MINISTRY OF COMMERCE

NOTIFICATION

New Delhi, the 5th January, 1998

FINAL FINDINGS

Subject: Anti dumping investigation concerning imports of certain catalysts from Denmark - Final Findings.

ADD/IW/39/95-96'. - Having regard to the Customs Tariff Act 1975 as amended in 1995 and the Customs Tariff (Identification, Assessment and Collection of Anti Dumping Duty o;, Dumped Articles and for Determination of Injury) Rules, 1995, thereof:

A. PROCEDURE

1. The Procedure described below has been followed: if The Designated Authority (hereinafter also referred to as the Authority) notified preliminary findings vide Notification no. ADD/IW/39/95-96 dated the 7th May, 1997 and requested the interested parties to make their views known in writing within forty days from the date of its publication;

i. The Authority forwarded a copy of the preliminary findings to known interested parties who were requested to furnish their views, if any, on the preliminary findings within forty days of the date of the letter;
ii. The Authority also forwarded a copy of the preliminary findings to the Embassy of Denmark in New Delhi with a request that the exporters and other interested parties may be advised to furnish their views on the preliminary findings;
iii. The Authority held an oral hearing on 8th July, 1997 to hear views orally. All the parties attending the oral hearing were requested to file written submissions of the views expressed orally. The parties were advised to collect copies of the views expressed by the opposing parties and were requested to offer their rebuttals.
iv. The Authority made available the public file to the interested parties containing non-confidential version of all evidence submitted to the Authority by various interested parties. All parties who made request for inspection, in writing, were allowed to inspect the public file;

v. In accordance with Rule 16 of the Rules supra, the essential facts/basis considered for these findings were disclosed to known interested parties and comments received on the same have also been duly considered in these findings;

vi. Subsequent to the appointment of new Designated Authority by the Central Government on 17th Dec., 1997, all interested parties were advised vide letter dated 22nd Dec., 1997 to indicate if they would like to explain orally the submissions made by them, which were already on record, in accordance with Rule 6(6). The interested parties were informed that they could appear before the Authority on 2nd Jan., 1998, if so desired to explain their case orally. ,

vii. The Authority held an oral hearing on 2nd Jan., 1998. It was clarified that no new issues could be brought up and that the arguments should be limited to issues presented at the hearing on 8th July, 1998. No written statements were taken on, record.

viii. On 2nd Jan., 1998, the learned counsel for HTAS desired to know whether the Central Government had granted extension of time period. It was clarified to all the interested parties present on 2nd Jan., 1998 that the Authority was hearing orally within the time limits extended by the Central Govt.

ix. The investigations have been concluded within the time limit extended by the Central Government, i.e., 5th Jan., 1998.

B. PETITIONER'S VIEWS

2. The petitioner raised the following arguments:

a. In the absence of sales in the home market, the appropriate price to consider is the price the exporter has charged in the European Union (EU).

b. Consideration of EU as a territory by the Authority is appropriate. It is appropriate to consider EU as a territory which is virtually a quasi-sovereign entity, the constitution of which provides free flow of goods within its bounds and has the power to direct removal of all impediments and is now contemplating a common currency and, in view of the following:

- Article XII of the WTO Agreement covers any State or separate customs territory;
- The EU is recognised as a single unit for various purposes, such as EU itself is treated as a member. Annexure 3 to WTO Agreement inter-alia provides that for purposes or certain reviews, the EU will be counted as one;
- While construing the law for determination of normal value, the principles of purposive interpretation to the provisions of the law should be applied;

- The statute confers upon the Central Govt. a power to impose a fiscal levy to protect the Indian industry, and, therefore, leaves considerable latitude to the Central Govt. to adopt one or other method of determination.
- The expression "territory" cannot be limited to a geographical area contained within a country, and interpretation drawn from the Constitution of India would not be appropriate. It would be inappropriate to apply universal meaning to the word, and the word must be construed with reference to its context and not in isolation.
- The provisions of the law are a direct fallout of the GATT treaty whose objective is to establish domestic price for comparison with export price. EU is a cohesive trade unit, and is, for more than one purpose treated as a single unit.

c. The price HTAS has charged in the EU and to the Indian customers establishes that it has dumped catalyst in India.
d. The prices charged by the other European manufacturers also establish that the exporter dumped the subject catalyst in India.
e. The dumping by HTAS has caused material injury to the Indian industry. The Indian industry was selling below the cost of production and their capacity utilisation suffered.

C. VIEWS OF EXPORTERS. IMPORTERS AND OTHER INTERESTED PARTIES

3. The views expressed by the exporter, Haldor Topsoe A/S (referred to as HTAS hereinafter) and other interested parties are as under:

On dumping:

a. The Authority was requested to furnish the details of normal value and export price used in the calculation of dumping margin.
b. The finding that EU is the exporting territory for determination of normal value is legally incorrect, in view of the following:

i. The Authority did not propose to treat EU as the domestic market for determination of normal value either in the initiation notice or in the questionnaire (Request for Information). The Authority has violated the principles of natural justice by making the determination without notice.
ii. HTAS treated Denmark as the exporting country and submitted that there were no sales in the home market. The exporter, therefore, furnished details of cost of production and did not furnish details of export price to third countries as the same were considered to be not necessary.

iii. Section 9A of the Act supra has to be assigned such interpretation as is GATT compatible. Interpretation of Section 9A by the Authority is incorrect in view of the GATT Agreement. The word "territory" appearing under Section 9A of the Act supra is not authorised by GATT Agreement. The word "exporting country or territory" should be read as exporting country or exporting territory. The Authority is not correct in treating Denmark as the exporting country and then determining prices in the exporting territory. The Authority is entitled to determine prices in the exporting territory only when the investigations are against exporting territory.

iv. The Authority should have given its finding (if the determination is to be made as was done in the preliminary findings) that EU could be considered as territory of Denmark and then determined the price of the catalysts in the territory of Denmark.

v. The word "territory" appears at only two places in the GATT agreement, Article 4.1 (ii) and 9.1. None of these articles empower the Authority to treat the consumption in the EU as the consumption in Denmark. Even Article 4.3, which empowers consideration of domestic industry in two or more countries in case their markets have reached such integration that they have the characteristics of a single unified market, does not use the word "territory". Thus the countries which form the EU have the characteristics of a single unified market and hence any petition brought before the EC has to satisfy the requirements of domestic industry with reference to Article 4.3.

vi. The word "territory" means an area forming part of a country. New Webster's, Penguin English Dictionary and the Constitution of India have defined the word similarly.

c. With regard to normal value of HDS in USA, the same cannot be demanded from HTAS. The normal value in USA can be determined only by an investigation properly initiated after notifying the said country and obtaining the information from the exporter in USA.

d. With regard to the determination of normal value under Section 9A(1)c(ii), the view taken by the Authority in the preliminary findings is erroneous. Since an allegation has been made against HTAS, the exporter is at liberty to rebut the allegation by means which are provided under the Section. If there are no domestic sales, the exporter can establish no dumping by showing either the export price to third countries or the cost of production. Any other view will render strong bias in favour of domestic industry in the importing country.

With regard to non-submission of information relating to export price to third countries, HTAS argued that it has not supplied information relating to export price to third countries for the following two reasons:

- the information is not required since there is a choice available to the exporter to prove by other means that there is no unfair trade; and
- price to any third country is not a price to an "appropriate country" and is not a "comparable representative price". The information on export price to third countries will affect the exporter' future trading activities in these countries.

e. With regard to list prices for determination of normal value, HTAS argued that use of list prices is fraught with serious repercussions. The list prices exist mostly in the list only and the actual transaction prices vary widely depending on the market conditions. The conclusion of the Authority that the list prices are indicative of actual prices prevailing is erroneous. To illustrate, HTAS supplied ZnODS catalyst in EU at less than the list price in 12 out of 19 orders, and 6 out of 13 orders of LTS are below list prices.

f. Determination of two dumping margin is erroneous. HTAS argued that the Authority did not initiate investigations into the subject catalysts under the two custom heads. Further, the exporter argued that it did not have pricing strategy/policy for the catalysts depending on whether the catalysts are being imported under Chapter 38 or under 98. HTAS supplied proprietary catalysts at more or less the same prices, whether these were initial or replacement charge.

On injury:

a. Determination of two injury margin is erroneous, as the Authority has not taken into account the fact that the petitioners are entitled to Deemed Export benefit under Chapter X of the EXIM policy when the petitioners supply the said catalysts to projects. The benefit is equal to the duty element when the catalyst is imported under Chapter 38, and therefore, there will be only one injury margin.

b. There is no material injury to the domestic industry, in view of the following:

i. The period of investigation determined is arbitrary and without any basis.

ii. Life of catalysts differs from supplier to supplier and is also determined by plant design. Injury aspect has to be studied over a very long period of investigation of about 3 to 4 years.

iii. The assessment of injury cumulatively for all the six types of catalysts by the Authority in the preliminary findings is erroneous. The manufacturing facilities for the different catalysts are different and the findings of the Authority on this account are without any evidence. The petitioners had provided separate details for each catalyst. Disregarding such information furnished by the petitioners and concluding that it is neither appropriate nor feasible to adopt such a course (of assessing injury in respect of individual catalyst) is not warranted.

c. Imposition of anti-dumping duty will affect the larger interests of the farming community.

On causal link:

Causal relationship has not been established. Choice of a wrong period of investigation for assessment of injury and fluctuating demand for catalysts have to be considered while analysing the market share. The Indian industry was not even short-listed in some of the tenders to supply the said catalysts, and, therefore, the loss of market share cannot be attributed to the supply of catalysts from Denmark. The finding of the decline in market share of the domestic industry from 93.9% (1988) to 68% (investigation period) overlooks the fact of restrictions placed on imports of catalysts that prevailed in 1988. ICI India Ltd. does not have the plant or capability to produce any of the subject catalysts.

D. EXAMINATION BY AUTHORITY

4. The submissions made by the petitioners, exporters, importers and other interested parties have been examined, considered and, wherever appropriate, have been dealt hereinafter.

E. PRODUCT UNDER CONSIDERATION, LIKE ARTICLES AND DOMESTIC INDUSTRY

5. Under Rule 2(d) “like article” means an article which is identical or alike in all respects to the article under investigation for being dumped in India or in the absence of such an article, another article which although not alike in all respects, has characteristics closely resembling those of the articles under investigation.

6. The Authority confirms paras 5 to 9 of the preliminary findings and confirms that each of the subject catalysts produced by the domestic industry is a like article to the respective subject catalysts originating in or exported from Denmark within the meaning of the rules supra.

F. DUMPING

7. The arguments raised opposing determination of dumping have been discussed hereinabove. Analysis of the arguments raised is as under:

8. With regard to the exporters contention that details of normal value and export price requested by the representatives of HTAS ought to have been furnished, the

Authority notes that the methodology adopted was discussed in sufficient detail in the preliminary findings. The Authority further notes that the exporter has declined to furnish the information requested by the Authority and, on the other hand, desired the calculations done by the Authority, which were based on the confidential information furnished by the petitioners and the exporter. Since the calculations were based on the information furnished on confidential basis, no details can be furnished to any interested party(ies).

9. With regard to the contentions raised by HTAS on determination of normal value, the position is as under:

i. The Authority had clearly mentioned in the Initiation Notification that the petitioners had provided, as evidence of dumping, fob list price in USA, fob list price in Europe, actual prices in Europe on the basis of orders procured by European companies and export price of the exporters from Denmark to third countries. It needs to be appreciated that under the anti-dumping proceedings, an initiation notification merely starts an investigations based on sufficient and prima-facie evidence submitted by the petitioners subject only to the conditions and pre-requisites mentioned under Rule 5 of the Anti dumping Rules. The law, therefore, envisages that the Authority is authorised to collect all the relevant information from the interested parties subsequent to the initiation notification only. The argument of HTAS that the Authority did not propose to treat EU as the domestic market for determination of normal value either in the initiation notice or in the request for information is, therefore, untenable in law and procedures.

ii. The Authority notes that the exporter is required to furnish the information as is deemed necessary by the Authority. While the exporter can always advance his arguments to support his case, it is required to furnish the information requested by the Authority before advancing any argument. The exporter cannot plead non-submission of information on the grounds that the information is not considered necessary by the exporter. It is not conceived in law that the exporter has a right to pre-decide as to what information is necessary and what is not for the Authority to arrive at a decision. The Authority notes that by not providing the desired information, the exporter has not co-operated in the investigations and has prevented that Authority from analysing whether normal value can be established on the basis of export price to third country.

iii. The argument of HTAS with regard to consideration of EU as a territory of Denmark is not based on facts. The Authority has not held anywhere in the preliminary findings that EU could be considered as a territory of Denmark. Even at the time of hearing, the learned counsel of the exporter could not

elaborate as to which portion of the notification leads to this interpretation that EU is a territory of Denmark. The Authority has merely held that EU can be considered as an exporting territory for determination of normal value. The Authority notes that the exporter has not advanced any argument to show as to why the prices prevailing in the EU cannot be considered as the prices prevailing in the domestic market of the exporter.

iv. Though it is appreciated that the word "territory" has not been used under Article 4.3 of the Anti-dumping agreement, yet it is abundantly clear that the countries which form a single unified market, for the purpose of anti-dumping investigations, consider these single unified markets as the domestic industry. This issue and the rationale behind considering EU for the purpose of determination of normal value has been discussed in the preliminary findings and no substantive arguments have been raised thereafter. Even though it has been contended that the Authority has considered EU as a territory of Denmark, the order categorically considers EU as an exporting territory for the limited purpose of determination of normal value.

Under the circumstances, the Authority holds that while the exporter is at a liberty to advance his argument, the primary responsibility of the exporter is to furnish information requested by the Authority so that an appropriate decision can be made by the Authority. In the instant case, however, HTAS has preferred not to disclose the details of the export price to third countries. The reasons advanced by the exporter for not furnishing the information cannot be appreciated. Further, no arguments have been advanced by the exporter for holding that export price to third countries would not be a comparable representative price or no country can be considered as an appropriate country. In fact, the exporter has, without any basis, argued that disclosure of information with regard to third countries may affect its future trading activities in these countries.

10. With regard to normal value of HDS catalyst, the Authority notes that HTAS supplied the catalysts in India, which were produced by its subsidiary. The Authority notes that the exporter, in response to the Questionnaire Response, has furnished details of the following plants, while answering the names and addresses of its plants:

- Haldor Topsoe A/S, Denmark
- Haldor Topsoe, Inc., Texas, USA

It is further found from the annual report of the company that Haldor Topsoe, Inc. is a 100 percent owned subsidiary of Haldor Topsoe A/S.

11. In view of the above, the claim of the exporter that it cannot be expected to furnish details of normal value of this catalyst cannot be appreciated. The Authority notes that

the exporter has not furnished information requested by the Authority, thus impeding the investigations significantly.

12. With regard to normal value of HDS catalyst, the Authority notes that the exporter was requested to furnish factual information about the prices at which business was transacted by it, which were not supplied by the exporter. The information available with the Authority shows that list prices are indicative of the transaction prices and there was no evidence to the contrary. The Authority notes that the exporter, even while advancing his argument, has not disclosed the prices on the basis of which the argument has been advanced. The Authority has, therefore, rightly determined the normal value on the basis of the best information available to it regarding the prices prevailing in the country of origin.

13. With regard to determination of two dumping margins and initiation of investigations against imports under one custom head only, the Authority notes that the subject catalysts are being imported under two distinct and clearly identified Custom heads. The Authority further notes that custom head under which the product is cleared as mentioned in the initiation notification does not alter the factual position, as it has been abundantly made clear in the preliminary findings that the purpose of writing custom heads is to facilitate understanding of the subject goods and not to limit the scope of the investigations. Import of these catalysts under the two custom heads are being allowed under separate and distinct conditions. The argument of the exporter that its export price has been more or less the same whether the supplies were initial or replacement charge is factually incorrect, as the Authority has found different dumping margins in case of clearances under the two heads.

14. In view of the foregoing and after considering the arguments raised by interested parties, the Authority confirms the methodology adopted in the preliminary findings with regard to determination of dumping. The dumping margins are as follows:

Name of the catalyst Dumping margin

(% of export price)

Ch 38 Ch 98

Hydrodesulpherisation Catalyst (HDS) 32.61 85.19

Zinc Oxide Desulpherisation Catalyst 76.06 90.34

(ZnO)

High Temperature Shift Catalyst (HTS) 97.04 153.97

Low Temperature Shift Catalyst (LTS) 100.00 113.90

Secondary Reforming Catalyst (SR), nil 152.71

Methanation Catalyst (Meth) 134.74 134.74

G. INJURY

15. The arguments raised opposing preliminary findings with regard to the injury to the domestic industry has been discussed above. The position with regard to the arguments raised is as under:

16. With regard to determination of two injury margins, the Authority has worked out fair selling price for determination of injury margin for clearances under Chapter 98 after considering the benefit of deemed exports available to the domestic industry. There is force in the argument of HTAS that there should be two fair selling prices and in view of the fact that the clearances under Chapter 38 and 98 are under different conditions, it would be appropriate to work out two injury margins.

17. The investigation period is used to work out dumping. A longer period of three to five years including the investigation period is used to assess the injury to domestic industry. It is appreciated that life of catalysts varies significantly resulting in fluctuating demand pattern. However, contention of the exporter that the manufacturing facilities do not overlap is factually incorrect in so far as the petitioners are concerned, as it was found during the spot investigations that the manufacturing facilities of the petitioners, for instance, drying and forming capacities, are common. Since the Authority is required to assess the injury to the domestic industry, the factors affecting the domestic industry only are relevant in this regard.

18. The preliminary findings with regard to the injury to the domestic industry is not based on any single parameter affecting the domestic industry, such as production, capacity utilisation, sales, selling prices, stocks, profitability, etc. The Authority has clearly held in the preliminary findings that various indicators relating to the domestic industry, collectively and cumulatively establish that the domestic industry has suffered material injury. The arguments of the interested parties that some of the factors do not show injury to the domestic industry deserves to be ignored.

19. In view of the above and after considering the arguments raised by the interested parties, the Authority holds that there is sufficient evidence to suggest that the

domestic industry has suffered material injury. The Authority, therefore, confirm the preliminary findings with regard to the injury to the domestic industry.

H. CAUSAL LINK

20. The material injury has been caused to the .domestic industry by the dumped imports. The argument that imports in 1988 were restricted (because of which the market share of the imports increased) does not alter the position in as much as the market share of the domestic industry declined in the investigation period as compared to 1992. Furthermore, the findings of the Authority that the import of catalysts at dumping prices resulted in price underselling in the Indian market and forced the domestic industry to reduce the prices to such an extent that the domestic industry was prevented from recovering its full cost of production and earn a reasonable profit have also not been disputed by any interested party(ies). The Authority notes that the Research & Development is an integral and essential part of an industry, particularly an industry like the present. No industry can afford to continue its R & D efforts in case its operations are at a loss.

21. In view of the above and after considering the arguments raised by the interested parties, the Authority holds that there is sufficient evidence to suggest that material injury to the domestic industry has been caused by the dumped imports.

I. FINAL FINDINGS

22. The Authority, after considering the foregoing, concludes that :

- The subject catalysts originating in or exported from Denmark have been exported to India below their normal value;
- the domestic industry has suffered material injury;
- the injury has been caused to the domestic industry by the exports of the subject catalysts originating in or exported from Denmark.

23. The Authority confirms the preliminary findings and recommends imposition of definitive anti-dumping duties on all imports of subject catalysts originating in or exported from Denmark at the rates specified below :

Name of the catalyst Amount of Duty (Rs. per ltr.)

When Imported When Imported

under Chapter 38 under Chapter 98

Hydrodesulpherisation 36.23 121.59

Catalyst (HDS)

Zinc Oxide Desulpherisation nil nil

Catalyst (ZnO)

High Temperature Shift 25.64 87.89

Catalyst (HTS)

Low Temperature Shift 52.61 117.50

Catalyst (LTS)

Secondary Reforming nil 266.49

Catalyst (SR)

Methanation Catalyst (Meth) 215.46 215.46

24. Subject to above, the Authority confirms the preliminary findings dated 7.5.1996.

25. An appeal against this order shall lie to the Customs, Excise and Gold (Control) Appellate Tribunal in accordance with the Act supra.

RATHI VINAY JHA,
Designated Authority