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Article 文章

Lacunae in the Indian New Shipper Review AD investigations

印度反倾销调查的新出口商复审存在缺陷

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 determine 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 for no fault of his. 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 贸易救济新闻

Anti-dumping actions by China - 中国采取的反倾销行动

Product 产品	Country 国家	Measures 措施	Notification 通知
Toluidine 甲苯胺	EU 欧盟	ADD investigation initiated 发起反倾销调查	Announcement No. 36, 2012, dated 29-6-2012 2012年6月29日 商务部公告2012 年第36号
Epichlorohydrin 环氧氯丙烷	USA, South Korea, Japan and Russia 美国、韩 国、日本和 俄罗斯	ADD extended for another 5 years 反倾销税延长5年	Announcement No. 32, 2012, dated 27-6-2012 2012年6月27日 商务部公告2012 年第32号
Dried Corn Distiller's Grain 干玉米酒糟	USA 美国	Termination of ADD investigation 终止反倾销调查	Announcement No. 31, 2012, dated 21-6-2012 2012年6月21日 商务部公告2012 年第31号
Grain Oriented Flat- rolled Electrical Steel 取向性硅电钢	Russia 俄罗斯	Termination of ADD mid-term review 终止反倾销的期中复审	Announcement No. 34/2012, dated 21-6-2012 2012年6月21日 商务部公告2012 年第34号
Sulfamethoxazole 磺胺甲恶唑	India 印度	ADD extended 反倾销期终复审调查	Announcement No. 33/2012, dated 15-6-2012 2012年6月15日 商务部公告2012 年第33号

Anti-dumping actions against China - 对中国采取的反倾销行动

Product 产品	Country 国家	Measures 措施	Notification 通知
Activated Carbon 活性炭	USA 美国	Sunset review to be conducted 开展日落复审	News Release 12-064, dated 4-6-2012 2012年6月4日, 发布新闻12-064
Aluminium Extrusions (further worked – Added attachments) 铝挤压品 (进一步加 工 – 增加附件)	Canada 加拿大	ADD and Countervailing duty imposable 征收反倾销税和反补贴税	Dumping case No. AD/1379, Subsidy Case No. CV/124, dated 3-7-2012 2012年7月3日, 倾销案件第1379 号, 补贴案件第124号

Product 产品	Country 国家	Measures 措施	Notification 通知
Aluminium road wheels 铝制车轮	Australia 澳大利亚	Affirmative ADD and Countervailing duty investigation 肯定性确定反倾销税和反补贴税	Customs Dumping Notice No. 2012/33, dated 5-7-2012 2012年7月5日 海关倾销通知第2012/33号
Citrus fruits (prepared or preserved) 柑橘类水果 (精制的或腌制的)	EU 欧盟	Reopening of ADD investigation 重新开展反倾销调查	EU Announcement dated 19-6-2012 in 2012/C 175/08 2012年6月19日 欧盟公告2012/C175/08
Digital Offset Printing Plates 数码印刷版	India 印度	Provisional ADD imposed 征收临时反倾销税	Notification No. 31/2012-Cus. (ADD), dated 4-6-2012 2012年6月4日 海关通知第31/2012-Cus. (ADD)
Enameled cast iron bath tubs 上釉生铁浴盆	Russia, Kazakhstan and Belorussia Customs Union 俄罗斯、哈萨克斯坦和白俄罗斯关税联盟	ADD investigation initiated 发起反倾销调查	Notice No. 1, dated 15-6-2012 2012年6月15日 第1号通知
Folding gift boxes 折叠礼物盒	USA 美国	Sunset review expedited 快速日落复审	News Release 12-076, dated 6-7-2012 2012年7月6日 发布新闻 12-076
Furfuraldehyde 糠醛	EU 欧盟	ADD repealed 废止反倾销税	Council Implementing Regulation (EU) No. 541/2012, dated 21-6-2012 2012年6月21日, 欧盟理事会第541/2012执行规定
Hollow structural sections 碳钢焊管	Australia 澳大利亚	Affirmative ADD and Countervailing duty investigation 肯定性确定反倾销税和反补贴税	Customs Dumping Notice No. 2012/31, dated 3-7-2012 2012年7月3日, 海关倾销通知第2012/31号
Hot Rolled Products of Stainless Steel (300 series) 不锈钢热轧产品 (300系列)	India 印度	Safeguard investigation initiated 发起保障措施调查	Notification dated 26th June 2012 2012年6月26日 通知

Product 产品	Country 国家	Measures 措施	Notification 通知
Iron or steel fasteners 钢铁紧固件	EU 欧盟	Review of ADD measures initiated 发起反倾销措施复审	EU Announcement dated 6-6-2012 in 2012/C 160/07 2012年6月6日 欧盟公告2012/ C160/07
Mattress innerspring units 内装弹簧席梦思	Canada 加拿大	Reinvestigation of normal values and export prices 重新调查正常价值和出口价格	Dumping case No. AD/1383, dated 7-6-2012 2012年6月7日 倾销案件第1383号
Meta Phenylene Diamine 间苯二胺	India 印度	ADD investigation initiated 发起反倾销调查	Notification No. 14/4/2012-DGAD, dated 19-6-2012 2012年6月19日 第14/4/2012- DGAD通知
Plain Gypsum Plaster Boards 石膏板	India 印度	Provisional ADD imposed 征收临时反倾销税	Notification No. 32/2012-Cus. (ADD), dated 7-6-2012 2012年6月7日 第32/2012-Cus. (ADD)通知
Seamless casings 无缝套管	Canada 加拿大	Sunset review initiated 发起日落复审	Expiry Review No. RR-2012-002, dated 28-6-2012 2012年6月28日 期终复审第RR- 2012-002
Soda ash (Disodium Carbonate) 碳酸钠	India 印度	Definitive ADD imposed 征收最终反倾销税	Notification No. 34/2012-Cus. (ADD), dated 3-7-2012 2012年7月3日 第34/2012-Cus. (ADD)通知
Soy protein (concentrated) 大豆蛋白	EU 欧盟	ADD investigation terminated 终止反倾销调查	Commission decision dated 27-6-2012 in 2012/34/EU 2012年6月27日 委员会决定 2012/34/EU

WTO News 世贸组织新闻

中国对电工钢的反倾销和反补贴措施违反世贸组织协议

世贸组织的贸易争端解决机构专家组确认中国对来自美国的取向性电工钢采取反倾销和反补贴的措施违反了世贸组织反倾销协议以及补贴和反补贴措施协议的各种条款。在其2012年6月15日的报告中，专家组认为商务部是在没有充分证据并且没有要求申请人提供充分的非机密性概要以保证对其所提供的机密性信息进行合理理解的情况下发起反补贴调查。专家组认为商务部在披露相关必要事实、公开通知以及在裁决中对实质损害、涉案进口的价格影响以及计算所有其他补贴税率或倾销幅度所认定的事实的解释存在缺陷。

美国的标签条款违反世贸组织技术性贸易壁垒协议

世贸组织的争端解决机构上诉机构已经部分支持专家组的报告，认为美国实施的COOL条款，即对在美国销售特定产品的零售商需要在这些产品上表明其原产地的义务违反了技术性贸易壁垒第2.1条的规定，因为这将进口的牲畜造成较少优惠待遇。上诉机构认为这些约束性条款激励加工者有选择性地使用本地牲畜并且抑制了使用类似的进口牲畜。但是，上诉机构推翻了专家组有关的就技术性贸易壁垒协议第2.2条的裁决，并且认为专家组错误地裁决“COOL措施没有根据第2.2条的内容进行区分目标，因为该措施无法向消费者传达有意义的原产地信息。”根据该条款，有一条内容值得注意，即只有当牲畜在美国出生、生长并被屠宰而完成整个加工过程才能被定义为原产自美国。

中国阻止对其稀土政策寻求专家组的请求

2012年7月10日，中国拒绝了美国、欧盟和日本提出的请求成立专家组以评价中国的稀土出口措施。根据中国的决定，争端解决机构已经推迟成立专家组。该争议是关于中国以出口关税、出口配额、最低出口价格要求、出口许可要求以及定量限制有关的额外行政要求和程序，从而限制各种形式的稀土、钨、锰的出口。这些措施被认为是违反了1994年关税和贸易总协定的条款以及中国入世议定书。

南非对禽肉征收反倾销税案 - 巴西寻求磋商

巴西已经根据世贸组织争端解决机制向南非发出正式的磋商要求，对于后者对来自于巴西的冻鸡禽肉而不论整鸡以及去骨的征收临时反倾销税提出磋商。根据2012年6月21日的磋商请求，巴西认为出初裁决定、征收临时反倾销税以及发起并进行反倾销调查违反了南非在1994年关税和贸易总协定的有关条款，同时也违反了反倾销协议第2、3、4、5、6、7、12条以及附件1和附件2。

欧盟对生物柴油采取措施

2012年6月22日，印度尼西亚以及阿根廷与货物贸易理事会进行会议，批评最近西班牙对生物柴油的政府规定，该规定不正当的歧视进口并且违反了1994年关税和贸易总协定第3条的国民待遇原则。根据他们的说法，上述措施影响了发展中国家在全球生产链的参与程度，并且不鼓励他们工业化的努力。然而欧盟认为西班牙的措施与欧盟的再生能源目标一致，并且他没有禁止从阿根廷或其他贸易伙伴处进口生物柴油。

Statutory updates 法律更新

印度公布保障措施条款以实施数量限制

印度政府已经发布了2012年保障措施（数量限制）条例。根据1992年对外贸易（发展和管理）法最近公布的第9A章授权公布了这些条款，规定当产品以不断增加数量的形式进口至印度并且对国内产业造成或威胁造成严重损害的情况下，可实施数量限制。这些条款，与印度财政部进行的关于执行保障措施数量限制的保障措施税调查类似。这贴条款也说明任何这些数量限制需要在没有歧视的前提下对所有进口进行限制而不考虑其来源。

印度严查中国牛奶盒奶制品的进口禁令

印度已经延长了其对来自中国的牛奶和奶制品的进口禁令。该禁令将包括巧克力和巧克力产品以及以牛奶或乳固体作为原料的糖果、糕饼和其他食品。根据对外贸易总局于2012年7月2日发布的第4(RE-2012)/2009-14通知，该禁令将持续到2013年6月23日，或到有新的命令为止。在发布上述通知之前，印度政府已经于2011年12月26日发布了91(RE-2010)/2009-14禁令，有效期至2012年6月24日为止。

News Nuggets 新闻精华

巴西欲与其他金砖国家建立货币互换协议

巴西和中国同意以本国货币（里拉和人民币）作为贸易交易的货币。该协议是在联合国里约可持续发展峰会由巴西总统和中国总理之间的双边会议上达成的。巴西的财政部长认为采取本国货币协议的理由是两国可避开国际经济危机、允许双方对互惠投资取回资金。他也宣布与其他金砖集团国家成员之间的类似货币互换协议正在研究中（巴西、俄罗斯、印度、中国和南非）。印度目前与日本达成货币互换协议而中国已经与不同国家达成了20个左右的货币互换协议。

正常化贸易关系

俄罗斯有希望于7月底完成其加入世贸组织的过程。该截止时间对美国也是非常重要的，因为其不得不决定是否废除其对俄罗斯的杰克逊-瓦尼克修正案并且授予俄罗斯永久正常

贸易关系或继续2011年12月15日的状态援引世贸组织协议第13条。

根据世贸组织标准，一旦俄罗斯成为全权代表，美国将不得不向俄罗斯授予“无条件”的最惠国待遇或者违反其世贸组织义务。他可能根据杰克逊-瓦尼克修正案选择拒绝认可俄罗斯的永久正常贸易关系，颁布该修正案是为了唤起俄罗斯的移民限制并且美国寻求根据第13条在特殊成员之间不适用多边贸易协议。这种情况下，俄罗斯和美国将不受世贸组织规则的约束并且任何一方可以对另一方采取措施。对将永久正常贸易关系延伸到俄罗斯的新公布法案的不同贸易实体和支持者的观点认为两国之间的双边合作协议（1992）以及有条件的授予正常贸易关系的做法将给美国带来有限的利益。

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