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March  
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## Article

### Time period in anti-dumping reviews - An issue in flux

By **Lakshmi Neelakantan**

The provisions relating to anti-dumping measures under the Customs Tariff Act 1975 (“Act”) and the Customs Tariff (Identification, Assessment & Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (“AD rules”) provide for different time periods for different stages of proceedings. This article seeks to analyze whether the time period for completing a mid-term or sunset review can be extended beyond the statutory time period of 12 months, and whether such extension is in consonance with the Act and AD Rules.

#### **Legal Framework of Time Period for Investigations and Reviews**

Rule 17(1) of the AD Rules provides a period of one year to the Designated Authority to conclude the original anti-dumping investigation. The proviso to Rule 17(1) empowers the Central Government to extend further the period of one year by six months to conclude the investigation in the event that “special circumstances” exist. Rule 18 of AD Rules provides for the levy of duty based upon the recommendation issued by the Designated Authority.

Mid-term reviews are dealt with under Rule 23(1A) of AD Rules. Rule 23(1A) states that the Designated Authority shall review the need for continued imposition of anti-dumping duty and upon completing such review, the Designated Authority shall recommend to the Central Government for its withdrawal, where

it comes to a conclusion that the injury to the domestic industry is *not likely to continue or recur if the anti-dumping duty is removed or varied and is therefore no longer warranted*.

The scope of a sunset review is somewhat different and is dealt with under Section 9A(5) of the Act read with Rule 23(1B) of AD Rules. Section 9A (5) of the Act states that anti-dumping duty shall cease to have effect on the expiry of five years from the date of imposition of such duty, unless it is revoked earlier. The first proviso to Section 9A(5) of the Act affirms that if the Central Government is of the opinion that cessation of the duty is likely to lead to continuation or recurrence of dumping and injury, then such duty may be extended for a further period of five years.

Rule 23(1B) of the AD Rules provides that anti-dumping duty, once imposed, shall be effective for a period not exceeding five years, *unless the Designated Authority comes to a conclusion on a review initiated before that period that the expiry of the said anti-dumping duty is likely to lead to continuation or recurrence of dumping and injury to the domestic industry*. Therefore, in a sunset review, the question that arises for consideration is *whether the expiry of the anti-dumping duty in existence is likely to lead to continuation or recurrence of dumping and injury to the domestic industry*. On the other hand, in a mid-term review, the question that arises for consideration is *whether the injury to*

*the domestic industry is not likely to continue or recur if the anti-dumping duty is removed or varied and is therefore no longer warranted.*

It is important to note that the second proviso to Section 9A(5) of the Act provides that the Central Government may extend the levy of the anti-dumping duty for a period of one year, if the sunset review is not concluded before the expiry of five years from the date of imposition of the duty. With regard to both mid-term and sunset reviews which are conducted pursuant to Rule 23 of the AD Rules, Rule 23(2) is negatively worded and provides that such reviews shall be concluded within a period not exceeding twelve months from the date of initiation of such review.

### Analysis

It may be recalled that Rule 17(1) of AD Rules read with the first proviso to Rule 17(1) provides that the Designated Authority shall, within one year from the date of initiation of an investigation submit its findings to the Central Government, unless the Central Government in its discretion extends further this period of one year by six months. Rule 23(2), which lays down timelines for reviews, provides that reviews shall be concluded within a period not exceeding twelve months from the date of initiation of such review.

Interestingly, Rule 23(3) borrows certain other provisions from AD Rules, such as Rules 6, 17, 19, 20 including Rule 17 which is applicable *mutatis mutandis* in case of a review. Therefore, a preliminary question that arises is whether the discretionary extension of the time

period by six months which is *provided* in the proviso to Rule 17(1), becomes applicable to the twelve month time period for conducting reviews laid down in Rule 23(2), due to the *mutatis mutandis* reference in Rule 23(3). A reading of Rule 23(3) suggests that the time period for concluding an investigation under Rule 17(1) may not be applicable to the time period for concluding a review in Rule 23(2).

One possible reason in support of this interpretation is that the expression *mutatis mutandis* means “*all necessary changes having been made; with the necessary changes*”.<sup>1</sup> Therefore, the rule of *mutatis mutandis* may be more in the nature of a rule of ‘adaptation’ as opposed to a simple rule of ‘adoption’. Hence, Rule 17 is required to be borrowed for the purpose of Rule 23 with necessary changes but in as much as the specific timeline for the review as provided by Rule 23(2), Rule 17 may not be applicable.

As far as a sunset review is concerned, the following reasons support the interpretation of Rules 23(1B) and (2) that the time period for completing the same cannot be extended beyond 12 months:

- i. *First*, the extension of the period of anti-dumping duty during the pendency of sunset review is for a period of “one year” under the second proviso to Section 9A(5) of the Act. It is relevant to note that if a duty is not extended before expiry, then it amounts to reviving a dead duty which is not in consonance with Section 9A(5) of the Act and Rule 23(1B) of AD Rules. Bearing in mind this fact, the

<sup>1</sup> Black’s Law Dictionary (9th ed. 2009)

purpose of a sunset review (*determining the likelihood of continuation or recurrence of dumping and injury*) would be better served if the review was completed well in advance of the date of expiry of the duty. Furthermore, the Central Government may take some time to take a decision on the recommendation of the Designated Authority. In order to ensure that the Ministry of Finance gets sufficient time to consider the recommendation of the Designated Authority so that duty can be levied if need be, before the expiry of the existing duty, the sunset review may have been completed well in time. Probably, Designated Authority may complete the sunset review before expiry of 9 months from the date of completion of five year period leaving three months to the Ministry of Finance for taking a final decision. In any case, if the Designated Authority takes 12 months to complete the investigation, it will leave no time for the Finance Ministry to consider the recommendations and impose the duty before expiry of 12 months. That being the case, the question of extending the period for completing the review beyond 12 months does not arise.

- ii. *Second*, it can also be seen from the wording of the above provisions that the time periods laid down in Rules 17(1) and 23(2) of AD Rules are mandatory in nature. Any relaxation in the time period will disturb the legitimate expectations of interested parties and prejudice their economic interests.
- iii. *Third*, in case sufficient evidence exists for non-continuation of anti-dumping duty in a sunset review, the Designated Authority makes the appropriate recommendation in time and the duty may be withdrawn accordingly at the

earliest. In case the time period for concluding the investigation is allowed to be extended, the collection of anti-dumping duty may be carried out without due justification.

As far as a mid-term review is concerned, it is essential to note that its primary objective of ascertaining the change in circumstances, which necessitates the modification of removal of duty, may not be served if the time period is extended and it is not possible to correctly ascertain the change in circumstances after the lapse of an inordinately long time period.

### **Conclusion**

It can be seen that the practice of the Designated Authority and Ministry of Finance with respect to extension of time period for reviews is required to be corrected. This issue is extremely critical both from the standpoint of the exporter as well as the domestic industry. When the time period for completing a review is extended, it prejudices the exporter to the extent that it distorts market conditions. Equally, such extension of time period deprives the domestic industry of protection for a period of six months when the review is being conducted by the Designated Authority and an additional three months for the Ministry of Finance to take a final decision about the continuation of duty.

Perhaps, it will be appropriate for the Designated Authority to issue a public notice clarifying the timelines applicable for completing a sunset review as well as a midterm review.

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## Trade Remedy News

### Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Acetone	Korea RP	5/2015-Cus. (ADD)	18-2-2015	Definitive ADD re-imposed
Carbon Black used in rubber applications	Korea RP	F.No.14/9/2014-DGAD	9-2-2015	ADD investigation initiated
Caustic Soda	China and Korea RP	F.No. 15/23/2013-DGAD	27-2-2015	ADD sunset review – Time for completing review extended till 18-6-2015
Electrical insulators	China	F.No. 14/11/2013-DGAD	4-3-2015	Definitive ADD recommended
Graphite Electrodes of all diameters	China	4/2015-Cus. (ADD)	13-2-2015	Definitive ADD imposed
Morpholine	China EU and USA	Final Findings No. 15/5/2013-DGAD	19-2-2015	ADD Mid-term review – ADD continuation recommended on goods from China PR and EU while revocation recommended in case of imports from USA
Plain Medium Density Fibre	China, Malaysia, Thailand and Sri Lanka	Office Memorandum No.354/39/2009-TRU (Pt.-I)	17-2-2015	ADD sunset review - Time period for completion of sunset review extended till 17-8-2015
Sodium Citrate	China	F.No. 14/23/2013-DGAD	27-2-2015	Definitive ADD recommended
Sodium Nitrate	EU, China PR, Ukraine, Korea RP	3/2015-Cus. (ADD)	10-2-2015	Definitive ADD imposed
Tyre Curing Presses (except Six Day Light Curing Press for curing bi-cycle tyres)	China	6/2015-Cus. (ADD)	3-3-2015	ADD extended till 7-1-2016

### Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Frozen Warm water Shrimp	USA	[A-533-840] 80 FR 12147	6-3-2015	ADD administrative review - Preliminary determination of sales less than normal value



Product	Country	Notification No.	Date of Notification	Remarks
Oil country tubular goods	Canada	Canada Border Service Agency Press Release	3-3-2015	ADD and CVD – Final affirmative determination of dumping and subsidisation
Polyethylene Terephthalate Film, Sheet, and Strip from India	USA	[A-533-824] 80 FR 11160	2-3-2015	Final results of ADD administrative review for the period June 1, 2012 – June 30, 2013. Weighted average dumping margin of 1.89% for Jindal Poly Films Limited and 0% for SRF Limited.
Polyethylene Terephthalate Film, Sheet, and Strip from India	USA	[C-533-825] 80 FR 11163	2-3-2015	Final results of CVD administrative review for the period January 1 – December 31, 2012. Subsidy rate of 7.66% for Jindal Poly Films Limited and 2.03% for SRF Limited.
Preserved mushrooms	USA	[A-533-813] 80 FR 11164	2-3-2015	ADD sunset review initiated

## WTO News

### Panel report issued on China's anti-dumping duties on steel tubes

On 13 February 2015, a WTO panel issued reports in the disputes brought by Japan and European Union, regarding China's imposition of anti-dumping duties on high-performance stainless steel seamless tubes (DS454 and DS460). The Panel held, *inter alia*, as follows:

- i. The Panel upheld a number of claims under Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-dumping Agreement, but rejected the claims under Article 3.2 that MOFCOM was required, and had failed to assess whether price undercutting by the subject imports had

the actual effect of placing downward pressure on domestic prices. The complainants had claimed that MOFCOM's consideration of the price effects of subject imports was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement; assessment of impact of the dumped imports on the state of the domestic industry was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement; and that authority's determination that there is a causal link between dumped imports and material injury to the domestic industry was inconsistent with Articles 3.1 and 3.5 of the ADA.

- ii. Claims under Article 6.8 and Annex II:1, were rejected by the panel which found that there was no factual basis to conclude that Chinese authorities had failed to inform unknown exporters/producers of the information required of them, since they had posted the exporter questionnaire on its website. Claims that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement because it permitted full text of certain reports to remain confidential without a proper showing of “good cause” for such treatment by the petitioners, was however upheld by the Panel.
- iii. Similarly, the claim that by applying provisional measures for a period exceeding four months without meeting the requirements of Article 7.4 of the Anti-Dumping Agreement, China acted inconsistently with that provision, was also upheld by the Panel.
- iv. The Panel upheld European Union’s Article 2.2.2 claim concerning SG&A amounts, fair comparison claim under Article 2.4 and a procedural aspect of the European Union’s claim under Article 6.7 and Annex I:7 concerning alleged double-counting of certain administrative expenses.

### **US files subsidy dispute against China**

On 11 February 2015, the US has notified WTO Secretariat of a request for consultations with China regarding certain measures that

allegedly provide export-contingent subsidies to enterprises in several industrial sectors. These sectors include textiles, agriculture, medical products, light industry, special chemical engineering, new materials, and hardware and building materials.

According to the US, China designates a cluster of enterprises in a particular industry as a Demonstration Base (Foreign Trade Transformation and Upgrading Demonstration Bases) and then provides export-contingent subsidies which include provision of discounted or free services through Common Service Platforms or the provision of cash grants to enterprises. Furthermore, the US argues that China provides certain other export-contingent subsidies to Chinese manufacturers, producers, and farmers. Inconsistency with Article 3.1(a) and 3.2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) is claimed by USA while listing some 182 legal instruments of the Chinese authorities in this regard.

### **Panel established on EU dispute against US over large commercial aircraft**

On 23 February 2015, the WTO Dispute Settlement Body established a panel to study a complaint by the European Union against the United States of America over alleged tax incentives for the manufacturing of large commercial aircraft (DS487). India along with Brazil, China, Japan, Korea and Russia has reserved their third party rights in this dispute. According to EU conditional tax incentives established by the State of Washington in relation to the development, manufacture,

and sale of large civil aircraft constitute specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement. There are presently 4 disputes (DS347, DS353, DS317, DS316) at various stages of dispute settlement presently

in WTO between the two Members (USA and EU) relating to incentives for manufacture of aircrafts with both alleging that incentives by the other being in violation of WTO provisions.

## Ratio Decidendi

### Anti-dumping duty – Exclusion of unreliable and temporary exports from sunset review

Customs, Excise and Service Tax Appellate Tribunal (CESTAT) has upheld the decision of the designated authority excluding exports made by the appellant (Indonesian exporter), for the purpose of determination of likelihood of recurrence of dumping and injury. The appellant had made exports to India only during a short period relevant for the sunset review while there were no exports during period prior to or even after the relevant period. Observing absence of any good reason in this regard from the appellant, the Tribunal held the exports to be temporary and unreliable. Designated authority's finding that exports by appellant to the world were at prices lower than other Indonesian exporters was also noted by the Tribunal in this regard.

Further, considering various precedents and WTO panel report in DS244, the Tribunal held that the criteria under Section 9A(1) of the Customs Tariff Act, 1975 that anti-dumping duty should not exceed the dumping margin would have no practical application for continuation of duty under Section 9A(5). It was held that in case of sunset review, the question is not as to whether there is current

dumping, but it is whether revocation of duty would result in recurrence of dumping and injury. The anti-dumping bench of the CESTAT also held that there is no legal requirement to determine appellant-specific dumping margin in sunset review. [*P.T. Asahimas Chemicals v. Designated Authority – Final Order No. 50334/2015, dated 13-2-2015, CESTAT, New Delhi*]

### Anti-dumping duty – Corroboration of exporter-specific rate

Noting that where a rate based on adverse inferences is derived from secondary information, US Department of Commerce (DOC) must support the rate by demonstrating that the information has some basis in the commercial reality of the exporter during the period of review, the United States Court of International Trade has remanded the matter back to the department, in the case pertaining to assignment of exporter-specific anti-dumping duty rate. Department's reliance on the Customs data was also rejected by the court noting that if the Department wants to rely on it to corroborate the rate assigned, it must provide a full explanation of what the data represents and also supply substantial evidence to demonstrate the amounts deposited during the relevant period.



It was also held that payment of cash deposits at such rates by the importers is not indicative of the exporter's commercial reality during the period as the final duty rates were not known at that time. Similarly, department's reliance on small quantity of data was also rejected by the court holding that if department wants to rely on such data it should provide a sufficient explanation as to why its small quantity amounts to substantial evidence. Finally

while remanding the matter the Court was of the view that department had not satisfied its burden of corroboration and that by merely stating that the Department has not identified other sources that support its assessment, it cannot be concluded that the Customs Data is the only information relevant to the exporter. [*Since Hardware (Guangzhou) Co. Ltd. v. United States* – Slip Opinion No. 15-15, dated 18-2-2015, USCIT]

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