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Article

Date of expiry of definitive anti-dumping duty

By **Atul Gupta**

It is a debatable issue from which date the period of 5 years should be reckoned for determining the date on which imposition of definitive anti-dumping duty would expire, if no sunset review is conducted before such expiry (Article 11.3 of WTO: ADA). This debate assumed significance in respect of Indian practice after the delivery of a recent judgment[1] by the Hon'ble Supreme Court. This issue may arise only if a duty is imposed retroactively under Article 10.2 and/or Article 10.6. Many of the luminaries started looking towards the west to understand this issue. In EU, the practice is to secure provisional anti-dumping duty by guarantee and then collect it as definitive anti-dumping duty retroactively.[2] It is also provided in Article 11(4) of EU Regulation that definitive duty may be levied on goods entered for free circulation no more than 90 days before the application of provisional measures. However, for sunset review, the date of "imposition" of definitive duty is taken into account and the date *from* which such definitive duty is levied and collected is ignored. Similar is the system in US. Though EU and US are long standing practitioners of anti-dumping duty law, the long usage may not make a practice consistent. WTO: ADA made departure from certain practices followed for a very long period (cumulation of injury investigation against countries dumping and countries subsidizing, requirement to export before initiation of new shipper review etc.).

A practice followed for long without being questioned may only appear consistent but that is not the ultimate test. Therefore, an examination of the provisions of the WTO:ADA is necessary. In this regard the following Articles may be of relevance:

"7.2 Provisional measures may take the *form* of a provisional duty or, preferably, a *security by cash deposit or bond* equal to the amount of the antidumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure, provided that the normal duty and the estimated amount of the antidumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures."

"10.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry)

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[1] *Commissioner of Customs, Bangalore* v. *G.M. Exports* – C.A. No. 3889 of 2006, along with 7814/2012, 7894/2015, 7895/2015, 5119/2012, 3082/2011 and 3086/2011, decided on 23-9-2015

[2] Article 7(3) of COUNCIL REGULATION (EC) No 1225/2009 dated 30th Nov, 2009 and Article 3 of COUNCIL IMPLEMENTING REGULATION (EU) No 1106/2013 dated 5th Nov, 2013

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, antidumping duties may be *levied* retroactively for the period for which *provisional measures*, if any, have been applied."

"10.3 If the *definitive* antidumping duty *is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected.* If the *definitive* duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be."

"10.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a *definitive antidumping duty may be "imposed" only from the date of the determination of threat of injury or material retardation,* and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner."

"10.6 A *definitive* antidumping duty may be *levied* on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that…."

"10.8 No duties shall be *levied retroactively* pursuant to paragraph 6 on products entered for consumption prior to the date of initiation of the investigation"

"11.3 Notwithstanding the provisions of paragraphs 1 and 2, any *definitive* antidumping duty shall be terminated on a date not later than five years *from* its *imposition*……"

"Footnote 12: As used in this Agreement "*levy*" shall mean the *definitive* or final legal assessment or collection of a duty or tax."

Footnote 12 defines the term "levy" as definitive duty. Article 7.4 provides for provisional measures which includes the "form of provisional duty". Therefore, interpretation regarding the computation of date of expiry cannot be different for cases where provisional measure was imposed in the "form of provisional duty" and where provisional measure resorted in any other manner like execution of bond. Article 10.2 does not provide imposition of definitive duty retroactively only in case where *provisional duty* was in force but also in all cases where *provisional measure* of any form was in force. It may also be noted that Article 10.6 also provides that a *definitive* antidumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures. It again contradicts the understanding that definitive duty is levied only on goods imported after final determination. Article 10.4 also indicates that *definitive antidumping duty may be "imposed" only from the date of the determination of threat of injury or material retardation.* That provides an indication about use of the words "imposed" and "from the date of determination". It means negatively that definitive duty may be levied from a date prior to the date of the determination. Article 10.8 again indicates that definitive duty may be levied *retroactively*, i.e. from the date prior to the date on which it is imposed.

Though Article 10.3 of WTO: ADA prohibits the collection of difference, however, this fact does not change the character of the duty imposed, levied and collected, i.e. the character of duty continues to be "Definitive" anti-dumping duty only.

In case where only a security or bond was obtained as provisional measure on imports, definitive duty can be collected retroactively in respect of such imports. In such case, it cannot be said that provisional duty was not imposed and therefore, the date from which this period of five years be computed would be the date from which definitive duty is imposed, i.e. the date on which provisional measure was imposed.

Further, in case where definitive duty is levied under Article 10.6, then the time period for expiry of definitive duty needs to be computed from date of such levy. Further, it seems illogical to say that though definitive duty may be levied and collected for 6 month plus 90 days prior to its announcement of imposition, such period may be excluded for computation of period of 5 years for expiry. The duty "levied" all through such period is only a definitive duty and there is only one duty, i.e. the definitive duty, which may be levied and retained. All the imports suffered only definitive anti-dumping duty.

In light of the above explanation, the words "from its imposition" used in Article 10.3 suggest a construction to calculate the time from the date *from* which definitive duty is imposed, levied and collected instead of from the date *on* which announcement by way of notification about such imposition published/issued.

Such an interpretation indicates that the practice followed in the west (EU and USA) for computation of period of five years may be wrong.

In light of above, it seems that definitive duty expires after a period of five years from the date from which imports suffered imposition, levy and collection of anti-dumping duty.

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Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
4,4 Diamino Stilbene2, 2Disulphonic Acid	China	F.No. 15/18/2015-DGAD	1-10-2015	ADD Mid-Term Review initiated

Product	Country	Notification No.	Date of Notification	Remarks
AA Dry Cell Batteries	China and Vietnam	F.No. 14/31/2014-DGAD	20-10-2015	Anti-dumping investigation initiated
Albendazole	China	F.No.14/31/2013-DGAD	5-11-2015	Definitive ADD recommended
All Fully Drawn or Fully Oriented Yarn/ Spin Draw Yarn/Flat Yarn of Polyester	China and Thailand	51/2015-Cus. (ADD)	21-10-2015	Definitive anti-dumping duty continued after Sunset Review
Clear Float Glass of nominal thickness	Pakistan, Saudi Arabia and UAE	53/2015-Cus. (ADD)	30-10-2015	ADD provisional assessment ordered for exports through specified exporter from Pakistan
Cold Rolled Flat Products of Stainless Steel	China, Korea RP, EU, South Africa, Chinese Taipei, Thailand and USA	F.No. 15/04/2014-DGAD	12-10-2015	Anti-dumping duty recommended to be continued in Sunset Review
Front Axle Beam and Steering Knuckles	China	49/2015-Cus. (ADD)	21-10-2015	Definitive anti-dumping duty continued after Sunset Review
Glazed/Unglazed Porcelain/Vitrified tiles in polished or unpolished finish with less than 3% water absorption	China	F.No. 14/14/2014-DGAD	13-10-2015	Anti-dumping investigation initiated
Gliclazide	China	F.No. 14/5/2014-DGAD	20-10-2015	Definitive Anti-dumping duty recommended
Hexamine	China and UAE	50/2015-Cus. (ADD)	21-10-2015	Definitive anti-dumping duty imposed
Jute Product	Bangladesh and Nepal	F.No. 14/19/2015-DGAD	21-10-2015	Anti-dumping investigation initiated
Melamine Tableware and Kitchenware	China, Thailand and Vietnam	F.No. 14/10/2014-DGAD	20-10-2015	Definitive Anti-dumping duty recommended
Methylene Chloride	China and Russia	F. No. 14/33/2014-DGAD	30-10-2015	Provisional ADD recommended

Product	Country	Notification No.	Date of Notification	Remarks
Narrow Woven Fabric	China and Chinese Taipei	52/2015-Cus. (ADD)	28-10-2015	Anti-dumping duty extended up to 5-10-2016
Phthalic Anhydride	Japan and Russia	F. No. 14/6/2014-DGAD	3-11-2015	Definitive ADD recommended
Plain medium Density Fibre Board of thickness 6 mm and above	China , Malaysia, Thailand and Sri Lanka	48/2015-Cus. (ADD)	21-10-2015	Definitive anti-dumping duty continued after Sunset Review
Polypropylene	Singapore	F.No. 15/14/2014-DGAD	23-10-2015	ADD Sunset Review investigation extended till 27-1-2016
Rubber Chemicals, namely, MBT, CBS, TDQ, PVI and TMT	China and Korea RP	F.No.14/5/2007-DGAD	30-10-2015	ADD on exports from specified entity from Korea RP reduced
Soda Ash	Turkey and Russia	F.No. 15/17/2015-DGAD	1-10-2015	ADD Mid-Term Review initiated

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Cold-Rolled Steel Flat Products	USA	[C-533-866] 80 FR 60881	10-9-2015	Dumping margin determined in final results of administrative review 2013-14
Corrosion-Resistant Steel Products	USA	[A-475-832] 80 FR 61793	14-10-2015	Preliminary Determinations of Antidumping Duty, Investigations postponed
Lined Paper Products	USA	[A-533-843] 80 FR 60628	7-10-2015	W. Avg. dumping margin of 11.77% determined for Kokuyo Riddhi and Navneet Publications in preliminary results of Administrative Review
Polyethylene Terephthalate Resin	USA	[A-533-861] 80 FR 62029	15-10-2015	W. Avg. dumping margins determined in Preliminary Determinations

Product	Country	Notification No.	Date of Notification	Remarks
Welded Stainless Pressure Pipe	USA	[C-533-868] 80 FR 65700	27-10-2015	CVD investigation initiated
		[A-533-867] 80 FR 65696		Anti-dumping investigation initiated

WTO News

India's import procedures for apples questioned by several WTO members

On 20th of October 2015, at the second meeting for the year of the Committee on Import Licensing, the EU and US have questioned India on latter's recent policy limiting the entry of imported apples through one port only, the Nhava Sheva port in Mumbai. EU requested for rationale of the measure and asked India what will happen to imported apples that are brought through other ports. USA also commented on the lack of comment period before the new policy was implemented. India however replied stating that the measure does not fall within the definition of an import licensing measure under the Agreement on Import Licensing Procedures and thus is not "fit for discussion under this Committee." It was also stated that the panel in dispute DS366 had not considered designating port of entry as a violation of import licensing provisions.

Chinese ADD investigation procedure held to violate WTO Agreement

The Appellate Body of the WTO's DSB has issued its report finding the Chinese ADD provisions to be inconsistent with various procedural and substantive provisions of the Anti-Dumping Agreement, and Article VI of the GATT 1994. The reports issued on 14-10-2015, in the cases *"China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes"* from Japan (DS454) and the European Union (DS460), broadly upheld the panel view in this regard. The report upholds the Panel's finding that China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by failing to determine an SG&A amount for a specified EU company on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product.

The Panel's finding that China acted inconsistently with Article 6.7 and paragraph 7 of Annex I by rejecting the company's request for rectification only on the basis that it was not provided prior to verification, was also upheld by the Appellate Body. MOFCOM allowing the full text of the petitioner's supplemental evidence to remain confidential was also found to be violative of Article 6.5 of the Anti-Dumping Agreement. The Appellate Body however found that the Panel had erred in its interpretation and application of Article 6.9 of the ADA and consequently reversed the Panel's findings in this regard. It was held that MOFCOM failed to disclose adequately the essential facts in connection with the data underlying determination of dumping concerning specified companies.

Ukraine files dispute against Russia over imports of railway equipment

On 21st of October 2015, Ukraine notified the WTO Secretariat that it has initiated WTO dispute proceedings against Russia regarding measures affecting the importation of railway equipment and parts into Russia. Ukraine alleged that as a result of the suspensions of conformity assessment certificates and the impediment to apply for new certificates pursuant to the newly adopted CU Technical Regulations, the Ukrainian producers can no longer export their railroad products to the Russian Federation. According to Ukraine, Russian measures appear to be inconsistent with Article I:1, III:4, X:3(a), XI:1, XIII:1 of the GATT, 1994, and various provisions of the Technical Barriers to Trade (TBT) Agreement of the WTO.

Panel established to study Indonesia's Safeguard measures on steel

The Dispute Settlement Body of the WTO has established a panel to study the complaint against the Indonesian Safeguard measures on imports of flat-rolled iron or steel products. The measures were disputed by Vietnam (DS490) and alleged to be inconsistent with Articles I:1, XIX:1(a) and XIX:2 of the GATT 1994; and Articles 2.1, 3.1, 4.1(a), 4.1 (b), 4.1(c), 4.2(a), 4.2 (b), 4.2(c), 12.2 and 12.3 of the Agreement on Safeguards. India has also reserved its third party rights in the dispute.

Safeguard investigations initiated on steel wire rods and flat-rolled products of iron

Chile has on 5-10-2015 initiated a Safeguard investigation on imports of steel wire rod. The National Commission of Chile has recommended imposition of a provisional safeguard duty of 37.8% on imports of steel wire rod.

Zambia has on 5-10-2015 notified the WTO's Committee on Safeguards that it has initiated on 10 July 2015 a Safeguard investigation on "Flat-Rolled Products of Iron, Non-Alloy Steel, Trailers and Semi-Trailers". Further, provisional measures, to last for 180 days from 10th July 2015 to 10th January 2016 have also been put in place by Zambia.

Ratio Decidendi

Targeted dumping – Time for filing allegations

United States Court of International Trade has upheld the Department of Commerce's practice that at the time of the underlying review, an allegation of targeted dumping has to be made at a reasonable time prior to the issuance of the preliminary determination. The appellant (Domestic manufacturers association) argued that the agency had failed to explain why the allegation (targeted dumping allegation) was untimely filed given the absence of any statutory, regulatory, or other deadlines requiring that such arguments be presented prior to the case briefs.

The Court in this regard observed that

although there were no established or articulated deadlines for the filing of targeted dumping allegations for administrative reviews, the appellant was not unaware of the department's practice which requires an allegation prior to the preliminary determination. It also noted the Department's explanation as to why it requires a targeted dumping allegation prior to filing an administrative case brief on the preliminary results, i.e., to provide interested parties an opportunity to comment on the results of a targeted dumping analysis, was not inherently unreasonable. [*Diamond Sawblades Manufacturers Coalition* v. *United States* - Slip Op 15 – 116, dated 21-10-2015, US CIT]

ADD – Use of alternate methodology to calculate dumping

US Court of International Trade has held that merely because the A-A methodology did not result in a significant dumping margin and the A-T methodology did, it does not necessarily follow that the statute permits the application of A-T to determine dumping margin. Earlier in the remand proceedings, Department of Commerce held that because substantial dumping was not found using A-A, but by using A-T, it was permissible for the Department to use the alternative A-T methodology. The Court in this regard observed that should the department choose to use the A-T methodology, the statute requires it to explain why the two general methodologies (A-A and T-T) could not be used. Noting that the Department had chosen a narrative rather than an explanation and has failed to satisfy the requirements of the statute, the Court again remanded the matter. [*Beijing Tianhai Industry Co. Ltd.* v. *United States* - Slip Op. 15-114, dated 14-10-2015]

News Nuggets

Lumbering though a trade dispute

The Softwood Lumber Agreement was a mutual agreement between US and Canada post the WTO ruling in DS 257 which found that the determination of countervailing duty by the US was incorrect. It was one of the biggest trade disputes between US and Canada wherein US alleged that Canada was subsidising its timber harvesters through various government programmes which enabled them to obtain timber from government lands at very low rates. The stumpage rates in Canada were fixed by the Canadian government. Following the ruling by the Appellate Body, USA refunded part of the duties collected by it and the two nations entered into the SLA which expired last month. As part of this agreement Canada levied export duty on exports of lumber products. Both sides have one year to rework their position during which US will not resort to imposition of duties.

However USA's lack of interest in renewing the Softwood Lumber Agreement (SLA) is being attributed to Trans-Pacific Partnership deal (TPP) which was concluded last month. It is said that that TPP with its new set of rules regulating trade, could address trade distortion issues without necessitating a separate agreement between the two nations who are part of the TPP agreement.

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