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amicus

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First Anniversary Issue

Greetings.

It gives me great pleasure to bring you the First Anniversary Edition of our 'International Trade Amicus'. In June 2011, we started off with the first issue. During the first 12 issues, we have covered a number of topics ranging from cross-border investments to cross-border trade. We have tried our best to (a) keep the articles focused on the core issues, (b) ensure a high level of legal analysis, (c) present verified facts and avoid inadvertent errors, and (d) generally adhere to the publication deadlines. Except on one occasion, when the issue was deliberately delayed to cover the new changes in the Foreign Trade Policy announced so that our readers could be briefed about the new developments in a timely manner, we have managed to publish the newsletter generally on time. I congratulate the editorial team and all those who contributed articles, information, data, etc. for the successful completion of the first year.

You will be happy to know that 'International Trade Amicus' is also being published in Chinese language from January this year taking into account the demands from our Chinese readers. This is a proof that our publication is able to cater to the needs of the international community.

I request all our readers to share with us their esteemed opinion about this newsletter. Your opinion will help improve ourselves.

Looking forward to a more enriching interaction with every reader

V. Lakshmikumaran,
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Article

Levy of provisional anti-dumping measures in India

By **Atul Gupta**

Anti-dumping duty is a trade remedy measure against the unfair practice of injurious dumping. An anti-dumping duty shall be imposed only pursuant to a determination of dumping, injury and causal link made in accordance with the provisions of the Anti-dumping Agreement (ADA). However, to conduct an investigation as required under the provisions of the ADA would require time. In order to prevent injury being caused during the conduct of the investigation, a provisional measure may be imposed. Since the provisional measure is imposed without completing the investigation, it has to be imposed only for as short a period as possible. Article 7.4 of ADA states as follows:

“7.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.”

When countries examine whether a duty lower than the margin of dumping would be sufficient to remove injury, they apply ‘lesser duty’ rule. Thus, when a country applies lesser duty rule, the provisional measure may be imposed for a maximum period of 6 months and if not, for 4 months. India follows the ‘lesser duty’ rule and accordingly, provisional measures are applied for a

maximum period of 6 months in India. Upon completion of the investigation, definitive anti-dumping duty may be imposed.

In Mexico – Anti-dumping measures on imports of HFCS from USA¹, Mexico did not revoke the provisional measure after expiry of six months from the date of its imposition. The Panel ruled that in the light of the specific limitation on the period of application of provisional measures contained in Article 7.4, the application of the provisional measure beyond the six month period was inconsistent with Mexico’s obligation under Article 7.4 of the ADA. Mexico argued that Article VI of GATT 1994 condemns dumping if there is threat of injury to the domestic industry; therefore, its decision not to terminate the provisional measure was consistent with the spirit of Article VI. The Panel observed that the AD Agreement contains specific rules for the implementation of Article VI of GATT 1994 with respect, inter alia, to the period of application of provisional measures.²

Those rules are binding on all members, and arguments based on references to the “spirit” of the GATT 1994 are unavailing to justify a failure to comply with those rules. In India, the provisional anti-dumping duties are notified only for a period of 6 months. However, if the investigation is not complete and no final duty is levied before the expiry of the provisional duty, no anti-dumping duty needs to be paid by the importer. However, in some cases, the Indian Customs authorities insist that the importer pay provisional duty in order to

¹ DS 132

² Article 1 of the AD Agreement provides:

“An anti dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated¹ and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti dumping legislation or regulations.”

Further Article 18.1 of the AD Agreement provides:

“No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.”

safeguard the eventual duty liability that may arise upon the notification of final anti-dumping duty. This would amount to extension of the provisional duty beyond the legally permitted period of 6 months. There is no legal sanction for the said practice followed by the Customs authorities and hence, shall not be resorted to.

Normally, definitive anti-dumping duty shall come into force from the date of its imposition. However, in the circumstances mentioned in Article 10.2 of ADA, definitive anti-dumping duty may be imposed retroactively for the period for which provisional measures, if any, have been applied. The relevant provision is extracted below:

“10.2. Where a final determination of injury (but not of a threat thereof or material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which the provisional measures, if any, have been applied.”

The corresponding Indian legal provisions are contained in Section 9A(2) of the Customs Tariff Act, 1975 read with Rules 13 and 20 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (AD Rules). In terms of Rule 20(1), definitive anti-dumping duty shall take effect from the date of its publication in the official gazette, i.e., from the date of its imposition. Rule 20(2)(a) talks about the retrospective levy. The relevant portion is extracted here:

“20(2)(2) where a provisional duty has been levied and where the designated authority has recorded a final finding of injury or where the designated authority, has recorded a final finding of threat of injury and a further finding that the effect of dumped imports in the absence of provisional duty would have led to injury, the anti-dumping duty may be levied from the date of imposition of provisional duty.”

Article 10.2 of ADA provides that definitive anti-dumping duty may be applied for the period for which the provisional measures have been applied. Indian Rule 20(2)(a) states that the anti-dumping duty may be levied from the date of imposition of provisional duty. If the definitive anti-dumping duty is imposed before the expiry of the provisional duty, there will be no difference in the application of these two provisions. If the final anti-dumping duty is imposed after expiry of the provisional duty, under the Indian Rules, the final duty is automatically applied retroactively for the interregnum i.e. the period from the date of expiry of provisional duty till the date of imposition of final duty. The Courts have held that the definitive duty imposed under Rule 18 will fully apply with effect from the date of imposition of provisional duty and that there is no scope of creating a hiatus in the retrospectivity of anti-dumping duty in respect of the interregnum period.³ It is necessary to ensure that the provisions of ADA are uniformly applied in all the member countries. India should review its current laws and practices to make them fully WTO compliant.

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³ Apollo Tyres v. UOI, CESTAT New Delhi, Final Order Nos. 17-21/2005-AD, dated 9-9-2005; Commissioner of Customs v. Akash Trading Co., Kerala High Court, Customs Appeal No. 15, 16, 17 & 24 of 2006, decided on 15-7-2009; CC v. Samarth Industries, Bombay High Court, Customs Appeal No. 18 of 2009, decided on 15-12-2011.

Trade Remedy News

Anti-dumping / Safeguard actions by India

Acetone from Chinese Taipei – ADD withdrawn:

Anti-dumping duty has been withdrawn on imports of acetone from Chinese Taipei. Indian Finance Ministry's Notification No. 29/2012-Cus. (ADD), dated 29-5-2012 amends Notification No. 33/2008-Cus. in this regard.

Aniline from EU – ADD imposed: Anti-dumping duty has been imposed on aniline imported into India from the European Union. Ministry of Finance Notification No. 30/2012-Cus. (ADD), dated 29-5-2012 issued in this regard imposes ADD @ 110.72 USD/MT for a period of 5 years.

Dry Cell Batteries from China – ADD extended:

Anti-dumping duty on dry cell batteries from China has been extended till 12-4-2013 after the Indian Ministry of Commerce initiated the sunset review. Notification No. 25/2012-Cus. (ADD), dated 14-5-2012 of the Indian Finance Ministry amends Notification No. 57/2007-Cus. which had expired on 12-4-2012.

Partially Oriented Yarn from China – ADD re-imposed:

Anti-dumping duty has been re-imposed for five years on Partially Oriented Yarn (POY) from China. Indian Revenue Department's Notification No. 22/2012-Cus. (ADD), dated 2-5-2012 issued in this regard imposes same quantum of ADD on POY as imposed by earlier notification which expired on 10-2-2012.

Six Day Light Curing Press for bi-cycle tyres – ADD

withdrawn: Anti-dumping duty has been withdrawn on imports of Six Day Light Curing Press for curing bi-cycle tyres, from China. Notification No. 26/2012-Cus. (ADD), dated 14-5-2012 issued in this regard amends Notification No. 1/2010-Cus. which imposes 10% duty on imports of specified tyre curing presses from China.

Viscose Filament Yarn from China – ADD re-

imposed: India has re-imposed anti-dumping duty on viscose filament yarn from China. Notification No. 23/2012-Cus. (ADD), dated 4-5-2012 issued in this

regard imposes such duty for the period of 5 years on ad valorem basis while the notification which earlier covered the said product from China, till 24-2-2012, imposed ADD at specific rate.

White Portland Cement from UAE and Iran – ADD

extended: Anti-dumping duty on white Portland Cement from UAE and Iran has been extended till 11-4-2013 after the India's Commerce Ministry initiated sunset review of the said levy. Notification No. 28/2012-Cus. (ADD), dated 21-5-2012 issued in this regard amends Notification No. 56/2007-Cus. which had expired on 11-4-2012.

Zinc Oxide from China – ADD extended:

Consequent to initiation of sunset review in the case of anti-dumping duty on imports of Zinc Oxide from China, India has extended the levy till 6-5-2013. Notification No. 27/2012-Cus. (ADD), dated 18-5-2012 issued in this regard amends Notification No. 64/2007-Cus. which had expired on 6-5-2012.

Grinding Media Balls from Thailand and China

– Definitive ADD recommended: Definitive anti-dumping duties in the range of USD 158.80 to USD 187 per MT on grinding media balls (excluding forged grinding media balls) imported from Thailand and at the rate of USD 387.36/MT on such imports from China have been recommended by DGAD by Notification No. 14/34/2010-DGAD, dated 22-5-2012.

Pentaerythritol from Saudi Arabia – ADD investiga-

tion initiated: Anti-dumping investigations have been initiated on imports of Pentaerythritol from Saudi Arabia as per Indian Ministry of Commerce's Notification No. 14/11/2011-DGAD, dated 22-5-2012. Period of investigation is from 1-1-2011 till 31-12-2011.

Phthalic anhydride - Definitive Safeguard duty im-

posed: Definitive Safeguard duty has been imposed on Phthalic Anhydride imported into India from any country except the specified developing countries. The exclusion

given to developing countries is however not available to imports from Pakistan, China and Thailand. As per Notification No. 3/2012Cus.(SG), dated 29-5-2012 of the Indian Ministry of Finance, Safeguard duty of 10% is imposable on imports between 17-1-2012 to 16-1-2013. Consequently, notification imposing such duty provisionally has been rescinded.

Diocetyl Phthalate – Safeguard investigation initiated: Director General of Safeguards, India, has initiated safeguard investigation on imports of Diocetyl Phthalate (DOP) into India. As per the Initiation Notice dated 23-5-2012 in F.No. D-22011/ 13/2011, the period of investigation is from 2008-09 till the third quarter of 2011-2012.

Electrical Insulators from China – Safeguard investigation initiated: Director General of Safeguards in the Indian Ministry of Finance has initiated a Transi-

tional Product Specific Safeguard Duty investigation against imports of specified electrical insulators from China. The period of investigation is from 2008-09 till December, 2011 as per Initiation Notice dated 30-5-2012 in F.No. D-22011/14/2011. An anti-dumping investigation is also going on simultaneously against imports of electrical insulators from China.

Anti-dumping action against India

Carbon steel welded pipes – Canada initiates anti-dumping and anti-subsidy investigations: Canada has, on 14-5-2012, initiated both anti-dumping and countervailing duty investigations against imports of certain carbon steel welded pipes from India among other countries. Period of investigation is from 1-1-2011 till 31-12-2011 in both the cases and information has been sought by Canada Border Services Agency from the exporters etc. by 20-6-2012.

WTO News

‘Dolphin-safe’ labeling for tuna found discriminatory by WTO

Reversing the Panel’s finding, the Appellate Body in the DSB of the WTO has held that the USA’s ‘dolphin safe’ labeling provisions in case of tuna fish were inconsistent with Article 2.1 of the Technical Barriers to Trade (TBT) Agreement of the WTO (DS381). It held that the “dolphin-safe” labelling provisions modify the conditions of competition in the US market to the detriment of Mexican tuna products. The Appellate Body observed that the measure was not even-handed in the way in which they address the risks to dolphins arising from different fishing techniques in different areas of the ocean.

The Appellate Body, while reversing the finding of the Panel with regard to Article 2.2 of the TBT, held that the measure under consideration was not more trade restrictive than necessary to fulfil the USA’s legitimate objectives. As far as Article 2.4 of the TBT

is concerned, the finding of the panel that Agreement on the International Dolphin Conservation Program (AIDCP) was a relevant international standard was also reversed by the Appellate Body. Earlier, Mexico had challenged the US’s ‘dolphin-safe’ labelling provisions prescribing certain conditions for use of “dolphin-safe” label and requiring certain documentary evidence for such labeling, as inconsistent with various provisions of the TBT.

Poultry import restrictions by India - USA asks for constitution of DSB panel

The United States of America has, on 11-5-2012, asked the Dispute Settlement Body of the WTO to constitute a panel to resolve the dispute pertaining to India’s import restrictions on certain agricultural products (primarily poultry products) from countries having reported Avian Influenza (DS430). As per com-

munication from the delegation of the United States as circulated on 14-5-2012 in the WTO, India's measures as notified under legal instrument S.O. 1663(E), and also implemented through Indian Livestock Importation Act, 1898 and various orders issued by relevant department of Indian Government are inconsistent with India's commitments and obligations under Articles 2.2, 2.3, 3.1, 5.1, 5.2, 5.5, 5.6, 6.1, 6.2 and 7 of the Agreement on Application of Sanitary and Phytosanitary Measures (SPM) and Article XI of the GATT 1994. USA contends that even as India applies the measures in respect of imported goods, it does not apply similar avian influenza related controls with respect to like domestic products and their internal movement within India. According to the U.S., India's measures constitute import prohibitions or restrictions other than duties, taxes, or other charges.

Turkey questions India's marble import policy

India's marble import policy was questioned by Turkey on 10-5-2012 under the Committee on Import Licensing. The questions came up as follow-up to the communication already exchanged between the two on the issue. Turkey while raising the question as to whether the quantitative restrictions imposed by India for import of marble would be enough for India's total capacity for cutting and processing marble states that the quota of 500,000 MT is very restrictive, far away from meeting the market demands. Turkey further requested India to explain the rationale behind the import pricing policy and states that the price determined by India for the whole year makes the link between price and quality, as stated by India, arbitrary. As regards reliance placed by India on environmental concerns, Turkey has further asked if there is any scientific study that can be cited by India indicating that the marble processing and marble mining have hazardous effect on the environment and that they are similar.

US rejects Canada's request for joining the consultations between India and USA in the Steel CVD Dispute

Canada has, on 7-5-2012, communicated its request to DSB to join the consultations regarding trade dispute between India and the USA pertaining to imposition of countervailing duty on certain hot rolled carbon steel flat products from India. As per communication circulated to the DSB and to the delegates of India and the USA under Article 4.11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Canada stated that it has substantial trade interest in these consultations since the U.S. is the largest market for Canadian exports of hot-rolled carbon steel flat products. It is learnt that US has rejected Canada's request for joining the consultations.

India to complain against US tax on countries not under GPA

India is planning to file a WTO complaint against USA's 2% tax on goods and services imported from nations, which are not part of WTO's Agreement on Government Procurement (GPA). India is not a member to this agreement but is an observer. The tax has been imposed by "James Zadroga 9/11 Health and Compensation Act of 2010" which amends Internal Revenue Code of 1986 to provide for 2% excise duty on any foreign person receiving specified federal procurement payments against supply of goods or services. The amount collected is to be used to help the victims of 9/11 terror attack and those who fell ill following their work at the site of the World Trade Center. India views the decision to impose 2% additional tax as a violation of the MFN status under the WTO, which seeks to ensure non-discrimination among trading partners.

FTA News

India-Peru FTA in the offing

Peruvian Ambassador to India, Mr. Javier Paulinich, has recently said that both countries are ready to negotiate the signing of Free Trade Agreement. Both the countries have already had 2 rounds of discussions and it is expected that in second half of this year Peru and India will enter into a third and concluding round of talks to conclude an agreement for the promotion and protection of investments. As per reports a Peruvian delegation from the Private Investment Promotion Agency and the Ministry of Foreign Trade and Tourism will be coming to India to initiate a bilateral investment treaty, and will launch an FTA feasibility study. Peru is the fifth most populous country in the Latin America and currently having trade volumes of around USD 1 billion with India.

African economic blocs set to integrate

The Governments of the African countries presently organized in the East African Community (EAC), the Common Market for Eastern and Southern Africa (Comesa) and the Southern African Development Community (SADC) are mulling over a new Free Trade Area by integrating the 3 economic blocs consisting of 26 countries by 2014. The move aims to create a free market of 525 million people with an output of US\$1 trillion making it a global player and is intended to offset negative factors such as the high cost of doing business, the lack of infrastructure, and disagreements over harmonising of cross-border trade regulations. The region has been witnessing some interesting finds of oil and gas which would be helpful in overall development of the area.

Ratio Decidendi

'Domestic industry' – Jurisdiction of DA after amendment in 2010

The Madras High Court in W.P. No. 193 of 2012 & others has held that the February 2010 amendment to the definition of "Domestic Industry" has not taken away the discretionary power of the DGAD. In other words, DGAD had the discretion and continues to have the discretion to include within the scope of the term 'domestic industry' such domestic producers who are related to exporters or importers or are themselves importers of the product under investigation. Following this judgment dated 27th April 2012, it is likely that anti-dumping duties recommended vide final findings dated 17th February 2012 issued by DGAD will be soon implemented [*Nirma Ltd. v. Saint Gobain Glass India Ltd.* – W.P. No. 193, 194, 189, 195, 307 and 337 of 2012 decided on 27-4-2012].

Tribunal having no power to review – Time earlier granted for post-decisional hearing extended

The Customs, Excise & Service Tax Appellate Tribunal (CESTAT) by Miscellaneous Order No AD/M/2-4/2012-CU(DB) dated 14th May 2012, dismissed the application of domestic industry (Reliance Industries Ltd) for recalling the final order dated 11-8-2011 by which the matter was remanded to the DGAD for granting post-decisional hearing in the case of import of Polypropylene from Saudi Arabia, Oman and Singapore on the ground that the Tribunal does not have powers to review its own orders. The Tribunal also directed DGAD to complete the post decisional hearings with specific reference to the period upto the termination of duties in December 2011 in respect of Saudi Arabia and for the full period for other countries. Further, additional time of 6 months was granted to the DGAD to complete post-decisional hearing and come out with the final findings [*Advance Petrochemical Co. v. Designated Authority* – Misc. Order No. AD/M/2-4/2012-Cus., dated 14-5-2012].

News Nuggets

India releases supplement to Foreign Trade Policy

The Annual Supplement for the year 2012-13 to the Foreign Trade Policy has been released on 5th June, 2012 by the Indian Commerce Ministry. The policy while granting some relief to exporters in terms of additional benefits and extension of some of the presently available concessions, also tries to restrict the outflow of foreign exchange by allowing domestic procurement against some of the popular duty credit scrips. Major changes include the following:

- Zero duty EPCG scheme has been extended for one year (upto 31 March 2013) with its enlarged scope to cover even units that are availing Technology Up-gradation Fund Scheme (TUFS) for another line of business.
- New post-export EPCG scheme has been introduced under which the exporters may import capital goods on payment of duty and subsequently receive duty credit scrips on completion of export obligation. Since duties are paid upfront at the time of import of capital goods, export obligation is set at 85% of the normal level. This will obviate monitoring and reporting requirements and reduce transaction costs.
- North Eastern Region gets a boost: Under EPCG scheme, EO would be only 25% of the normal export obligation in case of imports by eight North-Eastern states.
- Export of green technology is being promoted: Under the EPCG Scheme, EO is reduced to 75% of normal levels in respect of export of 16 specified green technology products.
- Limited transferability of the scrips has been introduced in respect of Status Holder Incentive Scrips.
- The duty credit scrips granted under FPS, FMS,

VKGUY, SHIS, MLFPS, SFIS and AIIIS may be utilized for payment of central excise duty on goods procured from the domestic market.

- Under Advance Authorisation Scheme, import will be permitted at any of the EDI ports irrespective of the port in which the Advance Authorisation has been registered. There will be no requirement for Transfer Release Advice. This would reduce transaction costs.
- Under the new “e-BRC” system, banks would electronically transfer information relating to foreign exchange realization to the DGFT’s server. Exporters will not be required to make any request to the bank for issuance of BRC.

EU and U.S. to mutually recognise certified traders

Bilateral trade between EU and the US - two large trading blocs alternate between disputes over airbus subsidies or EU’s insistence on carbon trading by airlines and calls for an EU-US FTA. Striking a note of cooperation EU and the US have decided to recognise each others ‘safe traders’ or security certified operators. The joint decision is to be implemented from July 1, 2012. AEO or Authorised Economic Operator status is granted to an economic operator based on customs compliance, appropriate record-keeping, financial solvency, security and safety standards. Under the Customs-Trade Partnership Against Terrorism (C-TPAT) of the U.S., businesses are required to ensure that their security practices as well as those of others in the supply chain are adequate. It is believed that this mutual recognition of each other’s programmes – EU’s AEO and C-TPAT of the U.S. will help in smoother and faster flow of goods between countries. It is expected that business will benefit from reduced inspections and save on transportation costs. The EU has similar agreements with Switzerland, Norway and Japan.

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