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## Article

### Anti-dumping duty assessment and combination rates

By **Bhargav Mansatta**

#### Introduction

In India, anti-dumping duty rates are designated for a combination of 'producer and exporter'. In many other countries, such a combination rate is not being followed. It is common knowledge that producers may export goods directly to their customers abroad or they may export through independent trading houses. On several occasions, producers rely on trading houses for their export sales as such trading houses are familiar with international customers, pricing and market situation. The question arises regarding the applicable anti-dumping duty rate on such exports. Extent of dumping done by a particular producer-reseller combination may differ from direct exports by the producer or from another producer-reseller combination. Anti-dumping Agreement does not provide any guidance for assessment of duty in such a situation.

In India, there is no express legal basis for the use of combination rates. However, the Director General of Anti-dumping (DGAD) has invariably resorted to use of combination rates in anti-dumping investigations. Rationale for use of combination rate is not found in the findings of the authority. It is understandable that the basic objective for using the combination rate is to avoid dumping by the reseller. Combination rate approach is not without its problems. When the subject merchandise is exported by the reseller which is sourced from several producers or when the subject merchandise produced by a single producer is exported through several exporters, then co-operation of all the producers and exporters becomes relevant in order to prescribe a combination

rate. Failure to co-operate by any one reseller or producer in such a situation may result in an adverse determination and the residual duty rate may be prescribed for all the parties, including those who have cooperated fully with the authority in the investigation.

#### United States Practice

In the United States, Title 19, Part 351 of Code of Federal Regulations (19 C.F.R § 351) provides for rules relating to anti-dumping and countervailing duty investigations. When the goods are exported by a non-producing exporter 19 C.F.R § 351.107 (b) (1) (i) provides that "*Secretary may establish a "combination" cash deposit rate for each combination of the exporter and its supplying producer(s)*".

As highlighted by the United States Court of Appeals, the rationale for using combination rate may be that the producer is held responsible only for its own dumping unlike in case of single rate method where he is held responsible for the reseller's dumping. Despite the express provision, United States has rarely resorted to the use of combination rates in the case of anti-dumping investigations. It is significant to note that the U.S. has adopted a knowledge based approach in case of application of combination rates. The regulation inserted in 1997 [See 62 FR 27296, dt. May 19, 1997] by which the aforementioned rule relating to combination rate was inserted also provided as below:

*"The Department also believes it is not appropriate to establish combination rates in an investigation or review of a producer i.e. where a producer sells to an exporter*

*with knowledge of exportation to the United States. In these situations, the establishment of separate rates for a producer in combination with each of the exporters through which it sells to the United States could lead to manipulation by the producer. . . . In such situations, the Department generally intends to establish a single rate for such a respondent based on its status as a producer, although unusual circumstances may warrant the application of a combination rate.”*

This is evident in the case of *Tung Mung Development Co. Ltd. v. United States*, 354 F.3d 1371 wherein the United States Court of Appeals upheld the determination made by Department of Commerce when it used a combination rate for producers who were unaware of middleman (reseller) dumping. Even in case of non-market economy countries, application of combination rates is prescribed by the U.S. [See Import Administration: Policy Bulletin 05.1, 5 April 2005]. It is also provided that one rate is calculated for the exporter and all of the producers which supplied subject merchandise to it during the period of investigation. This was adopted to prevent avoidance of payment of anti-dumping duties by shifting exports through exporters with the lowest assigned rate.

Moreover, in the United States, when the reseller who has exported subject merchandise does not have its own rate of duty, then instead of the ‘all others’ rate, the rate specified for the producer whose merchandise has been exported by the reseller will be made applicable unless review is requested against such producer or reseller or when the producer did not know that the merchandise sold to the reseller was meant for export to the U.S. Also, in the course of review, knowledge based approach is adopted. If the Department determines that the producer knew, or should have known that the merchandise it sold to the reseller was meant for export

to the United States, the reseller’s merchandise will be liquidated at the producer’s assessment rate which the Department calculates for the producer in the review. [See 63 FR 55361, Dt. Oct. 15, 1998 and 68 FR 23954, dt. May 6, 2003]

However, in India, If there is no specific rate prescribed for a reseller who has exported the subject merchandise, then in such a situation, as a matter of practice, the goods will be subject to the anti-dumping duty at ‘all others’ rate.

### **Conclusion**

Generally, use of combination rate may result in fair assessment of anti-dumping duty in as much as it attributes dumping to the person responsible for it. However, as highlighted in the introductory portion, it is important to warn against the use of combination rate in each and every investigation. Use of combination rate by reason of mere apprehension of reseller dumping may result in unnecessary prejudice to the producer or reseller who are ready to co-operate but are subject to a higher rate of ‘all others’ duty for want of cooperation by other independent reseller or producers, as the case may be. To avoid such problems, as a matter of practice, countries have increasingly resorted to use of single rate instead of a combination rate.

The problem is significant in India for its consistent use of combination rate whereas in the United States, adoption of knowledge based approach has, in effect, resulted in a situation whereby there are only a few cases where the department has resorted to use of combination rate. It is high time that India aligns its practices with international practices and discontinues the practice of using combination rates.

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## Trade Remedy News

### Anti-dumping actions by India

**Coumarin from China – ADD confirmed:** Anti-dumping duty on Coumarin originating in, or exported from, China has been reconfirmed by Indian Ministry of Finance by Notification No. 12/2012-Cus. (ADD), dated 8-2-2012. Notification No. 82/2010-Cus. earlier issued in this regard has been superseded as the same was set aside and the matter remanded (subject to provisional assessment of future imports) by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) by its order dated 17-6-2011. The Tribunal had noted that the Designated Authority had denied personal hearing to the interested parties while giving its final findings on ADD investigations.

**Sodium Tripoly Phosphate (STPP) from China – ADD withdrawn:** Anti-dumping duty on STPP from China has been withdrawn by Finance Ministry's Notification No. 13/2012-Cus. (ADD), dated 22-2-2012 pursuant to final findings in mid-term review by the Ministry of Commerce Notification No. 15/18/2011-DGAD, dated 10-2-2012. Notification No. 58/2011-Cus., imposing ADD has been rescinded.

**Phenol from Korea RP, Chinese Taipei or USA – ADD withdrawal recommended:** The Designated authority in the Indian Ministry of Commerce has, subsequent to mid-term review investigations, concluded that there is no need for continued imposition of anti-dumping duty on Phenol from Korea RP, Chinese Taipei or USA. Notifications No. 15/31/2010-DGAD, dated 9-2-2012 and 23-2-2012 state that there is no adverse impact of imports on the domestic industry.

**Phosphoric acid (excluding agricultural/fertilizer grade) from Israel or Taiwan – ADD recommended:** Definitive Anti-dumping duty has been recommended by the designated authority on phosphoric acid excluding the agricultural or fertilizer grade acid from Israel or Taiwan. Ministry of Commerce Notification No. 14/44/2010-DGAD,

dated 2-2-2012 issued in this regard recommends imposition of ADD equal to lesser of margin of dumping and margin of injury.

**ADD reaffirmed after post-decisional hearings in six cases:** Anti-dumping duty on a number of items has been confirmed by the Designated Authority last month in proceedings held pursuant to remand order passed by the CESTAT. In a series of notifications issued on 9th and 10th of February, 2012, the DA in the Ministry of Commerce, after post-decisional hearings, concluded that no modification was warranted in the final findings issued earlier. The Tribunal had, on 11-8-2011, remanded the matter to the DA for grant of such hearing after it found that the investigation was conducted before a particular officer as Designated Authority but conclusions and final findings were issued by a successor officer, without granting fresh hearings. The products covered are Pre-sensitized positive offset aluminium plates from Bulgaria, China, Malaysia, Singapore or Korea RP; Flat base steel wheels and Polytetrafluoroethylene from China; Vitamin A Palmitate from Switzerland or China; Synchronous Digital Hierarchy Transmission Equipment from China or Israel and Poly Vinyl Chloride (suspension grade) from Taiwan, China, Indonesia, Japan, Korea RP, Malaysia, Thailand or USA.

**Soda Ash from specified countries – ADD recommended:** The Designated Authority in the Ministry of Commerce has recommended imposition of anti-dumping duty on soda ash from China, Ukraine, EU, Iran, USA, Pakistan or Kenya. Notification No. 14/17/2010-DGAD, dated 17-2-2012 issued in this regard recommends specific ADD ranging from 2.38 to 36.26 USD/MT on such imports. This finding is, however, subject to the outcome of judgment of Division Bench of the Madras High Court which has stayed the order passed by Single Judge. The judgment of the single Judge Bench had held that the domestic produc-

ers, who are either importers or are related to importers/exporters of the goods under investigation, cannot be the part of domestic industry.

**Aniline from Japan or USA – ADD withdrawal recommended:** Pursuant to second sunset review investigation on import of Aniline from Japan or USA, DGAD in the final findings dated 17th January 2012 [Notification No. 15/19/2010-DGAD] has recommended withdrawal of anti-dumping duties imposed under Customs Notification No. 58/2006-Cus dated 9-6-2006. The withdrawal has been made on the ground of absence of likelihood of injury to domestic industry from imports of subject goods if the measure is withdrawn.

**Soda Ash from Turkey and Russia – ADD investigation initiated:** Investigation as to whether soda ash from Turkey and Russia is being dumped in India has been initiated by the Designated Authority in the Indian Ministry of Commerce. Information has been called from interested parties within 40 days from date of Notification No. 14/3/2011-DGAD, dated 10-2-2012.

## Trade remedy measures against India

**Stainless steel fasteners and their parts – EU imposes Provisional Countervailing duty:** The European Union has imposed provisional countervailing duty for period of four months on imports of stainless steel fasteners and their parts from India. Commission Regulation (EU) No.115/2012, dated 9-2-2012 highlights that a case for subsidization of exports was made while the Commission considered Indian schemes like DEPB, Advance authorization, EPCG, EOU, FPS and export credit scheme. Exemption from electricity duty was also considered for imposing duty ranging from 3.2% to 16.5% depending upon the exporter.

**Polyethylene Terephthalate – Countervailing measures by EU:** The European Union has initiated expiry review of countervailing measures on imports of Polyethylene Terephthalate from India. The investigation will be concluded within 15 months as per Notice 2012/C 55/05, dated 24-2-2012.

## WTO News

### India complains over Turkey's safeguard duty on Indian cotton exports

India has, on 13-2-2012, formally sought consultations under Article 4 of the DSU with Turkey on the latter's imposition of safeguard duty on imports of cotton yarn (other than sewing thread) from India. According to India, Turkey had imposed provisional safeguard measures on 4th August, 2011 with retrospective effect from 15th July, 2011 without making the required determination in the said review and upon conclusion of the review, has issued definitive findings on 25th January, 2012 recommending continuation of the measures retrospectively with effect from 14th July 2011. India holds that Turkey cannot take recourse to provisional measures under Article 6 of the Agreement on Safeguards (AoS) while undertaking a review of the existing measures which had expired on 14-7-2011. India has also challenged

the original safeguard duty as imposed by Turkey since 2008, stating that the provisions violated Article XIX:(1(a) of GATT 1994 and AoS. Earlier, India had forwarded a questionnaire to the Turkish authorities on 5-10-2011, a reply to which was given by Turkey on 22-12-2011 stating that the provisional measure was applied in the form of security and was need-based and that application of provisional safeguard measure during the extension investigation did not mean extension of the measure in force for the product under investigation. Incidentally, Turkey itself has also sought consultations with Egypt under Article 12.4 of AoS against the latter's imposition of provisional safeguard duty on cotton yarn from Turkey.

### “Zeroing” in anti-dumping investigations – US set to amend its provisions

USA's method of zeroing while calculating the anti-dumping duty rates has long been disputed and held inconsistent with

the Anti-dumping Agreement of the WTO by various DSB panels. Now, as per developments last month, US is likely to amend its law and has signed an MOU with Japan and EU in this regard thereby bringing to end long pending disputes in DS322, DS294 and DS350. It is also in the process of arranging discussions with Brazil on this issue. While calculating ADD in review investigations, the US had been rejecting the transactions (holding them as equal to zero) where the price of the product in the domestic market of the exporter was lower than the price in the U.S. market. This had led to increase in the ADD rates, as otherwise dumping is calculated while comparing average domestic and export prices. In December, 2010 US has published a notice by means of which it had proposed to amend its law by abandoning use of zeroing in the administrative reviews and this notice is now set for adoption after some modifications.

Interestingly, Korea's request for establishment of DSB panel for studying USA's anti-dumping measures on corrosion-resistant carbon steel flat products from Korea (DS420) has been accepted by the WTO DSB committee on

22-2-2012. The dispute concerns several US laws, regulations, administrative proceedings and practices, related to the use of "zeroing" methodology in anti dumping determinations concerning the said products. Further, Vietnam has also sought consultations with the US on the latter's said provisions in relation to US ADD on certain warm water shrimps from Vietnam (DS491).

### **WTO body authorises EU to give concessions to Pakistan**

In its meeting on 1st February, WTO's Council for Trade in Goods unanimously approved the decision of the European Union (EU) to provide unilateral market access to Pakistan at zero duty. As a result, EU is now authorised to provide trade concessions to Pakistan on 75 products. The waiver, being granted as an exceptional measure, will be effective for two years from 1st January, 2012 to 31st December, 2013. Therefore, by implication import duties paid after 1st January 2012 would be refundable unless the final EU Regulation specifies otherwise.

## **FTA News**

### **US-Korea FTA effective from 15th March, 2012**

U.S.-Korea Free Trade Agreement will enter into force on 15th of March this year. The US has exchanged diplomatic notes with Korea and each side has confirmed that they had completed their applicable legal requirements and procedures for the agreement's entry into force. The agreement, originally signed in 2007 but postponed due to several disputes including those relating to US automakers' access to Korean market, will now remove duties on about two-third of US's agricultural and three-fourth of its industrial exports to Korea.

### **EU's FTA negotiations on pause mode**

Free Trade Agreements that the European Union wishes to ink, has been falling foul with many countries. EU's FTAs in Asia are being postponed or delayed while such agreements are making news in the Eastern Europe. India-EU FTA has been postponed till the year end after the leadership failed to secure a deal after 15 rounds of talks under the

Bilateral Trade and Investment Agreement. This FTA is being considered in certain quarters as leaning heavily in favour of EU. Again, negotiations for the Philippines-EU bilateral FTA have been put on hold while the former's Trade and Industry Minister calling for consultations with the stakeholders. ASEAN-EU FTA has also been put on wait by the EU because of the difficulty to come up with a unified regional agreement given the divergence of interests in the 10-member ASEAN countries. In eastern Europe, EU is slowly making inroads in respect of Ukraine, Moldova, Georgia and now Armenia - countries which were part of erstwhile USSR. EU-Ukraine, EU-Moldova and EU-Georgia are Deep and Comprehensive FTAs and are in final stages of ratification while the European Union has now confirmed its decision to launch similar negotiations with Armenia. All the negotiations are being done under the framework of the Eastern Partnership and the European Neighbourhood Policy.

## News Nuggets

### EU's carbon tax set to be retaliated

European Union's decision to unilaterally impose a carbon tax on flights landing in or taking off the Eurozone with effect from 2013 has been under severe criticism. Last month about 30 countries including India, China, US, Russia and Brazil met in Moscow to chalk out further strategy to counter the European measure. As per reports, the measures may include filing court suits against the E.U., taking the matter to the dispute settlement body of the WTO, suspending talks with European carriers on new routes, reviewing bilateral service and open skies agreements with European countries, barring national airlines from participating in the EU's scheme and imposing retaliatory levies on E.U. airlines. Earlier, in a meeting held in Delhi, these nations had warned the EU against taking the unilateral decision when negotiations about greenhouse gas reductions are underway under the UN climate convention. China has already issued orders to its airlines not to participate in the EU's Emission Trading System while U.S. Congress is also considering an identical ban. There is speculation that the system could set off a "trade war" among nations as they

impose similar retaliatory fees on EU-based airlines. It is yet to be seen as to what would be the outcome of the dispute if it goes to WTO but the European Court of Justice has already said that such measures do not violate any international treaty.

### Ukraine readies itself for trade disputes

Ukraine's Parliament, on 23-2-2012, adopted a new law allowing the country to introduce counter-measures against "discriminatory or unfriendly actions of foreign states." Under this statute, the government has empowered itself with the right to use licensing regime. Parliament itself can now introduce full or partial embargo as well as deprive the most favored nation treatment or special preferential treatment. According to one of the Members of Parliament of Ukraine, the law is not being enacted as a tool against Russia yet there is wide spread speculation that the recent ban on certain types of Ukrainian cheese by Russia was in the minds of the Ukrainian law makers when they passed the said legislation.

## Ratio decidendi

### Anti-dumping duty after expiry of provisional duty

Anti-dumping duty is leviable during the interregnum period after the expiry of provisional measure and before imposition of definitive measure. The Bombay High Court, in its recent judgment, has held that once the levy of anti-dumping duty under Rule 20(2)(a) of the Anti-dumping Rules relates back to the date of the imposition of provisional duty, there could be no reason or justification to hold that the levy of anti-dumping duty must sustain a break during the period between expiry of the provisional duty

and issuance of a notification imposing final duty. While holding so, the court deliberated upon the interpretation of the word 'levy'/'levied' in Rule 20(2)(a) *ibid* and stated that imposition of anti-dumping duty relating back to the imposition of provisional duty cannot be regarded as retrospective in nature or character [*Commissioner v. Samarth Industries*—Bombay High Court order dated 15-12-2011 in Customs Appeal Nos. 18 of 2009, 46, 49, 50 of 2008 with WP No. 2143 of 2005 and 4027 of 2004].

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