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Article 文章

Provisional anti-dumping measures in India – A misused provision

印度的临时反倾销措施-被滥用的条款

By **T.D. Satish**

An anti-dumping investigation normally stretches for a period of 12 months, which upon due cause shown may continue up to 18 months from the date of initiation of the investigation. In order to prevent injury being caused to the domestic industry during this period, it may be necessary to give some form of interim protection. In such cases, investigating authorities may make a preliminary determination and impose provisional measures.

Article 7 of Agreement on Anti-Dumping (“ADA”) regulates the imposition of provisional anti-dumping measures by member-countries. Rule 12 and Rule 13 of the Indian anti-dumping rules also adopt Article 7 and provide a mechanism for recommending provisional measures and implementing the same.

Preliminary finding issued recently by the Indian anti-dumping authority (“DGAD”) in the case of Cast Aluminum Wheels from Thailand, China, Korea and Taiwan¹ has opened up an issue of the time limits, if any, for issuing the preliminary findings. In this regard, it is worth looking at Rule 12 and Rule 17 of the Indian AD rules:

“12. Preliminary findings. - (1) The designated authority shall proceed expeditiously with the conduct of the investigation and shall, in appropriate cases, record a preliminary finding regarding export price, normal value and margin of dumping, and in respect of imports from specified countries....

17. Final findings. - (1) The designated authority shall, within one year from the date of initiation of an investigation, determine as to whether or not the article under investigation is being dumped in India and submit to the Central Government its final finding.....

Provided that the Central Government may, [in its discretion in special circumstances], extend further the aforesaid period of one year by six months.”

Among other things, Rule 12(1) requires DGAD to proceed expeditiously with the conduct of investigation and in appropriate cases, record a preliminary finding. On the other hand, Rule 17 requires DGAD to submit final finding to Central Government within one year from the date of initiation.

The questions

Thus, the first question that merits attention is whether the word ‘expeditiously’ holds any relevance under Rule 12? Secondly, can DGAD recommend imposition of provisional measures beyond the normal period of 12 months prescribed under the provisions for completing an investigation?

Understanding ‘expeditiously’

Rule 12 requires DGAD to proceed with the investigation expeditiously. The term ‘expeditiously’ used in Rule 12 denotes ‘swiftness’ and ‘promptness’ required to conduct the investigation. In a prompt investigation conducted by DGAD, only if there is a need

¹ Preliminary finding dated 13-Jan-2014

for interim protection to the domestic industry, DGAD may make a preliminary determination. For application of Rule 12, duty has been cast on DGAD to be prompt in its investigation. Expeditious investigation requires DGAD not to linger the investigation unnecessarily beyond the normal prescribed period. However, when such an investigation extends beyond the prescribed period of one year, it automatically means that the investigation conducted by DGAD is not prompt. Thus, only if the investigation is prompt, DGAD may be justified in recommending provisional duties.

Another significance of the term ‘expeditiously’ appearing in Rule 12 specifically could be to direct DGAD to conduct preliminary examination promptly and determine whether there is a need to impose provisional anti-dumping duty. After all, the very purpose of a provisional measure is to give interim protection to the injured domestic industry party, where completion of investigation may take a longer time.

In the absence of any specific provision prescribing the upper limit for recommending or imposing a provisional measure, DGAD gets a wide discretion to recommend provisional measure any time before the final determination, which may even exceed normal one year prescribed under Rule 17. Such a delay in making preliminary determination may in turn lead to uncertainty in the market, which may distort the market conditions further.

Obviously, the very purpose of recommending a provisional measure is lost if such a

recommendation is made at the fag end of the normal prescribed time limit and not somewhere in between. The term ‘expeditiously’ under Rule 12 has not been interpreted so far by any court. The WTO Dispute Settlement Body also has not made any observation on the promptness with which any preliminary determination shall be issued. However, jurisprudence can be developed by examining the standards set by other members of WTO. European Union for example, has an express provision that no provisional anti-dumping measure can be imposed beyond 9 months from the date of initiation of investigation². Thus, European Union has prescribed a definite time frame within which preliminary findings shall be issued. Such time frame is absent in the Indian law. However, one has to give a harmonious interpretation of Rule 12 and Rule 17. This means the preliminary determination shall be made promptly by DGAD and in any case, before final determination, that is, one year from the date of initiation.

Preliminary findings after one year?

Second issue that crops up is whether DGAD is justified in recommending provisional duties even after the lapse of original time period granted under Rule 17. There is no time limit for issuance of preliminary findings under Rule 12. However, there is a definite time limit prescribed for issuing the final findings by DGAD under Rule 17 of anti-dumping rules, which clearly provides that DGAD has to come out with a final determination within one year from the date of initiation of investigation. Thus, by law, there is

² Article 7(1) of Council Regulation (EC) No 1225/2009

an upper limit prescribed for coming out with final findings.

It must be noted that Rule 17 governs issuance of final findings by DGAD and not the preliminary findings. Logically, if there is an upper limit prescribed for issuance of final findings, it should automatically apply to preliminary determination as well.

The 'extra time' of 6 months has been granted to DGAD to complete the investigation under the proviso to Rule 17. The proviso will apply only with respect to the issue covered in the main provision. Since Rule 17 deals with final determination, the proviso will be applicable only for issuing the final finding. The additional time granted under the proviso to Rule 17 for issuing final findings cannot be interpreted to provide additional time for issuing the preliminary finding under Rule 12. The word 'expeditiously' appearing in Rule 12 cannot be interpreted to authorize the DGAD to issue preliminary findings in a non-expeditious manner.

Further, when the investigation is not completed within 12 months period, the Indian Government grants a specific extension of time for completing the investigation and issuing the final findings pursuant to the proviso to Rule 17. Such permission is only with regard to issuing the final findings and not with regard to preliminary findings. Therefore, DGAD cannot use the extension of time granted by the Indian Government to issue a preliminary finding.

In *Aluminum Wheels* case, DGAD has been granted extension of 3 months, ending on 9th March 2014. DGAD made a preliminary determination on 13th January 2014, that is, 13

months after initiation and less than 2 months before the expiry of extended time period of time as well. This is not the first time DGAD has extended its discretionary arm beyond the normal period. Though DGAD does not normally recommend provisional measures after one year, however, in 6 investigations so far, DGAD has come out with a determination after one year and has made such belated determination only once in last 5 years. Though such belated provisional determinations may be rare, they still exist and reflect the extent of discretionary power vested with DGAD to use the provision in favor of the domestic industry. On the face of it, preliminary recommendation made by DGAD in this particular case seems to be incorrect.

To conclude

From the point when an anti-dumping investigation is initiated, the international trade with respect to such product gets distorted. Thus, prompt and expeditious investigation by DGAD becomes essential. Since the investigation invariably stretches beyond one year, the injured domestic industry may require some level of interim protection during that period when investigation is ongoing. However, recommending a provisional duty after investigation has already run its race beyond the normal period prescribed, may at one hand not provide any adequate protection to domestic industry, which already has suffered irreversible damage during the interim period and on the other hand, it will only cause further distortion in the market as buyers will be more averse to imported products, which may anytime be subjected to anti-dumping duty. Given the open ended and unclear legislation

with respect to preliminary determination, which gives DGAD a chance to abuse its discretionary power, the only way out is to make a specific provision putting an upper limit for imposition of provisional measures. Until such time, the fate of exporters will remain in a limbo and may

receive shock treatment at any moment with a provisional determination, even after expiry of normal time period prescribed.

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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 通知号及日期
1-Hydroxy Ethylidene-1,1-Diphosphonic Acid 羟基乙叉二膦酸	USA 美国	ADD sunset review initiated 发起反倾销日落复审调查	US ITC news release, dated 26-2-2014 2014年2月26日, 美国国际贸易委员会发布公告
Bare Elastomeric Filament Yarn 裸弹性丝纱	India 印度	Safeguard duty investigation initiated 发起保障措施调查	D-22011/ 23/2013, dated 28-2-2014 2014年2月28日, D-22011/ 23/2013
Barium Carbonate 碳酸钡	USA 美国	ADD sunset review initiated 发起反倾销日落复审调查	A-570-880, 79 FR 6163, dated 3-2-2014 2014年2月3日, A-570-880, 79 FR 6163
Cable 缆绳产品	South Africa 南非	ADD sunset review initiated 发起反倾销日落复审调查	Dated 24-2-2014 2014年2月24日
Carbon and certain alloy steel wire rod 碳钢合金盘条	USA 美国	ADD and CVD investigations initiated 发起反倾销和反补贴调查	US ITA Press Release dated 21-2-2014 2014年2月21日, 美国国际贸易委员会发布新闻
Ceramic boarder 瓷砖腰线	Argentina 阿根廷	ADD-affirmative preliminary injury determination 反倾销-肯定性损害临时裁决	Dated 13-2-2014 2014年2月13日
Chlorinated Isocyanurates 三氯异氰尿酸	USA 美国	Preliminary finding of countervailable subsidization 初步裁定存在补贴	US ITA Press Release dated 12-2-2014 2014年2月12日, 美国国际贸易委员会发布新闻

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知号及日期
Circular welded austenitic stainless pressure pipe 圆形焊接奥氏体不锈钢高压套管	USA 美国	ADD and CVD sunset review initiated 发起反倾销和反补贴日落复审调查	A-570-930 & C-570-931, 79 FR 6163, dated 3-2-2014 2014年2月3日, A-570-930 & C-570-931, 79 FR 6163
Citric Acid 柠檬酸	Eurasian Economic Commission 欧亚经济委员会	ADD investigation initiated 发起反倾销调查	Dated 25-2-2014 2014年2月25日
Coated paper 铜版纸	South Africa 南非	ADD investigation terminated 终止反倾销调查	Dated 21-2-2014 2014年2月21日
Crawfish tail meat 小龙虾尾肉	USA 美国	Sunset review to be conducted 发起反倾销日落复审调查	US ITC News Release 14-014, dated 4-2-2014 2014年2月4日, 美国国际贸易委员会发布新闻
Crystalline silicon photovoltaic products 晶体硅光伏产品	USA 美国	Determination of material injury by goods subsidized and sold at less than fair value 确定由于补贴和低于正常价值销售造成实质损害	US ITC News Release 14-019, dated 14-2-2014 2014年2月14日, 美国国际贸易委员会发布新闻
Dicyandiamide 双氰胺	EU 欧盟	ADD repealed after sunset review 日落复审取消反倾销税	Council Implementing Regulation (EU) No. 135/2014, dated 11-2-2014 2014年2月11日, 欧盟委员会执行公告第135/2014号
Drill bits with cylinder tail 螺旋钻头	Argentina 阿根廷	ADD expiry review initiated 发起反倾销期终复审调查	Dated 17-2-2014 2014年2月17日
Electrolytic Manganese Dioxide 电解二氧化锰	USA 美国	ADD - Affirmative determination in sunset review 反倾销日落复审肯定性裁定	A-602-806, 79 FR 6162, dated 3-2-2014 2014年2月3日, A-602-806, 79 FR 6162
Ferrovandium 铁钒合金	USA 美国	Sunset review to be conducted 发起日落复审	US ITC News Release 14-015, dated 4-2-2014 2014年2月4日, 美国国际贸易委员会发布新闻14-015
Float glass 浮法玻璃	Korea RP 韩国	Initiated ADD sunset review 发起反倾销日落复审调查	Dated 12-2-2014 2014年2月12日

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知号及日期
Frontseating service valves 空调用截止阀	USA 美国	Sunset review to be conducted 发起日落复审	US ITC News Release, dated 26-2-2014 2014年2月26日, 美国国际贸易委员会发布公告
Glass fibres and articles thereof 玻璃纤维及其制品	India 印度	ADD mid-term review - Micro glass fibre with diameter 0.3 – 2.5 microns recommended to be excluded from ADD 反倾销期中复审-直径在0.3-2.5微米的微纤维被排除在反倾销税征收范围之外	14/21/2013-DGAD, dated 10-2-2014 2014年2月10日, 14/21/2013-DGAD
Grain-Oriented Electrical Steel 取向电工钢	USA 美国	ADD – Preliminary determination postponed 反倾销-延迟临时反倾销裁决	A-570-994, 79 FR 11082, dated 27-2-2014 2014年2月27日, A-570-994, 79 FR 11082
Hollow structural sections 空心焊缝管	Australia 澳大利亚	Exemption inquiry initiated 发起反倾销免税调查	Anti-dumping Notice No. 2014/15, dated 3-3-2014 2014年3月2日, 反倾销通知第, dated 3-3-2014
I and H sections of other alloy Steel I和H型合金钢	Indonesia 印度尼西亚	Safeguard Investigation initiated 发起保障措施调查	G/SG/N/6/IDN/25, dated 13-2-2014 (WTO – Committee on Safeguards), dated 12-2-2014 2014年2月12日, 世贸组织保障措施委员会G/SG/N/6/IDN/25
Lightweight thermal paper 低克重热敏纸	USA 美国	ADD and CVD – Affirmative determination in sunset review 反倾销和反补贴-日落复审肯定性裁决	A-570-920, 79 FR 9879, dated 21-2-2014 and C-570-921, 79 FR 10477, dated 25-2-2014 2014年2月21日, A-570-920, 79 FR 9879和2014年2月25日, C-570-921, 79 FR 10477
Monosodium Glutamate 谷氨酸钠	USA 美国	ADD – Affirmative preliminary determination 反倾销-肯定性临时裁决	US ITC News Release, dated 5-3-2014 2014年3月5日, 美国国际贸易委员会发布新闻
New tyres, rubber, bicycle 自行车胎	Brazil 巴西	Imposition of ADD duty 征收反倾销税	Dated 18-2-2014 2014年2月18日
Non-malleable cast iron pipe fittings 无可锻性铸铁管附件	USA 美国	ADD to continue after sunset review 日落复审继续征收反倾销税	A-570-875, 79 FR 8437, dated 12-2-2014 2014年2月12日, A-570-875, 79 FR 8437

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知号及日期
Non-self priming centrifugal pump 非自吸式离心电泵	Argentina 阿根廷	Preliminary finding issued 发布临时裁决	Dated 3-4-2014 2014年3月4日
Pencil 铅笔	Brazil 巴西	Initiated ADD sunset review 发起反倾销日落复审调查	Dated 10-2-2014 2014年2月10日
Persulfates 过硫酸盐	USA 美国	ADD - Affirmative determination in Sunset review 反倾销日落复审肯定性裁决	US ITC News Release 14-020, dated 24-2-2014 2014年2月24日, 美国国际贸易委员会发布新闻14-020
Polyethylene Terephthalate Film, Sheet and Strip 聚对苯二甲酸乙二酯膜, 片和条	USA 美国	ADD - Affirmative determination in sunset review 反倾销日落复审肯定性裁决	A-570-924, 79 FR 10095, dated 24-2-2014 2014年2月24日, A-570-924, 79 FR 10095
Pre-sensitized aluminum plates 铝制预涂感光平板	Brazil 巴西	ADD investigation initiated 发起反倾销调查	Dated 25-2-2014 2014年2月25日
Refined Brown Aluminum Oxide 棕刚玉	USA 美国	ADD sunset review initiated 发起反倾销日落复审	A-570-882, 79 FR 6163, dated 3-2-2014 2014年2月3日, A-570-882, 79 FR 6163
Saturated Fatty Alcohol 脂肪醇	India 印度	Safeguard duty investigation initiated 发起保障措施调查	D-22011/26/2013, dated 13-2-2014 2014年2月13日, D-22011/26/2013
Silicon metal 金属硅	Australia 澳大利亚	Dumping and Subsidisation – Investigation initiated 发起反倾销和反补贴调查	Anti-dumping Notice No. 2014/08, dated 6-2-2014 2014年2月6日, 反倾销通告第2014/08
Sodium Acid Pyrophosphate 酸式焦磷酸钠	Brazil 巴西	AD – Affirmative Preliminary Determination 反倾销-肯定性临时裁决	Dated 24-2-2014 2014年2月24日

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知号及日期
Sodium Citrate 柠檬酸钠	India 印度	Safeguard investigation initiated 发起保障措施调查	F. No. D-22011/20/2013, dated 4-3-2014 2014年3月4日, D-22011/20/2013
Sodium Nitrite 亚硝酸钠	India 印度	Safeguard duty imposed until 25-5-2015 保障措施税延至2015年5月25日	1/2014-Cus. (SG), dated 26-2-2014 2014年2月26日, 1/2014-Cus. (SG)
Spectacle frames 眼镜框架	Turkey 土耳其	Imposition of safeguard duty continued for another 2 years 继续征收2年的保障措施税	Dated 19-2-2014 2014年2月19日
Stainless steel tableware 不锈钢厨具 餐具	Eurasian Economic Commission 欧亚经济委员会	ADD investigation initiated 发起反倾销调查	Dated 5-2-2014 2014年2月5日
Steel wire garment hangers 钢丝衣架	USA 美国	ADD - Affirmative determination in sunset review 反倾销日落复审肯定性裁决	US ITC News Release 14-018, dated 7-2-2014 2014年2月7日, 美国国际贸易 委员会发布新闻14-018
TDI 甲苯二异氰酸酯	Japan 日本	ADD investigation initiated 发起反倾销调查	Dated 14-2-2014 2014年2月14日
Three-phase oil-immersed power transformer 油浸式三相变压器	Argentina 阿根廷	ADD - Affirmative preliminary determination 反倾销-肯定性临时裁决	Dated 13-2-2014 2014年2月13日
Uncovered innerspring units 非封闭内置弹簧部 件	USA 美国	ADD - Sunset review to be expedited 反倾销-快速日落复审	US ITC News Release 14-016, dated 4-2-2014 2014年2月4日, 美国国际贸易 委员会发布新闻14-016
Woven sacks 复合编织袋	USA 美国	ADD and CVD - Affirmative determination in Sunset review 反倾销和反补贴日落复审肯定性裁决	US ITC News Release 14-022, dated 28-2-2014 2014年2月28日, 美国国际贸易 委员会发布新闻14-022
Zinc coated (galvanised) steel 镀锌板和镀锌铝板	Australia 澳大利亚	Exemption inquiry initiated 发起免税调查	Anti-dumping Notice No. 2014/16, dated 25-2-2014 2014年2月25日, 反倾销通告第 2014/16

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 通知号及日期
Perchloroethylene 四氯乙烯	EU and USA 欧盟和美国	Provisional ADD imposed 征收临时反倾销税	MOFCOM Announcement No.11 of 2014, dated 17-2-2014 2014年2月17日，商务部公告 2014年第11号
X-ray security inspection equipment X射线安全检查设备	EU 欧盟	Imposition of ADD terminated 终止征收反倾销税	MOFCOM Announcement No.9 of 2014, dated 19-2-2014 2014年2月19日，商务部公告 2014年第9号

WTO News 世贸组织新闻

中国寻求成立专家组以探讨美国的反倾销计算方法

中国已经向争端解决机构请求成立专家组，以确定美国政府在计算倾销幅度时使用的某些方法（DS471），即在反倾销调查和复审过程中的针对性倾销方法，以及对来自非市场经济国家之一的中国的进口产品假设单一税率。美国使用的推断的方法违反了利害关系方的利益，一旦生产商或出口商未能符合合作的标准，则对其使用可获得的不利事实，也同样被认为是违反了反倾销协议第6.8条和附件2的内容。【具体内容请参阅国际贸易法律月刊2014年2月的文章】

根据丹麦和美国的请求成立专家组

根据丹麦的请求，争端解决机构于2月26日成立专家组，以评估欧盟对法罗群岛采取的措施（DS469）。而关于中国对来自美国的取向

电工钢征收反补贴和反倾销税一案（DS414）也于同一天成立了执行专家组。印度在这两个争端中均保留其第三方权利。

丹麦称欧盟的措施禁止了在法罗群岛控制范围内捕获的大西洋-斯堪的安鲱鱼和东北大西洋鲭鱼产品进入欧盟市场，这违反了关税和贸易总协定的某些条款。欧盟的措施也禁止了悬挂法罗群岛旗帜国并且捕捞大西洋-斯堪的安鲱鱼或鲭鱼的船只使用欧盟港口。

至于美国和中国之间的争端，上诉机构已经于2012年10月判决支持专家组对中国商务部有关涉案产品进口造成价格影响的判决违反了反倾销协议第3.1和3.2条以及补贴和反补贴协议第15.1和15.2条。中国的行为也被认为违反了反倾销协议第6.9和12.2.2条以及补贴和反补贴协议第12.8条和12.2.2条的内容。

News Nuggets 新闻精华

印度和美国的贸易关系趋向紧张

印度和美国的贸易关系再次趋向紧张。据报导美国可能将印度列入优先外国国家名单。印度回应道美国采取的这一措施可能在世贸组织方面受到挑战，而且两国在最近频繁运用世贸组织的规则相互较量。美国国际贸易委员会对印度的贸易、投资和产业政策发起了一项调查，而主要的争议焦点似乎是在制药领域的知识产权保护。据报导美国对于印度由于突发公共卫生事件以外的原因授予强制许可的做法并不满意。

上个月也看到美国寻求与印度在世贸组织展开磋商，挑战印度的国家太阳能计划第二阶段所谓的国内成分要求。一些其他争端也已经在争端解决机构的议事日程上。美国对印度对来自美洲的禽类产品的某些进口限制措施存在争议。印度对于美国对来自印度的某些钢制品征收反补贴税的做法向法院提起诉讼。美国征收高额签证费并且计划控制签证的规定也被印度认为是违反了服务贸易总协定的诸多条款。

Ratio Decidendi 判决理由

市场经济地位调查的时限

欧盟法院判决支持普通法院的裁决，调查机关在规定的3个月后，根据基本反倾销条例第2(7)(c)条的规定，作出接受市场经济待遇的决定将不自动造成该法规的失效。欧盟法院没有规定在第2(7)(c)条第二段规定的时限是否在程序上能够确保出口商行使抗辩权不受影响。

低等法院认为三个月的时间限制是为了确保市场经济待遇的标准得到评估而不受到倾销幅度因素的影响。另外，它也认为，事实

上调查机关在调查一开始即已经知晓较低的成本投入。

根据欧盟法院的判决，市场经济待遇决定的实质性没有争议，而出口商未能证明如果调查机关能过在不超过三个月的时限内完成，调查机关可能接受较低的倾销幅度。出口商认为普通法院不能引入新的标准，如以“仅仅貌似合理的假设”对市场经济待遇使用较低倾销幅度而不适用后附的时限的判决是没有成效的。

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