

# Luthra & Luthra

## TRADE AND COMPETITION LAW NEWSLETTER

From the Editor's Desk



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Dear Friends,

Here's wishing you all a very Happy Christmas and welcome to the holiday issue of the *Luthra & Luthra Trade and Competition Law Newsletter!*

These are very interesting times on the trade remedies front. The global economic downturn has also affected India which has seen a sharp rise in antidumping cases against a host of sectors ranging from chemicals to capital goods. Of significant interest are the latest initiations against Cold Rolled and Hot Rolled steel products which target a total of 18 countries between them and seek a retrospective application of duty! These actions are particularly important in light of the recent Government decision to put hot rolled steel on the restricted list of imports. Clearly the domestic industry is seeking protection through a variety of measures. The Indian actions are indicative of similar future developments expected worldwide.

On the competition law front, we have an article on the Combination Regulations explaining the types of transactions which would be affected by the new Competition Act.

As regards WTO disputes, zeroing features again, this time with the EC challenging both model as well as simple zeroing employed by the US DOC. The Panel ruled against zeroing, its reasoning also heavily relying on the jurisprudence developed by the AB on this issue. We also have a brief discussion on the India-US wines dispute, which is important even from the perspective of other imported products that may be subject to duties beyond the basic customs duty.

Our endeavor remains to bring you relevant developments and we hope you find this Newsletter useful and informative.

Your suggestions and feedback are always welcome!

**Rajiv K. Luthra**  
Managing Partner

## SOME IMPORTANT DEVELOPMENTS AFFECTING INTERNATIONAL TRADE

### **I. US GSP withdrawal for India's silver imports**

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India's silver jewelry export sector may be severely hit due to the US revoking the duty-free status for Indian silver jewelry imports under its Generalized System of Preferences scheme (GSP)

The US GSP programme was created in 1974 and provided products from developing countries like India duty free access to promote economic growth in those countries and improve bilateral trade with the US.

In order to obtain this benefit it is required that the articles should constitute a means of growth or chief production of that country. The only limitation under this system is the one pertaining to the Competitive Need Limitations test. This limitation states that once the beneficiary country's exports exceed the prescribed quantity and become competitive then the benefits under GSP would cease. Specifically if exports of a product from a country to the US enjoying the duty-free benefits, crosses the \$130 million mark or if it gains more than 50% of share in the total imports of that item by the US, then that item would be taken off the GSP beneficiary list. It is on this ground that US is considering the removal of Indian export of silver jewelry from the GSP scheme by revoking its duty free status. According to data, silver exports from India increased to \$49.4 million in the January-August 2007 period, an increase of 7.1% from the previous year.

Earlier Indian exports relating to gold and handloom were also removed from the purview of GSP. Subsequently, the relevant export promotion councils made an application asking for a waiver, which was also rejected. As far as silver jewelry exports are concerned the Indian government has agreed to take up the matter with the US administration in light of the increasing input costs and reducing demand. The government is said to bring to the notice of the US government the consequent decline in the industry and resulting job losses on imposition of the duty.

Other than silver other leading products exported by India under GSP programme were - wind powered electric generating sets (\$109 million), gold necklaces and neck chains (\$76 million), hand-hooked carpets and other textile floor coverings carpets (\$72 million), silver jewelry (\$49.4 million), auto and truck parts (\$47 million), and worked monumental or building stone (\$46 million).

### **II. Indian curbs on steel imports**

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Under Export and Import Policy 2004-09, laid down by the Directorate General of Foreign Trade (DGFT), certain goods are placed under restricted categories for import and export. Under section 3 and 5 of the Foreign Trade (Development and Regulation) Act, 1992, the Central Government can make provisions for prohibiting, restricting or otherwise regulating the import of export of the

goods. Some of the goods are absolutely prohibited for import and export whereas some goods can be imported or exported against a licence. Under this provision the Central Government has issued the Notification bearing no.63 and 64 (RE-2008) / 2004-2009 dated 21<sup>st</sup> and 24<sup>th</sup> November 2008 respectively by which Hot Rolled Coils under the export import code 7208 and Seamless tubes and pipes under the export import code 7304 are classified as “restricted”. By virtue of these

notifications, amendments have been made to Schedule – I (Imports) of the ITC (HS) Classifications of Export and Import Items, 2004-09. The effect of these notifications is that items which were previously freely traded will now be restricted and can be traded only with a license. This notification comes in light of the slow down experienced by domestic steel companies in the last few months and are also motivated by reports that China is likely to cut its export duty on steel items.

## COMPETITION LAW CORNER

### **I. Regulation of mergers & amalgamations under the Indian competition law- a glance**

#### **1. Regulation of M&As**

The Competition Act, 2002 (Competition Act) (on its being made effective) will regulate the following: (i) Anti-Competitive Agreements; (ii) Abuse of dominant position by an enterprise or group; and (iii) Regulation of combinations (which includes acquisition of shares, voting rights, assets or control, merger or amalgamations).

Generally, M&As are effective means of generating economies of scale and scope but occasionally mergers result in reduction of number of players in the industry especially when combining parties are engaged in the same business. Without merger review, collusive enterprises may adopt the merger route to engage in anti-competitive conduct. Since unscrambling the merged entity is extremely difficult, ex ante regulation is imperative. Further there is business sense in compulsory notification as certainty of outcome is achieved prior to implementing the transaction.

#### **2. Main provisions of the Act concerning M&As**

To begin with it should be noted that the regulation of M & As under the Act

can be bifurcated in two components, namely (i) Filing of a notice in the specified form disclosing details along with requisite fee, and (ii) examination of the notice by the CCI so as to conclude whether to (a) allow the combination; (b) allow the combination but with modifications; or (c) block the combination. In the event that the CCI forms an opinion that anti-competitive effects may result from the merger and if the parties to the combination address these concerns to the satisfaction of the CCI, the CCI may still approve the merger.

Interestingly, only those combinations where the total value of the assets or the turnover of the combining parties exceeds the thresholds prescribed are regulated by the Act.

The thresholds are provided in the table below:

<b>Operations</b>	<b>No Group</b>	<b>Group</b>
In India	Total value of assets > Rs.1000/- crores or turnover of Rs.3000/- crores.	Total value of assets of more than Rs.4000/- crores or turnover more than Rs.12000/- crores.
In India or Outside	Aggregate value of assets > \$500 mn (inclgd. at	Aggregate value of assets of more than \$2 bn

	least in India Rs.500 crores or turnover > \$1500 mn (inclgd. at least turnover of Rs.1500 crores in India).	(inclgd. at least assets of Rs.500 crores in India) or turnover of \$6 bn (inclgd. Rs.1500 crores turnover in India.
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The value of assets is determined by taking the book value of the assets in the audited books of account of the enterprise in the financial year immediately preceding the financial year in which the date of the proposed merger falls, as reduced by any depreciation. The value of assets also includes the brand value, value of any goodwill, or value of any copyright, patent, collective mark, homonymous geographical indication, design or layout-design or similar other commercial rights. Therefore, the value of assets will need to be recast only when these components have not been given effect in the audited accounts. Similarly, the value of the turnover includes the value of any sale of 'goods' or 'services'. Incidentally, the triggering threshold limits in India are higher than those prevalent in the US and are broadly comparable with that of UK.

i. Exceptions

Share subscriptions, financing facilities or acquisitions by a public financial institution, foreign institutional investor, bank or venture capital fund

made pursuant to any covenant of a loan agreement or investment agreement fall outside the combination provisions. However such investment institutions are legally obligated to notify any such acquisition within 7 days to the CCI.

ii. Time lines

It is obligatory on any person or enterprise that proposes to enter into a combination to give notice to the CCI, (in the form specified) along with the fee as determined by the regulations within 30 days of the:

- Board's approval in case of merger/amalgamation; or
- Execution of any agreement or other document for acquisition.

In case of acquisition, a duty to file the notice devolves on the acquirer while in case of mergers or amalgamations, parties have to file the notice jointly. Failure to file the notice with the CCI attracts penalty which can be upto 1% of the total turnover or assets, whichever is higher, of the combination.

iii. Combination to take effect

No combination can take effect until (i) it is approved by the CCI; or (ii) upon the expiry of a period of two hundred and ten days from the day on which a valid notice has been given to the CCI.

iv. Appreciable adverse effects on competition

The CCI will evaluate every combination to determine whether such combination has or is likely to cause 'appreciable adverse effects on competition' (AAEC) in the relevant

market in India. The CCI is required to give due regard to all or any of the factors, namely (a) level of competition through imports; (b) extent of barriers to entry; (c) level of combination; (d) countervailing power; (e) likelihood of increase in prices or profit margins; (f) effective competition post merger; (g) availability of substitutes; (h) market share individually and of a combination; (i) likelihood of removal of a effective competitor; (j) vertical integration; (k) a failing business case; (l) innovation; (m) contribution to the economic development; and (n) whether benefits outweigh the adverse impact.

### 3. Significant features of the proposed regulations governing combinations

The CCI has formulated a draft of the Competition Commission of India (Combinations) Regulations, and these carve out certain categories of transactions which are not likely to have AAEC and are thereby proposed to be exempted. In such cases enterprise are exempt from filing the combination notice with the CCI:

- an acquisition of shares or voting rights of not more than 15% of the acquired entity and not leading to the latter's control;
- additional acquisitions when the acquirer already holds more than 50% in the acquired entity;
- acquisitions while acting as underwriter;
- acquisitions pursuant to bonus/rights issue or sub division of shares;
- an acquisition entitling the acquirer in any financial year ending on 31st March to exercise less than 5% of voting rights and who along with

persons acting in concert has acquired 15% or more but less than 50% of shares or voting rights of the additional shares

- an acquisition of assets which do not relate to the business of the acquirer subject to fulfillment of certain conditions;
- an acquisition of current assets in the ordinary course of business;
- a combination where only one of the combining parties has assets/turnover of over Rs. 200/600 crores respectively in India
- acquisitions within the same group;
- acquisitions resulting from a gift, intestate etc; and
- any combination that is specifically exempt under any other statute of Parliament.

#### i. Procedural rules for filing

The Regulation provides an option to file the long form (Form 1) or the short form (Form 2).

The fee payable along with form is Rs 40 lakhs and the CCI is required to form a prima facie opinion within 30 /60 days of filing of long/short notice. The CCI, on request, may consider granting cover of confidentiality in respect of information furnished. Any person or member of the public can submit written objections to the proposed combination.

### 4. Recommendations

The threshold limits of total value of assets/turnover which trigger filing of notice were evolved in 2002 and a period of more than 6 years has since elapsed. Thus, there is justification to review these limits at least to offset the

inflation that has occurred all these years.

The Government should also delete Section 108A to 108H of the Companies Act, 1956 which provide that companies that are dominant (having over 25% market share in a particular product) need to take Central Government approval when acquiring a public company which would result in a greater 'dominance'. Continuation of these sections would amount to dual regulation on the same subject and by two different authorities.

There is need to exclude some components from 'turnover' such as subsidy, aid, taxes. Moreover, what would constitute turnover in different service sectors for the purposes of the Act needs elucidation. It needs to be clarified as to whether public sector undertaking will be treated on a standalone basis or as a 'group' when it intends to go ahead with acquisition of a private entity. An inconsequential technical lapse or deficiency in the notice ought not be construed to be an infirm notice.

Periodic review of procedures is a recommendatory practice and therefore may be advisable to incorporate regulation to this effect.

The level of information required to be given by the filer of notice of combination is burdensome and therefore needs to be rationalized.

## 5. Conclusion

The need of the hour is to prohibit M&As which are anti competitive and yet at the same time the CCI must be geared to swiftly approve M&As which

are beneficial and do not cause adverse effects. This requires a delicate balancing act. Getting the balance between prohibition and permission is important as an overly restrictive approach can prevent beneficial mergers from going ahead, promote existing inefficient market structures and result in limiting incentives for new investment. On the other hand an overly permissive approach to merger control can entrench monopoly elements. In order to achieve this fine balance the CCI must have good understanding of market forces, it should maintain transparency in its functioning and adopt a continuous consultative approach.

## II. Selection of CCI members

The Competition Act, 2002 was given presidential assent in January 2003, and the Competition Commission of India (the 'CCI'), was set up later that year. However, not soon after the Act was passed did it find itself being closely scrutinized by the Supreme Court of India in the case of *Brahm Dutta v. Union of India*<sup>1</sup>. The cause of concern was the Competition Commission of India (Selection of Chairperson and Other Members of the Commission) Rules 2003 (the 'Rules') notified by the Government in exercise of powers conferred under the then Section 9 of the Act.

The upshot of the controversy was that the current framework of the Act read with the Rules allowed the possibility that the Chairperson of the CCI, as well

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<sup>1</sup> AIR 2005 SC 730 : (2005) 2 SCC 431

as the selection committee constituted to select the Chairperson of the CCI, could be a non-judicial person. Mr. Dutt contended that as the CCI is a body exercising both regulatory and adjudicatory functions, (a) the Chairperson of the CCI should be retired Chief Justice or a judge of the High Court or Supreme Court, to be nominated by the Chief Justice of India (CJI); (b) that all the judicial members of the CCI should be appointed by the CJI; or that (c) the Chairperson and judicial members be appointed by a selection Committee that was presided over by the CJI.

During proceedings, the Central Government committed to making the necessary amendments to the Act. Very briefly, the amendments proposed to suitably modify the law and also create an appellate tribunal to hear appeals from the orders passed by the CCI and to exercise original jurisdiction in respect of applications for award of compensation. Recording its promise, the Court declined to pronounce a judgment on the constitutionality of the Rules at that stage. The writ petition was accordingly disposed of leaving all the questions raised open for discussion at the appropriate time.<sup>2</sup>

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<sup>2</sup> The Court did however part with the following comments: *"We may observe that if an expert body is to be created as submitted on behalf of the Union of India consistent with what is said to be the international practice, it might be appropriate for the respondents to consider the creation of two separate bodies, one with expertise that is advisory and regulatory and the other adjudicatory. This followed up by an appellate body as contemplated by the proposed amendment, can go a long way, in meeting the challenge sought to be raised in this Writ Petition based on the doctrine of separation of powers recognised by the Constitution. Any way, it is for those who*

The process of modernizing the Indian competition regime was initiated in 1999. The Act was passed on 2002. The Competition Amendment Act was finally passed by Parliament in September 2007. As promised, provisions relating to the setting up of the Competition Appellate Tribunal were introduced in the Act, and the qualifications and the period of professional experience for selection of Chairperson of the CCI, the Appellate Tribunal and the Selection Committees of the two were modified.

In February 2008 the Ministry of Corporate Affairs issued the Competition Commission of India (Term of the Selection Committee and the manner of selection of panel of names) Rules, 2008. The Selection Committee was set up in May headed by sitting Supreme Court judge, Justice Altamas Kabir.

The Committee submitted its shortlist of three recommendations for each position to the Ministry in September. The front runners for the position of Chairperson appear to be retired bureaucrat Ajay Dua, the former secretary at the Department of Industrial Policy and Promotion (DIPP), and Dhanendra Kumar, Executive Director for India at the World Bank.<sup>3</sup>

The Government is expected to finalize the Chairperson & the members of the

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*are concerned with the process of amendment to consider that aspect. It cannot be gainsaid that the Commission as now contemplated, has a number of adjudicatory functions as well."*

[Para 6]

<sup>3</sup>

<http://www.livemint.com/2008/09/26235007/T hree-in-the-running-for-CCI-t.html>

CCI within in the coming couple of weeks. In the meantime, the CCI has already put up a draft of several of its Regulations, namely regulations governing general procedure of inquiries, regulations incorporating procedure for conduct of 'meetings' besides those governing combinations, cases of predatory pricing, engagement of consultants, leniency programme to bust cartels etc. Soon after the CCI is fully constituted, it would re-evaluate these draft regulations and adopt them, with or without changes.

However, it will be a while yet before the Commission is able to get off the ground. Several additional staff including law officers and economists are yet to be appointed. According to a study conducted by the Indian Institute of Management, Bangalore, the CCI will require upto 240 professionals in its first year itself. Another stumbling block would be the appointment of the Chairperson & members of the Appellate Tribunal, without which the CCI cannot pursue its regulatory functions as appeals against an order or direction (including a decision to drop a matter complained or brought before it for inquiry) of the CCI lies to the Appellate Tribunal. The Appellate Tribunal after its constitution has to take first on board the task of formulating its own Regulations and the resultant effect is that the Tribunal is likely to take some more time after its establishment and constitution to commence operations.

The CCI may nevertheless, on full constitution and upon notifications of its Regulations, immediately take up references from the Central or State Governments on its existing/proposed policies, statues and byelaws, examine

them from the lens of competition law and render its opinion for consideration of the referrer Government. This will enable the CCI to contribute formally its wisdom at the soonest in mending public action which affects or is likely to affect competition.

## SIGNIFICANT WTO DISPUTES AND ANTIDUMPING ACTIONS AGAINST INDIA

### I. United States – Continued existence and application of zeroing methodology<sup>4</sup>

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#### Facts

This case was brought by the EC wherein it challenged the continued application by the US of anti-dumping duties resulting from the anti-dumping orders which were in place in 18 cases and also challenged the specific instances of application of “zeroing” in 4 anti-dumping investigations, 37 periodic reviews and 11 sunset reviews pertaining to the same 18 cases. The EC challenged model zeroing in investigations, simple zeroing in periodic reviews and US reliance on dumping margins from original or review investigations which were arrived at based on the zeroing methodology.

#### Procedural issues

##### I. Terms of Reference

At the outset the US challenged the EC request for Panel as being different from its consultation request. In the consultation request the EC had identified 38 measures whereas its Panel request included 52 measures. The Panel noted that difference in measures identified in the consultation and Panel request would not preclude a Panel from ruling on claims arising

from such measures if the two requests concerned the same matter or dispute. In this instance while the Panel request contained more measures, it noted that the measures identified the same products from the same countries using the same methodology for determining dumping and thus included the extra measures in its terms of reference.

##### II. Interim measures

Out of the 52 measures identified by the EC in its Panel request, 4 were interim/preliminary results of periodic and sunset reviews. The US contended that these 4 measures could not be within the Panel’s terms of reference as they did not fulfill the requirement of Article 17.4 of the WTO Antidumping Agreement. Article 17.4 states that a member can approach the Dispute Settlement Body (DSB) if consultations have failed and the importing country member has taken final action to levy definitive antidumping duties. However Article 17.4 provides that where a provisional measures has a significant impact and the affected member believes that the interim measure is against Article 7:1 (provisional measures), then in such cases too such member may approach the DSB. In this case, the Panel noted that while a preliminary measure would have an effect on the final duty the EC had not established that the preliminary measures were contrary to Article 7:1 and therefore excluded the same from its terms of reference.

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<sup>4</sup> WT/DS350/R

## Substantive issues

### I. Model Zeroing

The EC had challenged model zeroing used by the US DOC in calculating dumping margins as being violative of Article 2.4.2, 2.4 of the Antidumping Agreement and Articles VI:1 and VI:2 of GATT 1994. In model zeroing the dumping analysis is done model wise on a weighted average basis. However in aggregating all model wise calculations for a product-wise dumping margin, the US DOC does not take into account those transactions where the weighted average export price exceeds the weighted average normal value thus leading to a higher dumping margin. The EC contended that Article 2.4.2 stipulates that dumping margins are to 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 Panel agreed with the EC and held that in light of Article 2.4.2 an investigating authority could not exclude any export transaction made during the POI for the purposes of dumping margin calculations. In this regard the Panel also relied upon the ruling of the Appellate Body (AB) in the *US-Final Dumping Determination on Soft wood Lumber from Canada*<sup>5</sup> case wherein the AB had held model zeroing as being contrary to Article 2.4.2. The Panel however did not address the claims under the other Articles having found that model zeroing to be violative of Article 2.4.2.

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<sup>5</sup> WT/DS264/AB/R

### II. Simple Zeroing in periodic reviews

Simple zeroing involves comparing a weighted average normal value with individual export transactions. The US DOC however disregards those comparisons wherein the export price exceeds the weighted average normal value. The EC contended that this practice was violative of Articles 2.1, 2.4.2, 2.4, 9.3 and 11.2 of the Antidumping Agreement and Articles VI:1 and VI:2 of GATT 1994. In this regard the Panel noted that there had been several Panel decisions that had upheld the validity of simple zeroing in periodic reviews but all these Panel findings had been overturned by the AB.

The Panel observed that while security and predictability of the dispute settlement system could be facilitated by Panels following case law developed by the AB in similar legal scenarios as this further created legitimate expectation among WTO members, they nonetheless also had to fulfill their obligation to make an objective assessment of the facts at hand and provide cogent reasons for decisions they reached. Thus a Panel could not simply follow the reasoning of an adopted report of another Panel or the AB without careful consideration of the facts but at the same time it could not make a finding different from an adopted Panel or AB report which was on similar facts and circumstances without careful consideration of why a different result was warranted.

In light of the same and with a view to provide 'prompt resolution' of the dispute, the Panel followed the AB's findings on this issue and found simple

zeroing to be inconsistent with Article VI:2 of GATT and Article 9.3 of the Antidumping Agreement. The Panel did not make findings on claims made under other Articles.

### III. Simple zeroing in Sunset Reviews

With respect to sunset reviews, the EC argued that sunset review determinations that relied on dumping margins from previous investigation that used zeroing violated Article 11.1 and 11.3 of the Antidumping Agreement. The Panel observed that while Article 11.3 does not explicitly prohibit reliance on previous margins, the AB had addressed the issue and had found that reliance on previous margins that used zeroing was inconsistent with Article 11.3. The Panel also observed that since it had found model zeroing and simple zeroing to be inconsistent with GATT and the Antidumping Agreement, if the US DOC relied on the same prior margins in sunset reviews, such determinations would also be WTO inconsistent.

## **II. India - Additional and Extra-Additional Duties on Imports from the United States<sup>6</sup>**

### **Facts**

The dispute was centered around India levying additional duty (“AD”) on the import of alcoholic liquor and such additional duties (“SUAD”) on the import of certain alcoholic, industrial and agricultural products. Both the AD and the SUAD are levied on imports to

<sup>6</sup> WT/DS360/AB/R

counter balance the effects of internal taxes on like domestic products. Thus the AD was imposed to counter balance state excise duty while the SUAD was imposed to counter balance state sales tax, value added tax and other local charges. AD was levied as per the provisions of Section 3(1) of the Customs Tariff Act which empowers the government to specify the rate of AD which is equal to the excise duty levied on alcoholic liquor produced in different Indian states. India, however upon the Panel’s establishment exempted goods subject to AD from such duties. Similar to the AD, the SUAD was imposed under section 3(5) of the Customs Tariff Act. Both duties were imposed at the time of importation and were in addition to the basic customs duty (“BCD”).

The United States raised the following contentions:

- Levy of the AD on alcoholic products was inconsistent with Articles II:1(b)7 and (a) of the GATT 1994.
- Levy of the SUAD on alcoholic, industrial and agricultural products among other products was

<sup>7</sup> Article II:1(b) provides as follows:

*The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.*

inconsistent with Articles II:1(b) and (a) of the GATT 1994.

India's primary defense was that both the AD and SUAD are duties levied in lieu of internal taxes – the AD is levied in lieu of excise duties and the SUAD is imposed to counterbalance sales tax, VAT and other local taxes or charges. Hence, these duties being distinct from the BCD they have been levied in accordance with the provisions of Article II:2(a)<sup>8</sup> of the GATT 1994.

### **Substantive Issues**

#### **1. Interpretation of Article II: 1 (b) GATT**

The Panel had held against the US stating that it had failed to establish that the AD and SUAD were inconsistent with GATT Articles II:1(a) and II:1(b). In determining whether the duties were against Article II:1 (b), the Panel sought to make a distinction between the duties enumerated in Article II:1(b) and II:2 stating that the first line of Article II:1(b) covers only duties and charges that “inherently discriminate against imports” as

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<sup>8</sup> Article II:2 provides as follows:  
*Nothing in this Article shall prevent any Member from imposing at any time on the importation of any product:*

- (a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part*
- (b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;*
- (c) fees or other charges commensurate with the cost of services rendered.*

opposed to charges under Article II which did not “inherently discriminate against, or disadvantage, imports”.

At the outset the AB clarified the relationship between Article II:1(b) and Article II:2. It noted that Article II:2 began with the words “Nothing in this Article shall prevent...” and it therefore followed that by virtue of the wording in Article II:2, nothing in Article II, including Article II:1(b) would prevent a Member from imposing on the importation of a product a charge which was in accordance with Article II:2. The chapeau of Article II:2, therefore, connects Articles II:1(b) and II:2(a) and this indicated that the two provisions were inter-related and had to be interpreted together.

The AB ruled against the Panel on the issue that Article II:1(b) are ‘inherently discriminatory’ and noted that there are other legitimate rationale for countries imposing charges of the nature in Article II:1 (b) like raising revenue. The AB further noted that it is not always the case that the charges under Articles II:2 (b) (i.e. antidumping and countervailing duties) and (c) (other fees and charges) do not always inherently discriminate against imports since for both these articles there is normally no domestic charge that would serve as the counterpart to which such duties would correspond.

Hence, what was required to be proven was whether the AD and the SUAD are inconsistent with Article II: 2 (a)

#### **2. Interpretation of Article II: 2 (a)**

As stated above Article II:2 (a) permits a WTO member to impose a charge which is equivalent to an internal tax

imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product.

The Panel had held that the term “equivalent” in Article II: 2 (a) connotes only qualitative equivalence and not quantitative equivalence. The Panel had held that the term “equivalent” must be read separately from the term “consistency with Article III:2” as mentioned in Article II: 2 (a) because the term “equivalent” refers to the border charge, and the phrase “imposed consistently with the provisions of paragraph 2 of Article III” refers to the internal tax.

The Panel had further held that a border charge that is equivalent to an internal tax, but imposed inconsistently with Article III:2, would nonetheless be justified under Article II:2(a), and that the element of “consistency with Article III:2” is therefore “not a necessary condition” for the application of Article II:2(a). Thus a separate claim would have to be made under Article III:2 if a violation was being alleged.

The AB rejected the Panel’s reasoning and held that the term equivalent must be construed quantitatively in addition to be construed qualitatively to give a fair interpretation to the term and the term “equivalent” includes elements of ‘amount’ in addition to ‘effect’. For, in the absence of a quantitative assessment a country could impose a border charge that was significantly greater in amount than the internal tax but it would, under the Panel’s interpretation nonetheless be deemed “equivalent” to the internal tax if the two taxes were functionally equivalent.

The AB rejected the Panel’s reasoning that a separate claim is required under Article III: 2 and held that a claim under Article II:2 (a) may be inconsistent with Article III: 2. The AB held that since quantity is an essential part of determining equivalent under Article II: 2 (a), Article III: 2 must also be satisfied to justify charges under Article II: 2 (a).

Hence, under Article II: 2 (a) the qualitative as well as the quantitative test would have to be satisfied for such charges to be valid.

### 3. Conformity of AD and SUAD with Article II:2(a) and Article II: 1 (b)

The AB held that India’s only contention was that the AD on alcoholic liquor and the SUAD are duties levied in lieu of internal taxes – the AD on alcoholic liquor is levied in lieu of excise duties and the SUAD is imposed to counterbalance sales tax, VAT and other local taxes or charges. Hence, the AB held that there were primarily two issues for consideration in this appeal i.e. to examine the relationship (i) between the AD and the excise duties, and (ii) between the SUAD and state sales taxes, value-added taxes, and other local taxes or charges.

The AB had already held that the term equivalent includes a quantitative analysis as well. In light of that, the AD had to be quantitatively equivalent to the excise duties in addition to fulfilling qualitative equivalence. The AB observed that levy of excise duties differed from state to state which made excise duties variable. India explained that rates of AD were the result of averaging which ensured that the rate

was a reasonable representation of the net fiscal burden imposed on like domestic products on account of excise. India also admitted that in some States the AD could marginally be higher than the excise imposed on alcoholic beverages in that State. There was however no information before the Panel on duties and amounts actually levied. Thus the AB held that in so far as Article II: 2 (a) was not satisfied resulting in the imposition of charges on imports of alcoholic beverages in excess of the excise duties applied on like domestic products, it would render the AD inconsistent with Article II:1(b) to the extent that it results in the imposition of duties on alcoholic beverages in excess of those set forth in India's Schedule of Concessions.

With regard to the SUAD, the facts showed that imported products which were subject to SUAD when re-sold in India were again subject to state sales taxes, value-added taxes, and other local taxes and the SUAD was not creditable in respect of these local levies for the re-sale transaction. Further, there was variance in the rates of these local taxes which could mean that the SUAD was in excess of the local taxes. Based on this, the AB held that to the extent that SUAD on imports were in excess of the various local levies, the SUAD would be inconsistent with Article II: 2 (a) and would render the Duty inconsistent with Article II:1(b) to the extent that it results in the imposition of duties on alcoholic beverages in excess of those set forth in India's Schedule of Concessions.

### III. AD action against India in the US

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On December 12, the US International Trade Commission (ITC) determined that there was reasonable indication that a US industry was materially injured by reason of imports of commodity matchbooks from India that were allegedly subsidized and sold in the United States at less than fair value.

The Department of Commerce (DOC) had earlier announced its decision to initiate antidumping and countervailing duty investigations on imports of commodity matchbooks from India.

The petition was filed by D. D. Bean & Sons Co. (NH). Commodity matchbooks are currently classifiable under the subheadings 3605.00.0060 and 3605.00.0030 of the Harmonized Tariff Schedule of the United States.

The U.S. International Trade Commission (ITC) was scheduled to make its preliminary injury determination around December 13. In light of the ITC's affirmative determinations, the US DOC will continue to conduct its countervailing and antidumping duty investigations of imports of these products from India, with its preliminary countervailing duty determination due on or about January 22, 2009, and its preliminary antidumping duty determination due on or about April 7, 2009.

## ANTIDUMPING INVESTIGATIONS AGAINST IMPORTS INTO INDIA

The following table provides an overview of recent antidumping actions<sup>9</sup> against imports into India, before the Directorate General for Antidumping and Allied Duties (DGAD).

COUNTRIES	PRODUCT	DOMESTIC INDUSTRY	RELEVANT DATE	COMMENTS
China PR	Front Axle Beam and Steering Knuckle meant for heavy and medium commercial vehicles	M/s Bharat Forge Ltd	8th December 2008	<b>Initiation</b> Initiation vide DGAD Notification No.14/19/2008 dated 8th December 2008.
China PR, Indonesia, Iran, Japan, Kazakhstan, Malaysia, Philippines, Romania, Russia, South Africa, Saudi Arabia, Korea, Thailand, Turkey and Ukraine	Hot Rolled Steel Products	M/s Essar Steels Limited, Ispat Industries Limited, and JSW Steel Limited	28th November 2008	<b>Initiation</b> Initiation vide DGAD Notification No.14/23/2008 dated 28th November 2008
China PR, Japan, Korea, European Union, South Africa, Taiwan, Thailand and USA	Cold-Rolled Flat Products of Stainless Steel	M/s. Jindal Stainless Ltd	25th November, 2008	<b>Initiation</b> Initiation vide DGAD Notification No.14/6/2008 dated 25 <sup>th</sup> November 2008
China PR, Sri Lanka and	Compact Fluorescent	M/s Indo Asian Fusegear Ltd.,	21 <sup>st</sup> November,	<b>Preliminary Duty Preliminary Findings</b>

<sup>9</sup> This information is provided as of December 8, 2008.

Vietnam	Lamps (CFL)	M/s Havell's India Ltd. and M/s Osram India Pvt. Ltd	2008	vide DGAD Notification 14/1/2007 dated 12 <sup>th</sup> March 2008. Duty imposed by Customs vide Notification No. 126 /2008.
China PR	Melamine	M/s Gujarat State Fertilizers & Chemicals Ltd	21 <sup>st</sup> November 2008	<b>Sunset Review</b> Initiation of Sunset Review vide DGAD Notification No. 15/29/2008 dated 21 <sup>st</sup> November 2008.
China PR and Korea	Caustic Soda	Alkali Manufacturers Association of India	21 <sup>st</sup> November 2008	<b>Sunset Review</b> Final Findings of the Sunset Review vide DGAD Notification No. 15/11/2007 dated 21 <sup>st</sup> November 2008.
USA, Thailand and Korea	Acrylic Fibre.	M/s. Indian Acrylic Ltd. and M/s. Vardhman Acrylics Ltd.	20 <sup>th</sup> November, 2008	<b>Sunset review</b> Final Findings of the Sunset Review vide DGAD Notification No. 10/7/2006 dated 3 <sup>rd</sup> October 2008. Duty imposed by Customs vide Notification No. 123/2008 dated 20 <sup>th</sup> November 2008 on goods imported from Republic of Korea and Thailand only.
China PR	Sodium Nitrite	M/s Deepak Nitrite Ltd	17 <sup>th</sup> November 2008	<b>Initiation Mid term</b> Initiation of Mid term review vide DGAD Notification No. 15/24/2008.
Korea	Phosphoric Acid (excluding agriculture	M/s Gujarat Alkalies & Chemicals Ltd and Solaris	12 <sup>th</sup> November 2008	<b>Initiation</b> Initiation vide DGAD Notification No.14/7/2007 dated 12 <sup>th</sup>

	& fertilizer grade)	Chemtech ltd		November 2008.
China PR and Singapore	D (-) Para Hydroxy Phenyl Glycine Methyl Potassium Dane Salt	M/s DCM Shriram Industries Ltd. (Unit: Daurala Organics Ltd.)	5 <sup>th</sup> November, 2008	<b>Sunset review</b> Final Findings of the Sunset Review vide DGAD Notification No.14/23/2002 dated 5 <sup>th</sup> November 2008.
China PR	Penicillin-G	M/s Alembic Ltd	3 <sup>rd</sup> November, 2008	<b>Initiation</b> Initiation vide DGAD Notification No.14/10/2008 dated 3 <sup>rd</sup> November, 2008.
Singapore, South Africa and the European Union	Phenol	M/s. Hindustan Organic Chemicals Limited and SI Group India Limited	31 <sup>st</sup> October, 2008	<b>Sunset Review</b> Final Findings of the Sunset Review vide DGAD Notification No. 15/9/2007 dated 4 <sup>th</sup> August 2008. Duty imposed by Customs vide Notification 114 /2008 dated 31 <sup>st</sup> October 2008.
China PR and Taiwan	Cable ties	M/s. Surelock Plastics Pvt. Ltd.	31 <sup>st</sup> October, 2008	<b>Preliminary Duty</b> Preliminary Findings vide DGAD Notification No.14/10/2007 dated 23 <sup>rd</sup> September 2008. Duty imposed by Customs vide Notification No.118 /2008 dated 31 <sup>st</sup> October 2008
Korea	Fully drawn yarn or fully printed yarn or fully oriented yarn or spin drawn yarn or flat yarn of polyester	M/s Central India Polyesters Ltd., M/s Century Enka Ltd., M/s Garden Silk Mills Ltd., M/s Nova Petrochemicals	22 <sup>nd</sup> October, 2008	<b>Imposition of penalty for breach of price undertaking</b> Vide DGAD Notification No.14/3/2005 dated 8 <sup>th</sup> September, 2008 the Designated Authority had come to the conclusion that M/s H.K.

	and other yarns falling under Chapter 52 of the Customs Tariff Act	Ltd., M/s Recron Synthetics Ltd. and M/s Welspun Syntex Ltd.		Corporation had violated the voluntary price undertaking and had decided to it as a non-cooperating exporter and recommended imposition of definitive final anti-dumping duty at a rate equal to US\$ 588/MT. Customs Notification No. 111/2008 dated 22nd October, 2008 imposing the duty.
China PR and Thailand	Bus and Truck Radial	Automotive Tyre Manufacturers' Association	21 <sup>st</sup> October	<b>Initiation</b> Initiation vide DGAD Notification No.14/172008 dated 21 <sup>st</sup> October 2008.
China PR	Vitamin-C	Suo Moto initiation of the Sunset Review by Designated Authority.	21 <sup>st</sup> October, 2008	<b>Sunset review</b> Initiation of Sunset Review vide DGAD Notification No. 15/16/2008 dated 23 <sup>rd</sup> May 2008. Customs Notification No. 109/ 2008 dated 21st October 2008 extending the anti-dumping duty for a period of one year from the date of its expiry.
China PR	Ceramic Tiles	M/s H & R Johnson (India) Ltd. & M/s Kajaria Ceramics Ltd	17 <sup>th</sup> October, 2008	<b>Initiation</b> Initiated vide DGAD Notification No.14/16/2008 dated 17 <sup>th</sup> October 2008.
China PR	Chloroquine phosphate	M/s Ipca Laboratories Ltd.	16 <sup>th</sup> October, 2008	<b>Sunset Review</b> Initiation Of Sunset Review vide DGAD Notification No. 15/22/2008 dated 3rd September, 2008. Customs Notification No.

				108/ 2008 dated 16th October, 2008 extending the antidumping duty for a period of one year from date of initiation of the review.
China PR	Tyre Curing Presses	M/s Larsen & Toubro Ltd	16 <sup>th</sup> October, 2008	<b>Initiation</b> Initiation vide DGAD Notification No.14/22/2007 dated the 16 <sup>th</sup> October 2008.
Germany and Korea	Acrylonitrile Butadiene Rubber	M/s. Gujarat Apar Polymers Limited	4 <sup>th</sup> October, 2008	<b>Second Sunset Review</b> Final Findings of the Second Sunset Review vide DGAD Notification No. 15/6/2007 dated 4 <sup>th</sup> October 2008.
China PR & Hong Kong	Flax Fabrics	M/s Jaya Shree Textiles (a unit of Aditya Birla Nuov Ltd.)	3 <sup>rd</sup> October, 2008	<b>Initiation</b> Initiation vide DGAD Notification No.14/8/2008 dated 3 <sup>rd</sup> October 2008.
China and Korea	Rubber Chemicals viz. MBT, CBS, TDQ, PVI, and TMT from China PR and PX-13(6PPD) from China PR and Republic of Korea	NOCIL	1 <sup>st</sup> October, 2008	<b>Final Findings</b> Final Findings vide DGAD Notification No.14/5/2007 dated 1 <sup>st</sup> October 2008.
Belarus	Nylon Tyre Cord Fabrics	Association of Synthetic Fiber Industry on behalf of M/s Century Enka and M/s SRF Ltd	30 <sup>th</sup> September, 2008	<b>Initiation</b> Initiation DGAD Notification No.14/9/2008 dated 30 <sup>th</sup> September, 2008.

China PR	Sulphur Black	Sulphur Black Manufacturers' Association	24 <sup>th</sup> September, 2008	<b>Final Findings</b> Final Findings vide DGAD Notification No. 14/16/2006, dated 24 <sup>th</sup> September 2008.
China PR, Taiwan and Indonesia	Maleic Anhydride	M/s Thirumalai Chemicals Ltd., Ranipet, Tamil Nadu	18 <sup>th</sup> September, 2008	<b>Final Findings</b> Final Findings of the DGAD vide Notification No. 14/3/2007 dated 22nd August, 2008. Duty imposed vide Customs Notification 105/2008 dated 18th September, 2008.
China PR	Nylon Tyre Cord Fabric (NTCF)	Association of Synthetic Fibre Industries(ASFI)	16 <sup>th</sup> September, 2008	<b>Sunset Review</b> Initiation vide DGAD Notification No. 14/20/2008 dated 16 <sup>th</sup> September 2008.
Indonesia	Cathode Ray Colour Television Picture Tubes	M/s Samtel Colour Limited	15 <sup>th</sup> September, 2008	<b>Initiation</b> Initiation vide DGAD Notification No.14/15/2008 dated 15 <sup>th</sup> September 2008.

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