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## Article

### Safeguard measures - Extension post-expiry, not correct

By **Atul Gupta & other team members, International Trade Practice**

The framework for duration and review of safeguard measures is provided under Article 7 of the Agreement on Safeguards (AoSG). In this regard Article 7.2 and Article 7.5 of the AOSG are relevant. While Article 7.2 provides for extension of the measure, Article 7.5 provides for levying duty “once again” i.e. a fresh levy after the expiry of time for which the previous safeguard measure was applied. The relevant provisions are extracted below:

*“2. The period mentioned in paragraph 1 may be extended provided that the competent authorities of the importing Member have determined, in conformity with the procedures set out in Articles 2, 3, 4 and 5, that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting, and provided that the pertinent provisions of Articles 8 and 12 are observed.”*

*“5. No safeguard measure shall be applied again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, for a period of time equal to that during which such measure had been previously applied, provided that the period of non-application is at least two years.”*

Import of Article 7.2 is that the period of original safeguard measure may be extended only after the competent authority of the importing member has determined need for continuation of the measure after following the procedures set out in Articles 2, 3, 4 and 5 of the AoSG. Initiation of review is at no stretch equated with the extension of measure.

As per the Oxford Dictionary of English, 3rd Edition (2010), the term “continues” means:

“continue: verb (continues, continuing, continued)  
- persist in an activity or process; remain in existence or operation; remain in a specified position or state; recommence or resume after interruption...”

The term “continues” in this Article 7.2 has to be given a contextual interpretation with respect to other provisions of Article 7 of the AoSG. Dictionary meaning of the term “continues” provides two different meanings. One meaning is “*remain in existence or operation*” while another meaning is “*recommence or resume after interruption*”. The former meaning can only be adopted for interpreting Article 7.2 because if the latter meaning is adopted for a reading of this Article, then the prohibition placed in Article 7.5 will become meaningless.

Article 7.5 prohibits resumption of application of a safeguard measure unless there is a gap of a certain time period (known as the “cooling off period”) between the expiry of the previous period and resumption of the application. Any interpretation, which suggests that a gap between the expiry of the period for which the measure was previously applied and its resumption is *permissible*, is inconsistent with Article 7.5 of the AoSG because such an interpretation will allow importing Member to bypass the prohibition contained in Article 7.5.

The initiation of review before or after the expiry of the period for which a safeguard measure was previously in force is inconsequential, *unless the determination* for an extension of period of such measure itself has been made *before such previous period is over and the measure is actually extended*

*before its expiry.* It is therefore incorrect to state that if an investigation is initiated before the expiry, then a determination for the continuation of duty may be made before or after expiry.

If the above proposition was true, such an interpretation will be correct even for the situation where the Authority for Safeguards initiates an investigation at any time, say in 1 or 2 years, where the expired measure was in force for a total period of four years in a developed country, *after expiry* of the period for which the previous safeguard measure was in force and further determine with regard to the continuation of the duty *after* some time from the date of initiation. However, such a situation is clearly covered and prohibited by the provisions of Article 7.5 of AoSG.

It is a well settled legal proposition that an interpretation shall be made in a manner which

gives meaning to each provision of the Agreement and does not result in an absurd situation. An interpretation which would render Article 7.5 redundant cannot be adopted. Therefore, Article 7.2 applies when a safeguard measure is to continue *without a gap* and Article 7.5 applies when a safeguard measure is to be applied “once again” or “applied afresh” *after a gap*, subject to a minimum gap of two years.

### Indian practice and its consistency with AoSG

In the past, the DG Safeguards prudently adopted the practice consistent with the above interpretation of AoSG. However, of late the DG Safeguards has been deviating from its well-established past practice; perhaps with the rationale that India has not enacted a legal provision corresponding to Article 7.5 of AoSG. Such a trend is evident from the following table:

S. No.	Product	Date of expiry of measure	Date of determination for continuation	Date of extension
1.	Phenol	29-6-2001	16-5-2001	28-6-2001
2.	Acetone	26-7-2002	4-2-2002	12-4-2002
3.	Soda Ash	19-4-2010	13-4-2010	28-6-2010
4.	Aluminium Flat Product	22-3-2011	13-10-2011 (terminated)	--
5.	Phthalic Anhydride	16-1-2013	7-6-2013 (terminated)	--

As is evident from the above table, if the DG Safeguards initiates a review at the fag-end of the investigation, the DG Safeguards may take some time to complete the review (so as to fulfill the procedure in Articles 2, 3, 4 and 5 of AoSG) and as a result, *the measure will recommence or be applied*

*again after a gap. Here it is pertinent to note that neither the legal provision relating to safeguard duty nor the AoSG provide for retrospective levy of duty.*

Retrospective levy of duty is possible only if such power is expressly provided in the statute.

Therefore, the decision to levy safeguard duty as a result of a review cannot 'relate back' to the date on which the duty previously in force expired. The higher judiciary while interpreting pari materia legal provisions held that once the decision to extend the time has not been taken before its expiry, continuity is broken and a subsequent decision is illegal. For a valid decision, not only a request for extension of time has to be made before the expiry of the period

but the order to extend also has to be passed within such time.<sup>1</sup>

In conclusion, it may be suggested that India needs to review its practice regarding review of safeguard measures in order to be fully compliant with its obligations under the WTO covered agreements, in particular the AoSG.

*[The author is a Principal Associate, International Trade Practice, Lakshmikumaran & Sridharan, New Delhi]*

## Trade Remedy News

### Anti-dumping /safeguard actions by India

Product	Country	Notification No.	Date of Notification	Remarks
Ductile Iron Pipes	China	15/1006/2012-DGAD	4-9-2013	Continuation of ADD recommended after sunset review
Electrical Insulators	China	14/11/2013-DGAD	5-9-2013	AD investigation initiated
Glass Fibre	China	14/21/2013-DGAD	19-9-2013	Mid-term review initiated to examine exclusion of Micro Glass Fibres
Methylene Chloride	EU, Korea RP and USA	14/19/2012-DGAD	6-9-2013	Provisional ADD recommended
Morpholine	China, EU and USA	15/5/2013-DGAD	18-9-2013	Mid-term review initiated
Sodium Nitrite	All Countries	GSRD 22011/03/2013	17-9-2013	Safeguard duty recommended for 2 years
Sodium Perchlorate	China	20/2013-Customs (ADD)	6-9-2013	ADD imposed for 5 years
Zinc Oxide	China	21/2013-Customs (ADD)	6-9-2013	ADD imposed for 5 years

<sup>1</sup> See *Tarsem Kumar v. Collector of Central Excise, Chandigarh*, AIR 1972 P&H 444; *Ambali Karthikeyan v. Collector of Customs and Central Excise*, 2000 (125) ELT 50; *Babu Verghese & Ors. v. Bar Council of Kerala & Ors.*, AIR 1999 SC 1281.

## Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Lined Paper Products	USA	78 FR 54235	3-9-2013	ADD and countervailing duty – Applications invited for administrative review
Oil Country Tubular Goods	USA	78 FR 56865	16-9-2013	Due date for completion of preliminary determination in countervailing duty investigations extended till 29-11-2013
Pyridine	China	MOFCOM Announcement No. 62 of 2013	22-9-2013	Anti-dumping investigation extended by two months
Stainless steel wires	EU	Council implementing Regulation (EU) No 861/2013	7-9-2013	Definitive countervailing duty imposed
Steel Threaded Rod	USA	78 FR 56217	12-9-2013	Due date for completion of preliminary determination in countervailing duty investigation extended till 25-11-2013
Silicomanganese	USA	78 FR 58556	24-9-2013	Second Review of ADD - USITC determined that revocation of AD order likely to lead to continuation or recurrence of injury
Shrimp	USA	Inv. Nos. 701-TA-491-493, 495, and 497 (Final)	20-9-2013	Countervailing duty investigations terminated

## WTO News

### Indonesia also disputes Australian tobacco plain packaging provisions

Indonesia has on 20-9-2013 notified the WTO for consultations with Australia on the latter's plain packaging requirements applicable to tobacco products and packaging. The Australian measures which establish comprehensive requirements regarding the appearance and form of the retail

packaging of tobacco products, as well as the tobacco products themselves, are being alleged to be inconsistent with Australia's commitments under TBT Agreement, TRIPS Agreement, and the GATT 1994. This is the fifth case, before the WTO, against Australia for these controversial measures. Ukraine, Honduras, Dominican Republic and Cuba have already knocked the doors of WTO

and the DSB has established a panel in the dispute involving Ukraine, where India along with 34 other countries has reserved third party rights. Further, the DSB committee has, on 25-9-2013, established a separate panel in the dispute involving Honduras.

### **Russia joins Information Technology Agreement**

The Russian Federation has joined the WTO's plurilateral agreement on Trade in Information Technology Products. Russia's entry as 78th Member of the Information Technology Agreement was confirmed, on 13th of September, by the Committee of Participants in the Expansion of Trade in Information Technology Products. This commitment to join the ITA was undertaken by Russia while it joined the WTO last year in August. The Agreement requires the participants to completely eliminate duties on IT products covering computers, semiconductors, software, etc. Interestingly, consultations to further enhance the scope of this agreement were suspended in July this year when China and India backed out of proposal to include several products like cell phones, tablets and flat-panel televisions for duty concession. [For

*News report on suspension of talks, please refer International Trade Amicus-August 2013 issue]*

### **Panel established on Panama's request against Colombian compound tariff**

The Dispute Settlement Body of the WTO has, on 25th of September, 2013, established a panel, on second request of Panama, in the dispute *Colombia - Measures Relating to the Importation of Textiles, Apparel and Footwear (DS461)*. The measure under dispute is compound tariff that Colombia has imposed on the importation of certain textiles, apparel and footwear. As per Panama, the measures are inconsistent with various provisions of GATT, 1994, inasmuch as application of compound tariff results in imposition of levies in excess of those resulting from the application of the ad valorem tariff; appear to accord the affected imports treatment less favourable; specific levy appears not to have any link with any service rendered and; this specific levy was not in force on 15-4-1994 (Relevant date for recording "other duties and charges" under paragraph 2 of the Understanding on the Interpretation of Article II:1(b) of GATT).

## **News Nuggets**

### **USA begins investigation of India's discriminative policies**

The USITC has begun an investigation into the trade, investment, and industrial policies of India and their effects on the U.S. Economy. The ITC will conduct an investigation regarding Indian industrial policies that discriminate against U.S. imports and investments for the sake of supporting Indian domestic industries, and the effect that those barriers have on the U.S. economy and U.S. jobs. The Commission will

provide in its report an overview of trends and policies in India, focusing on period since 2003, affecting trade and FDI in India's agriculture, manufacturing and service sectors, as well as the overall business environment. The Commission will provide case studies that examine the effects of particular restrictive measures on U.S. firms that export to or invest in India, or that have not done so because of the measures. A public hearing is scheduled to be held at the USITC on February 13, 2014. The deadline for receipt of requests to appear in the public hearing is January 21, 2014.

## Ratio Decidendi

### ADD Interim Review – Use of different methodology for calculation of dumping margin

The European Union's Court of Justice (ECJ) has, on 19-9-2013, held that at the time of the review, it was not necessary to re-establish the symmetry between normal value and export price, in case the reason of adjustment, namely the part refund of VAT to the Chinese exporters, as was present during the time of original investigation, had ceased to exist at the time of review. The court held that even if it was accepted that the Council, in the review procedure, had adopted a method of comparison different from that used in the original investigation, it has been demonstrated, that between the original investigation and the review procedure the circumstances had changed and,

that this change was of such a nature as to warrant abandoning such an adjustment.

Earlier, in the original investigation the EU authorities had deducted VAT both from the normal value and the export price, but during review proceedings, VAT was not deducted. The court below (General Court) noticed that while partial refund of VAT was granted to the exporters during the period of original investigation, the exporters did not get any refund during the review investigation period. It was also held by the General Court that the method did not inflate the dumping margin inasmuch as it added VAT portion on both sides of the equation (i.e. with export price and with normal value) and hence was neutral. [*Dashiqiao Sanqiang Refractory Materials Co. Ltd. v. European Commission – ECJ Order dated 19-9-2013 in Case C-15/12 P*].

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