

## Luthra & Luthra Trade Law Newsletter

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### *From the Editor's desk*

Welcome to the third issue of the Luthra & Luthra Trade Law Newsletter.

In this issue we have attempted to provide our readers with a flavour of the negotiations taking place on antidumping and anti-subsidy, also called the 'Rules Negotiations'. Due to the depth of the issues being discussed at the WTO a few select areas have been highlighted in this present volume of the L&L Trade Law Newsletter. Specifically, this volume consists of an analysis of proposals on the "lesser duty rule", "sunset reviews", "new shipper reviews" and "changed circumstances review".

Subsequent volumes of the L&L Trade Law Newsletter will contain analysis of proposals pertaining to the WTO Subsidies Agreement and fisheries subsidies in particular.

Recently the Ministry of Commerce held a National Seminar on Fisheries Subsidies in the context of negotiations on the same at the WTO. Lawyers from L&L participated in this seminar and provided inputs on specific aspects of the emerging disciplines. A broad overview of the discussions at the National Seminar is provided herein.

The discussion on zeroing continues in the section on the developments at the WTO Dispute Settlement and highlights the conflicting stances being taken by the Appellate Body and Panels on this very contentious subject.

As always we continue our summary of trade remedial actions at the US Department of Commerce, the European Commission and the Indian antidumping authorities (DGAD). In addition to a summary of findings issued by these authorities, we have also included a discussion on a recently issued judgement of the Supreme Court of India pertaining to the calculation of non-injurious price and normal value, which is likely to have significant implications on the methodology followed by the DGAD.

We hope you will find this Newsletter useful and informative and as always your comments and suggestions are welcome!

Warm regards,

Rajiv K. Luthra  
Managing Partner

## SERIES ON “RULES NEGOTIATIONS”

In this volume of the **Luthra & Luthra Trade Law Newsletter**, we have endeavored to provide a few highlights on issues being discussed at the “Rules Negotiations” at the WTO. The Rules Negotiations refer to the negotiations currently underway at the WTO wherein Members are discussing ways to clarify and improve rules related to antidumping and anti-subsidy law. The negotiations were launched at the Ministerial Conference held in Doha in 2001 and include negotiations on antidumping, anti-subsidy, subsidies for fisheries and regional trade agreements. WTO Members have made several proposals on possible approaches towards clarifying these disciplines. India has a substantial interest in the shaping of these discussions, as it is both a significant user and a frequent target of antidumping laws. This volume of the **L&L Trade Law Newsletter** contains a discussion of certain procedural issues that have arisen in the context of the WTO Antidumping Agreement. The subsequent issues will contain discussions on issues pertaining to the anti-subsidies agreement and fisheries subsidies.

In this volume we have focused our analysis on proposals made on the “lesser duty rule”, “sunset reviews”, “new shipper reviews” and “changed circumstances review”.

### ***I. Lesser Duty Rule***

In antidumping proceedings a dumping margin is calculated by comparing the normal value (price of the product in the exporters’ home market) and the export price (price of the product in the importing country). An antidumping

duty is levied if there is a positive dumping margin.

Art. 9.1 of the Anti-Dumping Agreement, which deals with imposition and collection of anti-dumping duties lays down that while the anti-dumping duty imposed cannot be greater than the margin of dumping, it is desirable that “*the duty be less than the margin if **such lesser duty would be adequate to remove the injury to the domestic industry***” (called the “lesser duty rule”).

While some countries (and India is an active proponent of this position) have sought that the lesser duty rule be made mandatory, other countries have resisted this development. The divergence in stance is mainly between developing countries such as India, Brazil, China and developed nations such as the USA and Canada.

Developing countries believe that the rationale behind antidumping duties is to counteract injury being suffered by the domestic industry and higher levels of duty as derived from the dumping margin may be more than what is adequate to protect the domestic industry.

To illustrate, suppose company X in country A exports textiles to country B. The margin of dumping is determined to be 40%. However the domestic price of textiles in country B is only 5% higher and the relative price gap between domestic and import prices for textiles in country B never exceeded 10% over the entire period under investigation. In such a situation, it would be more appropriate to impose a duty of say, 10%, rather than a duty of 40%.<sup>1</sup>

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<sup>1</sup> Communication on Anti-Dumping: Illustrative Major Issues, TN/RL/W/6.

Further even where Member countries decide to use the lesser duty rule, Article 9.1 does not lay down any guidelines on how the lesser duty is to be estimated.

Proposals from countries have centered on making the rule mandatory and on the possible means of calculating a duty lesser than the margin of dumping.

There has been considerable opposition to the mandatory application of the lesser duty rule.<sup>2</sup> The US has asserted that the long-term effect of dumping has to be considered. If the anti-dumping duties simply offset the amount of dumping with respect to the domestic industry, they may not be able to counteract the long term injury suffered by industries “plagued by dumping” such as laying-off skilled workers, cutting back on research and development expenditures etc. which require significant time and investment to remedy.

With respect to calculating the lesser duty, the following methodologies have been proposed:

Price Undercutting Method: The lesser duty level is the difference between the ex-factory price of the domestic like product and the CIF landed price of the dumped imports.

Representative Cost Plus Profit Method: The duty level is calculated as the difference between the representative per unit cost of production, selling, general and administrative costs (“SG&A”), plus profit of the domestic

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<sup>2</sup> See generally, TN/RL/W/45. See also Communication from Australia, TN/RL/W/121 where Australia expresses concern whether the rule would have to be applied in each and every case or whether the authority would have to consider it in each case. This arises from Australia’s municipal laws wherein the authority compulsorily considers whether a lesser duty should be applied but is not “mandated” by law to actually apply such lesser duty.

like product; and the CIF landed price of the dumped imports.

Non-dumped Import Price Method: The lesser duty level is calculated as the difference between the CIF landed price of the non-dumped imports (either from the nation under investigation or from third countries) of the like products and the CIF landed price of the dumped imports.

Proponents have also suggested that there be no “zeroing” in applying the lesser duty rule. India itself follows the lesser duty rule thus benefiting exporters as a duty lesser than the dumping margin is usually applied. Such being the case, India has a significant interest in ensuring that other jurisdictions too follow the same.

## ***II. Sunset Reviews***

Antidumping duties remain in force for 5 years and come up for re-determination at the end of the 5 year period if the domestic industry so petitions (Article 11.3). While the intention of the rule is that duties should remain in force for a reasonable period, which will allow the domestic industry time to recover from the effect of dumping, in practice the duties remain in force for a much longer time. It is popularly said that the sun never really sets in a sunset review. Part of the problem arises from the “likelihood” test provided in Article 11.3, which states that a duty shall be terminated unless the authorities determine in a review that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The main issue that arises in this regard is whether the provisions of Article 11.3 should be modified sufficiently to ensure that the exception is not over-used.

A number of countries including Brazil, Chile, Colombia, Costa Rica, Hong

Kong, China, Israel, Japan, Korea and Norway have recommended that Article 11.3 should be amended to only state that no definitive anti-dumping measure shall continue beyond 5 years of its imposition. It is further recommended that after 5 years a further restriction should only be possible through an analysis of the current (or immediate past) situation and not by the prediction of the future (the likelihood of dumping or injury) as that is based almost completely on surmise and conceptualization.

The opposing view in this regard has come from the developed world. Australia for instance has pointed out that under the procedures suggested above, the measure would come to be terminated even if injury is caused after the five year period.<sup>3</sup> The European Union has also disagreed with automatic termination and raises doubts about the idea that the mere fact of absence of imports is sufficient to terminate the measure.<sup>4</sup> The United States goes even further to question the very basis of the idea that termination of orders after five years is a general rule. It also submitted that withdrawal from market by the exporter after imposition of duty only shows that it cannot sell in that market unless it engages in the unfair trade practices which have been remedied by the anti-dumping order in force.<sup>5</sup>

In light of both these contrasting views, Japan has submitted a paper that may form a mid-way path. Japan's proposal provides for automatic termination, but after automatic termination, authorities

may conduct new AD investigations if they have reason to believe that injurious dumping is occurring. The proposal allowed for the automatic termination to occur later than five years after imposition, as decided by negotiation.<sup>6</sup>

India too has recognized the problems faced by the developing countries due to over-use of the exception<sup>7</sup>. Given that Indian exports are frequently targeted, it is in India's interest to have more clarity in the disciplines pertaining to sunset reviews.

### **III. Changed circumstances review**

Sunset reviews are not the only avenues open to review the imposition of a duty. Apart from the review at the end of 5 years, the WTO AD Agreement also provides for periodic reviews that can be requested either by the exporter or the domestic industry. Article 11.2 of the Anti-Dumping Agreement mandates that investigating authorities "shall review the need for the continued imposition of the duty" after the elapse of a certain period of time. The basic rationale behind the provision is that anti-dumping duties should only be imposed so long as it is necessary to do so. Thus nations have initiated mechanisms such as administrative reviews, interim reviews etc. to comply with the mandate of Article 11.2. However, the lack of any guidelines, whether substantive or procedural, under Article 11 has made this provision

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<sup>3</sup> Comments from Australia on the People's Republic of China's paper on anti-dumping, TN/RL/W/74

<sup>4</sup> Questions from the European Communities, TN/RL/W/20.

<sup>5</sup> Questions from the United States on Papers, TN/RL/W/25.

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<sup>6</sup> Paper from Japan, TN/RL/GEN/104.

<sup>7</sup> Communication by Bangladesh; the People's Republic of China; Colombia; Costa Rica; Egypt; Guatemala; Hong Kong, China; India; Indonesia; Korea; Macao, China; Maldives; Pakistan; Paraguay; Peru; Thailand and Vietnam, TN/RL/W/48.

one of the most contentious provisions of the ADA.

Art. 11.2 states that the authorities should review “whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied”. Since both the possibility of the recurrence of dumping and of injury are required to be established, several questions arise. Firstly, does a finding of “no present dumping” necessarily imply that the anti-dumping duty is to be discontinued? The Panel Report on *US – DRAMS*<sup>8</sup> observed that such an interpretation is not warranted. It has been reiterated that the test under Article 11.2 is one of the possibility of future dumping. Thus a finding of no present dumping should not imply automatic termination of anti-dumping duty.

There is a conflict between nations such as the United States who are in favour of continuing the existing *status quo* and developing nations such as India, Korea, Brazil, China who have suggested that the inherent ambiguity in Art. 11.2 makes it susceptible to abuse by employing arbitrary procedures and standards<sup>9</sup>.

Proposals for changes to Article 11.2<sup>10</sup> have mainly focused on making provisions of Article 2 applicable to reviews, meaning that the procedure for comparison between the normal price and the export price as stipulated in Article 2.4.2 should be applied to

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<sup>8</sup> Panel Report on United States - Anti-Dumping Duty on DRAMS from Korea, WT/DS99/R, see paragraph 6.48, Fn. 494 and paragraphs 6.32, 6.34.

<sup>9</sup> Proposal on Reviews, TN/RL/W/83, Proposal on Article 11.2: Brazil, TN/RL/GEN/117.

<sup>10</sup> Proposals on Proceedings under Article 11.2: Communication from Brazil, Chile, Israel, Japan, Korea, Singapore, Switzerland, Thailand TN/RL/GEN/52.

reviews as well. This proposal is significant in light of the US practice of “zeroing” which has been held to be inconsistent with Article 2.4.2. However the fate of zeroing in reviews still remains unclear in light of the recent Panel ruling in *US-Measures relating to zeroing and sunset reviews, recourse to Panel by Japan*,<sup>11</sup> which is discussed subsequently in this Newsletter.

Members have also suggested a timeline for the completion of Art. 11.2 investigations. The review should be completed within 12 months and it is suggested that the investigating authorities should pay a reasonable rate of interest if duties are not refunded within 90 days following the completion of the review.

The most ambitious suggestions has been that if no dumping margin has been found, the “likelihood of injury” test shall not apply and the measure shall be terminated<sup>12</sup>. This is of course contrary to the Panel interpretation in *US – DRAMS* and will necessitate a significant amendment.

#### ***IV. New Shipper Review***

An antidumping duty is imposed against exporters from a country that are known to the investigating authority. For those exporters that are not known, the investigating authorities set a rate called the “all others rate”. Thus even if an exporter is not known, but had exported the product during the POI, that exporter is subject to the “all others rate”. However frequently there are also exporters who may not have exported the product to the country imposing the antidumping duty during the POI (“new shipper”). In this case the exporter would be subject to the “all others rate”.

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<sup>11</sup> WT/DS322/R.

<sup>12</sup> Proposal on Reviews, TN/RL/W/83.

If an “all others rate” was not applicable for new shippers, it would be very easy for exporters who were subject to the duty to completely evade that duty by changing their name and exporting the product as a “new shipper”. In order to prevent such evasion, the AD Agreement in Article 9.5 envisages that a new shipper can claim a new rate, provided that such new shipper did not export the product during the POI and the new shipper was unrelated to the exporters that are subject to the antidumping duty. This forces new shippers to participate and apply for their own rate based on their own dumping margins.

However the United States has asserted the safeguards in this provision are abused by entities by simply establishing a new corporate identity.<sup>13</sup> Such entities make one export sale, small in volume but abnormally high-priced, to a collusive customer. The new company then requests a new shipper review, without disclosing its affiliation with the already-investigated company. The original company ships through its newly created conduit and enters the market with very low-priced merchandise. If this collusive arrangement is not discovered, the original company continues exporting with a very low margin. Even if the arrangement is discovered during the review, the original company succeeds in delaying the imposition of anti-dumping duties. Thus the proposal essentially focuses on creating a higher benchmark for initiating a new shipper review (NSR).

Developing countries such as Argentina, Mexico and Egypt also seek changes to Article 9.5 and Mexico has suggested that the new shipper should establish that he has made “representative

exports of the product subject to anti-dumping duties”<sup>14</sup>. US proposal uses the terminology of “bona fide commercial sales” taking into consideration factors such as normal commercial quantities, channels and methods of distribution, and the timing, pricing, terms and process of sales.<sup>15</sup>

The divergence between the proposals arises on the issue of time-frames. Developing country Members have expressed concerns that while Article 9.5 mandates that NSR be carried out “promptly” and “on an accelerated basis”, in the absence of clear guidelines, there are vast discrepancies in time-lines actually applied.<sup>16</sup> Proposals have suggested between 6-8 months to 9 months.<sup>17</sup> The US on the other hand has proposed to eliminate the requirement that NSR be initiated and carried out “on an accelerated basis”. This is because such a requirement would impose significant administrative burdens. US has expressed willingness though to negotiate on this point, as the rationale behind this proposal is not to delay reviews, but to conduct the same in an orderly fashion.

While India has not been a vociferous supporter for clarifications, it may lend its support to the position undertaken by developing countries, especially given the recent trend in certain investigations at the Indian antidumping authority wherein several NSR requests haven been made, which is imposing a significant administrative burden on the Authority.

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<sup>13</sup> Submission by the United States, TN/RL/W/72.

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<sup>14</sup> TN/RL/GEN/98/Rev.1.

<sup>15</sup> Paper from the United States, TN/RL/GEN/91.

<sup>16</sup> Paper from Mexico, TN/RL/GEN/98.

<sup>17</sup> Egypt, TN/RL/GEN/118.

**NATIONAL SEMINAR ON FISHERIES  
SUBSIDIES NEGOTIATIONS,  
NEW DELHI**

The Ministry of Commerce had organized a “National Seminar on Fisheries Subsidies Negotiations at the WTO” on September 14, 2006 in Delhi, which was chaired by the Commerce Secretary Mr. Pillai and attended by representatives from various state governments, NGO’s, the Planning Commission and lawyers from Luthra & Luthra Law Offices. Below are some broad highlights of issues discussed at the seminar. An analysis of proposals pertaining specifically to fisheries subsidies negotiations will be undertaken in the second part of the “Series on Rules Negotiations” in volume 4 of the Luthra & Luthra Trade Law Newsletter.

**Background**

The Doha Ministerial Conference had mandated negotiations on subsidies provided to fisheries with the aim of clarifying and improving disciplines with respect to this sector while also taking into account the importance of fisheries to developing countries. The National Seminar had been organized with the intention of raising awareness among stakeholders and participants on the various deliberations taking place at the WTO negotiations and to seek inputs from such stakeholders towards formulating India’s position on fisheries subsidies.

**Issues**

The National Seminar was chaired by the Commerce Secretary and began with a discussion on the various frameworks being proposed by WTO Members. The basic rationale behind including specific disciplines within the WTO on fisheries

subsidies was to protect the environment and curb over fishing and over exploitation of fishing resources. It is believed that subsidies exacerbate and contribute to over fishing and exploitation of fishing resources and the present subsidies disciplines within the WTO are not adequate to address the problem faced by the fisheries sector.

Proponents of the disciplines (New Zealand, Australia, Brazil, US) have suggested a “top down” approach, meaning there would be a broad prohibition on **all** subsidy programs with certain carefully carved out exceptions. Japan and Korea, two countries that are highly dependent on their fishing resources, had resisted even the need for disciplines but have changed their stance since and have suggested a “bottom up” approach wherein all subsidy programs would be permitted except for a few identified programs that would be prohibited.

Views were sought from stakeholders at the National Seminar on the approach that India should take at the WTO negotiations, given the nature of the Indian fishing industry and the scope of subsidies being provided to the sector.

The general view was that fishing in coastal waters needed to be disciplined, as there was significant concentration and over fishing in these areas while the EEZ areas remained relatively unexploited. However the plight of small and artisanal farmers that rely on fish catch for their livelihood was emphasized and representatives from state governments underscored the importance of support to these fishermen and consequently the insulation from prohibition under any new disciplines. Participants also discussed proposals from New Zealand, the European Communities, Brazil and

Argentina in the context of formulating special & differential (S&D) treatment and debated the impact of these disciplines on aquaculture. Participants noted the language in the Brazilian paper<sup>18</sup> on the impact of aquaculture on “wild capture” fisheries and discussed at length the implications of the language proposed on any exceptions made to aquaculture in the new disciplines. It was agreed that representatives from the various states would engage with the Ministry and provide inputs on conservation efforts undertaken, implementation of fisheries resources management plan, levels of subsidization and regulatory frameworks within each state.

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<sup>18</sup> TN/RL/GEN/79/Rev.3.

## WTO PANEL AND AB: SIGNIFICANT RECENT DISPUTES

### *US- Final Dumping Determination on Softwood Lumber from Canada, Recourse to Article 21.5, Report of the Appellate Body (WT/DS264/AB/RW)*

This was an appeal from a Panel report established under Article 21.5 of the DSU to examine whether US had brought its measures into conformity after the ruling of the Panel and the AB in the initial US-Final Dumping Determination on Softwood Lumber<sup>19</sup> wherein both the Panel and the AB had held that the use of zeroing by the DOC in a weighted-average-to-weighted-average comparison was inconsistent with Article 2.4.2. The DOC then recalculated the dumping margin in a section 129 determination<sup>20</sup> but used a transaction-to-transaction methodology to compare normal value and export price. In doing a transaction-to-transaction comparison, the DOC employed zeroing as a result of which transactions wherein export price was greater than normal value were ignored and only transactions where normal value was greater than export price were taken to arrive at a dumping margin. Canada challenged the use of zeroing by the DOC but the Panel held in favour of the US and stated that use of zeroing in a transaction-to-transaction comparison was not inconsistent with Articles 2.4.2 and 2.4. Canada then appealed this decision of the 21.5 Panel to the AB.<sup>21</sup>

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<sup>19</sup> WT/DS264/R and WT/DS264/AB/R.

<sup>20</sup> For a discussion on section 129 determinations, see Luthra & Luthra Trade Law Newsletter, Volume II.

<sup>21</sup> For a discussion of the 21.5 Panel report in *US-Final Dumping Determination on Softwood Lumber from Canada*, see Luthra & Luthra Trade Law Newsletter, Volume II.

The 21.5 Panel had essentially refused to extend the concept of calculating the dumping margin for the “product as a whole” (which was used to censure zeroing in an average-to-average comparison) to the use of zeroing in a transaction-to-transaction methodology and did not find it to be inconsistent with Article 2.4.2 of the AD Agreement.

Article 2.4.2 of the AD Agreement reads as follows:

*“Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis.”*

The AB pointed out that under Article 2.4.2, a dumping margin can be established on a transaction-to-transaction basis by comparing normal value and “export prices”. This implied that there would be several transactions to be compared. However the Article also referred to “a comparison” between normal value and export prices, thereby meaning that all the multiple transactions that were compared would then be aggregated together to arrive at a dumping margin. Thus a transaction-to-transaction methodology involves a multi step process whereby first normal value and export prices are compared on a transaction specific basis and then the results of all these transaction specific comparisons are taken together or aggregated to establish a dumping margin. Thus, “margins if dumping” under Article 2.4.2 resulted from an aggregation of all transaction specific

comparisons and not from only certain transaction specific comparisons wherein export transactions that were above normal value are ignored.

Canada had also argued that using zeroing in a transaction-to-transaction comparison violated the “fair comparison” obligation of the opening sentence of Article 2.4.2. The 21.5 Panel had stated that “fair comparison” language could not be used to override the more specific provisions of Article 2.4.2.

The AB however disagreed with the 21.5 Panel. It stated that Article 2.4.2 began with the phrase “subject to the provisions governing fair comparison in paragraph 4” and thus the methodologies of comparison under Article 2.4.2 were subject to the “fair comparison” requirement of Article 2.4. Article 2.4 set forth a general obligation to make a “fair comparison” which applied generally to all of Article 2 and in particular to Article 2.4.2.

The AB also noted that if “zeroing” were permitted under one methodology and not under another, it would lead to results that are systematically different and produce illogical results. The US had also argued that if zeroing were prohibited under all methodologies, it would render the different comparison methods meaningless, as the results of the various comparisons would be mathematically equivalent. The AB was not convinced of this argument and held that the concerns were over-stated and the same had not been proven.

Thus in light of the above reasoning the AB held that the use of zeroing in transaction-to-transaction comparison methods was inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement.

## COMMENTARY

This decision of the AB is followed by a decision of a Panel, which was again faced with deciding on the legality of dumping. However the decision of the Panel that follows below, took a view that was diametrically different from that of the AB above. While the AB seems to be more inclined to condemn dumping not only in average-to-average comparisons but also in transaction-to-transaction methodologies, the Panel seems to be taking a more cautious view of the matter. In fact the Panel decision mentioned below also highlights the express divergence in view on zeroing taken by the Panel in spite of available AB reasoning to condemn the practice.

### **US- Measures relating to Zeroing and Sunset reviews- recourse to Panel by Japan (WT/DS322/R)**

This is another in the series of disputes pertaining to the use of “zeroing” methodology by the United States Department of Commerce (DOC). In this particular instance Japan challenged the use of zeroing by the DOC in calculating dumping margins. Specifically the zeroing was of two types- model and simple. In model zeroing the product was clubbed into different types and for each type a weighted average-to-weighted average comparison was done. Simple zeroing referred to average-to-transaction and transaction-to-transaction methodologies. The challenges pertained to original investigations, periodic reviews and sunset reviews.

Prior to the issuance of this Panel report, several Panels and the Appellate Body had decided on the validity of using “zeroing” in dumping margin calculations in original as well as review

cases. The position of these various Panels and the AB is stated below:

1. *EC-Cotton-Type Bed linen from India*<sup>22</sup> case both Panel and AB stated that use of “zeroing” in calculating dumping margins was inconsistent with Article 2.4.2.
2. In the *US-Final Dumping Determination on Softwood Lumber*<sup>23</sup> from Canada, again both the Panel and AB decided that “zeroing” in the weighted average-to-weighted average comparison was inconsistent with Article 2.4.2
3. The Panel in *US- Lumber AD Final 21.5*<sup>24</sup> proceedings held that zeroing in the transaction-to-transaction comparison was not inconsistent with Article 2.4.2. It further also held that zeroing did not violate “fair comparison” obligation under Article 2.4
4. The Appellate body in *US-Lumber AD Final 21.5*<sup>25</sup> struck down both of the 21.5 Panel’s rulings and held that zeroing in transaction-to-transaction comparison was inconsistent with Article 2.4.2 and that it violated the “fair comparison” obligation of Article 2.4.
5. The Panel and AB in *United States - Laws, Regulations and Methodology for Calculating Dumping Margins*<sup>26</sup> firstly held that the “zeroing” methodology can be challenged “as such” when

used in original investigations in a weighted average-to-weighted average comparison. Further both held that zeroing as used in the weighted-average to weighted-average comparison in original investigations is “as such” inconsistent with Article 2.4.2.

However the Panel and the AB disagreed on the consistency of the weighted average-to-transaction in administrative reviews. While the Panel held that zeroing in the weighted average-to-transaction methodology in administrative reviews was not inconsistent with Article 2.4.2, the AB found that the use of this methodology as applied by the DOC was inconsistent with Article 9.3 and GATT Article VI:2.

The AB was unable to decide whether “zeroing” as a methodology when used in administrative reviews was “as such” inconsistent with the Antidumping Agreement.

6. *US - Final Dumping Determination on Softwood Lumber from Canada, Recourse to Article 21.5, Report of the Appellate Body*<sup>27</sup> (discussed above) held that use of zeroing in transaction-to-transaction comparison methodology in a section 129 determination was inconsistent with Article 2.4.2 and also against the “fair comparison” obligation under Article 2.4 of the AD Agreement.

The Panel in this particular case had adequate historical basis to rule on

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<sup>22</sup> WT/DS141/R and WT/DS141/AB/R

<sup>23</sup> WT/DS264/R and WT/DS264/AB/R

<sup>24</sup> WT/DS264/RW

<sup>25</sup> WT/DS264/AB/RW

<sup>26</sup> WT/DS294/R and WT/DS294/AB/R

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<sup>27</sup> WT/DS264/AB/RW

whether zeroing was inconsistent in relation to original as well as review investigations but as is seen from the discussion below, it relied on established reasoning only for the purposes of analysing zeroing in original investigations but chose to depart from the reasoning provided by the AB in analysing zeroing in review situations.

### **Model Zeroing in original investigations**

Firstly the Panel held that “zeroing procedures” (a term used by Japan to refer to the methodology) were a measure that could be challenged “as such” This was in accordance with the Panel and AB ruling in *United States - Laws, Regulations and Methodology for Calculating Dumping Margins* which held that “zeroing” is attributable to the US and that it is a rule or norm of general and prospective application. It stated that the norm can be characterized as an “administrative procedure” within the meaning of Article 18.4 of the AD Agreement.

Similarly in keeping with former decisions, the Panel held that “model zeroing” where weighted average-to-weighted average comparisons were done in the context of original investigations was inconsistent with Article 2.1 and 2.4.2. Article 2.4.2 requires that the margin of dumping take into account “all comparable export transactions” (i.e. transactions where export price exceeded normal value) and since the DOC’s model zeroing essentially ignored export prices that were above the normal value, it resulted in calculating a margin of dumping, that did not take into account the product as a whole and was

inconsistent with Article 2.4.2 of the AD Agreement.

### **Simple zeroing in original investigations**

Japan also challenged the use of simple zeroing in original investigations by the DOC. Japan essentially argued that Articles 2.1 and 2.4.2 require that a dumping margin be calculated for the product as a whole and this requirement would equally apply to zeroing in a transaction-to-transaction (simple) methodology. Japan also relied on the AB report in the case of *United States-Laws, Regulations and Methodology for Calculating Dumping Margins* wherein the AB had held use of zeroing in administrative reviews as being inconsistent with Article 9.3 and GATT Article VI:2. This according to Japan suggested that the concept of the “product as a whole” was equally applicable to simple zeroing.

The Panel disagreed with Japan and stated that the AB in *United States-Laws, Regulations and Methodology for Calculating Dumping Margins* used the concept of the “product as a whole” in the context of model zeroing and the AB in that case did not provide any rationale for extending the concept to simple zeroing as well. The Panel in this case in fact agreed with the Panel in the *US- Lumber AD Final 21.5*<sup>28</sup> case which stated that Article 2.1 does not mention the phrase “product as a whole” and that there is nothing in either Article 2.1 or GATT Article VI:1 and VI: 2 which states that export transactions should be examined at an aggregate level. This according to the 21.5 Panel did not preclude the possibility of arriving at a dumping margin on a transaction specific basis.

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28 WT/DS264/RW

Japan contented that due to the concept of “product as a whole”, Article 2.4.2 provided for a general prohibition on “zeroing”. The Panel disagreed by stating that Article 2.4.2 specifically provided for a transaction-to-transaction comparison and this implied that transactions where export price was less than normal value could be treated as being more relevant than cases where export price exceeded normal value. This according to the Panel also formed the basis for using zeroing in the average-to-transaction methodology. The Panel also agreed with the US argument that if zeroing was prohibited generally, the results of the average-to-average and the average-to-transaction would be exactly similar thus undermining the rationale for the latter methodology.

Japan also used the “fair comparison” language of Article 2.4 to argue that simple zeroing did not lead to fair comparisons between export prices and normal value. The Panel stated that the standard for “fairness” could not be easily determined and could not be used to limit the more specific provisions of the AD agreement. Therefore the fair comparison language of Article 2.4 did not result in a general prohibition on the use of zeroing in calculating dumping margins.

For the above reasons it did not agree with Japan that there was a general prohibition on zeroing and found that the US DOC did not act inconsistently by using simple zeroing in original investigations.

#### **Zeroing in reviews of antidumping duties**

Japan placed reliance on the AB decision in *United States- Laws, Regulations and Methodology for*

*Calculating Dumping Margins* to argue that zeroing was also not permitted in reviews conducted under Article 9.3. In the cited case, the AB had held that since Article 9.3 states that antidumping duty shall not exceed the margin of dumping calculated under Article 2 and since zeroing was held to be inconsistent with Article 2.4.2, this also led to the conclusion that zeroing was inconsistent with reviews conducted under Article 9.3. The Panel disagreed with Japan and stated that it had difficulty placing reliance on the cited AB finding, because that report lacked an adequate explanation of why the concept of the “product as whole” applied to contexts beyond multiple averaging methodologies.

Further it also held that Article 2.4.2 was only applicable to the “investigation phase” as understood under Article 5, thereby limiting the prohibition on zeroing only to original investigations and not to reviews under Article 9 or 11. The Panel therefore held that use of simple zeroing in Article 9 reviews was not inconsistent with the AD agreement.

#### **Zeroing in sunset and changed circumstances review**

Japan then stated that Article 11 requires that in determining whether a duty should continue under a changed circumstance or a sunset review, the authority had to bear in mind that a duty could remain in force only to the extent necessary to counteract dumping which is causing injury.

The AB had in a previous case of *US-Corrosion Resistant Steel Sunset Review*<sup>29</sup> held that if an authority did

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<sup>29</sup> WT/DS244/AB/R. The Panel in this case had stated that Article 2 disciplines do not apply to sunset reviews. The AB on appeal examined the language of Article 11.3 and stated that Article 11.3 neither explicitly requires authorities in a

rely on margins of dumping those margins had to be calculated by conforming to Article 2.4. Thus it had been Japan's case that DOC's methodology of relying on dumping margins calculated in prior proceedings wherein zeroing was used, led to relying on margins of dumping which did not conform to the disciplines of Article 2.4.

The Panel again rejected Japan's argument on the ground that there was not adequate evidence to establish that the DOC as a rule relied on previous margins of dumping in Article 11 reviews.

Japan then challenged on an "as applied" basis, the reliance of the US DOC and the ITC in two sunset reviews in which the two agencies had relied on previously established margins of dumping.

Again the Panel did not find in favour of Japan. In these two cases, the DOC had relied on margins of dumping calculated in Article 9 reviews and not on the margins calculated in original

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sunset review to calculate fresh dumping margins, nor explicitly prohibits them from relying on dumping margins calculated in the past. This "silence in the text of Article 11.3," it said, "suggests that no obligation is imposed on investigating authorities to calculate or rely on dumping margins in a sunset review." However, the opening words of Article 2.1 "[f]or the purpose of this Agreement" go beyond a cross-reference and indicate that Article 2.1 applies to the entire Anti-Dumping Agreement." Thus the word 'dumping' as used in Article 11.3 has the meaning described in Article 2.1. Therefore while there is "no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping.....should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4."

investigations. However the Panel stated that simple zeroing was not inconsistent with Article 9.3 and thus when the DOC in an Article 11 review relied on dumping margins calculated in an Article 9 review it did not act inconsistently with the AD agreement.

As for Japan's allegation that the ITC (the authority that determines injury) relied on previously established margins of dumping, the Panel again disagreed with Japan and held that Japan had not adduced sufficient evidence to show that the ITC had actually relied on these dumping margins to arrive at a conclusion as against just noting them.

## Conclusion

This Panel decision disagreed in substantial terms with the decision of the AB in previous cases wherein the AB had held not only model zeroing but also simple zeroing to be inconsistent with the AD agreement, and highlights the divergent approaches taken by Panels and the AB in adjudicating on the practice of zeroing. The Panel in this decision limited the prohibition on zeroing to the weighted-average-to-weighted-average methodology as used in original investigations but refused to condemn simple zeroing either in original investigations or in periodic, new shipper, changed circumstances or sunset reviews. Given that the AB has been in favour of prohibiting the use of zeroing, it would be interesting to see if the AB overrules this decision on an appeal and condemns zeroing not only in original investigations but also in sunset and changed circumstances reviews.

## AD/CVD CASES AGAINST INDIA IN THE US

### Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review: Stainless Steel Bar from India

As per Federal Register Notice (71 FR 37905), dated July 3, 2006, the DOC published the final results of the Antidumping Duty Administrative Review covering the period between February 1, 2004, through January 31, 2005. Since no comments were received in response to the preliminary findings published on March 7, 2006, therefore the final results confirmed the preliminary findings and a dumping margin of 21.02% was calculated for Chandan Steel Ltd.

The DOC also rescinded the administrative review against Ferro Alloys Corporation, Ltd. (Facor) as there had been no entry of the subject merchandise to the United States during the POR, as was confirmed by the US Customs and Border Protection (CBP).

### Stainless Steel Wire Rods from India: Notice of Court Decision Not in Harmony

The United States Court of International Trade (CIT) remanded to the DOC its determination of an administrative review for the period December 1, 1999, through November 30, 2000, in relation to the Viraj Group. The products in question included certain stainless steel wire made of alloy steels manufactured by hot-rolling process.

Subsequent to the remand by the CIT, the DOC re-determined and filed the final results with the CIT, which affirmed the same. On July 21, 2006, in Federal Register Notice (71 FR 41421),

the DOC concluded that out of the Viraj entities under investigation, only Viraj Forgings Ltd. (VFL) and Viraj Impoexpo Limited (VIL) had made sales to the United States during the period of review and thus other entities were not to be considered. The DOC estimated a weighted-average margin of 1.29% for VFL and 3.77% for VIL, as per the CIT's directions, and stated that the same would stand unless the Court of Appeals for the Federal Circuit differed with the CIT

### Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results of Antidumping Duty Administrative Review

The DOC published the preliminary results of the administrative review of the antidumping duty order on certain hot-rolled carbon steel flat products (HRS) from India, for the period December 1, 2003, through November 30, 2004 on January 12, 2006. The review covered only one producer/exporter of HRS, namely Essar Steel Ltd (Essar). The final weighted-average dumping margin calculated was zero percent, i.e., below the de minimis margin; as concluded in the Federal Register Notice (71 FR 40694) dated July 18, 2006. Since this was below the de minimis margin of 0.50%, Essar was not required to pay any cash deposit.

### Notice of Rescission of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India

An administrative review of the countervailing duty order on certain hot-rolled carbon steel flat products from India was requested by United States Steel Corp. for the period between January 1, 2005 and December 31, 2005

(POR) and it only covered Essar Steel, Ltd. (“Essar”).

Essar, submitted a letter stating that it had made no shipments of subject merchandise to the United States during the POR and this claim was verified by a customs query. On March 28, 2006, the DOC had published a notice of intent to rescind the administrative review since no comments were received on the same from the petitioner, or any other party. Hence, the DOC, by a Federal Register Notice (71 FR 40699) dated July 18, 2006 rescinded the administrative review of the countervailing duty order.

*Certain Frozen Warmwater Shrimp from India: Partial Rescission of Antidumping Administrative Review*

On April 7, 2006, the Department of Commerce initiated an administrative review of antidumping duty, vide Federal Register Notice (71 FR 17819) for 347 companies from India, Brazil, Ecuador and Thailand, in response to a request from the Ad Hoc Shrimp Trade Action Committee. However, the requests for administrative review were withdrawn for 268 companies, within the prescribed deadline of 90 days of the date of publication of the notice of initiation. Hence, the review was rescinded with respect to these 268 companies vide notice 71 FR 41419 dated July 21, 2006.

*Stainless Steel Bar from Brazil, India, Japan, and Spain: Final Results of the Expedited Sunset Reviews of Antidumping Duty Orders*

On March 1, 2006, the Department of Commerce initiated the second sunset reviews of the antidumping duty orders on stainless steel bar (SSB) from Brazil, India, Japan, and Spain vide Federal Register Notice (71 FR 10476).

Carpenter Technology Corp., Crucible Materials Corp., Electralloy Corp., North American Stainless, Universal Stainless & Alloy Products, Inc., and Valbruna Slater Stainless, Inc. were the domestic interested parties. While complete substantive responses were received from the domestic interested parties, no response was received from any of the respondent interested parties.

In its Final Results of the Expedited Sunset Review, published in the Federal Register Notice (71 FR 38372) dated July 6, 2006, the DOC concluded that revocation of antidumping duty was likely to lead to a continuation recurrence of dumping and assigned the following weighted-average percentage margins for the companies mentioned below:

<u>India:</u>	
Grand Foundry, Ltd.	3.87%
Mukand, Ltd.	21.02 %
All Others	12.45 %
<u>Brazil:</u>	
	19.43 %
<u>Japan:</u>	
	61.47%
<u>Spain:</u> Between 7.72 and 62.85%	

*Notice of Final Determination of Sales Less Than Fair Value and Negative Determination of Critical Circumstances: Certain Lined Paper Products from India*

As per Federal Register notice (71 FR 45012) dated August 8, 2006, the Department of Commerce published the final finding of the antidumping duty determination and existence of critical circumstances covering the period July 1, 2004, through June 30, 2005.

On April 17, 2006, the Department of Commerce published the preliminary determination on antidumping duty and invited comments in response to the

notice. Comments were received from the petitioners and the respondents, Aero Exports, Kejriwal India Ltd., and Navneet Publications (India) Ltd. While Kejriwal provided the required information to reach the final determination the other two respondents failed to do so despite repeated requests. Thus the DOC proceeded to determine the final results as per the material available to them and determined that, in selecting from among the facts otherwise available, an adverse inference is warranted. They relied on the preliminary findings to determine the probative value of the margins and concluded that Kejriwal's information had probative value. Accordingly they imposed second highest individual margin of 23.17% calculated in the proceedings based on the data reported by Kejriwal. The DOC determined the weighted average margin percentage as follows

Aero Exports	23.17%
Kejriwal Paper Limited	3.91%
Navneet Publications Ltd	23.17%
All Others	3.91%

Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Lined Paper Products from India

As per Federal Register notice (71 FR 45034) dated August 8, 2006, the Department of Commerce published the final affirmation countervailing duty determination and existence of Critical Circumstances covering the period April 1, 2004, to March 31, 2005.

The investigation covered 12 subsidy programs. On February 15, 2006, the Department of Commerce published its preliminary affirmative determination in the countervailing duty investigation

of certain lined paper products from India.

The net subsidy rates for the investigated companies were determined at :

Aero Exports	7.05 %
Kejriwal Exports	de minimis
Navneet Publications Ltd.	10.24%
All Others Rate	9.42 %

Notice of Preliminary Results and Rescission, in Part, of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet and Strip from India

As per Federal Register notice (71 FR 45037) dated August 8, 2006, the DOC published the preliminary results and part rescission of the countervailing duty for the period January 1, 2004 to December 31, 2004

On July 1, 2002, the Department published in the Federal Register the countervailing duty (CVD) order on PET film from India. Domestic industry consisting of Dupont Teijin Films, Mitsubishi Polyester Film of America, and Toray Plastics (America), requested for an administrative review with respect to Jindal and Polyplex Corporation Ltd. Also, on August 1, 2005, Garware requested for an administrative review with respect to its exports.

On August 29, 2005, the DOC initiated an administrative review of the CVD order on PET film from India covering Jindal, Garware, and Polyplex, for the period January 1, 2004 through December 31, 2004. On September 14, 2005, Garware withdrew its request for an administrative review. Since no other person asked for the review of the exports of Garware, the order rescinded Garware as an applicant.

The total estimated net countervailable subsidy was determined to be 13.15% ad valorem for Jindal and 13.19% ad valorem for Polyplex.

Certain Polyethylene Terephthalate Film, Sheet and Strip from India: Final Results of Antidumping Duty Administrative Review

As per Federal Register notice (71 FR 47485) dated August 17, 2006, the Department of Commerce published the final results of the Antidumping duty of the Administrative Review covering the period July 1, 2004, through June 30, 2005.

On April 12, 2006, the Department of Commerce published the preliminary results of the administrative review. The review covered 3 producers/exporters of PET film, MTZ Polyfilms, Ltd., Jindal Poly Films Limited, and Polyplex Corporation Ltd.

The DOC determined the weighted average margin percentage as follows:

Jindal Poly Films Limited	2.32%
MTZ Polyfilms, Ltd	0.00%
Polyplex Corporation Ltd	0.01%

**AD/CVD cases against India in the European Union**

COUNCIL NOTICE (EC) No. 2006/582/EC dated August 28, 2006 terminating anti-dumping proceedings initiated by Council Notice No. 2005/C 159/05 initiating proceedings in respect of certain Footwear with a protective toecap originating in the People's Republic of China and India.

The European Commission on June 30, 2005 notified (2005/C 159/05) the initiation of an anti-dumping proceeding concerning imports of certain footwear with protective toecap originating in the People's Republic of China and India.

The complaint by the European Confederation of the Footwear industry pursuant to which the above stated notification had been issued was withdrawn by a letter dated July 17, 2006 and addressed to the Commission as per Article 9(1) of the Basic Regulation. The Commission informed interested parties and gave them the opportunity to comment in this regard. No comments were received indicating that such termination would not be in the Community interest. Consequently, the proceedings were terminated vide Commission decision (2006/582/EC) dated August 28, 2006.

COUNCIL NOTICE (EC) No. 2006/C 196/02 August 19, 2006 pertaining to impending expiry of the definitive anti-dumping duty imposed by Regulation (EC) No. 2272/2004 extending definitive anti-dumping duty imposed on coumarin originating in the People's Republic of China to imports of coumarin consigned from India or Thailand.

The European Commission on December 22, 2004 extended the definitive anti-

dumping duty imposed by Regulation (EC) No. 2272/2004 on imports of coumarin originating in the People's Republic of China to imports of coumarin consigned from India or Thailand, whether declared as originating in India or Thailand or not.

The European Commission on August 19, 2006 notified (2006/C 196/02) that unless a review is initiated in accordance with the procedure, the anti-dumping measures mentioned below will expire. The notice called upon the Community to lodge a written request for review containing sufficient evidence that the expiry of the measures would be likely to result in a continuation or recurrence of dumping and injury. The date of expiry is May 10, 2007 and the request has to be made at least three months prior to the same.

*COUNCIL NOTICE (EC) No. 2006/C 180/06 dated August 2, 2006 pertaining to initiation of a partial interim review of the countervailing measures applicable to imports of polyethylene terephthalate (PET) film originating in India.*

The European Commission had imposed definitive countervailing duty by Council Regulation (EC) No. 367/2006 on imports of polyethylene terephthalate (PET) film originating in India.

The Commission initiated a partial interim review on its own initiative to examine subsidization for one Indian exporter, namely Jindal Poly Films Ltd. The Commission believed that there was prima facie evidence to indicate that the circumstances with regard to subsidization based on which measures were established had changed due to a substantial increase in the level of subsidization and that these changes were of a lasting nature. The

Commission invited interested parties to express their views along with supporting evidence and make a request to be heard within 40 days of the publication of the above-mentioned notice.

*COUNCIL REGULATION (EC) No. 1288/2006 of August 25, 2006 amending Regulation (EC) No 367/2006 imposing a definitive countervailing duty on imports of polyethylene terephthalate (PET) film originating in India.*

The Council by Regulation (EC) No. 2597/1999 imposed a definitive countervailing duty in the form of an *ad valorem* duty, on polyethylene terephthalate (PET) film originating in India. This was maintained by Regulation (EC) No. 367/2006 following an expiry review.

A request for a partial interim review of Council Regulation (EC) No 2597/1999 was made by DuPont Teijin, Films, Mitsubishi Polyester Film GmbH, Nuroll SpA and Toray Plastics Europe, representing a major proportion of community production of PET Film alleging that the existing level was no longer sufficient to counteract the level of subsidization caused by one Indian exporter, namely Garware Polyester Limited ("Garware"). The partial initial review was initiated by the Commission to examine the level of subsidization for Garware. With respect to the DEPB, Garware contended that DEPB would soon be discontinued by the Government of India and be replaced by a WTO compatible scheme. However the Commission found no evidence on whether the new scheme was in effect and therefore went ahead with its examination of the DEPB and held it to be a countervailable subsidy. In the partial interim review, the Commission examined whether the current level of

measures would not be sufficient to counteract the countervailable subsidy, which is causing injury.

The Commission observed that Garware was in receipt of much higher subsidisation than before and that it was likely to continue to receive subsidies of an amount higher than determined in the original investigation. Thus it concluded that the continuation of the existing measure was not sufficient to counteract the countervailable subsidy causing injury and that the existing measures would need to be amended to reflect the new findings.

*COUNCIL NOTICE (EC) No. 2006/C 202/09 dated August 25, 2006 pertaining to initiation of a partial interim review of the anti-dumping measures applicable to imports of polyethylene terephthalate (PET) film originating in India.*

The European Commission had imposed definitive anti-dumping duty by Council Regulation (EC) No. 1676/2001, as last amended by Council Regulation (EC) No. 366/2006 on imports of polyethylene terephthalate (PET) film originating in India.

The Commission received a request that was lodged by Community producers representing more than 50 % of Community production of PET film. The review is limited in scope to the examination of dumping as far as one exporting producer, namely, Jindal Poly Films Limited. The Community producers has provided sufficient prima facie evidence that the circumstances with regard to dumping on the basis of which measures were established for the company have changed and that these changes are of a lasting nature.

Therefore, the Commission after consulting the Advisory Committee felt that sufficient evidence exists to justify the initiation of a partial interim review and initiated such review. The Commission invited interested parties to express their views along with supporting evidence and make a request to be heard within 40 days of publication of this above-mentioned notice.

*COUNCIL NOTICE (EC) No. 2006/C 197/02 dated August 22, 2006 pertaining to initiation of an expiry review of the anti-dumping measures applicable to imports of polyethylene terephthalate (PET) film originating in India.*

The European Commission had imposed definitive countervailing duty by Council Regulation (EC) No 1676/2001, as last amended by Council Regulation (EC) No 366/2006 on imports of polyethylene terephthalate (PET) film originating in India.

Community producers on May 23, 2006 filed a request for initiation of expiry review on the grounds that the expiry of the measures would be likely to result in a continuation of dumping and injury to the Community industry. The Commission after consulting the Advisory Committee felt that there was sufficient evidence of the same and therefore an expiry review was initiated vide Council Notice (EC) No. 2006/C 197/02. The period of investigation is July 1, 2005 to June 30, 2006. The Commission invited interested parties to express their views along with supporting evidence and make a request to be heard within 40 days of publication of the above mentioned notice, showing either that the expiry of measures would not be likely, to lead to a continuation or recurrence of dumping and injury or

that such continuance is against Community interests.

COUNCIL REGULATION (EC) No 1424/2006 of 25 September 2006 amending Regulation (EC) No 1676/2001 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of polyethylene terephthalate film originating in India and the Republic of Korea

The Council had, by Regulation (EC) No 1676/2001, imposed a definitive anti-dumping duty on imports of polyethylene terephthalate film (PET film) originating in India. In view of the large number of exporting producers of PET film in India, a sample of the exporting producers was selected and individual dumping margins were calculated individually for them. For other cooperating companies not part of the sample, a dumping margin of 57.7% was determined and anti-dumping duties were imposed taking into account the countervailing duties against export subsidies on the same products originating from India.

An Indian exporter, SRF Limited, requested a new shipper review (NSR) on the grounds that the exporter had not exported any goods to the European Union during the period of investigation. SRF also established that it was not related to any exporter or producer subject to the anti-dumping duty imposed and that it had either exported the goods concerned after the investigation period or had entered into an irrevocable contract to export a significant quantity to the Community. Under a NSR, the exporter would be subject to the same rate of duty as the companies, which had cooperated in the original investigation but were not part of the sample.

However since SRF was found to fulfil all three criteria, it was held to be a new shipper and the dumping margin was determined as 15.5%, vide the present ruling.

COUNCIL REGULATION (EC) No 1515/2006 of October 10, 2006 repealing the anti-dumping duty on imports of synthetic staple fibres of polyesters originating in Australia, India, Indonesia and Thailand and terminating the proceedings in respect of such imports, following expiry reviews, and terminating the partial interim review of such imports originating in Thailand

In July 2000, the Council by Regulation (EC) No 1522/2000 had imposed a definitive anti-dumping duty on imports of synthetic staple fibres of polyesters (polyester staple fibres or PSF) originating in Australia, Indonesia and Thailand. Further, in December 2000, the Council by Regulation (EC) No 2852/2000 had imposed measures consisting of an *ad valorem* duty for all imports of PSF originating in India and Republic of Korea, except for imports from one Indian exporting producer from which an undertaking had been accepted. Following an interim review the measures on imports from Republic Korea had been amended and renewed for 5 years by Council Regulation (EC) No 428/2005.

On April 13, 2005 and September 23, 2005 the Commission had received requests from the Comité International de la Rayonne et des Fibres Synthétiques (CIRFS) on behalf of producers representing more than 50 %, of the total Community production of PSF. The requests were based on the grounds that the expiry of the measures would be likely to result in a recurrence

of dumping and injury to the Community industry.

The period of investigation for the expiry reviews was July 1, 2004 to June 30, 2005. It was found that during this period the export of PSF originating in Australia, India, Indonesia and Thailand were negligible. Import of the concerned countries amounted to only 1056 tonnes compared to the original rate of more than 69 000 tonnes. Thus, no representative dumping evaluation could be made in order to determine the likelihood of continuation of dumping. Indian companies that were investigated included Futura Polyesters Limited, Chennai, Indo Rama Synthetics (India) Ltd, Nagpur and Reliance Industries Limited, Mumbai.

Further, spare capacities and unused stocks as well as pricing and export strategies in the respective countries were analyzed to determine the likelihood of recurrence of dumping. The examination revealed that despite some

negative results, capacities did not suggest likelihood of recurrence of dumping. Certain Community producers opposed and argued that in India two major producers had increased capacities by 361000 tonnes in 2007 and the existence of at least one new PSF producer indicated a likelihood of recurrence of dumping. However, the Commission also found that the biggest Indian producer had acquired a Community producer thus suggesting that it may not have any interest in exporting significant quantities of PSF to the Community in the future. Furthermore, data from cooperating Indian producers showed that their domestic sales had been increasing and would likely continue in that trend. In light of the above findings the Commission thought it necessary to terminate the proceedings in respect of PSF imports from Australia, Indonesia, India and Thailand.

### ANTIDUMPING INVESTIGATIONS AGAINST IMPORTS INTO INDIA

The following table provides an overview of the various recent antidumping actions considered by the Directorate General for Antidumping and Allied Duties (DGAD) in India.

Sl. No	Countries	PRODUCT	Domestic industry	Relevant date	Comments
1	PRC	Silk Fabrics 20-100 gms/mtr	Central Silk Board with Mysore Power Loom Silk Manufacturers Co-operative Society Ltd., Karnataka Weavers Federation, Bangalore District and Bangalore Rural District.	27.04.06	Preliminary findings of the Authority imposing provisional anti-dumping duty vide notification no. 14/20/2004-DGAD  Customs notification imposed the anti-dumping duty vide notification No.52/2006 dated 31.05.2006  Matter initiated on 18.05.2005, almost 11 months prior to the making of the preliminary findings.
2.	China PR and Ukraine	Viscose Filament Yarn	Association of Man Made Fibre Industry of India on behalf of M/s Kesoram Industries Ltd., M/s Indian Rayon & Industries Ltd. and M/s NRC Ltd.	24.05.06	Final findings on 4.04.06 vide notification No. 14/23/2004-DGAD  Customs notification no. 45/2006 imposed antidumping duty in accordance with these findings.
3.	PRC	Zinc Oxide	M/s Transpek Industries Ltd. and M/s Demosha Chemicals Ltd.	29.05.06	Sunset review initiated on 7.04.06 vide notification No. 15/4/2005-DGAD  Customs notification no. 51/2006 extended the imposition of the antidumping duty by one year pending the outcome of the review.
4	UAE and Iran	White Cement	M/s. J K White Cement Works	29.05.06	Sunset review initiated on 28.02.06 vide notification

			(Unit of J K Cement Limited) supported by M/s Grasim Industries Ltd. (White Cement Division)		No.15/6/2005-DGAD.  Customs notification No. 50/2006 extended the imposition of the antidumping duty by one year pending the outcome of the review.
5	PRC	Steel Wheels	M/s. Kalyani Lemmerz Limited, Pune and M/s Wheels India Limited	31.05.06	Initiation through notification F.NO.14/8/2005-DGAD
6	EU (excluding France), Indonesia and Chinese Taipei	Caustic Soda.	M/S Hindustan Lever Limited	2.06.06	<p>Mid Term Review – Final findings vide Notification No. 15/5/2005-DGAD</p> <p>It was contended by the domestic industry that HLL was an ‘industrial user’ who could participate as an ‘interested party’ in the proceedings but could not initiate review. It was noted that the definition of interested parties is an inclusive definition and the DGAD had a right to consider any party as an interested party. DGAD considered HLL to be an ‘interested party’ and allowed it to proceed.</p> <p>Imports from Taiwan had ceased during POI. In order to examine a threat of imports, DGAD considered whether the goods were being dumped in other countries (USA and Australia) and whether there was a likelihood of it occurring in India. On an examination of excess capacities it was held that injury would recur if duty were removed.</p> <p>Customs notification No. 72/2006 dated 10.07.06 implemented these findings.</p>

7	PRC	Saccharin	M/s A S Enterprises, M/s Swati Petrochemicals Pvt. Ltd., M/s Shree Vardhyani Chemical Industry Co. Ltd. and All India Saccharin Manufacturers Association.	6.06.06	Preliminary findings vide notification No.14/27/2004 - DGAD, dated the 1.04.06  Customs notification no. 54/2006 imposed antidumping duty in accordance with these findings.
8	USA and Japan	Aniline	M/s Narmada Chematur Petrochemicals Limited (NCPL), Bharuch and M/s Hindustan Organic Chemicals Limited (HOCL),	9.06.06	Sunset Review initiated on 6.04.05 vide notification No. 15/2/2005-DGAD.  Customs notification no. 58/2006 dated 9.06.06 extended the imposition of the anti-dumping duty for one year pending the outcome of the review.
9	EU, USA, PRC and Brazil	Ethylene-propylene-non-conjugated diene rubber (EPDM)	M/s Unimers Ltd	16.06.06	Final findings vide notification No.14/18/2004-DGAD  Customs Notification No. 75/2006 dated 19.07.06 imposed antidumping duty in accordance with the final findings.
10	Saudi Arabia and Russia	Hexamine	M/s Simalin Chemicals Industries Ltd., and M/s Rockhard Petro Chemical Industries Ltd.,	27.06.06	Sunset Review initiated on 15.06.06 vide notification No. 8/1/2001(SSR)-DGAD  Customs notification no. 65/2006 extended the imposition of the anti-dumping duty for one year pending the outcome of the review.
11	Taiwan, China PR, Indonesia, Japan, Korea RP,	Poly Vinyl Chloride (PVC) – Suspension Grade	M/s Indian Petrochemicals Corporation Ltd.(IPCL), M/s. Dhargandhra Chemical &	28.06.06	Initiation through notification No.14/8/2006-DGAD.

	Malaysia, Thailand and USA		Works(DCW), M/s. Chemplast Sanmar Ltd., (Chemplast) and M/s. DCM Shriram Consolidated Ltd		
12	PRC, Chinese Taipei, Malaysia, Indonesia Thailand and Korea RP	Nylon Filament yarn (NFY)	Modipom Ltd. JCT Ltd. Shree Synthetics Ltd. Gujarat State Fertilizers Co. Ltd.	3.07.06	<p>Final findings vide notification no. 14/5/2005-DGAD</p> <p>In determining injury it was argued that the first year of POI should be excluded from consideration as injury occurred in this year due to an earthquake. However the DGAD took the first year into consideration and emphasized that injury was a trend of various factors during the POI and not the performance of the domestic industry during the POI vis a vis its performance in the base year. DGAD concluded that injury had occurred during the POI</p> <p>Customs notification no. 85/2006 dated 29.08.06 imposed antidumping duty in accordance with these findings.</p>
13	Indonesia Republic of Korea, Malaysia and Chinese Taipei	Fully drawn yarn, fully oriented yarn, spin drawn yarn or flat yarn of polyester (non-textured and non-POY) and other yarn	M/s Association of Synthetic Fibre Industries on behalf of M/s Central India Polyesters Ltd., M/s Century Enka Ltd., M/s Garden Silk Mills Ltd., M/s Nova Petrochemicals Ltd., M/s Recron Synthetics Ltd. and M/s Welspun Syntex Ltd.	3.07.06	<p>Preliminary findings vide notification no. 14/3/2005-DGAD</p> <p>In the case of M/S Hualon Corp. from Korea the NV was calculated based on their exports to Turkey as there had been very small volumes of domestic sales.</p> <p>Customs notification No. 82/2006 dated 21.08.06 imposed antidumping duty in accordance with these findings.</p>

14	PRC	Partially Oriented Yarn (POY)	Association of Synthetic Fibre Industries	4.07.06	Preliminary findings vide notification no. 14/10/2005-DGAD.  Customs notification no. 77/2006 dated 2.08.06 imposed antidumping duty in accordance with these findings.
15	PRC	Phosphoric Acid-Technical Grade and Food Grade	M/s. Gujarat Alkalies & Chemicals Limited, Baroda and Solaris Chemtach Limited,	4.07.06	Initiation through notification F. No. 14/7/2006-DGAD
16	Singapore, South Africa and EU	Phenol	M/s. Hindustan Organic Chemicals Limited and Schenectady Herdillia Limited	14.07.06	Initiation of Mid-Term Review through notification No. 15/4/2006-DGAD
17	PRC	2 Methyl (5) Nitro Imidazole	M/s. Aarti Drugs Ltd. and Unichem Laboratories	17.07.06	Sunset review initiated on 30.06.06 vide notification No. 15/18/2005-DGAD  Customs notification no. 74/2006 extended the imposition of the antidumping duty by one year pending the outcome of the review.
18	PRC	Cellophane Transparent Film (CTF)	M/s. Kesoram Rayon	28.07.06	Final findings vide notification 14/7/2005  Petitioner sole producer of the like product in India. No representation by any Chinese producer.  Customs notification no. 94/2006 dated 7.09.06 imposed antidumping duty in accordance with these findings
19	China PR and Japan	Peroxosulphates	M/s Gujarat Persalts Pvt. Ltd., M/s Calibre Chemicals Pvt.	28.07.06	Initiation through notification no F.NO. 14/1/2006-DGAD

			Ltd., & M/s Yoyo Chemicals		
20	PRC and Thailand	Bias Tyres	Automotive Tyre Manufacturers Association (ATMA),	31.07.06	<p>Preliminary Findings through notification No.14/9/2005-DGAD</p> <p>On the basis of these Preliminary Findings, vide Customs Notification No-106/2006 dated 09.10.2006, a provisional anti-dumping duty was imposed.</p>
21	Singapore	D (-) Para Hydroxy Phenyl Glycine Base (PHPG Base)	M/s Kaneka Singapore Corporation, (KSC)	4.08.06	<p>Mid term review - Final Findings through notification No. 15/14/2005-DGAD (KSC) applied for review on the grounds that</p> <ul style="list-style-type: none"> <li>• The dumping Margin had significantly declined and thus benchmark fixed in the original investigation should be reduced.</li> <li>• The Customs duty had reduced from 35% to 20%.</li> <li>• The cost of production had significantly declined in view of reduction in raw material price</li> <li>• The profits realized by the company had significantly declined</li> </ul> <p>The domestic industry argued that there are insufficient grounds for review brought out. The most important criteria for review relates to whether the injury would be likely to continue or recur, if the duty were varied or removed, which remains unsubstantiated. The DGAD held that the grounds provided by KSC were sufficient to initiate review as they indicated changed circumstances.</p> <p>Customs Notification No-100/2006, dated 29.09.2006,</p>

					continued the imposition of the anti-dumping duty since withdrawal of the same was likely to lead to dumping and injury.
22	PRC, Bulgaria, Malaysia, Singapore, Korea RP	Presensitized Positive Offset Aluminium plates	M/s Technova Imaging Systems (P) Ltd. and Stovec Industries Limited	24.08.06	Initiation through notification No.14/6/2006-DGAD
23	PRC, Hong Kong, Singapore and Chinese Taipei.	Compact Discs-Recordable (CDRs)	Optical Disc Manufacturers Welfare Association	28.08.06	Preliminary Findings through notification F.NO. 14/15/2005-DGAD  Customs Notification No-105/2006 dated 06.10.2006, a provisional anti-dumping duty was imposed.
24	PRC	Nylon Tyre Cord Fabric (NTCF)	M/s. Junma Tyre Cord Co. Limited	29.08.06	New Shipper Review initiated under Rule 22 on 11.06.06 vide notification no No.15/11/2006-DGAD.  Party claimed he is unrelated to exporters on whom duty is levied.  Customs notification no. 84/2006 imposed provisional assessment on the subject goods exported by the party, pending the outcome of the review.
25	PRC	Paracetamol	M/s Triton Laboratories Ltd., M/s Vamsi Labs Ltd., M/s Srinivasa Agro Industries & Drugs Ltd., and M/s Sri Krishna Pharmaceuticals Ltd.	31.08.06	Sunset review initiated on 25.06.06 vide notification No. 15/20/2006-DGAD  Customs notification no. 87/2006 extended the imposition of the antidumping duty by one year pending the outcome of the review.
26	EU, Chinese Taipei,	Acetone	M/s Hindustan Organic Chemicals Ltd.,	7.09.06	Initiation notification no. 14/4/2006-DGAD

	Singapore, South Africa and USA.		and M/s Schenectady Herdillia Ltd.,		
27	PRC and UAE	Vitrified and porcelain tiles, other than vitrified industrial tiles	M/s Heyuan Wanfeng Ceramics Co. Ltd., and exported by M/s Foshan Lungo Ceramics Co. Ltd. Of PRC and M/s Enterprise Trading FZE of UAE	8.09.06	<p>New Shipper Review under Rule 22. Final findings on 14.08.06 vide notification no No. 15/19/2004-DGAD.</p> <p>The export price of the subject goods produced by the parties was above its normal value during the period of investigation. Therefore no antidumping duty was imposed on subject goods produced by the parties.</p> <p>Customs notification no. 95/2006 accordingly made amendments to earlier notification 73/2003-Customs dated 1.05.03</p>
28	Saudi Arabia, Iran, Japan, USA and France	Caustic Soda	M/s. Alkali Manufacturers Association	13.09.06	<p>Sunset review final findings on 1.08.06 vide notification No. 15/29/2004-DGAD recommending continuation of anti-dumping duty on the subject goods from the countries.</p> <p>Sunset review initiated on 2.05.05</p> <p>Customs notification no. 98/2006 imposed antidumping duty in accordance with these findings.</p>
29.	China PR and Singapore	D(-) Para Hydroxy Phenyl Glycine Methyl Potassium Dane Salt (PHPG Dane	M/s. Daurala Organics Ltd.	29.09.2006	<p>Mid-term review initiated on 3rd October, 2005 vide notification No.15/13/2005-DGAD</p> <p>Mid-term review findings vide No.15/13/2005-DGAD, dated the 18th August, 2006, concluded that there was possibility of continuation of</p>

		Salt)			dumping and injury if duty was withdrawn.  Customs Notification No-102/2006, dated 29.09.2006, imposed duty in accordance with the above findings.
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**RELIANCE INDUSTRIES VS. THE  
DESIGNATED AUTHORITY**

Civil Appeal No. 1294 of 2001, Decided  
on: 11.09.2006

This case concerns the calculation of the Non Injurious Price (NIP), which is used to determine the injury margin and is an integral part of the concept of the “lesser duty rule”. In imposing an antidumping duty, the Indian authority does not impose a duty equal to the dumping margin, but imposes a duty equal to the “margin of injury”. The rationale for this rule is that the purpose of an AD duty is to counteract the injury suffered by the domestic industry as a result of the dumped imports, and if a duty lower than the margin of dumping suffices to counter the injury caused then such lower duty should be imposed.

“Margin of Injury” is the difference between the landed value of exports and the fair selling (notional) price of the domestic manufacturer, which is usually called the Non-Injurious Price. The NIP is determined by the Designated Authority on the basis of cost of production (less interest), selling general and administrative expenses (SG&A), and a fixed rate of return on the capital employed of the domestic industry. In practice, the antidumping duty is restricted to the margin of injury, provided the injury is lower than the margin of dumping.

**FACTS:**

Reliance Industries (Reliance) filed a petition on 12.10.1998 seeking the imposition of antidumping duties on imports of Pure Terephthalic Acid (PTA) originating or being imported from Japan, Malaysia, Spain and Taiwan. As Reliance accounted for the total production of PTA in India it had

the requisite standing to file the petition.

In its Preliminary Findings dated 22<sup>nd</sup> October, 1999, the Designated Authority (DA) found a positive dumping margin for imports from Japan, Malaysia and Spain (there had been no exports from Taiwan during the period of investigation). However, the DA held that, with respect to the imports from Japan and Malaysia, there was *no causal link* between the dumped imports and the injury as the price of the dumped imports was higher than the Non-Injurious Price (NIP) for the domestic industry and thus there was no price undercutting or price depression attributable to the dumped imports.

The Final Finding dated 20<sup>th</sup> April, 2000, upheld the conclusions in the preliminary findings and imposed a duty only on imports from Spain.

Reliance challenged the determination of the DA before the CEGAT alleging that:

- a. The method of calculating the NIP had been incorrect.
- b. The landed values for imports from Japan and Malaysia were inflated.

The CEGAT rejected Reliance’s contention that NIP had been incorrectly determined. It upheld the method applied by the DA. On the question of landed price, the DA conceded that there had been an error in its methodology and the landed value was revised. As a result of a recalculation of the landed value, a duty was imposed on Japanese imports as well.

Reliance challenged the decision of the CEGAT on the method of calculation of the NIP before the Supreme Court.

**DETERMINATION OF NON-INJURIOUS PRICE**

Reliance contended that the DA erred in calculating the NIP for Reliance rather than an NIP for the “domestic industry as a whole”. The DA had taken the actual cost of electricity produced in Reliance’s captive power plant instead of using the market rate of electricity while calculating the NIP as a result of which the NIP was calculated at a much lower level than it should have been. When this NIP was compared to the landed value of imports, the DA found that the landed value of imports was higher than the NIP and thus there was no causal link between dumped imports and injury suffered by the domestic industry.

On appeal the CEGAT upheld the DA’s method of determining the NIP and stated that since the appellant was the sole producer of PTA in India and actual cost data was available, there was no reason to take an assumed value for the cost of electricity in calculating NIP.

At the Supreme Court Reliance contended that the NIP should be calculated for the industry as a whole and that for the purpose of determination of NIP, the DA is always required to take into consideration the transfer price (market value) of the inputs and not their actual cost of captive production.

The Supreme Court agreed with Reliance and examining the economic rationale underlying the antidumping legislations observed that the antidumping laws were meant for protection of the domestic industries as a whole against unfair practice of dumping, irrespective of whether they are backwardly integrated (as Reliance) or not. It was for this reason too that injury was examined for the

domestic industry as a whole and not for individual companies. In such a situation, it was imperative that the DA should have calculated the NIP for the domestic industry as a whole and not for a particular manufacturer.

The SC decision however is silent on the fact that in this particular instance Reliance was the sole manufacturer of PTA. Thus in the absence of other manufacturers, the DA could only have calculated the NIP by taking data of the only available manufacturer of PTA in India.

**DETERMINATION OF NORMAL VALUE:**

In the Final Findings, the DA had made an observation that “Normal Value, under the Rules, is exporter specific and not country specific.” This was specifically in response to comments made by some interested parties that normal value should have been calculated by taking into account “the prices at which the complainant (Reliance) had exported the products to Spain and the EU” as this would be indicative of the normally prevailing price of PTA in Spain.

The DA rejected this method of calculating the normal value especially when the exporters had provided data on their domestic selling price. It remarked that it was not proper to rely on the complainant’s prices in Spain for determining normal value when the exporter in question had furnished information on its own domestic selling price, which in comparison to its export price provided evidence of dumping. It was in this context that the DA had remarked that “Normal Value under the Rules, is exporter specific and not country specific”.

The Supreme Court, expressed its disagreement with the DA’s statement on this issue and relying on the

Supreme Court judgment in ***Designated Authority v. M/s. Haldor Topsoe***<sup>1</sup> stated that normal value is not exporter specific but “exporter country specific”.

It is however worth noting that the ***Haldor Topsoe case***, was decided under a different fact situation. In that case the exporter in question had refused to provide information on its export price sales to third countries for calculation of normal value as a result of which the DA had relied on “best judgment assessment” and used the price of similar articles manufactured by another exporter/manufacturer to determine the normal value. The Tribunal on appeal however, struck down the determination of the DA with the observation that since the anti-dumping duty was exporter specific such information relating to a different manufacturer could not be taken into account for calculating normal value

The Supreme Court in ***Haldor Topsoe*** disagreed with the reasoning of the Tribunal. It held that the term “comparable price” in section 9A of the Customs Tariff Act, 1975 referred to the price of similar articles sold under similar circumstances irrespective of the manufacturer. Thus the use by the DA of prices of another manufacturer who operated in a nation with similar market conditions was valid especially given that the exporter had not co-operated in providing information for the determination of normal value.

In the ***Reliance Case***, the Bench interpreted ***Haldor Topsoe*** to finally conclude that both normal value and NIP were not exporter or domestic industry specific, rather they were exporting country specific and importing country specific. Thus, once dumping of specific goods from a country is established, dumping duty can be imposed on all exports of those

goods from that country to India under Section 9A, irrespective of the exporter. The rate of duty may vary though from exporter to exporter depending upon the export price.

Similarly, the NIP is the reasonable price at which the subject goods can be produced by the domestic industry as a whole in India. Special advantages or disadvantages that one or more domestic producers may have should be ignored for determination of the NIP for the domestic industry as a whole.

### CONCLUSION

The Supreme Court’s interpretation of ***Haldor Topsoe*** appears to ignore the factual basis of the ***Topsoe*** decision. In ***Topsoe***, the exporter under investigation had refused to supply certain data sought by the investigating authority and hence the DA had drawn an adverse inference against him to make its determination on the basis of “best information available”. It was in this context that it was not obliged to limit its investigation only to the materials supplied by the particular exporter but could seek price information from other sources.

The SC’s statement in the ***Reliance*** case is in response to the DA’s statement on normal value. Thus the impact that the SC’s ruling would have on the determination of normal value is unclear. In the ***Reliance case***, the exporter from Spain had co-operated with the DA and provided its domestic price information for calculation of normal value. Given this, it is unclear if the SC’s remark will have a bearing on the sources available to the DA to determine normal value in the event of cooperation by the exporter. Further given the Supreme Court’s reliance on

*Holdor Topsoe*, which was decided under very dissimilar factual circumstances, it remains to be seen

whether future benches will continue to uphold this finding in all fact circumstances.

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