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Article

Lacunae in the Indian New Shipper Review AD investigations

By **T.D. Satish**

In anti-dumping investigations normally an 'all others rate' is also determined to cover exporters who had not participated in the investigation. However, there may arise a situation where a foreign producer who had not previously exported his products to the investigating country might be desirous of doing so subsequent to the levy of duty. This may arise under two situations, namely, the producer/exporter was not in existence at the time of original investigation or he did not have any exports to the investigating country during that period. Under both the situations, there existed no possibility for him to take part in the investigation and request for a separate rate of duty which may be lower than the 'all others rate' or the residual rate.

Article 9.5 of WTO's Anti-dumping Agreement covers the above situation. It provides that the investigating authority shall conduct a New Shipper Review (NSR) and determine an individual margin of dumping for any producer or exporter who had not exported the subject product to the importing Member during the period of investigation provided certain conditions are satisfied. This article (Article 9.5 of ADA) as adopted by India in the form of Rule 22 of Indian Anti-Dumping Rules (AD Rules), lays down that, in order to be eligible to file a request for such review, the producer should not have exported the subject products to investigating country during the period of investigation and also should not be related to any entity, which in turn has exported the subject product during the period of investigation and is attracting anti-dumping duties.

The Lacunae

Under EU Anti-Dumping Regulations, all the reviews, whether interim, expiry or new shipper, are covered under Article 11. Thus, procedures remain the same

for all the reviews. In contrast, India has separate Rule 22 for conducting New Shipper Review (NSR) and Rule 23 governing mid-term and sunset reviews. While procedures relating to Rule 23 reviews are well laid out, rules concerning new shipper reviews only give the power to conduct NSR and pre-conditions for requesting NSR. Procedures relating to conduct of NSRs have to be determined by reading Rule 22 of AD Rules along with Sections 9A(1) and 9A(6) of the Customs Tariff Act, 1975, which grant power to Central Government to make rules for conduct of anti-dumping investigations. Thus, the investigating authority in India enjoys very wide and discretionary power while conducting new shipper reviews, which give rise to a few important issues as discussed in the following paragraphs.

Prospective period of investigation

In normal anti-dumping investigations, the period of investigation is retrospective. Hence, in a normal investigation, the arms of an exporter/ producer are 'tied' as they cannot change their pricing decisions based upon the period for which its dumping margin would be determined. However, in case of NSRs, use of retrospective period may always not be helpful as the concerned producer/ exporter may not have exported anything during that period. As a result, a prospective period may be decided at the time of initiation and the investigation is based on such prospective period data. This leads to an apprehension that an unscrupulous new shipper may sell and report his exports at a higher price for that prospective period and get a favourable dumping margin. This issue came before Hon'ble Delhi High Court in the case of *H & R Johnson (India) Ltd v. Union of India* [2008 (232)

E.L.T. 390 (Del.)], wherein the High Court held that to remove or at least lessen the manipulations, there are 3 options available:

- (i) to permit exports without the levy of anti-dumping duty, which may wipe out the domestic industry;
- (ii) to permit exports after levy of anti-dumping duty, which may financially wipe out first time exporters;
- (iii) to permit exports on the basis of provisional assessments.

As the third option keeps a check on exporters and at the same time protects the interest of domestic industry, the High Court upheld the selection of a period of investigation that is prospective. However, this issue remains a bone of contention between opposing parties in NSR investigations.

Time limit for investigation

There is a marked divergence in Rule 22 of AD Rules as compared to Article 9.5 ADA. While Article 9.5 requires investigating authorities to initiate and conduct such reviews on *an accelerated basis compared to normal duty assessment and review proceedings*, no such guidance is prescribed for NSR investigations under Rule 22 of the Indian Rules. Because of this crucial departure in AD Rules, Indian investigating authorities treat such reviews as a normal investigation and take 12 months plus 6 months for completing the investigations. For instance, in the NSR investigation concerning Nylon Tyre Cord Fabrics from China, the entire investigation took 21 months to conclude. This is a clear violation of Article 9.5 of ADA. EU, in stark contrast, provides for 9 month deadline under Article 11(5) of its AD regulations, which is less than the time limit prescribed for a normal AD investigation.

Starting point for requesting a new shipper review

Rule 22 provides for a 'periodical' review to deter-

mine a separate dumping margin for exporters who had not exported during the period of review. The word 'periodical' may thus, include a period ranging from date of imposition of original anti-dumping duty levy until the date of lapse of anti-dumping duty. In fact, the CESTAT in *H & R Johnson (India) Ltd. v. Designated Authority* [2005 (185) E.L.T. 125 (Tri. - Del.)] clarified the meaning of the word 'periodical' and held that *"there are no time intervals intended by this expression and it only means that as and when the occasion arises to determine the individual margins, the designated authority may intermittently undertake a review. The review for determining individual margin, by its very nature, is case specific and does not require any full fledged investigation of the nature covered by Rule 5. This is why it was left to the designated authority when to undertake the review, without prescribing any time intervals."* In such a situation, an investigating authority would have to conduct multiple investigations for same product for each and every new shipper (though restricted to determination of dumping margin). For instance, in the case of Vitrified Porcelain Tiles from China and UAE, the investigating authority in India has conducted as many as 5 new shipper reviews with one more currently being investigated. For countries with limited resources and work-force handling anti-dumping investigations, as in India, this creates a further strain. At the same time, domestic industry has to necessarily take part in each and every new shipper review investigation to safeguard their interest. This gives rise to multiplicity of investigations.

New shipper review just before the lapse of fifth and the final year

The present practice in India suggests that if a request for new shipper review or even a mid-term review is in proximity to initiation of impending sunset review investigation, then the new shipper review or

mid-term review investigation is not initiated or pursued. This intention can be gathered from a recent finding in the case of Acetone from Singapore, EU, South Africa and USA, wherein the investigating authority decided to close the mid-term review during the course of investigation as a sunset review application was filed by domestic industry. This creates a huge problem for a new shipper, who comes into existence or decides to export to India during the third or fourth year of imposition. In such a circumstance, the new shipper would have to either start exporting at 'all others' or 'residual' rate of duty or as an alternate wait till the completion of sunset review investigation and then apply for a new shipper review. Either way, the new shipper has to unduly suffer.

Way forward

The entire concept of new shipper review hinges on the understanding that a new shipper, who has never exported his goods to the investigating country or the country that has levied anti-dumping duty should not be unduly penalized. Article 9.5 of ADA

was inserted on an assumption that the parties to the investigation would undertake fair business practices. The first issue has been to a large extent taken care by way of provisional assessment, which takes care of the interests of both the domestic industry and the new shipper. Since second issue is in direct conflict with Article 9.5 ADA, the problem can be resolved by modifying the Indian rule to be in line with the corresponding provisions of ADA. Third issue can be easily overcome by issuing a clarification as was done by issuance of Trade Notice 1/2008 dated 10th March 2008 and Trade Notice 1/2010 dated 17th May 2010, whereby procedure regarding initiation of sunset review and mid-term review investigation was clarified. For rectifying the fourth problem, the Indian authorities shall initiate a new shipper review as soon as a valid request is filed by an exporter and should not delay the initiation on the pretext that a sunset review is round the corner.

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Trade Remedy News

Anti-dumping / Safeguard actions by India

Acetone from EU, Singapore, South Africa and USA – Sunset review initiated: DGAD in the Ministry of Commerce has initiated sunset review of anti-dumping duty on imports of Acetone from European Union, Singapore, South Africa and USA. As per Notification No. 15/1/2012-DGAD, dated 15-6-2012 issued in this regard period of investigation is from 1-1-2011 till 31-12-2011.

Digital Offset Printing Plates from China and Japan – Provisional ADD imposed: Ministry of Finance, India, has imposed provisional anti-dumping duty on imports of Digital Offset Printing Plates from China and Japan. The ADD imposed by Notification No. 31/2012-Cus. (ADD), dated 4-6-2012 will remain in force for a period of 6 months.

Hot Rolled Products of Stainless Steel (300 series) from China – Safeguard investigation initiated:

Directorate General of Safeguards in the Ministry of Finance has initiated China specific safeguard investigation against imports of Hot Rolled Products of Stainless Steel (300 series). The investigation initiated by Notification dated 26th June 2012 is pursuant to request by a domestic stainless steel major.

Melamine from EU, Iran, Indonesia, and Japan – Definitive ADD recommended:

DGAD in the Ministry of Commerce has recommended benchmark/reference form of anti-dumping duty on imports of Melamine from EU, Iran, Indonesia and Japan. Notification No. 14/35/2010-DGAD, dated 1-6-2012 recommends ADD equal to the difference between the specified amount and the landed value. The amount specified is USD 1446/MT for imports from Iran and USD 1537/MT for imports from EU, Indonesia and Singapore.

Meta Phenylene Diamine (MPDA) from China – ADD investigation initiated:

India has initiated anti-dumping investigation on imports of Meta Phenylene Diamine (MPDA) from China. DGAD in the Ministry of Commerce has issued Notification No. 14/4/2012-DGAD, dated 19-6-2012 in this regard. MPDA is a chemical intermediate used for manufacturing dyes, engineering polymer, aramid fiber and in photography & medical applications.

Pentaerythritol from EU (excluding Sweden) – Definitive ADD imposed:

Indian Ministry of Finance has imposed definitive anti-dumping duty on imports of Pentaerythritol from the European Union (except Sweden). The ADD imposed by Notification No. 33/2012-Cus. (ADD), dated 20-6-2012 will remain in force for a period of 5 years from date of said notification.

Plain Gypsum Plaster Boards from China, Indonesia, Thailand and UAE – Provisional ADD

imposed: Ministry of Finance has imposed provisional anti-dumping duty on imports of Plain Gypsum Plaster Boards from China, Indonesia, Thailand and UAE. The ADD imposed by Notification No. 32/2012-Cus. (ADD), dated 7-6-2012 will remain in force for 6 months and would not be applicable on imports of fire boards, fire heat boards, impact boards, gypsum ceiling boards with moisture barrier, echo boards, heat boards, anti-mold boards or weather boards, thermal boards and gypsum ceiling boards with aluminium edges sealed in white film.

Soda Ash from China & other specified countries – Definitive ADD imposed:

India has imposed definitive anti-dumping duty on imports of Soda Ash (Disodium Carbonate) from China, EU, Kenya, Iran, Pakistan, Ukraine and the U.S. The levy will be in force for 5 years from 3rd July, 2012 according to Notification No. 34/2012-Cus. (ADD).

Anti-dumping actions against India

Circular welded pipe and tube – Affirmative determination in sunset review by USA:

United States on 14-6-2012 made a affirmative determination in sunset review holding that revoking the existing anti-dumping duty orders on circular welded pipe and tube from Brazil, India, Korea, Mexico, Taiwan, Thailand and Turkey is likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. As per News Release 12-068, the existing orders for the imposition of ADD will remain in place.

Sulfamethoxazole – ADD extended by China:

China has initiated sunset review of anti-dumping duty on imports of sulfamethoxazole from India. As per Announcement No. 33/2012, dated 15-6-2012 levy of such duty which was set to expire on 15th of June has also been extended. The review will end by 15-6-2013.

WTO News

Anti-dumping duty on Poultry Meat by South Africa - Brazil seeks consultations

Brazil has sought formal consultations with South Africa under the WTO dispute settlement mechanism against the latter's imposition of provisional anti-dumping duty on frozen meat of fowls of the species *Gallus Domesticus*, whole bird and boneless cuts from Brazil. As per consultation request dated 21-6-2012, Brazil considers that the preliminary determination and the imposition of provisional anti-dumping duties, as well as the initiation and conduct of the investigation are inconsistent with South Africa's obligations under the provisions of the GATT 1994 as also under Articles 2, 3, 4, 5, 6, 7, 12 and Annex I and Annex II of the Anti-Dumping Agreement.

China's anti-dumping and countervailing duty measures on electrical steel held inconsistent with WTO agreements

DSB panel in the WTO has held that the Chinese anti-dumping and countervailing duty measures on grain oriented flat-rolled electrical steel from USA are inconsistent with various provisions of WTO's Anti-Dumping Agreement and the SCM Agreement. In its report dated 15-6-2012 the panel has held that MOFCOM initiated countervailing duty investigations without sufficient evidence and did not require the applicants to furnish non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of information submitted in confidence. It was held that there was deficiency in the disclosure of related essential facts, public notice and explanation in connection with findings of material injury, price effects of subject imports and facts to calculate all other subsidy rate or dumping margin.

US labelling provisions violate WTO's TBT agreement

The appellate body of the DSB in the WTO has partly upheld the panel report when it held that the US COOL provisions which impose an obligation on retailers selling specific products in the United States to label those products with their country of origin are violative of Article 2.1 of the Agreement on Technical Barriers to Trade as they accord less favourable treatment to imported livestock. The appellate body held that the mandatory provisions create an incentive for processors to exclusively use domestic livestock and act as disincentive against using like imported livestock. The appellate body however reversed the panel findings as far as Article 2.2 of TBT is concerned and has held that the panel erred in finding that "the COOL measure does not fulfil the identified objective within the meaning of Article 2.2 because it fails to convey meaningful origin information to consumers". As per the provisions an article could be marked as of US origin when the livestock from which it is processed was born, raised and slaughtered in US only.

China blocks request for panel on its rare earth policy

China, on 10 July, 2012, rejected request by United States, European Union and Japan for establishment of panel to examine China's export measures on rare earths. Owing to China's decision, the DSB has deferred establishment of panel. The dispute relates to China's restrictions on the export of various forms of rare earths, tungsten and molybdenum in the form of export duties, export quotas, minimum export price requirements, export licensing requirements and additional requirements and procedures in connection with the administration of the quantitative restrictions. These measures are alleged to be inconsistent with

provisions of GATT 1994 and also China's Protocol of Accession.

EU measure on biodiesel

Indonesia and Argentina, at the meeting of the Council for Trade in Goods on 22 June 2012, criticized a recent Spanish Ministerial Order on biodiesel as unjustified discrimination against imports and in violation of the national treatment principle under Ar-

ticle III of the GATT 1994. According to them, the said measure affected developing countries' participation in the global chain of production, and discouraged their efforts at industrialization. EU however said that Spanish measure was in line with the renewable energy objectives of the EU, and that it did not prevent the importation of biodiesel from Argentina or other trading partners.

Statutory updates

India notifies Safeguard Rules to impose quantitative restrictions

The Indian Government has introduced Safeguard Measures (Quantitative Restrictions) Rules, 2012. These rules have been notified under the powers conferred by recently introduced Section 9A of the Foreign Trade (Development and Regulation) Act, 1992 providing for imposition of quantitative restrictions if goods are imported into India in increased quantities and cause or threaten to cause serious injury to the domestic industry. These rules, similar to those relating to safeguard duty investigation conducted by the Indian Finance Ministry, specify procedures for investigation concerning imposition of safeguard quantitative restrictions. These rules also state that any such quantitative restriction has to be applied on

non-discriminatory basis to all imports irrespective of its source.

India extends import ban on Chinese milk & milk products

India has extended its ban on import of milk and milk products from China. The prohibition would include chocolates and chocolate products and candies/ confectionary/ food preparations with milk or milk solids as an ingredient. As per DGFT Notification No. 4(RE-2012)/2009-14, dated 2-7-2012 the prohibition will be effective till 23-6-2013, or until further orders whichever is earlier. Before issue of the above notification, such prohibition was governed by Notification No. 91(RE – 2010)/2009-14, dated 26-12-2011 and it was effective only till 24-6-2012.

News Nuggets

Brazil to have currency swap agreements with other BRICS countries

Brazil and China have agreed to pay for trade transactions in local currencies (the Real and the Yuan or Renminbi). The agreement was reached at the UN Rio + 20 sustainable development summit, during a bilateral meeting between Brazilian President and the Chinese Prime Minister. Brazil's Minister of Finance said the reason for the local currency agreement is to shield the two countries from the international economic crisis, allowing them to withdraw funds for reciprocal investments. He also announced that similar currency swap agreements were under study with all the members of the BRICS group of nations (Brazil, Russia, India, China and South Africa). India presently has a currency swap agreement with Japan while China is having around 20 such swap agreements with different countries.

Normalising trade relations

Russia is expected to complete the process of its accession to WTO by end of July. The deadline is also

assuming importance for USA as it has to decide on whether to repeal application of the Jackson-Vanik Act to Russia and grant it Permanent Normal Trade Relations (PNTR) status or continue with the December 15, 2011 position of invoking Article XIII of the WTO Agreement.

USA will have to grant 'unconditional' MFN status to Russia as per WTO norms once Russia becomes a full-fledged member or be in violation of its WTO obligations. It could choose to deny PNTR status to Russia applying the Jackson-Vanik Act which was enacted in wake of emigration restrictions in Russia and seek 'Non-Application of Multilateral Trade Agreements between Particular Members' as per Article XIII. In such a scenario Russia and USA would not be bound by WTO rules and neither can enforce them against the other. Representations from various trade bodies and supporters of the recently introduced bill to extend PNTR to Russia state that, the Bilateral Cooperation Agreement (1992) between the two nations and practice of granting Normal Trade Relations (NTR) on conditional basis offer limited benefits to the USA.

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