

## Anti-dumping Provisions in India: An Overview

### Introduction

The Anti-dumping Agreement under GATT (“**Agreement**”) laid down the principles to be followed by the member countries for imposition of anti-dumping and countervailing duties as well as safeguard measures. Accordingly, Indian laws were amended with effect from January 1, 1995 to bring them in-line with the provisions of the Agreement. In India, sections 9A, 9B and 9C of the Customs Tariff Act, 1975 (“**Act**”) and the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (“**Rules**”) framed thereunder form the legal basis for anti-dumping investigations and for the levy of anti-dumping duties.

The present bulletin will provide an overview of the provisions dealing with the anti-dumping law in India.

#### 1.0 Anti-dumping law in India

##### 1.1 Definition of dumping

As per section 9A of the Act, dumping is a practice by which products of a country are exported to India at less than its normal value. A product is considered as being *exported at less than its normal value*, if its price (a) is less than the comparable price for the like product in the exporting country, or (b) in the absence of such domestic price, is less than (i) the highest comparable price for the like product for export to any third country, or (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Maintaining the spirit of the Agreement, the Indian law on anti-dumping does not restrain the practice of anti-dumping. It only safeguards the Indian market from the injuries of dumping. Accordingly, India can take action against the dumped product only if it causes actual injury to the domestic market. Mere intent to cause injury without actual injury is not actionable.

##### 1.2 Determination of dumping

As per the explanation to section 9A of the Act, the following need to be established to determine dumping:

1.2.1 The existence of dumping: To establish dumping, a comparison should be made between the *export price* and *normal value*. The Act defines *export price* as the price at which the product is exported to India and *normal value* as the price at which like articles are sold in the country of the exporter.<sup>1</sup> If the normal value cannot be determined by means of domestic

<sup>1</sup> Explanations (b) and (c) to section 9A of the Act

sales of the exporting country the following shall be taken into consideration while determining normal value: (a) export price of a third country, or (b) cost of production in the country of origin. A product shall be considered dumped if its export price is less than the normal price of a similar product in the exporting country.<sup>2</sup> This is termed as dumping margin under the Act.

1.2.2 Ordinary course of trade: A transaction in the ordinary course of trade refers to one between an independent buyer and seller where the buyer and seller are not related and price is the sole consideration for the sale. If there is a special or favoured buyer from whom the seller charges an especially low price, it can be termed as dumping.

1.2.3 Like products: The term *like product* is a product which is identical in all respects to the product under consideration, or in the absence of such a product, another product, which has characteristics closely resembling those of the product under consideration. If material injury is caused to the Indian domestic industry producing the like product due to the low pricing of the imported goods, it can be termed as dumping.

### 1.3 Cause of action in case of dumping

The Act protects the domestic industry from any material injury caused by the dumping of products. Anti-dumping action can be taken in case of (a) material injury, (b) threat of material injury<sup>3</sup> and (c) retardation of the establishment of a domestic industry.<sup>4</sup> The determination of injury is based on the examination of the volume of the dumped imports and its effect on the prices in the domestic market for like products. Such injury must be proved by the domestic producers. In doing so, evidence towards decline in sales, profits, output, market share, productivity, etc. can be put forth by the domestic industry.<sup>5</sup>

### 1.4 Investigation

Per rule 5(1) of the Rules, an investigation on dumping can be initiated only upon receipt of a written application to the designated authority<sup>6</sup> by or on behalf of the domestic industry. In order to constitute a valid application, two conditions have to be satisfied by the domestic producers expressly supporting the application (1) must account for at least 25% of the total production of the like article by the domestic industry in India; and (2) must

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<sup>2</sup> Explanation (a) to section 9A of the Act

<sup>3</sup> To establish a threat of material injury, there must be (a) significant increase in imports into India; (b) imminent substantial increase in the exports to certain markets, taking into account the availability of other export markets; and (c) an alteration in the price of a product causing a significant suppressing effect on domestic prices, leading to increase in demand for further imports

<sup>4</sup> Section 9B(1)(b)(ii) of the Act

<sup>5</sup> The Directorate General of Anti-dumping & Allied Duties, Ministry of Commerce, "Anti-dumping – A Guide," <http://www.commerce.nic.in/anti-dum.pdf>, visited on August 9, 2010

<sup>6</sup> Rule 3 of the Rules empowers the Central Government to appoint any person above the rank of a Joint Secretary or any person the Government may think fit to be appointed as the designated authority. Such person heads the Directorate General of Anti-dumping and Allied Duties functioning in the Ministry of Commerce and Industry

account for more than 50% of the total production of the like article by those expressly supporting and those opposing the application.<sup>7</sup>

The designated authority shall expeditiously conduct the investigations and record a preliminary finding regarding export price, normal value, margin of dumping and injury. The Department of Revenue, Ministry of Finance may, on the basis of this preliminary finding of the designated authority impose a provisional duty on the offender.<sup>8</sup> However, rule 13 of the Rules disallows the provisional duty to exceed the margin of dumping. The final finding shall be submitted by the designated authority to the Central Government within 1 year from the date of initiation of the investigation.<sup>9</sup>

### 1.5 Relief to the domestic industry

Relief can be provided to the Indian domestic industry in the form of anti-dumping duties or price undertakings. Under Rule 18 of the Rules, anti-dumping duty is imposed by the Central Government within 3 months of the date of receipt of the final finding from the designated authority. The anti-dumping duty levied is either on the dumping margin or the injury margin,<sup>10</sup> whichever is lower.<sup>11</sup> The Act allows the levying of duty retrospectively if (a) there is a history of dumping which caused the injury or that the importer was, or, should have been aware that the exporter practices dumping and that such dumping would cause injury, and (b) the injury is caused by massive dumping, in a relatively short time, so as to seriously undermine the remedial effect of anti-dumping duty.<sup>12</sup>

Rule 15 of the Rules empowers the designated authority to suspend or terminate the investigation if the exporter concerned furnishes an undertaking to revise his price to remove the dumping or the injurious effect of dumping. In case the exporter issues a price undertaking, no anti-dumping duties are levied on the exporter. No undertaking can be accepted before preliminary determination is made.

### 1.6 Review

As per section 9A(5) of the Act, the imposition of anti-dumping duty shall be effective for 5 years from the date of imposition, unless revoked earlier. However, there is lack of clarity in the Act and from the court as to the circumstances under which anti-dumping duty can be revoked earlier than the stipulated five-year period. During the period the duty is effective, the designated authority under Rule 23 of the Rules, shall review the need for the continued imposition of the anti-dumping duty, from time to time. Herein the Act and the courts again fail to provide as to how often the reviews can be done, thereby empowering the designated authority with discretionary powers. Such a review can be done *suo motu* or on the basis of request received from an interested party. As per Rule 2(c) of the

<sup>7</sup> Rule 5(3)(a) and Explanation to Rule 5(3) of the Rules

<sup>8</sup> Rule 13 of the Rules

<sup>9</sup> Rule 17 of the Rules

<sup>10</sup> Injury margin is the difference between the fair selling price due to the domestic industry and the assessable value of the product under consideration

<sup>11</sup> Rule 18 of the Rules

<sup>12</sup> Section 9A(3) of the Act

Rules, an interested party is (1) an exporter of foreign producer or importer of an article subject to investigation for being dumped in India, (2) the government of the exporting country, and (3) a producer of the like article in India.

### **1.7 Appeal**

The parties under section 9C of the Act have a statutory right to file an appeal against the order of determination of anti-dumping duty or its review. The appeal is to be filed within 90 days of the date of the order before the Customs, Excise and Gold (Control) Appellate Tribunal constituted under section 129 of the Customs Act.

### **Conclusion**

Anti-dumping is a major threat to several countries like India, where often Chinese goods or goods manufactured by other countries are dumped. Accordingly, adequate anti-dumping legislations are necessary to protect the domestic industry. Bearing in mind that the existing anti-dumping law in India is based on the Agreement, it still is not an independent legislation dealing solely with the issue of anti-dumping. Enacting a single legislation dealing with anti-dumping will assist the judiciary by providing all the rules and regulations pertaining to anti-dumping in one place. Thus, India should enact an independent statute only to deal with anti-dumping issues.

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