

Newsletter International Trade Law



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STAY UPDATED ON THE LATEST CHANGES IN TRADE LAWS.
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NTC being challenged and facing challenges

The National tariff commission (NTC) is performing two seemingly contradictory and distinguishable functions of protecting the domestic industry under the NTC Act, 2015 as well as implementing trade remedy laws. The genre of both these laws and their functions are not only inherently different but they also have different backgrounds. Different eras and different mindsets are required to implement these laws simultaneously. The NTC has its roots in the culture of protectionism and lack of autonomy has led to the culture of concealed protectionism.

The basic function that was entrusted to the NTC was under the NTC Act 1995 which was related to the tariffs and protection to the domestic industry. NTC performed these functions by advising the Federal government on the Tariffs and duty structure. The role of NTC was diversified and rather contradictory role of implementing the trade remedy laws was entrusted to the NTC in the year 2000 with the introduction of Trade Remedy Laws and since then it has proven to be challenging to the NTC since it has yet to gain its reputation as an objective, unbiased and impartial authority both within the framework of legal institutions and the market players.

The NTC also has to balance the considerations of raising revenue for the government through tariffs and using the regulatory duty as a tool of economic policy. This fact has been admitted in the national tariff policy of the year 2019. The overshadowing and overriding role of the federal board of revenue has been limited however, the role of NTC in informing duty structure is still under utilised.

The institutional bias due to inherent trade restrictive past is one of the many hindrances that are not allowing the NTC to achieve the said reputation. No doubt there are other challenges which include Resource Limitations, Legal and Structural Challenges, Global Trade Dynamics, Industry Collaboration, and Technological Advancements to name a few

Another reason being the appointment and reappointment of officials who have either retired or are still serving within the government departments in the capacity of admin heads to the NTC which reinforces not only the inherent institutional biases but also impedes the morphosis and evolution of the institution into an independent institution and makes it more vulnerable to the regulatory capture and governmental influences

It is also to be seen as to when the department will also accommodate positions from the private sector at the highest level including the players from market; a step which shall increase the trust in the NTC and enhance its objectivity and transparency.

The NTC is also facing challenges to the appointments of Chairman and Members, an event which is more of a trend now rather than a one-off occasion. A Writ Petition is pending adjudication before Honourable Islamabad High Court in which the appointments are under the Judicial Review. The questions regarding the Chairman's appointment as well as his extension of his contract are under consideration. The extension was made through a letter from Ministry of Commerce and the said extension was not made through the Federal Government i.e. the Federal Cabinet. Another point of consideration before the Honourable High Court is that the appointments were made in excess of the advertised position.

The aforementioned issues of legitimacy and objectivity could have easily been remedied by applying the provisions of the law in their letter and spirit and by doing that while keeping consistency in the application of the law. However, we have seen little of that happening over the last 25 years or so since the promulgation of Trade Remedy laws. The appointments have historically proven to be Achilles heels for the NTC in the past. At least on three previous occasions, the appointments to the NTC have been set aside by the higher courts of the country. The result of this round of litigation is yet to be seen.





Legacy of Anti Dumping Appellate Tribunal

The federal government has appointed members and chairman to the anti-dumping appellate tribunal. The much awaited/anticipated appointments could not have come at a better time. The appointments have been made with a delay which has resulted in minor buildup of DOCKET and cases of high importance and priority are posing a challenge to the newly appointed tribunal. The challenges are numerous and many ranging from administrative, legal as well as balancing the previous legacy and setting new standards, the interpretation and application of law within the wider legal framework and keeping in view it's letter and spirit is the real challenge.

It is interesting to be seen whether the newly appointed tribunal will follow the same legal legacy as was put in practice by the previous tribunal or will they set new standards for themselves! One such example is that there is diverging views in allowing and disallowing stay applications by the tribunal.

The first ever tribunal appointment comprised of illustrious names such as Mr Supreme Court Justice retired Judges Munir A Sheikh as well as Mr Justice Zawar Hussain Jaffari not only granted stay orders but the application of law was more consistent owing to their Stirling legal careers.

The appointments to the tribunal that followed included other big names such as Mr Justice [R] Ghulam Rabbani Supreme Court retired judge; as well as a practising lawyer and a District Court retired judge.

The appointment procedure during that time was not under any competitive process rather nominations were directly made by Federal Government and the incumbent served at the pleasure of Federal Government for a fixed time on a contract basis.

The appointments though made on merit were not necessarily made keeping in view the special nature of law rather the focus was on pure legal knowledge and experience in administering the law. Such an approach had its downside as well which reflected in one of the most famous cases of BOPP. The case was decided in favour of domestic industry. However, the same case was set aside by the WTO panel which issued its report as a glaring rebuttal to the approach of the tribunal as well as National Tariff Commission.

The Amendments were made to the anti dumping legislation through repeal of the anti dumping duties act 2000 and introduction of anti dumping duties act of 2015 which drastically changed the nature of the appointments to the tribunal, process of appointment and terms and conditions of appointment, thus making the appointments more competitive and setting standards for appointment.

No Supreme Court and High Court retired judge could make it to the appointment since the age of appointment was raised to 62 years. However, retired officers of government departments became the obvious choice for appointment and especially those retired from customs served as a majority of 2/3 for a period of five years.

The tendency of government officials to favour another government department and the approach which suits, favours and authenticates government leaning stance did not necessarily amount to prejudice or favouritism. Any hint to such approach cannot be attributed to officers themselves, the approach of tribunal has to be guided by the only consideration of rule of law.

The new tribunal has to make its own way and it has to do so by not finding a balancing act but it can do so by adopting a strict legal approach being a body overseeing the functions of NTC. The importers have since long been dismayed at the regulatory capture of the government departments.

A pro government approach is not necessarily what government needs and the application of law clearly will take us out of the approach of protectionism/concealed protectionism in the form of wrong and misapplication of the trade remedy laws.

A few profound questions are still pending including the question of whether tribunal is a civil court or informal quasi judicial body.

By: Salman Farooq Advocate High Court

REPORTS ON RECENT LEGAL DEVELOPMENTS

REGULATORY DUTY

The regulatory duty has historically been imposed by the Federal government under section 18 of the customs act and notification in this regard is issued by the Ministry of Finance. The tariff which is also known as regulatory duty has been used by all the governments as a tool of raising revenue and also as the measure to protect the domestic industry from foreign competition. However this is not one of the most informed and progressive way for a country to move ahead since the tariffs are indirect taxes and the burden of the taxes are invariably passed on to the consumers leading to increase in poverty and decrease in the value of living for ordinary Pakistanis.

The use of tariffs to raise revenue rather than as a tool of economic policy has caused multitude of problems for the Pakistan economy as a whole. The protected domestic industry has been overprotected for very very long period of time and they have neither diversified nor have felt the need to improve the competitiveness. An issue which stiffens the growth of the economy and since the domestic industry is even unable to cater the domestic market the question of export becomes out of question making it impossible for Pakistan economy to have or achieve export led growth.

The challenge to regulatory duty has to come from the institutional framework point of view and keeping in view the first ever trade policy of Pakistan that was devised in the year 2019. Both the aspects of the challenge are pending adjudication before The Honorable Lahore High Court on the basis that the institutional role of NTC in advising the Government on tariff structures cannot be ignored and NTC has to be strengthened to ensure imposition of tariff and tariff rationalisation on research based methodology and not merely on whims and wishes of the Government. Moreover, the Federal Government should not act in violation of their own policy the result of which is that the legal framework will be violated and the Federal Board of Revenue, Ministry of Finance will end up making the final decision based on the revenue generation philosophy instead of devising Tariff structures based on research methodology and trade policy. Both of these important points still need final determination by the court of law. We have also acquired stay orders against the regulatory duty .



ANTI DUMPING LAWS

The newly formed Anti-dumping Appellate Tribunal has begun operations. High Courts recognize the necessity of interim stays during pending adjudication. Numerous stay orders affirm that no duty can be collected while appeals are pending in cases involving fiscal laws, a principle upheld by the Supreme Court of Pakistan.

It was expected that the Tribunal would follow Supreme Court precedents. However, it has chosen to apply principles under Civil Procedure Code Order 39 Rules 1 and 2 while dismissing stay applications, adhering to Civil Procedure Code intricacies. Appeals before the Anti-dumping Appellate Tribunal differ from other matters, involving unique legal questions and factual issues per investigation. Adjudication requires proper fact appreciation and law application based on WTO panel and Appellate Body reports, which can overturn Tribunal and National Tariff Commission decisions, as seen in the BOPP Panel Report. We have obtained stay orders from High Courts to maintain status quo, avoiding market disruptions, and safeguard importers' rights until appeals are resolved.

VALUATION

The process of valuation is carried out by the Customs authorities under Section 25 A of Customs Act. The fact that the authority has been delegated to the Customs Authorities; who are the collecting authority. Customs being under the administrative control of the Ministry of Finance issues exorbitant valuations which find no favours with the courts of law and thus are set aside more often than not, if challenged. The question of legality of delegating the power of valuation to the custom authorities is also open to legal scrutiny on the touchstone of separation of power. It has been the practice since last many a year that importers used to seek interim relief under section 81 of the Customs Act to get their consignments cleared by submitting security in the form of bank guarantee or pay order. However, the Honourable High Courts have declared that interim relief cannot be sought under the Customs Act section 81.

The importers were constrained to pay full valuation amount. However, the question of grant of interim relief under Article 199 of the Constitution was brought by our law firm and the Honourable Lahore High Court was pleased to agree with our stance. Interim relief was granted in more than one cases till the decision from appeal.

By: Salman Farooq Advocate High Court