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## Contents

### Article

Reference-price based anti-dumping  
duty: The Indian perspective ..... 2

### Trade Remedy News

Trade remedy measures by India ..... 7

Trade remedy measures against India 8

WTO News ..... 9

### India Customs & Trade Policy

Update..... 9

Ratio Decidendi..... 11

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## Article

### Reference-price based anti-dumping duty: The Indian perspective

By **Baratwaj Viswanathan**

#### Introduction

Anti-dumping investigations are conducted to determine the existence of dumping which causes injury to the domestic industry in the investigating country. In simple language, dumping is the act of exporting the product at a price lower than the price at which the said product is sold in the domestic market of the exporting country, thus causing injury to domestic producers in the importing country. Once dumping, injury and relationship between the two is established by the investigating authority, the result is the determination of Anti-Dumping Duty ('ADD') to offset the impact of the said dumping.

Countries adopt different forms for levying ADD. The most common form of ADD is fixed duty, wherein duty is levied at a fixed rate per unit of import of the investigated article or an *ad-valorem* duty wherein the duty is levied as a percentage of the import price of the said article. There is yet another form of ADD which is reference-price based duty. This form of ADD is occasionally adopted in India when the situation warrants. In this article, the author first explains the basic working of a reference-price based duty in the Indian context by way of an example, thereafter the article focuses on various situations wherein this form of ADD is most desirable. The article concludes with reference to other jurisdictions wherein this form of ADD is levied, *albeit* with different names or methods of application.

#### Understanding the working of reference-price form of ADD in India

As the name suggests, under the reference-price form of duty, a benchmark price is fixed by the investigating authority and ADD is collected with reference to this benchmark price. The benchmark price is generally arrived based on the extent of dumping and injury determined during the investigation. If the landed value of imported goods (CIF price *plus* non-creditable custom duties) in India is lower than the benchmark price, ADD is imposed as the difference between the said landed value and the benchmark price. If on the other hand, the landed value is higher than the benchmark price, no ADD is levied. The following illustration will help in appreciating the reference-price form of duty and its difference in comparison with fixed duty and *ad-valorem* duty.

Product 'A' is being exported from USA to India, say, at CIF price of INR 65 per unit. The said product is being sold at INR 100 per unit in the domestic market of USA while the price at which the Indian domestic producer may reasonably be expected to sell the product (also known as non-injurious price) is say INR 90 per unit. ADD based on fixed rate, *ad-valorem* and benchmark price is tabulated as under:

Particulars	Amount	Remarks
CIF price of imported product	INR 65 per unit	CIF price of product during the investigation period

Particulars	Amount	Remarks
Landed value of imported product (LV)	INR 70 per unit	CIF price plus BCD and applicable social welfare surcharge
Non-Injurious Price (NIP)	INR 90 per unit	Fair selling price in Indian market (generally, the cost of production of domestic producer plus 22% Return of Capital Employed)
Injury margin	INR 20 per unit	NIP minus LV (i.e., 90 minus 70)
Normal Value (NV)	INR 100 per unit	Domestic selling price in USA at ex-factory level
Export price (EP)	INR 60 per unit	Export price from USA to India at ex-factory level
Dumping margin	INR 40 per unit	NV minus EP (i.e., 100 minus 60)
<b>Fixed price-based duty (based on per unit irrespective of present CIF price)</b>		
ADD payable per unit	INR 20 per unit	Lower of the dumping and injury margin per unit calculated above i.e., lower of 20 and 40
<b>Ad-valorem duty (as % of CIF price)</b>		
ADD payable as %	30.77%	Lower of the dumping and injury margin per unit divided by the CIF price prevailing during investigation period i.e. $(20 / 65) * 100$
<b>Reference-price based duty</b>		
Benchmark price	INR 90 per unit	Lower of the dumping and injury margin per

Particulars	Amount	Remarks
		unit plus the LV i.e., 20+70

Now let us assume three scenarios wherein importers 'X', 'Y' and 'Z' import the product at CIF price of INR 50 per unit, INR 90 per unit and INR 120 per unit, respectively. The ADD payable by importer X, Y, and Z under fixed and *ad-valorem* methods is as under:

Duty payable in three scenarios			
Scenario s	Importer X	Importer Y	Importer Z
	CIF price of INR 50 per unit	CIF price of INR 90 per unit	CIF price of INR 120 per unit
ADD payable under fixed form (INR per unit)	20	20	20
ADD payable under <i>Ad-valorem</i> form (INR per unit)	15.39 (i.e., $50 * 30.77\%$ )	27.70 (i.e., $90 * 30.77\%$ )	36.92 (i.e., $120 * 30.77\%$ )

From the above, it is clear that ADD is leviable in all cases regardless of the export price under both fixed duty and *ad-valorem* duty methods. It is important to notice that even if importers Y and Z have imported the product at high CIF prices which may not cause any injury to the domestic producers in India, they still must pay the ADD. Further, the *ad-valorem* duty increases with the increase in CIF price.

Now let's see how the reference-price duty works in the above three scenarios:

Duty payable in three scenarios under reference-price based method			
Scenarios	Importer X	Importer Y	Importer Z
	If the CIF price is INR 50 per unit	If the CIF price is INR 90 per unit	If the CIF price is INR 120 per unit
Landed value in INR per unit [CIF price plus BCD and surcharge (assumed as INR 5 per unit in all three cases for simplicity)]	55	95	125
Benchmark price (INR per unit)	90	90	90
ADD payable	35 (i.e., 90 minus 55)	0 (i.e., 90 minus 95)	0 (i.e., 90 minus 125)

Therefore, under the reference-price form of duty, ADD is leviable only if the landed price is lower than the benchmark price. In other words, the ADD becomes Nil as soon as an importer imports at price which is sufficiently high to not be a matter of concern to the domestic producer in India and which may be an un-dumped or non-injurious price.

Having understood the mechanism of the reference-price form of duty, it is relevant to hypothesize the situations under which the

reference-price of duty is suitable to appreciate the utility of the reference-price form of duty.

### **Situations under which reference-price form of duty may be suitable**

#### **a. Protecting interest of downstream user industries dependent on imports**

This form of duty is suitable to protect the interest of downstream industries which are dependent on the imports of the product investigated, from price increase beyond a certain level. Imposing ADD based on reference ensures that duty collected is not beyond the benchmark price, thus capping the price increase.

#### **b. Discouraging further decrease in export price and tendencies to undervalue the imports**

As discussed earlier, in case of *ad-valorem* form of duty, ADD is collected as a percentage of the CIF price. Thus, if the CIF price reduces, the duty also reduces. Similarly, under fixed duty, the ADD remains the same regardless of the extent of price decrease. In cases where exporters have room to further decrease their export prices, reference-price form of duty would discourage such price decrease since the difference between the landed value and benchmark price will have to be paid as ADD to the Government.

#### **c. Differentiating a high-priced from low-priced product type**

Where the scope of the investigated product includes both high-priced and low-priced products, imposing duty based on fixed or *ad-valorem* methods may not be able to differentiate the product types, especially when volume of import tilts to higher priced products after the

investigation period. In such a scenario, duty may be based on reference-price for the high-priced product and *ad-valorem* for the low-priced product. The European Commission, in one of the investigations<sup>1</sup> had recommended duty based on the said approach.

#### **d. Price stability**

The reference-price form of duty is also useful in situations where price stability in the industry is required. By adopting reference-price form of duty, the effective price including the ADD would be more or less stable.

### ***Situations under which reference-price form of duty may not be suitable***

There may be some situations where the reference-price form of duty may not more suitable as compared to traditional forms of fixed and *ad-valorem* duties:

#### **a. Where the raw materials used in the manufacture of the product investigated are subject to wide price fluctuations**

Where the price of raw materials is subject to price fluctuations, the cost of production and the price of the product investigated may witness significant changes post the investigation period making the benchmark price fixed during investigation as irrelevant. If the price of the raw material increases, the reference-price form of duty may result in diluting the protection to the domestic industry. On the other hand, if the price of the raw material decreases, reference-price form of duty will grant undue and additional protection to the domestic industry at the cost of user

industries who import the product for their downstream manufacturing needs.

#### **b. Possibility of misuse**

Under reference-price, since no ADD is leviable when the landed values are higher than the reference-price, exporters may tend to structure their exports of the product at a high price to the related parties in India to avoid ADD. Subsequently the related entities may tend to sell the product at a low price to the actual users in India thereby making the protection of ADD redundant for the domestic industry.

#### **c. Where the product investigated consists of multiple varieties of product with different prices**

The reference-price form of duty may not be suitable where the product investigated consists of several grades and the price difference between each grade is significant. In such a scenario, determining one single reference-price for all grades may not reflect the correct picture. In such situations, multiple reference prices will have to be devised which may make the task of investigating authority complicated.

Therefore, while determining the form of duty to be levied, it is necessary, for the investigating authority to consider the underlying situation and, for the interested parties (domestic industry, foreign exporters, and importers) to bring to the attention of investigating authority all relevant facts for deciding the form of duty.

### ***How reference-price form of duty is applied in other jurisdictions***

Having understood the working and utility of reference-price form of duty, it may be relevant for readers to know how this duty is adopted in

<sup>1</sup> Anti-Dumping investigation on imports of certain ring binder mechanisms from Malaysia and China PR (Council Regulation (EC) No 119/97 of 20 January 1997)



different countries and its difference in application methods as compared to India.

In the European Union ('EU'), the reference-price form of duty is known as Minimum Import Price ('MIP'). Like the reference-price, the European Commission determines the MIP of investigated product. ADD is leviable when the export price is lower than the MIP. MIP as a form of duty is usually adopted in the EU in the following situations:

- Where a particular product type has a high export price (resulting in no dumping for that product type) *vis-a-vis* some others which have lower export price (resulting in dumping for such product types). In such situation, MIP is adopted to differentiate such product types under investigation.
- Where the domestic producers in the EU have dominating market power or high market share, the market price may be higher which would be unfavorable to the user industry. In such cases, MIP is adopted to ensure that import prices do not exceed a certain level in order to protect the user industry's interest in the EU market

EU also has the practice of imposing a combination duty i.e., MIP for certain product type and *ad-valorem* for other product types<sup>2</sup> or MIP for certain categories of exporters and fixed duty for other categories of exporters<sup>3</sup>. Further, to address the issue of subsequent price volatility, the European Commission also sometimes recommends adjustments to MIP to take into

account the price fluctuations post the investigation period<sup>4</sup>.

In Australia, similar to the mechanism of reference-price, the 'floor price' duty is levied whereby a floor price is fixed and exports made lower than the floor price is subjected to ADD. The mechanism is similar to the reference-price method. Like the EU, Australia also levies mixed duty whereby reference-price may be determined for certain types of products while fixed / *ad-valorem* duty is levied on other types of goods in the same investigation.

In Canada, the Canada Border Services Agency undertakes periodical reviews of the reference price to ensure that the price determined is not outdated.

In USA, the reference-price form of duty is generally not recommended. However, like other jurisdictions, the US may suspend the imposition of anti-dumping duties against exporters who provide price undertakings to the investigating authorities.

### Conclusion

Reference-price as a form of duty has been used across various jurisdictions. Recently, the Directorate General of Trade Remedies ('DGTR') in India has recommended imposition of ADD based on reference-price in two investigations<sup>5</sup>. As discussed above, while the reference-price form of duty is useful in certain situations, it suffers from the shortcoming of becoming outdated due to price fluctuations. To address this limitation, duties are sometimes levied for a

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<sup>2</sup> Anti-Dumping investigation on imports of certain ring binder mechanisms from Malaysia and China PR (Council Regulation (EC) No 119/97 of 20 January 1997)

<sup>3</sup> Anti-Dumping investigation on imports of melamine from China PR (COUNCIL IMPLEMENTING REGULATION (EU) No 457/2011 of 10 May 2011)

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<sup>4</sup> In September 2017, the European Union had decided to lower the MIP for China-made crystalline silicon photovoltaic products on a quarterly basis to keep up with the global average. The MIP was determined by international prices indicated in the Bloomberg database (BNEF spot price index).

<sup>5</sup> Final Findings dated 2 August 2022 in the Anti-Dumping Investigation on imports of ATS-8 from China PR; Preliminary Findings dated 4 July 2022 in the Anti-Dumping Investigation on imports of UDCA from China PR and Korea RP

short period of time, say 1.5 to 2 years, so that the reference-price may be reviewed at periodical intervals. Recently, the DGTR recommended duty based on reference-price for a period of 2 years in the investigation on ATS-8 (a pharmaceutical drug intermediate) so that the duty levied can be reviewed after 2 years. Possibly, the Indian authority in future may also adopt the EU's practice of linking the reference-

price / benchmark prices to certain indices which would take into account the subsequent price fluctuations. This would ensure that the benefits of reference-price system are fully derived while overcoming the shortcomings.

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## Trade Remedy News

### Trade Remedy actions by India

Product	Country	Notification No.	Date of notification	Remarks
ATS-8	China PR	F. No. 6/11/2021-DGTR	1 August 2022	Anti-dumping Duty recommended to be imposed
Ofloxacin and its intermediates	China PR	F. No. 6/12/2021-DGTR	16 August 2022	Anti-dumping Duty recommended to be imposed
Opal Glassware	China PR and UAE	24/2022-Cus. (ADD)	3 August 2022	Anti-dumping duty continued after sunset review
Resin Bonded Thin Wheels	China PR	F. No. 6/09/2021-DGTR	5 August 2022	Anti-dumping Duty recommended to be imposed
Textured Tempered Glass whether Coated or Uncoated	China PR	F. No. 190354/179/2022-TRU	17 August 2022	Central Government decides not to impose anti-dumping duty as recommended
Ursodeoxycholic Acid (UDCA)	China PR and Korea RP	25/2022-Cus. (ADD)	18 August 2022	Provisional anti-dumping duty imposed

## Trade remedy actions against India

Product	Investigating Country	Document No.	Date of Document	Remarks
Barium Chloride	USA	87 FR 50602	17 August 2022	Preliminary negative determination of sales at less than fair value
Cold-Rolled Steel Flat Products	USA	87 FR 52360	25 August 2022	Anti-dumping and countervailing duty orders continued after sunset review
Corrosion-Resistant Steel Products	USA	87 FR 50601	17 August 2022	Anti-dumping and countervailing duty orders continued after sunset review
Polyethylene Terephthalate Film, Sheet, and Strip	USA	87 FR 48453	9 August 2022	CVD – Preliminary determination of provision of countervailable subsidies to SRF Limited
Sodium Nitrite	USA	87 FR 50604	17 August 2022	Preliminary affirmative determination of sales at less than fair value
Stainless Steel Wire Rods	USA	87 FR 45083	27 July 2022	Affirmative sunset review of anti-dumping duty order
Steel Nails	USA	87 FR 51333	22 August 2022	Final affirmative countervailing duty determination
Steel Nails	USA	87 FR 47719	4 August 2022	Preliminary affirmative determination of sales at less than fair value
Welded carbon steel standard pipes and tubes	USA	87 FR 47711	4 August 2022	Initiation of circumvention inquiries on the Anti-dumping duty and countervailing duty orders
Zinc coated (galvanised) steel	Australia	Anti-dumping Notice No. 2022/067	9 August 2022	Exemption from anti-dumping and countervailing duties granted to certain categories of hot dipped zinc-aluminium-magnesium alloy coated steel coils
Zinc Coated (Galvanized) Steel	Australia	Anti-dumping Notice No. 2022/063	28 July 2022	Anti-dumping Duty and countervailing duty continued after continuation inquiry





## WTO News

### South Africa initiates WTO dispute complaint challenging EU citrus fruit measures

South Africa has sought consultation with the European Union on certain measures imposed by the latter in respect of import of citrus fruits from South Africa (DS613). The document circulated in WTO on 29 July by the South Africa states that the EU has made abrupt and radical changes to the applicable phytosanitary requirements for the importation of oranges and other citrus products from South Africa and as of 14 July 2022, the EU now requires, for the first time, that imports of citrus fruit must undergo specified mandatory cold treatment processes and precooling steps for specific periods before importation. According

to South Africa, the new EU's requirements are not based on science, lack technical justification, are discriminatory, and are more trade-restrictive than necessary to achieve their objective, among other things. South Africa claims the EU measures appear to be inconsistent with various provisions of the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures and the General Agreement on Tariffs and Trade 1994. It also claims that the EU's import regime on South African citrus fruit appears to be inconsistent with the EU's obligations under the Agreement Establishing the World Trade Organization (WTO Agreement). This is the first-ever WTO dispute settlement case initiated by South Africa.



## India Customs & Trade Policy Update

### Food imports – Health certificate to accompany import consignment of milk, pork and fish and their products

Imported food consignments of milk and milk products, pork and pork products and fish and fish products need to be accompanied by a health certificate issued by competent authority of the exporting country, with effect from 1 November 2022. The Central Board of Indirect Taxes and Customs has *vide* its Instruction No. 18/2022, dated 12 August 2022 shared an Order dated 3 August 2022 by the Food Safety and Standards Authority of India which also

prescribes the format for the health certificates for this purpose.

### Non-ferrous Metal Import Monitoring System (NFMIMS) – Advance registration not required – DGFT also clarifies various issues

The Ministry of Commerce has removed the requirement of advance registration of minimum 5 days from the expected date of arrival of import consignment under the Non-ferrous Metal Import Monitoring System. Hitherto, the importer was liable to register not later than 5 days before the expected date of arrival of import consignment. It

may be noted that NFMIMS is at present applicable for import of copper and aluminium. Policy Condition No. 3(c) of Chapter 74 and Policy Condition No. 1(c) of Chapter 76 of Schedule-I of ITC(HS) have been amended for the purpose by Notification No. 26/2015-20, dated 10 August 2022.

Meanwhile, the DGFT has vide its Policy Circular No. 42/2015-20, dated 27 July 2022 clarified that while NFMIMS will not be applicable on air-freighted goods, it will be applicable on imports under Advance Authorisations, DFIA, and import to SEZs. It has also been clarified that any number of consignments can be imported by a single valid registration and that the information relating to proper Quality Control Order can be treated as optional category in the description to be filed by the importer.

### **Wheat or meslin flour (atta), maida, samolina (rava/sirgi), wholemeal atta and resultant atta – Exports prohibited**

Export of wheat or meslin flour (atta), maida, samolina (rava/sirgi), wholemeal atta and resultant atta has been made prohibited with effect from 27 August 2022. DGFT Notification No. 30/2015-20, dated 27 August 2022 issued for the purpose also states that the provisions as under Para 1.05 of the Foreign Trade Policy, 2015-2020 regarding transitional arrangement shall not be applicable. However, export of the above items is allowed subject to permission of Government of India in certain cases, based on the request of foreign Government(s). Further, Notification No. 29/2015-20, also dated 27 August 2022 amends Notification No. 31 (RE-2012)/2009-2014, dated 4 February 2013 to withdraw the exemption on wheat or meslin flour from export restrictions/ban.

### **Rice exports to Europe – Date of requirement of certificate of inspection for exports to other than specified countries, postponed**

Export of rice (both basmati and non-basmati) to European countries, other than United Kingdom, Iceland, Liechtenstein, Norway and Switzerland, will now require a certificate of inspection from Export Inspection Council or Export Inspection Agency, for exports from 1 January 2023. Earlier the date was 1 July 2022. DGFT Notification No. 27/2015-20, dated 17 August 2022 amends Notification No. 61/2015-20, dated 23 March 2022 for this purpose.

### **Hexane, food grade – BIS certification not required on imports**

The requirement of BIS certification for import of Hexane, food grade has been removed with effect from 4 August 2022. Policy Condition to HS Code 29021100 and SI. No. 52 of Appendix III to Schedule-I have been revised by Notification No. 24/2015-20, dated 4 August 2022 for this purpose.

### **Display assembly of cellular mobile phone along with any other part is not eligible for BCD @ 10%**

The Central Board of Indirect Taxes and Customs has clarified that display assembly of cellular mobile phone with or without back support frame, plus any other parts like sim tray, antenna pin, speaker net, power key, slider switch, etc., is not eligible for the benefit of concessional rate of duty of 10% BCD under SI. No. 5D of Notification No. 57/2017-Cus. As per Circular No. 14/2022-Cus., dated 18 August 2022, if display assembly of mobile phone is imported with merely a back support frame of metal/plastic attached to it, the assembly would be eligible for the concessional rate of 10%. It may be noted that the circular also states that

back support frame of plastic/metal if imported individually will attract a BCD of 15%.

## Rules of Origin to prevail over CAROTA Rules

The Central Board of Indirect Taxes and Customs has reiterated that in the event of a

conflict between a provision of Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 and a provision of the Rules of Origin, the provision of the Rules of Origin shall prevail to the extent of the conflict. Instruction No. 19/2022-Cus., dated 17 August 2022 has been issued for the purpose.



## Ratio Decidendi

### SEIS benefits available even when no valid IEC number held at time of export of services

The Bombay High Court has allowed the benefit of Services Exports from India Scheme (SEIS) in a case where the exporter had no valid Importer Exporter Code (IEC) number at the time of rendering export of services. The Court in this regard observed that the eligibility criteria incorporated in para 3.08(f) of the Foreign Trade Policy (condition of having an active IEC number at the time of rendering services for claiming reward) was inconsistent with Section 7 of the Foreign Trade (Development and Regulation) Act. It was of the view that by way of delegated legislation, additional rights or obligations cannot be imposed. The High Court noted that the proviso to Section 7 of the FTDR Act does not lay down that the IEC number is essential at the time of rendering services of said specified kind. [*Smarte Solutions Pvt. Ltd. v. Union of India* – Judgement dated 27 July 2022 in Writ Petition No. 503/2021, Bombay High Court]

### Aircraft imports – Non-scheduled (passenger) operator can carry out charter services and still be eligible for exemption under Notification No. 21/2002-Cus.

The Larger Bench of the CESTAT has held that a non-scheduled (passenger) operator can carry out charter service and be not ineligible for exemption under Notification No. 21/2002-Cus. The Court noted that an operator providing non-scheduled (passenger) services can always provide such services either on individual seat basis or by chartering the entire aircraft and that such a restriction was not contained either in Condition No. 104 to the said notification or the Aircraft Rules or the Civil Aviation Requirements. It also noted that as per the definition of non-scheduled (passenger) services contained in the Explanation to Condition No. 104, all air transport services other than scheduled (passenger) air transport services were included. The Tribunal also held that non-publication of tariff was not violative of Explanation (c) of Condition No. 104 and that the aircraft was available for use by

public. It observed that even personnel of companies which are group companies of the assessee were also members of public. The Larger Bench was hence of the view that the Division Bench in *King Rotors* was not justified in

holding that the decision of the earlier Division Bench in *Sameer Gehlot* was rendered *per incuriam*. [*VRL Logistics Ltd. v. Commissioner – 2022 TIOL 717 CESTAT AHM-LB*]

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