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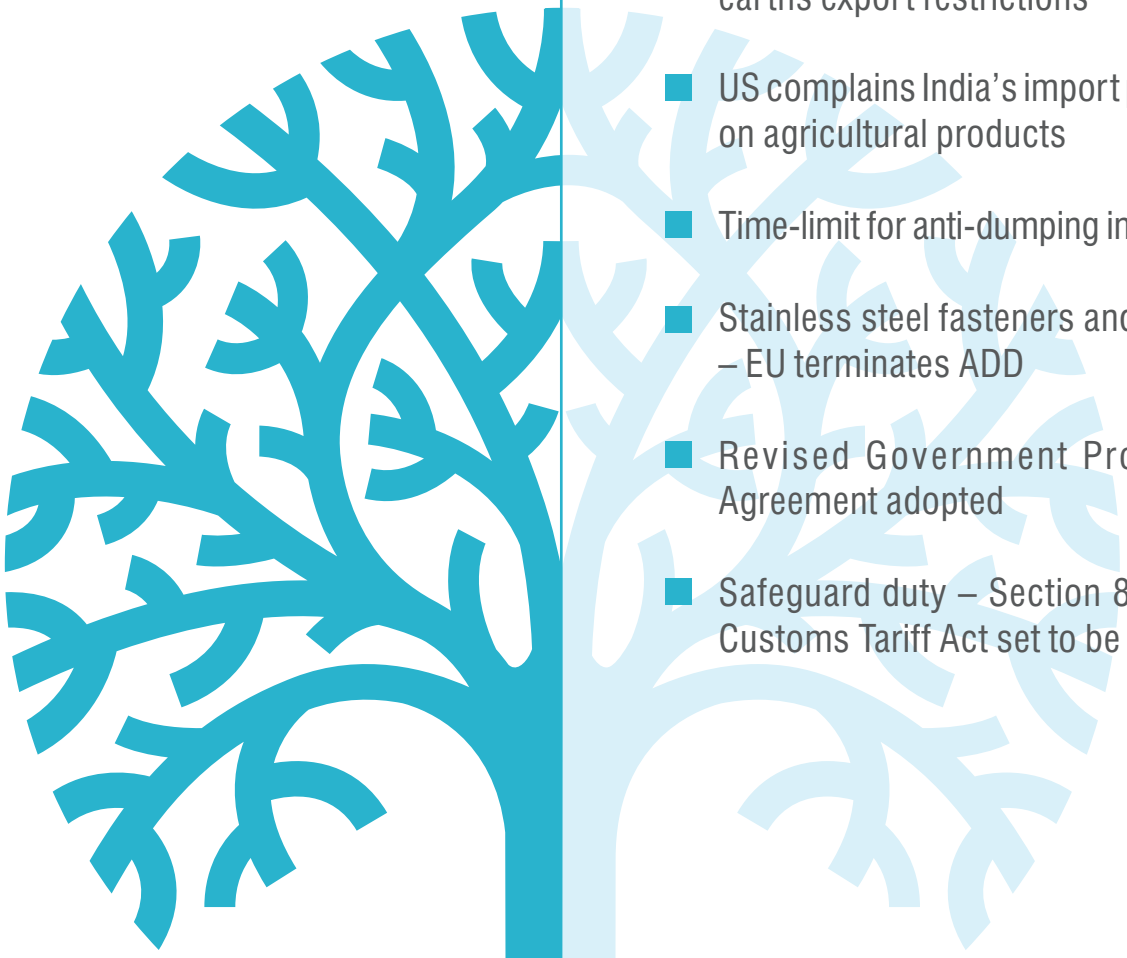

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Time-limit for anti-dumping investigation - Theory and Practice

By **T.D. Satish**

To preserve the supremacy of law and legal procedures, adherence to a time frame prescribed for completion of an investigation becomes important. It is even more essential in those cases, where the fate of an industry segment depends on the finding or the conclusion of the appointed authority. Anti-dumping investigation is one such specie, wherein the interested parties to the investigation look forward to a quick determination. In this regard, Article 5.10 of WTO Agreement on Anti-dumping (ADA) states that except in special circumstances, an investigation shall be concluded within one year of initiation, and in any case not more than 18 months. Upon a plain reading of Article 5.10, following issues emerge:

- The meaning of the term "investigation";
- Time period that an antidumping investigation should take to reach a conclusion;
- The sanctity of 18 month cut-off period

Article 5.10 provides that an anti-dumping investigation should be completed within 18 months. However, the term 'investigation' has not been defined under the Agreement. The question is whether the term 'investigation' means only the stage of final finding recommendation or whether the term also includes the decision to levy anti-dumping duties after issuance of findings.

In this regard, anti-dumping law of European Commission [Article 6(9)] provides that an investigation shall, in all cases, be concluded within 15 months. Proposal for levy of anti-dumping duty is sent by the Commission in EU to Council of Ministers or Council, which is responsible for adoption of final measures. The website of EC as also the practice of EC suggest that the 15 month period for concluding an investigation also includes the stage of levy of anti-dumping duty. On the other hand, in the US, dumping aspect of investigation is taken care by the Department of Commerce (DOC), whereas injury determinations are made by the International Trade Commission (ITC). Only when the final determinations of both DOC and ITC are affirmative, DOC issues an anti-dumping order. Thus, in the US also, an anti-dumping investigation covers investigation as well as levy, which is in the form of issuance of orders by DOC. In India, in stark contrast to procedures adopted by EC and the US, the law provides 18 month period to Directorate General of Anti-Dumping (DGAD) for issuance of final findings/ recommendations and thereafter another 3 months are provided to Ministry of Finance to accept and levy the duties. Considering the procedures of above 2 members as guiding light to interpret Article 5.10 of ADA, it seems India's anti-dumping law providing total of 21 (18+3) month period is violative of said agreement.

On the flip-side if it is considered that the term 'investigation' is only restricted to issuance of final findings/determinations, then also, an anti-dumping investigation should be completed within the stipulated period of one year. It is only under *special circumstances* that the investigation may be extended for an extra period of 6 months. However, the benchmark remains "special circumstances".

In *Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil,* the WTO Panel held that *"… AD Agreement imposes a deadline for the conclusion of an investigation in Article 5.10. We consider that, if an investigation is to be completed in conformity with the timeframe provided for in Article 5.10, deadlines are indeed necessary…"* The finding made in the panel report highlights the relevance of a timeframe in an investigation.

As regards the issuance of final determinations, while the United States provides for detailed time-table for each stage of investigation and EU provides for a 15 month deadline to complete the investigation, the Indian Anti-Dumping Rules under Rule 17(1) provides that the Directorate General of Anti-Dumping (DGAD) shall, within 1 year from the date of initiation, come out with the final finding. However, proviso to Rule 17 creates an exception under "special circumstances" by giving Central Government the discretion to extend the period by another 6 months. But more often than not, investigations exceed the 12 month deadline and the exception provision is used in a generalized manner. Furthermore, since 2010 DGAD has used its entire quota of 18 months in about 13 investigations (reviews included) to issue the final findings. Of these 13 findings, only in one case DGAD demonstrated existence of "special circumstance" by explicitly recording reason for delay and recorded the approval for extension of time granted by the Government. The final findings issued by DGAD, otherwise, neither provide reasons for delay in completion of investigation nor do they have any word about approval for extension granted by Government.

As far as Indian practice is concerned, it is settled by various orders of Appellate Tribunal and Courts that a period of 12 months can be automatically extended to 18 months, irrespective of type of investigation. In the case of *Fragrances & Flavours Asscn of India* v. *Designated Authority* [2011 (270) E.L.T. 733 (Tri. - Del.)], the Appellate Tribunal dismissed the plea of DGAD that oral hearing could not be given as investigation was time bound. The Appellate Tribunal concluded that AD Rules provided for extension of time and DGAD was wrong in taking a lame excuse of 12 month limitation. In *Grauer & Weil (I) Ltd* v. *Designated Authority* [2011(271) ELT 112 (Tri.-Del.)], Appellate Tribunal held that 6 month extension rule is applicable in case of mid-term reviews also.

There is no doubt that both DGAD and Courts try to adhere to the timeline prescribed and try to ensure that investigations are completed within the time limit prescribed. In the last 3 years, there has been only one exceptional case, wherein DGAD issued final finding post 18 month period (R134a Gas from Japan and China). In that case, delay in issuance of final finding was due to pending litigations. But having said that, completion of investigation after 18 months would still be violative of Article 5.10, even though the investigation was marred by domestic judicial proceedings. India, as a member of WTO and as a signatory to GATT, is bound to align its domestic laws and regulations to ensure conformity with ADA. Conformity of domestic anti-dumping laws would necessarily include consideration of other domestic general laws. Thus, even though a pending anti-dumping investigation may get caught in domestic judicial proceedings, yet India as a member of WTO has to ensure that the anti-dumping proceedings are conducted in accordance with provisions of ADA, including Article 5.10. There arises another question with respect to the absoluteness of 18 month

time-frame. That is, whether it is permissible for an investigating authority to re-look into the investigation after 18 month deadline once it has made its final determination?

The practice of "remanding" back of investigation to DGAD by the appellate forum poses yet another problem. In a normal case of remand, DGAD is directed by Tribunal to have a fresh look into its findings, issued at fag end of statutory time limit, or consider points, which it previously did not consider. However, where an investigation is void *ab-initio* due to violation of principles of natural justice, it will be improper for a Tribunal to remand the matter back to DGAD for correcting the violation of rules or law, as remanding back of matter would provide more time than actually permitted by law. Considering the time normally taken by Tribunal to decide a case, remanding back of matter may well result in circumvention of Rule 17(1) of AD Rules and Article 5.10 of ADA.

Conclusion

As per Indian practice, it is now more or less settled that a period of 12 months to complete an anti-dumping investigation is not rigid. It may be extended even without addressing the issue of "special circumstance". The problems with regard to Article 5.10 and Rule 17(1) are twin-fold. First problem relates to the meaning of the term 'investigation' and whether levy of duty also forms part of investigation itself. If levy of duty also forms a part of investigation, then Rule 17(1) read with Rule 18(1) of AD Rules constitute violation of Article 5.10 of ADA. Second issue is with respect to conducting of investigation post 18 month impasse. While DGAD and courts have been careful with maintenance of 18 month period, yet the practice of Appellate Tribunal of "remanding back" the case to DGAD remains a grey area.

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Trade Remedy News

Anti-dumping / Safeguard actions by India

Phenol from USA, Korea RP or Taiwan – ADD withdrawn: Anti-dumping duty on Phenol from USA, Korea RP and Taiwan has been withdrawn by the Indian Government. Notification No. 14/2012-Cus. (ADD), dated 29-2-2012 rescinds Notification No. 30/2008-Cus., consequent to the mid-term review by the DGAD and finding on absence of adverse impact on domestic industry.

Yarn – ADD on specified yarn from Indonesia, Korea, Malaysia or Chinese Taipei extended: Anti-dumping duty on fully drawn or fully printed yarn or spin drawn yarn or flat yarn of polyester from the specified countries has been extended till 20-8-2012. Notification No. 15/2012-Cus.(ADD), dated 5-3-2012 issued in this regard amends Notification No. 15/2007-Cus. which had expired on 20-8-2011.

Flat base steel wheels from China – ADD extended: Anti-dumping duty on flat base steel wheels from China has been extended till 27-3-2013. Notification No. 16/2012-Cus.(ADD) has been issued in this regard to amend Notification No. 124/2007-Cus., under which ADD is levied at present.

Digital Offset Printing Plates from China or Japan – Provisional ADD recommended: The Director General of Anti-dumping and Allied Duties in the Ministry of Commerce has recommended the levy of provisional anti-dumping duty on 3 types of digital offset printing plates from China or Japan.

Notification F.No. 14/7/2011-DGAD, dated 16-3-2012 recommends benchmark/reference form of anti dumping duties on provisional basis, equal to the difference between the specified amount as indicated in the notification and the landed value of the goods. The amount specified ranges from 5.26 USD to 6.60 USD/sqm.

Dry cell batteries from China – Sunset review initiated: The DGAD in the Ministry of Commerce has initiated sunset review of the anti-dumping duty levied on zinc carbon pencil batteries, R6, AA, UM3, etc. from China. Notification No. 15/12/2011-DGAD, dated 21-3-2012 calls for comments from the interested parties within 40 days of the notification while Notification No. 57/2007-Cus. imposing such levy is set to expire on 12-4-2012.

Peroxosulphates from China or Japan – Sunset review initiated: The DGAD in the Ministry of Commerce has initiated sunset review of anti-dumping duty levied on Peroxosulphates (also known as 'Persulphates') from China or Japan by its Notification No. 15/9/2011-DGAD, dated 13-3-2012. Notification No. 96/2007-Cus., imposing ADD on the said goods from such countries has expired on 18-3-2012.

Viscose rayon filament yarn from China – ADD extension recommended: Consequent to sunset review, the Indian Ministry of Commerce has recommended extension of anti-dumping duty on viscose rayon filament yarn of specified deniers from China. Notification No.15/23/2010-DGAD, dated 24-2-2012 issued for this purpose asks for imposition of ADD on ad valorem basis instead of specific duty as prevalent earlier vide Notification No. 45/2006-Cus.

Vitamin A Palmitate from China or Switzerland – Sunset review initiated: Indian Ministry of Commerce has initiated sunset review of anti-dumping duty imposed on Vitamin A Palmitate from China or Switzerland as Notification No. 15/7/2011-DGAD, dated 23-3-2012 reveals. Finance Ministry's Notification No. 112/2007-Cus., imposing such levy has lapsed on 27-3-2012.

Plain Gypsum Plaster Boards from China, Indonesia, Thailand and UAE – Provisional ADD recommended: Provisional anti-dumping duty on fixed duty basis has been recommended on imports of Plain Gypsum Plaster Boards from specified countries. The preliminary findings dated 19th March 2012 [Notification No. 14/45/2010-DGAD] exclude various items like fire boards, impact boards, heat boards and specified gypsum ceiling boards from the scope of anti-dumping duty.

Phthalic Anhydride (PAN) – Safeguard duty recommended: The Director General (Safeguards) has recommended safeguard duty on imports of Phthalic Anhydride into India. The said duty at the rate of 10% has been recommended in final findings dated 29th March 2012 issued under Notification No. GSR D-22011/8/2011 for a period of one year on imports from any country other than developing countries. However, the exclusion for developing countries would not cover imports from Pakistan, China and Thailand.

Carbon Black from China – Safeguard duty recommended: Provisional specific safeguard duty at the rate of 30% ad-valorem minus anti-dumping duty has been recommended to be imposed on carbon black for rubber applications imported from China. The recommendation contained in preliminary findings dated 16th March 2012 in Notification GSR D-22011/12/2011 by DG Safeguards, if accepted by Ministry of Finance, will be in force for a period of 200 days from the date of imposition pending final determination of market disruption and threat of market disruption.

Trade remedy measures against India

Stainless steel fasteners and their parts – EU terminates ADD: The European Union has by its Commission Decision dated 22-3-2012 in 2012/163/EU has terminated the levy of anti-dumping duty on stainless steel fasteners and their parts after it found absence of material causal link between dumped imports and injury suffered by the industry in EU. It may be noted that only last month EU had imposed provisional countervailing duty on such imports from India.

WTO News

US complains India's import prohibitions on agricultural products

The United States of America has complained against India's import prohibitions relating to poultry and poultry products including meat, eggs, day-old chicks, wild birds & products obtained therefrom for industrial or agricultural use and live pigs (DS 430). India had imposed the prohibitions because of concerns relating to out-break of Avian Influenza and the disputed provisions were incorporated under the Livestock Importation Act and number of orders issued thereunder. As per communication dated 6th March, 2012 circulated in accordance with Article 4.4 of the DSU of the WTO, the US has sought consultations with India while stating that the provisions were inconsistent with Articles 2.2, 2.3, 3.1, 5.1, 5.2, 5.5, 5.6, 5.7, 6.1, 6.2, 7, and Annex B, paragraphs 2, 5, and 6 of the Sanitary and Phytosanitary Measures Agreement; and Articles I and XI of the GATT 1994. The letter also states that the measures also appear to nullify or impair the benefits accruing to the United States directly or indirectly under the cited agreements. The WTO's Agreement on the Application of Sanitary and Phytosanitary Measures explicitly recognizes that WTO Members have the right to adopt regulations to protect human, animal, or plant life or health.

US appeals 'US COOL' panel report

USA has notified the Dispute Settlement Body of the WTO on 23-3-2012 of its decision to appeal the panel reports (DS384 and 386) in the disputes relating to certain labeling requirements it had imposed on meat products. As per the provisions which were collectively called as COOL measures (Certificate Of Origin Labeling), retailers were under obligation to inform the buyers, the country of origin of the product, mainly beef and pork. The provisions further provided that a product can be said to be of US origin only when the animal from which the product is derived in born, raised and slaughtered in the US. The DSB panel had held the provisions as violative of Articles 2.1 and 2.2 of the TBT Agreement but had provided leeway to the US when it observed that the objectives of US provisions were legitimate. On a related development, issues concerning India's labeling requirements for drugs and cosmetics and food safety laws have also been raised time and again before the TBT committee.

EU, Japan and US challenge China's rare earths export restrictions

China's restrictions on export of various forms of rare earths, tungsten and molybdenum have been complained by the European Union, USA and Japan

before the DSB of the WTO as they sought consultations with China on the same. As per letter circulated, China imposes various export restrictions including export duties, quantitative restrictions and licensing requirements through measures published as well as unpublished. These measures, as per reports, significantly distort the market and favour Chinese industry at the expense of companies and consumers in other countries who use such raw materials in hi-tech and green businesses, cars and machinery manufacturing, chemicals, steel and non-ferrous metal industries. On 30th of January this year the WTO had held that China's export restrictions on several other industrial raw materials were in breach of the WTO rules (DS394, 395 and 398). India was one of the third parties to the earlier dispute.

Boeing subsidy dispute – DSB Appellate Body partially upholds panel report

In one of the longest lasting disputes, the Appellate Body of the DSB has on 12-3-2012 presented its report concerning the alleged subsidization of the large civil aircrafts produced by Boeing (DS 353). The Appellate Body held that the measures under the eight NASA R&D programmes and the 23 US-DOD Research, Development, Test, and Evaluation ("RDT & E") programmes for payments and access to facilities, equipment and employees provided to Boeing constituted financial contributions within the meaning of Article 1.1(a)(1) of the Subsidies and Countervailing Measures (SCM) Agreement and conferred a benefit on Boeing within the meaning of Article 1.1(b) ibid. The Appellate Body also upheld the panel's findings that the reduction in tax rate by Washington State was a financial contribution and is a specific subsidy. The Appellate Body finally recommended that the DSB request the U.S. to bring its measures so as to be consistent with the SCM Agreement. This report has also been adopted by the DSB on 23-3-2012. In another dispute of similar nature wherein Boeing was affected by EU's subsidy to Airbus (DS316), the US has decided to request for establishment of WTO's compliance panel to check whether EU has complied with the DSB Appellate Body report which held against EU.

FTA News

India's FTAs on right track

India is scheduled to sign some important and high profile Free trade Agreements with Australia, Israel and the EU this year. FTA between India and Australia is on the right track with third round of talks scheduled to be held between the two nations in Sydney in May this year. As per the Australian High Commissioner Mr. Peter Varghese, two-way trade between the two nations stood at $22 billion where one of the major contributors is coal. Discussions on the FTA with Israel are also at an advanced level with new areas being identified for engagement including water technology, agriculture, pharmaceuticals and life sciences. India-EU FTA is however facing some road blocks due to multiple issues like duty rate on automobiles and the implementation of the patent regime in case of pharmaceutical products. Meanwhile Turkey has also shown interest in having a Free Trade Agreement with India with the Turkish Ambassador stating that they were waiting for the Indian colleagues to give them a date for signing the joint study.

News Nuggets

Australia plain packaging legislation – Ukraine protests

Australia's 'plain packaging' legislation aimed at reducing smoking and improving public health faces opposition anew. This time Ukraine has complained to the WTO that the Australian law requiring tobacco products to be packaged in identical colours and packets is violative of Australia's obligations under TRIPS as well as provisions of Agreement on Technical Barriers to Trade (TBT) and GATT. The complaint alleges that by requiring tobacco products to be sold in standard packs, right-holders are prevented from exercising legitimate rights in respect of trademarks. It also states that the measures are unnecessarily restrictive and hence not in conformity with Article 2.2 of the TBT. Ukraine also objects to the Australian law on the ground that it does not accord equal treatment to imported products as compared to domestic products and that benefits accruing under various agreements have been nullified. The claim of unequal treatment appears weak since the law is applicable to domestic and foreign entities and the latter have an extended timeline to comply.

The issue was discussed at the TRIPS council meetings last year and in February. The Dominican Republic, Honduras, Cuba and Nicaragua had voiced concerns over restrictions placed on intellectual property rights and effects on tobacco industry as a whole. Honduras had suggested that the law could be amended to allow at least 50% of the front surface to display trademark, logos, etc instead of the current 25% of the surface allowed for displaying company name, brand and so on. India and the EU had supported Australia's right to use the flexibilities in TRIPs for implementing a public health measure. A major point of discussion is whether the issue is trade-related or only one of intellectual property rights. Australia also faces claims from a tobacco major under the Bilateral Investment Treaty with Hong Kong over this law.

Revised Government Procurement Agreement adopted

The WTO's Committee on Government Procurement has on 30-3-2012 adopted the revised Government Procurement Agreement (GPA) after a final review. The review was consequent to Ministerial Conference decision on 15th of December last year when a historic plurilateral agreement providing for opening up of domestic procurement markets for foreign traders was reached between 42 countries. The revised agreement will now go to the respective parliaments for ratification.

The agreement provides for more transparent set of rules for international public procurement though the respective governments are not expected to open up all of their procurements, and can specifically exclude some sensitive sectors. The agreement does not automatically apply to all government procurement of the parties but, its coverage is determined with regard to each party in annexes as provided in one of the appendices to the agreement. While China is one of the signatories to the agreement since 1997, India is an observer since 2010 along with 21 other countries (some of which are still negotiating WTO accession).

Statutory Update

Safeguard duty – Section 8C of Indian Customs Tariff Act set to be amended

The Indian Finance Bill, 2012 as introduced in the Parliament on 16th of March, 2012 proposes to amend Section 8C of the Customs Tariff Act, 1975 which is the parent provision for imposition of transitional safeguard duty on goods imported from China. As per the amendments the Central Government may continue the duties for a period of up to 10 years from the date of initial imposition of duty, notwithstanding the efforts taken by the domestic industry to adjust itself to meet such market disruption or threat arising thereof. Under the existing proviso to Section 8C (5), duties can be extended to the same length of time. The amendment includes a reference to the adjustment efforts taken by the domestic industry. There is no such reference in Article 16 of China's Protocol of Accession to WTO which forms the basis for the imposition of transitional safeguard duties against imports from China. The precise implications of this amendment are not clear.