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## 国际贸易 法律月刊

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## Article 文章

### Anti-dumping duty – Power to grant exemption

#### 反倾销税 – 授予豁免的权力

By **Atul Gupta**

Generally duties are levied by the legislature. The statute as enacted by the legislature would indicate the nature, incidence and rate of levy. The statute may not contain detailed conditions for administration of the levy. Such conditions may be notified by the Government if the concerned statute grants power therefor. The taxation statute may also delegate power to the Government to grant exemption from the levy of duties in public interest or under other conditions as may be specified in the statute.

In this article, let us examine the legality of the notifications issued by the Central Government under Section 25 of the Customs Act, 1962 granting exemption from the levy of anti-dumping duty, safeguard duty and countervailing duty. The provisions of anti-dumping duty, safeguard duty and countervailing duty are analogous in nature for examining this issue. First of all, Section 25 of the Customs Act, 1962 empowers the government to exempt the goods of any specified description from the whole or any part of the duty of customs leviable thereon, if it is considered necessary in public interest.

Accordingly, only customs duties may be exempted under Section 25. Let us see whether anti-dumping duties are ‘customs duties’. Section 2(15) of the Customs Act defines “duty” to mean a duty of customs leviable under that Act. Section 12 of the Customs Act further provides that duties of customs shall be levied at such rates as being specified under the Customs Tariff Act, 1975, or any other law for the time being

in force, on goods imported into India. Section 2 of the Customs Tariff Act provides that the rates at which duties of customs shall be levied under the Customs Act are specified in the first or second schedules. Anti-dumping duty is neither levied under the Customs Act nor is the rate of duty specified in the first or second schedule to the Customs Tariff Act. Anti-dumping duties are levied under Section 9A of the Customs Tariff Act 1975. The Hon’ble Supreme Court has held that the anti-dumping duty is not a customs duty leviable under the Customs Act<sup>1</sup> and, therefore, the assessment provisions contained in the Customs Act are not applicable to assess anti-dumping duty. At that time though the provisions contained in the Customs Act relating to non-levy, short levy, refunds and appeals were applicable to anti-dumping duty in the same manner as they were applied in relation to duties leviable under the Customs Act [sub-section 9A(8)<sup>2</sup>].

To overcome such interpretations, the scope of sub-section 8 of Section 9A was enlarged. The amended Section 9A provides that the provisions of the Customs Act, the rules and regulations framed thereunder relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties as far as may be applied to the duty chargeable under this section (i.e. Section 9A of the Customs Tariff Act 1975) as they apply in relation to duties leviable under the Customs Act<sup>3</sup>. However, once again sub-section 8

<sup>1</sup> Civil Appeal No. 706 of 2005 decided on 8-9-2006 decided by the Hon’ble Supreme Court in *Sneh Enterprises v. Commissioner of Customs, New Delhi*

<sup>2</sup> Inserted by Section 89 of the Finance Act, 2000

<sup>3</sup> Substituted by Section 76 of the Finance (No.2) Act, 2004

was substituted<sup>4</sup> and at the same time a provision to validate it from January 1, 1995 was passed. This time the words ‘including those’ were added.

Now, one should examine whether the power to grant exemption from duty of customs delegated under Section 25 of the Customs Act, 1962 could be used by the Central Government to grant exemption from anti-dumping duty. In this regard, analogous provisions contained in Section 3 of the Customs Tariff Act relating to imposition of additional duty of customs equal to excise duty, sales tax, local taxes and other charges may be relevant. Sub-section 8 of Section 3 of the Customs Tariff Act borrows the provisions of the Customs Act and the rules and regulations made thereunder, including those relating to drawbacks, refunds and ‘exemptions from duties’ as they apply in relation to duties leviable under the Customs Act. Section 9A dealing with the levy of anti-dumping duty does not specifically borrow the provisions relating to grant of ‘exemptions’ provided for under the Customs Act, 1962.

Further, the Customs Tariff Act also provides for imposition of other duties such as safeguard duty under Section 8B, China specific safeguard duty under Section 8C, countervailing duty on subsidized article under Section 9. Sections 8B and 8C empower the Central Government to grant exemption only to such *quantity* of any article as may be specified in the notification. It may also be kept in mind that Section 9A(2A) grants exemption to EOU from imposition of anti-dumping duty.

The power to impose duty as a delegated legislation does not include the power to grant exemption unless it is specifically provided<sup>5</sup>. So a doubt may be raised

that the Central Government is lacking the power to grant exemption from anti-dumping duty.

The Central Government issues notifications to grant exemption from these duties under Section 25 of the Customs Act. The exemptions can be of two types, namely, end-use based exemptions on a case specific basis and exemptions from duties payable upon importation of inputs for utilization in the manufacture of goods for exports. The example for the first category is exemption granted to importers of Metcoke<sup>6</sup>. The example of second category is exemption of import of goods under Advance License<sup>7</sup>. It is pertinent to keep in mind that if the EOUs have been granted exemption under the statute itself, whether Central Government can grant exemptions to other similarly placed entities is a question to be answered.

The issue may be divided into four periods (i) before amendment in 2000, (ii) amendment after 2000, (iii) amendment after 2004 and (iv) amendment after 2009 with validation provisions. It is evident that before the amendment made in 2004, when the Hon’ble Supreme Court held that the provisions of assessment were not applicable, no power could be traced under Section 25 for the Central Government to grant exemption from anti-dumping duty. Even after amendment in 2004, the borrowed provision was exhaustive in respect of the matters contained in the then inserted sub-section 8. However, when sub-section 8 was reinserted in 2009, the provision was made inclusive in respect of the matters contained in the then inserted sub-section. This means, matters like ‘exemption’ being analogous in nature vis-a-vis the matters contained in the sub-section like determination of rate of duty, it may be safely assumed

<sup>4</sup> Substituted by Section 101 of the Finance (No.2) Act, 2009

<sup>5</sup> W.P. (C) No. 592 of 2004(U), decided on 30-6-2009 decided by Kerala High Court in *Rubfila International Ltd. v. Union of India*

<sup>6</sup> Notification No. 5/2003-Cus, dated 3-1-2003 and Notification No. 100/2002-Cus, dated 1-10-2002

<sup>7</sup> Notification No. 41/1997-Cus, dated 30-4-1997 and Notification No. 75/1999-Cus, dated 11-6-1999

that the provision relating to exemption has also been borrowed. Further, the provision as inserted in 2009 validated the relevant provisions from January 1, 1995. This means the exemption notifications issued under Section 25 before 2009 (though may have been issued without power) got validated.

Therefore, it appears that the notifications issued under Section 25 of the Customs Act granting

exemption from anti-dumping duty, safeguard duty or countervailing duty are not beyond the power delegated to the Central Government by the Legislature. Though for avoiding any unwarranted litigation, the provision in sub-section 8 could have been worded more explicitly.

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## Trade Remedy News 贸易救济新闻

### Trade remedy actions against China

#### 对中国采取的贸易救济行动

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
2,4-Dichlorophenoxyacetic acid 2,4-二氯苯氧基乙酸	Australia 澳大利亚	Affirmative Sunset review 肯定性日落复审终裁	Australian Customs Dumping Notice No. 2013/13, dated 31-1-2013 2013年1月31日, 澳大利亚海关倾销通知第2013/13
Ceramics, Marbles & Glass Tile Bands 陶瓷、大理石及玻璃制瓷砖腰线	Argentina 阿根廷	ADD investigation initiated 发起反倾销调查	Press No. 186/2012 released, dated 2-1-2013 2013年1月2日 发布2012年第186号决议
Certain kitchen appliance shelving and racks 厨房用金属架	USA 美国	ADD administrative review final finding 发布反倾销行政复审终裁	US DoC Press Release dated 25-1-2013 2013年1月25日, 美国商务部发布公告
Electric iron 电熨斗	Brazil 巴西	ADD review terminated 结束反倾销复审	Press released, dated 22-1-2013 2013年1月22日 发布公告
Flat hot rolled steel added boron in coils 热轧硼卷	Thailand 泰国	Imposing ADD for 5 years 征收5年的反倾销税	Released final finding in December 2012 2012年12月作出反倾销终裁
Frozen Warm water Shrimp 冷冻暖水虾	USA 美国	Countervailing duty investigations initiated 发起反补贴调查	US DoC Press Release dated 18-1-2013 2013年1月18日, 美国商务部发布公告

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Galvanized Steel Wire 镀锌钢丝	Canada 加拿大	Initiation of investigation in dumping and subsidization 发起反倾销和反补贴调查	Dumping case No. AD/1397 & Subsidy case No. CV/133, decision dated 21-1-2013 2013年1月21日, 倾销案件号AD/1397, 补贴案件号CV/133
Hollow Structural Sections 焊缝管	Australia 澳大利亚	Initiation of reinvestigation in dumping and subsidization 重新发起反倾销和反补贴调查	Australian Customs Dumping Notice No. 2013/07, dated 18-1-2013 2013年1月18日, 澳大利亚海关倾销通知第2013/07
Hot Rolled Flat Products of Stainless Steel-304 grade 304不锈钢热轧板材	India 印度	Provisional Safeguard duty imposed at the rate of 20% ad-valorem, for 200 days 征收200天20%从价税的临时特别保障措施税	Notification No. 1/2013-Cus. (SG), dated 4-1-2013 2013年1月4日, 通知第1/2013-Cus.(SG)
Hot-Rolled Carbon Steel Plate 热轧碳钢中厚板	Canada 加拿大	Affirmative Expiry review 肯定性期终复审终裁	Canadian International Trade Tribunal Press Release dated 8-1-2013 2013年1月8日, 加拿大国际贸易法庭发布公告
Meta Phenylene Diamine (MPDA) 间苯二胺	India 印度	Provisional ADD recommended 建议征收临时反倾销税	14/4/2012-DGAD, dated 1-1-2013 2013年1月1日, 14/4/2012-DGAD
Molybdenum wire 钼丝	EU 欧盟	Affirmative anti-circumvention final finding 肯定性反规避终裁	Press release, dated 16-1-2013 2013年1月16日 发布公告
Oriented polypropylene film 取向聚丙烯薄膜	South Korea 韩国	ADD investigation initiated 发起反倾销调查	Press release, dated 7-1-2013 2013年1月7日 发布公告
Phenolic aldehyde plywood 酚醛胶合板	Argentina 阿根廷	ADD investigation initiated 发起反倾销调查	Press release No. 187/2012 dated 2-1-2013 2013年1月2日 发布2012年第187号决议
Plain Gypsum Plaster Boards 石膏板	India 印度	Definitive ADD recommended 建议征收最终反倾销税	14/45/2010-DGAD, dated 15-1-2013 2013年1月15日, 14/45/2010-DGAD
Polyester staple fibre 聚酯短纤	USA 美国	Final results of administrative review announced 发布行政复审最终结果	US DoC Press Release dated 11-1-2013 2013年1月11日, 美国商务部发布公告

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Resinas Epoxi Liquidas 液态环氧树脂	Brazil 巴西	ADD investigation initiated 发起反倾销调查	Press Release, dated 3-1-2013 2013年1月3日 发布公告
Spoke 辐条	Argentina 阿根廷	ADD sunset review investigation initiated 发起反倾销日落复审调查	Press Release no. 10/2013, dated 23-1-2013 2013年1月23日 发布2013 年第10号决议
Stainless Steel Cold Rolled Flat products of 200 series 200系列冷轧不锈 钢板	India 印度	Termination of investigation upon request from applicant domestic producers approved on 27-7-2011 根据国内生产商申请终止调查	Office Memorandum 14/21/2010- DGAD, dated 4-1-2013 2013年1月4日, 工作备忘录 14/21/2010-DGAD
Steel threaded rod 钢制螺杆	USA 美国	Modified ADD administrative review final finding 修改反倾销行政复审终裁	US DoC Press Release dated 22-1-2013 2013年1月22日, 美国商务部发布公告
Tapered roller bearings and parts thereof 圆锥滚子轴承及其 配件	USA 美国	Final results of administrative review announced 发布行政复审最终结果	International Trade Administration [A-570-601], dated 8-1-2013 2013年1月8日 国际贸易委员会
TCCA 三氯异氰尿酸	USA 美国	ADD administrative review final finding 发布反倾销行政复审终裁	US DoC Press Release dated 22-1-2013 2013年1月22日, 美国商务部发布公告
Three-phase oil immersed transformer (10000- 60000kw) 1万—60万千瓦油浸式 三相变压器	Argentina 阿根廷	ADD investigation initiated 发起反倾销调查	Press release No. 185/2012 dated 2-1-2013 2013年1月2日 发布2012年第185 号决议
Utility Scale Wind turbines 应用级风电塔	USA 美国	Affirmative injury determination in ADD and countervailing duty investigation 反倾销和反补贴调查确定肯定性损害裁定	News Release 13-008, dated 18-1-2013 2013年1月18日, 发布新闻13-008
Xanthan Gum 黄原胶	USA 美国	ADD affirmative preliminary determination 肯定性反倾销临时裁定	US DoC Press Release dated 4-1-2013 2013年1月4日, 美国商务部发布公告

## Trade remedy actions by China

### 中国采取的贸易救济行动

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Diethylene Glycol Monobutyl Ether 二甘醇的单丁醚	USA, EU 美国和欧盟	ADD imposed 征收反倾销税	News report dated 26-1-2013 2013年1月26日 公告第5号
Ethylene Glycol Monobutyl Ether 乙二醇的单丁醚	USA, EU 美国和欧盟	ADD imposed 征收反倾销税	News report dated 26-1-2013 2013年1月26日 公告第5号
High-performance stainless steel seamless tubes 高性能无缝不锈钢管	EU, Japan 欧盟和日本	Provisional ADD imposed 征收临时反倾销税	Press Release dated 31-1-2013 2013年1月31日 公告

## WTO News 世贸组织新闻

### 美国将印尼关于农产品的进口限制诉至世贸组织

美国已经寻求与印度尼西亚就后者某些关于园艺产品和动物产品的进口限制措施进行磋商。从美国官方于2013年1月10日发布的内容看，印尼对进口的园艺产品、动物和动物产品在使用了非自动进口许可和配额规定（要求在进口之前完成各项步骤），因此限制了产品的进口。美国还称许可证制度没有在一个统一的、公平的以及合理的情况下进行管理，因为措施在适用的时候并不一致，也不可预见。因此这些措施违反了1994年关税与贸易总协定第10.3(a)条和第11.1条，农业协定第4.2条，以及进口许可程序协定第1.2条、第3.2条和第3.3条。

### 阿根廷的进口许可措施 – 世贸组织成立专家组

世贸组织争端解决机构已经于2013年1月

28日根据欧盟、美国和日本第二次的请求，成立了专家组（DS438, DS444, DS445）以解决关于阿根廷的进口许可措施。这些国家指责阿根廷的措施违反了1994年关税与贸易总协定以及进口许可程序协定。印度与其他13个国家作为第三放参与到专家组程序中。值得注意的是根据2013年1月25日阿根廷发布的第11 / 2013号决议，阿根廷已经废除了之间的17项决议，这些决议是在1999年至2011年期间签署的旨在对某些产品的进口进行限制，因此阿根廷认为专家组不应当对在专家组成立时尚未生效的措施进行裁决。

在阿根廷和美国之间的另一争端，争端解决机构也成立的专家组。该争端是关于美国的某些措施影响了从阿根廷进口动物和动物制品（DS447）。印度与澳大利亚、中国、欧盟和韩国一起在该争议中保留作为第三方的权利。

## Ratio Decidendi 判决理由

### 反倾销案件中对上诉法庭的判决向高等法院上诉

孟买高等法院判决上诉法庭（海关、货物和服务税上诉法庭或称CESTAT）在反倾销案件中所作的判决可以根据1962年海关法第130章向高等法院上诉或者如果案件涉及税率或货物的评估价格，也可以根据海关法第130E章内容向最高法院提起上诉。孟买高等法院认为1962年海关法关于上诉的相关条款应当并入1975年海关关税法第9A(8)章并且必须以必要的形式适用这些条款，从而使得上诉条款便于理解和可操作。[*Rishiroop Polymers私人有限公司诉调查机关-孟买高等法院*2013年1月16日判决，申请号2011年第10277号]

### 美国采取的贸易救济行动-允许对非市场经济国家征收反补贴税

美国国际贸易法庭判决认为美国可以对非市场经济国家征收反补贴税。该法院确认2012年3月颁布的法律允许商务部对来自非市场经济国家的被补贴产品追溯性的征收反

补贴税。该法本身是在美国法院之前否认商务部拥有这项权利之后才颁布的。目前法院认为该法合理地反映了合法的政府利益，因此并没有违反美国宪法规定的正当程序或公平保护的要求。另外，法院还判决，如果法律具有追溯性，它并没有与溯及既往的条款相冲突，因为该法的性质是救济性的而不是惩罚性的。[*GPX国际轮胎公司诉美国政府-美国国际贸易法院*2013年1月7日判决]

值得注意的是在2011年的DS379案件中，世贸组织贸易争端解决机构的上诉机构已经认为美国根据美国商务部的非市场经济的计算方式得出的结果，对同一产品同时征收反补贴税和反倾销税，导致了实施“双重救济”，这违背了美国在世贸组织中的义务，中国已经向世贸组织在其最近的DS449案件争议中提出该2012年法不符合世贸规则，并且专家组已经成立。

## News Nuggets 新闻精华

### 海豹产品禁令-欧洲总法律顾问企图取消反对禁令的申请

欧盟对在欧盟销售的海豹产品的禁令从2009年，即欧洲议会和欧盟委员会批准该禁令起，一直在多次争论中成为焦点。一些人认为通过击打方式杀害海豹对动物是非常残忍的，另一些人则认为海豹是作为加拿大一些民众和北极圈其他部分的生活资料。目前，2013年1月17日，欧

洲总法律顾问希望取消向欧洲法院提交的申请，该申请是由反对捕猎海豹禁令的团体提交的。法院的顾问认为申请人不能试图废除立法，因为该法并没有直接并且个人地关系到他们。台湾和俄罗斯也禁止在他们的市场销售该产品。目前加拿大和挪威向世贸组织提交两个争议，认为欧盟禁



止海豹产品的法律违反了技术性贸易壁垒协议的诸多条款，1994年关税及贸易总协定第1.1条、第3.4条和第11.1条以及农产品协议第4.2条。

### 目标倾销中的归零

归零做法继续在美国的反倾销法律中存在。在对来自韩国和墨西哥的大型家用洗衣机案件中发现国外生产商、零售商涉及“目标倾销”。目标倾销是指调查机关发现“出口价格模式在不同的采购商、地区或时间段内存在显著差异”的情况。

因此调查机关会采取比较加权平均价格对交易的做法而不是通常的加权平均正常价值对所有可比较的出口价格的加权平均价格。该做法受到了甚至包括美国在内的批评，认为所有零售商提供有竞争力的折扣销售如“黑色星期五”销售（感恩节）现象则不能作为适当的因素被计算。同时需要根据反倾销协议第2.4.2条的内容作出充分的解释，才能使用条文中没有规定的归零做法。

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