

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1661 of 2015

[Dewan Steel Mills & others V. Federation of Pakistan & another]

- Dates of hearing : 31.01.2017, 08.02.2017, 20.03.2017 and 18.04.2017.
- Date of Decision : 02.06.2017.
- Plaintiffs : Dewan Steel Mills and others, through M/s. Haider Waheed and Basil Nabi Malik, Advocates.
- Defendants 1 & 2 : Federation of Pakistan and National Tariff Commission, through M/s. Ali Almani and Ahmed Shiraz, Advocates.
- Defendant No.3 : Amreli Steel Limited, through Mr. Khalid Jawed Khan, Advocate.

Case law cited by the Plaintiffs' counsel.

1. WT/DS454/AB/R • WT/DS460/AB/R
[*Japan and China v. India, Korea, Russia, Saudi Arabia, Turkey and United States*]
2. JUDGMENT in Case No.264/82 at Luxembourg
[*Timex v. Council and Commission*]
3. 2013 S C M R page-1880
[*Hamid Mir and another v. Federation of Pakistan and others*]

Unreported Decisions.

4. Case No.W.P. No.4735 of 2016
[*International Business Management, etc. Versus Federation of Pakistan etc.*] (Lahore High Court)].
5. Case No.W.P. No.28351 of 2016.
[*Muhammad Abbas Raza Versus Federation of Pakistan, etc*] (Lahore High Court)].
6. Civil Petitions No.1608, 1654, 1686, 1687, 1706 to 1708 of 2009.
[*M/s. Waheed Sons, Lahore, etc and others Versus National Tariff Commission, Islamabad etc.* (Hon'ble Supreme Court)]

Case law cited by Defendant No.2' counsel.

1. 2012 Supreme Court Monthly Review (SCMR) Page-730
[*Administrator, Thal Development through EACO Bhakkar and others v. Ali Muhammad*]
2. P L D 1978 Lahore Page-441
[*Abdul Aziz v. Syed Arif Ali and others*]
3. P L D 1961 (W. P.) Lahore Page-326
[*Pakistan Transport Co. Ltd. Jhang v. Shorkot Transport Co. (Regd.) Shorkot and others*]
4. 1982 Law Notes (Lahore) Page-404
[*Muhammad Saeed and others v. The Chairman Pakistan Railways Headquarters Lahore*]
5. P. L. D. 1949 Lahore Page-301
[*Mian Sultan Ali Nanghiana v. Mian Nur Hussain*]
6. R.S.A No.1862 of 2007 (Dec – Inj)
[*Channagiri Cements Pvt. Ltd. and another v. Karnataka Power Transmission and others*]
7. Case No. Appeal (Civil) 4552 of 2000
[*Devinder Singh and others v. State of Haryana and another*]
8. Supreme Court of India on 14.03.1997
[*Punjab State Electricity Board v. Ashwani Kumar*]
9. Edmin Vermulst and Paul Waer, Sweet and Maxwell, London 1996
[*E.C. Anti-Dumping Law and Practice*]
10. 2006 P T D Page-1446
[*Imran Traders v. Ministry of Commerce*]
11. 2007 (122) ECC Page-121
[*Essar Steel Limited and another v. Union of India*]
12. 2003 (2) CTC Page-333
[*Mahavir Mirror Industries v. The Designated Authority*]
13. Writ Petition No.3008 of 2002
[*Sree Karpagambal Mills Ltd. v. Directorate General of Anti-Dumping & Allied Duties and others*]
14. 288 U. S. Page-294-325
[*Norwegian Nitrogen Products Company v. United States of America*]
15. 467 US Page-837
[*Chevron, U. S. A. Inc. v. Natural Resources Defence Council, Inc.*]
16. F.3d 1511 (Fed. Cir. 1993)
[*Daewoo Electronics Co., Ltd. and others v. The United States*]
17. 2000 (118) E.L.T 275 (Tribunal) In the Cegat, Court No.1, New Delhi [Anti-Dumping Bench]
[*Oswal Woollen Mills Ltd. v. Designated Authority*].

18. 1997 (96) E.L.T. 126 (Tribunal). In the Cegat, Court No.1, New Delhi.
[*Nippon Zeon Co. Ltd v. Designated Authority*]
19. Judgment of the Court (20 March, 1985) at Luxembourg.
[*Timex v. Council and Commission*].

Case law relied upon by Counsel of Defendant No.3.

1. 2009 Supreme Court Monthly Review (SCMR) Page-1392
[*Securities and Exchange Commission of Pakistan v. Mian Nisar Elahi and others*]

Other Precedents

1. P L D 1991 Supreme Court page-14
[*Chairman, Regional Transport Authority, Rawalpindi v. Pakistan Mutual Insurance Company Limited, Rawalpindi*]
2. P L D 2006 Supreme Court page-602
[*Muhammad Mubeen-us-Salam and others v. Federation of Pakistan and others*]
3. P L D 2014 Supreme Court page-131
[*ACTION AGAINST DISTRIBUTION OF DEVELOPMENT FUNDS BY EX-PRIME MINISTER RAJA PARVAIZ ASHRAF: In the matter of*]

Research Material

1. Relevant provisions of Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“GATT 1994”).
2. A Hand Book on Anti-Dumping Investigations issued by WTO.
3. Definition of Index and Indexation.
4. A write-up on disclosure of Confidential Information in Anti-Dumping and Countervailing Duty Proceedings.
[by *James Taylor and Edwin A. Vermulst*]

- Law under discussion:
- (1) Constitution of the Islamic Republic of Pakistan, 1973.
 - (2) Civil Procedure Code, 1908.
 - (3) Specific Relief Act, 1877.
 - (4) Anti-Dumping Duties Act, 2015.
 - (5) Anti-Dumping Duties Rules, 2001.
 - (6) Freedom of Information Ordinance, 2002.

J U D G M E N T

Muhammad Faisal Kamal Alam, J: Plaintiffs have brought this action at law primarily against defendant No.2-National Tariff Commission (“NTC”) that while conducting an investigation in respect of product Continuous Casting Billets (“C.C. Billets”) imported by the plaintiffs, the defendant No.2-NTC is not acting within parameters of law. Plaint contains the following prayer clause: -

“PRAYERS

The Plaintiffs herein above mentioned humbly pray for the following: -

- 1. The Honourable High Court may be pleased to declare that the investigation initiated by the Defendant No.2 is unlawful and illegal, and hence of no legal effect;*
- 2. The Honourable High Court may be pleased to declare that the Defendant No.2 had acted unlawfully and illegally in depriving the Plaintiffs of the complete copy of the application, along with all annexures and evidence, on the basis of alleged confidentiality;*
- 3. That the Honourable High Court may be pleased to restrain the Defendants from initiating, conducting or concluding the impugned investigation (as mentioned in Public Notice dated 05.08.2015) against the producers / importers of hot rolled steel billets;*
- 4. That in the alternative, the Honourable High Court may be pleased to restrain the Defendants from conducting and / or concluding the investigation without affording the Plaintiffs a copy of the application submitted by the applicants to Defendant No.2, inclusive of all evidence attached therewith, an opportunity to be heard, as well as all other legal rights as available under the law;*
- 5. That the Honourable High Court may be pleased to award the costs of the suit to the plaintiffs;*
- 6. That the Honourable High Court may be pleased to award any other relief as it may deem appropriate in the facts and circumstances of the instant case.”*

2. On issuance of notice, defendant No.2-NTC has contentiously contested the case and claim of plaintiffs by filing their counter affidavits to different interlocutory applications filed by the plaintiff, to which the latter filed Affidavit-in-Rejoinder.

3. Since the controversy at hand does not involve such facts, which are triable issues, therefore, by consent of the parties, it was decided that this matter should be decided on the basis of legal issues, therefore, vide order dated 16.01.2017, following consent issues were settled: -

1. Whether the suit as framed and filed is maintainable in law?

2. Whether the requirement of Sections 31 and 33 of Anti-Dumping Duties Act, 2015, has been complied with or not?

4. While writing Judgment, it is deemed appropriate that though a formal but a necessary issue should also be framed to the effect that:

3. What should the decree be?

5. Succinctly, Plaintiffs are engaged in the business of importing 'hot rolled steel billets' (raw material), for the purpose of manufacturing steel bars through a metal working process.

6. As per learned counsel, a Complaint has been lodged with the Defendant No.2 against the Plaintiffs that the latter have committed an act of dumping the above product in local market, that is, introduced into the Commerce of Pakistan. Subsequently, a Public Notice dated 05.10.2015 was published in the Daily Express "Tribune" by the Defendant No.2 under Anti-Dumping Duties Act, 2015, ("**Governing Law**"). The investigation is in respect of C.C. Billets exported by China into Pakistan. Hence, the above C.C. Billets are the investigated product in term of Section 2(k) of the Governing Law.

7. In the intervening period, defendant No.2-NTC has given its Preliminary Determination about the subject product. This report dated 22.04.2016, has been appended as Annexure 'A' with C.M.A.No.15958 of 2016, preferred by the plaintiff and seeking a restraining order against defendant No.2-NTC from passing a final determination in the matter. In addition to this, another application being C.M.A.No.15780 of 2016 was filed for initiating contempt proceedings against officials of defendant No.2-NTC.

8. The grievance of the Plaintiffs is that the Defendant No.2 has not provided them a complete copy of the complaint lodged by (i) Amreli Steels Limited, Karachi (ii) Agha Steel Industries, Karachi, and (iii) ASG Metals Limited, Karachi, (**Complainants / Interested Parties**). Subsequently, Amreli Steels Limited was impleaded as defendant No.3, vide order dated 08.02.2017.

9. Mr. Haider Waheed, learned counsel vehemently argued that it is plaintiffs' statutory right in terms of Section 28 and Section 33 of the Governing Law to be provided the full text of written application alongwith record / material relied upon by the above Applicants / Complainants and the Plaintiffs have under the latter provision has a right to see the information relating to the subject Complaint. It was further argued that only fetter to the above provision is Section 31, which pertains to the confidentiality, but in Section 31 itself the confidentiality is qualified (conditional) and has been explained in detail; that includes business or trade secrets, production process and other operational and financial information, which are not publicly available. To justify his submissions, the plaintiffs' counsel has drawn the attention of the Court to certain portion of the Complaint in which normal export price and other components are missing, rather they are deleted through asterisk and at

page 543 of the case file it has been alleged that the goods imported by plaintiffs have a dumping margin of 46.86% which plaintiffs' side seriously questions besides impugning the entire proceedings. It would be advantageous to reproduce Section 31 herein under: -

“31. Confidentiality.—(1) Subject to sub-Section (2), the Commission shall, during and after an investigation, keep confidential any information submitted to it and such information shall not be disclosed without specific permission of the party submitting it.

(2) Any information which is—

(a) by nature confidential, because its disclosure shall be of significant competitive advantage to a competitor, or because its disclosure would have a significantly adverse effect upon a person supplying the information, or upon a person from whom the information was acquired;

(b) determined by the Commissioner to be of a confidential nature for any other reason; or

(c) provided as confidential by parties to an investigation, shall, on good cause shown, be kept confidential by the Commission.

(3) The following types of information shall be deemed to be by nature confidential, unless the Commission determines that disclosure in a particular case would neither be of significant competitive advantage to a competitor nor have a significantly adverse effect upon a person supplying the information or upon a person from whom such information was acquired, namely: -

(a) business or trade secrets concerning the nature of a product, production processes, operations, production equipment, or machinery;

(b) information concerning financial condition of a company which is not publicly available; and

(c) information concerning costs, identification of customers, sales, inventories, shipments, or amount or source of any income, profit, loss or expenditure related to manufacture and sale of a product.

(4) Any party seeking any information to be kept confidential shall request for the same at the time the information is submitted, along with the reasons warranting confidentiality. The Commission shall consider such request expeditiously keeping the information confidential is not warranted.

(5) Any party submitting any information with the request to keep it confidential shall furnish non-confidential summary of all such information. Such summary may take the form of ranges or indexation of figures provided in the confidential version or marked deletions in text or in such other form as the Commission may require:

Provided that such non-confidential summary shall permit a reasonable understanding of the substance of the information submitted in confidence:

Provided further that any deletion in text shall, unless otherwise allowed by the Commission, only relate to names of the buyer or supplier.

(6) In exceptional circumstances, any party submitting confidential information may indicate that such information is not susceptible of summary, in which case a statement of the reasons why summarization is not possible shall be provided. If the Commissioner concludes that the non-confidential summary provided fails to satisfy the requirements of sub-section (5), it may determine that the request for keeping the information confidential is not warranted.

(7) If the Commission finds that a request for keeping the information confidential is not warranted, and if the supplier of such information is unwilling to make it public or to authorize the disclosure in generalized or summary form, the Commission shall disregard such information and return the same to the party submitting it.

(8) Subject to sub-section (9), notwithstanding anything contained in this Act or in any other law for the time being in force, any confidential information received or obtained, directly or indirectly, by the Commissioner pursuant to or in connection with an investigation shall not be subject to disclosure by the Commission Government or a Provincial Government without the prior permission of the party submitting such confidential information.

(9) The provisions of sub-section (8) shall not preclude the supply of any information called for by the Appellate Tribunal pursuant to section 72:

Provided that the obligation to protect confidential information as provided for in this Chapter shall, mutatis mutandis, extend to the Appellate Tribunal.”

10. It was further argued that the defendant No.2 in utter disregard of other statutory provision has accepted the subject Complaint for hearing. To explain this contention, the learned counsel has made a Reference to Sections 20, 21, 22 and Subsection 2 (b) of Section 20, *inter alia*, providing that the application / complaint should disclose the evidence of dumping and injury; similarly Section 21 enjoins that a notice to be given to the Government of each exporting country; in the present case China, whereas, Section 23 provides that defendant No.2/Commission should first examine the accuracy and adequacy of the evidence and where after, the application / complaint shall be set down for a proper investigation.

11. The Plaintiffs' side further contends that the Complainants in the present case do not even fulfill the criteria mentioned in Section 24 of the Governing Law, primarily relating to the production capacity. To further fortify this argument, plaintiffs' legal team has relied upon the language of Sub-section 2 of Section 24, which is in a negative command, which according to him, should be interpreted strictly being mandatory in nature. Further arguments from the plaintiffs' side were advanced to show that in view of the above provision, the defendant No.2 has to pass a preliminary order about the competency of the Applicants / Complaints before initiating the subject investigation against the plaintiffs. As per learned counsel for the Plaintiffs, the present Complainants /Applicants neither constitute 25% (twenty five percent) of the total production of market share nor fulfills the 50% threshold of collective output, hence their complaint before defendant No.2-NTC is liable to be dismissed. In this regard he has referred to public advertisement appended as Annexure "A" with the Plaintiffs' Rejoinder, in

which it is mentioned that the total production capacity of Still Mills Manufactures in Pakistan is seven million Metric Ton and due to certain Government policies they were compelled to reduce their production to only fifty percent. As per learned counsel if the interview of CEO of one of the Complainants (interested party) Amreli Steels Limited (defendant No.3) is read, which he has annexed with his Affidavit-in-Rejoinder, it would be clear that total capacity of Amreli Steels Limited is two lac metric ton only and if the other Complainants, for the arguments sake are also joined with Amreli Steels Limited then the accumulative total production would be six lac metric ton. Plaintiffs' counsel has referred to its covering letter of 15.09.2015, under which they have filed their Reply / Comments before defendant No.2-NTC in response to the investigation under dispute bearing Case No.36 of 2015/NTC/CCB. This covering letter and Reply are appended with Affidavit-in-Rejoinder of plaintiffs, which they have filed as rebuttal to the counter affidavit of defendants to C.M.A.No.12609 of 2015, whereunder plaintiffs have sought an interim injunctive relief.

12. Primarily, the plaintiffs' side laid foundation of their arguments on section 31 of the Governing Law. The crux of the arguments is that unless defendant No.2-NTC meets the test of Section 31 (confidentiality) of the Governing Law, latter (defendant No.2-NTC) is under an obligation to provide the entire complaint along with annexures to the plaintiffs enabling them to file a comprehensive reply. The onus is on defendant No.2-NTC to show 'good cause' for not disclosing the contents of entire complaint, which onus defendants have failed to discharge. It was further argued that the Questionnaire, which is annexed as Annexure 'F/1'; at page-489, contains indexation and other asterisk and the actual figures as contained in the complaint of above named complainants including defendant No.3 has not been disclosed by defendant No.2-NTC to the plaintiffs and thus the

latter deprived of their right to a fair trial as envisaged under Article 10A read with Article 19A, relating to freedom of information, of the Constitution of Pakistan.

13. In his rebuttal by filing a comprehensive synopsis, the plaintiffs' counsel has reiterated that even information within public domain has also been withheld in the questionnaire, which created impediment for the plaintiffs to submit their complete reply and that is why they have submitted their incomplete response as referred hereinabove.

As per plaintiffs, defendant No.2-NTC has given the details of Chinese Exporters and the quantity they have exported, but yet Commission did not have exporting price, which is not believable and can easily be obtained from the Chinese Market by defendant No.2-NTC as well as through other material available, for instance, London Metal Bulletin and the Chinese Metal Bulletin. Similarly, pivotal factor in determining the injury is the calculation of normal value of the investigated product. As per the plaintiffs' counsel, normal value indexed by defendant No.2-NTC in its questionnaire in Table-2 under clause 8.6, (available at page-539 of the case file), is completely erroneous and imaginary as normal value can be calculated or determined by applying standard methods including the one mentioned hereinabove. Consequently, the plaintiffs have challenged the dumping margin of 46.86% as mentioned under clause-9 of the questionnaire –Table-3. Plaintiffs' counsel has cited the Judgments mentioned in the title of this decision to fortify his submissions.

14. The above arguments were controverted by the legal team of defendants No.1 and 2; Mr. Ali Almani and Mr. Ahmed Shiraz (Legal Advisor of NTC). According to defendants' counsel, while conducting investigation against the plaintiffs, defendant No.2-NTC has complied with requisite statutory formalities and the entire investigation up to the stage of

Preliminary Determination is carried out and completed through due process of law.

15. As per defendants' counsel, defendant No.2-NTC had first made efforts to obtain information and other data about the subject dispute from Chinese Exporters through Chinese Embassy at Islamabad, besides, sending a questionnaire to Pakistani importers including the plaintiffs. Unfortunately, no information was shared by Chinese Exporters and even conduct of Pakistani Importers is also not forthcoming, except those which are mentioned in paragraph-15-3 of the Preliminary Determination. It is further argued that the Governing Law itself is quite equitable in nature and unlike other statutes, in terms of Section 70 thereof, even an investigation of the nature is also appealable before the Appellate Tribunal, thus, the plaintiffs have every right to agitate their grievances before the Appellate Tribunal established under the Governing Law, which is a special statute, instead of pursuing the present *lis*, which otherwise tantamount to strangulating the statutory provisions of the Governing Law as this Court is a final Court of Appeal against the decisions of the Appellate Tribunal in terms of subsection (13) of Section 70 of the Governing Law.

It was further argued by defendants' legal team that investigation is only undertaken if it appears to defendant No.2-NTC that act of dumping is causing injury to the local industry. Mr. Ali Almani has referred to the Binder No.A and read the internationally accepted concept of dumping. He then referred to relevant Articles of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, besides citing case law of foreign jurisdictions in support of his stance that confidentiality clause is not something unusual in the Governing Law, but similar clauses do exist in the laws of all those countries, where the Anti-

Dumping Regime are functioning. It would be advantageous to reproduce the relevant concept on 'dumping' as under: -

“The term “**Dumping**” is recognized as a practice of selling a product in a foreign country for less than the prevailing price of the same product in the domestic country or the manufacturing cost of the product. Many countries have declared dumping as an illegal business practice to protect their domestic industries from such unfair competition. If a company situated in a country exports a product at an export price lower than the normal price it charges in its domestic market, it is said to be ‘*dumping*’ the product into another Country. This form of price differentiation between markets is not a prohibited practice under international trade agreements.

The only unacceptable and harmful type of dumping is predatory dumping, which happens when a foreign firm, with the help of huge subsidies from its Government, sells goods at lower prices or below cost of manufacturing in the domestic market of the importing country in order to eliminate domestic producers and gain monopoly. It can harm the domestic industry by reducing its sales volume in market shares, as well as its sales prices, resulting in decline in profitability, job losses and, in the worst case, in the domestic industry going out of business and thus creating monopolistic situations. Such dumping, where the dumping firm rules the price on attaining monopoly is harmful to the entire society because it hurts not only the domestic producers but also consumers. Such business practice is clearly undesirable as viewed by a huge number of free trade opponents.

According to the World Trade Organization (WTO) Rules, a firm is said to dump if it sells its product in another country at a price less than the normal value. (Underlined for emphasis)

Remedial action in the form of Anti-Dumping measures generally involves charging extra import duty on that product from the exporting country to bring its closure to the normal value and thus remove the injury to the domestic industry in the importing country.”

Similarly, Section 4 of the Governing Law provides_

4. Identification of dumping.— *For the purposes of this Act an investigated product shall be considered to be dumped if it is introduced into the commerce of Pakistan at a price which is less than its normal value.*

16. It is also necessary to reproduce the relevant Articles hereunder of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 to which Pakistan is one of the signatories and the reason for enacting the Governing Law:

“*Members hereby agree as follows:*

PART 1

Article 1

Principles

An antidumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the

information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.

6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.”

[Underlined to add emphasis]

17. Defendants’ counsel has also relied upon number of reported decisions (*Supra*) in support of his arguments that rule of adequate and efficacious alternate remedy in statutory hierarchy as is mentioned in the Governing Law, is not only applicable to the exercise of writ jurisdiction but also to the proceedings of the nature, though here it is termed as rule of implied ouster.

18. With regard to the arguments of the plaintiffs’ side that the Complainants including defendant No.3 do not constitute 50% of market share, it was stated that this aspect was specifically dealt with while passing

the Preliminary Determination by defendant No.2-NTC; Paragraphs Nos. 8 to 9.5 of Preliminary Determination were referred by defendants' side in relation to the market shares of the complainant, besides making a reference to page-517 of main file, which is one of the sections of the impugned Questionnaire dealing with the issue of market share under Section 24 (of the Governing Law).

19. Mr. Khalid Jawed Khan, learned counsel for defendant No.3 based his arguments on various statutory provisions of the Governing Law. He referred to Section 25 to advance his contention that defendant No.2-NTC can even *Suo Moto* take notice of dumping of goods in Pakistan, which is causing injury to local industry and, therefore, plea taken by the plaintiffs about inadequacy of requisite market shares of the Complainant is meritless. He further contended that Anti-Dumping Duty is only leviable when the act of Anti-Dumping is causing injury to the Complainants or local industry in terms of Section 3 of the Governing Law. It was further averred that the Governing Law itself provides checks and balances on defendant No.2-NTC and the onus is on latter to prove the material injury cause to the local industry. It was further argued that if every investigation, which otherwise is initiated after preliminary enquiry, is restrained, then defendant No.2-NTC would become dysfunctional. Learned counsel representing defendant No.3, while summing up his arguments has relied upon the judgment of *SECP v. Mian Nisar Elahi (supra)*, that time can be enlarged by this Court, which will enable the plaintiffs to file their appeal before the Appellate Tribunal in terms of Section 70 of the Governing Law, if in the event, this Court comes to the conclusion that present suit is not maintainable.

20. With the able assistance of learned counsel representing respective parties, the record of the case is examined and their submissions are thoughtfully considered.

21. In compliance of the observations, Mr. Ahmed Shiraz (Legal Advisor) of defendant No.2-NTC has submitted an additional Information in the form of a Binder, in which record and proceedings of the impugned complaint, which is pending before the said defendant No.2-NTC, has been made available, besides, extract of relevant provisions / Articles of the GATT 1994 and one of the precedents in which Egyptian Authority; viz. 'Anti-Dumping, Subsidy and Safeguard Department' sought information from Pakistan as an exporting country of the product Matches (in Boxes). The above questionnaire of Egyptian Jurisdiction is a non-confidential version in which crucial information has either been indexed or left blank.

22. Anti-Dumping Duties Rules, 2001, have been referred and particularly sub-rules d, e, f, g of Rule 3, to support their contention that defendant No.2-NTC sought all that information from the interested parties / complainants, which was required to evaluate the accuracy of complaint. It was further argued that at National Tariff Commission, transparency is maintained by maintaining a public file relating to each investigation containing information, but obviously not the confidential one covered under Section 31 of the Governing Law; in this regard Rule 3 and 7 of the Anti- Dumping Rule, 2001, are referred. It would be advantageous to reproduce the above discussed Rules:

“3. Disclosure in application. - An application shall, in addition to the information specified in section 20 of the Ordinance, contain such information as is reasonably available to an applicant on the following, namely:--

- (a) name, address, telephone number, facsimile number and electronic mail address of the applicant;

- (b) the identity of domestic industry by or on behalf of which the application is being made, including the names, addresses and telephone numbers, facsimile numbers and electronic mail addresses of all other known producers or, association of producers which is a trade organisation as defined in the Trade Organisations Ordinance, 1961 (XLV of 1961), and has been granted or deemed to have been granted a licence thereunder, in domestic industry;
- (c) information relating to the degree of domestic industry support for the application, including--
 - (i) the total volume and value of domestic production of a domestic like product; and
 - (ii) the volume and value of a domestic like product produced by the applicant and by each domestic producer identified;
- (d) a complete description of the allegedly dumped product, including the technical characteristics and uses of such product and its current customs tariff classification number as specified in the First Schedule to the Customs Act, 1969 (IV of 1969);
- (e) the country in which the allegedly dumped product is manufactured or produced and, if it is imported from a country other than the country of manufacture or production, the intermediate country from which the product is imported;
- (f) the name and address of each person the applicant believes sells the allegedly dumped product and the proportion of total exports to Pakistan that person accounted for during the most recent twelve-month period;
- (g) information on prices at which the product in question is sold when destined for consumption in domestic market of the country of export or origin or, where appropriate, information on the prices at which the product is sold from the country of export or origin to

a third country or on the constructed value of the allegedly dumped product, and information on export prices or, where appropriate, on the prices at which the allegedly dumped product is first resold to an independent buyer in Pakistan, and on any adjustments as provided for in section 11 of the Ordinance.

7. Public file to be maintained for interested party and access thereto.--(1) The Commission shall establish and maintain a public file relating to each investigation or review pursuant to the Ordinance and subject to the requirement to protect confidential information under section 31 of the Ordinance, the Commission shall place in such file-

- (a) all public notices relating to an investigation or review;
- (b) all materials, including questionnaires, responses to questionnaires, and written communications submitted to the Commission;
- (c) all other information developed or obtained by the Commission; and
- (d) any other documents the Commission deems appropriate for disclosure to an interested party.

(2) The public file to be maintained under sub-rule (I) shall be available to any interested party for review and copying at the offices of the Commission, during such time as the Commission may notify, throughout the course of an investigation or review and any appeal under section 64 of the Ordinance.”

23. The preamble of the Governing Law itself conveys the object of its enactment, *inter alia*, in order to implement the international obligation of Pakistan being one of the signatories of General Agreement on Tariff and Trade, 1994 (“GATT”). To give effect to this multilateral treaty, a legislative instrument is required under Article 70, sub-article 2 read with item / paragraph No.3 of Fourth Schedule of Federal Legislative List of the Constitution of Pakistan.

24. It is also noteworthy that the Governing Law is quite flexible; Section 46 whereof provides a concept of price undertaking, that is, if the National Tariff Commission in its Preliminary Determination has come to a conclusion that the investigated product has in fact caused the injurious effect of dumping then on the undertaking of exporters that they will not export the product at the dumped price, the imposition of anti-dumping duty can either be suspended or terminated. This shows the inbuilt checks and balances in the Governing Law and apparently these options and discretions are provided to make this statute a practical and workable one as far as possible.

Issue No.2 should be decided first.

25. To answer this issue, the impugned Anti-Dumping Importer's Questionnaire with regard to the Product Under Investigation-POI (available at pages-489 to 649) has been perused together with the Report (of 22.04.2016) on Preliminary Determination, available in second part from pages-157 to 225, delivered by the Chairman and the Members of defendant No.2-NTC.

26. The questionnaire contain list of exporters but since they all are based in China and did not provide information, therefore, no data was prepared in this regard, but to determine the export price and normal value in terms of Section 5 and 6 of the Governing Law, which is a basic component for reaching the dumping figure causing injury, the defendant No.2-NTC has used indexation. This is a main bone of contention of plaintiff that the defendant No.2-NTC should have disclosed the actual figure provided by interest parties including defendant No.3 (Amreli Steel Limited). It is strenuously argued by legal team of the plaintiffs that the crucial paragraph of questionnaire, where information provided by

interested parties / complainants, should have been disclosed, but defendant No.2-NTC has inserted asterisk, due to which the plaintiffs are unable to have a reasonable understanding of questionnaire and sent an abridged version of Reply as referred in the foregoing paragraphs.

27. On the other hand learned counsel representing defendant No.2-NTC and defendant No.3 have argued that above being a vital information is fully covered under Section 31 of the Governing Law relating to the confidentiality. It was further argued that disclosure of all the information as provided by interested parties / complainants would totally expose complainants' confidential data to the plaintiffs, which admittedly are their competitors.

28. Interestingly, the above questionnaire has been sent under a correspondence dated 07.08.2015 by defendant No.2-NTC to one of the plaintiffs, [available at page-485 of the case file], in which the present plaintiffs have also been given an option to provide the answer to the questionnaire in confidential and non-confidential version in the light of Article 6.5.1 of the Agreement on Implementation of Article VI of GATT 1994, (already reproduced hereinabove); it means that plaintiffs have also been given an equal opportunity for not disclosing that information which falls within Section 31 of the Governing Law.

29. Arguments of plaintiffs' counsel that the indexation and asterisks used in the questionnaire is even contrary to the concept of indexation and ranges are wrongly applied merely to technically oust the plaintiffs from the contest and to deprive the plaintiffs from rebutting the evidence of interested parties / complainants, could not be accepted for the reason that Section 31 of the Governing Law itself gives protection to the confidential information which provision is in line with the Clauses / Articles of the afore referred Implementation Agreement. The other argument of Mr.

Haider Waheed, that first the defendant No.2-NTC should make a determination and show a 'good cause' as mentioned in subsection 2(b) and (c) of Section 31 of the Governing Law and then can use indexation in the questionnaire, is also devoid of merits, as already in the Governing Law different stages of the proceeding have been mentioned and it is not necessary for defendant No.2-NTC to first pass an independent decision or determination, as argued by plaintiffs' side, before delivering its Preliminary Determination. At best, defendant No.2-NTC can forward its determination that was given to an interested party invoking the confidentiality under subsection (4) of Section 31 of the Governing Law, at the time of filing the complaint, also to Respondents, in the present case, the plaintiffs. This aspect of confidentiality has already been determined as pointed out by Mr. Ali Almani (counsel for defendants) in paragraph-18 of the Report on Preliminary Determination dated 22.04.2016 ("**Preliminary Determination**"), therefore, I answer the second issue in the terms that while sending the aforesaid questionnaire to the plaintiffs, defendant No.2-NTC has complied with the requirement of Section 31 of the Governing Law, whereas the plaintiffs are entitled to see and obtain copies of that information submitted to defendant No.2-NTC by the complainants / interested parties, which is not confidential and is relevant to the presentation of the case of the plaintiffs as envisaged under Section 33 of the Governing Law, which information is accessible by virtue of the aforesaid correspondence of defendant No.2-NTC dated 25.08.2015.

Plaintiffs' side has relied upon a decision of World Trade Organization (WTO) Appellate Body, on a complaint preferred by Japan, European Union and other countries against the measures adopted by Ministry of Commerce of the People's Republic of China (MOFCOM) imposing Anti-Dumping duties on the products exported from Japan and European Union, was set aside on various grounds including the one

mentioned in paragraph-6.1 that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement and permitted the full text of the reports contained in appendix 5 and appendix 8 to the petition, as well as MOFCOM improperly relied on the Market share of dumped imports, and its flawed price report. This decision in my humble view does neither advance the case of plaintiffs nor answers the issues involved in the present proceeding.

Now adverting to Issue No.1.

30. The unreported decisions relied upon by the plaintiffs' side are taken into account. Two of these are relevant for discussion. The Judgment of learned Lahore High Court given in Writ Petition No.4735 of 2016, which is appended as annexure "W/2" with the Written Arguments of Plaintiffs and the other one is a Judgment of the Hon'ble Supreme Court (annexure "W/4") handed down in number of Civil Petitions No.1654, 1686, 1607 and others of 2009 filed by M/s. Waheed Sons Lahore and others versus defendant No.2-NTC, in which amongst other, the initiation of investigation on the complaint by one of the local manufacturers, Master Tiles and Ceramic Limited, was challenged. The facts are that while the parties were entangled in litigation, the National Tariff Commission first passed the Preliminary Determination, which was followed by Final Determination. In that case also the product under investigation, viz. porcelain / ceramic tiles, was being imported from China. Though the Hon'ble Apex Court set aside the decision of National Tariff Commission on the ground that composition of National Tariff Commission (present defendant No.2), as mentioned in the relevant Statute-National Tariff Commission Act, 1990 was incomplete, but the cases were remanded to present defendant No.2-NTC for decision afresh in terms of Section 11 of the above Act, while holding that a fresh decision should be given by a duly

constituted Commission (NTC). However, the merits of the case were not touched upon and it was left to the Commission to decide the matter on merits. The Lahore High Court's case is not different, in which though it was held that one of the members of the Commission was not qualified to hold the Office while highlighting the importance of the NTC as an institution, but despite this irregularity, the proceeding before the Commission was not quashed but it was held in abeyance with the directions that when the composition of NTC is complete, the proceeding should be resumed. In the operative part of the Order, the learned High Court has specifically clarified that notice of initiation of proceeding which at that time was already issued, will remain intact.

31. Mr. Haider Waheed, learned counsel for the plaintiffs has contended that the Preliminary Determination should be set at naught as it has been passed in violation of restraining order of this Court, which was merged in the order of 10.01.2017 and officials of defendant No.2-NTC has committed contempt of Court. Submission considered. The first *ad-interim* injunction granted on 22.09.2015 is somewhat conditional and subject to fulfillment of Section 33 of the Governing Law, whereas, on 22.12.2015, the restraining order was slightly modified and on 01.01.2016 the matter was adjourned with a clarification that the defendants while proceeding further in the subject investigation under dispute have to conduct themselves strictly in accordance with law. Regarding the order dated 22.12.2015, the plaintiffs filed a Review Application (C.M.A.No.18691 of 2015), contents whereof are self-explanatory. Finally, on 10.01.2017, the restraining order was lastly modified by directing the Defendants to adhere to the terms of earlier orders of 22.09.2015 and 01.01.2016.

32. The relevant provision of the Anti-Dumping Duties Act, 2015 (Governing Law), is also taken into account and in my considered view that

under Section 68 thereof, *inter alia*, (relating to quorum of NTC) a Preliminary Determination of the nature can be decided by two members of defendant No.2-NTC. Admittedly, the subject Report on Preliminary Determination (as referred above) has been signed by the Chairman and one Member, therefore, the same at least on the touchstone of quorum cannot be set at naught. The concluding Paragraph of this Preliminary Determination has clearly stated that no provisional Anti-Dumping Duty has been imposed on plaintiffs in view of the fact that the restraining orders passed by the Court have restrained the defendant No.2-NTC from taking any coercive measure, thus the defendant No.2-NTC refrained itself from imposing any provisional Anti-Dumping Duties on imports of the investigated products. Defendant No.2-NTC informed the counsel for the plaintiffs about Preliminary Determination vide a correspondence dated 26.05.2016 (available at Page-263 of second part of the Court file), but till date, admittedly no appeal (even under protest and without prejudice to the stance in the instant suit) as provided in Section 70 of the Governing Law, has been preferred by the plaintiffs to challenge the above Preliminary Determination. Plaintiffs again sought an injunctive relief by filing another Application being C.M.A.No.15958 of 2016 (under Order XXXIX, Rules 1 and 2 of C.P.C.), *inter alia*, that defendant No.2-NTC should be restrained from passing a Final Determination, besides filing yet another application for initiating the contempt proceedings against the officials of defendant No.2-NTC.

33. Taking into the consideration, the above undisputed factual aspect of the case revolving around the subject Preliminary Determination and peculiar nature of the controversy as agitated in the present cause vis-à-vis the Governing Law, having intricate technical characteristics, I am of the considered view that neither defendant No.2-NTC nor its officials, who

have been named in the Contempt of Court Application are guilty of disobeying the order of this Court in a contumacious manner, therefore, no proceeding under Contempt of Court Act are warranted against the officials of defendant No.2-NTC and consequently, the C.M.A.No.15780 of 2016 for initiating the contempt proceeding is hereby dismissed. Thus, the Preliminary Determination cannot be set aside at this stage.

34. The legal team of defendants has relied upon the number of precedents, which are already mentioned in the title of this decision to advance their arguments on the principle of implied ouster; simply put, what defendants have argued that when a statutory remedy is mentioned in the statute, particularly a special statute governing the subject, then the ordinary jurisdiction of Civil Court under Section 9 of the Civil Procedure Code, 1908, is also barred. On this point of law, the aforesaid decision of Administrator, Thal Development (*supra*) handed down by the Hon'ble Supreme Court, has been rightly relied upon by the defendants, wherein it has been held that since remedy of appeal was provided under Section 161 of West Pakistan Land Revenue Act, 1967, therefore, mere concession of the parties could not have conferred jurisdiction on a Court which was otherwise expressly barred by a statute and for which a specific mechanism has been provided in the hierarchy of the authority functioning under a special statute. This principle has been expounded in detail in a full bench decision of Mian Sultan (*supra*) (**P L D 1949 Lahore 301**), relevant portion whereof is reproduced hereunder for a better appreciation of this rule:

“ It is, not contended here that there is any express ouster of the Civil Court's jurisdiction because neither in the Constitution Act nor in the Orders in Council or the Electoral Rules is there any provision that Civil Courts will have no jurisdiction to entertain suits relating to an electoral right. The question falling for decision is whether on a true construction of the various provisions contained in the Orders in Council and the

Electoral Rules it can be held that the jurisdiction of Civil Courts is impliedly barred. It is while determining this question that the distinction between a right which is purely the creation of a statute and a right at common law becomes important because where a civil right did not exist before a statute was passed and was entirely created by that statute, it is reasonable to infer that the Legislature intended that right to be enforced only in the manner that the statute prescribes. In the present case the right was created by the Constitution Act and the Orders in Council issued thereunder, which, together with the Electoral Rules promulgated by the Governor in exercise of the authority conferred on him by the Act and the Orders, also contain a complete Code in regard to the manner in which a person may acquire and exercise that right and the remedies available to him in case of infringement of that right. The right, therefore, falls within that class of rights which being a creation of the statute can only be enforced in the manner prescribed by the statute creating them and are excluded from the cognizance of Civil Courts. It is this position which was intended to be expressed by the provisions of Part III of the Provincial Elections (Corrupt Practices and Election Petitions) Order to the effect that an election shall not be called in question except by an election petition, that all proceedings and applications in connection with such petition shall be dealt with by and carried on by or before the Commissioners and that the Governor's orders on the report of the Commissioners shall be final. The ouster of Civil Courts' jurisdiction in such cases rests on the construction of the statute creating the right and a special tribunal for its enforcement and if as a matter of construction of the relevant statute the Court arrives at the conclusion that the Legislature intended that the right created by the statute should only be exercised or enforced in the manner provided by that statute, then it is somewhat difficult to accept the Madras and Patna view which found favour with the Division Bench in *Sat Narian Gurwala v. Hanuman Parshad* (44) that if the special tribunal is not constituted or having been constituted it does not function, the Civil Courts' jurisdiction to adjudicate on that right is not affected. The new right depending for its creation on the will of the Legislature, the Legislature could well have refused to create it or having created it, could have subjected it to qualifications and restrictions or defined the conditions under which it could be exercised. The argument for ouster is based in such cases on the presumed intention of the Legislature that the right was intended to be exercised only in the

manner prescribed by Act that created it, and if that presumption is correct, the Civil Courts never acquired any jurisdiction to adjudicate on it as the very Act that created it also declared that it should be excluded from the Civil Court's cognizance, and the creation and ouster being simultaneous, the Civil Courts never had any jurisdiction in respect of it.”

35. Various provisions of the Governing Law have been thoughtfully considered and in my considered view, it is one of the unique statutes I have come across, which even provides a remedy of appeal against initiation of investigation, besides making the Preliminary Determination also challengeable in appeal in terms of Section 70. Therefore, I hold that since under the Governing Law a special statutory remedy is provided and this being the subject of technical nature and that is why, quorum / composition of defendant No.2-NTC and academic qualification of its members are also mentioned, therefore, the plaintiffs can avail remedy of appeal before the Appellate Forum as mentioned under Section 70 of the Governing Law.

36. The above view is further endorsed by the Judgment of **Securities and Exchange Commission of Pakistan v. Mian Nisar Elahi and others** (*supra*) cited by Mr. Khalid Jawed Khan. In the above case, the Hon'ble Supreme Court has deprecated the practice of challenging initial orders passed by Securities and Exchange Commission of Pakistan (“SECP”) directly before the High Court in its writ jurisdiction, while making an observation that dispute is highly of technical nature and could have been resolved only through special expertise (available with SECP). While setting aside the Judgment of Lahore High Court, the Hon'ble Apex Court sent the cases back to SECP to be decided by its appellate authority while making an observation that a lenient view should be taken with regard to condonation of delay. However, in present case, the difficulty in availing

such remedy would be the period of limitation as in terms of subsection (2) of Section 70, thirty (30) days' time is prescribed for preferring an appeal against the Preliminary Determination, which has already ended. Undisputedly, plaintiffs came to know about the Preliminary Determination when they filed second injunction application (C.M.A.No.15958 of 2016, as referred in preceding paragraphs), that is, on 14.11.2016, but as discussed earlier, no appeal has been preferred till date.

37. Another reported decision of Hon'ble Supreme Court handed down in **Muhammad Mubeen-us-Salam's case** (*supra*) provides an answer, *inter alia*, where the Court had enlarged the time of filing appeals before the Service Tribunal, as due to litigation the appeals sought to be filed had become time barred. Consequently, in instant case also time is enlarged and present plaintiffs of this Suit can file the Appeal(s) against the Preliminary Determination before the Appellate Tribunal under Section 70 of the Governing Law within fifteen (15) days from the date of this Judgment.

38. While hearing an appeal of Plaintiffs against Preliminary Determination, the Appellate Forum of defendant No.2-NTC shall take into account the observations made in the following paragraphs with regard to certain portions / paragraphs of their Preliminary Determination:

- i) The Appellate Forum of defendant No.2-NTC will reconsider its finding on the market share which has been mentioned in paragraph-9 with the caption "Standing of the Application" (of the Preliminary Determination) particularly after exclusion of three interested parties, as mentioned in paragraph 8.3. This market share is mentioned in the Table-I.
- ii) The Appellate Forum should also reconsider certain aspects of confidentiality as mentioned in its Preliminary Determination, *inter alia*, as prices of the investigated products could have been obtained from the local market of

exporting country, that is, China. Even this information is obtainable and ascertainable from special bulletins.

- iii) Similarly, data obtained from Customs Valuation Department usually is in public domain and it cannot be treated as confidential. Even Customs Valuation Department is posting valuation table on its website. Unless otherwise barred by any statute or rules, the information and database about prices may not be treated as confidential, primarily on the touchstone of Article 19A of the Constitution of Pakistan and the Freedom of Information Ordinance, 2002.
- iv) Defendant No.2-NTC is to ensure that the term used in the Governing Law about accuracy of the complaint impliedly includes that interested parties under the garb of such complaint should not oust their competitor(s) from business and decisions of defendant No.2-NTC should not be resulting in creating directly or indirectly any monopoly or cartel of few entities or businesses.
- v) In terms of Section 11 and 12 of the Governing Law, where amongst other, the terms physical characteristics is also mentioned, which, in my considered view, should also mean that quality of the product under investigation be also evaluated by the defendant No.2-NTC. To further clarify, for instance, if Pakistani importers are importing raw material product for making finished goods of superior quality than the one locally manufactured by their competitors, then a very cautious approach is required on the part of NTC while determining/deciding a complaint, inter alia, as it is also a right of every local consumer / customer to choose a best available quality product.

39. It is also necessary to observe that the vast discretion available with defendant No.2-NTC is still a structured one, as judicially pronounced from time to time and particularly by the Hon'ble Supreme Court in its famous reported decisions, viz. *Chairman, Regional Transport Authority*, [P L D 1991 Supreme Court page-14] and P L D 2014 Supreme Court page-131 {both decisions are mentioned in the title}. It may be advantageous

to reproduce a relevant paragraph from the above decision of Chairman, Regional Transport Authority_

“..... Structuring discretion means regularizing it, organizing it, producing order in it, so that decisions will achieve a higher quality of justice The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents, and fair informal procedureWhen legislative bodies delegate discretionary power without meaningful standards, administrators should develop standards at the earliest feasible time, and then, as circumstances permit, should further confine their own discretion through principles and rules. The movement from vague standards to definite standards to broad principles to rules may be accomplished by policy statements in any form, by adjudicatory opinions, or by exercise of the rulemaking power When legislative bodies delegate discretionary power without meaningful standards, administrators should develop standards at the earliest feasible time, and then, as circumstances permit, should further confine their own discretion through principles and rules.”

Secondly, the discretion conferred upon the defendant No.2-NTC is coupled with an implied obligation that defendant No.2-NTC has to discharge its function in a fair, just and reasonable manner as enjoined by Section 20A of the General Clauses Act, 1897; and

Thirdly, if any party is claiming confidentiality about any information then such a request for keeping the information confidential shall be considered on the touchstone of Article 19A of the Constitution of Pakistan, relating to the access to information, the pronouncement in **Hamid Mir’s case (ibid)** as well as the Freedom of Information Ordinance, 2002.

40. From the perusal of unreported precedents relied upon by the learned counsel for the Plaintiffs, it appears that defendant No.2-NTC has certain administrative issues and its Senior Officials like Members and Chairman

litigated in connection with their own employment issues, that resulted in impeding the function of defendant No.2-NTC. In my considered view, role of National Tariff Commission is not only a very significant but also an onerous one, in the wake of China Pakistan Economic Corridor (“CPEC”); although CPEC is considered to be an Economic programme for regional connectivity, but at the same time, Defendant No.2-NTC besides other government functionaries will have to ensure that local industry is not destroyed or in other words, the imports from China should not result in threat of material injury or causing material retardation of the establishment of a domestic industry as envisaged in the definition of injury contained in the Governing Law. Defendant No.1 (Federal Government) is directed to ensure, *inter alia*, by improving the capacity of defendant No.2-NTC to meet impending challenges. Concerned Ministry, its Secretary and the Minister are responsible for ensuring compliance of these observations. Much acclaimed business opportunities in CPEC must focus on the fact that it should also result in enhancing / boosting exports of Pakistan, resulting in reduction of trade deficit.

Issue No.3.

41. Since the reported decisions relied upon by Defendants; their ratio and dicta, both are applicable to the issues at hand, therefore, I hold that the present suit as framed is not maintainable and is accordingly dismissed.

42. The Appellate Tribunal while considering the observations mentioned in the preceding paragraphs, will decide the Appeal of present Plaintiffs, if preferred within the time prescribed herein above, in accordance with law.

43. Parties are left to bear their own costs. Suit stands disposed of.

JUDGE

Dated: 02.06.2017.