

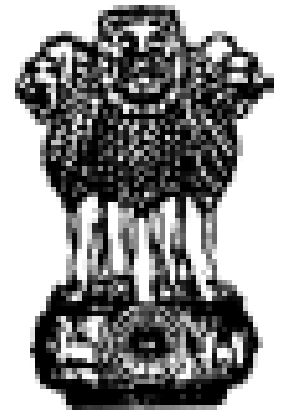
# Sunset Reviews Procedures and Practices India's Perspectives

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## Outline of the Presentation

### **Process & Timing**

- Duration of the Measures and Timing of Reviews
- Issues concerning Initiation of SSRs
- Application Process and Evidentiary Standards
- Time Period of Review and Status of Measures during Reviews

### **Substantive Tests**

- Jurisprudence on Substantive Determinations and Indian Practices
- Application of Lesser Duty Rules
- Outcomes

## Duration of an Antidumping Measure:

### Article 11

**Article-11.1:** An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

### Article-11.3

- Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition, or
- from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or
- from the date of the review under Article 11.3

The Appellate Body in *US — Oil Country Tubular Goods Sunset Reviews* held that

“Continuation of an anti-dumping duty is “an exception to the otherwise mandated expiry of the duty after five years””

## Review Provisions in Indian Laws

### Section 9-A (5) of Customs Tariff Act 1975

“The anti-dumping duty imposed under this section shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition:

- Provided that if the Central Government, in a review, is of the opinion that the cessation of such duty is likely to lead to continuation or recurrence of dumping and injury, it may, from time to time, extend the period of such imposition for a further period of five years and such further period shall commence from the date of order of such extension:
- Provided further that where a review initiated before the expiry of the aforesaid period of five years has not come to a conclusion before such expiry, the anti-dumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year.

# Sunset Review Provisions in Indian Antidumping Rules

## ***Rule 23 (1B) of the Antidumping Rules as amended***

- (1B) Notwithstanding anything contained in sub-rule (1) or (1A), any definitive antidumping duty levied under the Act, shall be effective for a period not exceeding five years from the date of its imposition, unless the designated authority comes to a conclusion, on a review initiated before that period on its own initiative or upon a duly substantiated request made by or on behalf of the domestic industry, within a reasonable period of time prior to the expiry of that period, that the expiry of the said anti-dumping duty is likely to lead to continuation or recurrence of dumping and injury to the domestic industry.
- (2) Any review initiated under sub-rule (1) shall be concluded within a period not exceeding twelve months from the date of initiation of such review.

# Initial Duration of Duty

## India's Practice

- **Original Investigations**
  - Duties are invariably imposed for a period of five years from the date of imposition
  - Only one exception where duty was imposed for a period less than full five years and duty was allowed to lapse without review;
- **In Sunset Reviews**
  - Duties are generally extended for full five years
- **In Mid Term reviews**
  - So far duties have been modified, or withdrawn only without extension;
  - But the Law provides for extending the duties for a further period of five years from the date of such review, if the review covers examination of both dumping and injury.

## Applicability of Measures:-

## Duty Vs Price Undertaking

- Measures mostly in the form of duties
  - Fixed duties
  - Variable duties / Reference Price
  - Ad Valorem duties
- Few Price undertakings were accepted in original investigations
  - Implementation and Monitoring is a problem
  - Practice has since been discontinued
- Can fresh Price undertakings be accepted in SSRs?
  - If so what would be the basis of such undertakings

# Initiation of Sunset Review

## How?

- Invariably Initiated upon a duly substantiated request made by or on behalf of the domestic industry.
- However, Authority can initiate *Suo Moto*
  - This provision has not been used so far except under judicial intervention;
  - Would be useful to know how other Authorities initiate *Suo Moto*

## **Is Sunset review mandatory?**

- Are the Authorities bound to initiate a review at the end of duty period to examine the need for continued imposition of the duties?



# Initiation of Sunset Review

## When?

- Reviews are initiated before the date of expiry of the measure in force
- Law does not provide any specific time limit for application
  - As a practice Domestic Industry is required to file before six months from the date of expiry
- Authority tries to initiate well before the expiry of duty
- Upon initiation of review the duty is extended for a period of one year from the date of expiry.

## Domestic Industry

## Standing Requirement

- **Domestic Industry for Injury Investigation**
  - As defined in Article 4 (Article 4 has universal application throughout the Agreement).
  - Composition of the domestic industry could be different from the domestic industry in the earlier investigations.
- Determination of **standing** of domestic industry?
  - Article 11.3 does not refer to Article 5.4
  - But expression 'by or on behalf of the domestic industry' seems to have same meaning as in Art 5.4
  - Therefore, standing is invariably examined for initiation of SSR

## Duly substantiated request

## Evidentiary Standards

### Application of Article 5 disciplines

- Article 11.3 refers to procedure under Article 6 alone.
- No reference to Article 5
- Therefore, the standards and scope of evidence in SSR application ('duly substantiated application') and obligation of the Authority to examine the same remains unclear.
- However, in practice Authority requires the petitioning domestic industry to provide adequate evidence on record before initiation.

# Duly substantiated request

# Evidence Required by the Authority

## Duly substantiated request for review

- Onus on the 'domestic industry' to *prima facie* establish likelihood of continuation or recurrence of dumping and injury.
  - Evidence of current dumping, if any.
  - Evidence of current Injury, if any.
  - Causal links
  - Likelihood factors for continuation or recurrence
- Authority may reject a request for initiation
  - If not substantiated
  - If no *prima facie* evidence of likelihood
- Rejection of request for initiation of SSR is not uncommon in India
  - **Instances of judicial interventions**
    - requiring mandatory initiations

# De Minimis and negligibility Standards in Sunset Review

## De minimis Standards

- The Panel in *US — Corrosion-Resistant Steel Sunset Review* held that
  - de minimis standard and negligibility standard under [Article 5.8](#) for the purposes of a cumulative injury assessment under [Article 3.3](#) that applies to original investigations under [Article 5.8](#) does not apply to sunset reviews under [Article 11.3](#)

## Applicability of Cumulation

- The Appellate Body in *US — Oil Country Tubular Goods Sunset Reviews* held that, while [Articles 3.3](#) and [11.3](#) are silent on this issue, this silence “cannot be understood to imply that cumulation is prohibited in sunset reviews”.
  - But such cumulation does not need to satisfy the conditions of [Article 3.3](#)
- Practice of the Authority are in conformity with the above

## Time period of Review

- Art 11.3 - Sunset Reviews shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.
  - But it does not refer to Article 5.10 which allows extension upto 18 months
- Leads to considerable confusion and litigations
- Authority considers that the extension power under Rule 17 for fresh investigations is also applicable to SSRs

## Status of the measure during the review

### Article 11.3 of ADA

- The definitive duty may remain in force pending the outcome of such a review.
- Does not specify the period upto which such duty may remain in force.
  - Since the period of review is 'normally' 12 months it is presumed that the duty can remain in force for a maximum period of 12 months beyond original duty
  - What if extension of period of review is permissible?
  - What happens if the duty is not extended but review continues?

### Indian Law

- Permits extension of duty for maximum period of 12 months only.
  - Leads to a situation of no duty for certain period while review continues

# Effective Date of Review and Collection of duty

## Indian Practice

- Extension of original duty by 12 months is pretty automatic upon initiation of SSR
  - Duty is collected as definitive duty
- As a result of the Review the duty can be modified
  - both in quantum and form
- The effective date of the duty as a result of the review
  - from the date of expiry of the extended duty (6 years), Or
  - from the date of imposition by Dept. of Revenue
- The new duty remains valid for 5 years from this date
  - No retroactive application from the date of expiry
  - No refund of duties collected during the period of review in case duties are revoked as a result of review



## Substantive Determination

### In a SSR Authority examines whether:

- Whether dumping continued after imposition of the antidumping duty and if so, whether it is likely to continue;
- If dumping did not continue, whether the dumping is likely to recur in the event of revocation of the duties;
- 
- Whether the domestic industry continued to suffer material injury and if so, whether injury is likely to continue if the duties are removed;
- If the domestic industry has not suffered continued injury, whether injury to the domestic industry is likely to recur in the event of revocation of the duties.

## Jurisprudence:

### Likelihood of continuation or recurrence of dumping and Injury

Appellate Body in *US — Corrosion-Resistant Steel Sunset Review* noted that,

- likelihood determination is a prospective determination; and
- “the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated”;
- The Authorities must examine whether the evidence demonstrates that dumping would be probable if the duty were terminated — and not simply if the evidence suggests that such a result might be possible or plausible.
- the prospective likelihood determination will inevitably rest on a factual foundation relating to the past and present.

The Authority examines the POI data, Injury Period data and often Post POI data in its likelihood determinations

## Jurisprudence

## Determinations in a Sunset Review:

## Dumping

- Appellate Body in *US — Corrosion-Resistant Steel Sunset Review* held that
  - “no obligation is imposed on investigating authorities to calculate or rely on dumping margins in a sunset review.”
  - “in a sunset review, dumping margins may well be relevant to, but they will not necessarily be conclusive of, whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping”;
  - However, “should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2 in general and Article 2.4 in particular”

# Authority's Practices

## Current Dumping Determination

- Authority issues questionnaire to all known exporters
  - Standard questionnaire with additional questions for likelihood analysis
  - Does not restrict to any specific exporter(s)
  - May resort to sampling if required
- Invariably makes a current dumping determination based on current level of cost and prices
  - Exporter Specific as well as all others
  - For the countries under review
  - **Follows the principles of determination as per Article 2.4 of ADA**
- As a result of the review a specific exporter may be excluded from continuation of duty
  - If found not dumping during the period of review and not likely to resort to dumping if duties are revoked.

## Authority's Practices

## Likelihood of Continuation or Recurrence of Dumping

- For likelihood analysis Authority considers factors such as
  - Current level of dumping and volumes during the review period;
  - Past history of dumping and margins of dumping;
  - Spare capacities in the country of export and availability of markets;
  - Export orientation of the producers in the country of export;
  - Global and domestic demand supply scenario in the exporting country as well as India;
  - Trade remedy action in major importing countries, if any;
  - Third country export prices of the exporters;
  - Post POI volume and price trends; and
  - Any other factor that is brought to the notice of the Authority

# Determinations in a Sunset Review

## Injury

- The Panel in *US — Oil Country Tubular Goods Sunset Reviews* held that
  - “...an investigating authority is not required to make an injury determination in a sunset review. It follows, then, that the obligations set out in Article 3 do not normally apply to sunset reviews”
  - However, to the extent that an investigating authority relies on a determination of ‘injury’ when conducting a sunset review, the obligations of Article 3 would apply to that determination.

## Appellate Body's views

- Appellate Body partially endorsed this view and held that
  - the investigating authority must consider the continuation or recurrence of 'injury' as defined in footnote 9.
- **But all of the provisions of Article 3 are not applicable in their entirety to sunset review determinations under Article 11.3**
- “Certain of the analyses mandated by Article 3 and necessarily relevant in an original investigation may prove to be probative, or possibly even required, in order for an investigating authority in a sunset review to arrive at a 'reasoned conclusion'.”

# Likelihood of Injury

## Jurisprudence

- The Appellate Body in *US — Oil Country Tubular Goods Sunset Reviews*
  - injury determination to be based on ‘positive evidence’ and an ‘objective examination’.
  - factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination.
  - An investigating authority may also, in its own judgement, consider other factors contained in Article 3 when making a likelihood-of-injury determination.
  - **But the necessity of conducting such an analysis in a given case results from the requirement imposed by Article 11.3 — not Article 3.**
  - that a likelihood-of-injury determination rest on a ‘sufficient factual basis’ that allows the agency to draw ‘reasoned and adequate conclusions’



# Exporter Specific Likelihood Determinations

- The Appellate Body in *US — Corrosion-Resistant Steel Sunset Review*
- The Appellate Body considered that, on its face, [Article 11.3](#) does not oblige investigating authorities in a sunset review to make “company-specific” likelihood determinations:

## Timeframe for likelihood analysis (Future Horizon)

- The Panel in *US — Oil Country Tubular Goods Sunset Reviews* noted that Article 11.3 of the Anti-Dumping Agreement does not prescribe any timeframe for likelihood of continuation or recurrence of injury; nor does it require investigating authorities to specify the time-frame on which their likelihood determination is based.
- The Appellate Body rejected the argument that the requirement set out in Article 3.7 that the threat of material injury be “imminent” is to be imported into Article 11.3 in the form of a temporal limitation on the time-frame within which “injury” must be determined to continue or recur.

## Existence of a causation requirement in sunset reviews

The Appellate Body in *US — Anti-Dumping Measures on Oil Country Tubular Goods* considered that:

- “On its face, [Article 11.3](#) does not require investigating authorities to establish the existence of a ‘causal link’ between likely dumping and likely injury.
- Instead, by its terms, [Article 11.3](#) requires investigating authorities to determine whether the *expiry of the duty* would be likely to lead to *continuation or recurrence of dumping and injury*.
- Thus, in order to continue the duty, there must be a nexus between the ‘expiry of the duty’, on the one hand, and ‘continuation or recurrence of dumping and injury’, on the other hand, such that the former ‘would be likely to lead to’ the latter. This nexus must be clearly demonstrated.

## Likely Standard

- The Appellate Body in *US — Oil Country Tubular Goods Sunset Reviews* considered that
- the ‘likely’ standard of [Article 11.3](#) applies to the overall determinations regarding dumping and injury;
- it need not necessarily apply to each factor considered in rendering the overall determinations on dumping and injury”;

# Practices of the Authority

## Current Injury

- Authority invariably examines existence of current injury, if any, before examining the likelihood
  - Applies Article 3 disciplines and examines injury cumulatively
  - Applies non-attribution discipline for current injury
  - Examines impact of imports from other sources attracting duty as a factor of non-attribution
- Injury is examined with reference to the applicant domestic industry, which could be different from the original investigation;
- Also determines injury margin, if any, for the current dumped imports

## India's Practice

### Factors considered for Likelihood analysis

Factors examined for likelihood of continuation or recurrence of injury

- **likely volume effects**

- Current level of dumped imports from the country under investigation and other countries indicating likelihood of substantially increased imports;
- Spare capacities in the country of export or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports;
- availability of other export markets to absorb these production;
- Inventory levels and likely market shares.

Continued...

## **Likely Price effects of dumped imports**

- Current and likely dumping and injury margin levels;
- Current and likely price undercutting and underselling effects;
- whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports;
- Likelihood of dumping determination is exporter as well as country specific;
- Whereas likelihood of injury determination is country specific or cumulated, as the case may be;

## Authority's Practices

- Authority invariably makes fresh determination of dumping and injury margins in a SSR,
  - provided a reasonable volume of exports are made during the period under review allowing such a determination;
- The duty level is modified based on the fresh determination of both dumping and injury margins;
- Lesser Duty Rule is applied in SSRs also, if a fresh determination is made;
- Otherwise earlier duty may continue.
- No dumping by a specific exporter during the period of review may lead to discontinuation of duty with respect to that exporter,
  - provided likelihood of recurrence is not established.



## Authority's Practices

### Continued...

- If a specific exporter stops exports after imposition of duty, or a very small quantity is exported making determination of new dumping margin unrealistic the Authority may continue the original duty, provided likelihood of recurrence is established;
- Low or no exports for an extended period (injury investigation period) coupled with determination of no likelihood of immediate recurrence of dumping may lead to revocation of duty on a specific exporter or a country.
- A situation of continued dumping but without injury margin or continued injury may also lead to discontinuation of duty unless it is established that injury is likely to recur in the near future if the duties are revoked.

## Public Interest Assessment

- Public interest assessment is not mandated in the National Regulation of India
- However, the user industry and other parties, affected by the decision to extend the duty, are heard and their interests are kept in mind while recommending extension of duty in a SSR in India
- Revision of duties in SSRs (mostly downward) and application of Lesser Duty Rule in Sunset Reviews also (though not mandated) addresses the public interests

# Outcomes

## Share of Measures subjected to SSR and Frequency of terminations

- Over 90% of the measures have been subjected to Sunset Reviews since 2002
- Average Life of the Measures in India is about 82 months.
- Though about 85% of the measures have been extended through the SSR majority of the investigations result in revocation of duties against one or more countries in multi-country investigations
- The Reviews normally result in lowering of the duty rates.
- Extension of same duty only in fewer number of cases



Thank You