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Contents

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Article

Provisional anti-dumping measures in India – A misused provision

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An anti-dumping investigation normally stretches for a period of 12 months, which upon due cause shown may continue up to 18 months from the date of initiation of the investigation. In order to prevent injury being caused to the domestic industry during this period, it may be necessary to give some form of interim protection. In such cases, investigating authorities may make a preliminary determination and impose provisional measures.

Article 7 of Agreement on Anti-Dumping ("ADA") regulates the imposition of provisional anti-dumping measures by member-countries. Rule 12 and Rule 13 of the Indian anti-dumping rules also adopt Article 7 and provide a mechanism for recommending provisional measures and implementing the same.

Preliminary finding issued recently by the Indian anti-dumping authority ("DGAD") in the case of Cast Aluminum Wheels from Thailand, China, Korea and Taiwan[1] has opened up an issue of the time limits, if any, for issuing the preliminary findings. In this regard, it is worth looking at Rule 12 and Rule 17 of the Indian AD rules:

> **"12. Preliminary findings.** - (1) The designated authority shall proceed expeditiously with the conduct of the investigation and shall, in appropriate cases, record a preliminary finding regarding export price, normal value and margin of dumping, and in respect of imports from specified countries….
>
> **17. Final findings.** - (1) The designated authority shall, within one year from the date of initiation of an investigation, determine as to whether or not the article under investigation is being dumped in India and submit to the Central Government its final finding……
>
> Provided that the Central Government may, [in its discretion in special circumstances], extend further the aforesaid period of one year by six months."

Among other things, Rule 12(1) requires DGAD to proceed expeditiously with the conduct of investigation and in appropriate cases, record a preliminary finding. On the other hand, Rule 17 requires DGAD to submit final finding to Central Government within one year from the date of initiation.

The questions

Thus, the first question that merits attention is whether the word 'expeditiously' holds any relevance under Rule 12? Secondly, can DGAD recommend imposition of provisional measures beyond the normal period of 12 months prescribed under the provisions for completing an investigation?

Understanding 'expeditiously'

Rule 12 requires DGAD to proceed with the investigation expeditiously. The term 'expeditiously' used in Rule 12 denotes 'swiftness' and 'promptness' required to conduct the investigation. In a prompt investigation conducted by DGAD, only if there is a need

[1] Preliminary finding dated 13-Jan-2014

for interim protection to the domestic industry, DGAD may make a preliminary determination. For application of Rule 12, duty has been cast on DGAD to be prompt in its investigation. Expeditious investigation requires DGAD not to linger the investigation unnecessarily beyond the normal prescribed period. However, when such an investigation extends beyond the prescribed period of one year, it automatically means that the investigation conducted by DGAD is not prompt. Thus, only if the investigation is prompt, DGAD may be justified in recommending provisional duties.

Another significance of the term 'expeditiously' appearing in Rule 12 specifically could be to direct DGAD to conduct preliminary examination promptly and determine whether there is a need to impose provisional anti-dumping duty. After all, the very purpose of a provisional measure is to give interim protection to the injured domestic industry party, where completion of investigation may take a longer time.

In the absence of any specific provision prescribing the upper limit for recommending or imposing a provisional measure, DGAD gets a wide discretion to recommend provisional measure any time before the final determination, which may even exceed normal one year prescribed under Rule 17. Such a delay in making preliminary determination may in turn lead to uncertainty in the market, which may distort the market conditions further.

Obviously, the very purpose of recommending a provisional measure is lost if such a recommendation is made at the fag end of the normal prescribed time limit and not somewhere in between. The term 'expeditiously' under Rule 12 has not been interpreted so far by any court. The WTO Dispute Settlement Body also has not made any observation on the promptness with which any preliminary determination shall be issued. However, jurisprudence can be developed by examining the standards set by other members of WTO. European Union for example, has an express provision that no provisional anti-dumping measure can be imposed beyond 9 months from the date of initiation of investigation[2]. Thus, European Union has prescribed a definite time frame within which preliminary findings shall be issued. Such time frame is absent in the Indian law. However, one has to give a harmonious interpretation of Rule 12 and Rule 17. This means the preliminary determination shall be made promptly by DGAD and in any case, before final determination, that is, one year from the date of initiation.

Preliminary findings after one year?

Second issue that crops up is whether DGAD is justified in recommending provisional duties even after the lapse of original time period granted under Rule 17. There is no time limit for issuance of preliminary findings under Rule 12. However, there is a definite time limit prescribed for issuing the final findings by DGAD under Rule 17 of anti-dumping rules, which clearly provides that DGAD has to come out with a final determination within one year from the date of initiation of investigation. Thus, by law, there is

[2] Article 7(1) of Council Regulation (EC) No 1225/2009

an upper limit prescribed for coming out with final findings.

It must be noted that Rule 17 governs issuance of final findings by DGAD and not the preliminary findings. Logically, if there is an upper limit prescribed for issuance of final findings, it should automatically apply to preliminary determination as well.

The 'extra time' of 6 months has been granted to DGAD to complete the investigation under the proviso to Rule 17. The proviso will apply only with respect to the issue covered in the main provision. Since Rule 17 deals with final determination, the proviso will be applicable only for issuing the final finding. The additional time granted under the proviso to Rule 17 for issuing final findings cannot be interpreted to provide additional time for issuing the preliminary finding under Rule 12. The word 'expeditiously' appearing in Rule 12 cannot be interpreted to authorize the DGAD to issue preliminary findings in a non-expeditious manner.

Further, when the investigation is not completed within 12 months period, the Indian Government grants a specific extension of time for completing the investigation and issuing the final findings pursuant to the proviso to Rule 17. Such permission is only with regard to issuing the final findings and not with regard to preliminary findings. Therefore, DGAD cannot use the extension of time granted by the Indian Government to issue a preliminary finding.

In *Aluminum Wheels* case, DGAD has been granted extension of 3 months, ending on 9th March 2014. DGAD made a preliminary determination on 13th January 2014, that is, 13 months after initiation and less than 2 months before the expiry of extended time period of time as well. This is not the first time DGAD has extended its discretionary arm beyond the normal period. Though DGAD does not normally recommend provisional measures after one year, however, in 6 investigations so far, DGAD has come out with a determination after one year and has made such belated determination only once in last 5 years. Though such belated provisional determinations may be rare, they still exist and reflect the extent of discretionary power vested with DGAD to use the provision in favor of the domestic industry. On the face of it, preliminary recommendation made by DGAD in this particular case seems to be incorrect.

To conclude

From the point when an anti-dumping investigation is initiated, the international trade with respect to such product gets distorted. Thus, prompt and expeditious investigation by DGAD becomes essential. Since the investigation invariably stretches beyond one year, the injured domestic industry may require some level of interim protection during that period when investigation is ongoing. However, recommending a provisional duty after investigation has already run its race beyond the normal period prescribed, may at one hand not provide any adequate protection to domestic industry, which already has suffered irreversible damage during the interim period and on the other hand, it will only cause further distortion in the market as buyers will be more averse to imported products, which may anytime be subjected to anti-dumping duty. Given the open ended and unclear legislation

with respect to preliminary determination, which gives DGAD a chance to abuse its discretionary power, the only way out is to make a specific provision putting an upper limit for imposition of provisional measures. Until such time, the fate of exporters will remain in a limbo and may receive shock treatment at any moment with a provisional determination, even after expiry of normal time period prescribed.

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Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Acrylic Fibre	Egypt	14/18/2013 DGAD	24-2-2014	Anti-dumping investigation initiated
Bare Elastomeric Filament Yarn	All countries	D-22011/ 23/2013	28-2-2014	Safeguard duty investigation initiated
Glass Fibres and articles thereof	China	14/21/2013-DGAD	10-2-2014	ADD Mid-term Review - Micro glass fibre with diameter 0.3–2.5 microns recommended to be excluded from ADD
Persulphates	Taiwan, Turkey and USA	14/9/2012-DGAD	12-2-2014	ADD investigation - Time period for completion extended till 27-3-2014
Saturated Fatty Alcohol	All countries	D-22011/26/2013	13-2-2014	Safeguard duty investigation initiated
Sodium Nitrite	All countries, except developing countries other than China	1/2014-Cus. (SG)	26-2-2014	Safeguard duty imposed till 25-5-2015

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Certain Oil Country Tubular Goods	USA	[A-533-857] 79 FR 10493	25-2-2014	USDOC preliminarily determines critical circumstances in ADD investigation and that prices are at 'less than fair value'. Dumping margin preliminarily determined between 0 – 55.29%.

Product	Country	Notification No.	Date of Notification	Remarks
Hot-Rolled Carbon Steel Flat Products	USA	[A-533-820, C-533-821] 79 FR 7425	7-2-2014	ADD and CVD sunset review – Duties to continue
I and H sections of other alloy Steel	Indonesia	G/SG/N/6/IDN/25, dated 13-2-2014 (WTO – Committee on Safeguards)	12-2-2014	Safeguard investigation initiated
Polyethylene terephthalate (PET)	EU	Council Implementing Regulation (EU) No. 190/2014 of 24-2-2014	28-2-2014	Acceptance of price undertaking withdrawn and countervailing duty resumed on said goods produced by three Indian entities
Steel Threaded Rod	USA	[C-533-856] 79 FR 9162	18-2-2014	Preliminary affirmative determination of critical circumstances in CVD investigation by USDOC
Steel Threaded Rod	USA	[A-533-855] 78 FR 9164	18-2-2014	USDOC preliminarily determines critical circumstances in ADD investigation and that prices are at 'less than fair value'. Final determination postponed and dumping margin preliminarily determined between 8.63 and 119.87%.

WTO News

Panels established at the request of Denmark and United States

The Dispute Settlement Body has established a panel on 26th February at the request of Denmark to study the measures imposed by European Union against Faroe Islands (DS469). A compliance panel on China's countervailing and anti-dumping duties on grain oriented flat-rolled electrical steel from the United States (DS414) has also been established by the DSB on the same day. India has reserved its third party rights in both the disputes.

According to Denmark, EU's measures prohibiting entry of certain products of Atlanto-Scandian herring and Northeast Atlantic mackerel (Scomber scombrus) caught under the control of Faroe Islands, violate various provisions of GATT. The impugned measures

also prohibit use of EU ports by vessels flying flag of Faroe Islands and fishing for Atlanto-Scandian herring or mackerel.

In respect of the dispute between the US and China, the Appellate Body had upheld, in October 2012, Panel's report that MOFCOM's finding relating to price effects of subject imports was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement. China's action was also held to be inconsistent with Articles 6.9 and 12.2.2 of the Anti-Dumping Agreement and Articles 12.8 and 12.2.2 of the SCM Agreement.

China seeks panel to probe AD methodologies of US

China has requested the DSB for establishment of panel to consider certain methodologies used by the United States for calculation of dumping margin, namely targeted dumping methodology in anti-dumping investigations and in reviews, and the single rate presumption in respect of imports from China which is a non-market economy (DS471). USA's use of inferences that is adverse to the interests of party, in selecting from among the facts otherwise available, in case the producer or exporter had failed to cooperate, is also being contested as violative of Article 6.8 and Annex II of the Anti-Dumping Agreement. *[Also see Article in February 2014 issue of International Trade Amicus]*

USA disputes India's measures on solar cells and modules again

United States of America has, on 10th February, sought consultations with India on the latter's measures relating to solar cells and solar modules. This is the second time the US has raised its concerns against the Indian measures, the first one pertaining to phase I of the Jawaharlal Nehru National Solar Mission programme (DS456) was filed in February 2013.

As per the documents circulated in the WTO on 13-2-2014, this new request supplements and not replaces the request for consultations circulated last year. The new dispute on phase II of the programme, which according to the US allows solar power developers certain benefits and advantages, such as long term tariffs for electricity, contingent on their purchase and use of solar cells and solar modules of domestic origin, is violative of the GATT provisions as these measures provide less favourable treatment to identical imported goods. According to the US the measures are also inconsistent with Article 2.1 of the TRIMs Agreement because they are trade-related investment measures inconsistent with Article III of the GATT 1994.

News Nuggets

Anti-dumping duty affecting trade ties between India and Saudi Arabia

Saudi Arabia has raised its concerns on imposition of anti-dumping duties by India on various products exported by it. The issue was discussed by Commerce Ministers of both the countries on 27th of February. As per reports, Saudi Arabia is of the view that imposition of anti-dumping duty by India on various products would be detrimental to the

trade relations between the two countries. The Indian Minister clarified that the duties are imposed after due diligence and that it is a quasi judicial exercise. It was pointed out that the levy has in fact been withdrawn on polypropylene and pentaerythritol. Both sides also emphasized the need for timely conclusion of Free Trade Agreement between India and the Gulf Cooperation Council countries.

Trade relations between India and USA under strain

Trade relations between India and USA are under strain again. Amidst reports that USA may place India in its list of Priority Foreign Countries, India has responded that such a measure by the USA might invite a challenge at the WTO, which is being increasingly used both by India and USA against each other in recent times. US International Trade Commission (ITC) has launched an investigation into India's trade, investment and industrial policies where the major area of dispute seems to be Intellectual Property Rights (IPR) in pharmaceuticals. The US, as per reports, is not happy with compulsory licence being granted by India for reasons other than public health emergencies.

Last month also witnessed USA seeking consultations with India in WTO, challenging phase II of India's National Solar Mission on the alleged domestic content requirements. A few other disputes are already under way in the Dispute Settlement Body of the global trade watchdog. While USA also disputes India's certain restrictions on import of poultry products from America, India on its part has dragged the US to the forum against countervailing duty imposed by the latter on import of certain steel rods from India. The high visa fees being imposed by USA and a proposal to tighten the visa rules are also seen by India as violative of various provisions of GATS.

Ratio Decidendi

Time-limit for investigation of Market Economy Treatment

The Court of Justice for European Union (CJEU) has upheld the findings of the General Court that adoption of Market Economy Treatment (MET) decision after expiry of prescribed three month period, under Article 2(7)(c) of the basic AD regulation, would not automatically entail annulment of the said regulation. The CJEU did not rule on whether the time-limit laid down in the second subparagraph of Article 2(7)(c) of the basic regulation constitutes a procedural guarantee intended to protect exporter's rights of defence.

The lower court had opined that the purpose of the three month time limit was to ensure that criteria for MET was examined without being influenced by effect on dumping margin. Further, it had held that, on facts, the lower cost of inputs was known to the Commission from

the beginning of the investigation.

According to CJEU, the substance of the MET decision had not been disputed and the exporter failed to prove that, if the Commission had not exceeded the three-month time-limit, the Council might have adopted a lower dumping margin. The exporter argued, without success that the General Court could not introduce new criteria like 'only plausible hypothesis' of the MET application being lower dumping margin and that the time limit was to be adhered to. [*Ningbo Yonghong Fasteners Co. Ltd.* v. *Council of the European Union* – CJEU Judgment dated 27-2-2014 in Case C601/12 P]