REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3889 OF 2006

COMMISSIONER OF CUSTOMS,
BANGALORE …APPELLANT

VERSUS

M/S. G.M. EXPORTS & OTHERS ...RESPONDENTS

WITH

CIVIL APPEAL NO.7814 OF 2012

CIVIL APPEAL NO. 7894 OF 2015
[ARISING OUT OF SLP (CIVIL) NO. 13028 OF 2012]

CIVIL APPEAL NO. 7895 OF 2015
[ARISING OUT OF SLP (CIVIL) NO. 27811 OF 2012]

CIVIL APPEAL NO.5119 OF 2012

CIVIL APPEAL NO.3082 OF 2011

CIVIL APPEAL NO.3086 OF 2011

J U D G M E N T

R.F. Nariman, J.

1. Leave granted in S.L.P. (Civil) No. 13028 of 2012 and S.L.P. (Civil) No. 27811 of 2012.

2. Seven appeals are before us; some of them are from the Bombay High Court judgment dated 15.12.2011 and the Kerala High Court judgment dated 15.07.2009. Others are appeals against a Karnataka Tribunal (Bangalore) judgment and a Bombay Tribunal judgment, which follows the Bombay High Court judgment referred to above. Since all these appeals raise a common question of law of some complexity relating to anti-dumping duty, the said appeals have been bunched together and are being disposed of together. It may also be stated that the preponderant view, that is the view of both the Bombay and Kerala High Courts and the Bombay Tribunal, is in favour of the construction suggested by revenue. Only the Karnataka Tribunal (Bangalore) has decided in favour of the assessee.

3. The question of law which arises in the instant appeals is whether anti-dumping duty imposed with respect to imports made during the period between the expiry of the provisional anti-dumping duty and the imposition of the final anti-dumping duty is legal and valid.

4. It is necessary in this case to begin at the very beginning. The General Agreement on Tariffs and Trade (GATT) in Article VI first laid down how, conceptually, anti-dumping duties were to be imposed. The relevant part of Article VI reads as under:-

> "Article VI
>
> Anti-dumping and Countervailing Duties
>
> 1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(b) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1."

5. In pursuance of the said Article VI, various member nations entered into a World Trade Organisation Agreement to

implement Article VI, in 1994. The said agreement is referred to as “Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994”, and in its material aspects, which are important in order to decide the question raised in these appeals, states as follows:-

“Members hereby agree as follows:

PART I

Article 1

Principles

> An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.”

“Article 10

Retroactivity

10.1 Provisional measures and anti-dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 and paragraph 1 of Article 9, respectively, enters into force, subject to the exceptions set out in this Article.

10.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

10.3 If the definitive anti-dumping duty is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected. If the definitive duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be."

"10.6 A definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that:

(I) there is a history of dumping which caused injury or that the importer was, or should have been,

aware that the exporter practises dumping and that such dumping would cause injury, and

(ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.

10.7 The authorities may, after initiating an investigation, take such measures as the withholding of appraisement or assessment as may be necessary to collect anti-dumping duties retroactively, as provided for in paragraph 6, once they have sufficient evidence that the conditions set forth in that paragraph are satisfied.

10.8 No duties shall be levied retroactively pursuant to paragraph 6 on products entered for consumption prior to the date of initiation of the investigation."

"18.4 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question."

6. In pursuance of the said Article VI and the said Agreement, both of which India is a signatory to, amendments were made in the Customs Tariff Act in the year 1995. The amendment with which we are directly concerned is the introduction of a new Section 9A to the said Act which reads as under:-

> **"Section 9A. Anti - dumping duty on dumped articles**
>
> (1) Where any article is exported by an exporter or producer from any country or territory (hereafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.
>
> Explanation.-For the purposes of this section,-
>
> (a) "margin of dumping" in relation to an article, means the difference between its export price and its normal value;
>
> (b) "export price", in relation to an article, means the price of the article exported from the exporting country or territory and in cases where there is no export price or where the export price is unreliable because of association or a compensatory

arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported articles are first resold to an independent buyer or if the article is not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as may be determined in accordance with the rules made under sub-section (6);

(c) “normal value”, in relation to an article, means-

(i) the comparable price, in the ordinary course of trade, for the like article when destined for consumption in the exporting country or territory as determined in accordance with the rules made under sub-section (6); or

(ii) when there are no sales of the like article in the ordinary course of trade in the domestic market of the exporting country or territory, or when because of the particular market situation or low volume of the sales in the domestic market of the exporting country or territory, such sales do not permit a proper comparison, the normal value shall be either-

(a) comparable representative price of the like article when exported from the exporting country or territory to an appropriate third country as determined in accordance with the rules made under sub-section (6); or

(b) the cost of production of the said article in the country of origin along with reasonable addition for

administrative, selling and general costs, and for profits, as determined in accordance with the rules made under sub- section(6):

Provided that in the case of import of the article from a country other than the country of origin and where the article has been merely transhipped through the country of export or such article is not produced in the country of export or there is no comparable price in the country of export, the normal value shall be determined with reference to its price in the country of origin.

(1A). Where the Central Government, on such inquiry as it may consider necessary, is of the opinion that circumvention of anti-dumping duty imposed under sub-section (1) has taken place, either by altering the description or name or composition of the article subject to such anti-dumping duty or by import of such article in an unassembled or dissembled form or by changing the country of its origin or export or in any other manner, whereby the anti-dumping duty so imposed is rendered ineffective, it may extend the anti-dumping duty to such article or an article originating in or exported from such country, as the case may be.

(2) The Central Government may, pending the determination in accordance with the provisions of this section and the rules made thereunder of the normal value and the margin of dumping in relation to any article, impose on the importation of such article into India an anti-dumping duty on the basis of a provisional estimate of such value and margin and if such anti-dumping duty exceeds the margin as so determined,-

(a) the Central Government shall, having regard to such determination and as soon as may be after such determination, reduce such anti-dumping duty; and

(b) refund shall be made of so much of the anti-dumping duty which has been collected as is in excess of the anti-dumping duty as so reduced.

(2A) Notwithstanding anything contained in sub-section (1) and sub-section (2), a notification issued under sub-section (1) or any anti-dumping duty imposed under sub-section (2), unless specifically made applicable in such notification or such imposition, as the case may be, shall not apply to articles imported by a hundred per cent export-oriented undertaking or a unit in a free trade zone or in a special economic zone.

Explanation. - For the purposes of this section, the expressions "hundred per cent export-oriented undertaking", "free trade zone" and "special economic zone" shall have the meanings assigned to them in Explanations 2 to sub-section (f) of section 3 of Central Excise Act, 1944.

(3) If the Central Government, in respect of the dumped article under inquiry, is of the opinion that -

(i) there is a history of dumping which caused injury or that the importer was, or should have been,

aware that the exporter practices dumping and that such dumping would cause injury; and

(ii) the injury is caused by massive dumping of an article imported in a relatively short time which in the light of the timing and the volume of imported article dumped and other circumstances is likely to seriously undermine the remedial effect of the anti-dumping duty liable to be levied,

the Central Government may, by notification in the Official Gazette, levy anti-dumping duty retrospectively from a date prior to the date of imposition of anti-dumping duty under sub-section (2) but not beyond ninety days from the date of notification under that sub-section, and notwithstanding any thing contained in any other law for the time being in force, such duty shall be payable at such rate and from such date as may be specified in the notification.

(4) The anti-dumping duty chargeable under this section shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.

(5) 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.

(6) The margin of dumping as referred to in sub-section (1) or sub-section (2) shall, from time to time, be ascertained and determined by the Central Government, after such inquiry as it may consider necessary and the Central Government may, by notification in the Official Gazette, make rules for the purposes of this section, and without prejudice to the generality of the foregoing such rules may provide for the manner in which articles liable for any anti-dumping duty under this section may be identified and for the manner in which the export price and the normal value of and the margin of dumping in relation to, such articles may be determined and for the assessment and collection of such anti-dumping duty.

(6A) The margin of dumping in relation to an article, exported by an exporter or producer, under inquiry under sub- section (6) shall be determined on the basis of records concerning normal value and export price maintained, and information provided, by such exporter or producer:

Provided that where an exporter or producer fails to provide such records or information, the margin of dumping for such exporter or producer shall be determined on the basis of facts available.;

(7) Every notification issued under this section shall, as soon as may be after it is issued, be laid before each House of Parliament.

(8) The provisions of the Customs Act, 1962, (52 of 1962) and the rules and regulations made thereunder, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act."

7. In exercise of powers conferred, *inter alia*, by Section 9A (6) of the Customs Tariff Act, the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 have been framed. The Rules relevant to the determination of the present controversy are set out hereunder:-

"2. Definitions.- In these rules, unless the context otherwise requires-

(e) "provisional duty" means an anti dumping duty imposed under sub-section (2) of section 9A of the Act;

5. Initiation of investigation. - (1) Except as provided in sub-rule (4), the designated authority shall initiate an investigation to determine the existence, degree and effect of any alleged dumping only upon receipt of a written application by or on behalf of the domestic industry.

(2) An application under sub-rule (1) shall be in the form as may be specified by the designated authority and the application shall be supported by evidence of -

(a) dumping

(b) injury, where applicable, and

(c) where applicable, a causal link between such dumped imports and alleged injury.

(3) The designated authority shall not initiate an investigation pursuant to an application made under sub-rule (1) unless –

(a) it determines, on the basis of an examination of the degree of support for, or opposition to the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry :

Provided that no investigation shall be initiated if domestic producers expressly supporting the application account for less than twenty five per cent of the total production of the like article by the domestic industry, and

(b) it examines the accuracy and adequacy of the evidence provided in the application and satisfies itself that there is sufficient evidence regarding -

(i) dumping,

(ii) injury, where applicable; and

(iii) where applicable, a causal link between such dumped imports and the alleged injury, to justify the initiation of an investigation.

Explanation. - For the purpose of this rule the application shall be deemed to have been made by or on behalf of the domestic industry, if it is supported by those domestic producers whose collective output constitute more than fifty per cent of the total production of the like article produced by that portion of the domestic industry expressing either support for or opposition, as the case may be, to the application.

(4) Notwithstanding anything contained in sub-rule (1) the designated authority may initiate an investigation *suo motu* if it is satisfied from the information received from the Collector of Customs appointed under the Customs Act, 1962 (52 of 1962) or from any other source that sufficient evidence exists as to the existence of the circumstances referred to in clause (b) of sub-rule (3).

(5) The designated authority shall notify the government of the exporting country before proceeding to initiate an investigation.

11. Determination of injury. - (1) In the case of imports from specified countries, the designated authority shall record a further finding that import of such article into India causes or threatens material injury to any established industry in India or materially retards the establishment of any industry in India.

(2) The designated authority shall determine the injury to domestic industry, threat of injury to domestic industry, material retardation to establishment of domestic industry and a causal link between dumped imports and injury, taking into account all relevant facts, including the volume of

dumped imports, their effect on price in the domestic market for like articles and the consequent effect of such imports on domestic producers of such articles and in accordance with the principles set out in Annexure II to these rules.

(3) The designated authority may, in exceptional cases, give a finding as to the existence of injury even where a substantial portion of the domestic industry is not injured, if-

(i) there is a concentration of dumped imports into an isolated market, and

(ii) the dumped articles are causing injury to the producers of all or almost all of the production within such market.

12. Preliminary findings. - (1) The designated authority shall proceed expeditiously with the conduct of the investigation and shall, in appropriate cases, record a preliminary finding regarding export price, normal value and margin of dumping, and in respect of imports from specified countries, it shall also record a further finding regarding injury to the domestic industry and such finding shall contain sufficiently detailed information for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. It will also contain:-

(i) the names of the suppliers, or when this is impracticable, the supplying countries involved;

(ii) a description of the article which is sufficient for customs purposes;

(iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value;

(iv) considerations relevant to the injury determination; and

(v) the main reasons leading to the determination.

(2). The designated authority shall issue a public notice recording its preliminary findings.

13. Levy of provisional duty - The Central Government may, on the basis of the preliminary findings recorded by the designated authority, impose a provisional duty not exceeding the margin of dumping:

Provided that no such duty shall be imposed before the expiry of sixty days from the date of the public notice issued by the designated authority regarding its decision to initiate investigations:

Provided further that such duty shall remain in force only for a period not exceeding six months which may upon request of the exporters representing a significant percentage of the trade involved be extended by the Central Government to nine months.

17. Final findings. - (1) The designated authority shall, within one year from the date of initiation of an investigation, determine as to whether or not the article under investigation is being dumped in India and submit to the Central Government its final finding –

(a) as to, -

(i) the export price, normal value and the margin of dumping of the said article;

(ii) whether import of the said article into India, in the case of imports from specified countries, causes or threatens material injury to any industry established in India or materially retards the establishment of any industry in India;

(iii) a causal link, where applicable, between the dumped imports and injury;

(iv) whether a retrospective levy is called for and if so, the reasons therefor and date of commencement of such retrospective levy:

Provided that the Central Government may, in its discretion in special circumstances extend further the aforesaid period of one year by six months:

Provided further that in those cases where the designated authority has suspended the investigation on the acceptance of a price undertaking as provided in rule 15 and subsequently resumes the same on violation of the terms of the said undertaking, the period for which investigation was kept under suspension shall not be taken into account while calculating the period of said one year,

(b) recommending the amount of duty which, if levied, would remove the injury where applicable, to the domestic industry.

(2) The final finding, if affirmative, shall contain all information on the matter of facts and law and reasons which have led to the conclusion and shall also contain information regarding-

(i) the names of the suppliers, or when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

(iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value;

(iv) considerations relevant to the injury determination; and

(v) the main reasons leading to the determination.

(3) The designated authority shall determine an individual margin of dumping for each known exporter or producer concerned of the article under investigation: Provided that in cases where the number of exporters, producers, importers or types of articles involved are so large as to make such determination impracticable, it may limit its findings either to a reasonable number of interested parties or articles by using statistically valid samples based on information available at the time of selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated, and any selection, of exporters, producers, or types of articles, made under this proviso shall preferably be made in consultation with and with the consent of the exporters, producers or importers concerned :

Provided further that the designated authority shall, determine an individual margin of dumping for any exporter or producer, though not selected initially, who submit necessary information in time, except where the number of exporters or producers are so large that individual examination would be unduly burdensome and prevent the timely completion of the investigation.

(4) The designated authority shall issue a public notice recording its final findings.

18. Levy of duty. - (1) The Central Government may, within three months of the date of publication of final findings by the designated authority under rule 17, impose by notification in the Official Gazette, upon importation into India of the article covered by the final finding, anti-dumping duty not exceeding the margin of dumping as determined under rule 17.

(2) In cases where the designated authority has selected percentage of the volume of the exports from a particular country, as referred to sub-rule (3) of rule 17, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed –

(i) the weighted average margin of dumping established with respect to the selected exporters or producers or,

(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value/ the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined:

Provided that the Central Government shall disregard for the purpose of this sub-rule any zero margin, margins which are less than 2 per cent expressed as the percentage of export price and margins established in the circumstances detailed in sub-rule (8) of rule 6. The Central Government shall apply individual duties to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation as referred to in the second proviso to sub-rule (3) of rule 17.

(3) Notwithstanding anything contained in sub-rule (1), where a domestic industry has been interpreted according to the proviso to sub-clause (b) of rule 2, a duty shall be levied only after the exporters have been given opportunity to cease exporting at dumped prices to the area concerned or otherwise give an undertaking pursuant to rule 15 and such undertaking has not been promptly given and in such cases duty shall not be levied only on the articles of specific producers which supply the area in question.

(4) If the final finding of the designated authority is negative that is contrary to the evidence on whose basis the investigation was initiated, the Central Government shall, within forty-five days of the publication of final findings by the designated authority under rule 17, withdraw the provisional duty imposed, if any.

20. Commencement of duty. - (1) The anti-dumping duty levied under rule 13 and rule 19 shall take effect from the date of its publication in the Official Gazette.

(2) Notwithstanding anything contained in sub-rule (1) –

(a) where a provisional duty has been levied and where the designated authority has recorded a final finding of injury or where the designated authority has recorded a final finding of threat of injury and a further finding that the effect of dumped imports in the absence of provisional duty would have led to injury, the anti-dumping duty may be levied from the date of imposition of provisional duty;

(b) in the circumstances referred to in sub-section (3) of section 9A of the Act, the antidumping duty may be levied retrospectively from the date commencing ninety days prior to the imposition of such provisional duty:

Provided that no duty shall be levied retrospectively on imports entered for home consumption before initiation of the investigation:

Provided further that in the cases of violation of price undertaking referred to in sub-rule (6) of rule 15, no duty shall be levied retrospectively on the imports which have entered for home consumption before the violation of the terms of such undertaking.

Provided also that notwithstanding anything contained in the foregoing proviso, in case of violation of such undertaking, the provisional duty shall be deemed to have been levied from the date of violation of the undertaking or such date as the Central Government may specify in each case.

21. Refund of duty. - (1) If the anti-dumping duty imposed by the Central Government on the basis of the final findings of the investigation conducted by the designated authority is higher than the provisional duty already imposed and collected, the differential shall not be collected from the importer.

(2) If, the anti-dumping duty fixed after the conclusion of the investigation is lower than the provisional duty already imposed and collected, the differential shall be refunded to the importer.

(3) If the provisional duty imposed by the Central Government is withdrawn in accordance with the provisions of sub-rule (4) of rule 18, the provisional duty already imposed and collected, if any, shall be refunded to the importer."

8. We will take the facts contained in the judgment of the Bombay High Court dated 15.12.2011, in the case of **Harsh International** v. **Commissioner of Customs**, Civil Appeal No. 5119 of 2012, which explain how the question which has to be determined by this judgment arose. On 6th August, 2001 a public notice was issued by the Designated Authority initiating proceedings in regard to the import of Vitrified/Porcelain tiles originating in or exported from the People's Republic of China

and the United Arab Emirates. The Designated Authority issued preliminary findings on 3rd December, 2001. Following the preliminary findings, the Union Government imposed, by a notification dated 2nd May, 2002, a provisional antidumping duty under Section 9A(2) of the Customs Tariff Act read with Rules 13 and 20 of the Antidumping Rules. The Designated Authority rendered its final findings on 4th February, 2003 and while concluding that material injury had resulted to the domestic industry recommended the imposition of antidumping duty. The Union Government issued a notification on 1st May, 2003 imposing a final antidumping duty with effect from the date of the imposition of the provisional antidumping duty i.e. 2nd May, 2002. The question before the Court is as to whether the Central Government was within its jurisdiction in imposing a final antidumping duty between 2nd November, 2002 and 30th April, 2003. This, according to the assessees, is the "gap period" when the provisional duty had come to an end by efflux of six months until a final notification was issued by the Union Government on 1st May, 2003.

9. The stage is now set for setting out the arguments of the learned counsel both for the revenue and for the assessees.

10. Ms. Pinky Anand, learned Additional Solicitor General appearing on behalf of the revenue argued that both literally and purposively Rule 20 leads to one conclusion and one conclusion alone – that final anti-dumping duty would take effect from the date of imposition of the provisional duty, which would necessarily include the "gap" period i.e. the period between the lapse of the provisional duty and the imposition of the final duty. According to learned counsel, any other construction would defeat the object and purpose of imposing a final anti-dumping duty after the Designated Authority has found, post investigation, that there is dumping of goods and material injury to the domestic industry as a result. Thus, despite dumping and material injury being present, no anti-dumping duty would be leviable in the interregnum period which would be wholly subversive of the object sought to be achieved; that is, saving the domestic industry from unfair trade practices of foreign exporters. She also argued that a literal reading of Rule 20 is called for which makes it clear that the

final anti-dumping duty is to be levied from the date of imposition of provisional duty which would necessarily include the “gap” period. Further, since the final duty is made to relate back to the date of the provisional duty imposition, a fiction is employed which must be allowed to have full play and the mind should not boggle in giving such fiction its logical consequence. According to learned counsel, “levied” in Rule 20(2)(a) obviously does not include “collection” as has been held in several Supreme Court judgments and therefore, “levy” would not include “collection” for which reason Rule 20 has to be read on its own without reference to the consequence that is found in Rule 21. She further argued that it is true that laws that are made in pursuance of international treaties ought to be construed in accordance with such treaties, but where the Indian law deviates from the treaty agreement, Indian law prevails. It is clear that unlike Article 10 of the WTO Agreement, Rule 20(2)(a) only speaks of anti-dumping duty being levied from the date of imposition of provisional duty and does not speak of the period for which the provisional duty applied, thus

making it clear that anti-dumping duty can be levied and collected for the "gap" or interregnum period.

11. On the other hand, learned counsel for the various assessees have argued that Rule 20(2)(a) should be interpreted in the light of the WTO Agreement, and so interpreted would necessarily be interpreted as meaning only the period for which the provisional duty is levied, and not beyond. It has been argued with some vehemence that this also follows from a reading of clause 18.4 of the Agreement and a reading of the Central Government's own website which was referred to us in the course of arguments stating that the anti-dumping rules are in consonance with the WTO Agreements on anti-dumping. Further, it has been argued that the word "levied" under Rule 20(2)(a), in the context includes even "collection" and this being so, whatever has not been "collected" in the interregnum period obviously cannot be collected retrospectively. It was also argued before us that Section 9A(3) alone empowers the rule making authority to impose a retrospective anti-dumping duty within the strict confines of the said rule. Section 9A(2) and (6), in contrast, do

not allow any imposition, retrospectively, of anti-dumping duty, and therefore if Rule 20 were to be read in the manner suggested by revenue, it would be *ultra vires* the parent statute. It was further argued that the levy of anti-dumping duty is not automatic and is only levied by the Central Government taking into account a series of complex economic factors. This being so, the continuity of such levy can only be for the period indicated in the provisional duty levy notification and not beyond. It was also argued that, on a true construction of Rule 20(2)(a), the said rule merely validates a provisional duty already levied, and nothing beyond. It was further argued that Rule 20(2)(a) has to be harmoniously construed with both Rules 13 and 21, or else, the suggested construction by revenue of Rule 20(2)(a) would render Rules 13 and 21 nugatory. In this context, it was further argued that no duty can be levied in the interregnum period as the Government would then be doing indirectly what it is prohibited from doing directly – namely, extending the period of six months of the levy of provisional duty beyond six months and until the notification imposing the final anti-dumping duty.

12. Two earlier judgments of this Court have stated as to what exactly was the object sought to be achieved by the introduction of Section 9A of the Customs Tariff Act read with the Anti-Dumping Rules. But before we come to these judgments, it is important to refer to our basic law, and in particular Article 51(c) of the Constitution of India, which reads as follows:

> "51. Promotion of international peace and security. —The State shall endeavour to —
>
> (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and"

13. In **S&S Enterprise** v. **Designated Authority and others**, (2005) 3 SCC 337, this Court said:

> "In our opinion, the interpretation of Rule 14(d) by Respondent No.1 and the Tribunal is incorrect and contrary to its language. The imposition of dumping duty is under Section 9A of the Customs Tariff Act, 1975 and the Rules and is the outcome of the General Agreement on Tariff and Trade (GATT) to which India is a party. The purpose behind the imposition of the duty is to curb unfair trade practices resorted to by exporters of a particular country of flooding the domestic markets with goods at rates which are lower than the rate at which the exporters normally sell the same or like goods in

their own countries so as to cause or be likely to cause injury to the domestic market. The levy of dumping duty is a method recognized by GATT which seeks to remedy the injury and at the same time balances the right of exporters from other countries to sell their products within the country with the interest of the domestic markets. Thus the factors to constitute 'dumping', are (i) an import at prices which are lower than the normal value of the goods in the exporting country; (ii) the exports must be sufficient to cause injury to the domestic industry." [at para 4]

14. To similar effect is the judgment of **Reliance Industries Ltd.** v. **Designated Authority and others**, (2006) 10 SCC 368:

"The result was that an industrial base was created in India after independence and this has definitely resulted in some progress. The purpose of Section 9-A can, therefore, easily be seen. The purpose was that our industries which had been built up after independence with great difficulties must not be allowed to be destroyed by unfair competition of some foreign companies. Dumping is a well-known method of unfair competition which is adopted by the foreign companies. This is done by selling goods at a very low price for some time so that the domestic industries cannot compete and are thereby destroyed, and after such destruction has taken place, prices are again raised.

The purpose of Section 9-A is, therefore, to maintain a level playing field and prevent dumping, while allowing for healthy competition. The purpose is not protectionism in the classical sense (as proposed by the German economist Friedrich List in his famous book '*National System of Political*

> *Economy*' published in 1841) but to prevent unfair trade practices. The 1995 Amendment to Section 9A was apparently made in pursuance to Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) which permitted anti-dumping measures as an instrument of fair competition.
>
> The concept of anti-dumping is founded on the basis that a foreign manufacturer sells below the normal value in order to destabilise domestic manufacturers. Dumping, in the short term, may give some transitory benefits to the local customers on account of lower priced goods, but in the long run destroys the local industries and may have a drastic effect on prices in the long run." [at paras 10, 11 & 12]

15. A number of judgments, both English and Indian, have laid down as to what is the correct approach to the construction of a statute made in response to an international treaty obligation by a member nation. Thus, in **The Jade The Eschersheim Owners of the motor vessel Erkowit** v. **Owners of the ship Jade**, [1976] 1 All ER 920, the House of Lords stated:

> "As the Act was passed to enable Her Majesty's government to give effect to the obligations in international law which it would assume on ratifying the convention to which it was a signatory, the rule of statutory construction laid down in Salomon v. Customs and Excise Commissioners [1966] 3 All ER

871 and Post Office v. Estuary Radio Ltd. [1967] 3 All ER 633 is applicable. If there be any difference between the language of the statutory provision and that of the corresponding provision of the convention, the statutory language should be construed in the same sense as that of the convention if the words of the statute are reasonably capable of bearing that meaning." [at page 924]

16. Similarly in **Quazi** v. **Quazi,** [1979] 3 All ER 897, the House of Lords put it thus:

"In the instant case, however, this does not help the respondent wife; it helps the appellant husband. The purpose for which the Recognition Act was passed is declared by the preamble to be with a view to the ratification by the United Kingdom of the Recognition Convention and for other purposes. Where Parliament passes an Act amending the domestic law of the United Kingdom in order to enable this country to ratify an international treaty and thereby assume towards other states that are parties to the treaty an obligation in international law to observe its terms, it is a legitimate aid to the construction of any provisions of the Act that are ambiguous or vague to have recourse to the terms of the treaty in order to see what was the obligation in international law that Parliament intended that this country should be enabled to assume. The ambiguity or obscurity is to be resolved in favour of that meaning that is consistent with the provisions of the treaty: see *Salomon v. Customs and Excise Commissioners* [1966] 3 All ER 871 and *Post Office v. Estuary Radio Ltd.* [1967] 3 All ER 633." [at page 903]

17. In **Garland** v. **British Rail Engineering Ltd.,** [1982] 2 All ER 402, the same Rule was set out with an addition – that not only should municipal law carry out treaty obligations, but it should also not be inconsistent with the terms of a treaty. This was put by the House of Lords in the following words:-

> "My Lords, even if the obligation to observe the provisions of article 119 were an obligation assumed by the United Kingdom under an ordinary international treaty or convention and there were no question of the treaty obligation being directly applicable as part of the law to be applied by the courts in this country without need for any further enactment, it is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it." [at page 415]

18. Another interesting aspect was brought out by the House of Lords in **The Hollandia's case** [1982] 3 All ER 1141, and that is that a treaty provision embodied in a statute needs to be construed uniformly in all the member nations who are its signatories, and should therefore not be controlled by domestic

precedents but should be construed on its own terms on broad principles of general application in a purposive and not in a narrow literal manner. This is stated in the following words:

> "My Lords, the provisions in section 1 of the Act that I have quoted appear to me to be free from any ambiguity perceptible to even the most ingenious of legal minds. The Hague-Visby Rules, or rather all those of them that are included in the Schedule, are to have the force of law in the United Kingdom: they are to be treated as if they were part of directly enacted statute law. But since they form part of an international convention which must come under the consideration of foreign as well as English courts, it is, as Lord Macmillan said of the Hague Rules themselves in *Stag Line Ltd. v. Foscolo, Mango and Co. Ltd.*[1932] A.C. 328 at 350, [1931] All ER Rep 666 at 677 -
>
> > "desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation."
>
> They should be given a purposive rather than a narrow literalistic construction, particularly wherever the adoption of a literalistic construction would enable the stated purpose of the international convention, viz., the unification of domestic laws of the contracting states relating to bills of lading, to be evaded by the use of colourable devices that, not being expressly referred to in the Rules, are not specifically prohibited." [at page No.1145]

19. In **Sidhu and others** v. **British Airways plc Abnett (known as Sykes) v. British Airways plc,** [1997] 1 All ER 193, the same thought was echoed in the following words:-

> "I believe that the answer to the question raised in the present case is to be found in the objects and structure of the convention. The language used and the subject matter with which it deals demonstrate that what was sought to be achieved was a uniform international code, which could be applied by the courts of all the High Contracting Parties without reference to the rules of their own domestic law." [at page No.212]

20. To similar effect are some of the judgments of our court. In **Vellore Citizens' Welfare Forum** v. **Union of India and others**, (1996) 5 SCC 647, when dealing with the Environment Protection Act, this Court stated:

> "Even otherwise once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost an accepted proposition of law that the rules of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law. To support we may refer to Justice H.R. Khanna's opinion in *Addl. Distt. Magistrate Jabalpur v. Shivakant Shukla* [(1976) 2 SCC 521 : AIR 1976 SC 1207], *Jolly George*

Varghese v. *Bank of Cochin* [(1980) 2 SCC 360 : AIR 1980 SC 470] and *Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey,* [(1984) 2 SCC 534 : 1984 SCC (Cri) 313 : AIR 1984 SC 667]." [at para 15]

21. Similarly in **Daya Singh Lahoria** v. **Union of India and others**, (2001) 4 SCC 516, when construing Section 21 of the Extradition Act, 1962, this Court referred to the Extradition Treaty and construed Section 21 in the light of the international position then obtained. This Court said:

"…. The Extradition Treaty contains several articles of which Article 7 is rather significant for our purpose, which may be quoted hereinbelow in extenso:

"7. A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning, to the territories of the High Contracting Party by whom he has been surrendered.

This stipulation does not apply to crimes or offences committed after the extradition."

The aforesaid Article unequivocally indicates that the person concerned cannot be tried for any other crime or offence than those for which the

> extradition shall have taken place until he has been restored or has had the opportunity of returning to the territories of the High Contracting Party by whom he has been surrendered. The provisions of Section 21 of the Extradition Act are in consonance with the aforesaid Article of the Extradition Treaty…." [at para 3]

22. In yet another judgment of this Court, i.e. **S&S Enterprise,** already referred to, this Court construed Rule 14(d) of the very anti-dumping rules with which we are concerned, in the light of the very agreement on implementation of Article VI of GATT. This Court was asked to compute the volume of exports on the basis of price and not on the basis of quantity. In repelling this contention, this Court referred to Article 5.8 of the Agreement on implementation of Article VI and held:-

> "However a negligible quantity of imports would not be sufficient to cause such injury. Article 5.8 of the Agreement on Implementation of Article VI of the GATT, 1994 makes this clear:
>
> > "An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is no sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the

> volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2%, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3% of imports of the like product in the importing member, unless countries which individually account for less than 3% of the imports of the like product in the importing member collectively account for more than 7% of imports of the like product in the importing member." [para 5]

> "Therefore, when Rule 14(d) says that the investigation must be terminated if the 'volume' of the dumped imports is less than 3% of the imports of the like product, it must mean that the quantity of dumped imports must account for less than 3% of the total imports. To hold otherwise would mean that if the price is lower than 3%, irrespective of the quantity imported, the investigation would be dropped and it would, as submitted by the appellant, lead to the absurd situation that a small number of expensive imports would invite anti-dumping investigation but cheap imports flooding the domestic markets would not. In fact such a situation is exactly what the dumping rules have been framed to prevent." [para 10]

23. A conspectus of the aforesaid authorities would lead to the following conclusions:

(1) Article 51(c) of the Constitution of India is a Directive Principle of State Policy which states that the

State shall endeavour to foster respect for international law and treaty obligations. As a result, rules of international law which are not contrary to domestic law are followed by the courts in this country. This is a situation in which there is an international treaty to which India is not a signatory or general rules of international law are made applicable. It is in this situation that if there happens to be a conflict between domestic law and international law, domestic law will prevail.

(2) In a situation where India is a signatory nation to an international treaty, and a statute is passed pursuant to the said treaty, it is a legitimate aid to the construction of the provisions of such statute that are vague or ambiguous to have recourse to the terms of the treaty to resolve such ambiguity in favour of a meaning that is consistent with the provisions of the treaty.

(3) In a situation where India is a signatory nation to an international treaty, and a statute is made in furtherance of such treaty, a purposive rather than a narrow literal construction of such statute is preferred. The

interpretation of such a statute should be construed on broad principles of general acceptance rather than earlier domestic precedents, being intended to carry out treaty obligations, and not to be inconsistent with them.

(4) In a situation in which India is a signatory nation to an international treaty, and a statute is made to enforce a treaty obligation, and if there be any difference between the language of such statute and a corresponding provision of the treaty, the statutory language should be construed in the same sense as that of the treaty. This is for the reason that in such cases what is sought to be achieved by the international treaty is a uniform international code of law which is to be applied by the courts of all the signatory nations in a manner that leads to the same result in all the signatory nations.

It is in the light of these principles that we must now examine the statute in question.

Construction of Section 9A.

24. Section 9A(1) refers to an anti-dumping duty. Such duty is only imposed when an article is exported from a country outside India to India at less than its normal value. Such duty can, in the Central Government's discretion, be imposed at a rate that does not exceed the margin of dumping, which only means the difference between the export price and the normal value of such article in international trade. It is clear that sub-section (1) refers to a "final" or "definitive" duty, and has to be read with sub-section (3) thereof, which authorises the levy of the "final" or "definitive" anti-dumping duty retrospectively in the circumstances mentioned in sub-section (3). The scheme therefore of Section 9A(1) and (3) is that an anti-dumping duty is normally to be imposed with prospective effect unless, *inter alia*, because of massive dumping of an article in a relatively short time the remedial effect of the anti-dumping duty to be levied would be seriously undermined. This would therefore require a retrospective duty being levied, but not beyond a period of 90 days, to undo the effect of undermining the anti-dumping duty to be levied. Short of sub-section (3), no

other part of Section 9A authorises the Central Government to levy an anti-dumping duty with retrospective effect.

25. Section 9A(2) speaks of an anti-dumping duty which the Central Government levies on the basis of a provisional estimate, thus referring to a provisional anti-dumping duty. The Section further goes on to say that after a final determination is made in accordance with the Rules, the Central Government may reduce such provisional anti-dumping duty, having regard to the final determination made by the designated authority under the Rules. If and when this happens, what is important to note is that refund shall be made of so much of the anti-dumping duty which has been collected in excess of the final anti-dumping duty so reduced. Under sub-section (5), a maximum period of five years is allowable on the anti-dumping duty imposed. This is extendable only for a further period of five years and not beyond. Sub-section (6) in turn refers to the Central Government's power to make rules, *inter alia*, to assess and collect anti-dumping duty.

26. It is important to note that neither sub-section (2) nor sub-section (6) authorises the Central Government, either

expressly or by necessary implication, to make rules and/or to levy anti-dumping duty with retrospective effect. This is in contrast with sub-section (3) which expressly so authorises the Central Government in the circumstances mentioned in the sub-section.

Interpretation of the Anti-Dumping Rules

27. A reading of the Anti-Dumping Rules would show that they have been framed keeping in view the WTO Agreement of 1994 strictly in mind. A designated authority is appointed under Rule 3 who, under Rule 4, is to investigate the existence, degree, and effect of dumping in relation to import of any article and to submit its findings, provisional or final as the case may be, to the Central Government. The designated authority is to initiate an investigation either *suo motu* or upon receipt of a written application by or on behalf of the domestic industry into (i) dumping (ii) material injury to the domestic industry and (iii) where applicable, a causal link between such dumped imports and the material injury – see Rule 5. Such investigation is to be initiated by issue of a public notice under rule 6. Since material injury to an established domestic injury or material retardation

of the establishment of any such industry is an important aspect in levying anti dumping duty, the designated authority is to be guided, under Rule 11, by Annexure II of the Rules, paragraphs (iv) and (v) of which read as under:-

> "(iv) The examination of the impact of the dumped imports on the domestic industry concerned, shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including natural and potential decline in sales, profits, output, market share, productivity, return on investments or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital investments.
>
> (v) It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs (ii) and (iv) above, causing injury to the domestic industry. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of relevant evidence before the designated authority. The designated authority shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injury caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in

technology and the export performance and the productivity of the domestic industry."

28. It will thus be seen that the determination of material injury to domestic industry depends on a series of complex economic factors which are to be segregated from other factors which may also cause injury to the said industry.

29. Under Rule 12, the designated authority is to "proceed expeditiously" with the conduct of the investigation and shall in appropriate cases record his preliminary findings on all the aspects delineated above. No time frame is indicated except that utmost dispatch is the order of the day.

30. Rule 13 is very important and when Rule 20 is read harmoniously with both Rules 13 and 21, all the dark clouds which come in on account of the suggested construction of Rule 20 by revenue get dispelled by the sunlight of harmonious construction of all the three Rules read together.

31. Rule 13, in line with clause 7.4 of the WTO Agreement, enables the Central Government to impose provisional anti-dumping duty not exceeding the margin of dumping, with

two provisos. First, no such duty can be imposed before the expiry of 60 days from the date of public notice issued by the designated authority regarding its decision to initiate investigations. And second, such duty cannot remain in force for a period of more than six months, which is only extendable on request made by the foreign exporters who represent a significant percentage of the trade involved, to a maximum period of 9 months. The important words used in the second proviso are “shall”, “only”, and “not exceeding”, all of which point to the fact that the time period mentioned in the said proviso is mandatory and cannot be exceeded by even a single day.

32. Under Rule 17, the designated authority is given one year from the date of initiation of an investigation to come out with its final findings. This is extendable by the Central Government only in special circumstances, and only by a further period of 6 months, and no more (Clause 5.10 of the WTO Agreement). Significantly, the designated authority, in its final finding, may also provide for a retrospective levy of duty, the reasons therefor, and the date of commencement of such retrospective

levy. This is obviously referable to Section 9A(3), which reproduces clause 10.6 of the WTO Agreement. The reasons must be the reasons mentioned in the said sub-section, and, as mentioned in the said sub-section, such retrospective levy cannot commence beyond 90 days from the date of the notification imposing provisional duty.

33. Under Rule 18, the Central Government may in its discretion, and within a maximum period of three months from the date of publication of the final findings by the designated authority, impose a final anti-dumping duty.

34. This brings us to Rule 20, the correct construction of which is determinative of the question raised in these appeals. The first thing to notice about Rule 20 is, as its marginal note states, that it is concerned only with the date of commencement of duty. Once this is appreciated, it becomes clear that its focus is only on when anti-dumping duties are to commence. In sub-rule (1), it speaks of anti-dumping duties levied under Rule 13 and Rule 19, and states that they shall take effect only prospectively, i.e. from the date of publication in the official gazette. It is clear that Rule 19 is a mistake made by the

draftsman of the Rules. Rule 18 is obviously referred to. Thus, under sub-rule (1), the provisional anti-dumping duty takes effect on and from the date of its publication in the official gazette. Same is the case with the final anti-dumping duty levied under Rule 18.

35. Sub-rule (2) is in two parts. Sub-clause (a) deals with the date of commencement of an anti-dumping duty, having due regard to a provisional duty that has been levied, whereas sub-clause (b) specifically deals with duty to be retrospectively imposed, that is a retrospective imposition prior to the imposition of a provisional duty. It will immediately be noticed that the subject matter of sub-clause (a) does not purport to be the imposition of an anti-dumping duty with retrospective effect. This is because it seeks to give effect to clause 10.2 of the WTO Agreement. As has been argued by learned counsel on both sides, the key to the understanding of the import of sub-clause (a) is the expression "where a provisional duty has been levied…." Obviously, the word "levied" has to be read as levied in accordance with Rule 13 which, as its marginal note indicates, provides for the "levy" of provisional duty. Once this

is clear and the word “levied” is to be understood as levied under Rule 13, the second proviso of Rule 13 gets attracted, and under this proviso such levy cannot be for a period exceeding 6 months (on facts in these cases, such period has not in fact been extended beyond 6 months). Thus, it is clear that all that sub-rule (2)(a) does is to enable the levy of a final anti-dumping duty from the date of imposition of a provisional duty so as to convert the provisional measure into a final measure, or so as to take within its ken the provisional anti-dumping duty already imposed. This aspect is succinctly put by “A Handbook on Anti-Dumping Investigations” by Judith Czako, Johann Human and Jorge Miranda. The learned authors state:

> “L. RETROACTIVE COLLECTION OF DEFINITIVE DUTIES
>
> The normal rule for application of definitive duties, set out in Article 10.1 of the AD Agreement, is that duties shall only be collected on imports made (“entered for consumption”) after the effective date of the final determination. Articles 10.2 and 10.6 establish two exceptions to this general rule, providing for the retroactive collection of definitive duties (that is, for the collection of definitive duties before the effective date of the final determination) in two situations:

- The first such situation involves the collection of definitive duties for the period during which provisional measures were applied (and for all practical purposes "converts" the provisional measure into a definitive measure); and

- The other involves the collection of definitive duties up to 90 days prior to the date of application of provisional measures, although no definitive duties can be collected on imports that took place before initiation."

36. On a correct reading of the said sub-rule, therefore, the final anti-dumping duty only incorporates the provisional anti-dumping duty within itself, but in the manner provided by Rule 13. Thus, it is clear that such incorporation can only be the period upto which the provisional duty can be levied and not beyond. Thus understood, it is clear that both literally, and in keeping with the object sought to be achieved – that is the making of laws in conformity with the WTO Agreement, there can be no levy of anti-dumping duty in the "gap" or interregnum period between the lapse of the provisional duty and the imposition of the final duty. Such interpretation makes it clear that clause 10.2 of the WTO Agreement is reproduced in the

same sense though not in the same form in sub-rule (2)(a). The same result therefore as is envisaged in clause 10.2 is achieved by the said construction – that is anti-dumping duty may be levied retroactively for the period for which provisional measures have been applied. The said construction is in consonance with the principles already laid down earlier in this judgment in that the WTO Agreement is intended to be applied by the various signatory nations in a uniform manner. This can only be done by construing the language of Section 9A read with the Rules in the same sense as that of the WTO Agreement.

37. At this juncture, it is interesting to note that a number of member countries of the WTO agreement have opted for the Rule by which anti-dumping duty is levied to the full extent of the margin of dumping. Such nations like Argentina, Mexico and USA therefore have, under the WTO Agreement, only a period of 4 months extendable upto a maximum period of 6 months (instead of 6 months and 9 months respectively) so far as the life span of a provisional duty is concerned. Most of Europe and the rest of the world have opted to impose duties

upto the margin of dumping depending upon the extent of injury caused to their domestic industry. Interestingly, the European Community Council Regulation No. 1225 of 2009 dated 30.11.2009 on protection against dumped imports from countries not members of the European Community has this to say:

"Article 9

Termination without measures; imposition of definitive duties

> 4. Where the facts as finally established show that there is dumping and injury caused thereby, and the Community interest calls for intervention in accordance with Article 21, a definitive anti-dumping duty shall be imposed by the Council, acting on a proposal submitted by the Commission after consultation of the Advisory Committee. The proposal shall be adopted by the Council unless it decides by a simple majority to reject the proposal, within a period of one month after its submission by the Commission. Where provisional duties are in force, a proposal for definitive action shall be submitted no later than one month before the expiry of such duties. The amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry."

38. It will be seen from this that an inflexible rule is laid down that would ensure that no "gap" or intervening period occurs

between the expiry of the provisional duty and the imposition of the final duty, inasmuch as a proposal to levy final duty has to be submitted no later than one month before the expiry of a provisional duty.

39. However, interestingly enough, in the United States Manual dealing with anti-dumping duties, the following is the statement of law:-

> "Therefore, a period of time, known sometimes as the "gap period," may exist between the expiration of the end of the provisional measures, even if extended, and the publication of the ITC's final determination (the starting of definitive duties) where the DOC cannot require CBP to collect cash deposits, bonds, or other securities. (The gap period begins the day after the end of the 4- or 6-month period, and ends the day before the ITC's final determination is published). The DOC normally administers this problem in one of two ways. We either send instructions to CBP towards the beginning of the gap period, instructing them to stop collecting cash deposits or bonds, or we wait until the order has been published, then instruct CBP to liquidate all entries during the gap period without regard to antidumping duties."

40. We are heartened to note that one other signatory nation has taken the stand that no duty can be collected during the "gap period".

41. Viewed slightly differently, the suggested construction by revenue would render Rule 2(a) *ultra vires* Section 9A. It has already been seen that sub-section (2) and sub-section (6) of Section 9A do not authorize the imposition of a duty with retrospective effect, in contrast with sub-section (3) thereof. Any duty levied by a final duty notification during the interregnum period would necessarily amount to a retrospective levy of duty for the reason that such period is not covered by the provisional duty notification, being beyond 6 months. This would therefore render sub-rule (2)(a) *ultra vires* Section 9A. A construction which is both in consonance with international law and treaty obligations, which Article 51(c) of the Constitution states as a directive principle of State policy; and with the application of the doctrine of harmonious construction is to be preferred to a narrow doctrinaire meaning which would lead to the Rule being read in such a manner that it is *ultra vires* the parent statute.

42. One other interesting thing remains. Most of the debate at the Bar was centered around the expression “levied” in Rule 20 sub-rule (2)(a), revenue contending, based on two judgments of

this Court in **N.B. Sanjana, Assistant Collector of Central Excise, Bombay and others** v. **The Elphinstone Spinning and Weaving Mills Company Ltd.**, 1971 (1) SCC 337 and **Assistant Collector of Central Excise, Calcutta Division** v. **National Tobacco Co. of India Ltd.,** (1972) 2 SCC 560, that "levy" does not include "collection". This has been countered by arguments on behalf of the assessees that the word "levied" in the said sub-rule has been used in the same sense as the expression "imposed and collected" in Rule 21(1), and would therefore include "collection" as well. In view of what has been held by us above, we find it unnecessary to decide this contention.

43. The effect of Rule 21 on the aforesaid construction of Rule 20 now needs to be adverted to. Rule 21, in turn, is made to carry out what is stated in clause 10.3 of the WTO Agreement. Rule 21(2) echoes what is already found in Section 9A(2). If provisional anti-dumping duty is found to be higher than the final anti-dumping duty, the differential shall be refunded to the importer. But sub-rule (1) goes a step further and states that if the anti-dumping duty finally imposed is higher

than the provisional duty already imposed and collected, the differential shall not be collected from the importer.

44. It is obvious that this Rule has been framed in the interest of international trade. It is well known that export contracts are entered into long before anti-dumping duties may be imposed, and in the interests of international trade, the importer should not be put to a loss in case a final duty happens to be higher than the provisional duty already imposed. The delicate balancing act between protection of domestic industry and the hardship caused in the course of international trade has thus been tilted in favour of the latter. If learned counsel for the revenue were right, despite the fact that such differential cannot be collected from the importer under Rule 21(1) for the period that the provisional duty notification is in force, during the interregnum period, the full amount of final duty is liable to be recovered from the importer. This would turn Rule 21(1) on its head and result in an absurdity. A simple example will suffice. If provisional duty already imposed and collected is Rs. 50/- per metric ton (PMT), and final duty imposed say one year later with retroactive effect from the date of imposition of the provisional

duty is Rs. 100/- PMT, the difference of Rs. 50/- PMT cannot be recovered from the importer for the period that the provisional notification is in force. Therefore, for the first 6 months in the aforesaid example, the importer is liable to pay nil duty. However, for the next 6 months, that is in the interregnum period between the expiry of the provisional duty and the date of imposition of the final duty, the importer becomes liable to pay Rs.100/- PMT. The said example demonstrates how the arguments of the revenue would lead to an absurdity such as this.

45. Rule 21(1) also answers the contention of the Revenue that the object of anti-dumping laws would be defeated if it were found that dumping and material injury having been found, yet no anti-dumping duty can be levied. By application of this Rule, it is clear that for the period that the provisional duty notification is in force, the difference of Rs.50/-, in the example just given, cannot be collected from the importer despite Rs.50/- having been imposed because of dumping and material injury to the domestic industry. Therefore, it is clear that there already exists, within the scheme of the anti-dumping law, a situation in

which there is dumping and material injury to the domestic industry, for which an anti-dumping duty is levied, but which cannot be collected. There is, therefore, a balance struck between material injury to the domestic industry and retrospective levy of duty in favour of the latter.

46. We also find force in the submission of learned counsel for the assessees that the revenue's construction of Rule 20 would achieve indirectly what cannot be achieved directly, having regard to the mandatory language contained in Rule 13 second proviso. Here again a simple example would suffice. Say the provisional duty is levied at the rate of Rs. 50/- PMT and comes to an end after 6 months. 6 months later, a final duty is imposed again at the same rate of Rs. 50/- PMT with effect from the date of levy of the provisional duty. If learned counsel for the revenue were right, Rs. 50/- PMT could be recovered under Rule 20(2)(a) for the interregnum period as well which would, in effect, destroy the scheme of Rule 13 second proviso by extending the period of the provisional duty notification beyond a period of 6 months, which clearly cannot

be done. We find therefore that on all these counts, the arguments of revenue cannot be countenanced.

47. It remains now to deal with the impugned judgment of the Bombay High Court. After setting out the contentions of the respective parties and referring to the relevant statutory provisions and the WTO Agreement, the Bombay High Court arrives at a finding that Parliament has made a departure from the language used in the WTO Agreement and the Court must therefore give effect to such departure.

48. We have already held that this would fly in the face of all the judgments referred to in paragraphs 15 to 22 hereinabove, and principles (3) and (4) of paragraph 23 of this judgment which speak of how domestic legislation must be construed when it is made in furtherance of an international treaty. In particular, in the facts of these cases, it would also ignore the effect of Article 18.4 of the WTO Agreement, which expressly states that all the signatory member nations have to make their laws “conform” to the provisions of the WTO Agreement, something which the Central Government itself states in its internet website which deals with the law of anti-dumping.

49. The High Court goes on to state that the construction suggested on behalf of the assessee would lead to a manifest absurdity as there would be no reason or justification to hold that the levy of anti-dumping duty must sustain a break during the period between the expiry of the provisional duty notification and the issuance of a notification imposing a final anti-dumping duty. The High Court went on to hold that the object and purpose underlying Section 9A would be defeated, as for the interregnum period where both dumping and material injury to domestic industry are found, no anti-dumping duty can be issued. This conclusion again cannot be countenanced for the simple reason that if Rule 20(2)(a) were to be construed n the fashion suggested by the High Court, it would be *ultra vires* Section 9A for the reasons already given by us. Further, the object and purpose of Section 9A is to impose an anti-dumping duty in consonance with the WTO Agreement, which Section 9A gives full effect to. These basic points have been missed by the High Court in arriving at the aforesaid finding. Further, the High Court fails to give due importance in its judgment to Rules 13 and 21. We have already seen how Rule 21(1) envisages

precisely the situation spoken of by the High Court, and yet states that, in the circumstances mentioned therein, despite dumping and material injury to the domestic industry, differential duty cannot be collected from the importer. In fact, the High Court goes on to say that the expression "imposed and collected" in Rule 21, not being there in Rule 20(2)(a), cannot therefore be imported into the said sub-rule, so that "levied" cannot mean "imposed and collected". We have already held, in view of our construction of Rule 20(2)(a), that this need not be gone into. What has been missed by the High Court is that the expression "levied" has to be understood as "levied" under Rule 13 and once this is so, it becomes clear that such levy cannot exceed a period of 6 months or a maximum period of 9 months, as the case may be.

50. The Bombay High Court follows the Kerala High Court reasoning, which is to the same effect. For the reasons given by us in this judgment, we find it difficult to accede to such reasoning. We, therefore, allow the appeals of the assessees and dismiss Civil Appeal No. 3889 of 2006 of the revenue. We make it clear that we have only decided the point of levy of

anti-dumping duty during the interregnum between the expiry of a provisional duty notification and the imposition of a final anti-dumping duty. If either the assessees or the revenue have succeeded on any other point, such point will remain untouched by this judgment. With these observations, all the said appeals are disposed of.

…….J.
(A.K. Sikri)

…….J.
(R.F. Nariman)

New Delhi;
September 23, 2015.