

# LUTHRA & LUTHRA

## TRADE AND COMPETITION LAW NEWSLETTER



### In this issue:

- I. Addressing cartelization in the Indian context  
*Page 2*
- II. Broad overview of fisheries subsidies proposals  
*Page 6*
- III. WTO disputes
  - a. US- Measures relating to zeroing and sunset reviews  
*Page 8*
  - b. US- AD measures on shrimp from Ecuador  
*Page 12*
  - c. US- Sunset reviews of AD measures on OCTG from Argentina  
*Page 13*
  - d. EC- Measures affecting the approval and marketing of biotech products  
*Page 16*
- IV. AD/CVD cases against India in the US & EC  
*Page 24*
- V. Antidumping investigations against imports into India  
*Page 29*

### From the Editor's Desk

Welcome to the fourth issue of Luthra & Luthra Trade and Competition Law Newsletter.

As you may have noticed our newsletter is now called the *Luthra & Luthra Trade and Competition Law Newsletter* and we have brought about this change with a twofold purpose. Firstly the change reflects synergies in these two areas of law. Secondly and more significantly, the change is a reflection of the growing impact of competition law on the Indian business environment. The passage of the new Competition Act by Parliament is imminent and once in force it will have significant implications for corporations and businesses in India. This newsletter is therefore an effort on our part to familiarize our readers with various issues pertaining to business structures and agreements arising under the Act. Since the Indian government has indicated that it will deal stringently with cartelization, as a start we have focused on the regulation of cartels under the Act. We will address other relevant developments and concepts in subsequent volumes.

On the trade front, zeroing makes news again, this time with the US-Japan case where the Appellate Body conclusively condemned zeroing even in sunset and new shipper reviews. We have also discussed the Oil country Tubular goods case where the AB in a compliance ruling upheld a peculiar practice of the DOC with respect to waivers. The much talked about Biotech dispute which was in the news earlier on in the year, has also been discussed at length.

Our endeavour remains to bring you relevant developments and we hope you will find this Newsletter useful and informative. Your suggestions and feedback are always welcome!

**Rajiv K. Luthra**  
Managing Partner

## ADDRESSING CARTELIZATION WITHIN THE INDIAN CONTEXT

It is increasingly recognized more than ever before that competition in markets promotes efficiency, encourages innovation, improves quality, boosts choice, reduces costs, leads to lower prices of goods and services. It is also a driving force for building up the competitiveness of the domestic industry: businesses that do not face competition at home are less likely to be globally competitive. Thus, competition in markets is not only essential for consumers, but also for business houses and economy as a whole. It is this imperative which has persuaded countries to either enact their competition law or to modernize their existing competition law and to revamp Competition Authorities, the number of countries having a competition law has risen from 35 in 1995 to around 100 as on date. India falls in the family of those countries, which are endeavouring to modernize their competition regimes.

### THE COMPETITION ACT, 2002

In line with international trend and to cope with changing realities, India reviewed the Monopolies and Restrictive Trade Practices Act, 1969 and has enacted the Competition Act, 2002 (the Act). The Central Government has also established the Competition Commission of India (the Commission) with effect from 14/10/03.

One of the core enforcement areas of the Act on its being made effective is Prohibition of Anti-Competitive Agreements” having appreciable adverse effect on competition in markets, in India”, which is a key factor before an agreement is dubbed as ‘anticompetitive agreement’ and declared void. Incidentally, a

‘agreement’ includes any arrangement or understanding or action in concert. The ‘agreement’ need not be in writing, not necessarily to be legally enforceable and an arrangement or understanding is as good as a formal written agreement.

### TYPES OF ANTICOMPETITIVE AGREEMENTS

Anti-competitive agreements as per the Act, are of two kinds; namely

(i) those agreements which are presumed to have appreciable adverse effect on competition in which case the burden of proof shifts on the enterprise or person against which the charge is levelled. These primarily include:

- (a) directly or indirectly fixing the prices;
- (b) limiting or controlling production, supply, markets, technical development, investment or provision of services;
- (c) sharing or allocation of geographical area of market, customers or in any other similar way; and
- (d) directly or indirectly resulting in bid-rigging or collusive bidding.

(ii) those agreements which are to be judged by “Rule of Reason” i.e., the burden of proof in respect of which lies on the investigator/prosecutor. These include tie-in arrangements, exclusive supply agreement, exclusive distribution agreement, refusal to deal and resale price maintenance.

## CARTELS

'Cartels' are included in the category of agreements, which are presumed to have appreciable adverse effect on competition. The term 'Cartel' is explicitly defined in the Act as:-

*"Cartel includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of service;*

The three ingredients to constitute 'Cartel' are:-

- (a) an agreement which includes arrangement or understanding;
- (b) agreement is amongst producers, sellers, distributors, traders or service providers i.e. parties are engaged in identical or similar trade of goods or provision of service, and
- (c) agreement aims to limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services

An obvious question arises as to why a 'Cartel' is presumed to have appreciable adverse effect on competition. Competition law seeks to promote, maintain and sustain competition in market being beneficial to various stakeholders in society. In the case of a 'Cartel', competitors agree not to compete on price, product, customers etc. Since direct competitors agree to forego competition and opt for collusion, consumers and business houses lose the benefits of competition. Thus, cartels are inherently harmful. Further, since competitors invariably do not reduce the agreement to writing and keep it secretive, such agreements are often in the nature of an arrangement or a mere understanding. Moreover, the best evidence against

'Cartel' is usually in possession of the charged parties, who are not likely to easily part with and make such evidence available to the investigator or enquiring authority. These compulsions seem to have persuaded law-makers to prescribe that 'Cartel's be presumed to have an appreciable adverse effect on competition.

## EFFECT OF CARTELIZATION

Small number of firms in an industry, high concentration, barriers to entry, low technological advancement, homogeneous product, strong ability of competing firms to exchange information on price and other terms of sale, uniformity in cost or efficiency, and effective trade association etc. make it conducive for firms to cartelize and to continue as such on a long-term basis. Firms are also encouraged to cartelize where there is less fear of being detected and punished.

There is worldwide recognition and consensus that Cartels harm consumers and damage economies, with estimates showing that average overcharge is somewhere in the 20-30 percent range. Enforcement action usually results in a sharp fall in prices as is evident in various countries. In Sweden and Finland, competition authorities observed price declines of 20-25 percent following enforcement action against asphalt cartels. The football replica kits case in the United Kingdom has resulted in long-term price reduction to the extent of 30 percent following the OFT's enforcement action. In Israel, the competition authority observed that prices declined by approximately 40-60 percent after it uncovered a bid-rigging cartel among envelope producers.

In India too, cartels have been alleged in various sectors, namely cement,

steel, tyres, trucking, family planning device (Copper T) etc. India is also believed to be a victim of overseas cartel in soda ash, bulk vitamins and petrol. All these tend to raise the price or reduce the choice of consumers. Business houses are affected most by cartels as the cost of procuring inputs is increased and choice is restricted making production uncompetitive and unviable. It is for this reason that “Cartels” are considered as the most serious form of anticompetitive conduct. The 1998 OECD Recommendation proclaimed that Cartels are “the most egregious violations of competition law”. Further, developing countries are affected more either due to absence of competition regime or inadequate capacity to detect, discover and prosecute domestic as well as overseas cartels.

## **DETECTION OF CARTELS**

Detection and prosecution of cartels is highly problematic under Monopolies and Restrictive Trade Practices Act, (MRTP) for it does not even provide for an explicit definition of cartels. Further the Act does not provide for the mechanism to take action against overseas delinquent enterprises as there is no provision which enables MRTPC to enter into cooperation agreement with overseas contemporary agency/authority. More importantly the authorities under the Act do not have the powers to grant leniency or prescribe stringent punishments.

To overcome these defects/deficiencies, the Competition Act of India has been legislated granting the Commission with effective powers to deal with cartelization. For instance to deter others not to indulge and to punish those who have indulged in cartelization, the Competition

Commission of India, unlike the Commission under the MRTP Act, has power to impose a penalty upon each producer, seller, distributor, trader or service provider included in the cartel. This penalty is equivalent to three times the amount of profits made out of such agreement by the cartel or ten percent of the average turnover of the cartel for the last three financial years, whichever is higher. The directors of the delinquent corporate entities can also be liable in case the violation is deliberate or occurred due to their negligence.

To facilitate detection of cartels through “approvers” and in keeping with provisions for “immunity” or “amnesty programs”, which have been used by competition authorities in developed countries, the Competition Act also provides for leniency programs designed to induce a cartel member to defect from the cartel agreement. The Act also provides that in the event of disclosure made by a member results in busting of a cartel, such member would be considered for a lesser penalty.

## **CONCLUSION**

The coming into force of the Competition Act holds immense possibilities for combating and prosecuting cartels. The availability of explicit and unambiguous definition of ‘Cartel’, incorporation of a leniency provision for a member of a cartel to defect, the power to impose deterrent penalty linked with profits or turnover on each member, and the grant of wide powers on the Director General to undertake “search” and “seizure” besides powers of the civil court for the purpose of investigation has considerably heightened the

possibilities of detection and severe punishment of cartels.

The Indian Government too seems to have taken note of the adverse effect of cartelization on the economy and the Prime Minister has recently called upon the industry to desist from forming interest groups. Commerce Minister Mr. Kamal Nath has even stated that “the government would

take action against companies that form cartels and push prices up” and has warned that the government will deal with cartelization severely. Given the government’s determination to combat cartelization it is likely several existing “under the carpet” arrangements within the Indian industry will be under greater scrutiny.

## BROAD OVERVIEW OF THE FISHERIES SUBSIDIES NEGOTIATIONS

Disciplines for the regulation of subsidies pertaining to the fisheries sector are currently being negotiated among the WTO Membership as part of the larger Rules negotiations. These negotiations are based on the premise that government subsidies are one of the primary causes for unsustainable fishing practices and depletion of fish stock around the world.

In the early days of the negotiations, several countries, particularly Japan and Korea refuted this premise and contended that there was no established relationship between subsidies and depletion of fish stock. The initial objection also arose from the fact that while the WTO Agreement on Subsidies and Countervailing Measures (ASCM) pertains to trade distorting effects of subsidies, the new disciplines seek to address production distorting effects of subsidies. The disciplines therefore seek to address an environmental issue through an instrument that remedies trade distortions. However over time, they have changed their approach and emphasis among the membership now seems to be more on formulating disciplines that take into account concerns of various countries whose economies rely heavily on the fisheries sector, rather than contesting the original assumption. Thus there has nonetheless been a growing consensus that to the extent that subsidies towards fishing activities lead to unsustainable fishing practices, they should be disciplined. The disciplines will most likely be included as an Annex to the ASCM.

The nature and shape that these disciplines is of particular significance for developing countries who have

garnered an ever growing share in world trade of fisheries products. This is especially true of India, which was among the top 10 capture fishery producing countries and the second largest producer aquaculture fish products after China.

There have been two general approaches towards the formulation of these disciplines, the top-down and the bottom-up approach. The top-down approach proposed by demadeurs of these disciplines suggest that all subsidies given to fisheries should be prohibited save for carefully carved out exceptions. The bottom up approach on the other hand propounded by Japan and Korea suggests that all subsidies should be allowed save for clear cases of subsidies towards capacity enhancement such as construction of new vessels that lead to increased capacity.

Members have also deliberated on whether the disciplines would apply to inland fisheries and to aquaculture. The general opinion seems to be that only marine capture fisheries would be covered and inland would be left out of the scope of the disciplines. Similarly it has been suggested that aquaculture, since it leads to breeding of fish species, should be outside the coverage of the disciplines. Brazil had however proposed that where aquaculture involved marine capture fish, then in those cases subsidies provided to aquaculture would also be covered. This approach has however not found much support among the membership.

Small and vulnerable coastal states and ACP countries have highlighted the need to keep access payments, i.e. payments received by these countries

for access to fishing fleets from other countries in their EEZ's, out of the scope of these disciplines. The US, Brazil and Argentina however believe that there is a subsidies element in these access payments when the acquiring government transfers these rights to its private industry where such transfer takes place at a price which is lower than the access fee paid. The ACP countries are apprehensive that any disciplining of access fees will result in a reduction of the revenue generated for these small economies.

Countries such as India have also highlighted the need for more effective S&D treatment for assistance provided to small-scale artisanal fisheries. Developing countries, especially India is characterized by a significant portion of fishing population, which relies on fishing for its subsistence as against large-scale commercial fishing. Boats used by such fishers are usually un-motorized, not more than 20 mts in length and they fish close to the shoreline. India therefore believes that effective carve outs should be made for assistance to such communities for their activities do not have a significant impact on the viability of fish stocks. Other developing countries have evinced support for this approach

and called for more elaboration of the terms artisanal and small-scale fisheries based on the economic impact of these types of fishing activity on the economy.

Countries such as Brazil and Argentina have also made references to the role of Regional fisheries management organization (RFMO's) or the role of FAO in determining the state of the fish stocks in waters around the world which has however been met with criticism from several quarters.

Countries like the US are still pushing for a blanket ban while Japan has come out with a fresh proposal suggesting a bottom up approach wherein specific forms of financial assistance towards capacity building would be targeted unlike the broad ban suggested by the United States.

There does not seem to be a clear indication that countries, particularly developing countries favour either the top-down or the bottom-up approach as they have highlighted issues of specific concern to their economies, and it still remains to be seen which position the WTO membership would unanimously consider for a text based proposal.

## WTO PANEL AND AB: SIGNIFICANT RECENT DISPUTES

### *United States- Measures relating to Zeroing and Sunset Reviews, WT/DS 322/AB/R*

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#### A. **FACTS**

This was an appeal from the Panel decision in the same case wherein Japan had challenged the use of zeroing by the US Department of Commerce (DOC) in original as well as review investigations. The Panel decision was reported in volume 3 of the *Luthra & Luthra Trade Law Newsletter*. The Panel in that decision had held that “zeroing procedures” were a measure which could be challenged “as such”. The United States did not challenge the finding that “zeroing procedures” when used in original investigation in a weighted average to weighted average comparison was a measure which could be challenged “as such”. However the US did challenge the Panel finding that “zeroing procedures” when used in transaction to transaction (T-T) or in weighted average to transaction (W-T) comparisons in original investigations constituted a measure which could be challenged “as such”. The US stated that the existence of a rule or norm requiring the application of zeroing should have been examined separately for each comparison methodology and for each type of anti-dumping proceeding. Since the Panel had analyzed all three comparison methodologies together it had erred in giving its decision. In reply, Japan had submitted evidence to the Panel indicating that zeroing is a constant feature whenever a margin of dumping is calculated regardless of the comparison methodology used. The US had not been able to adduce any evidence in which zeroing was not

applied. Nor did it indicate how the use of alternative comparison methodologies would make a difference in the operation or application of the zeroing procedures. The Appellate Body held that the zeroing procedures under different comparison methodologies, and in different stages of anti-dumping proceedings, do not correspond to separate rules or norms, but simply reflect different manifestations of a single rule or norm. The AB in reviewing the Panel’s decision agreed with Japan and also highlighted that the US did not explain why the rationale underlying zeroing procedures in W-W comparisons in original investigations or W-T comparisons in periodic reviews did not also apply to T-T and W-T comparisons in original investigations. The AB thus confirmed the Panel finding that zeroing procedures constitute a measure, which can be challenged “as such”.

#### B. **ZEROING IN TRANSACTION TO TRANSACTION COMPARISONS**

##### I. **THE PANEL’S REASONING**

The Panel had found model zeroing procedures in W-W comparisons in original investigations inconsistent with Article 2.4.2 of the AD Agreement and this was not appealed. However, the Panel stated that simple zeroing procedures in T-T comparisons<sup>1</sup> in original investigations was WTO consistent for the following reasons. First, the fact that the terms *dumping* and *margin of dumping* in Article 2.1

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<sup>1</sup> Under the T-T comparison methodology the margin of dumping is established by a comparison between the normal value and the export price in individual transactions.

and Articles VI:1, VI:2 of the GATT 1994 are defined in relation to *products* does not warrant the conclusion that these terms cannot apply to individual transactions and inherently require an examination of export transactions at an aggregate level. Second, the fact that Article 2.4.2 expressly permits the use of a T-T comparison methodology logically means that a Member may treat transactions in which export prices are less than normal value as being more relevant than transactions in which export prices exceeds normal value. Third, a general prohibition of zeroing under all the three methodologies listed in Article 2.4.2 would be contrary to the principle of effective treaty interpretation, because it would mean that the application of the W-T comparison methodology would always yield the same mathematical result as the application of the W-W comparison methodology. Because the Panel had found that zeroing was permissible in T-T comparisons under Articles 2.4.2 it concluded that zeroing does not breach the *fair comparison requirement* in Article 2.4 either. The Panel applied the same line of reasoning in rejecting Japan's claims relating to zeroing in the context of periodic reviews and new shipper reviews.

## 2. THE REASONING OF THE AB

### a. ARTICLE 2.4.2

Japan appealed that the use of zeroing in the T-T comparison methodology was inconsistent with the AD Agreement. The Appellate Body upheld Japan's arguments based on the following reasons.

First, unlike the Panel it held that the terms *dumping* and *margins of dumping* can be found to exist only for the *product under investigation as a whole* and not for individual

transactions. The Appellate Body relied on the Report of the Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)*<sup>2</sup> where it was held that the calculation of a margin of dumping using the T-T comparison methodology is a multi-step exercise in which the results of transaction-specific comparisons are mere inputs for the overall calculation exercise in order to establish the margin of dumping of the product under investigation. In that case, the AB had held that zeroing “as applied” in T-T comparison methodologies in original investigations was inconsistent with article 2.4.2. Second, it held that zeroing under the T-T comparison methodology would be more detrimental when compared to zeroing under the W-W comparison methodology because the former would inflate the margin of dumping to an even greater extent as compared to the latter. This is because zeroing under the T-T comparison methodology would disregard the result of each comparison involving a transaction whereas under the W-W comparison methodology zeroing would have occur only across the sub-groups in the process of aggregation. Third, the phrase *all comparable export transactions* in article 2.4.2 of the AD Agreement requires that each group includes only transactions that are comparable and that no export transaction may be left out when determining margins of dumping under that methodology. Since the W-W comparison methodology involved the calculation of a weighted average export price this phrase was necessary there. By contrast, under the T-T comparison methodology since all export transactions are taken into account on an individual basis and

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<sup>2</sup> WT/DS264/AB/RW at para.87 (cited in para.120 of this Report)

matched with the most appropriate transactions in the domestic market the phrase *all comparable export transactions* was not necessary there. Fourth, since the W-W and T-T comparison methodologies fulfilled the same function being mere alternative means for establishing margins of dumping it would be illogical to interpret the two methods in a manner that would lead to systematically different results. Lastly, it held that if the results of certain comparisons were disregarded only for purposes of calculating margins of dumping but taken into consideration for determining injury this would lead to treating the same transaction as non-dumped for one purpose and dumped for another which would be inconsistent with the need for consistent treatment of a product in an anti-dumping investigation.

b. “FAIR COMPARISON” OBLIGATION UNDER ARTICLE 2.4

Article 2.4 requires that a fair comparison to be made between export price and normal value in determining the dumping margin. The Appellate Body had previously in *US – Softwood Lumber V (Article 21.5 – Canada)*<sup>3</sup> described the use of zeroing under the T-T comparison methodology as partial and biased since it distorts the prices of certain export transactions by artificially inflating the magnitude of dumping, resulting in higher margins of dumping and a positive determination of dumping more likely. Hence it held zeroing in T-T comparisons in original investigations as inconsistent with the fair comparison requirement in Article 2.4.

<sup>3</sup> WT/DS264/AB/RW at para.139 (cited in para.146 of the Report)

c. ZEROING IN PERIODIC REVIEWS AND ARTICLE 9.3

The Panel had found that the United States did not act inconsistently with the *Anti-Dumping Agreement* by maintaining zeroing procedures in periodic reviews. The Panel had held that the terms *dumping* and *margins of dumping* as they appear in Article 9 refer to results of transaction-specific comparisons and hence different from their meaning in Articles 2.1 and 2.4. The Appellate Body rejected this reasoning and held that *dumping* and *margins of dumping* can only be found at the level of a “product” and not at the level of a type, model of a product or even at an individual transaction. As per the AB, margins of dumping for the products as a whole can only be calculated after aggregating all intermediate results.

The Panel in its analysis of zeroing in periodic reviews had stressed on the operation of the retrospective and prospective duty assessment systems<sup>4</sup> under article 9 to hold that there was no general prohibition on zeroing. According to the Panel, antidumping duty was incurred on an importer and import specific basis and if zeroing were prohibited in a retrospective duty assessment system, an importing country would be precluded from collecting duties for those export transactions to those importers which were at prices below the normal value because of other export transactions to other importers that were above normal value. The AB rejected this line

<sup>4</sup> In the retrospective duty system, dumping is calculated for each entry over a preceding period of time, and the amount owed by an importer depends on the prices of the merchandise that it enters. As opposed to that, in the prospective duty system dumping duties are assessed at the time of entry, based on a comparison of the price for the particular entry as compared to a normal value.

of reasoning by stating that antidumping duties was a concept that pertained to pricing behaviour of exporters and not importers. Infact an authority could collect duties in the form of a cash deposit on all export sales, even those that were above normal value. However in a review, the authority had to ensure that the total amount of duties collected from all importers did not exceed the total amount of dumping found for all export sales made by the exporter. The AB stressed that under both the retrospective as well as prospective duty assessment systems, the margin of dumping operated as a ceiling for the amount of antidumping duties that could be collected in respect of sales made by an exporter.

d. ZEROING IN NEW SHIPPER REVIEWS

The Panel's reasoning, which the Appellate Body rejected, with respect to periodic reviews under Article 9.3 was also its reasoning for new shipper reviews under Article 9.5. Since the Appellate Body disagreed with the Panel on periodic reviews, it also held that the use of zeroing, in establishing individual margins of dumping for new shippers was also inconsistent with Article 9.5 of the Anti-Dumping Agreement.

The AB further stressed that the use of zeroing in periodic reviews and new shipper reviews was inconsistent with the fair comparison requirement in Article 2.4. The Appellate Body held that if anti-dumping duties were assessed on the basis of zeroing then this methodology cannot be viewed as involving a fair comparison.

e. MARGINS OF DUMPING IN SUNSET REVIEWS

Japan had argued that two specific sunset review determinations were inconsistent with Articles 11.1 and 11.3 of the Anti-Dumping Agreement, because they were based on margins of dumping that were calculated inconsistently with Articles 2.1, 2.4, and 2.4.2 of the AD Agreement. The Panel held that since the margins of dumping relied upon by US DOC were margins calculated during periodic reviews, and recalling its previous finding that the AD Agreement does not prohibit zeroing in the context of such reviews, the Panel found that the US DOC did not act inconsistently with Articles 2 and 11.

The Appellate Body disagreed with the Panel on this issue as well. Relying on *US – Corrosion-Resistant Steel Sunset Review*,<sup>5</sup> the Appellate Body explained that dumping margins must conform to the disciplines of Article 2.4. And any inconsistency with Article 2.4 would give rise to an inconsistency with Article 11.3. In this particular sunset review case, the DOC had decided that there was a likelihood of dumping based on dumping margins established in a prior periodic review. The margins in periodic reviews were calculated using zeroing, which the AB had held to be inconsistent with article 2.4. Therefore based on the reasoning of US-Corrosion Resistant Steel Sunset Review the AB held the margins of dumping calculated in these sunset reviews to be inconsistent with Article 11.3.

The Appellate Body recommended that the DSB request the United States to bring its measures into conformity

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<sup>5</sup> WT/DS244/AB/R at para.127 (cited in para. 183 of the Report)

with its obligations under the AD Agreement and GATT.

**US – Anti-Dumping Measure on Shrimp from Ecuador, WT/DS335/R**

On 27<sup>th</sup> January 2004 the USDOC had initiated an anti-dumping investigation on Certain Frozen and Canned Warm-water Shrimp from Ecuador. Ecuador claimed that the USDOC had engaged in the practice of zeroing while determining the dumping margins for Exporklore, Promarisco and ‘all others’ in the final dumping determination, and had as a result violated Article 2.4.2 of the AD Agreement. ‘All others’ rate was described as the amended final weighted average of Exporklore and Promarisco’s margins, which applied to all non-investigated Ecuadorian producers that exported to the United States. While contending the same Ecuador heavily relied on the Appellate Body Report in *US Softwood Lumber V*<sup>6</sup>

**A. ISSUES**

1. Whether USDOC applied zeroing in calculating the dumping margin?
2. Whether USDOC acted inconsistently with Article 2.4.2 of the AD Agreement by applying zeroing while assessing the margin of dumping for Exporklore, Promarisco and all others on the basis of the weighted average-to-weighted average methodology.

**B. PANEL ANALYSIS**

**I. ISSUE 1**

The Panel held that USDOC had performed the practice of zeroing with respect to Exporklore, Promarisco and

‘all others’ and this position was affirmed by the fact that even the US did not deny it.

**II. ISSUE 2**

The Panel acknowledged that previous Appellate Body Reports create legitimate expectations among the WTO members and accordingly analyzed the opinion of the Appellate Body in several cases with primary stress on the Appellate Body Report in *US-Softwood Lumber V*.<sup>7</sup>

In that case Canada had claimed that the application of zeroing by USDOC, in calculating margins of dumping on the basis of the weighted average-to-weighted average methodology, was inconsistent with Article 2.4.2 of the AD Agreement.

The Appellate Body had analyzed the text of Article 2.4.2 and noted that the question before it was that while interpreting the terms ‘all comparable export transactions’ and ‘margins of dumping’ in Article 2.4.2 whether a Member should take into account ‘all’ comparable export transactions only at the sub-group level or whether such transactions also had to be taken into account when the results of the sub-group comparisons were aggregated.

For doing the same the Appellate Body analyzed Article 2.1 of the AD Agreement since the definition of dumping contained in Article 2.1 applied to the entire Agreement including Article 2.4.2. It held that a plain textual interpretation of Article 2.1 defined dumping in relation to a product as a whole and hence as with dumping the ‘dumping margins’ could therefore be found to exist only for the

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<sup>6</sup> WT/DS264/AB/R

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<sup>7</sup> Ibid

product as a whole by aggregating all the intermediate values.

The DOC practice of zeroing did not take account the entirety of the prices of some export transactions and thus inflated the margin of dumping for the product as a whole. The Appellate Body thus concluded that the practice of zeroing was inconsistent with Article 2.4.2 since dumping margins were not calculated for the product as a whole.

The Panel also took account of other decisions and saw a consistent line of Appellate Body Reports from *EC – Bed Linen*<sup>8</sup> to *US – Zeroing (EC)*<sup>9</sup> that held zeroing in the context of the weighted average-to-weighted average methodology was inconsistent with Article 2.4.2.

The Panel thus concluded that in this case there was *prima facie* evidence that the methodology applied by the US DOC in calculating the margins of dumping for Exporklore and Promarisco was the same as the methodology that had been rejected by the Appellate Body in *US – Softwood Lumber V* as being inconsistent with Article 2.4.2 of the AD Agreement. Furthermore, the United States again did not refute Ecuador’s claims.

### C. CONCLUSION

Hence, the Panel held that USDOC had violated its obligations under Article 2.4.2 of the AD Agreement. The Panel further held that since the calculation of the dumping margins for Exporklore and Promarisco was inconsistent with Article 2.4.2, the calculation of the ‘all others’ rate as the weighted average of the individual

rates necessarily incorporates this inconsistent methodology.

## ***US- Sunset Reviews of Anti Dumping Measures on Oil Country Tubular Goods from Argentina***, Article 21.5 AB Report, WT/DS268/AB/RW

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### A. FACTS

This dispute related to the implementation by the United States of the DSB recommendations and rulings in *US – Oil Country Tubular Goods Sunset Reviews*<sup>10</sup>. On 3<sup>rd</sup> July 2000 the US DOC had initiated a sunset review of the anti-dumping duty on OCTG from Argentina.

### B. THE WAIVERS

The US domestic statute provided for two forms of waivers. The first form of waiver, known as affirmative waiver referred to a situation where an interested party waived its participation by filing an express statement of such waiver to the US DOC. The second form of waiver known as deemed waiver referred to a situation where the US DOC considered the failure of an interested party to submit a complete substantive response to the notice of initiation of a sunset review as a waiver of participation. According to (US) Tariff Act if either of these waivers were exercised by the party it would lead to a presumption of continuation of dumping in the event of removal of anti-dumping duty. Argentina had not participated in the proceedings initiated by the US DOC. Treating this non-participation as a deemed waiver by Argentina, the US DOC came to the conclusion that dumping was likely to

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8 WT/DS141/AB/R

9 WT/DS294/AB/R

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10 WT/DS268/AB/R

recur and hence the anti-dumping duties must remain in tact. Argentina challenged the conclusion reached by the US DOC at the WTO. Argentina stated that the waiver provisions led the US DOC to assume likelihood of dumping. It contended that the waiver provisions thus violated Article 11.3 of the AD Agreement since they did not allow the US to make a positive determination of the likelihood of dumping. This contention was upheld by the Panel and the Appellate Body which recommended that the waiver provisions must be brought in conformity with the AD Agreement.

In order to comply with the recommendations and rulings of the DSB, the United States introduced two relevant amendments to its Regulations. With respect to the affirmative waiver a new requirement was introduced whereby the respondent interested party wishing to waive its participation in a sunset review had to submit a statement that it was likely to dump if the order was revoked or the investigation terminated. Secondly, the provision relating to deemed waivers were repealed. The US contended that these amendments sufficiently complied with the recommendations of the Panel Report as modified by the Appellate Body. Argentina disputed the same. Hence, Argentina requested for the establishment of a Panel under Article 21.5 of the DSU. The findings of the Panel were subsequently appealed by the US to the Appellate Body.

### **C. ARGUMENTS OF THE PARTIES**

#### **I. ARGENTINA**

Argentina argued that even after the amended waiver provisions, the Tariff Act continued to mandate an affirmative finding of likelihood of dumping in cases where an exporter

expressly waived its right to participate in a sunset review. The amended waiver had imposed a new requirement that a statement of waiver had to be accompanied by a statement indicating that the exporter who waived its right to participate was likely to continue dumping should the measure be revoked. Regarding this requirement, Argentina contended that by giving decisive guidance to such a document, the US law ran counter to the investigating authorities' obligation to make adequate and reasoned determinations on the basis of positive evidence in sunset reviews. Furthermore, Argentina contended that the Tariff Act mandated an affirmative finding of likelihood not only with respect to exporters who had waived their right to participate through signing a statement that they are likely to continue dumping, but also with respect to those who choose not to participate without signing such a statement. Argentina thus submitted that the United States had failed to implement the DSB recommendations and rulings regarding the inconsistency of US law with Article 11.3 of the AD Agreement.

#### **II. UNITED STATES**

According to the amended waiver provisions the exporters who chose to affirmatively waive their right to participate in a sunset review now had to acknowledge in writing that they would be likely to continue dumping in the case of the revocation of the duty. The US contended that because of this express affirmation, the company-specific likelihood determination was now based on positive evidence and not on assumptions. Accordingly the United States maintained that it had brought its measure in compliance with the DSB recommendations and rulings. With respect to Argentina's second contention the US stated that

for the exporters who do not affirmatively waive their right to participate, the US DOC would base its determinations on a review of all of the facts on the administrative record and hence the same did not violate Article 11.3 of the AD Agreement.

### **C. ISSUE**

The primary issue before the Panel was whether after the amendment of the waiver provisions, the US DOC would still be precluded from making a reasoned determination of likelihood of continuation of dumping in sunset reviews.

### **D. FINDINGS OF THE PANEL**

#### **I. COMPANY SPECIFIC FINDINGS<sup>11</sup>**

The Panel held that the amended waiver provisions might not preclude the US DOC from arriving at reasoned conclusions of likelihood of continuation of dumping under certain circumstances. An example of the same was where all exporters explicitly and affirmatively waived their right to participate and acknowledged that they were likely to continue dumping in the event that the measures were revoked. However, the Panel held, that even in such a situation, the investigating authorities would have to assess such statements objectively in light of all other evidence gathered by the investigating authorities and placed on the record.

#### **II. ORDER-WIDE AND COMPANY SPECIFIC**

The Panel then went on to hold that the amended waiver provisions might preclude the US DOC from reaching

reasoned conclusions in certain circumstances. The Panel recalled that the amended waiver provision, only applied to the US DOC's company-specific determinations for individual exporters who waived their right to participate. On the other hand, the US domestic law (SAA) required the US DOC to make its sunset determinations on an order-wide basis. The Panel further noted that there was no provision under US law that determined the outcome of the US DOC's order-wide sunset determinations. Given these considerations, the Panel held that in a sunset review involving multiple exporters from one country, where some of the exporters simply chose to remain silent after the initiation of the sunset review while some affirmatively waived their right to participate as per the procedure provided, the USDOC would have no alternative but to find likelihood of dumping on an order-wide basis because of the company-specific determinations that would have been made by it.

In response, the United States further argued that the USDOC would take all record evidence into account in making its order-wide determination, including the company-specific determinations but the final findings would be based on an objective assessment of evidence before it and would not be solely based on the company specific findings.

However, the US was unable to direct the Panel's attention to any provision of US law which would support its proposition that the US DOC's order-wide determinations were independent from the company-specific determinations. In light of this the Panel held that irrespective of the US arguments, the company-specific determinations would necessarily have

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<sup>11</sup> The Panel based the ultimate assessment of Argentina's claim regarding waivers, on the US DOC's order-wide as opposed to company-specific determinations.

a significant impact on order wide determinations even if they don't determine the outcome of the US DOC's order-wide determination. The DOC's order-wide determination would be based on the assumption that because one exporter waived its right to participate and acknowledged to be likely to continue dumping, other exporters would also be likely to continue dumping. Accordingly it would fail to observe the obligation of the investigating authorities to make reasoned determinations of likelihood of continuation of dumping based on a sufficient factual premise as required by Article 11.3 of the AD Agreement.

***E. FINDINGS OF THE APPELLATE BODY***

**I. COMPANY SPECIFIC FINDINGS**

Pursuant to the amended Regulations, an exporter who chose to waive participation had to submit a statement indicating that it was likely to dump if the order was revoked or the investigation terminated. The Appellate Body held that this statement constituted positive evidence for calculation of the dumping margin since there was an unremarkable, and entirely rational, chain of reasoning that linked the evidence of what a party said it would do, to the finding that such party was likely to act in accordance with its acknowledged intention. The Appellate Body further held that for those exporters who chose to remain silent by failing to respond to a notice of initiation, no company-specific determination would be made by the US DOC for that exporter and instead the findings would be based on order-wide determinations.

**II. ORDER WIDE AND COMPANY SPECIFIC**

The Appellate Body had already concluded that the company-specific findings would, after the amendment of the waiver, be based on positive evidence. It went on to hold that the amended waiver provisions do not in anyway preclude the US DOC from considering other evidence on the record when making an order-wide determination because, as stated by the US, the DOC would anyway consider all information and arguments on the record, and the relevance of a company-specific finding to the order-wide likelihood determination would always depend on the facts of each case. Accordingly the Appellate Body held that the amended waiver provisions did not preclude the DOC from making a reasoned determination with a sufficient factual basis, and were thus consistent with Article 11.3 of the Anti-Dumping Agreement.

***The European Communities – Measures Affecting the Approval and Marketing of Biotech Products***, Panel Report, WT/DS291, 292, 293/R

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This case was brought by U.S., Canada and Argentina against the EC because of the alleged restriction that had been placed by the EC on the approval and marketing of biotech products. The complaining parties alleged violation of provisions of the SPS Agreement, the TBT Agreement, and the GATT. While there were three complainants, the Panel issued one common report with one common finding, except where the claims presented and evidence submitted by each of the complaining Members was different.

The complainants were not challenging the relevant EC procedures<sup>12</sup> applicable for the approval and import/marketing of biotech products but to the application of these procedures. Thus at the outset the Panel had to decide whether the procedures constituted SPS measures within the scope of the SPS Agreement. The Panel analyzed provisions of Annex A (1) which defines SPS measures and concluded that the form, nature and purpose of all three EC procedures constitute SPS measure within the meaning of Annex A (1).

#### A. STATEMENT OF ISSUES

There were primarily three issues raised before the Panel. The first related to an alleged general moratorium on approvals of biotech products maintained by the EC. The second related to the various product-specific EC measures affecting the approval of specific biotech products. The third related to the safeguard measures employed by several EC member states prohibiting the import and marketing of specific biotech products.

#### B. FINDINGS

##### I. THE GENERAL MORATORIUM

According to the complainants the EC had established a general moratorium on approval procedures between October 1998 and August 2003. This moratorium on approvals was not a formal and legal *de jure* moratorium but a *de facto* moratorium. During this period, the complainants argued the EC effectively suspended consideration

of applications for approvals of biotech products at certain critical stages with a view to preventing the final approval of these applications. The EC not only contested these claims but the very existence of the moratorium itself.

The Panel however after examining the facts and history surrounding individual applications and the number of approvals granted during this period held that a *de facto* moratorium did in fact exist on approvals of biotech products between June 1999 and 29 August 2003.

The next step was for the Panel to decide whether a “moratorium” was a “measure” that could be challenged in a WTO proceeding. In a WTO dispute settlement proceedings, a Member can only challenge a “measure” (such as a law or regulation) of another. The Panel placed reliance on the AB decision in *US – German Steel CVD*<sup>13</sup> case, which stated that “any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.” The EC contested that the moratorium was not enacted through a formal EC decision-making process and it was just practice whereby consideration of individual applications was suspended. The Panel however held that the fact that the moratorium was *de facto* did not detract from the fact that it was an omission and that it was attributable to the EC and its Member States and was thus a “measure” for purposes of dispute settlement proceedings. The EC further contested that even if the moratorium was a measure the Panel should not make findings on the same as it ceased to exist after the establishment of the Panel. The Panel

<sup>12</sup> These procedures include EC Directive 90/220/EEC and 2001/18 and Regulation 258/97.

<sup>13</sup> WT/DS213/AB/R at para.81 (referred to in para.1289 of Panel Report)

again disagreed with the EC and held that while that may be true, the fact was that the moratorium could be reinstated at any time and therefore in the interests of finding a positive solution to the dispute, it would make findings on the moratorium.

Having decided that the *de facto* was a challengeable measure, the next step for the Panel was to decide whether the *de facto* moratorium was a measure under the SPS Agreement and therefore inconsistent with obligations under this Agreement.

The complaining parties contended that the moratorium violated Article 8 read with Annex C (1) (a), Article 7 read with Annex B (1), Article 8 read with Annex C (1) (b), Article 2.2 read with Article 5.1, Article 2.3 read with Article 5.5, Article 2.2 read with Article 5.6, Article 2.3 read with Article 5.5 and Article 10.1.

(i) **Is the moratorium a “SPS measure” under Article 5.1 of the SPS Agreement**

The Panel held that for the moratorium to be violative of Article 5.1 of the SPS Agreement it must be an ‘SPS measure’. In order for it to be an SPS measure it must be a substantive SPS ‘requirement or procedure’ under the second paragraph of Annex A (1) or must qualify as a SPS measure in the specific context within which that term appears. The complainants argued that Article 5.1 requires that SPS measures are based on an assessment of risk to human, animal, plant life and health taking into account risk assessment techniques developed by relevant international organizations. The Panel found that the moratorium in essence delayed decision on final approvals but that in itself did not constitute a substantive decision to reject all

applications pending for approval. Thus the moratorium was not an effective marketing ban and hence was also not a substantive requirement. The moratorium concerned the application of the EC approval procedures (i.e the application of the relevant EC Directive and Regulation) and hence, it was not a procedure in itself. The Panel held that the moratorium was not a SPS measure and therefore Article 5.1 did not apply.

(ii) **Is the Moratorium an “SPS measure” under Article 5.6 and 5.5 of the SPS Agreement**

The Panel had held that the moratorium did not qualify as a substantive measure or requirement under Annex A (1) and was not therefore a substantive SPS measure. Further the Panel even assessed the moratorium read in specific context of Article 5.6. Article 5.6 requires that when Members maintain SPS measures to achieve a certain level of sanitary or phytosanitary protection, such SPS measure are not more trade restrictive than required to achieve the appropriate level of sanitary or phytosanitary protection. Considering the language of Article 5.6, the Panel held that the moratorium does not qualify as an SPS measure since it was not applied for achieving the “appropriate level of protection”. The reasoning given by the Panel was that it was a mere procedural decision to delay the final substantive SPS measure. Hence, it not being a SPS measure the Panel held that Article 5.6 did not apply.

Similarly Article 5.5 also pertained to SPS measures, which were applied for achieving a particular level of protection and based on the reasoning under Article 5.1 and 5.6, the moratorium was not applied to achieve

a certain level of protection and thus did not constitute a SPS measure for the purposes of Article 5.5.

The complainants had also contented that the moratorium violated Article 2 of the SPS Agreement. The Panel however held that claims under Article 2 were dependent on the Article 5 claims and since the moratorium was adjudged not to be an SPS measure under Article 5, the corresponding claims under Article 2 were also rejected.

**(iii) Transparency claim under Article 7 and Annex B (1)**

Article 7 of the SPS Agreement requires that Members notify changes in their SPS measures and provide information on these measures in accordance with Annex B of the Agreement. The complaining parties essentially alleged that by failing to publish the existence of the moratorium the EC had violated its transparency obligation under Article 7 and Annex B(1). The Panel stated that Annex B (1) requires that SPS “regulations” which are “adopted” are published promptly so that interested WTO Members may become acquainted with them. The Panel observed that Annex B (1) required the publication of SPS “regulations” which are a sub-category of SPS measures. An explanatory footnote to Annex B (1) clarifies that an SPS regulation means laws, decrees and ordinances. The Panel recalled its earlier finding that the moratorium was an *application* of EC procedures (the Directives and the Regulation) and was not an SPS measure in itself. As per the Panel this was further endorsed in the wording of Article 7, which led to the conclusion that the EC had not acted inconsistently with Article 7 and Annex B (1).

**(iv) Undue delay claim due to the moratorium under Article 8 and Annex C(1)(a), first clause**

Article 8 requires that Members comply with Annex C in the operation of control, inspection and approval procedures. Annex C (1) (a) obligates Members to ensure that procedures for checking the fulfilment of SPS measures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products.

USA and Canada alleged a violation of the first part of Annex C (1) (a) and claimed that the moratorium prevented approval procedures from being undertaken and completed without “undue delay”.

The Panel stated that (1) (a) requires that procedures be undertaken and completed without undue delay, meaning that approvals be completed with no justifiable loss of time. It thus examined the EC argument that the delay in approvals was justified due to evolving understanding of science on GMO based products. The Panel rejected this argument on the ground that the mere fact that science on the subject matter was evolving provided no justification for delaying completion of approval procedures by imposing a moratorium. Moreover in the case of a certain GMO product the Panel found that there had been unexplainable inaction on the part of the Commission to convene the relevant meetings and thereby take a vote on the approval on the GMO product concerned. The inaction was a result of the moratorium on approvals. Based on the above the Panel concluded that the EC had failed to observe the first part of Annex C (1) (a) and consequently Article 8 of the SPS Agreement.

(v) **The moratorium and violation of standard processing timelines under Article 8 and Annex C(1)(b), first clause**

The US further alleged that the EC violated Annex C (1) (b) which provides among other things that Members communicate standard processing periods and timeline to applicants upon request, explain delays upon request and publish the standard processing period for each procedure. According to the US, the EC modified the published standard processing period by maintaining the moratorium. The Panel held that the fact that the moratorium was unpublished was independent of the failure on behalf of the EC to publish the new standard processing periods. The Panel reconfirmed this fact by giving an analogy: “The European Communities could apply the general moratorium on approvals and at the same time publish any new standard processing periods.”

The US next argued that the EC had not communicated the moratorium to the applicant. The Panel held that Annex C(1)(b) categorically states that the anticipated processing period is to be communicated to the applicant ‘upon request’ and since no request was made by the U.S., EC was under no obligation to communicate the same.

The US contended that the EC had not promptly examined the completeness of documentation and informed the applicants of deficiencies. The Panel held that the burden of proof lay on the US to prove this assertion and in the absence of the same the EC cannot be assumed to have violated this obligation.

The US contended that under the moratorium delays were not explained. However, in order to be informed of the delays the US again had to make an express application, which was not made. In the absence of the same the Panel held that it cannot be assumed that delays were not explained.

Hence, since the moratorium was consistent with the Annex it was also held to be consistent with Article 8.

(vi) **Special and differential claim under Article 10.1 of the SPS Agreement**

Argentina claimed that it should have been given special and differential (S & D) treatment as it is a developing country. At the outset the Panel held that Argentina’s claim was not brought forth in a clear manner since it was under doubt whether they were challenging the moratorium or the EC approval legislation. With respect to the EC legislation (which approved certain biotech products) the Panel held that the burden was on Argentina to establish that the EC had not taken into account Argentina’s special needs as a developing country. The Panel held that the mere fact that there is no indication that the EC accorded Argentina S&D treatment is not prima facie indication that it did not take into account Argentina’s special needs. It could well likely be the case that it took into account Argentina’s needs but decided that products from Argentina did not warrant S&D treatment. It was thus upto Argentina to adduce evidence to show that the EC has not complied with its obligation under Article 10.1, which it had not fulfilled.

## II. THE PRODUCT-SPECIFIC MEASURES

Apart from the general *de facto* moratorium on approvals of biotech products, the complainants also made several claims pertaining to specific biotech products where approvals had been delayed. The issue was whether a delay and thereby a failure to consider an application for approval was an SPS measure for purposes of Annex A (1).

The Panel held that the product specific measures (i.e delay in approval of a product) was not a “SPS measure” under Annex A(1) because it was neither a requirement nor a procedure. It was held not to be a requirement because a failure to consider a particular application for final approval did not qualify as the same thing as a negative final approval decision. The Panel further held that the failure to consider a particular application for final approval cannot be equated to imposing a new ban. With respect to whether it was a procedure the Panel held that since the alleged product-specific measures did not impose any new substantive requirement, no substantive requirement would have been modified and hence it was not a procedure. The Panel held that the EC’s alleged failure to consider a particular application for final approval was not a measure but was an instance of application of a particular way of operating the relevant EC approval procedure. Hence, it was held not to be an SPS measure.

Since the failure to consider an application for approval was not an SPS measure, it also rejected all claims pertaining to articles 5.1, 5.5, 5.6, 2.2, 2.3 and Article 7 read with Annex B(1). The Panel rejected the arguments on product specific measures under

Article 8 read with Annex C (1) (b) on the same grounds that it rejected the arguments pertaining to the general *de facto* moratorium under the same Article and Annex.

### (i) Undue delay claim for product specific measures under Article 8 and Annex C(1)(a), first clause

As stated above, Article 8 requires that Members comply with Annex C in the operation of control, inspection and approval procedures. Annex C (1) (a) obligates Members to ensure that procedures for checking the fulfilment of SPS measures are undertaken and completed without undue delay (first clause) and in no less favourable manner for imported products than for like domestic products (second clause). Just as in the case of the general moratorium, the Panel examined the time taken for approvals procedures pertaining to specific products and found that out of 27 products submitted for approval, there had been undue delay in the case of 24 products as a result of the general *de facto* moratorium. For three products (transgenic potato, LL oilseed rape and LL soybeans), the Panel held that there had not been undue delay and therefore the approval procedures did not violate article 8 and Annex C (1) (a) first clause.

### (ii) Discrimination claim under Article 8 and Annex C (1) (a) second clause

As highlighted above, the second clause of Annex C (1) (a) also states that procedures for checking the fulfilment of SPS measures are undertaken and completed in no less favourable manner for imported products than for like domestic products. It was Argentina’s claim that

in examining product specific applications for approvals the EC had discriminated between biotech and non-biotech products thereby treating biotech products less favourably than non-biotech products. Specifically, Argentina claimed that prior to 1998, the EC had granted approvals for the marketing of biotech products, which it had not done after 1998 as a result of the general *de facto* moratorium.

As per the Panel a complaining member alleging discrimination under the second clause of Annex C (1) (a) had to establish that (i) imported products had been treated in less favourable manner than domestic products in respect of approvals procedures and (ii) the imported products which are treated less favourably should be “like” the domestic products which are treated more favourably.

The Panel noted that Argentina had not claimed that imported biotech products were treated less favourably than domestic biotech products. Infact Argentina claimed that biotech products whether they were imported or not were treated less favourably than domestic non-biotech products. This according to the Panel was crucial as it showed that there was an alleged discrimination between biotech and non-biotech products irrespective of the origin of the product (i.e irrespective of whether it was imported or not) The alleged discrimination was therefore not related to the foreign origin of the products but due to a difference in risk perception. The Panel therefore held that Argentina had failed to establish a claim under the second clause of Annex C(1) (a) and did not go onto examine whether biotech and non-biotech products were “like” products for the purposes of the claim in discrimination.

### III SAFEGUARD MEASURES MAINTAINED BY INDIVIDUAL EC MEMBER STATES

Some EC member States i.e. Austria, Belgium, France, Germany, Italy and Luxembourg had imposed safeguard measures by way of prohibiting the import, use and marketing of certain biotech products that had been formally approved for use within the EC previously. All these measures were based upon either Article 16 of Directive 90/220 or Article 12 of Regulation 258/97 which provided for protection of human health and environment. The Complaining Parties thus challenged these prohibitions as inconsistent with EC’s WTO obligations.

The Panel held that the safeguard measures were imposed for various reasons such as to address concerns on allergenicity, toxicity, development of antibiotic resistance, long term in environmentally sensitive areas, consumer health among others and therefore constituted SPS measures within the meaning of various provisions of Annex A (1).

The Panel held that all the measures were attributable to the respective governments and were taken through decisions which were legally binding. Hence, they were considered as laws, decrees or regulations for the purpose of Annex A (1). With respect to the nature of these measures it was held that the decisions prohibited the import, use and marketing of the products, which was considered a “requirement” for the purposes of Annex A (1).

Moreover the measures had an effect on international trade within the meaning of Article 1.1 of the *SPS Agreement* as the measures had

the possibility of directly or indirectly affecting international trade.

The complainants argued that the safeguard measures were inconsistent with article 5.1 which the EC stated was a wrong standard to apply, as the safeguards were provisional measures, which were permitted under article 5.7. Article 5.7 states that in cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information. The Panel however disagreed with the EC argument that the mere fact that a measure is provisional would bring it under the purview of article 5.7 and held that the pre-condition for applicability of article 5.7 was the insufficiency of scientific evidence.

The Panel therefore had to determine whether the safeguard measures should be assessed under the standards of article 5.1 or 5.7. The preliminary enquiry thus was whether article 5.7 was an exception to article 5.1 (which states that SPS measures can only be maintained if based on risk assessment). The Panel held that article 5.7 was a qualified right in that, if there was a violation of article 5.1 (i.e. the measure is not based on risk assessment), only then would it consider if the measure was nonetheless valid under article 5.7. The Panel therefore first examined whether the safeguard measures fell under article 5.1, i.e. was there was a risk assessment and was the measure “based on” such risk assessment. The Panel noted that for each of the products at issue, the competent authority of the Member state where the product was originally submitted and the EC relevant scientific

committee had evaluated the potential risks to human health and the environment prior to the granting of Community-wide approval, and had provided a positive opinion. The logical outcome of the risk assessment should have been the non-imposition of any safeguard measure at the level of the member states because the products had been approved at the community wide level. However the safeguard measure were taken inspite of the risk assessment approving the products and therefore could not be said to be “based on” the risk assessment. Since the measures were not based on risk assessment they did not conform to article 5.1 and the Panel had to examine if they nonetheless fell within the purview of article 5.7.

The Panel then deliberated whether the safeguard measures were valid under article 5.7. In order to prove a claim under article 5.7 it had to be established that there was insufficient relevant scientific information which in turn would justify imposing a provisional measure under article 5.7. The Panel held that scientific evidence would be considered to be insufficient if the evidence did not allow for the performance of a risk assessment. However risk assessments had been undertaken which proved that there was adequate scientific evidence. The Panel held that the safeguard measures had been imposed even where scientific evidence was sufficient and thereby acted inconsistently with article 5.7.

In conclusion the Panel recommended that the DSB request the EC to bring its measures concerning the *de facto* moratorium, the product specific measures and the safeguard measures in conformity with its ruling.

## AD/CVD CASES AGAINST INDIA IN THE US

### CERTAIN FORGED STAINLESS STEEL FLANGES FROM INDIA: NOTICE OF FINAL RESULTS OF NEW SHIPPER REVIEW

As per Federal Register Notice (72 FR 18628) dated April 13, 2007 the DOC published the final results of the New Shippers Review covering the period of February 1, 2005 to January 31, 2006. Since no comments were received in response to the preliminary findings published on January 31, 2007 therefore the final results confirmed the preliminary findings and a weighted average dumping margin of 1.52% was imposed on Kunj Forgings, Pvt., Ltd.

### POLYETHYLENE TEREPHTHALATE FILM, SHEET, AND STRIP FROM INDIA: NOTICE OF PARTIAL RESCISSION OF ADMINISTRATIVE REVIEW OF THE COUNTERVAILING DUTY ORDER

An administrative review of the antidumping duty order on PET films and strips was requested by Jindal Poly Films Limited, MTZ Polyfilms Ltd., Polyplex Corporation Ltd. and Garware Polyester Ltd. Polyplex withdrew its request for an administrative review on August 22, 2006, before the initiation of this review. On November 28, 2006, Jindal Polyfilms Ltd. also withdrew its request for an administrative review. As Jindal submitted its request within the 90 day limit set by the regulations and as no other parties had requested the review of Jindal Polyfilms Ltd., the DOC rescinded in part the review of the countervailing duty order on PET films from India for the period January 1, 2005 to December 31, 2005 for Jindal vide notice dated April 10, 2007 (72 FR 17838). Both Garware and MTZ

remain subject to the administrative review. The preliminary results for this administrative review for these companies are currently due July 31, 2007.

### STAINLESS STEEL BAR FROM INDIA: NOTICE OF INITIATION OF ANTIDUMPING DUTY NEW SHIPPER REVIEW

On February 28, 2007 Sunflag Iron & Steel Co. Ltd. requested for initiation of a new shipper review to the DOC of the antidumping duty order on stainless steel bars from India. The DOC as per Federal Register notice (72 FR 15110) dated March 30, 2007 accordingly initiated the new shipper review covering the period from February 1, 2006 to January 31, 2007.

### STAINLESS STEEL WIRE ROD FROM INDIA: NOTICE OF INITIATION OF ANTIDUMPING DUTY NEW SHIPPER REVIEW

On December 29, 2006 Sunflag Iron & Steel Co. Ltd. requested for initiation of a new shipper review to the DOC of the antidumping duty order on stainless steel wire rod from India. The DOC upheld Sunflag's contention that it had not exported stainless steel wire rod to the United States during the POI and that it had never been affiliated with any exporter or producer that exported stainless steel wire rod to the United States during the POI. Hence, the DOC as per Federal Register notice (72 FR 13088) dated March 20, 2007 accordingly initiated the new shipper review covering the period from December 1, 2005 to November 30, 2006.

**NOTICE OF PRELIMINARY RESULTS OF ANTIDUMPING DUTY ADMINISTRATIVE REVIEW, INTENT TO RESCIND AND PARTIAL RESCISSION OF ANTIDUMPING DUTY ADMINISTRATIVE REVIEW: STAINLESS STEEL BAR FROM INDIA**

As per Federal Register notice (72 FR 10151) dated March 7, 2007 the DOC published the preliminary results and partial rescission of the antidumping duty order for the period February 1, 2005, through January 31, 2006.

On February 21, 1995, the DOC published in the Federal Register the antidumping duty order on stainless steel bar from India. On February 1, 2006, the Department published a notice in the Federal Register providing an opportunity for interested parties to request an administrative review. A timely request was made on by Isibars Ltd and by the petitioners (Carpenter Technology Corporation, Crucible Specialty Metals, Electralloy Company, North American Stainless, Universal Stainless, and Valbruna Slater Stainless).

On April 5, 2006, the DOC initiated an administrative review on Akai Asian, Atlas, Bhansali, Facor, Grand Foundry, Isibars, Meltroll, Mukand, Sindia, Snowdrop, Venus, and conditionally initiated an administrative review with respect to Viraj Alloys, Ltd., Viraj Impoexpo, Ltd., Viraj Forgings, Ltd., Viraj Smelting, Viraj Profiles, and VSL Wires, Ltd., (collectively, the Viraj entities). The DOC considering it impractical to make separate findings for all the companies selected Venus and Bhansali for individual reviews since they were the two largest exporters.

In the Initiation Notice, the DOC had stated that it was conditionally initiating a review with respect to the Viraj entities<sup>14</sup> pending further information from the requestor as to sales of subject merchandise not covered by the revocation. In the absence of receipt of any information the DOC, on May 24, 2006, rescinded the administrative review with respect to the Viraj entities. The DOC preliminarily rescinded the administrative review with respect to Akai, Atlas and Meltroll since there was no entry of goods from them. The DOC treated Venus and Precision Metals as a single entity since they were affiliates.

The DOC rejected claim made by Bhansali and Venus for a duty draw back because they failed to demonstrate that there was a link between the import duty paid and the rebate received, and further that the imported raw materials were used in the production of the final exported product.

Accordingly the DOC held the dumping margin for Bhansali as 2.10% and 0.03% (de minimis) for Venus.

**CERTAIN FORGED STAINLESS STEEL FLANGES FROM INDIA: PRELIMINARY RESULTS OF ANTIDUMPING DUTY ADMINISTRATIVE REVIEW, PARTIAL RESCISSION AND INTENT TO RESCIND**

As per Federal Register notice (72 FR 10142) dated March 7, 2007 the DOC published the preliminary results and partial rescission of the antidumping duty for the period February 1, 2005 to January 31, 2006.

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<sup>14</sup> Viraj Alloys, Ltd., Viraj Impoexpo, Ltd., Viraj Forgings, Ltd., Viraj Smelting, Viraj Profiles, and VSL Wires, Ltd.

On February 9, 1994, the DOC published in the Federal Register the antidumping duty order on stainless steel flanges from India. The exporters consisted of Echjay Forgings Ltd, Shree Ganesh Forgings, Ltd. requested for an administrative review for their exports. Kunj Forgings Pvt. Ltd., Micro Forge (India) Ltd., Pradeep Metals Limited and Rollwell Forge, Ltd. requested for a new shipper review and failing that an administrative review for their exports.

On April 5, 2006, the DOC initiated administrative reviews for the six companies mentioned above. Micro and Pradeep had no entries during the POR and hence the administrative review with respect to them was rescinded. Even the new shipper

review was rescinded for these companies. With respect to Kunj since it qualified for a new shipper review the DOC rescinded the administrative review. With respect to Rollwell the DOC determined that it did not qualify for a new shipper review but qualified for an administrative review. The DOC rejected the use of Rollwell's material as insufficient and applied an adverse facts available (AFA) rate to Rollwell's sales. With respect to Shree Ganesh the DOC issued a notice to rescind the administrative review of Shree Ganesh based on the fact that the company had no entries during the POR of subject merchandise.

The weighted-average dumping margin was determined at 0.06% for Echjay and 210% for Rollwell.

## AD/CVD CASES AGAINST INDIA IN THE EU

**COMMISSION REGULATION (EC) No 216/2007 and 217/ 2007 of 28 February 2007 initiating an investigation concerning the possible circumvention of anti-dumping measures imposed by Council Regulation (EC) No 1629/2004 and possible circumvention of countervailing measures imposed by Council Regulation (EC) No 1628/2004 on imports of certain graphite electrode systems originating in India by imports of certain artificial graphite originating in India and making such imports subject to registration**

The Commission had imposed anti dumping and countervailing duty measures on imports of certain graphite electrode systems originating in India via Council Regulation (EC) No 1629/2004 and 1628/2004 on September 18, 2004. On 15<sup>th</sup> January 2007 the European Carbon and Graphite Association (ECGA) requested the Commission to investigate the possible circumvention of these anti-dumping and countervailing measures.<sup>15</sup> The Commission initiated the investigation on the basis that the request of the petitioners had brought forth sufficient *prima facie* evidence for concluding that the anti-dumping measures were being circumvented by means of imports of artificial graphite.

<sup>15</sup> The product was graphite electrodes of a kind used for electric furnaces, with an apparent density of 1,65 g/cm<sup>3</sup> or more and an electrical resistance of 6,0 µΩ.m or less (CN code ex 8545 11 00) and nipples used for such electrodes (CN code ex 8545 90 90). The product under investigation was artificial graphite rods of a diameter of 75 mm or more (CN code ex 3801 10 00).

The Commission relied on evidence submitted by the petitioners which showed a significant change in the pattern of trade involving exports from India to the Community had taken place following the imposition of the AD/CVD measures on the product concerned, and that there was insufficient due cause or justification other than the imposition of the duty for such a change. The evidence also showed that this change in the pattern of trade appeared to stem from a simple conversion operation carried out in the Community whereby imports of the product under investigation were converted into the product concerned.

**COUNCIL REGULATION (EC) No 193/2007 OF 22 FEBRUARY 2007 IMPOSING A DEFINITIVE COUNTERVAILING DUTY ON IMPORTS OF POLYETHYLENE TEREPHTHALATE (PET) ORIGINATING IN INDIA FOLLOWING AN EXPIRY REVIEW PURSUANT TO ARTICLE 18 OF REGULATION (EC) NO 2026/97**

On 30 August 2005 Polyethylene Terephthalate Committee of Plastics Europe requested the Commission for a re-analysis of the expiry review on the grounds that the expiry of the measures would again result in a continuation or recurrence of subsidization and injury to the Community industry. The POI covered the period from 1 October 2004 to 30 September 2005. The examination of trends in the context of injury covered the period from 1<sup>st</sup> January 2002 to the end of the review investigation period.

With respect to the Duty Entitlement Passbook Scheme, the Income Tax Schemes, the Gujarat Sales Tax

Incentive Scheme and Gujarat Electricity Duty Exemption Scheme it was found that none of the cooperating exporting producers obtained any countervailable benefits and hence it was not found necessary to further analyze these schemes. Under the West Bengal Incentive Schemes one company had benefited from these schemes however the impact of these benefits was negligible and hence, this scheme was not analyzed.

The following schemes were countervailed:

1. The Export Promotion Capital Goods Scheme
2. The Export Oriented Unit Scheme (EOU): The exemption from basic customs duty, special additional customs duty, the partial reimbursement of duty paid on fuel procured from domestic oil companies and the sales tax reimbursement were held to constitute export contingent subsidies within the meaning of Article 2. With respect to purchase of capital goods, the sales tax reimbursement and import duty exemption provisions were already incompatible with the rules for permitted drawback systems since capital goods could have been consumed in the production process. Further, the GOI had not set up any mechanism to determine which inputs were consumed in export

production and in what amounts. The GOI did not even demonstrate that no excess remission had taken place.

3. The Advance License Scheme was countervailed because it was contingent upon export performance and was held not to be a valid drawback scheme.
4. The Package Scheme of Incentives of the Government of Maharashtra was held countervailable since it was limited to certain enterprises located within a designated geographical region and further because it reduced government revenue.

The Commission held that the Indian exporters of the product concerned continued to benefit from the countervailable subsidization provided by the Indian authorities during the review investigation period. Further the subsidy schemes concerned, had given recurring benefits and there was no indication on phasing out of these programs in the reasonable future. Under these circumstances, the Commission concluded that subsidization was likely to continue in the future.

The Commission also held that that the repeal of the measures against India would in all likelihood result in the recurrence of injury to the Community industry.

## ANTIDUMPING INVESTIGATIONS AGAINST IMPORTS INTO INDIA

The following table provides an overview of the various recent antidumping actions against imports into India, which were considered by the Directorate General for Antidumping and Allied Duties (DGAD).

COUNTRIES	PRODUCT	DOMESTIC INDUSTRY	RELEVANT DATE	COMMENTS
PRC	Zinc Oxide	M/s Transpek Industries Ltd. and M/s Demosha Chemicals Ltd Zincolied India, JG Chemicals, Metalco, Rubomin Limited	07.05.2007	<p>Customs notification No.64/2007 imposed anti-dumping duty based on final findings of the sunset review of the DGAD dated April 4<sup>th</sup>, 2007.</p> <p>DGAD imposed antidumping on exporters even while it found that the financial performance of the domestic industry had improved. Production, capacity utilization, sales and profits of the domestic industry had also improved. However the DGAD noted that imports were continuing at dumped prices and that there was significant price undercutting and underselling without factoring in the antidumping duties.</p>
PCR/ Hong Kong Japan	Vitamin B12 and derivatives	M/s Merin Ltd (holding) M/s Wockhardt Ltd	18.04.2007	Initiation No. 14/12/2006 DGAD
PRC	Dry cell batteries	Association of Indian Dry Cell Manufacturers	13.04.2007	Customs notification 57/2007 dated April 13, 2007 imposed anti-dumping duty in pursuance of final findings of sunset review of the DGAD dated January 31 <sup>st</sup> , 2007.
PRC	Ceftriaxone Sodium sterile	M/s Aurobindo Pharma Ltd	04.04.2007	<p>Initiation No. 14/18/2006 DGAD</p> <p>The DGAD noted that there were other producers of the</p>

				product in India. However based on production volumes, the DGAD held that the applicant commanded a major proportion of the subject goods in India. The DGAD also noted that one of the Indian producers was a 100% export oriented unit and therefore did not qualify as domestic industry.
PRC and UAE	Vitrified and porcelain tiles, other than vitrified industrial tiles	M/s. SPL Ltd., M/s. H&R Johnson India Ltd. and M/s. Murudeshwar Ceramics Ltd.	30.03.2007	<p>Customs notification no. 73/2003 dated the May 1, 2003 imposed anti-dumping duty in accordance with final findings dated February 5, 2003.</p> <p>New shipper reviews was initiated on the request of M/s Foshan Chan Cheng Jinyi Ceramics Company Ltd. (producer) with M/s Joyson Ceramic Material Co Ltd., Hong Kong (exporter) through M/s Able Ace, Malaysia (exporter). The designated authority, <i>vide</i> notification no. 15/14/2006-DGAD, dated 22<sup>nd</sup> March, 2007 recommended provisional assessment of all exports of the subject goods made by the said exporters till the completion of the review by it.</p> <p>Customs <i>vide</i> notification no.59/2007 and 38/2007 dated 30<sup>th</sup> April 2007 ordered that pending the outcome of the new shipper review, vitrified and porcelain tiles shall be subject to provisional assessment.</p>
PRC	Flat Base Steel Wheels	M/s. Kalyani Lemmerz Limited and M/s	29.03.2007	Customs notification no. 51/2007 dated March 29, 2007 imposed provisional anti-

		Wheels India Limited.		dumping duty in accordance with the preliminary findings of the DGAD dated January 12, 2007.
PRC	Potassium Permanganate	M/s. Universal Chemicals and Industries (P) Ltd.	29.03.2007	<p>Customs notification no. 50/2007 dated March 29, 2007 imposed anti-dumping duty in accordance with the sunset review final findings of the DGAD dated March 1, 2007. .</p> <p>The co-operating exporter M/s Groupstars (Yunnan) LLC was not granted market economy treatment as one of the JV partners was said to have substantial state ownership during the POI. According to the facts, the said JV partner had gone into bankruptcy and its shares in the JV had been transferred to another entity. The DGAD however placed emphasis on the fact that during the POI, the JV partner was state controlled.</p> <p>There were two other domestic producers of the product, though petition was filed by M/s Universal. However DGAD sought cost and injury data for determining non-injurious price and injury to domestic industry as a whole from these two producers as well but neither producer co-operated. DGAD did not take into account their cost data and also commented that since both companies had started production towards the end of the POI, their cost and injury data would not be relevant.</p>
PRC and Switzerland	Vitamin-A Palmitate	M/s Nicholas Piramal India	28.03.2007	Customs notification no. 47/2007 dated March 28, 2007

		Ltd.		imposed provisional anti-dumping duty in accordance with the preliminary findings of the DGAD dated February 20, 2007.
PRC	Hydrofluoric acid	AHF Manufacturers Association	26.03.2007	Sunset review initiated <i>vide</i> notification No. 4/13/2006-DGAD, dated the March 17, 2007 with request for imposition of provisional anti-dumping duty pending review.  Custom notification no. 45/2007 dated March 26, 2007 extended the period for which duty was payable till and inclusive of March 27, 2008.
Taiwan and Japan (Canada)	Pentaerythritol	M/s Kanoria Chemicals & Industries Ltd. Supported by M/s. Perstorp Chemicals India (Pvt) Ltd	26.03.2007	Sunset review initiated <i>vide</i> notification No. 15/7/2006 of the DGAD, dated the March 15, 2007 against Taiwan and Japan and not against Canada with request for imposition for provisional anti-dumping duty pending review.  Customs notification no. 46/2007 dated March 26, 2007 extended period for which duty was payable till and inclusive of March 26, 2008. No anti-dumping duty was applicable to Canada with effect from March 31, 2007.
European Union	Sodium Nitrite	M/s. Deepak Nitrite Ltd and M/s Punjab Chemicals and Crop Ltd	21.03.2007	Sunset review initiated <i>vide</i> notification No. 15/6/2006 (SSR) of the DGAD, dated the March 6, 2007 with request for imposition of provisional anti-dumping duty pending review.  Custom notification no. 44/2007 dated March 21, 2007 extended the period for which duty was payable till and

				inclusive of March 27, 2008.
Qatar	Caustic Soda	M/s Alkali Manufacturers Association of India (AMAI) supported by M/s Grasim Industries Limited, Nagda, MP, M/s Gujarat Alkalies & Chemicals Ltd., Vadodara, Gujarat M/s Search Chem. Industries Ltd., Mumbai, M/s DCW Ltd., Mumbai and M/s Indian Rayon & Industries Ltd., Veraval, Gujarat	21.03.2007	Sunset review initiated <i>vide</i> notification No. 15/03/2007 of the DGAD, dated the March 9, 2007 with request for imposition of provisional anti-dumping duty pending review.  Custom notification no. 43/2007 dated March 21, 2007 extended the period for which duty was payable till and inclusive of March 26, 2008.
PRC	Saccharin	M/s A S Enterprises, M/s Swati Petrochemicals Pvt. Ltd., and M/s Shree Vardhyani Chemical Industry Co. Ltd. and their supporters representing the All India Saccharin Manufacturers Association, Mumbai.	19.03.2007	Customs notification no.41/2007 dated March 19, 2007 imposed final anti-dumping duty in accordance with the final findings dated January 3, 2007 of the DGAD.  None of the exporters were accorded market economy treatment mainly on account of the fact that there was product and selling control of saccharine in China.
PRC and Japan	Peroxosulphates also known as Persulphates	M/s Gujarat Persalts Pvt. Ltd. Ahmedabad, M/s Calibre Chemicals Pvt. Ltd. Mumbai and	19.03.2007	Customs notification no.40/2007 dated March 19, 2007 imposed provisional anti-dumping duty in accordance with the preliminary findings of the DGD dated February 23,

		M/s Yoyo Chemicals		<p>2007.</p> <p>Petition indicated USA as surrogate country and M/s FMC Corporation, USA provided information on cost and domestic sales. However the cost and prices differed considerably from the “constructed normal value” also submitted by the domestic industry.</p>
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