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## Article

### Imposition, collection and review of countervailing and anti-dumping duty – India and US Practice

By **Bhargav Mansatta**

India follows a prospective method of Anti-dumping Duty (AD) and Countervailing Duty (CVD) imposition whereas the United States has adopted a retrospective method. In prospective method, based on the actual data relating to a selected period known as ‘period of investigation’ the margin of dumping and / or subsidization is determined and the rate of duty is also determined. The rate of duty so determined based on the past period is applied for all shipments that take place on and from the date of levy. For instance, in an investigation initiated on 1st April 2012, the investigating authority may specify the period of investigation as Jan-Dec 2011. Based on the data for the period Jan-Dec 2011, investigating authority may determine a duty rate of say 7% and upon completion of the investigation on 31 March 2013, anti-dumping duty of 7% is levied. This duty will be applied for all shipments cleared on and from 31st March 2013 (i.e. the date of levy) and will continue to be in force till the duty rate is amended pursuant to a changed circumstances review.

In the retrospective method, the duty rate is determined taking into account the actual data for the period of investigation and applied upon completion of investigation. However, the duty is collected provisionally or as a deposit. At the end of

every year, the investigating authority will conduct a review of all the transactions that took place during the immediately preceding year and based on the actual data for the said period, the duty rate will be amended. All the clearances made during the past year will be ‘finally’ assessed for the specified period. The new rate determined at the end of such a review is applied as the ‘deposit rate’ for the future period.

Under both the systems, during the original investigation, provisional measures can be imposed before a final determination is arrived at. The only difference between both the systems is that in case of prospective levy, rate of provisional duty is re-determined at the time of final determination, whereas in retrospective method, the rate of provisional measure is not only re-determined at the time of final determination but it is also subsequently re-assessed ‘finally’ at the time of administrative review in the next year. For e.g. *In Certain Hot-Rolled Carbon Steel Flat Products from India*, C-533-821, Essar Steel Ltd., was subject to 9.08% provisional duty at the time of preliminary determination for the period of four months from April 20, 2001 to August 17, 2001 in the original investigation,<sup>1</sup> the rate was revised to 8.28% at the time of final determination<sup>2</sup> and it was finally assessed at the rate of 1.69% during

<sup>1</sup> Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Determination with Final Antidumping Duty Determinations: Certain Hot-Rolled Carbon Steel Flat Products from India:, 66 FR 20240-01, April 20, 2001

<sup>2</sup> Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from India and Indonesia, 66 FR 60198, December 3, 2001

the subsequent administrative review.<sup>3</sup> In other words, the provisional CVD rate for the period of four months starting from April 20, 2001 was revised thrice. It was finally confirmed at 1.69%.

Irrespective of the method of levy, during the original investigation, the CVD or AD assessed at the time of final determination can be levied retroactively for the period for which provisional measures were applied.<sup>4</sup> Also, under both the methods, it is required that in case the amount of AD or CVD determined at the time of final determination is less than the preliminarily determined rate, then the difference in the amount is refunded but if the amount is higher, then the difference is not collected.<sup>5</sup> It is also required that the application of provisional measure shall not exceed the four months period. In case of anti-dumping duties, the period may extend to six months, if the country employs a lesser duty rule.<sup>6</sup>

In India, definitive anti-dumping duty is applied retroactively from the date of imposition of provisional duties, in terms of Rule 20(2)(a). However, the Anti-dumping Agreement is markedly different. It does not use the phrase 'from the date of imposition of provisional duties' but states that the definitive duties may be levied 'for the period for which provisional measures have been applied'.<sup>7</sup>

Thus, irrespective of whether the definitive duties are imposed when the provisional measures are in force or after the expiry of the provisional measures, the definitive duty is imposed only from the date of its levy under the Anti-dumping Agreement. It may be levied under certain circumstances for the period for which the provisional measures have been applied. Despite such retroactive application, the definitive duty shall commence from the date of levy of definitive duty and not from the date of imposition of provisional duty. The Indian practice is quite the contrary. India levies definitive duty from the date of imposition of the provisional duty irrespective of whether the definitive duty is levied during the currency of the provisional measure or after its expiry. In other words, duty is charged for the interregnum i.e. period between the expiry of provisional measure and the levy of definitive duty.<sup>8</sup> The United States does not charge duty during such interregnum period.<sup>9</sup> The duty for such period is zero. The duty resumes from the date of imposition of definitive measures pursuant to the final determination.

In light of the provision under the Agreement and the WTO jurisprudence, India's practice would be difficult to defend if it is met with a

<sup>3</sup> Final Results of Countervailing Duty Administrative Review: Certain Hot Rolled Carbon Steel Flat Products from India, 69 FR 26549, May 13, 2004

<sup>4</sup> Article 20.2, SCM Agreement; Article 10.3, AD Agreement

<sup>5</sup> Article 20.3, SCM Agreement; Article 10.3, AD Agreement

<sup>6</sup> Article 17.4, SCM Agreement; Article 7.4, AD Agreement

<sup>7</sup> Article 10.2 of AD Agreement

<sup>8</sup> See *Acetone from Japan and Thailand*, Customs Notification dated April 9, 2010 imposing preliminary duty r/w Customs Notification dated April 18, 2011. *Circular Weaving Machine from China* Customs Notification dated April 12, 2010 imposing provisional Anti-dumping Duty r/w Customs Notification dated February 16, 2011

<sup>9</sup> Liquidation Instructions For Certain Hot-Rolled Carbon Steel Flat, Products From India for Essar Steel, Ltd. (C-533-821-002), Message No: 4167205, Date: 6/15/2004

challenge before the DSB.<sup>10</sup> In addition, Article 10.6 of the Anti-dumping Agreement specifies the conditions under which the definitive duty may be retroactively applied. The conditions are: (a) where there is a history of dumping or where the importer should have been aware that the exporter practices dumping and that such dumping could cause injury; and (b) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of dumped imports and other circumstances is likely to seriously undermine the remedial effects of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment. India applies definitive duty retroactively from the date of levy of provisional duty even if the conditions specified in Article 10.6 are not met. In fact, levy of definitive duty for the interregnum period without even examining the factors specified in Article 10.6 is a clear violation of the Anti-dumping Agreement.

One related issue in this regard is how to calculate the five year period upon completion of which the definitive duty shall expire. With regard to initiation of sunset review investigation, the practice of the United States and India varies. Article 21.3 of the SCM Agreement and Article 11.3 of the AD Agreement provide for the sunset review provision. SCM and AD Agreement in relevant part provide

as below:

Antidumping Agreement Article 11.3: Notwithstanding the provisions of paragraphs 1 and 2, any definitive antidumping duty *shall be terminated on a date not later than five years from its imposition* (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a *review initiated before that date* on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date.....

SCM Agreement Article 21.3: Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty *shall be terminated on a date not later than five years from its imposition* (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a *review initiated before that date* on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date...

The above provisions require that the definitive duty shall be terminated after *five years from its imposition* unless extended by review initiated *before such date*. It is clear from the plain language of the article that five years will be counted from the date of the imposition of definitive duty. Appellate Body has already stated that duty imposed after the *final determination* is considered as definitive duty in both the systems of investigation.<sup>11</sup>

<sup>10</sup> Panel Report, *Mexico – Anti-dumping measures on imports of HFCS from USA*, para. 7.182. See Atul Gupta, *Levy of provisional anti-dumping measures in India*, available at <http://www.lakshmisri.com/News-and-Publications/Archives/Publication/Levy-of-provisional-anti-dumping-measures-in-India>

<sup>11</sup> Appellate Body Report, *Mexico - Definitive Anti Dumping Measures on Beef and Rice*, para. 344-346

However, as a matter of practice, India calculates period of five years from the date of the imposition of the provisional measure.<sup>12</sup> This is despite the fact that Rule 23 (1B) of the Indian AD Rules is similar to Article 11.3 of the AD Agreement in providing that five years is to be calculated from the date of imposition of definitive duty. The United States, on the other hand, as a matter of law and practice, calculates five years from the date of imposition of the definitive measure. Date of initiation of sunset review is indicative of this practice as it is issued just before the end of such five year period.<sup>13</sup>

The Indian practice of counting the five year

period from the date of levy of provisional measures (wherever the definitive duty has been imposed from the date of imposition of provisional measure) may be in line with the requirements of Article 11.3 of the Anti-dumping Agreement. However, it may reduce the period for which the duty may have been in force otherwise. The Indian practice brings down the period of levy compared to other countries which may not be in the best interests of the domestic industry.

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<sup>12</sup> Illustratively, Initiation of Sunset Review, February 24, 2012, Flat Based Steel Wheels from China. See Preliminary Duty, Customs Notification 51/2007, March 29, 2007. Final Definitive Duty, Customs Notification 124/2007, December 31, 2007. Customs Notification No. 16 /2012 dated 20th March 2012 extending the time period for imposition of duty for one year until March 27th 2013 pursuant to initiation of sunset review.

<sup>13</sup> Illustratively, Initiation of Five-Year ("Sunset") Reviews, 71 FR 43443 (August 1, 2006), Certain Hot Rolled Carbon Steel Flat Products from India. Provisional Measure was imposed on 20 April, 2001. See Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Determination with Final Antidumping Duty Determinations: Certain hot-Rolled Carbon Steel Flat Products from India:, 66 FR 20240-01, April 20, 2001. Final determination of Definitive duty was made in December 3, 2001; See Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from India and Indonesia, 66 FR 60198, December 3, 2001. European Communities also follows the same practice for calculation of five year period.

## Trade Remedy News

### Anti-dumping actions by India

<b>Product</b>	<b>Country</b>	<b>Notification No.</b>	<b>Date of Notification</b>	<b>Remarks</b>
Acetone	Korea RP	12/2013-Customs (ADD)	25-6-2013	ADD imposed by 75/2008-Cus. extended till 9-6-2014 consequent to initiation of sunset review
Pentaerythritol	Chinese Taipei	13/2013-Customs (ADD)	25-6-2013	ADD imposed by 74/2011-Cus. extended till 27-4-2014 consequent to initiation of sunset review
Phenol	Chinese Taipei and USA	14/17/2012-DGAD	7-5-2013	ADD investigation initiated
Sodium Perchlorate	China	14/10/2012-DGAD	26-6-2013	Definitive anti-dumping duty recommended
USB Flash Drives	China, Chinese Taipei and Korea RP	14/22/2012-DGAD	21-6-2013	ADD investigation initiated
White Cement	UAE and Iran	15/13/2011-DGAD	6-6-2013	Sunset review recommends non-continuation of ADD
Zinc Oxide	China	15/14/2011-DGAD	25-6-2013	Sunset review recommends continuation of ADD

### Safeguard actions by India

<b>Product</b>	<b>Country</b>	<b>Notification No.</b>	<b>Date of Notification</b>	<b>Remarks</b>
Methyl Acetoacetate	All Countries	D-22011/ 08/2013	6-6-2013	Initiation of investigation
Phthalic Anhydride	All Countries	D-22011/ 14/2012	7-6-2013	Review finding recommends non-continuation of safeguard duty

### Trade remedy actions against India

<b>Product</b>	<b>Country</b>	<b>Notification No.</b>	<b>Date of Notification</b>	<b>Remarks</b>
Stainless Steel Bars	USA	78 FR 34337	7-6-2013	DOC determines zero dumping margin in its final results of administrative review for Ambica Steels Ltd.
Certain Frozen Warmwater Shrimp	USA	78 FR 33344	4-6-2013	Countervailing duty: Preliminary countervailable subsidy rates determined

## WTO News

### DSB Panels established upon requests from Indonesia and Panama

On 25th June 2013, consequent to second request from Indonesia, the Dispute Settlement Body (DSB) of the WTO has established a panel, to examine the dispute "EU - Anti-Dumping measures on imports of certain fatty alcohols from Indonesia". According to Indonesia, measures by EU are inconsistent with Articles 2.3, 2.4, 3.1, 3.5, 5.8, 9.2 and 9.4 of the Anti-dumping Agreement and Article X:3(a) of the GATT, 1994, as it failed to treat the Indonesian exporters' related Singapore sales offices as a single economic entity with their related producer/exporters and made adjustments to the export price of Indonesian exporters to reflect both the selling expenses of the Singapore sales offices as well as commission paid to the related Singapore sales offices. Indonesia also holds that EU inappropriately excluded "branched" fatty alcohols from the scope of the domestic like product. India, Korea and the United States have reserved their third-party rights to participate in the panel's proceedings.

On the same day, DSB also established a panel upon request from Panama, to examine the dispute "Argentina - Measures relating to trade in goods and services". As per the consultation paper, Panama alleges that Argentina establishes different percentages of presumed net profit in respect of payment of interest or remuneration to foreign-based creditors depending on their country of residence leading to different tax burden and the same amounting to less favourable treatment. Panama also alleges that Argentina discriminates in the valuation of transactions with parties from some specified countries and resorts to transfer pricing methods which result in significant costs. These measures are stated as not consistent with

Article II:1, XI, XVI and XVII of the GATS and I:1, III:2 and III:4 of GATT. Australia, China, Ecuador, EU, Guatemala, Honduras, India and the US are the third parties to the dispute.

### EU requests consultations with China

European Union has, on 13th of June 2013, requested for consultations with China on the latter's anti-dumping duties on certain high-performance stainless steel seamless tubes imported from EU. EU considers China's determination of ADD as inconsistent with Article VI of GATT and Articles 1, 2.2, 3.1, 3.2, 3.3, 3.4, 3.5, 6.4, 6.5, 6.7, 6.8, 6.9, 7.4 and 12.2 of the Anti-Dumping Agreement as China did not determine the costs of production and amounts for administrative, selling and general costs on the basis of records and actual data and not established existence of margins of dumping based on fair comparison between export price and normal value. It is also alleged that China's injury determination was not based on positive evidence. Japan has already filed a similar case (DS 454) against China relating to same products and a DSB panel has been established to hear the case. EU along with India, Republic of Korea, Russia, USA, Turkey and Saudi Arabia are the third parties to the latter dispute.

### Russia gets Observer status in Committee on Government Procurement

Committee on Government Procurement has, on 29th of May 2013, granted observer status to Russia, paving the way for eventual accession of Russian Federation as a full party to the Agreement on Government Procurement (GPA). Six other countries - Croatia, Macedonia, Mongolia, Montenegro, Saudi Arabia and Tajikistan are also committed to join the GPA, as part of their WTO accession protocols. India too enjoys the status of observer to this Agreement.

## News Nuggets

### China issues draft rules on WTO Trade Remedies

The Chinese Ministry of Commerce has released a policy draft on the implementation of WTO trade remedies and dispute settlements. The draft rules, would give Chinese authorities the legal basis for discretion to suggest or decide to modify or cancel such anti-dumping measures, countervailing measures or safeguarding measures according to relevant laws, or decide to take other appropriate measures, if the WTO's dispute resolution body requests China's anti-dumping, countervailing, or safeguarding measures to be made consistent with the WTO agreements. As per reports, the draft rules are the first ever of their kind released by the Ministry, which is in charge of handling trade related matters.

### ECJ upholds non-disclosure of India-EU FTA documents to public

Secrecy in trade deals between countries has always been in the line of fire, be the most

talked about Trans Pacific Trade Agreement or the India-EU FTA. Last month, the General court of European Court of Justice also upheld such secrecy in trade deals or negotiations. The Court, on 7th of June, held that grant of access to certain documents to the corporate houses or trade associations who participate as experts in the negotiations of the advisory committee, cannot be used by other organizations as a tool to avail similar access to all such documents. It was held that the documents were provided to trade associations and companies for the sole purpose of enabling all the participants to fulfil their roles as advisers to the Commission and the applicant lacked such status. The arguments on importance of its role in international negotiations or its reliability as an organisation entered in the Commission's interest group register, were not accepted. The appellant contended that sharing the documents with business associations and multinational companies can be regarded as "public dissemination" and that the materials thus lose their secret character.

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