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Time-limit for anti-dumping investigation - Theory and Practice

反倾销调查的时间限制 – 理论和实践

By T.D. Satish

To preserve the supremacy of law and legal procedures, adherence to a time frame prescribed for completion of an investigation becomes important. It is even more essential in those cases, where the fate of an industry segment depends on the finding or the conclusion of the appointed authority. Anti-dumping investigation is one such specie, wherein the interested parties to the investigation look forward to a quick determination. In this regard, Article 5.10 of WTO Agreement on Anti-dumping (ADA) states that except in special circumstances, an investigation shall be concluded within one year of initiation, and in any case not more than 18 months. Upon a plain reading of Article 5.10, following issues emerge:

- The meaning of the term “investigation”;
- Time period that an antidumping investigation should take to reach a conclusion;
- The sanctity of 18 month cut-off period

Article 5.10 provides that an anti-dumping investigation should be completed within 18 months. However, the term ‘investigation’ has not been defined under the Agreement. The question is whether the term ‘investigation’ means only the stage of final finding recommendation or whether the term also includes the decision to levy anti-dumping duties after issuance of findings.

In this regard, anti-dumping law of European Commission [Article 6(9)] provides that an investigation shall, in all cases, be concluded within 15 months. Proposal for levy of anti-dumping duty is

sent by the Commission in EU to Council of Ministers or Council, which is responsible for adoption of final measures. The website of EC as also the practice of EC suggest that the 15 month period for concluding an investigation also includes the stage of levy of anti-dumping duty. On the other hand, in the US, dumping aspect of investigation is taken care by the Department of Commerce (DOC), whereas injury determinations are made by the International Trade Commission (ITC). Only when the final determinations of both DOC and ITC are affirmative, DOC issues an anti-dumping order. Thus, in the US also, an anti-dumping investigation covers investigation as well as levy, which is in the form of issuance of orders by DOC. In India, in stark contrast to procedures adopted by EC and the US, the law provides 18 month period to Directorate General of Anti-Dumping (DGAD) for issuance of final findings/ recommendations and thereafter another 3 months are provided to Ministry of Finance to accept and levy the duties. Considering the procedures of above 2 members as guiding light to interpret Article 5.10 of ADA, it seems India’s anti-dumping law providing total of 21 (18+3) month period is violative of said agreement.

On the flip-side if it is considered that the term ‘investigation’ is only restricted to issuance of final findings/determinations, then also, an anti-dumping investigation should be completed within the stipulated period of one year. It is only under special circumstances that the investigation may be

extended for an extra period of 6 months. However, the benchmark remains “special circumstances”. In *Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil*, the WTO Panel held that “... AD Agreement imposes a deadline for the conclusion of an investigation in Article 5.10. We consider that, if an investigation is to be completed in conformity with the timeframe provided for in Article 5.10, deadlines are indeed necessary...” The finding made in the panel report highlights the relevance of a timeframe in an investigation.

As regards the issuance of final determinations, while the United States provides for detailed timetable for each stage of investigation and EU provides for a 15 month deadline to complete the investigation, the Indian Anti-Dumping Rules under Rule 17(1) provides that the Directorate General of Anti-Dumping (DGAD) shall, within 1 year from the date of initiation, come out with the final finding. However, proviso to Rule 17 creates an exception under “special circumstances” by giving Central Government the discretion to extend the period by another 6 months. But more often than not, investigations exceed the 12 month deadline and the exception provision is used in a generalized manner. Furthermore, since 2010 DGAD has used its entire quota of 18 months in about 13 investigations (reviews included) to issue the final findings. Of these 13 findings, only in one case DGAD demonstrated existence of “special circumstance” by explicitly recording reason for delay and recorded the approval for extension of time granted by the Government. The final findings issued by DGAD, otherwise, neither provide reasons for delay in completion of investigation nor do they have any word about approval for extension granted by Government.

As far as Indian practice is concerned, it is settled by various orders of Appellate Tribunal and Courts that a period of 12 months can be automatically extended to 18 months, irrespective of type of investigation. In the case of *Fragrances & Flavours Asscn of India v. Designated Authority* [2011 (270) E.L.T. 733 (Tri. - Del.)], the Appellate Tribunal dismissed the plea of DGAD that oral hearing could not be given as investigation was time bound. The Appellate Tribunal concluded that AD Rules provided for extension of time and DGAD was wrong in taking a lame excuse of 12 month limitation. In *Grauer & Weil (I) Ltd v. Designated Authority* [2011(271) ELT 112 (Tri.-Del.)], Appellate Tribunal held that 6 month extension rule is applicable in case of mid-term reviews also.

There is no doubt that both DGAD and Courts try to adhere to the timeline prescribed and try to ensure that investigations are completed within the time limit prescribed. In the last 3 years, there has been only one exceptional case, wherein DGAD issued final finding post 18 month period (R134a Gas from Japan and China). In that case, delay in issuance of final finding was due to pending litigations. But having said that, completion of investigation after 18 months would still be violative of Article 5.10, even though the investigation was marred by domestic judicial proceedings. India, as a member of WTO and as a signatory to GATT, is bound to align its domestic laws and regulations to ensure conformity with ADA. Conformity of domestic anti-dumping laws would necessarily include consideration of other domestic general laws. Thus, even though a pending anti-dumping investigation may get caught in domestic judicial proceedings, yet India as a member of WTO has to ensure that the anti-dumping proceedings are conducted in accordance with provisions of ADA, including Article 5.10. There arises another question with respect to the absoluteness of 18 month

time-frame. That is, whether it is permissible for an investigating authority to re-look into the investigation after 18 month deadline once it has made its final determination?

The practice of “remanding” back of investigation to DGAD by the appellate forum poses yet another problem. In a normal case of remand, DGAD is directed by Tribunal to have a fresh look into its findings, issued at fag end of statutory time limit, or consider points, which it previously did not consider. However, where an investigation is void *ab-initio* due to violation of principles of natural justice, it will be improper for a Tribunal to remand the matter back to DGAD for correcting the violation of rules or law, as remanding back of matter would provide more time than actually permitted by law. Considering the time normally taken by Tribunal to decide a case, remanding back of matter may well result in circumvention of Rule 17(1) of AD Rules and Article 5.10 of ADA.

Conclusion

As per Indian practice, it is now more or less settled that a period of 12 months to complete an anti-dumping investigation is not rigid. It may be extended even without addressing the issue of “special circumstance”. The problems with regard to Article 5.10 and Rule 17(1) are twin-fold. First problem relates to the meaning of the term ‘investigation’ and whether levy of duty also forms part of investigation itself. If levy of duty also forms a part of investigation, then Rule 17(1) read with Rule 18(1) of AD Rules constitute violation of Article 5.10 of ADA. Second issue is with respect to conducting of investigation post 18 month impasse. While DGAD and courts have been careful with maintenance of 18 month period, yet the practice of Appellate Tribunal of “remanding back” the case to DGAD remains a grey area.

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Trade Remedy News 贸易救济新闻

对中国发起的贸易救济措施 Trade remedy measures against China

Product 产品	Country 国家	Measures 措施	Notification 通知
Bicycles 自行车	EU 欧盟	Initiation of ADD interim review 发起反倾销中期复审	2012/C 71/07, dated 9-3-2012 2012年3月9日, 2012/C 71/07
Carbon Black 碳黑	India 印度	Safeguard duty recommended 建议保障措施税	Notification GSR D22011- /12/2011, dated 16-3-2012 2012年3月16日, GSR D22011- /12/2011通知
Digital Offset Printing Plates 数码印刷版	India 印度	Provisional ADD recommended 建议临时反倾销税	Notification No. 14/7/2011- DGAD, dated 16-3-2012 2012年3月16日, 第14/7/2011- DGAD通知
Dry cell batteries 干电池	India 印度	Sunset review initiated 发起日落复审	Notification No. 15/12/2011- DGAD, dated 21-3-2012 2012年3月21日, 第15/12/2011- DGAD通知

产品	国家	措施	通知
Flat base steel wheels 平底钢圈	India 印度	ADD extended 延长反倾销税	Notification No. 16/2012-Cus. (ADD), dated 20-3-2012 2012年3月20日, 第16/2012-Cus. (ADD)通知
Folding Gift Boxes 可折叠礼物盒	USA 美国	Sunset Review initiated 发起日落复审	DOC Case No. A-570-866, dated 22-3-2012 2012年3月22日, 商务部案件第 A-570-866
Iron or steel fasteners 钢铁紧固件	EU 欧盟	Review of ADD consequent of DSB order 根据贸易争端解决机构命令发起反倾销复审	2012/C 66/06, dated 6-3-2012 2012年3月6日, 2012/C 66/06
Ironing Boards 烫衣板	EU 欧盟	Partial re-opening of ADD investigation 部分重新展开反倾销调查	2012/C 63/07, dated 2-3-2012 2012年3月2日, 2012/C 63/07
Oil country tubular goods pup joints 石油管材短节	Canada 加拿大	Final determination of dumping and subsidizing 最终裁决倾销及补贴	Dumping file number: 4214-31 and Subsidy file number: 4218- 30, dated 12-3-2012 2012年3月12日, 倾销文件 号: 4214-31以及补贴文件 号: 4218-30
Peroxosulphates 硫酸盐	India 印度	Sunset review initiated 发起日落复审	Notification No. 15/9/2011- DGAD, dated 13-3-2012 2012年3月13日, 第15/9/2011- DGAD通知
Phthalic Anhydride 邻苯二甲酸酐	India 印度	Safeguard duty recommended 建议保障措施税	Notification No. GSR D22011- /8/2011, dated 19-3-2012 2012年3月19日, 第GSRD22011- /8/2011通知
Plain Gypsum Plaster Boards 石膏板	India 印度	Provisional ADD recommended 建议临时反倾销税	Notification No. 14/45/2010- DGAD, dated 19-3-2012 2012年3月19日, 第14/45/2010- DGAD通知
Preserved Mushrooms 腌制蘑菇	USA 美国	New Shipper Review initiated 发起新出口商复审	Notice A-570-851, dated 27-3- 2012 2012年3月27日, A-570-851 通知
Silicon Metal 金属硅	USA 美国	Sunset review concluded – ADD not to be revoked 决定日落复审 – 不取消反倾销税	Inv. No. 731-TA-472 (Third Re- view), dated 20-3-2012 2012年3月20日, 第731-TA-472 (第三次复审)

Product 产品	Country 国家	Measures 措施	Notification 通知
Tungsten Electrodes 钨电极	EU 欧盟	Initiation of ADD expiry review 发起反倾销期终复审	2012/ C 71/08, dated 9-3-2012 2012年3月9日, 2012/ C 71/08
Tyres – New Pneu- matic tyres for buses and trucks 轮胎-客车和卡车用 新充气轮胎	India 印度	ADD extended 延长反倾销税	Notification No. 17/2012-Cus. (ADD), dated 30-3-2012 2012年3月30日, 第17/2012- Cus. (ADD)通知
Viscose rayon fila- ment yarn 粘胶人造长丝	India 印度	ADD extension recommended 建议延长反倾销税	Notification No.15/23/2010-DGAD, dated 24-2-2012 2012年2月24日, 第15/23/2010- DGAD通知
Vitamin A Palmitate 棕榈酸维生素A	India 印度	Sunset review initiated 发起日落复审	Notification No. 15/7/2011-DGAD, dated 23-3-2012 2012年3月23日, 第15/7/2011- DGAD通知

中国发起的贸易救济措施 Trade remedy measures by China

Product 产品	Country 国家	Measures 措施	Notification 通知
Animal feed 动物饲料	USA 美国	ADD investigation extended 延长反倾销调查	News report dated 23rd March 2012年3月23日新闻
M-dihydroxybenzene or resorcinol 间苯二酚	Japan, USA 日本、美国	ADD investigation initiated 发起反倾销调查	Announcement No. 13/2012, dated 23-3-2012 2012年3月23日, 第13/2012 通告
Photographic paper and paperboard 照相纸和卡纸	USA, Japan, EU 美国、日 本、欧盟	ADD imposed 征收反倾销税	Announcement No. 10/2012, dated 22-3-2012 2012年3月22日, 第10/2012 通告
Toluene Diisocyanate 甲苯二异氰酸酯	EU 欧盟	ADD investigation initiated 发起反倾销调查	Announcement No. 14/2012, dated 23-3-2012 2012年3月23日, 第14/2012 通告

WTO News 世贸组织新闻

欧盟、日本和美国挑战中国的稀土出口限制

中国对以各种形式的稀土、钨、钼产品的出口限制已经受到欧盟、美国和日本向世贸组织争端解决结构的申诉，并且他们寻求与中国就此问题进行磋商。根据已发布的信件，中国实行多种出口限制，包括那些已发布以及未发布的措施如出口税、配额限制以及许可证要求。就报告所言，这些措施严重扭曲了市场并且对中国的行业就公司和消费者的成本上形成了比在其他国家使用这些原材料的行业的优势，如高科技和绿色企业、汽车和机械制造、化学、钢铁和有色金属行业。在今年的1月30日，世贸组织认为中国对某些工业原料的出口限制违反了世贸规则（DS394，395和398）。印度是这一争议的第三方之一。

美国对印度的农产品进口限制提出抗议

美国对印度就家禽及家禽产品包括通过工业或农业方式而获得的肉类、蛋类、小鸡、野生鸟类和产品以及生猪的进口限制提出抗议（DS430）。印度实施这些禁令目的是隔离禽流感，而受到争议的法规出自家畜进口法以及由此发布的一系列命令。根据世贸组织争端解决机构第4.4条内容于2012年3月6日进行的沟通情况，美国已经寻求与印度进行磋商并提出这些法规与卫生与动植物

检疫措施协议第2.2、2.3、3.1、5.1、5.2、5.5、5.6、5.7、6.1、6.2、7以及附件B第2、5、6段，以及1994关税贸易总协定第I和XI条不一致。信中还提到按照所援引的协议，措施还直接或间接地消除或影响了美国的利益。世贸组织协议在关于卫生与动植物检疫措施申请方面明确指出世贸组织成员有权采取法律手段以保护人类、动物或植物的生命以及健康。

美国对“美国原产地标志证明”专家组报告提出上诉

美国已于2012年3月23日向争端解决机构发出通知，决定对涉及某些其在肉类产品实施标签要求的专家组报告（DS384和386）提出上诉。根据有关法律即统称为COOL措施（原产地标志证明），零售商有义务告知消费者产品的原产地，主要是牛肉和猪肉。这些法律进一步要求只有在美国出生、成长以及被屠宰的动物才能被视为原产地在美国。贸易争端解决机构专家组认为这些法律违反了技术贸易壁垒协议第2.1和2.2条，但是专家组注意到美国法律的目的是正当的，这也给美国留有一些余地。与此有关的案件，关于印度根据药品和化妆品以及食品安全法要求实施标签的争议已经被提出并且被再次提交到技术贸易壁垒委员会。

News Nuggets 新闻精华

澳大利亚平装立法 - 乌克兰反对

旨在减少吸烟并且改善公众健康的澳大利亚的“平装”立法再次遇到了反对。这次由乌克兰向世贸组织提出抗议，乌克兰认为澳大利亚法律要求烟草产品需要按照统一颜色和小盒进行包装违反了澳大利亚就与贸易有关的知识产权协议以及技术贸易壁垒（TBT）和关税贸易总协定中的义务。投诉方认为通过要求烟草产品以标准包装，权利人将被排除行使其商标权的合法权利。同时它指出这些措施是不必要的限制，因此与贸易技术壁垒第2.2条不相符。乌克兰同时反对澳大利亚法律，认为它没有为进口产品提供与国内产品相同的待遇，并且在各种协议下产生的利益将被废除。不公平待遇的主张显得没有说服力，因为法律适用于国内以及外国企业

并且后者拥有延长的时间限制以遵守法律。

该争议于去年以及今年2月在贸易有关的知识产权理事会会议上被讨论。多米尼加共和国、洪都拉斯、古巴和尼加拉瓜发表了其对知识产权限制以及对整个烟草行业产生影响的关注。洪都拉斯已经建议可以修改法律允许至少50%前包装表面部分显示商标、标志等以取代目前允许25%的表面显示公司名称、商标等。印度和欧盟支持澳大利亚就与贸易有关的知识产权协议中为执行公众健康措施而灵活使用的权利。主要的讨论点是该争议是否是贸易有关或仅是知识产权权利中的一项。澳大利亚同时面临来自一主要烟草主体，即根据双边投资协议与香港之间就这些法律产生的争议。

修改后的政府采购协议被采纳

世贸组织政府采购委员会于2012年3月30日经过最后的审核，接受了修改的政府采购协议

(GPA)。该次审核是根据去年12月15日举行的部长级会议的决定产生的，过去为国外贸易商提供了开放的国内采购市场的多边协议在42个国家达成一致。此次修改的协议将向各有关国会发布并经过批准。

此协议为国际公共采购提供了更为透明的一系列法律，尽管相关政府并不期望开放他们所

有的采购，并且可能特别排除一些敏感行业。此协议并不自动适用于所有成员的政府采购，但是它的覆盖范围由每一成员方在附注中以协议附件的形式提供。而中国自1997年以来是该协议的签署国，印度自2010年与其它21国（其中一些仍在进行入世谈判）成为观察国。

Statutory Update 法律更新

保障措施税 – 印度海关关税法第8C章节即将被修改

2012年3月16日，印度议会引入2012年财政法案，建议修改1975年海关关税法第8C章节，该章内容是对进口自中国的产品实施过渡保障措施税的母法。根据修改的内容，中央政府可能自最初实施保障措施税之日起10年内继续实施该保障措施税，虽然在此期间国内产业已经通过努力调

解自身以面对这些扰乱市场或由此造成的威胁。根据现有的法律第8C(5)章的内容，保障措施税可以被延长相同期限。而在中国入世议定书第16条即对来自中国的进口产品征收过渡性保障措施税的条文中没有这一参考。此次修改如何被严格执行还不得而知。

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