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## Article

# The Appellate Body's disintegration: Is this the WTO's "Infinity War" or is there an "Endgame"?

By **Jayant Raghu Ram**

### Introduction

On 10<sup>th</sup> December 2019, the terms of two WTO Appellate Body ("AB") members – Mr. Ujal Singh Bhatia (from India) and Mr. Thomas Graham (from the United States) – came to an end, and they subsequently demitted office. In the absence of any selections by the WTO's Dispute Settlement Body to replace them, the AB's strength has come down to a symbolic one – represented by Ms. Hong Zhao (from China) – as against the requisite strength of seven. This development finally brings to fruition the United States' ("US") long-standing ambition to shut down the AB, which it has been targeting since 2016.

It is relevant to note that just before the shutdown, WTO Members' made last-ditch efforts to revive the AB. However, US disinterest ensured that nothing came off this; confirming the notion that the US does not want any effective system of settling WTO disputes.

Thus, for the first time in the WTO's 25-year history, there will be no AB, and the "crown jewel" would have lost some of its sheen. However, what will happen to a WTO dispute settlement minus the AB? Also, what will be the fate of pending appeals? This Article is intended to discuss these issues.

### Pending appeals and the way forward

At the time of its last seen, the AB had issued nearly 160 decisions. At present, there are currently 14 disputes pending disposal by the AB.

These numbers will in all probability increase as Members appeal panel reports.

However, the AB's paralysis does not mean the end of WTO dispute settlement as such. Fortunately, the panel process is still functional, and Members are continuing to initiate disputes. However, if a panel report arising from any of these complaints is appealed by any of the parties, the panel process would be rendered futile, particularly if the appeal is preferred by the respondent.

One implication that might arise from a reliance on panel adjudication is that there might be pressure on the panels to issue their reports in such a way that is acceptable to both parties, thereby avoiding a recourse to the appellate process. However, in a stark reminder of dispute settlement during the GATT days, such a practice would force panelists to be less objective and more diplomacy-oriented.

Notwithstanding the availability of panel adjudication, the AB paralysis has opened the door for Members to flirt with the adoption of measures that could be WTO inconsistent. Not only could this lead to a situation of lawlessness in the WTO, Members would not shy away from resorting to unilateral actions to address alleged WTO violations by other Members. This could lead to a trade war on a global scale. In fact, in the context of *India – Export Measures*, it is speculated that the United States may rely on the panel report itself to take unilateral Section 301 action against India.

## India's Pending Appeals at the WTO

Out of the 14 appeals pending disposal, 4 involve India either as a complainant or a respondent. These appeals are:

1. *India – Solar Cells and Modules* (DS456)
2. *US – Renewable Energy Measures* (DS 510)
3. *India – Export Measures* (DS 541)
4. *India – Iron and Steel Products* (DS 518)

The implications of these pending appeals are quite varied. In *India – Iron and Steel Products*, the safeguard measure challenged by Japan had expired during the panel process itself. Thus, any judgment on the validity of these measures would be merely academic in value and of limited implication for either party.

In *US – Renewable Energy Measures*, even though India is a complainant, the implications are limited since India's stakes in the export market for renewable energy products are not significant. In fact, this dispute was primarily brought by India as a tit-for-tat to the US' complaint against India in *India – Solar Cells and Modules*. However, that the decision in *US – Renewable Energy Measures* has not attained finality means India has lost any potential bargaining power in the parallel dispute brought against it by the US in *India – Solar Cells and Modules*.

In *India – Export Measures*, the implications are quite the opposite. It is significant that India has appealed the panel report since the AB paralysis means that India has more time till any final judgment is pronounced on the validity of its export support measures with the SCM Agreement. This would be of major relief to India

as the benefits conferred under these challenged export support schemes run into millions of rupees. Notwithstanding, the Government of India is already examining ways to formulate export subsidy programmes that are WTO compliant.

Among the disputes not appealed, it is relevant to note that India has initiated compliance proceedings in *India – Avian Influenza* and *India – Solar Cells and Modules*, where both the panels and Appellate Body have ruled against India's measures as being WTO inconsistent. If the compliance panels rule against India and India appeals both these rulings, decisions regarding India's compliance with the decisions in the above disputes would not achieve finality.

## Conclusion

The AB has stood as the vanguard of the rules-based system of settling WTO disputes. Its contribution to the international rule of law and its rich jurisprudence has been remarkable. Nonetheless, it should be pointed out the AB's decisions on certain issues do require introspection. However, none of these decisions are of such a nature that they warrant the AB's cessation.

The AB's disintegration by the US reminds one of how Thanos disintegrated half the universe with his apocalyptic snap. This begs the question – is there an *Endgame* in sight? Let's hope the WTO and its other Members can *assemble* to solve the fate of the WTO's dispute settlement mechanism.

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## Trade Remedy News

### Trade Remedy actions by India

Product	Country	Notification No.	Date of Notification	Remarks
1-Phenyl-3-Methyl-5-Pyrazolone	China	F.No. 6/32/2019-DGTR	23-12-2019	Anti-dumping investigation initiated
Clear Float Glass	Pakistan, Saudi Arabia, UAE	45/2019- Cus. (ADD)	10-12-2019	Definitive anti-dumping duty continued pursuant to sunset review
Diketopyrrolo Pyrrole Pigment Red 254 (DPP Red 254)	China	F.No. 7/27/2019-DGTR	18-12-2019	Sunset review of anti-dumping duty initiated
Flax Fabric	China and Hong Kong	F.No. 7/26/2019-DGTR	23-12-2019	Sunset review of anti-dumping duty initiated
Measuring Tapes	China	F.No.7/24/2019 -DGTR	18-12-2019	Sunset review of anti-dumping duty initiated
Mono Ethylene Glycol	Kuwait, Oman, Saudi Arabia, UAE and Singapore	6/29/2019-DGTR	09-12-2019	Anti-dumping investigation initiated
New Pneumatic Radial Tyres of Rubber, with or without tubes and/or flaps	Thailand	F. No. 6/30/2019-DGTR	02-12-2019	Anti-dumping investigation initiated

## Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
7-phenylacetamido-3-chloromethyl-3-cephem-4-carboxylic Acidpmethoxy benzyl Ester	China	MOFCOM Announcement Nos. 53 and 54 of 2019	26-11-2019	Anti-dumping and Countervailing investigations extended by six months
Polyester Textured Yarn	United States of America	84 FR 63848 [C-533-886]	19-11-2019	Final Affirmative Countervailing Duty Determination
Quartz Surface Products from India	United States of America	84 FR 68123 [A-533-889]	13-12-2019	Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Negative Determination of Critical Circumstances
Tungsten electrodes	European Union	Commission Implementing Regulation (EU) 2019/2171	19-12-2019	Initiation of possible circumvention of anti-dumping duty on imports from China

## WTO News

### Trade restrictions at historically high levels even as many new measures for facilitating trade implemented: WTO report

WTO Director General on 12<sup>th</sup> of December presented a report on “Overview of developments in the international trading environment”, with the WTO Members. The report covers new trade and trade-related measures implemented by WTO Members between 16<sup>th</sup> October 2018 and 15<sup>th</sup> October 2019 and states that WTO Members

implemented 102 new trade-restrictive measures during the review period, adding to the uncertainty surrounding international trade and the world economy. The main sectors targeted by the new import restrictions were mineral and fuels oils (HS 27) 17.7%, machinery and mechanical appliances (HS 84) 13%, electrical machinery and parts thereof (HS 85) 11.7%, and precious metals (HS 71) 6%. According to the WTO Secretariat, estimates of the stockpile of import restrictions implemented since 2009, and

still in force, suggest that 7.5% of world imports are affected by import restrictions.

Trade remedy measures continue to be a very important trade policy tool for WTO Members, and account for about 68% of all trade measures captured in this Report. As per the report, though the monthly average of initiations of trade remedy actions by WTO Members remained stable compared to 2018, the second half of the review period saw this figure accelerate, in particular as a result of new anti-dumping investigations. The main sectors targeted by trade remedy initiations during the review period were on furniture (HS 94) 24.7%, iron and steel (HS 72) 14%, articles of iron and steel (HS 73) 12.1%, and machinery and mechanical appliances (HS 84) 4.9%.

On the positive side, the report states that the WTO Members implemented 120 new measures aimed at facilitating trade, during the review period, including reducing or eliminating tariffs, export duties and import taxes. The main sectors targeted by the new import facilitating measures were machinery and mechanical appliances (HS 84) 13.4%, electrical machines and equipment (HS 85) 12.1%, copper and articles thereof (HS 74) 7.6%, and motor vehicles (HS 87) 7.4%.

### **No Customs duties on electronic transmissions – WTO extends moratorium**

WTO Members have on 10<sup>th</sup> of December agreed to maintain the current practice of not imposing customs duties on electronic transmissions until the 12<sup>th</sup> Ministerial Conference (MC12). Members also agreed to reinvigorate the work under the Work Programme on Electronic Commerce, based on the existing mandate. The 12<sup>th</sup> Ministerial Conference is scheduled to be held on 8-11<sup>th</sup> of June 2020 in Kazakhstan.

According to the document WT/GC/W/794, dated 9-12-2019 containing the draft General Council

decision, the work will include structured discussions in early 2020 based on all trade-related topics of interest brought forward by the Members, including LDCs, including on scope, definition and impact of the moratorium on customs duties on electronic transmissions.

It may be noted that the Declaration on Global Electronic Commerce was adopted by the WTO Members in the Second Ministerial Conference held in May 1998, declaring that Members will continue their current practice of not imposing customs duties on electronic transmissions. The decision has been since reviewed time and again by the General Council and extension has been granted by consensus.

### **European Union and Indonesia – EU initiates dispute against Indonesian restrictions on raw materials while Indonesia initiates dispute against EU biofuel measures**

European Union has on 27<sup>th</sup> of November 2019 initiated WTO dispute consultations with Indonesia regarding alleged export restrictions and local content subsidies adopted by the Indonesia with respect to certain raw materials (DS592). The request covers restrictions on exports of nickel, including an actual prohibition to export and domestic processing requirements and a domestic marketing obligation as well as export licensing requirements. Domestic processing requirements also apply to iron ore and chromium, as well as to coal; while the domestic marketing obligations also extend to coal products. With regard to export licensing requirements, the request also covers metal waste and scraps as well as coal and coke. On 16 December 2019, WTO dispute consultations have been requested by Indonesia with the EU regarding measures adopted by the EU and its member states in the renewable energy sector relating to biofuels. According to

Indonesia, the measures appear to violate the TBT Agreement, the GATT 1994 and the SCM Agreement.

## Panel report in second Airbus compliance proceedings issued – EU files appeal

On 2 December 2019, the WTO circulated the compliance panel report in the case brought by the European Union in “*European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft — Recourse to Article 21.5 of the DSU by the EU*” (DS316). It may be noted that European Union has on 6th of December filed an appeal against the second compliance panel ruling in the dispute. According to the EU, the panel erred in its finding that that the full repayment of the Member State Financing loan failed to achieve the withdrawal of the subsidy, and that amendment of the terms of a subsidy to align it with a contemporaneous market benchmark does not “withdraw the subsidy”. Further, the European Union contends that the Panel failed to make an objective assessment of the matter in respect of its various findings in relation to amendment in German loan agreement, restructuring of the French, German, Spanish and UK A380 MSF loans, etc.

## Indonesian complaint against Australian paper duties – Panel report issued

On 4 December 2019, the WTO circulated the dispute panel report in the case brought by Indonesia in “*Australia — Anti-Dumping Measures on A4 Copy Paper*” (DS529). According to the panel, Australia's measure is inconsistent with Article 2.2, first sentence, of the Anti-Dumping Agreement because Australia disregarded domestic sales of A4 copy paper of

Indah Kiat and Pindo Deli as the basis for determining normal value without properly determining that such sales did “not permit a proper comparison”. Australian measures were also held inconsistent with the Article 2.2 of the Anti-Dumping Agreement. Australia was found to have improperly rejected the pulp component of Indah Kiat's and Pindo Deli's records. As per the report, Australia had no basis to use Brazilian and South American export prices of pulp to China and Korea for the calculation of pulp costs when constructing the cost of production of A4 copy paper in Indonesia.

## Ukraine launches safeguard investigation on syringes

On 11 December 2019, Ukraine notified the WTO's Committee on Safeguards that it initiated on 2 December 2019 a safeguard investigation on syringes. A safeguard investigation seeks to determine whether increased imports of a product are causing, or is threatening to cause, serious injury to a domestic industry. According to the document G/SG/N/6/UKR/15, dated 10-12-2019, the product involved is disposable syringes, of polymeric materials with or without needles, two-component and three component, imported in Ukraine and classified in accordance with Harmonized System 2012 under Code 9018 31 10 00.

## Ecuador launches safeguard investigation on flat ceramics

On 5 December 2019, Ecuador notified the WTO's Committee on Safeguards that it initiated on 26 November 2019 a safeguard investigation on flat ceramics. The products involved are smooth ceramics classified under the following subheadings of the Ecuadorian Customs Tariff 6907.21.00.90; 6907.22.00.90; and 6907.23.00.90.



## India Customs & Trade Policy Update

**Registration under Steel Information Management System clarified:** In respect of the Steel Information Management System introduced by DGFT Notification No.17/2015-2020, the CBIC has clarified *vide* Circular No. 38/2019-Cus., dated 21-11-2019 that while the declaration of SIMS registration number and other required details is mandatory in the Bills of Entry, Customs need not insist the importer to submit any further documentary proof of the registration at the time of verification or examination. The Circular reiterates the clarifications issued by the DGFT in Circular No. 29/2015-20 dated 04-10-2019, i.e.: -

- (a) SIMS registration will not be applicable on air-freighted goods as this mode is used for emergency/small volume-high value goods required at short notice.
- (b) Once SIMS registration has been obtained, any number of consignments can be imported by a single SIMS registration within the validity of the registration.
- (c) SIMS is applicable to imports through Advance Authorisation, DFIA and imports to SEZs.
- (d) SIMS shall not be applicable to returnable steel racks imported on temporary import

**Gifts – Prohibition on import of goods where Customs clearance sought as gifts:** Import of goods including those purchased from e-commerce portals, through post or courier, where Customs clearance is sought as gifts, has been prohibited except for life saving drugs and rakhi. However, according to Explanation in Para 2.25

of Foreign Trade Policy 2015-20 as now revised by Notification No. 35/2015-20, dated 12-12-2019, import of goods as gifts with payment of full applicable duties will be allowed. The explanation also clarifies that Rakhi (but not gifts related to Rakhi) will be covered under Section 25(6) of Customs Act.

**Toys – Import Policy condition revised:** DGFT has revised its import policy condition in respect of toys, with effect from 2-12-2019. Instead of certificate of conformance from the manufacture that representative sample of the toys being imported have been tested by an independent laboratory accredited by NABL and found to meet the required specifications, the revised policy condition states that a sample will be randomly picked from each consignment and sent to labs accredited by NABL for testing. Clearance, as per the revised condition, would however be given by Customs on the condition that the product cannot be sold in the market till successful testing of the sample. It also states that if the sample fails to meet the required standards, the consignment will be sent back or destroyed at the cost of the importer. Notification No. 33/2015-20, dated 2-12-2019 for this purpose revises Policy Condition No. 2(iii) in Chapter 95 of ITC (HS).

**Peas – Import restrictions tightened:** DGFT has revised the import policy of peas including yellow peas, green peas, dun peas and kaspas peas. According to the amendments in Chapter 07 of the ITC (HS) by Notification No. 37/2015-20, dated 18-12-2019, import of such goods will be restricted and subject to minimum import price (MIP) of Rs. 200/kg CIF. Further, the imports will only be allowed through Kolkata sea port.



**Jewellery exports – Submission of self-attested copy of exporter’s copy of shipping bill as proof of export:** Self-attested copy of shipping bill to be submitted as proof of export along with other documents instead of the Export

Promotion copy of the shipping bill in respect of export of gold/ silver/ platinum jewellery and articles thereof. Para 4.68 of the Handbook of Procedures Vol.1 has been amended by Public Notice No. 48/2015-20, dated 18-12-2019.



## Ratio Decidendi

**Anti-dumping duty – Computation of normal value of exports – Failure in providing information – Exclusion of certain sales to independent buyers who themselves exported:** European Union’s General Court has held that the EU authorities were right to reject the claim to deduct recycled scrap metal from the cost of production of the product concerned (cold rolled coils), as they could not accurately verify as to whether the costs associated with the production and sale of the product concerned were reasonably reflected in the accounting records. The Court noted that the applicant failed to provide the exact quantity of hot-rolled coils consumed in the manufacture of the product concerned that the authorities could consider to be indispensable to the completion of its verification task. It noted that the question of the scrap deduction claimed was linked to the volume of hot-rolled coils consumed in the manufacture of the product concerned. The applicant had claimed that the Commission committed a manifest error in its appraisal of the facts by refusing to accept the deduction claimed for the value of recycled scrap from the cost of production of the product concerned.

Further, the General Court also upheld the EU authorities’ exclusion of certain sales of the product concerned to independent buyers in the exporting country, for the purposes of determining the normal value on the sole ground

that the products in question had subsequently been exported. The plea that the authorities could validly have excluded those sales from the calculation of the normal value only after having established that the vendor had, at the time of the sale, knowledge of the export of the products concerned or anticipated that the purchaser would re-sell those products for export, was rejected. The Court noted that part of the sales in question was subject to an export rebate system. [*Yieh United Steel Corp. v. European Commission* – Judgement dated 3-12-2019 in Case T-607/15, European Union’s General Court]

**Ports specified in exemption notification not exhaustive – Exemption, when port notified subsequently:** Madras High Court has allowed benefit of Notification No. 104/2009-Cus. (status holder incentive scheme) in a case where the imports were made before the addition of the name of the specific port in the said notification. It observed that the ports referred to in the exemption notification originally are not exhaustive as the notification was amended periodically by including other ports as well and one such inclusion was the specified port later. The Court was of the view that the list provided in the notification is only inclusive in view of the fact that the authorities included other ports by amending the said notification periodically. It also noted that the proviso in the said notification empowered the Commissioner of Customs to

issue permission of import and export from other ports as well by issuing a special order. Contention of the Revenue department that power conferred on the Commissioner is only prospective and not retrospective, was also rejected by the High Court. [*Tube Investments of India Ltd v. UoI* – 2019 VIL 580 MAD CU]

**EOU - Non-obtaining of permission from DC for clearance into DTA is procedural error:**

CESTAT Mumbai has held that non-obtaining of permission from the Development Commissioner does not take away the applicability of the Notification allowing a concessional rate of duty. The Tribunal observed that assessee cleared the goods during Aug-Sep, 2003 and at that time the Notification No. 53/97-Cus. was not in currency

and that only Notification No. 53/2003-Cus. was applicable under which there is no provision of obtaining permission. The Tribunal was of the view that even if such provision existed, the intent of the same is not to deny substantial rights to the assessee citing procedural infractions. It also held that when a Customs Notification has given rate of depreciation, it is not free for the appellants to chose concessional rate of duty in terms of such notification and depreciation rates in terms of the policy stating that the providence of policy overrides the provision of customs. Tribunal also observe that unused machinery cannot be termed as obsolete. [*Fontasey Engineering Exports Pvt. Ltd. v. Commissioner* – 2019 TIOL 3398 CESTAT MUM]

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