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## Contents

### Article

Role of 'adjustment plan' in Safeguard investigations ..... 2

### Trade Remedy News

Trade remedy measures by India ..... 4

Trade remedy measures against India 6

WTO News ..... 6

### India Customs & Trade Policy

Update..... 9

Ratio Decidendi..... 10

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## Article

### Role of 'adjustment plan' in Safeguard investigations

By Divyashree Suri

By virtue of India's accession to the World Trade Organization ("WTO"), India has agreed to the requirements of all the multilateral agreements under the framework of the WTO. One of the fundamental commitments undertaken by India in case of a measure taken against a sudden surge in imports of a product from Member countries is enshrined under Article 5 of the Agreement on Safeguards ("AoS").

Article 5.1 of AoS states as follows:

*"A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. [...]" (Emphasis added)*

In pursuance of such commitment, Rule 5(2)(b) of the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 ("**Safeguard Rules**") require the domestic industry of the like product to attach a '*statement on the efforts being taken, or planned to be taken, or both, to make a positive adjustment to import competition.*' However, the language of sub-rule (3) creates a hierarchy, under which the Designated Authority ("**Authority**") shall only commence investigation once the applicant has provided evidence of increased imports, serious injury or threat of serious injury and a causal link between increased imports and injury.<sup>1</sup> Therefore, while the absence of an adjustment plan may result in an incomplete application, it does not bar the authority from initiating a safeguards investigation.

The Authority adjudicates upon the viability of the adjustment plan in depth once the investigation is initiated. Factors such as cost reduction, increase of capacity, modernization plans, improvement in efficiency, reconfiguration of units, and backward integration have been accepted by the Authority to constitute viable adjustment plans.<sup>2</sup> Adjustment plans which are submitted by the domestic industries are often detailed and confidential, and the non-confidential version summaries are provided to the interested parties to the investigation. In an investigation concerning imports of *Hot Rolled Flat Sheets and Plates (Excluding Hot Rolled Flat Products in Coil Form) of Alloy or Non-Alloy Steel* into India, the domestic industry had kept their adjustment plans confidential. The Authority summarized such adjustment plans in its final findings for the sake of transparency and clarity.<sup>3</sup>

In an investigation concerning imports of *Flexible Slabstock Polyol (FSP)* into India, the Authority observed that the adjustment plan submitted by the domestic industry was not viable since (a) it did not have a specified time frame; and (b) the letter of intent for expansion of capacity was for polyol and not the Product

<sup>1</sup> Rule 5(3), Safeguard Rules

<sup>2</sup> Safeguard Investigation concerning imports of Acetone into India- Final Findings dated 7<sup>th</sup> October 1999; Safeguard Investigation concerning imports of Tubes, Pipes and Hollow Profiles, Seamless of Iron, Alloy, or non-alloy steel (other than cast iron and stainless steel) into India- Final Findings dated 11<sup>th</sup> March 2014; Safeguard investigation concerning imports of "Solar Cells whether assembled in modules or panels" into India- Final Findings

<sup>3</sup> Safeguard Investigation concerning imports of Hot Rolled Flat Sheets and Plates (Excluding Hot Rolled Flat Products in Coil Form) of Alloy or Non-Alloy Steel into India- Final Findings dated 2<sup>nd</sup> August 2016

Under Consideration (“PUC”).<sup>4</sup> A similar approach was also taken in an investigation concerning imports of *Bare Elastomeric Filament Yarn* where the investigation was terminated due to lack of a reliable adjustment plan.<sup>5</sup> However, in both these cases, the Authority observed other factors which resulted in negative findings. Similarly, in the investigation concerning imports of *Cold Rolled Flat Products of Stainless Steel of 400 series*, the adjustment plan was regarded as unviable, but also the other factors required to be satisfied, leading to negative findings.<sup>6</sup> It must also be noted that the Authority may choose not to analyze the adjustment plan if the safeguard measure is being sought for less than one year.<sup>7</sup>

There exists no Indian jurisprudence which further discusses the precise role of an adjustment plan in a safeguard investigation, and whether an investigation can result in a negative finding on the sole basis of unviability of the adjustment plan submitted by the domestic industry.

The WTO jurisprudence on this aspect is also limited. The Panel in the case of *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products* states that the obligation is on the Authority to justify that the measure being recommended is compatible with Article 5.1 of the AoS, but it does not have to be by way of an adjustment plan:

*“We wish to make it clear that we do not interpret Article 5.1 as requiring the consideration*

*of an adjustment plan by the authorities ... The Panel finds no specific requirement that an adjustment plan as such must be requested and considered in the text of the Agreement on Safeguards. Although there are references to industry adjustment in two of its provisions, nothing in the text of the Agreement on Safeguards suggests that consideration of a specific adjustment plan is required before a measure can be adopted. Rather, we believe that the question of adjustment, along with the question of preventing or remedying serious injury, must be a part of the authorities’ reasoned explanation of the measure it has chosen to apply. Nonetheless, we note that examination of an adjustment plan, within the context of the application of a safeguard measure, would be strong evidence that the authorities considered whether the measure was commensurate with the objective of preventing or remedying serious injury and facilitating adjustment.”<sup>8</sup>*

The role of an adjustment plan towards facilitating positive adjustment of the domestic industry such that it can cope with import competition, especially in a global economy which does not have equal constituents, is understated. Unlike anti-dumping and countervailing measures, safeguard measures are not imposed on ‘unfair’ imports. Safeguard is a protectionist measure for protecting domestic industries which are not developed enough to compete with imports. Further, it must also be noted, the AoS is a part of the implementation of Article XIX of the General Agreement on Tariffs and Trade (“GATT”) which allows Member Countries an ‘escape’ from other GATT obligations in case of a situation of ‘emergency’. In such a situation, the onus lies on the domestic industry to be pro-active and to provide an objective layout of how they intend to make use

<sup>4</sup> Safeguard Investigation concerning imports of Flexible Slabstock Polyol into India- Final Findings dated 13<sup>th</sup> January 2015

<sup>5</sup> Safeguard Investigation concerning imports of Bare Elastomeric Filament Yarn- Final Findings dated 29<sup>th</sup> September 2014

<sup>6</sup> Safeguard Investigation concerning imports of Cold Rolled Flat Products of Stainless Steel of 400 series into India- Final Findings dated 23<sup>rd</sup> March 2015

<sup>7</sup> Safeguard Duty investigation against imports of Caustic Soda into India- Final Findings dated 9<sup>th</sup> April 2010

<sup>8</sup> Panel Report, Korea – Dairy, para. 7.108.

of the period granted to them to make the required adjustments. An 'Adjustment Plan' allows the investigating authority to determine (a) the efforts being made by the domestic industries to compete with the imports; (b) the time period for which the safeguard measure should be implemented; and (c) in the event of the safeguard measure being implemented for over a year, the manner in which it should be progressively liberalized, to best benefit the industry in question.

Several practical problems may also arise out of not giving enough importance to 'facilitating adjustment'. The lack of initiative by the domestic industry coupled with the safeguard duties imposed on imports has the potential of

leading to a dire lack of supply, the consequences of which are borne by the user industry and consumers. Such a situation could spiral into several connected industries facing huge financial losses.

While the consistent Indian practice is to assess the facilitation of adjustment through adjustment plans, its weightage in determining the imposition of safeguard duties is unclear. It is only a factor of time and circumstances which shall truly reveal the consequences of non-submission of a viable adjustment plan.

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## Trade Remedy News

### Trade Remedy actions by India

Product	Country	Notification No.	Date of Notification	Remarks
Atrazine Technical	China PR	03/2019-Cus. (CVD)	17-09-2019	Definitive countervailing duty imposed.
Chlorinated Polyvinyl Chloride Resin	Korea RP, China PR	33/2019-Cus. (ADD)	26-08-2019	Provisional anti-dumping duty imposed.
Clear Float Glass	Malaysia	F.No. 6 /15/2019-DGTR	23-08-2019	Initiation of anti-dumping duty investigation.
Electrical Insulators of Glass or Ceramics/Porcelain	China PR	37/2019-Cus. (ADD)	14-9-2019	Anti-dumping duty continued after sunset review.

Product	Country	Notification No.	Date of Notification	Remarks
Flexible Slabstock Polyol	Kingdom of Saudi Arabia and United Arab Emirates	F.No. 6/20/2019-DGTR Case No. OI 14/2019	18-09-2019	Initiation of Anti-dumping investigation.
Melamine	China PR	34/2019- Cus. (ADD) & 35/2019-Cus. (ADD)	06-09-2019	Duties imposed on new shipper in the investigation, therefore amending the original duty table.
Phenol		F.No 22/3/2019-DGTR	23-08-2019	Initiation of safeguard duty investigation.
RBD Palmolein/Palm Oil	Malaysia	29/2019-Cus.	04-09-2019	Rate of Customs duty increased by 5 percent, for a period of 180 days, on goods imported under India-Malaysia Comprehensive Economic Cooperation Agreement, on recommendation of preliminary findings of DGTR under India-Malaysia Comprehensive Economic Cooperation Agreement (Bilateral Safeguard Measures) Rules, 2017.
Saccharin	China PR	02/2019-Cus. (CVD)	30-08-2019	Definitive Countervailing Duty imposed.
Textured Tempered Glass whether coated or uncoated	Malaysia	F. No. 06/13/2019-DGTR	12-09-2019	Initiation of Anti-Subsidy Investigation.
Welded Stainless Steel Pipes and Tubes	China PR and Vietnam	04/2019-Cus. (CVD)	17-09-2019	Definitive countervailing duty imposed.

## Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Oil Country Tubular Goods	USA	84 FR 50001 [C-533-858]	24-9-2019	CVD – Affirmative sunset review
Polyethylene Terephthalate Film, Sheet, and Strip	USA	84 FR 48123 [A-533-824]	12-9-2019	ADD Administrative Review 2017-18 – Preliminary finding of sale below normal value
Polyethylene Terephthalate Film, Sheet, and Strip	USA	84 FR 48105 [C-533-825]	12-9-2019	CVD Administrative Review 2017 – Preliminary determination of receipt of countervailable subsidies by two Indian entities.
Zinc Coated (Galvanised) Steel	Australia	Anti-Dumping Notice No. 2019/100	23-08-2019	Initiation of reviews of Anti-Dumping Measures



## WTO News

### Chinese Taipei initiates dispute against Indian tariffs on certain information and communications technology goods

WTO dispute consultations have been requested by Chinese Taipei with India concerning duties imposed by India affecting the imports of Information Technology goods to India. The request was circulated to WTO members on 9 September. According to Chinese Taipei, India applies duties in excess of the bound rates in its Schedule of Concessions and Commitments annexed to the GATT 1994 on imports of certain information and communications technology goods. It is alleged that the measures appear to be inconsistent with India's obligations under Article II:1(a) and (b) of the GATT 1994 because,

through those measures, India accords less favorable treatment to the commerce of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu of certain information and communication technology goods than provided for in its Schedule and has failed to exempt such goods from ordinary customs duties or other duties or charges in excess of those set forth in its Schedule.

### Canada files dispute against Chinese import restrictions on canola seed

WTO dispute consultations have been requested by Canada with China concerning measures imposed by China affecting the import of Canola Seed from Canada to China. The request relating to China's suspension of canola seed imports from two Canadian companies and China's

application of enhanced inspections to canola seed imports from other Canadian companies, was circulated to WTO members on 12<sup>th</sup> of September. While China cites detection of quarantine pests in canola seed shipments as the reason for its measures affecting the importation of Canadian canola seed, according to Canada, the measures do not appear to be based on the relevant international standards, guidelines, or recommendations. Canada alleges that the measures are inconsistent with various provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), GATT 1994 and the Trade Facilitation Agreement.

### **Ukrainian duties on ammonium nitrate from Russia – Appellate authority upholds Panel report**

On 12 September the Appellate Body issued its report in the case brought by the Russian Federation in “*Ukraine — Anti-Dumping Measures on Ammonium Nitrate*” (DS493). The dispute was concerned with anti-dumping measures imposed by Ukraine on imports of ammonium nitrate from Russia. The Appellate Body upheld the Panel Report that Ukraine acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement because Ukrainian investigating authorities did not provide an adequate basis under the second condition in the first sentence of that provision to reject the reported gas cost that the Russian producers under investigation paid. The Appellate Body further did not find any error in the finding of the Panel that Gazprom’s below-cost prices did not constitute a sufficient factual basis for the authorities to conclude that the records of the investigated Russian producers did not reasonably reflect the costs associated with the production and sale of ammonium nitrate. It also upheld the finding that Ukraine acted inconsistently with Article 2.2 of the Anti-Dumping

Agreement because the authorities failed to calculate the cost of production “in the country of origin”.

### **Korea initiates dispute against Japanese measures restricting exports to Korea**

WTO dispute consultations have been requested by Korea RP with Japan concerning measures imposed by Japan affecting the export of products and technology to Korea. The request was circulated to the WTO members on 16<sup>th</sup> of September. Korea alleges that Japanese measures restricting exports of fluorinated polyimide, resist polymers and hydrogen fluoride, and their related technologies destined for Korea are inconsistent with Japan’s obligations under various provisions of the WTO agreements. According to Korea, the implementation of the Amended Export Licensing Policies and Procedures constitutes politically motivated, disguised restrictions on trade.

### **Korean duties on Japanese pneumatic valves - Appellate Body issues report**

On 10 September the Appellate Body issued its report in the case brought by Japan in “*Korea — Anti-Dumping Duties on Pneumatic Valves from Japan*” (DS504). This dispute concerns anti-dumping duties imposed by Korea on imports of valves for pneumatic transmissions (pneumatic valves) originating from Japan. The Appellate Body upheld the Panel’s finding that that Japan failed to establish that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement with respect to their evaluation of the magnitude of the margin of dumping. It however upheld the Panel’s finding that Japan has not demonstrated that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement with respect to their conclusion that the dumped imports, through the effects of dumping, were causing injury to the

domestic industry, insofar as Japan's argument regarding insufficient correlation between dumped imports and trends in domestic-industry profits is concerned.

### Thai cigarette import measures - Thailand appeals second compliance panel report

On 9 September, Thailand has filed an appeal concerning the WTO compliance panel report in the case brought by the Philippines in “*Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines — Second Recourse to Article 21.5 of the DSU by the Philippines*” (DS371). The compliance panel report was circulated to WTO members on 12 July 2019. According to Thailand, the Panel erred in law in its interpretation of Article 15.1(a) of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994. It is also alleged that the Panel erred in law in finding that the exceptions of Article XX of the GATT 1994 do not apply to actions taken to enforce customs laws that may be inconsistent with the provisions of the Customs Valuation Agreement.

### China initiates dispute against additional US duties on Chinese imports

WTO dispute consultations have been requested by China with United States concerning duties imposed by the latter affecting the imports of Chinese goods. The request was circulated to WTO members on 4<sup>th</sup> of September. China alleges that the additional duty, described as modification of Section 301 Action, is only applied to China's products and in excess of the United States's bound rates in its Schedule of Concessions and Commitments annexed to the GATT 1994. Violation of Article I.1 of the GATT 1994 has been pleaded.

## Safeguard investigations notified in WTO

- **Madagascar launches three safeguard investigations:** On 27 August, Madagascar notified that it initiated three safeguard investigations: on soaps; on lubricating oils; and on vegetable oils and margarines. All three investigations were initiated on 14 August 2019.
- **Jordan launches safeguard investigation on potato chips:** On 3 September 2019, Jordan notified that it has initiated a safeguard investigation on imports of “potato prepared or preserved otherwise than by vinegar or acetic acid, not frozen” on 1 September 2019.
- **Guatemala launches safeguard investigation on flat-rolled products:** On 4 September 2019, Guatemala notified that it has initiated a safeguard investigation on imports of “flat-rolled products of other alloy steels of a width of 600MM or more” on 27 August 2019.
- **Ukraine launches safeguard investigations on certain nitrogen fertilizers and complex fertilizers:** On 5 September 2019, Ukraine has notified that it has initiated a safeguard investigation on imports of “certain nitrogen fertilizers” on 28 August 2019. A safeguard investigation on “complex fertilizers” (mineral fertilizers with nitrogen and phosphorus content and mineral fertilizers with nitrogen, phosphorus, potassium content) has also been launched on 28-8-2019.
- **Philippines launches safeguard investigation on rice:** On 13 September 2019, Philippines has notified that it has initiated a safeguard investigation on imports of rice on 11 September 2019.



- **Indonesia launches 3 safeguard investigations on fabrics, yarns and curtains:** On 20 September 2019, Indonesia notified that it has initiated three safeguard investigations - on fabrics, on yarn (other

than sewing thread) of synthetic and artificial staple fibres, and on curtains (including drapes), interior blinds, bed valances, and other furnishing articles. All the investigations were launched on 18<sup>th</sup> of September 2019.



## India Customs & Trade Policy Update

**Steel Import Monitoring System to be effective from 1-11-2019:** Import policy for certain specified items classifiable under Chapters 72, 73 and 86 of ITC(HS) has been revised from free to 'free subject to compulsory registration under Steel Import Monitoring System'. Under SIMS, the importers will be required to submit online advance information for import and obtain an automatic registration number by paying fee of Rs.1/thousand on CIF value. As per Notification No. 17/2015-20, dated 5-9-2019, SIMS will be effective for the Bill of Entry filed on or after 1-11-2019.

**Bank guarantee under AA/DFIA/EPCG Schemes - Norms revised:** CBIC has revised norms for execution of bank guarantee (BG) under Advance Authorization, DFIA and EPCG Schemes. Manufacturer exporters/service providers registered under GST can claim exemption from furnishing BG if they have exported in previous two Financial Years and have minimum export of Rs.1 Crore in the preceding financial year, or have paid Rs.1 Crore GST in the preceding financial year, under different categories. As per Circular No. 31/2019-Cus., dated 13-9-2019, certificate of export performance or payment of GST for availing exemption must be procured from the Export Promotion Councils or authenticated by a CA registered with the GST department.

**Drawback when permissible on FOB value without deducting foreign bank charges:** Duty drawback may be permitted on FOB value without deducting foreign bank charges. CBIC has clarified that since agency commission up to the limit of 12.5% of the FOB value is allowed, deduction on account of foreign bank charges is available within this overall limit of 12.5% of the FOB value. Circular No. 33/2019-Cus., dated 19-9-2019 further clarifies that agency commission and foreign bank charges, separately or jointly, exceeding this limit is to be deducted from the FOB value for granting duty drawback.

**Mechanism for claiming additional MEIS:** DGFT has notified a mechanism for claiming additional MEIS benefit in respect of exports made on or after 1-11-2017 by exporters who are not able to claim the benefits at higher rates as notified by DGFT in 2017-2018 by way of four Public Notices, since scrips were issued to them as per the older rates. As per DGFT Trade Notice No. 28/2019-20, such exporters are required to submit an application to the RA with the relevant documents. The RA would open a supplementary file, check the eligibility of the claim and fill the differential rate. After approval at the level of Deputy DGFT, the RA would issue the scrip for supplementary file, which will be utilized like other MEIS scrips.

**Motor vehicles - New policy condition inserted under Chapter 87 of ITC (HS):** A new condition has been inserted in Chapter 87 of the ITC(HS) by Notification No. 14/2015-20, dated 28-8-2019 for the purpose of import of motor vehicles. Accordingly, registration of vehicles imported by a vehicle manufacturer, an

organisation or a citizen for their personal use, demonstration, testing, research or scientific use, etc., should comply with the Standard Operating Procedure issued under the Central Motor Vehicles (Eleventh Amendment) Rules, 2018.



## Ratio Decidendi

**Refund claim not maintainable unless self-assessment order is modified though appeal:**

3-Judge Bench of the Supreme Court has held that unless the order of assessment or self-assessment is appealed, no refund application against the assessed duty can be entertained. The Apex Court observed that endorsement made on the Bill of Entry is an order of assessment, and that speaking order is not required to be passed in 'across the counter affair' when there is no *lis*. Setting aside the Delhi and Madras High Court Orders, the Supreme Court also noted that as self-assessment is nonetheless an order of assessment, no difference is made by deletion of the expression "in pursuance of an order of assessment" under Section 27(1)(i) of the Customs Act, 1962 (while introducing provisions of self-assessment) and no separate reasoned assessment order is required to be passed in the case of self-assessment. Further, taking note of the fact that provisions of Section 128 make appealable any decision or order under the Customs Act, the Court opined that order of self-assessment is appealable in case any person is aggrieved by it. It observed that Section 128 has not provided for an appeal against a speaking order but against "any order". [*ITC Limited v. Commissioner - Civil Appeal Nos. 293294 of 2009 and Ors., Supreme Court*]

**Appeal against CESTAT Order on violation of exemption condition lies before High Court:**

3-Judge Bench of the Supreme Court has held that an appeal against the CESTAT Order, involving violation of conditions of Customs exemption notification, would lie before the High Court and not the Supreme Court. Remanding the matters back to the High Court, the Apex Court observed that the question involved was not related to determination of rate of duty, valuation, determination of classification of goods, or coverage under exemption notification. It also observed that the appeals did not involve any question of law of general public importance which would be applicable to a class or category of assessees as a whole. [*Commissioner v. Motorola India Ltd. - Civil Appeal No. 10083 of 2011 and Ors., decided on 5-9-2019, Supreme Court*]

**Valuation – Substantial mark-up in supply of imported goods to customers when not indicates undervaluation of imports:**

Considering the nature of business of the appellant/importer and that the overheads involved in the business activity were bound to influence the price at which the imported goods were sold to the Indian customers, CESTAT Mumbai has held that the difference between the declared price at the time of import and the

selling price cannot be designated as profit accruing to the importer. The Tribunal also held that the fact that importer/ appellant and the supplier being connected through a common holding company and being related parties, was not sufficient to reject the declared price if there was no evidence that the relationship between the supplier and importer (being related parties) had impacted the conditions of sale. [*Voith Turbo Pvt. Ltd. v. Commissioner* - Final Order No. A/86581/2019 dated 11-9-2019, CESTAT Mumbai]

**No fundamental right to import and quantitative restrictions can be imposed:** The Bombay High Court has held that there is no fundamental right to import poppy seeds and quantitative restrictions can be imposed as per

the National Policy on Narcotic Drugs and Psychotropic Substances, controlled by the Narcotic Drugs & Psychotropic Substances Act, 1985 which can be traced to the Foreign Trade (Development & Regulation) Act, 1992. The importer had challenged the Central Bureau of Narcotics guidelines which regulate import of poppy seeds, as an unconstitutional restriction on their right to trade and carry on business. The Court noted that there is no fundamental right to import anything without restrictions, or only on terms beneficial to a particular person and that the importer had not challenged the power to impose such restrictions. [*Chailbihari Trading Pvt Ltd. v. Union of India* - 2019 TIOL 2021 HC MUM NDPS]

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