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Article

Scope of product under consideration in anti-dumping investigations

By **Bhargav Mansatta**

'Product under consideration' (PUC) in an anti-dumping investigation is the imported product which is alleged as being dumped in the domestic market of the investigating country. To this end, Article 2.1 of the Anti-dumping Agreement (ADA) provides as below:

"For the purpose of this Agreement, a *product is to be considered as being dumped*, i.e. introduced in to the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."

When the export price of the identified PUC is lower than its normal value then it is characterized as dumping and the product is called as the dumped product. Article 2.4.2 of the ADA explains how domestic investigating authorities must proceed in establishing 'the *existence of margins of dumping*', i.e. it explains how dumping is to be established in an anti-dumping investigation. It provides in relevant part as below:

"Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of process of *all comparable export transactions* or by a comparison of normal value and export prices on a transaction to transaction basis..."

There is no specific provision in the ADA concerning the selection, description, or determination, of a PUC. The ADA does not provide any guidance with regard to identification of PUC.

When the alleged dumped product is capable of production or is available in different types and models, domestic industry while filing the petition for initiating anti-dumping investigation, to avail maximum protection, often

seeks to include all product types and models within the scope of PUC. The problem arises at the time of imposition of anti-dumping duty in cases where there is considerable difference in the price and physical characteristics of different product types and models which form part of single PUC.

In *EC – Bed Linen*¹, the EC defined PUC as bed linen of cotton-type fibres, pure or mixed with man-made fibres or flax, bleached, dyed or printed. Bed linen included bed sheets, duvet covers and pillow cases, packaged for sale either separately or in sets. The EC calculated separate margins of dumping for separate model types to apply the 'zeroing methodology'. In the zeroing methodology, the EC compared weighted average normal value with the weighted average of export price for each model type separately within the PUC instead of PUC as a whole. It arrived at negative dumping margin for certain model types. While adding up the amounts it had calculated as 'dumping margins' for each model, it 'zeroed' the negative dumping margins which were arrived at with respect to certain model types. Thereafter, it added positive dumping margins and zeroes to determine the overall margin of dumping for the PUC.

The WTO Appellate Body (AB) observed that having defined the product at issue as it did, the EC was bound to treat that product consistently thereafter in accordance with that definition. Article 2.4.2 does not provide for the establishment of 'the existence of margins of dumping' for types or models of the product under investigation but the product that is subject to investigation.²

The foregoing observation was made by the AB while holding the 'zeroing' methodology as being inconsistent with ADA. The AB based on the interpretation of Article 2.4.2 held the methodology adopted by the EC as inconsistent with ADA. The interpretation of the AB with

¹ Appellate Body Report, European Communities – Anti-dumping duties on imports of cotton-type bed linen from India, WT/DS141/AB/R, 1 March 2001

² *Id.*, para. 52

regard to Article 2.4.2 will not only render zeroing as inconsistent but will also prevent members from imposing different rates of anti-dumping duty for different type of models by adopting multiple averaging.

The observation in *EC-Bed Linen* case came for consideration before the AB in *United States - Softwood Lumber*³. The AB clarified that multiple averaging is not *per se* prohibited under Article 2.4.2 and the reasoning of the AB in *EC-Bed Linen* case should not be read as prohibiting that practice. The AB did not rule on multiple averaging in *EC-Bed Linen* case as it was not an issue before it. However, it disagreed with the United States' argument that Article 2.4.2 of ADA refers to comparison at sub-group levels and that it does not address the issue of how the results of such comparison are to be aggregated.

The AB observed that investigating authority may undertake multiple averaging to establish margins of dumping for a product under investigation but they are not 'margins of dumping' within the meaning of Article 2.4.2, they are only intermediate calculations. It can form the basis for determining final dumping margin for the PUC as a whole. Thus, as per Article 2.4.2, investigating authority has to necessarily establish margins of dumping for the product as a whole.⁴

The AB also found the basis for its determination in Article 2.1 of the ADA which provides for determination of dumping of a *product*. In addition, it referred to Articles 6.10, 9.2 of the ADA and Article VI:2 of GATT 1994. Article 6.10 provides that the investigating authority shall determine an individual margin of dumping for each known exporter or producer concerned of the *product under investigation*. Article 9.2 of ADA and Article VI: 2 of GATT 1994 provide for imposition of anti-dumping duty on the imported product i.e. PUC.

In many cases, investigating authorities in EU, India, U.S. and other jurisdictions tend to use the flexibility

provided under the ADA while determining the scope of PUC. However, considering the foregoing interpretation, heterogeneity amongst the products within the PUC may invite practical difficulties at the time of imposition of duties. Overtly broad PUC may result in imposition of anti-dumping duty which is not appropriately attributable to each product type within the PUC. Also, the entire subsequent investigation hinges on the identified PUC. Determination of 'like product', price comparison, evaluation of information and the like will depend on PUC.

In *EC-Salmond*⁵, Norway argued that internal homogeneity within the PUC is mandatory under the ADA. Norway stated that if cars and bicycles are treated as one product under investigation then it would not be known whether some or all of the products are dumped. The Panel while rejecting the argument noted as below⁶:

"We are not persuaded by Norway's extreme example. Any grouping of products into a single product under consideration will have repercussions throughout the investigation, and the broader such a grouping is, the more serious those repercussions might be, complicating the investigating authority's task of collecting and evaluating relevant information and making determinations consistent with the AD Agreement."

Thus, from the foregoing analyses of the WTO disputes, it can be summarized that there is little doubt regarding the flexibility provided to investigating authorities in identifying the PUC, but before exercising their discretion regarding the scope of PUC, investigating authorities have to be mindful of the repercussions and complications which the overtly broad PUC may create in subsequent stages of the investigation process. Excessive heterogeneity among the products covered under the PUC may result in a determination which may fall foul of other provisions of the ADA.

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³ Appellate Body Report, United States – Final dumping determination on softwood lumber from Canada, WT/DS264/AB/R, 11 August 2004

⁴ *Id.*, para. 96 to 98

⁵ Panel Report, European Communities – Anti-dumping measure on farmed salmon from Norway, WT/DS337/R, 16 November 2007

⁶ *Id.*, para. 7.58

Trade Remedy News

Anti-dumping actions by India

Hexamine from Russia and Saudi Arabia – ADD extended: Consequent to initiation of sunset review, existing anti-dumping duties on imports of Hexamine from Saudi Arabia and Russia have been extended for a period of one year. Notification No. 38/2012-Cus. (ADD), dated 6th August 2012 issued for this purpose amends Notification No. 89/2007-Cus., dated 25th July, 2007 which had expired on 24-7-2012. The extended anti-dumping duties will remain in force till 24th July 2013 unless revoked earlier.

Nonyl Phenol from Chinese Taipei – ADD extended: Anti-dumping duty on imports of Nonyl Phenol from Chinese Taipei has been extended for period of one year. Notification No. 39/2012-Cus. (ADD), dated 24-8-2012 issued in this regard extends the levy till 21-8-2013, consequent to initiation of sunset review by the Indian Ministry of Commerce in respect of duties levied under Notification No. 94/2007-Cus.

Metronidazole from China – ADD re-imposed: Indian Ministry of Finance has again imposed anti-dumping duty on imports of Metronidazole from China. Notification No. 40/2012-Cus. (ADD), dated 30-8-2012, issued pursuant of final findings in sunset review by the Ministry of Commerce, imposes such levy for a period of five years.

DVD-R from Vietnam – Mid-term review initiated: DGAD in the Ministry of Commerce, India has initiated anti-dumping mid-term review investigation on imports of Recordable Digital Versatile Disc [DVD-R] of all kinds from Vietnam. As per Notification No. 15/5/2012-DGAD dated 16th August 2012, period of investigation is from 1-4-2011 to 30-3-2012.

Specified Polyester Yarns from Indonesia, Korea, Malaysia and Chinese Taipei – ADD revocation recommended: Pursuant to sunset review investigation, DGAD in the Ministry of Commerce has recommended revocation of anti-dumping duties on imports of Full Drawn or Oriented Yarn/Spin Drawn Yarn/ Flat Yarn of Polyester from Indonesia, Republic of Korea, Malaysia and Chinese Taipei. Notification F.No.15/26/2010- DGAD, dated 16th August 2012, recommends revocation of anti-dumping duties which were extended by Customs Notification No.15/2012-Cus., dated 5-3-2012 amending basic Notification No. 15/2007-Cus.

Polypropylene from Saudi Arabia, Singapore and Oman – ADD recommendation confirmed: DGAD in the Ministry of Commerce has in its post decisional final finding dated 9th August 2012 confirmed its earlier findings issued on 23-8-2010. The findings relate to recommendation of anti-dumping duty on imports of Polypropylene from Saudi Arabia, Singapore and Oman. Earlier the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), New Delhi, by its order dated 14th May 2012, had remanded the matter for a post decisional hearing. Presently such duty is not levied on imports of said product from Saudi Arabia.

Tyres – New Pneumatic Non-radial Bias Tyres for buses and lorries, from China and Thailand – ADD continuation recommended: Pursuant to sunset review investigation, DGAD has recommended continuation of ADD on imports of new/unused pneumatic non-radial bias tyres, tubes and flaps, having nominal rim dia code above 16", used in buses and lorries/trucks, from

China and Thailand. DGAD in its final finding under Notification No. 15/35/2010-DGAD, dated 2-8-2012 reduced the ADD on imports from China and increased the same in case of imports from Thailand while also observing that the measure required extension.

Paracetamol from China – ADD sunset review initiated: DGAD in the Ministry of Commerce has initiated second sunset review in respect of imports of Paracetamol from China. Period of investigation, as per Notification F.No. 14/1009/2012-DGAD, dated 28-8-2012 issued in this regard, is from 1-1-2011 to 31-3-2012. Presently, Customs Notification No. 99/2007-Cus. covers ADD on this product.

Trade remedy actions against India

Sulfamethoxazole (SMZ) - China revises ADD: With effect from 17-8-2012, China has revised anti-dumping duties, pursuant to a mid-term review, on imports of Sulfamethoxazole (SMZ) from India. MOFCOM Announcement No. 50 of 2012, dated 16-8-2012 states that anti-dumping duty @ 17.2% would be imposable on imports from Andhra Organics Ltd. and Virchow Laboratories Ltd., while 36.4% would be imposed on other Indian SMZ exporters.

Stainless Steel Wires - EU initiates anti-subsidy and

anti-dumping investigations: On 10th August 2012, the European Commission has initiated anti-subsidy and anti-dumping investigation against imports of Stainless Steel Wires originating from India. Anti-subsidy investigation, as per Articles 11(9) and 12(1) of the EC Basic Regulation, will be concluded within 13 months and provisional measures will be imposed within 9 months of initiation of the investigation. In case of anti-dumping duty, investigation will be completed within 15 months and provisional duty will be imposed within 9 months according to Articles 6(9) and 7(1) of the basic Regulations.

Sodium Dicloxacillin - Mexico imposes Countervailing duty: On 6th August 2012, Mexico imposed a definitive countervailing duty of 64.9% on imports of Sodium Dicloxacillin imported from India. Countervailing duty has been imposed after coming to a positive conclusion regarding existence of grant, which is causing significant harm to the national industry of Mexico. Strangely, Mexico has adopted the subsidy margins found by European Commission in a case relating to some other antibiotics that too in the year 2005 based on the data for the year 2002-03. Though seven years have lapsed, Mexico has thought it fit to adopt the same subsidy margin for this case.

WTO News

DSB Panel established on US countervailing measures on steel from India

The Dispute Settlement Body of the WTO has established Panel, at the request of India, to analyse certain countervailing duty measures imposed by USA on import of certain hot-rolled carbon steel flat products from India. As per India's request the measures are inconsistent with the WTO's Subsidies

and Countervailing Measures (SCM) Agreement and the GATT 1994. Earlier on 23rd of July, US had rejected the India's first request for establishment of the panel. European Union, Saudi Arabia, Canada, China, Turkey and Australia are the third parties to the dispute.

Argentina takes centre stage at DSB

Last month, Argentina took the centre stage as far as WTO disputes are concerned. Argentina made a number of consultation requests while many countries filed for consultations with Argentina on the latter's measures restricting imports. While Mexico notified the WTO on 24th August of its request for consultations with Argentina, Japan and USA notified their similar desire on 21-8-2012. All the three countries alleged that import restrictions, put in place by Argentina, caused by a system of non-automatic import licensing and other related measures, restricted import of goods and discriminated between imported and domestic goods.

In other developments, Argentina has requested for consultations with the EU and the US. The request for consultation with the European Union as well as Spain, on 17 August 2012, concerns certain measures affecting the importation of biodiesels

by the EU. The measure in dispute is the national implementation of the European Union regulatory framework for energy from renewable sources. As per Argentina, the measures would create discrimination between the product of European origin and that of other origins, implying a *de facto* prohibition on imports of biodiesel from outside the Community, for purposes of computing compliance with mandatory biofuel targets and hence is inconsistent with Articles III and XI of GATT, 1994, Article 2 of TRIMS Agreement and Article XVI.4 of the Marrakesh Agreement.

Further, Argentina has on 30th August, 2012 notified the request for consultations on measures applied by the US on imports of meat and other products of animal origin from Argentina. It is claimed that the restrictions, applied on sanitary grounds, do not have scientific justification and that the measures appear to cancel or impair the benefits for Argentina as derived from the WTO Agreements.

FTA News

India and ASEAN to have FTA on services and investments

Trade Ministers of India as well as 10 ASEAN countries have agreed to conclude the ongoing negotiations on widening the Free Trade Agreement among them so as to also cover services and investments. FTA for goods between the two parties is already operational and has resulted in substantial increase in the trade. As per the official statement released during 10th ASEAN-

India Economic Ministers Consultations, India will be hosting a meeting of the working group on services and investment in the second half of September to conclude negotiation before the ASEAN-India Commemorative Summit in December in New Delhi. Besides India, Japan, Australia, China, South Korea and New Zealand have FTA with ASEAN.

RATIO DECIDENDI

‘Domestic industry’ can include importer of the product under consideration

The Calcutta High Court Division Bench has reversed the order of the Single Judge which held that an importer of the article under investigation cannot be considered eligible as ‘domestic industry’. The Division Bench held that while interpreting the term ‘importer’, intention of the legislature should also have been taken into account apart from literal and apparent meaning as considered by the Single Bench. The Court further held that the object clause of Memorandum of Association of the domestic producer who applied as domestic industry, which provides for principal business of such domestic

producer, should also be considered. It observed that realistic and logical meaning of ‘importer’ should be the person who is carrying on business of import exclusively for trading purpose. It was hence held that though the appellant imported insignificant amount of the article under investigation, he would still be eligible as ‘domestic industry’. [*State of Gujarat Fertilizers & Chemicals Ltd. v. Additional Secretary and Designated Authority* - Order of Calcutta High Court dated 7-8-2012 in FMA 55 of 2012 with M.A.T. 1960/2011].

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