the Foreign Trade (Regulation) Rules, 1993. As per Trade Notice No. 44/2015-20, dated 1 March 2021, all proceedings including service of notice, reply to notice, notices for personal hearing, passing of orders, etc. will be done online. Personal hearings will be conducted through video conferencing through physical hearings. The Trade Notice provides for a transitional period up to 31 March 2021 in case of appeals and hence appellants can file the appeal manually also till this date. However, consequent proceedings will only be through online module.

Online filing of applications for Non-Preferential Certificate of Origin

The DGFT has expanded the electronic platform for Certificate of Origin (CoO) beyond the Preferential Certificate of Origin to facilitate electronic application of Non-Preferential Certificates of Origin. Accordingly, applications for Non-Preferential CoO may also be submitted through e-CoO platform w.e.f. 15 April 2021. Trade Notice No. 48/2020-21, dated 25 March 2021, issued for the purpose, also states that the

existing procedure of submitting paper CoO applications directly to the designated issuing agency shall also be in operation in parallel and that submission and issuance of CoO(NP) by the issuing agencies through their paper based system may continue up to 31 July 2021 or until further orders. Further, as part of this online CoO(NP) application process, the exporters can also choose to avail the option of requesting for attestation of the supporting documents submitted with the said application, wherever required.

Online applications for import authorisations for restricted goods

The DGFT has introduced a new online module for filing of electronic, paperless applications for import authorisations with effect from 22 March 2021. Accordingly, all applications for import authorisations will need to be submitted online and authorisations will be issued by DGFT Headquarters. Applications for revalidation or amendment of authorisations issued after said cut-off date will also be required to be submitted electronically to the DGFT HQ. Trade Notice No. 47/2020-21, dated 23 March 2021, issued for the purpose, also clarifies that applications for revalidation or amendment of import authorisations issued prior to 22 March may be submitted to the concerned RA who may amend such authorisation manually as per the earlier procedure.



Ratio Decidendi

Suspension of customs clearance of alleged IPR infringing goods when not permissible beyond 14 days

The Bombay High Court has held that the assertion that remedies under Section 53 of the Copyright Act, 1957 and Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 ('IPR Rules') framed under the Customs Act, 1962, are independent of each other, is fallible. The dispute involved suspension of the clearance of the imported goods alleged to be infringing the copyright in the artwork in the 'TR' mark. The Court also rejected the contention that the provisions of the Copyright Act will have to be read de hors the IPR Rules. Going through the provisions of the Copyright Act as amended in 2012 and the Copyright Rules, 2013, the High Court observed that the Customs authorities acted beyond jurisdiction by detaining the consignment beyond the prescribed period of 14 days. It observed that the person giving the notice of system alert under Section 53(1) of the Copyright Act had failed to produce a court order of restraint. [*NBU Bearings Pvt. Ltd. & Anr. v. Union of India & Ors.* – Judgement dated 12 March 2021 in Writ Petition (L) No. 3371 of 2021, Bombay High Court]

Countervailing duty – Verification process for excess remission – DA to seek information

The Anti-dumping Bench of the Customs, Excise and Service Tax Appellate Tribunal ('CESTAT') has set aside the imposition of 2.47% countervailing duty on continuous cast copper

wire produced by Metrod (Malaysia) SDN BHD ('appellant'). The Central Government had by its Notification dated 8 January 2020 (Serial No. 8 relating to Metrod) had earlier on the recommendation of the Designated Authority imposed CVD on imports of continuous cast copper wire into India. The Tribunal was of the view that it was not possible to sustain the CVD levied for 'other program' and if that program was excluded from the subsidy margin determination, the appellant would fall below the *de minimis* level.

The Tribunal noted that the Designated Authority was aware of the claim made by the appellant that the subsidy on the import of raw material would not be countervailing, since the appellant had used the imported duty free copper rods for producing copper wire solely for export market but the Designated Authority did not raise any doubts on this aspect, either in the verification report or in the disclosure statement. It observed that the Designated Authority did not at any point express any view that the appellant had exported lesser quantity of copper wire than the quantity of copper rods imported duty free. On the ground of non-provision of adequate evidence before the DA, the Tribunal observed that if during the course of investigation, the DA found that some information had not been given by the appellant or it was not providing details, the DA could have informed the appellant for removal of such doubts. [*Metrod (Malaysia) SDN BHD v. Designated Authority* – 2021 VIL 94 CESTAT DEL CU]

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