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Article

Quantitative Restrictions – An Overview

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Introduction

Article XI of GATT contains one of the cornerstones of the disciplines regarding multilateral trade regime established under the WTO i.e. general elimination of quantitative restrictions. Article XI is applicable to all the measures prohibiting or restricting importation, exportation and sale for export of products other than duties taxes or other charges. For instance, export quotas, tariff values, licensing requirements, etc., are all measures covered by Article XI. It is needless to say that Article XI is very broad in its application.

In order to appreciate the true scope of Article XI it is necessary to understand three key concepts viz., prohibitions, restrictions and measures. It is also necessary to remember that the term 'quantitative restriction', besides the general title, is not used anywhere in Article XI. However, this fact is not determinative of the correct interpretation of Article XI [1] which must be broadly interpreted.

Meaning of the terms 'prohibition' and 'restriction' used in Article XI

The word 'prohibition' is used in a very broad manner and is understood to mean as a "legal ban on the trade or importation of a specified commodity"[2].

For instance prohibition on importation of foreign products would be inconsistent with Article XI:1. The scope of the term 'restriction' is also broad and in terms of its ordinary meaning covers a limitation on action, a limiting condition or regulation[3]. The term cannot be equated with prohibition[4] and the previous panels have suggested that a restriction need not be a blanket prohibition or a precise numerical limit[5]. A survey of previous jurisprudence would suggest the following:

- "bond requirements" are not restrictions inconsistent with Article XI:1[6].
- "automatic import licensing" does not constitute restrictions inconsistent with Article XI:1[7].
- non-automatic export licensing is inconsistent with Article XI[8].
- measures, which affect the opportunities for importation itself are covered by Article XI[9].
- Fines, imposed as enforcement measure of import prohibition, notwithstanding that they are not border measures, are covered under Article XI:1[10].

1 Panel Report, *Colombia - Ports of Entry,* para. 7.243.

2 Appellate Body Report, *China –Raw Materials,* para 319.

3 Panel Report, *India - Quantitative Restrictions,* para. 5.142. See also Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials,* para 319.

4 Panel Report, *Colombia - Ports of Entry,* para. 7.234

5 Panel Report, *India - Quantitative Restrictions,* paras. 7.269 - 7.270.

6 Panel Report, *Dominican Republic - Import and Sale of Cigarettes,* para 7.265.

7 GATT Panel Report, *EEC – Minimum Import Prices (1978),* para 4.1

8 GATT Panel Report, *Japan – Semi Conductors (1988),* para 118.

9 Panel Report, *Dominican Republic - Import and Sale of Cigarettes,* para 7.261

10 Panel Report, *Brazil – Retreaded Tyres,* para. 7.372.

While it is true that quantitative restrictions such as import quota which may not *actually* restrict or impede trade are prohibited under Article XI[11], Article XI extends to *de facto* restrictions[12] as well and the very potential to limit trade is sufficient to constitute a restriction.[13] Further, the jurisprudence provides that "measures which involve no formal restriction but rather a network of strong suggestions can fall within the scope of Article XI:1"[14]. In other words Article XI encompasses "import limitations made effective through disincentives to importation, without a formal numerical limit on imports"[15].

Meaning of the term 'Other measures' used in Article XI

Article XI, besides quotas and licenses, also covers 'other measures'. In terms of the previous jurisprudence, the term 'measures' not only covers laws and regulations, but irrespective of the legal status, applies to a measure instituted by a member, which restricts imports or exports.[16] In fact, the term 'other measures' is meant to encompass a broad 'residual' category and is meant to underscore the broad nature of measures under Article XI,[17] in keeping with the mandate of Article XI to cover *any* measure that results in any form of limitation imposed *on, or in relation* to importation.[18] Indeed, the significance of the phrase 'other measures' is contained in the fact that Article XI would have included only those restrictions and prohibitions that are specifically listed in Article XI, if the words 'other measures' had not been included.[19]

Conclusion

Thus, Article XI is broadly worded and includes *de jure* as well as *de facto* restrictions on imported goods. The application of the tests detailed above will involve an assessment of how regulations affect the competitive conditions relating to imported goods. The tests to be applied with regard to a claim under Article XI are, therefore, governed by its own disciplines, which have been developed by way of interpretations by panels and the Appellate Body. Hence, an analysis of a claim under Article XI will involve the application of the principles outlined above on a case-by-case basis, as well as a thorough understanding of the regulatory regime and its effects on imported goods.

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11 Van den Bossche, Peter and Zdouc, Werner, *The Law and Policy of World Trade Organisation,* citing GATT Panel Report, *Japan – Leather (US II)(1984),* para. 55.

12 Panel Report, *Argentina – Hides and Leather,* para 11.17. *Per Contra,* Panel Report, *Columbia – Ports of Entry,* para 7.252.

13 Panel Report, *China - Raw Materials,* para 7.1081.

14 Panel Report, *India - Autos,* para 7.272.

15 *Ibid.*

16 GATT Panel Report, *Japan – Semi Conductors (1988),* para. 106. In the said case, even non-mandatory measures were considered as restrictions.

17 Panel Report, *Colombia - Ports of Entry,* para. 7.227.

18 Panel Report, *India- Autos,* paras 7.254-7.263.

19 Panel Report, *US- Gambling,* para 6.324.

Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
4,4 Diamino Stilbene 2,2 Disulphonic Acid (DASDA)	China	F.No.14/1/2012-DGAD	22-11-2013	Definitive ADD recommended
Acrylic Fibre	Korea RP and Thailand	27/2013-Cus. (ADD)	8-11-2013	ADD extended till 19-11-2014
Cable Ties	China and Taiwan	28/2013-Cus. (ADD)	12-11-2013	ADD extended till 30-10-2014
Compact Fluorescent Lamps (CFL)	China	F.No.15/22/2013-DGAD	14-11-2013	ADD sunset review initiated
Diclofenac Sodium	China	31/2013-Cus. (ADD)	13-11-2013	ADD extended till 9-4-2014
Hexamine	Saudi Arabia and Russia	F. No. 15/1000/2012-DGAD	14-11-2013	ADD sunset review – Duty recommended to be continued. Same however reduced for sole cooperating exporter
Nonyl Phenol	Chinese Taipei	F.No.15/1007/2012-DGAD	8-11-2013	ADD sunset review - Duty recommended to be continued
Pentaerythritol	Saudi Arabia	F. No. 14/11/2011	8-11-2013	ADD investigation terminated as dumping margin was de minimis
Phenol	South Africa	29/2013-Cus. (ADD)	12-11-2013	ADD extended till 30-10-2014
Phosphoric Acid-Technical Grade and Food Grade (including Industrial Grade)	China	F.No.15/1010/2012-DGAD	8-11-2013	ADD Sunset review - Duty recommended to be continued [20]
Polypropylene excluding ter-polymer	Oman	32/2013-Cus. (ADD)	2-12-2013	ADD revoked
Presensitised Positive Offset Aluminium Plates (PS Plates)	China	F. No.15/11/2012-DGAD	6-11-2013	Time period for completion of sunset review extended upto 17-3-2014
Vitamin A Palmitate	Switzerland and China	30/2013-Cus. (ADD)	13-11-2013	ADD reimposed after sunset review

[20] Notification in Para 74 mistakenly recommends ADD imposition on import of said product from EU

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Polyethylene Terephthalate Film, Sheet and Strip	USA	[A-533-824] 78 FR 67113	8-11-2013	Preliminary determination of continuation or recurrence of dumping and injury if ADD revoked
Pyridine	China		News reports dated 22-11-2013	Definitive ADD, ranging from 24.6% to 57.4%, imposed effective from 21-11-2013
Stainless Steel Wires	EU	Regulation (EU) No. 1106/2013	5-11-2013	Definitive ADD ranging from 0.7 % to 12.5% imposed
Steel Threaded Rod	USA	[A-533-855] 78 FR 71565	29-11-2013	Date for issuance of preliminary determination extended till 10-2-2014

WTO News

Success at Bali – First agreement in sight

Bali witnessed a meeting of minds at the 9th Ministerial Conference held from 3rd to 6th December, 2013. The WTO members managed to agree on certain items of the vast agenda which was on the table. One of the most publicised debates was on India's food security programme. The draft agreement, (as available at the time of release of this newsletter), envisages an interim mechanism to allow relief to developing countries to continue with their existing policies till a final solution is reached for adoption at the 11th ministerial conference. Though it has been hailed as a victory for India for the reason that a four-year peace clause setting definite time limit was not imposed, the agreement imposes certain conditions. Benefit under this agreement is available only when the member notifies that it is exceeding or is at the risk of exceeding the maximum threshold set for the Aggregate Measure of Support under the Agreement on Agriculture. It has to provide details of staple food crop covered, name of the food security programme, release of stock, statistics on opening balance, purchase, purchase price, total imports etc for each staple crop. The member is also expected to assure that stocks procured under such programmes do not distort trade or adversely affect the food security of other members.

Other points on which consensus emerged are on trade facilitation and Preferential Rules of Origin for LDCs. The acceptance of protocol for trade facilitation is expected to be completed by 31-7-2015. The agreement will enjoin members to publish information regarding import export procedures, administration of tariff quotas etc and also make them available on internet as far as possible. It also seeks to provide for consultation

with traders before amendment or enforcement of laws relating to movement, release and clearance of goods, including goods in transit. It includes provisions on reduction of fees for enquiries, release of detained goods prior to final determination, post-clearance audit measures, authorised operators, expedited release of goods entered through air cargo facilities to persons that apply for such treatment, border cooperation and uniform documentation.

EU's import ban on seal products upheld by DSB panel

European Union's ban on import of seal products, which brought issues of linkages between trade and environment to the forefront once again, has been upheld by the WTO panel. The DSB panel report, issued on 25th November 2013, holds that the EU Seal Regime was not inconsistent with EU's obligation under Article 2.2 of the TBT Agreement as it addresses EU public moral concerns on seal welfare to certain extent and that no alternative measure was demonstrated to make an equivalent and greater contribution to the fulfillment of that objective. The dispute *"European Communities — Measures prohibiting the importation and marketing of seal products"* (DS400 and DS401) pertained to EU regulations that generally prohibit import and placing of seal products in the market. Exceptions to these prohibitions are provided if certain conditions are met, including for seal products derived from hunting by Inuit or indigenous communities (IC exception) and hinting for marine resource management purposes (MRM exception). These exceptions were however held as not justified under Article(s) XX(a) and XX(b) of GATT 1994 and held violative of Article 2.1 of the TBT Agreement. *For earlier developments on the subject, in the European Court of Justice, refer February 2013 issue of International Trade Amicus.*

Indonesia initiates dispute against Pakistan's trade remedy measures on Indonesian paper

Indonesia notified the WTO Secretariat, on 27th November, of its request for consultations with Pakistan regarding latter's anti-dumping and countervailing duty investigations on imports of certain paper products from Indonesia. Indonesia alleges that Pakistan has not yet closed its anti-dumping and countervailing investigations, initiated on 10th and 23rd of November 2011, on imports of paper products from Indonesia. Indonesia considers this as violation of the 18-month limit set in the WTO Agreements on Anti-dumping and Subsidies and Countervailing Measures. As per DS470/1, both the investigations have been suspended by Pakistan's domestic courts and appeal against the Court's finding of inconsistency of anti-dumping investigation with the local laws is presently pending. Indonesia alleges that by non-termination of these investigations, Pakistan has violated Article 5.10 of ADA, Article 11.11 of SCM Agreement, along with Articles X:3(a) and XI:1 of GATT, 1994.

Faroe Islands initiates dispute against European Union

The authorities of the Faroe Islands have requested consultations with the European Union pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes and Article XXIII:1 of GATT 1994. Consultation request dated 4-11-2013, made by Denmark in respect of the Faroe Islands, is with regard to use of coercive economic measures in relation to Atlanto-Scandian herring (ClupeaHarengus). Faroe islands, in this case allege that EU's provisions, prohibiting

into the EU territory, fish or fish products of Atlanto-Scandian herring or mackerel caught under the control of the Faeroe Islands, are inconsistent with Articles I:1, V:2 and XI:1 of GATT, 1994. The request for consultations made (technically) by a member of EU (in this case, Kingdom of Denmark on behalf of Faroe Islands) against the EU is an engaging issue.

Interestingly enough, Faroe Islands has also referred the use of threats of coercive economic measures by the EU with regard to the same goods, to an arbitral tribunal, under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS).

News Nuggets

Price dumping in service industry

The fight for level playing field and fair competition has reached new heights in Australia. News reports suggest that the market leader - national carrier Qantas is exploring all options including approaching the Anti-dumping Commission against rival Virgin Australia. Besides the issues of structuring, raising capital for other foreign airlines the national carrier has raised the question of price dumping. Use of anti- dumping methodology is not new to service industry. EC Regulation 868/2004, was laid down to address the problem of subsidisation and unfair pricing practices in the supply of air services from non-member (of the European Community) countries. The EC regulation relates to unfair pricing as distinguished from normal competitive pricing, injury to domestic provider of 'like air service', investigation and imposition of provisional / definitive measures. The Australian anti-dumping commission deals with injury from import of goods and it remains to be seen if price dumping in respect of services will receive its attention.

ICSID on Investor and Investment

In a recent ruling, the ICSID held in favour of host state Kazakhstan against whom the claimant was a Kazakh national. Untangling from the mazes of political intrigue and questions on legality of methods adopted to save the claimant's investment in a bank in Kazakhstan, the ICSID examined 'corporate veil' and what constituted investment. Though tribunals are not bound by prior decisions the case [*K T Investment Group BV* v. *Republic of Kazakhstan,* ICSID Case No. ARB/09/8], makes very interesting reading on how the ICSID interprets investor and investment.

The claimant agreed that he had created shell companies to transfer his holdings in a Kazakh bank and sued under the Netherlands Kazakhstan BIT after the bank was nationalised. The tribunal was of the view that definition of investor as per the treaty - entity incorporated in other country – would enable the claimant to sue. It did not find force in the host country's appeal that as a Kazakh national the claimant could not sue as per the BIT since disputes should pertain to foreign investor and the host state. The tribunal declined to lift the corporate veil and determine real and effective nationality. Also, the argument that the company had been incorporated in Netherlands only to take advantage of the treaty was found to be immaterial.

But, the host country succeeded on *'ratione materiae'* in that there was no investment which

required protection. Though investment in shares could be investment, in the instant case, the shares were held for very short duration by shell companies wholly under the control of the claimant and transferred at nominal rates. The tribunal thus found that there was no risk, expectation of profit etc which would give the contribution or commitment of resources the character of investment.

Ratio Decidendi

Price undertaking of some exporters – Delay in addition in non-confidential file, effect

European Court of Justice has on 28-11-2013 held that Article 6(7) and 8(4) of the EU's Basic Regulation (Regulation No. 384/96) do not impose any obligation as to the point in time at which the authorities are required to add copy of the price undertaking to the non-confidential file so that the parties concerned may consult it. The Court in this regard, upholding the General Court's order, noted that the said articles though enable the parties concerned to have access to the information made available by other parties, provided that such information is relevant to the protection of their interests, there is no obligation as regards the time at which a copy of the price undertaking must be added. The Court also noted the finding of General Court that the irregularity of delay had not affected rights of defence of the appellant inasmuch as the appellant had not demonstrated that their own undertaking would, after they had inspected other undertaking, in fact would have been different. [*Chelyabinsk Electrometallurgical Integrated Plant OAO* v. *Council of the European Union* – ECJ Judgment dated 28-11-2013 in Case C-13/12 P].