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Articles

Publication and administration of trade regulations – Scope of GATT Article X after Bali

By **Ankur Sharma**

Transparency, uniformity and predictability in trade regulations enhance facilitation of international trade. Article X of the GATT 1994 deals with publication and administration of trade regulations. In particular, Article X:1 requires that rules, regulations, judicial decisions and administrative rulings be promptly published, Article X:2 requires that certain measures be officially published and Article X:3 establishes certain minimum standards for transparency and procedural fairness in the administration of such measures.[1] Article X:3(a) read with Article X:1 mandates requirements of uniformity, impartiality and reasonableness in the administration of laws, regulations, judicial decisions and administrative rulings of general application[2].

The recently concluded Trade Facilitation Agreement (hereinafter "TFA") at the Bali Ministerial Conference has further expanded the scope of Article X. This article analyses certain limitations of Article X and how those limitations have been addressed in the TFA.

Before Bali

Although Article X:1 requires member countries (hereinafter "members") to promptly publish trade-related laws, regulations, judicial decisions and administrative rulings, it does not provide for a timeframe that is to be maintained between publication and entry into force of such rules. Only if such measures effect an advance in a rate of duty or other charges on imports or impose a new or more burdensome requirement, restriction or prohibition on imports, they are required to be *officially* published before coming into force.[3]

Further, Article X does not identify the means that members could adopt to publicise their laws and regulations. Indeed, a WTO Panel had noted the importance of medium of publication and observed that trade related measures are to be published in such a manner so as to enable governments and traders to become acquainted with them, therefore they must be available through an appropriate medium rather than simply making them publicly available.[4]

After Bali

The TFA has tried to improve upon the above-mentioned aspects of Article X. Paragraph 1.1 of Article 1 of the TFA mentions the nature of information that members are to promptly publish in an easily accessible manner to enable governments and traders to become acquainted with them, such as:

1. Importation, exportation and transit procedures and required forms and documents;
2. Applied rates of duties, taxes of any kind, fees and other charges imposed on or in connection with importation, exportation or transit;
3. Rules for the classification or valuation of

[1] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.868; Appellate Body Report, *US – Shrimp*, para. 183.

[2] A measure of general application is one that affects an unidentified number of economic operators; *see* Appellate Body Report, *US – Underwear*, p. 21.

[3] Article X:2 of the GATT.

[4] Panel Report, *EC – IT Products*, para. 7.1084.

products for customs purposes; procedures relating to administration of tariff quotas;

4. Laws, regulations and administrative rulings of general application relating to rules of origin;
5. Import, export or transit restrictions or prohibitions; penalty provisions against breaches of import, export or transit formalities;
6. Appeal procedures;
7. Agreements with any country or countries relating to importation, exportation or transit.

When read with paragraph 1.2 of Article 2, members are required to make best efforts to make publicly available new or amended laws and regulations of general application related to movement, release and clearance of goods, including goods in transit before their entry into force.

Paragraph 2 of Article 1 of the TFA further requires members to make available through the internet,

- a description of its importation, exportation and transit procedures including appeal procedures;
- forms and documents required for importation, exportation or transit;
- contact information on enquiry points.

Members are also required to establish or maintain within their available resources, enquiry points to answer enquiries on matters covered under paragraph 1.1 of Article 1. Enquiry points may address enquiries within a reasonable period of time depending on complexity of the request.

An interesting development under Article 2 of the TFA is the opportunity that members may provide to traders and other interested parties to comment on proposed introduction or amendment of laws and regulations of general application[5] before entry into force. The language of this provision seems over-prescriptive and may be perceived as intrusive vis-a-vis the legislative processes of a member. Though the text of this provision allows a member to comply with this provision only to the extent permissible in its legal system, but such a requirement of consultation with other interested parties outside or within a member is not present in Article X of the GATT. Therefore, it appears to be an additional obligation incurred by members beyond the mandate of Article X. It could lead to lobbying and undue pressures on a member's legislative processes.

Other notable features regarding publication and administration of trade related information in the TFA include application requirements for an advance ruling, its review and applicability to the concerned member that issues such ruling and the applicant;[6] appeal and review procedures in customs matters;[7] notification in case of controls or inspections at the border in respect of foods, beverages and feedstuffs;[8] and information to carrier or importer on detention of goods declared for importation.[9]

[5] Laws and regulations of general application in this context relate to movement, release and clearance of goods, including goods in transit.
[6] Article 3 of the TFA.
[7] Article 4 of the TFA.
[8] Article 5, paragraph 1 of the TFA.
[9] Article 5, paragraph 2 of the TFA.

Conclusion

It is likely that the TFA would improve movement and clearance of goods as a result of increased transparency and ease in availability of rules and regulations related to importation, exportation and transit. Accessibility of trade-related information through Internet will keep traders abreast of the changes and enable them to adapt accordingly. At some places, however, the language of the TFA is open-ended; an example is use of the term "interested parties" in Articles 1 and 2.

Certain provisions also seem to be best effort clauses, where members are only required to comply within their available resources; establishment of enquiry points and opportunities to interested parties to comment on proposed laws and amendments are such instances. The implication of this would be in raising a claim of violation in future cases, where it would be difficult to prove that members have not made best effort with regard to these obligations. Article X of the GATT read with the TFA would redefine WTO dispute settlement, as a violation of transparency and administration procedures would become a major claim, rather than being a subsidiary claim, as it was until now.[10]

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Assigning single rate of duty by US for all producers & exporters from NME countries – An analysis

By **Elaine TAN**

On December 3, 2013, China has requested for a consultation with the United States of America for certain methodologies in 13 anti-dumping measures imposed by USDOC against China (DS471). It is alleged by China that USDOC uses certain anti-dumping methodologies that are inconsistent with the US obligations under the Anti-dumping Agreement (ADA), including "targeted dumping methodology", "zeroing", "single rate presumption" and "NME-wide methodology".

This is already not the first time China has raised these issues, especially the "zeroing" method, which has been disputed and held to be inconsistent with the ADA by various DSB panels.

In DS471 case, the focus is more on the single rate presumption, involving in all 13 alleged anti-dumping measures. With regards to US practice, the US presumes that all producers and exporters comprise a single entity under common government control. Section 351.107 (d) set forth *"Rates in antidumping proceedings involving nonmarket economy countries. In an antidumping proceeding involving imports from a nonmarket economy country, "rates" may consist of a single dumping margin applicable to all exporters and producers."* When determining the anti-dumping duty rate, there actually exists three categories of rates, i.e. individual rate applicable to mandatory respondent, weighted average rate applicable to respondents who are not mandatory but pass "separate rate" test and nation-wide single rate for all other enterprises on the basis of facts available. In this situation, the burden is placed upon the producers and exporters to provide sufficient proof of absence of government

[10] The approach of Panels so far is that if a measure is found in violation of substantive provisions such as Article I or Article III of the GATT, the Panels refrain from examining that measure under Article X.

control, in law and in fact, with respect to their export activities, based on a number of factors comprising the US' "separate rate" test. Companies who do not pass the "separate rate" test shall be subject to nation-wide single rate, whether or not they provide reliable export prices.

Thus, it is of importance to understand how US practice violates the WTO obligations in this regard.

Article 6.10 of the ADA which provides for the imposition of an individual margin of dumping for each known exporter or producer, reads as below:

> "The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated."

First of all, it is normally understood that the above article places an obligation on the authorities to apply individual dumping rate for each known exporter or producer. The Appellate Body in *EC-Fasteners (China)*[1] stated that the rule in the first sentence of Article 6.10 is mandatory. This is equally applicable in the case of all WTO Member countries irrespective of the nature of the economies. Article 6.10 first sentence does not envisage a special treatment for non-market economy countries. There is no sanction for applying a single rate treating all the exporters and producers in NME countries as a single homogenous entity.

Secondly, Article 6.10 only provides one exception namely where it is "impracticable". What's the meaning of impracticable? Although there is no specific interpretation on this word by the Panel yet, we shall understand it under related WTO provisions. If we go through the ADA , "impracticable" appears in Article 9.2 also.

> "… If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved."

Both Articles in fact provide same explanation of "impracticable", i.e. when a large number of exporters or producers are involved in the investigation and it is not practicable to determine an individual rate to each, the authorities may limit the number of interested parties. Other than this condition, the rules do not provide any additional conditions such as where NME applies.

Thirdly, according to the principle of the US legislation, it's not possible to determine individual dumping margins for each exporter or producer in NMEs. The US view is that in case varying dumping margins are determined to every export entity, it may cause circumvention since in an NME all producers and exporters comprise a single entity under common government control. In *Korea – Certain Paper*[2], the Panel concluded that:

[1] Appellate Body Report, *EC – Fasteners (China)* Para. 320.
[2] Panel Report, *Korea – Certain Paper,* Para.7.161

> "…Having said that, however, we do not consider that Article 6.10 provides the IA with unlimited discretion to do so… In our view, in order to properly treat multiple companies as a single exporter or producer in the context of its dumping determinations in an investigation, the IA has to determine that these companies are in a relationship close enough to support that treatment."

Therefore, the Panel holds that under the Article 6.10, if the authority decides not to grant individual dumping margin to companies who may be related, the burden shall be placed on the authority to closely evaluate if these companies are related enough to be deemed as a single entity but not on the presumption[3] or on the exporters or producers to prove their export activities are not intervened by the government.

Fourthly, even if under some situation, some exporters or producers are related companies in NMEs, the authorities still have the obligation to determine individual dumping margin for each. In *EC – Fasteners (China[4])*, the Appellate Body concluded that:

> "[W]e do not find any provision in the covered agreements that would allow importing Members to depart from the obligation to determine individual dumping margins only in respect of imports from NMEs. We have explained above that Section 15 of China's Accession Protocol permits derogation in respect of the domestic price or normal value aspect of price comparability, but does not address the export price aspect of price comparability. It, therefore, has no entailment in respect of the obligation in Article 6.10 of the Anti-Dumping Agreement to determine individual dumping margins. In our view, therefore, Section 15 of China's Accession Protocol does not provide a legal basis for flexibility in respect of export prices and for justifying an exception to the requirement to determine individual dumping margins in Article 6.10 of the Anti-Dumping Agreement."

Thus, there is no legal basis to deny a fully cooperative exporter's export price from NMEs. China's Accession Protocol only made compromise on the determination of domestic price and cost, which are two critical data for the determination of normal value, but these two data have never been used for the determination of export price. Therefore, if the company who passes the "separate rate" test, it shall be eligible to get individual rate based on its own export price and not be subject to the uniform rate impacted by other exporters.

Further, it has also been contended that the US measures, presuming state control, are inconsistent with the factual findings made by the US Department to justify CVD proceedings. The issue was last raised in a case before the US Court of International Trade [Slip opinion dated 11-10-2013 in Diamond saw blades][5]. Though US courts have been consistent in their opinion and have time and again justified presumption of state control[6], the issue it seems has been settled by the Appellate Body in the *EC – Fasteners (China)* and the non-individual treatment has been held inconsistent with WTO obligations. This precedent case assumes more importance in the issue raised above as USA had participated in the said dispute before the WTO as the interested third party, siding with the European Union on the issue raised above, and its arguments before the Appellate Body had been rejected. It hence seems most likely that the US has to change its practice in this regard.

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3 In EC – Fasteners (China), the Appellate Body upheld the Panel's finding that the presumption in Article 9(5) violated Article 6.10.

4 Appellate Body Report, *EC – Fasteners (China)* Para. 328.

5 The US Court of International Trade however declined to express its opinion on the issue.

6 *Sigma Corp.* v. *United States,* 117 F.3d 1401, 1405–06 (Fed. Cir. 1997)

Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
4,4 DiaminoStilbene 2,2 Disulphonic Acid (DASDA)	China	9/2014-Cus. (ADD)	23-1-2014	Definitive ADD imposed for 5 years
Acrylonitrile Butadiene Rubber	Korea RP	6/2014-Cus. (ADD)	23-1-2014	ADD extended upto 1-1-2015 pending sunset review determination
Cast aluminium alloy wheels	China, Korea RP and Thailand	14/7/2012-DGAD	13-1-2014	Provisional ADD recommended
Caustic Soda	China and Korea RP	3/2014-Cus. (ADD)	16-1-2014	ADD extended upto 25-12-2014 for imports from China pending sunset review determination
		4/2014-Cus. (ADD)	16-1-2014	ADD extended upto 25-12-2014 for imports from Korea pending sunset review determination
Compact Fluorescent Lamps	China	2/2014-Cus. (ADD)	3-1-2014	ADD extended upto 20-11-2014 pending sunset review determination
Flexible Slabstock Polyol	USA and Japan	15/15/2012-DGAD	13-1-2014	Discontinuance of ADD recommended
Float Glass (specified)	China and Indonesia	7/2014-Cus. (ADD)	23-1-2014	ADD extended upto 5-1-2015 pending sunset review determination
Hexamine	Saudi Arabia and Russia	8/2014-Cus. (ADD)	23-1-2014	ADD continued for 5 years pursuant to sunset review
Nonyl Phenol	Chinese Taipei	5/2014-Cus. (ADD)	16-1-2014	ADD continued for 5 years pursuant to sunset review
Nylon Tyre Cord Fabric	Belarus	1/2014-Cus. (ADD)	3-1-2014	Name of exporter amended pursuant to interim review
Phosphoric Acid - Technical grade and food grade (including industrial grade)	China	33/2013-Cus. (ADD)	31-12-2013	ADD continued for 5 years pursuant to sunset review
Polyvinyl Chloride Paste/Emulsion Resin	Norway and Mexico	14/5/2013-DGAD	22-1-2014	Initiation of ADD investigation

Product	Country	Notification No.	Date of Notification	Remarks
Polyvinyl Chloride (PVC) Suspension Grade Resin	Taiwan, China, Indonesia, Japan, Korea RP, Malaysia, Thailand and USA	21/29/2011-DGAD	24-1-2014	Extension of time upto 4-3-2014 for completion of ADD sunset review investigation
PVC Suspension Resin	EU and Mexico	14/1012/2012-DGAD	24-1-2014	Extension of time upto 4-1-2014 for completion of ADD investigation
Recordable Digital Versatile Disc (DVD)	Vietnam	34/2013-Cus. (ADD)	31-12-2013	ADD amended pursuant to interim review
Sodium Nitrate	European Union, China, Ukraine and Korea RP	15/1009/2012-DGAD	6-1-2014	Provisional ADD recommended

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Bars and Rods, Hot-Rolled, in irregularly wound coils	Indonesia	G/SG/N/6/IDN/24 (WTO Notification)	17-1-2014	Safeguard investigation initiated
Certain lined paper products	USA	C-533-844, 79 FR 5377	31-1-2014	Partial rescission of Countervailing Duty Administrative Review: 2012
Certain oil country tubular goods	USA	C-533-858, 79 FR 4333	27-1-2014	CVD investigations - Preliminary determination of critical circumstances
Polypropylene Resins	Brazil	Resolution No. 2	16-1-2014	CVD investigations - Preliminary determination of critical circumstances
Steel threaded rod	USA	Investigation Nos. 701–TA–498 and 731–TA–1213–1214 (Final)	17-1-2014	US ITC issues notice of scheduling of final phase of injury investigations in anti-dumping and countervailing duty investigations
Synthetic staple fibre	Egypt	Official Gazette No. 292	24-12-2013	Anti-dumping investigation initiated

WTO News

Compliance of DSB reports – US concerned about Chinese compliance while Mexico disputes USA's conformity

Compliance, or lack of it, was the flavor of this month at the WTO. While a compliance panel was established on Mexico's complaint against the USA's compliance in the *Tuna* dispute, USA itself disputed Chinese compliance in dispute pertaining to *electronic payment services* and the *GOES* dispute.

Dispute Settlement Body, on 22-1-2014, established a compliance panel on Mexico's complaint against US measures on the importation, marketing and sale of tuna and tuna products. Mexico considers that US modification to its dolphin-safe labelling requirements had not complied with the DSB's recommendations in dispute DS 381. The US had amended its provisions in July 2013 and hence is of the view that the panel's recommendations have been fully complied with. Canada, China, the European Union, Guatemala, Japan, Korea, Norway and Thailand have also reserved their third-party rights to participate in these proceedings.

On the same day, US disputed Chinese compliance in the dispute pertaining to measures affecting electronic payment services (DS 413). As per reports, USA called on China, in the dispute settlement committee's meeting to promptly meet its obligations and to permit foreign suppliers of electronic payment services to do business on fair and open terms. Further, in another matter, pertaining to trade remedy actions by China against the import of grain oriented flat-rolled electrical steel from USA (DS 414), the United States has, on 13-1-2014, sought consultations with China on the latter's failure to bring its anti-dumping and countervailing duties on U.S. exports of GOES into compliance with its obligations.

Canada and Norway appeal seal products reports

On 24th January 2014, Canada and Norway appealed against the Panel Report issued by DSB in WTO in DS-400 and DS-401 "European Communities — Measures Prohibiting the Importation and Marketing of Seal Products". Canada has sought review of the Report with respect to the legitimate regulatory distinction test in Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement). Canada also considers that the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the facts pertinent to its findings under Articles 2.1 and 2.2 of the TBT Agreement as well as Article XX(a) of the GATT 1994.

Trade remedy measures on the rise – DG Report

The annual report of the Director General to the Trade Policy Review Body says that 2013 witnessed increase in new trade restrictions and trade-remedy actions by almost 33% as compared to 2012 and that more actions were initiated, as earlier, than were terminated. As per the report, a vast majority of the 355 trade-remedy actions reported, comprised of anti-dumping and safeguard measures.

Countries that respond to the request to provide information on their new trade measures

for trade monitoring exercise are very few and this number has declined from 38 in 2012 to 35 in 2013, according to the report. The report dated 31-1-2014 observes that there is considerable scope of improvement in reporting of trade-related measures and it notes that behind-the-border measures such as subsidies, state-aids and domestic regulations are not being reported.

The Bali Package adopted at the 9th Ministerial Conference in December was found as a considerable achievement to boost trade, growth and development. According to the report, the number of new trade-facilitating measures reported by members fell to 107 in 2013, well down from 162 a year earlier. The report also discusses at length regional trade negotiations and agreements and how these agreements have significant ramifications for the evolution of multilateral trading system.

News Nuggets

From red to amber on green goods

Environment had been an issue of focus in trade talks whether leaving policy space for nations in free trade texts or IPR concerns in technology transfer or carbon trading. The European Union (EU) recently pledged to launch negotiations in the WTO on liberalising trade in 'green goods '. The press release states that WTO members should seek to evolve a binding agreement based on the principle of Most Favoured Nation (MFN). There is no agreed list of exactly what are green goods - understood to be goods which pollute environment less compared to other similar products and those which will help in combating pollution.

The Asia Pacific Economic Cooperation Forum (APEC) has finalised a list of 54 goods on which tariffs are sought to be reduced to 5% or less by 2015. Fourteen countries including China, EU, US, Japan and Australia will seek to build upon the APEC list bringing it into the folds of the WTO. The APEC list includes steam boilers, machinery for filtering or purifying water, assembled floor panels of bamboo, gas turbines waste incinerators and so on. India is not a member of APEC though it was invited to be an observer in the past. It does however promote export of green products.

A binding agreement could be a long way off, as it has been since the Doha round and how countries will strike a balance between making imports cheaper while keeping exports competitive is a tricky question. At present, the spotlight is still on tradewars over solar panels, restrictions on export of LNG and environment concerns on fracking.

Trade off between consultation and conclusion

The Bipartisan Congressional Trade Priorities Act of 2014 seeks to strengthen the role of the US Congress in treaty making or rather its enactment. Popularly referred to as the Fast Track Promotion authority, it would give the executive (President) greater freedom to conclude treaties. Notably, the earlier version of the Act, in 1974 enabled the US President to negotiate the GATT. There was limited scope for the legislature (Congress) to make changes to the agreed texts. The present version purports to strengthen public consultation and

access to information and tighten Congressional oversight. It lists facilitating digital trade, protecting IP, dispute settlement, currency manipulation and addressing impact of State-owned enterprises as objectives more appropriate for the 21st century. The Act will enable the President to enter into agreements upto June 1, 2018 and can be extended for another 3 years.

Ratio Decidendi

European Court finds absence of threat of injury, annuls regulation imposing ADD

The European General Court has held that decrease in the market share of domestic industries by few percentage points during the period under consideration period is not sufficient to say that the domestic industry was in vulnerable situation. Deliberating on the appellant's challenge to the EC's finding that though the community industry had not suffered injury but there was threat of injury as the European domestic industry was in a vulnerable position, the court, considering various evidences pointing to situation of strength in the domestic industry, held that the Community industry was not in a vulnerable situation.

Obvious contradiction between claim that imports originating in China limited the Community industry's inclination to expand its production capacity on one hand and, the emphasis on 'exceptional' nature of the expansion of the Community market and the imminent risk of a considerable contraction in demand (as confirmed by post-investigation period data) on the other, was also noted by the court. Further, it held that contraction in demand must not be attributed to the dumped imports. It was noted that that EC did not take into account, the availability of other export markets to absorb any additional exports, as required under Article 3(9) of the basic EU Regulation. While analyzing post-investigation period data, the court also observed that contrary to the belief of the Commission, prices of imports originating in China significantly increased even when there was contraction of domestic EU market.

The Court finally annulled Council Regulation (EC) No. 926/2009, dated 24-9-2009 imposing definitive anti-dumping duty on imports of certain seamless pipes and tubes of iron or steel originating in China and produced by a specific Chinese entity. The Court further ordered the Council of the European Union to bear its own costs and to pay those incurred by the said entity, appellant in this case. [*Hubei Xinyegang Steel Co. Ltd.* v. *Council of the European Union* - Case T-528/09, dated 29-1-2014]

Identity of purchaser – US DoC's omission in definition of goods excluded from ADD and CVD measures, upheld

The United States Court of International Trade has upheld the Department of Commerce's action of omitting the words 'sold to electronics manufacturers' from the US ITC's definition

of 'Finished heat sinks' (FHS) which are excluded from the ADD and CVD measures on aluminium extrusions. Initially the US ITC had, for the purpose of such exclusion defined FHS as "fabricated heat sinks, sold to electronics manufacturers, the design and production of which are organized around meeting certain specified thermal performance requirements and which have been fully, albeit not necessarily individually, tested to comply with such requirements". The Court in this regard noted that there was no evidence to support claim that DoC's implementation has expanded the ITC's definition and that the product would be improperly admitted without appropriate AD or CVD duties if the purchaser is not specified.

It was observed that the ITC report itself did not support the view that the omitted words were critical to the product definition and that ITC's purpose of specifying such words was clarification of actual end use and not for establishing exclusion. The Court rejected the claim of the domestic industry of unlawful expansion of the exclusion. Further, contention that testing should have been specified to identify the product, was rejected by the court holding same to be speculative. [*Aluminum Extrusions Fair Trade Committee* v. *United States* – US Court of International Trade – Slip Opinion 14-6 dated 23-1-2014]