

amicus

Contents

Article

Sampling in anti-dumping investigations – Understanding EC's practice.....	2
---	---

Trade Remedy News

Anti-dumping actions by India.....	5
Safeguard actions by India.....	7
Trade remedy action against India.....	7
Findings digest.....	7

WTO News.....	8
---------------	---

News Nuggets.....	9
-------------------	---

Ratio Decidendi.....	11
----------------------	----



November
2012

Article

Sampling in anti-dumping investigations – Understanding EC's practice

By TD Satish

Introduction

Anti-dumping investigations are company-specific and in a majority of such investigations, separate margin of dumping are determined for producers/exporters based on data provided by them. But often situation arises wherein large numbers of exporters participate and request for a separate duty margin. Since, anti-dumping investigations are time bound, this situation may as a necessary consequence result in significant administrative burden for the investigating authority. The concept of sampling is an effective way to overcome this problem, which has been in use even before it formed a part of the Anti-dumping Agreement (ADA) of the WTO. This article tries to compare the anti-dumping law in respect of sampling as existing in European Union and India and also examine the practice that has evolved in European Union with respect to sampling and whether such practice can be adopted under Indian system. Both EC's Basic Regulation No 1225/2009 dated 30-11-2009 (EC Law) and Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and For Determination of Injury) Rules, 1995 (Indian AD Rules) are based on general framework set under Article 6.10 of the ADA.

Major issues in Sampling

A. Basis for sampling:

Article 6.10 of the ADA provides that sampling can be resorted to where the number of exporters, producers, importers or type of products involved is so large so as to make determinations impracticable. Rule 17(3)

of Indian AD Rules has adopted sampling provision provided under Article 6.10 of the ADA albeit with changes. Indian jurisprudence on sampling is next to nothing with India having resorted to sampling in only 2 anti-dumping investigations so far, wherein sampling was based on volume of exports into India.^{1,2}

In contrast, the provision of sampling is broader in EU³, which also covers complainants and transactions over and above exporters, producers and type of products. While often sampling is undertaken in view of large number of producers and exporters from exporting country taking part in the investigations, there have also been few instances in EC where sampling has been undertaken in view of large participation from importers⁴, domestic industry producers⁵ or different models of products imported into EC. In *Hairbrushes from China PR, Korea, Taiwan, Thailand, Hong Kong*⁶, out of 8 companies participating from China PR, 5 companies were initially selected for sampling. However, since significant part of sampled companies did not cooperate, the sampling failed. To overcome this problem, EC adopted a sample which included export transactions of the four best-selling models sold by the two largest exporters from China PR. Apart from methods suggested, sampling may also be done based on largest representative volume of production, sales or exports, which can reasonably be investigated in time available. However, for doing such sampling, statistically valid information should be available at the time of selection of sample.

¹ Poly Vinyl Chloride (PVC) Suspension Grade from Taiwan, China PR, Indonesia, Japan, Korea RP, Malaysia, Thailand and USA

² Silk Fabrics 20-100 gms per meter from People's Republic of China

³ Article 17 of Council Regulation(EC) No 1225/2009

⁴ Integrated Electronic Compact Fluorescent Lamps (CFL-i) from China [2002 OJ (C244)2]; Certain Handbags from China [1997 OJ (L33)11]

⁵ Unbleached (grey) cotton fabrics from China, Egypt, India, Pakistan and Turkey [1996 OJ (L295) 3]; Farmed Atlantic Salmon from Norway, Chile, Faroe Is. [2003 OJ (L133) 1]; Certain luggage and travel goods from China PR [1997 OJ (L174) 53]

⁶ 2000 OJ (L111) 4

B. Issue of non-sampled respondents

In a sampling exercise, sampled exporters/producers get separate rate of duty based on information provided by them and non-sampled/producers are accorded weighted average dumping margin of sampled companies. Thus, a fundamental question arises whether such non-sampled exporters are entitled to separate rate of duties. Answer to the question lies in Article 6.10.2 of the ADA which provides that authorities shall determine an individual margin of dumping not initially selected for sampling, provided such an exporter/producer submits necessary information within the prescribed time limit. The last line of Article 6.10.2 further provides that voluntary responses shall not be discouraged, making it amply clear that where non-sampled companies wish to get a separate rate of duty, authorities shall accede to such requests. Indian AD Rules, on the other hand, specifically exclude the last line of Article 6.10.2 of the ADA.

The Indian provision on sampling is modeled on the EC anti-dumping law, which also contains similar provision [Article 17(3) of EC Law]. Article 17(3) of EC Law provides that requests for separate dumping margin for non-sampled exporters may be allowed where:-

- a. the company has submitted all necessary information within the timeframe provided, and
- b. individual examination would not be unduly burdensome.

There have been cases on both sides, with EC, in some cases, allowing few requests out of many applications received⁷, while rejecting the demand for separate dumping margin for entire non-sampled companies altogether, in certain other cases.

It is to be noted that EC anti-dumping law is more comprehensive than its Indian counterpart. Article 17(4) of the EC law provides that the authority may select a

new sample, where it reckons that there is a degree of non-cooperation from the parties selected in a sample. However, Indian Rules do not accommodate such a situation and as a result, leaving non-sampled exporters in Indian investigations in a more precarious situation. This is so because, by treating a sampled company as non-cooperating, the weighted average of remaining sampled companies may increase substantially, which may result in increase in dumping margin for non-sampled exporters.

C. The China factor

The problem gets further complicated when it comes to imports from China considering the fact that it is deemed to be a non-market economy country. In case of China, Chinese companies are entitled to claim market economy treatment (MET), acceptance of which would result in an individual normal value for the participating company. Even where such companies are not accorded market economy treatment, they can still claim individual treatment and claim a separate export price.

However, lack of cases dealing with MET status in case of sampling in India compels us to refer EC law and look for a solution. There have been cases involving China, wherein EC has considered responses of all the companies, whether part of sample or not, and has determined MET status for each of the companies individually. In *Certain Finished Polyester Filament Apparel Fabrics from China PR*⁸, the EC analyzed each of the 49 MET applications for MET treatment, of which 25 exporting producers from China were granted MET. Similarly in *Certain Castings from China PR*⁹, out of 21 exporting producers, on-the-spot examination was carried for 7 companies, of which only one satisfied the MET criteria. Of the remaining 14 un-verified exporters, desk analysis was conducted and 4 exporting producers

⁷ Hollow Sections from Turkey [2003 OJ (L175) 3]

⁸ 2005 OJ (L) 69/6 dated 16.03.2005

⁹ 2005 OJ (L) 199/1 dated 29.07.2005

from China were accorded MET status. However, in *Footwear from China PR*, the EC ruffled quite a few feathers, when it diverged from its previous position of considering individual MET claims. In this case, the Commission as well as the lower court rejected the appellant's contention that basic regulation obligated the Commission to examine individual MET/IT claims from an entity from NME country. The lower court held that Commission was not required to examine the MET/IT claims of non-sampled entities, where it has been concluded that the calculation of individual dumping margins would be unduly burdensome and would prevent it from completing the investigation in good time. However, Court of Justice of the European Union (ECJ)¹⁰ overruled the lower court on the point that Commission was not required to examine MET claims under Article 2(7)(b) and (c) of the basic regulation. The ECJ held that Article 2(7) and Article 17 differed in content and purpose and according to Article 2(7)(b), the Commission has to determine normal value in accordance with Article 2(1) to (6), if it was shown that market economy conditions prevail for that company and the same was not affected by the manner in which the dumping margin was to be calculated.

However, WTO Panel in *European Union – Anti-Dumping Measures on Certain Footwear from China PR*¹¹, has rejected the contention of China that the criteria used for the selection of the sample used in the determination of dumping do not guarantee that the sample selected will be representative for purposes of determining whether market economy conditions prevail in the industry producing the like product. The Panel held that anti-dumping duties may be imposed on non-sampled exporters, consistently with Articles 6.10 and 9.4 of the AD Agreement, as a consequence of a finding of dumping based on information provided by a limited number of examined producers. The Panel found no reason for non-imposition of anti-dumping

duties, in a case involving an NME, on non-sampled exporters based on a finding of dumping involving an MET analysis based on information provided by a limited number of examined producers. The Panel further opined that China did not indicate as to why the inclusion of such companies would make the sample more representative with respect to whether market economy conditions prevail for the industry in question and that there was no question that the sample used by the Commission for the MET determination concerned the “industry producing the like product” in this case.

Conclusion

The EC has been consistently using sampling provisions where large numbers of community producers, exporters, producers or products were involved. On the other hand, in spite of being the largest user of anti-dumping remedies, India has so far conducted 2 investigations using sampling methodology despite the fact that there are investigations wherein large numbers of interested parties take part. It is evident that India has failed to apply sampling provisions as effectively as is done by the EC. The EC law makes it clear that responses of non-sampled companies are examined and not rejected outright, which is not the case in India. Furthermore, the EC law provides an option to the authority to select another sample, if previous sample is not considered representative enough for want of cooperation or some other reason. Indian law, however, does not give such an option to authority, which places exporters/producers at a more precarious situation. Amendment in the existing Indian AD rules is one of the solutions that may be contemplated upon. However, despite the differences, there exist many similarities in EC law and practice, which can be adopted by India, while conducting sampling exercise.

[The author is an Associate, International Trade Practice, Lakshmikumaran & Sridharan, New Delhi]

¹⁰ *Brosmann Footwear (HK) Ltd vs. Council of the European Union (ECJ)*(Order in case C-249/10 P dated 2-Feb-12

¹¹ WT/DS405/R

Trade Remedy News

Anti-dumping actions by India

Product	Country	Notification No.	Date of Notification	Remarks
Cable Ties	China and Chinese Taipei	15/10/2011-DGAD	3-10-2012	ADD recommended in mid term review at enhanced rate and in a different form.
Choline Chloride for animal feed	China	14/19/2011-DGAD	4-10-2012	ADD recommended in original investigation at 61% of CIF price
Compact Disk Recordable (CDR)	China, Hong Kong, Singapore and Chinese Taipei	15/4/2011-DGAD	3-10-2012	ADD recommended to be withdrawn in the sun set review in the absence of dumping and likelihood of continuation of dumping
Cold Rolled Flat products of Stainless Steel (400 series) having a width below 600mm	European Union, Korea RP, and USA	46/2012–Customs (ADD)	4-10-2012	ADD recommended in the original investigation on 14-11-2011 implemented. The present notification imposing ADD has been issued beyond the period of three months time prescribed in Rule 18 of the AD Rules
Digital Offset Printing Plates	China	14/7/2011-DGAD	3-10-2012	ADD recommended in original investigation. Separate reference prices recommended for three categories of Digital Plates, namely 'Violet Plates', 'Thermal Plates' and 'CtCP'. Investigation was initiated on China and Japan and no duties recommended on Japan.

Product	Country	Notification No.	Date of Notification	Remarks
Melamine	European Union, Iran, Indonesia and Japan	48/2012-Customs (ADD)	8-10-2012	ADD was recommended in the original investigation concluded on 1-6-2012.
Plain Gypsum Plaster Board	China, Indonesia, Thailand and UAE	14/45/2010-DGAD	Communication dated 4-10-2012	Time limit extended for completion of original investigation till 20-1-2013
PVC Suspension Grade Resin	Taiwan, China, Indonesia, Japan, Korea RP, Malaysia, Thailand and USA	21/29/2011-DGAD	5-10-2012	sun set review initiated for ADD imposed on 23-01-2008.
PVC Suspension Grade Resin	European Union and Mexico	14/1012/2012-DGAD	5-10-2012	Initiation of new investigation
Red Phosphorous	China	14/12/2012-DGAD	28-9-2012	Initiation of new investigation
Sodium Hydrosulphite	China	15/34/2010-DGAD	3-10-2012	ADD rate recommended to be enhanced in the second sun set review. ADD originally imposed 12-03-2001
Tyres - New/unused pneumatic non-radial bias tyres, tubes and flaps for buses and lorries	China and Thailand	47/2012-Customs (ADD)	8-10-2012	ADD continued in the first sun set review at enhanced rate for Thailand and at reduced rate for China PR.

Safeguard actions by India

Product	Country	Notification No.	Date of Notification	Remarks
Carbon Black for rubber application	China	4/2012-Cus. (SG)	5-10-2012	Safeguard duty imposed till 31-12-2013. In view of the ADD already in force on Carbon Black, Safeguard Duty has been imposed for fifteen months at specified <i>ad valorem</i> rate minus ADD.
Phthalic Anhydride (PAN)	All countries	D-22011/ 14/2012	26-10-2012	Initiation of review of Safeguard Duty imposed on 17-1-2012

Trade remedy action against India

Precipitated Silicon Dioxide from India and China:

Brazil has initiated an anti-dumping investigation on imports of 'Precipitated Silicon Dioxide', from India and China, as per Circular SECEX 55 of 25-10-2012. Product under investigation is commonly classified under the position 2811.22.10 of the NCM (the Mercosur Common Nomenclature, based on the Harmonized System). Interested producers/exporters are required to file their questionnaire response within 40 days from the date of initiation.

Findings digest

Anti-dumping final findings in the investigation against 'Digital Plates' from China and Japan

Final findings in investigation concerning Digital Plates from China and Japan have been issued on 3rd October 2012, after the Central Government exercising its powers under Rule 17 of the AD Rules had earlier extended the due date for completion of

the investigation twice. The subject investigation covered 'Digital Plates' used in the printing industry for transferring data as an image (dot patterns or text) onto paper or on non-absorbent substrates like tin sheets or poly films etc. Investigation was initiated on 13th June, 2011 and a preliminary finding was issued on 16th March, 2012.

In this investigation, certain plates like 'Computer to Conventional Plate' ('CtCP') were sought to be excluded from the scope of the investigation but the DGAD observed that unlike analog plates wherein images are first transferred from the computer to a graphic art film and then to the analog plate, images can be transferred to a CtCP plates directly from the computer and therefore CtCP plates are in fact digital plates. The DGAD however observed that 'VP Plates' and 'VPSA Plates' are not pre sensitized with laser unlike CtCP plates and are outside the scope of the investigation.

Though the scope of the investigation was not

amended, 'Digital Plates' were categorized into three different groups, namely, Thermal, Violet and CtCP. Dumping margin and injury margin were determined separately for these three categories. Separate rates of duties were also recommended by the DGAD for these three categories of the product¹.

On the question of granting market economy treatment to Chinese exporters, the DGAD observed that aluminium, the major raw material for the manufacture of Digital Plates, was being procured domestically by the exporters and that 'aluminium industry' in China was being promoted by the

Government through different schemes and therefore, the exporters cannot be regarded as operating under market economy conditions.

The claim of the domestic industry that chemicals supplied free of cost along with the products as per contractual arrangements should be included in the costs for determining 'Non-Injurious Price' was *prima facie* accepted by the Authority. However, as the domestic industry did not substantiate the quantity and value of such chemicals so supplied, their costs were not included in determining the non-injurious price of the domestic industry.

WTO News

Mexico seeks consultation with China on subsidy to clothing and textile products

Mexico, on 15th October 2012, requested consultations with China on measures that are considered by Mexico as supportive of producers and exporters of apparel and textile products. According to Mexico, China maintains a wide variety of measures that support producers and exporters of apparel and textile products, as well as suppliers in the cotton and chemical fibres industries. These measures include tax exemptions for certain enterprises, reduction of import duties and VAT for purchase of equipment by certain groups of enterprises and those located in certain regions, measures contingent on use of Chinese goods and contingent on export performance, low cost loans by state-owned banks to certain industries, preferential land use rights, discounted electricity rates, support for production, sale and transportation provided to cotton farmers and the Chinese petrochemical industry, and cash payments from government agencies. The measures are alleged to be in violation of China's

obligations under the SCM Agreement, GATT 1994, the Agreement on Agriculture, and China's Accession Protocol.

Mexico maintains that these measures involve both prohibited and actionable subsidies that are causing or threatening to cause serious prejudice to its exports to the United States as well as through significant price undercutting and lost sales in the United States.

China's duties on steel products from the US – WTO Appellate Body upholds panel report

In China's appeal (DS 414) against the Panel's findings in the dispute relating to imposition of countervailing and anti-dumping duties by China on grain oriented flat-rolled electrical steel ("GOES") from the United States, the Appellate Body has issued its report. In relation to finding on price effects and the related disclosure of underlying facts, the Appellate Body held that China erred in holding that the investigating authority was not required to consider existence of any link between the imports and the price depression or suppression. The Appellate Body also

¹ It can however be noted that determination of separate rate of duties in an investigation for a single product has been held to be inconsistent with the WTO regulations by the Appellate Body in the case of *EC – Bed Linen* and also in *US – Softwood Lumber V*

upheld the Panel's finding that China acted inconsistent with the WTO Anti-dumping Agreement insofar as it failed to disclose in its preliminary determination and its final injury disclosure document all the "essential facts" relating to the "low price" of subject imports on which it relied for its price effects finding.

Panels set up on China's duties on US automobiles and on US compliance in Boeing dispute

The Dispute Settlement Body, on 23-10-2012, authorized the establishment of a panel to study the complaint by the United States against China on anti-dumping and countervailing duties imposed by China on automobiles from the United States (DS 440). The United States alleged that China's determination of dumping and subsidies in the investigations, involved procedural and substantive deficiencies. China's efforts to solve the matter bilaterally through negotiations with the United States went fruitless with the establishment of the Panel. India, European Union, Japan, Turkey, Korea, Saudi Arabia, Colombia and Oman have asked for exercise of third-party rights in the dispute.

In the Boeing dispute by European Union, despite the

United States notifying the DSB in September 2012 that it had withdrawn the subsidies to its large civil aircraft industry in accordance with the recommendations of the Body, a panel (a "compliance panel") has been established to examine whether the US has actually complied with the Body's recommendations. The DSB has also referred to arbitration a request by the EU to take countermeasures for \$12 billion against the US.

India urged to phase out export subsidies

India had been asked to phase out export subsidies to its textile and clothing industry. At the meeting of the Committee on Subsidies and Countervailing Measures, USA and Turkey have urged India to stop subsidizing as the two industries were found to be export competitive by the WTO from 2007. India however said that it wanted clarity on its obligations and that it is open to any bilateral discussion. Meanwhile the said committee also approved final extension of the transitional period for export subsidy programmes of some 19 developing countries. The deadline to remove export subsidies, for such countries, is now end of 2013 with final phasing out period of two years.

News Nuggets

One more product of Indian origin added to US TVPR Act list

The United States Department of Labour has included Thread/ Yarn from India in its list of goods covered under US TVPR Act. The original list has been updated to include more goods as per the report released on 26th September, 2012. The Department of Labour issues a list of products when it has a 'reason to believe' that such goods are manufactured using child labour or forced labour. The Trafficking Victims Protection Reauthorization Act ('TVPR Act') list originally

included 20 products from India like garments, carpets, gems and leather goods. While the list aims to generate awareness, there is no 'as such restriction' on the importation of these subject goods. It may be noted that in a recent research, the US Department of Labour had reviewed the need for exclusion of two products of Indian origin, namely garments and embellished textiles ('zari') based on the representations filed by the stakeholders in India. However, the US DOL did not agree on their exclusion.

Choosing between protection and protectionism

Tomato has emerged as the flavour of the season in Florida. At the heart of the trade dispute between USA and Mexico is the former's move to terminate the suspension agreement for Mexican tomatoes. The US Department of Commerce issued a preliminary notice of intent to terminate the agreement, in September 2012 and will give a final decision by mid 2013. Mexico has opposed this move which will allow tomato growers in Florida to file fresh anti-dumping petition. The current suspension agreement which has been in force since 1996 was in response to anti-dumping complaint filed after US tariffs were reduced following the NAFTA agreement. The suspension agreement involves a commitment from the signatory Mexican exporter to sell at or above a reference price and was due for renegotiation in December. However, in its communication dated 27-9-2012 the Department of Commerce has stated that 'nearly all', interpreted to be producers accounting for not less than 85% of like domestic product, were in support of termination of the agreement. Last year the two countries had managed to resolve a dispute over allowing Mexican trucks to operate in the US. Emphasising on the obligations under NAFTA, Mexico had levied retaliatory tariffs on a number of US goods for over a decade. It remains to be seen whether the tomato dispute will spur a protracted trade war.

Proportionality of responses in investment dispute

The issue of proportionality of action was put forth strongly in a recent ICSID award. The Tribunal found that though the foreign investor – an oil company had been negligent and violated the specific provisions of its contract with Ecuador, the *caducidad* ('expiry' or 'termination') order terminating the contract was a disproportionate (re)action and the host state was liable to pay damages. Applying the concept of proportionality as per Ecuador's Constitution, the Tribunal found Ecuador, by exercise of the option of *caducidad* to be '*breach of Ecuadorian law, in breach of customary international law, and in violation of the Treaty.*'

The foreign investor was to obtain authorization from Ecuador if it wanted to transfer/ assign interest in the oil blocks awarded to it or be subject to a *caducidad* terminating the contract. It sold 40% of its interest to another company. However, the Tribunal held that implementing the provisions of the contract without exploring other '*unpalatable or unrealistic*' options was not fair to the investor and cancellation of the contract was tantamount to expropriation. It also awarded compensation for 100% of the interest held in the oil blocks stating that to reduce compensation to 60% would lead to unjust enrichment of Ecuador. The dissenting opinion reasons that once a transfer has been found on facts, the ICSID does not have any jurisdiction to determine that such transfer is a nullity for purposes of calculating damages. The majority opinion itself states that under laws of New York and Ecuador, only a court could decide on absolute nullity and under the circumstances they were unlikely to do so.

Ratio Decidendi

Determination of like product and material injury supported by substantial evidence

The United States Court of International Trade (the Court) affirmed the negative injury determination in respect of finished heat sinks from China. The domestic industry (plaintiff) argued that the United States International Trade Commission (the Commission) had erred by carving out a separate like product namely finished heat sinks from 'aluminium extrusions' and the analysis using six factors considered by the Commission in determining the like product was not conclusive. The Court found that 6 factors viz., physical characteristics and uses, common manufacturing facilities and production employees, interchangeability, customer perceptions, channels of distribution and price had been taken into account appropriately to determine like product and that finished heat sinks constituted a separate domestic industry for purpose of material injury analysis. Further the impact of imports had been considered as per § 1677(7)(C)(ii). The Court found no force in the plaintiff's argument that inconsistency entered the data collected because inconsistent definitions of finished heat were used in the questionnaire. The Court thus refused to remand the case as the standard of review provided in 19 U.S.C. § 1516a(b)(1)(B)(i) that to uphold a determination, it must be supported by substantial evidence and otherwise in accordance with law, had been met. [*Aluminium Extrusions Fair Trade Committee v. United States and AavidThermalloy,*

United States Court of International Trade, decision dated 11-10-2012]

Countervailing duty, 'Adverse Fact Available' rate – Department must corroborate rate

The US Court of International Trade has directed the Department of Commerce to properly corroborate the 'Adverse Fact Available' rate calculated by the latter in the case of import of Certain Hot-Rolled Carbon Flat Products from India. Essar Steel Ltd., the petitioner in the present case was of the belief that the Commerce Department had not corroborated the rate assigned as a result of its participation in the State Government of Chhattisgarh Industrial Policy, which was treated as subsidy by the department to impose countervailing duty. While remanding the matter to explain corroboration of AFA rate, as secondary information was used, the Court was of the view that they stand ready to review whether the facts and circumstances of the administrative record support Commerce's AFA CVD rate as a reasonably accurate estimate of the respondent's actual benefit under the program plus some built in increase to deter non-compliance, with due account for the practicability of corroboration. The Court however rejected the appellant's argument that the rate was punitive as in past reviews Commerce never found them to have used the program at issue. [*Essar Steel Limited v. United States - United States Court of International Trade Opinion dated 15-10-2012*].

Disclaimer: *International Trade Amicus* is meant for informational purpose only and does not purport to be advice or opinion, legal or otherwise, whatsoever. The information provided is not intended to create an attorney-client relationship and not for advertising or soliciting. LakshmiKumaransridharan does not intend to advertise its services or solicit work through this newsletter. LakshmiKumaransridharan or its associates are not responsible for any error or omission in this newsletter or for any action taken based on its contents. The views expressed in the article(s) in this newsletter are personal views of the author(s). Unsolicited mails or information sent to LakshmiKumaransridharan will not be treated as confidential and do not create attorney-client relationship with LakshmiKumaransridharan. This issue covers news and developments till 31st October, 2012. To unsubscribe e-mail Knowledge Management Team at newslettertrade@lakshmisri.com
www.islaw.in <http://addb-islaw.in>