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## Article

### India tightens anti-dumping provisions - Anti-circumvention rules introduced

By **Manoj Gupta**

India has joined the select group of countries that have put in place anti-circumvention law to address issues relating to circumvention of antidumping duties. The law has been introduced in two stages. First, sub-section (1A) was inserted into Section 9A of the Customs Tariff Act 1975 through the Finance Act, 2011 that came into force from 8th April 2011. Secondly, the relevant rules have now been framed vide Customs Notification No. 6/2012-Cus. (N.T.), dated 19th January, 2012. Four new rules 25 to 28 have been added to address anti-circumvention issues. Section 9A(1A) read with the rules grant the power to the Indian Central Government to impose anti-dumping duty in case it finds that the same is being circumvented.

Circumvention can arise in three situations, as per the new rules. First, when an article liable to anti-dumping duty is imported into India in an unassembled, unfinished or incomplete form and is assembled, finished or completed in India. Alternately, export from the countries subject to anti-dumping duty may be made in an unassembled, unfinished or incomplete form to any other country not subject to anti-dumping duty and the assembly, finishing or completion operation is carried out in that country from where the goods are imported into India. In both the cases, value addition in India or the third country concerned shall not be less than 35%. Further, such operation should have started or increased after or just prior to the levy of anti-dumping duty. For calculation of value addition, payments relating to intellectual property rights, royalty, technical know-how fees and consultancy charges are not to be taken into account.

Secondly, the goods are held to be circumventing anti-dumping duty when even minor alteration in form or appearance of the article has been made when they are

imported from countries earlier notified for the purpose of the levy [Rule 25(2)].

Thirdly, when the goods are routed through any other exporter or country which was earlier not notified for such duty, the goods would be held as circumventing the duty if it is proved that the goods were so routed because of the change in trade practice or pattern. It has to be established that there was no justification, other than imposition of anti-dumping duty, for such changed trade pattern and that the remedial effect of the anti-dumping duty was undermined [Rule 25(3)].

The designated authority can *suo motu* or pursuant to an application in this regard by the domestic industry initiate investigation to determine the existence and effect of any alleged circumvention where it is satisfied that such imports are dumped.

#### *Scenario around the world*

Anti-dumping Agreement (ADA) of the WTO, on the basis of which the Indian rules are framed, does not provide for such provisions. This was considered before the Ministers of the representing countries in the WTO where no consensus was reached during the Uruguay Round. The matter was referred to Committee on Anti-dumping Practices which has further established an Informal Group on Anti-Circumvention to carry out the task of defining uniform rules in this regard. Hence, it is very much doubtful as to what would be the fate of such provisions if challenged in the DSB of the WTO (Article XX of GATT though provides for measures to prevent deceptive practices). However, US, EU, Australia, New Zealand, Japan and some of the Latin American countries like Mexico already have such set of provisions to levy anti-dumping duty on articles found to be circumventing such duty and till date no case

has been brought before the WTO in this regard (in DS89 the measures by US were challenged but the request for panel was withdrawn by Korea). These provisions, in fact, form the backbone of the basic anti-dumping investigations around the world. India has notified such provisions only now though industry had pointed out the requirement as early as in 2002.

### **Effect**

Will there be a sudden spurt in anti-dumping investigations, findings and notifications with the domestic industry making a bee-line to the designated authority's office? Ministry of Finance has also allotted separate suffix for anti-dumping notifications starting from 2012 and such notifications will no longer be issued under the

usual Customs head. Was this done to accommodate such rise in the number of notifications? There are also number of issues such as, whether the product after minor alteration [as in Rule 25(2)] will conform to "like article" theory for the purpose of calculation of normal value and what would be the scope of the alteration in the article to still be considered the same. Normal value calculation would also be a problematic issue when parts alone are imported. Routing of parts or components through third country also requires some consideration, as thorough understanding of even some of the FTAs is required. Only time will tell how the provisions are interpreted by courts and tribunals and how they really affect the trade.

*[The author is Assistant Manager, Lakshmikumaran & Sridharan, New Delhi]*

## **Trade Remedy News**

### **Anti-dumping / Safeguard Actions by India**

**Caustic soda from specified countries – ADD extended:** Anti-dumping duty on Sodium Hydroxide (Caustic Soda) from Saudi Arabia, Iran, Japan, USA and France has been extended till 1st of September, 2012. Notification No. 1/2012-Cus.(ADD), dated 6-1-2012 issued in this regard by the Indian Ministry of Finance amends basic Notification No. 98/2006-Cus., which had expired on 12-9-2011.

**Silk fabrics from China – ADD re-imposed:** Anti-dumping duty has been re-imposed on silk fabrics of weight 20-100 grams per metre when imported from China after more than a month from expiry of the levy. Notification No. 2/2012-Cus.(ADD), dated 13-1-2012 issued by the Indian Finance Ministry for this purpose also enhances the rate of ADD.

**Nylon Filament Yarn from specified countries – ADD re-imposed:** Nylon Filament Yarn (excluding high tenacity yarn of nylon and fishnet yarn of nylon) from China,

Chinese Taipei, Malaysia, Thailand and Korea RP will attract anti-dumping duty again. The levy had expired on 28-11-2011. Notification No. 3/2012-Cus.(ADD), dated 13-1-2012 excludes certain types of yarn if the landed price is more than a particular amount.

**Phosphoric Acid from Israel and Taiwan – Provisional ADD imposed:** Provisional anti-dumping duty valid for six months has been imposed on Phosphoric Acid from Israel and Taiwan. Notification No. 4/2012-Cus.(ADD), dated 13-1-2012 imposes ADD at lower rate in case of imports from Taiwan than on imports from Israel. The levy is not applicable to Phosphoric Acid (Agriculture / Fertiliser Grade).

**Cellophane Transparent Film from China – ADD re-imposed:** Anti-dumping duty on Cellophane Transparent Film from China has been re-imposed after expiry of the levy on 30-11-2011. Notification No. 5/2012-Cus.(ADD),

dated 13-1-2012 issued for the purpose also enhances the ADD rate.

**Saccharin from China – ADD extended:** Consequent to sunset review and recommendation to continue imposition of anti-dumping duty on Saccharin from China, Indian Ministry of Finance has extended the levy for another five years. Notification No. 7/2012-Cus.(ADD), dated 13-1-2012 imposes such duty at a lower rate. The previous notification which provided for a higher rate has been rescinded.

**Morpholine from China, EU and USA – Definitive ADD imposed:** India has imposed definitive anti-dumping duty on Morpholine imports from China, EU and USA. Notification No. 10/2012-Cus. (ADD), dated 24-1-2012 has been issued in this regard. Consequently, the notification on

provisional ADD has been rescinded.

**Geogrid/Geostrips/ Geostraps made of polyester or glass fibre from China – Definitive ADD imposed:** Definitive anti-dumping duty has been imposed by the Indian Ministry of Finance on imports of Geogrid/Geostrips/ Geostraps made of polyester or glass fibre from China. These items were not under provisional ADD during investigation. Notification No. 11/2012-Cus. (ADD), dated 24-1-2012 imposes such duty for five years.

**Phthalic Anhydride – Provisional safeguard duty imposed:** Provisional safeguard duty at the rate of 10% has been imposed by India on imports of Phthalic Anhydride. Notification No. 1/2012-Cus. (SG), dated 17-1-2012 issued in this regard imposes such duty for 180 days.

## WTO News

### DSB Panels constituted in three cases

On 20th January 2012, Dispute Settlement Body of WTO constituted three Panels. First one was requested by EU to review definitive anti-dumping duties imposed by China on X-ray security inspection equipment (DS425). According to EU the measure is inconsistent with China's obligations under several provisions of the Anti-Dumping Agreement (ADA). Second Panel was established on request by USA to review anti-dumping and countervailing duty measures imposed by China on broiler products (DS427). The United States said that China's dumping and subsidy determinations appeared to be inconsistent with China's obligations under the ADA. The US added that its concerns related to every phase of China's investigation.

The third Panel has been established to review measures applied by Canada in its renewable energy sector (DS426). Canada's feed-in-tariff measures are being challenged

by EU as the measures appeared to EU as internal sale or use of equipment for renewable energy generation facilities that accord less favourable treatment to imported equipment compared to local goods. According to EU, the measures granted subsidy because there would be a financial contribution or a form of income or price support. EU is concerned over what it calls as negative effects that such measure would have on the world-wide deployment of low-carbon technologies for electricity generation. India is keenly watching this case and is also third party to this dispute.

### Labelling disputes take centre stage – US Tuna case under appeal

Labelling requirements, as imposed by the U.S., were at the centre of dispute in the WTO last month. The U.S., on 20th of January, announced its decision to appeal against

the Panel Report in DS381 relating to USA's "Dolphin-safe labeling" requirements. As per reports, Mexico has also decided to appeal against the panel finding. The Panel had rejected Mexico's first claim under Article 2.1 of Technical Barriers to Trade Agreement (TBT) by holding that the U.S. dolphin-safe labelling provisions do not discriminate against Mexican tuna products and were hence not afforded less favourable treatment. As regards violation of Article 2.2 of the TBT, the Panel had found that Mexico had demonstrated that the US dolphin-safe labelling provisions are more trade-restrictive than necessary to fulfill legitimate objectives. Last month, the U.S. had decided to appeal in another labeling case (US COOL). India's labelling requirements for drugs & cosmetics and under Food Safety and Standards Regulations are also under scanner in the TBT Committee.

## Statutory Updates

### Refund of anti-dumping duty in certain cases – New rules notified

New rules relating to refund of anti-dumping duty have been notified by the Indian Central Board of Excise and Customs on 19th January, 2012. The rules deal with situation when the importer proves that anti-dumping duty in excess of the actual margin of dumping has been paid by him. Related amendments have also been made to provide for procedure for determination of amount paid in excess. The Refund of Anti-Dumping Duty (Paid in Excess of Actual Margin of Dumping) Rules, 2012 provide a time period of three months for filing refund applications to the Asstt./Deputy Commissioner of Customs at the port of importation. Refund shall be sanctioned within 90 days of filing application. While unjust enrichment provisions are applicable, this refund procedure not covers refund of excess anti-dumping duty which is refundable under Section 9A(2) of the Customs Tariff Act, 1975.

### Chinese export measures held as inconsistent by Appellate Body

The DSU Appellate Body, on 30th January, 2012, circulated its report relating to certain Chinese export measures restricting export of specified raw materials (bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorous and zinc) from China. The complaint was filed by the U.S. stating that the measures nullified benefits accruing to USA, EU and Mexico directly or indirectly (DS394, DS395 & DS398). Appellate Body report upholds the panel report that the measures, including export duties, export quotas, minimum export price requirements and export licensing requirements were inconsistent and not in conformity with the Chinese obligations. India was also present as third party to the dispute.

### New ADD anti-circumvention provisions brought

New rules have been inserted in the Indian anti-dumping rules to impose anti-dumping duty in cases where anti-dumping duty is found to be circumvented. Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 have been amended by Notification No. 6/2012-Cus. (N.T.), dated 19th January, 2012 to insert Rules 25 to 28 in this regard. Circumvention can arise in three situations, as per the provisions. Import of goods in unassembled form and value addition below specified level, imports after minor changes and routing through non-notified countries are covered. The designated authority can suo motu or on an application by the domestic industry, initiate investigation to determine the existence and effect of any alleged circumvention.



## News Nuggets

### **ADD investigations – Period for filing application by interested parties reduced**

Interested parties to anti-dumping investigations initiated by India will be required to file their applications within 15 days of the publication of initiation notice. As per the Trade Notice No. 1/2012, dated 9-1-2012 issued by Directorate General of Anti-dumping and Allied Duties any request at later date would not be maintainable. Information presented before the Designated Authority in oral hearing should be provided in writing by interested parties within 5 days. Soft copy of the submissions should be provided to the authority besides sending non-confidential version of the submissions to all other participating interested parties.

### **India to set up new DGTR for anti-subsidy actions**

Subsidies provided by Indian Government on export of goods have constantly faced the onslaught of countervailing duty actions in other countries especially in the U.S. and EU. While India has initiated several anti-dumping and safeguard duty actions, it has initiated countervailing duty investigation in just one case despite the WTO Subsidies and Countervailing Agreements permitting such action. The Indian Government is now planning to set up Directorate General of Trade Remedies (DGTR) which will be in charge of anti-dumping and countervailing duty actions. It is indicated that the anti-subsidy measures are more likely to hit exports from China.

### **Importers & exporters to comply with more reporting obligations**

Last month Argentina and Canada announced certain measures to regulate their imports and exports respectively. From 1st February, 2012, Argentina will ask companies to obtain permission from AFIP, the country's tax agency, before they import foreign-made goods. Canada is imposing an electronic reporting policy for exporters from 1st of April this year. Under Argentina's new regime,

importers will be required to file a sworn statement to the tax agency, which will be studied by competent authorities and then wait for approval or otherwise. As for the Canadian measures, the Canada Border Services Agency will require exporters to declare export shipments destined to non-U.S. destinations according to prescribed timeframes depending on the mode of transportation for export. While for exports through marine route, declaration has to be made 48 hours before loading of the goods, in case of any other mode, like air, rail or post, such declaration should be made in two hours.

### **U.S.-led trade bloc facing rough weather**

Taiwan has indicated its willingness to join the Trans Pacific Partnership Agreement (TPP). TPP seeks to establish a free trade area covering comprehensive market access in goods, services and investments, developing a single-tariff schedule and common rules of origin and includes agreements on intellectual property, government procurement, competition policy and labour rights protection. This coalition of the willing, in face of rising protectionist tendencies around the world, has hit quite a few roadblocks. Even as negotiators try to arrive at a consensus on about 11000 tariff lines, automotive, textile and footwear industries in the US are wary of losing their competitive edge. Further, with expiration of the Presidential Fast-track or Trade Promotional Authority which enables an US President to negotiate trade agreements and present the Congress with treaty text, implementing the agreement through legislation in national law may not be smooth.

New Zealand will have to amend its intellectual property laws granting longer term for protection of copyrights, ban on parallel importation of patented products and provide for patentability of new uses of known products. Opening up agriculture sector is a major area of concern for Canada and Japan who are interested in TPP membership. China, an important economic partner in the region is not part of the negotiations.

## FTA News

### Arbitration clause snowballs in India-EU FTA talks

The EU-India FTA continues to be news-in-the-making. Investor-State arbitration clause may be the newest spoke in the wheel. This clause allows foreign corporations to sue a national government when any policy/legislation by the latter is perceived to have diminished the corporation's anticipated profits or subjected it to 'unjust treatment'. This clause is a part of many Bilateral Investment Treaties (BITS) and FTAs and has been actively used in the recent past against countries like Argentina which faced over 30 claims in wake of financial crisis in 2001-2003. India has been wary of the investor-State arbitration clause as is evident from the CEPA with Singapore. Reports suggest that even though Indian companies also get benefitted from such clauses vis-a-vis their overseas operations, India will not include the investor-State arbitration clause in its pact with EU.

### Chile pushes for full-fledged trade pact with India

Chile intends to convert its present Preferential Tariff Agreement with India into a full-fledged FTA covering investment and services also. The two countries are expected to meet this month to discuss broadening of the contours of the PTA. Chile has expressed its desire to take the list of items covered to more than 1000. India, presently, grants preferential import duty benefit to items under 164 tariff lines from Chile. The economic ties may be scaled up with a Comprehensive Economic Partnership Agreement also on the cards. Balance of trade is currently in favour of Chile. But with the traditional markets like U.S. and Europe reeling under recession, India is aggressively looking for new markets and Latin American countries have been successful in luring India and China.

## Ratio decidendi

### Domestic producer cum importer/related to importer/exporter excluded from definition of "Domestic Industry"

The Madras High Court has held that the amended Rule 2(b) of the Anti-Dumping Rules, 1995 (as amended in 2010) leaves no discretion with the Designated Authority to bring in an excluded category into the definition of domestic industry and treat the domestic producer,

who himself is an importer or is related to importer or exporter, as part of domestic industry. Petition was filed by the importer against preliminary findings dated 2nd September 2011 of DGAD relating to anti-dumping investigation concerning imports of soda ash. The court also held that the understanding of proviso to Rule 5(3) of the AD Rules has to be in tune with Rule 2(b) *ibid*. [*Saint Gobain Glass India Ltd. v. Union of India* – W.P. No. 23515 of 2011, decided on 23-12-2011].

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