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Article

Indonesia - Iron or Steel Safeguards: Metallurgic jurisprudence on definition of a "Safeguard Measure"

By **Bhargav Mansatta** and **Jayant Raghu Ram**

Introduction

The Agreement on Safeguards (SGA) details the substantive and procedural provisions concerning the imposition of a safeguard measure. However, the conditions under which a safeguard measure can be implemented by a WTO Member are provided in Article XIX:1(a) of the GATT. Article XIX:1(a) permits a WTO Member to implement a safeguard measure if, as a result of unforeseen developments and of the effect of the obligations incurred under the GATT (including tariff concessions), any product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten serious injury to the domestic producers of the product in that territory.

In July 2014, Indonesia had imposed a "safeguard duty" on imports of iron and steel products ("**subject goods**"). Indonesia had however exempted 120 developing countries from the ambit of the safeguard duty, as required under Article 9.1 of the SGA.¹ It must be noted that Indonesia did not have tariff bindings on the subject goods in its Schedule of Concessions, i.e., there were no ceilings on the rate of duty that Indonesia could apply on imports of these subject goods.

At the WTO, Vietnam and Chinese Taipei² contested the consistency of the safeguard investigation and the resulting duty with the SGA and also as being in violation of Article I (MFN obligation)³ of the GATT.

Assessment of the Panel

Article XIX:1(a) of the GATT states:

"If, as a result of unforeseen developments and of the *effect of the obligations incurred* by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to *suspend the obligation in whole or in part or to withdraw or modify the concession.*"

In its analysis, the panel noted that for the measure to constitute a safeguard measure, it had to violate a GATT obligation for the purpose of preventing or remedying injury. However, in the present case, since Indonesia did not have tariff bindings on the subject goods in its schedule of concessions, the specific duty

¹ Article 9.1 of the SGA permits the Member imposing safeguard measures to exempt developing countries from the scope of application if import from these countries constitute less than 3% of the total volume of imports of the subject goods into the territory of such Member.

² Viet Nam and Chinese Taipei were not exempt from the specific duty imposed by Indonesia.

³ Article I of GATT prohibits a WTO Member from according treatment to the imports of goods from a WTO Member that is less favourable than that accorded to imports from other territories.

imposed by Indonesia on imports of the subject goods, i.e., the "safeguard measure", did not suspend, withdraw, or modify Indonesia's obligations under GATT Article II. Thus, the panel concluded that the specific duty was not a safeguard measure.

The panel had examined Indonesia's argument that since the safeguard duty violated Indonesia's tariff obligations under its various free trade agreements (**FTA**), there was a violation of GATT Article XXIV. Article XXIV permits FTAs between WTO Members, which in turn prevent parties to FTAs from raising their bound tariffs under the FTAs. However, the panel rejected this argument holding that there was no such obligation in Article XXIV, and such obligations were instead governed by the applicable FTA.

In the absence of a violation of any GATT obligation, the panel rejected the characterization of the measure as a safeguard measure. The panel exercised judicial economy and desisted from making findings on merits under the SGA.

In support of its contention that the measure was a safeguard measure, Indonesia argued that the measure was imposed after conducting a safeguard investigation under its applicable safeguard framework. Further, Indonesia stated that it had made the necessary notifications under the SGA to the WTO's Safeguard Committee. However, the panel did not agree that compliance with these procedures would characterise the impugned measure as a safeguard measure.

The panel then held that the measure, i.e., the increase in specific/import duty on imports of the subject goods was a violation of GATT Article I:1, on account of Indonesia's exemption for developing countries from the applied duty.

Among other things, the panel also clarified that the absence of tariff bindings on a particular good did not mean that a WTO Member could not

impose a safeguard measure. It clarified that, in such a circumstance, such a measure would have to be in the nature of a quota or minimum import price, as that would be in violation of the obligation under GATT Article XI to not impose quantitative restrictions on imports.⁴

Concurrence by the Appellate Body

Before the Appellate Body (**AB**), Indonesia argued that the panel had gone beyond its brief by examining the characterization of the measure even though the parties had not disputed the same. The AB however rejected this argument and held that the panel was not only entitled, but rather, was obliged under DSU Article 11 to determine which covered agreement was applicable.

The AB also upheld the panel's findings concerning the characterization of the measure and agreed with the panel's reasonings.⁵

Conclusion

A "safeguard measure" has to be one which violates a GATT obligation, and purpose of the violation should be for preventing or remedying injury to the domestic industry. There is no requirement to conduct a safeguard investigation (for the purpose of imposing a safeguard duty) into imports of a product on which there is no tariff binding. The implication of this decision is that where a country does not have tariff bindings, if the authority imposes a safeguard measure in the form of duties, it should *not*

⁴ The SGA permits a Member to impose a safeguard measure in the form of a quota or a specific duty.

⁵ In its report, the panel held that that violation of the GATT obligation for *such extent* and for *such time*, as may be necessary for preventing or remedying injury to the domestic industry, was part of the definition of a safeguard measure. However, the AB modified the panel's finding to hold that the **extent** and **duration** of such a measure was not was not relevant for determining whether the measure was a safeguard measure.

exempt developing countries. If, however, a country *does* intend to exempt developing countries, then the safeguard measure should be in the form of a quota or any other quantitative restriction.

[The authors are Joint Partner and Senior Associate, respectively, in International Trade Practice, Lakshmikumaran & Sridharan, New Delhi]



Trade Remedy News

Trade Remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Di Methyl Formamide	China, Germany, Saudi Arabia	F.No.6/37/2017 -DGAD	23-10-2018	Final Findings issued recommending non-imposition of anti-dumping duties
Normal Butanol or N-Butyl Alcohol	Saudi Arabia	F.No.14/20/2016 -DGAD	29-10-2018	Re-issue of Final Findings (pursuant to Order of High Court of Telangana and Andhra Pradesh) without recommendation for imposition of anti-dumping duties
O-Acid	China	F.No.7/14/2018 -DGAD and 55/2018-Cus	24-10-2018 and 15-11-2018	Anti-dumping Duty on O-Acid from China , imposed vide Notification No. 6/2018-Cus. (ADD) extended to imports of Ofloxacin Ester from China
Purified Terephthalic Acid (PTA)	Korea RP, Thailand	F.No.7/36/2018 -DGTR	31-10-2018	ADD - Initiation of Sunset Review investigation
PVC Suspension Grade Resin	China, Thailand, USA	F.No.7/34/2018 -DGTR	29-10-2018	ADD - Initiation of Sunset Review investigation
Uncoated Copier Paper	Indonesia, Thailand, Singapore	F.No.6/32/2017 -DGAD	30-10-2018	Final Findings issued recommending imposition of anti-dumping duty
Zeolite 4A (Detergent)	China	F.No.6/14/2017 -DGAD	29-10-2018	Final Findings issued recommending imposition of anti-

Product	Country	Notification No.	Date of Notification	Remarks
grade)				dumping duty

Trade Remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Corrosion-Resistant Steel Products	United States of America	83 FR 55696 [C-533-864]	07-11-2018	Notice of Court Decision not in harmony with the Affirmative Final Determination and Countervailing Duty Order
Corrosion-Resistant Steel Sheet	Canada	COR 2018 IN	08-11-2018	Preliminary Determinations - Statement of Reasons
Glycine	United States of America	83 FR 54713 [A-533-883]	31-10-2018	Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional measures
Large Diameter Welded Pipe	United States of America	83 FR 56819 [C-533-882]	14-11-2018	Final Affirmative Countervailing Duty Determination
Polyester Textured Yarn	United States of America	83 FR 58223 [A-533-885]	19-11-2018	Initiation of Less-Than-Fair-Value Investigationa
Polyester Textured Yarn	United States of America	83 FR 58232 [C-533-886]	19-11-2018	Initiation of Countervailing Duty Investigations
Stainless Steel Wires	European Union	2018/C 402/06 [AD591]	08-11-2018	Notice of the expiry of anti-dumping measures



WTO News

Thailand's measures on imported cigarettes - Compliance panel report issued

On November 12, the WTO circulated the compliance panel report in the dispute initiated by the Philippines in "*Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines — Recourse to Article 21.5 of the DSU by the Philippines*" (DS371). In the compliance proceedings, Philippines had challenged three sets of measures:

- The rulings of the Thai Board of Appeals regarding customs valuation of some shipments of cigarettes imported by Phillip Morris, Thailand (PM Thailand) alleging a series of procedural violations of the Customs Valuation Agreement (CVA);
- The substance, under the CVA, of the criminal charges filed against PM Thailand for under-declaration of customs values for imports of cigarettes between 2003 and 2006.
- The administration of the VAT regime for cigarettes by the Ministry of Finance, Thailand in so far as the notification requirement was not met.

Finding favor with Philippines, the compliance panel held that:

- the rulings of the Board of Appeals were inconsistent with Articles 1.1 and 1.2(a), Article 5.1(a)(i), (ii) and (iv), Article 11.3 and Article 16 of the CVA as it rejected the importer's declared transaction values without a valid basis and failed to provide sufficient or timely explanation regarding its determination of an alternative customs value.

- the criminal charges were inconsistent with Articles 1.1 and 1.2(a) of the CVA because they rejected the importer's declared transaction values without a valid basis, and without due examination of the circumstances of sale that was apt to reveal whether the relationship between the importer and the seller influenced the price paid by the importer;
- the administration of the VAT regime for cigarettes by the Ministry of Finance, Thailand was inconsistent with Article X:1 of the GATT 1994 since Thailand adopted an administrative ruling of general application without publishing it; with Article X:3(a) of the GATT 1994, because it administered its Revenue Code provisions in an unreasonable manner by imposing on cigarette importers a VAT notification requirement with which it was impossible to ensure compliance and which exposed importers to potential consequences of non-compliance; and with Article III:4 of the GATT 1994, because there were factual circumstances enabling the Thai producer of domestic like products to set the retail sales price for its cigarettes, and thereby ensure its compliance with the VAT notification requirement.

Indian safeguard duties on steel products – Panel report issued

On November 6, the WTO circulated the panel report in the case brought by Japan in "*India — Certain Measures on Imports of Iron and Steel Products*" (DS518). Before the Panel, Japan had challenged a safeguard measure imposed by India with respect to imports of certain steel products as being inconsistent with various

provisions of the Safeguards Agreement and the GATT, 1994.

India had requested a preliminary ruling regarding the compatibility of Japan's complaint with Article 3.7 of the DSU since the measure at issue had expired. The Panel ruled that the expiry of the measure after the establishment of the Panel did not excuse the Panel from exercising its function under Article 11 of the DSU to make findings with respect to the matter raised by Japan, as well as to make recommendations to the extent that the measure continued to have any effects.

With respect to the substantive and procedural claims made by Japan, the Panel held that India had acted inconsistently with provisions of GATT, 1994 and the Agreement on Safeguards. However, the Panel did not uphold Japan's claims pertaining to "major proportion" of the domestic production, failure of the Indian Authority to assess the captive segment of the market, regarding the Indian Authority's assessment of positive trends in certain injury factors and regarding the consistency of India's compliance with Article 12.1(a), (b) and (c) regarding timely notifications to the Committee on Safeguards.

Moroccan duties on steel products from Turkey - WTO issues panel report

On October 31, the WTO circulated the panel report in the case brought by Turkey in "*Morocco — Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey*" (DS513). In the dispute, Turkey challenged Morocco's anti-dumping measures against certain hot-rolled steel products from Turkey. The Panel exercised economy with respect to most issues, finding notable inconsistency on the part of Morocco on three grounds:

- Morocco had acted inconsistently with Article 3.1 of the Anti-Dumping Agreement in determining that the domestic industry was "unestablished" and with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in evaluating whether Turkish imports had "materially retarded" that industry's establishment.
- Morocco had acted inconsistently with Article 5.10 of the Anti-Dumping Agreement by failing to conclude the investigation within the 18-month maximum time-limit set out in that provision. It also found that Morocco had acted inconsistently with Article 6.9 by failing to inform all interested parties of certain "essential facts".
- Morocco had acted inconsistently with Article 6.8 of the Anti-Dumping Agreement by rejecting the reported information and establishing the margins of dumping for the two investigated Turkish producers based on facts available.

Pakistani duties on film, Korean duties on steel, US measures and members' countermeasures on steel and aluminium - Panels established

On October 29, at a meeting of the WTO's Dispute Settlement Body, WTO members agreed to a request from the United Arab Emirates for the establishment of a panel to examine anti-dumping duties imposed by Pakistan on biaxially oriented polypropylene film (BOPP film) from the UAE and a request from Japan for a panel to examine anti-dumping duties imposed by Korea on stainless steel bar from Japan.

The DSB also considered requests from seven WTO members for panels to review additional duties imposed by the United States on steel and aluminium imports, four requests from the US for

panels to examine countermeasures imposed by WTO members on US imports in response to the steel and aluminium duties, and a US request for a panel to examine Chinese measures for the protection of intellectual property rights.

Ukraine initiates dispute against Armenia, Kyrgyz Republic on steel pipe duties

On October 22, the WTO circulated to the WTO members a request for consultation with Armenia and the Kyrgyz Republic filed by Ukraine. The request pertains to anti-dumping duties imposed by the two countries on steel pipes from Ukraine.

Brazil initiates dispute against Chinese measures on sugar imports

On October 22, the WTO circulated to the WTO members a request for consultation with China filed by Brazil. The request pertains to certain measures imposed by China on imports of sugar from Brazil.

Japan initiates dispute against Korean support for shipbuilders

On November 13, the WTO circulated to the WTO members a request for consultation with Korea filed by Japan. The request pertains to alleged subsidies provided by the Korean government to its shipbuilding industry.



India Customs & Trade Policy Update

In-bond manufacturing – India consolidates forms

Central Board of Indirect Taxes and Customs in the Ministry of Finance has updated the procedure for seeking permission for in-bond manufacturing and for maintaining various records. An elaborate Circular No. 38/2018-Cus., dated 18-10-2018 issued for this purpose also prescribes various forms and clarifies on duty liability on removal of processed goods from such warehouse. As part of ease of doing business and to avoid duplication in the process of approvals, the form for seeking permission for in-bond manufacture will also serve the purpose for seeking grant of license as a private bonded warehouse. The prescribed form of application has been so designed that the process for seeking grant of license as a private bonded warehouse as well as permission to carry out manufacturing or other operations stand integrated into a single form.

Further, a separate form to be maintained by a unit operating under Section 65 of Customs Act for the receipt, processing and removal of goods, has been prescribed. The new form combines data elements required under Manufacture and Other Operations in Warehouse Regulations, 1966 and Warehouse (Custody and Handling of Goods) Regulations, 2016. The circular also prescribes a triple duty bond for the warehoused goods which is required to be executed by the owner of the warehoused goods.

DGFT consolidates list of documents required for export of restricted items

Directorate General of Foreign Trade under the Ministry of Commerce and Industry has prepared a list of documents required by the exporters while filing applications for grant of export authorisations for restricted items. Trade Notice No. 35/2018 issued for this purpose also states both online and offline application processes under actions on part of firms/individuals, while

also providing steps to be followed by the DGFT. Some specific documents as required by concerned administrative Ministries for grant of NOC have been consolidated here while check list for other frequently traded restricted goods will be prescribed shortly.

EPCG authorisations are now valid for 24 months instead of 18 months

Validity period of Export Promotion Capital Goods (EPCG) Authorisations has been extended from 18 months to 24 months. DGFT Public Notice No. 47/2015-20, dated 16-11-2018 while amending Para 2.16 of the FTP Handbook of Procedures Vol. 1, also states that import validity period of EPCG Authorisations which have been issued prior to 16-11-2018 and whose validity has not expired on this date, shall also be

extended to 24 months from the date of the issuance of the Authorisation.

Pharma exports – Track and Trace system for drug formulations postponed

The date for implementation of Track and Trace system for export of drug formulations has been extended up to 1-7-2019. The extension is with respect to maintaining the Parent-Child relationship in packaging levels and its uploading on the Central Portal, for both SSI and non- SSI manufactured drugs. Para 2.90 A (vi) and (vii) of the FTP Handbook of Procedure 2015-20 has been amended in this regard by DGFT Public Notice No. 43/2015-2020, dated 1-11-2018. The system was to be implemented by 15-11-2018.



Ratio Decidendi

Madras High Court has held that the time limit under which the new shipper review investigation must be completed should be read into Rule 22 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 which does not prescribe any time limit. The High Court in this regard perused the provisions of Article 9.5 of the WTO's Anti-Dumping Agreement which specified that this type of review has to be carried out on an accelerated basis, compared to normal duty assessment. It noted that the WTO agreement clearly stipulated that the period taken for these assessments cannot exceed the original investigation.

Reliance in this regard was also placed on the communications from India regarding reviews

specified in Rule 22, where India had stated that the term “periodical reviews” in Rule 22 implies accelerated reviews. It was held that the Court cannot interpret Rule 22 in such a way that there is no time period fixed for the purpose of carrying out the exercise in Rule 22.

The single judge Bench of the High Court in its impugned Order had held that in the absence of any time limit fixed in Rule 22, a review undertaken under Rule 22 is not required to be completed within 12/18 months. The New Shipper Review was initiated by Notification, dated 23/9/2015, while the final findings were issued on 10/4/2017. [*Saint Gobain India Private Ltd. v. Union of India - Writ Appeal Nos. 412 to 414 of 2018, decided on 14-11-2018, Madras High Court*]

NEW DELHI

5 Link Road, Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014

Phone : +91-11-4129 9811

B-6/10, Safdarjung Enclave
New Delhi -110 029

Phone : +91-11-4129 9900

E-mail : lsdel@lakshmisri.com

MUMBAI

2nd floor, B&C Wing,
Cnergy IT Park, Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025

Phone : +91-22-24392500

E-mail : lsbom@lakshmisri.com

CHENNAI

2, Wallace Garden, 2nd Street
Chennai - 600 006

Phone : +91-44-2833 4700

E-mail : lsmds@lakshmisri.com

BENGALURU

4th floor, World Trade Center
Brigade Gateway Campus
26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.

Ph: +91(80) 49331800

Fax:+91(80) 49331899

E-mail : lsblr@lakshmisri.com

HYDERABAD

'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church,
Nampally

Hyderabad - 500 001

Phone : +91-40-2323 4924

E-mail : lshyd@lakshmisri.com

AHMEDABAD

B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009

Phone : +91-79-4001 4500

E-mail : lsahd@lakshmisri.com

PUNE

607-609, Nucleus, 1 Church Road,
Camp, Pune-411 001.

Phone : +91-20-6680 1900

E-mail : ls pune@lakshmisri.com

KOLKATA

2nd Floor, Kanak Building
41, Chowringhee Road,
Kolkatta-700071

Phone : +91-33-4005 5570

E-mail : lskolkata@lakshmisri.com

CHANDIGARH

1st Floor, SCO No. 59,
Sector 26,

Chandigarh -160026

Phone : +91-172-4921700

E-mail : lschd@lakshmisri.com

GURGAON

OS2 & OS3, 5th floor,
Corporate Office Tower,
Ambience Island,

Sector 25-A,

Gurgaon-122001

phone: +91-0124 - 477 1300

Email: lsurgaon@lakshmisri.com

ALLAHABAD

3/1A/3, (opposite Auto Sales),
Colvin Road, (Lohia Marg),

Allahabad -211001 (U.R)

phone . +91-0532 - 2421037, 2420359

Email:lsallahabad@lakshmisri.com

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