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Contents

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Article

US steel and aluminium tariffs and the WTO's security exception: Unsecuring multilateral trade?

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The United States has instituted measures imposing high duties on all imports of steel and aluminium into the United States. While the US has sought to justify these measures on the basis of its national security requirements, the real underlying motive would seem to be to afford protection to its domestic steel and aluminium industries given the rhetoric that preceded these measures. Though these measures are seemingly inconsistent with WTO law, the US may attempt to defend them under, *inter-alia*, the provisions of GATT Article XXI, which pertains to security exceptions. However, the possibility that Article XXI may provide a credible defence in this instance is tenuous, as this article attempts to argue.

On 8th March 2018, US President issued two proclamations imposing tariffs of 25% and 10% on steel and aluminium articles respectively imported from all countries (except Canada and Mexico). These proclamations were issued pursuant to recommendations made in February 2018 by the Commerce Secretary ("Secretary") under Section 232 of the Trade Expansion Act, 1962, which permits the Department of Commerce to investigate the effects of imports on national security.

The motif of the recommendations made by the Secretary is that the displacement of American-produced steel and aluminium by excessive imports and their consequent adverse impact on American domestic industries was weakening the internal economy and therefore threatened the US' national security. The Secretary was also of the opinion that rising levels of imports of steel and aluminium threatened to impair national security by displacing the capacity and thereby disrupting the supply required to produce steel for critical infrastructure and national defense.

It is highly possible that the US would intend to defend these measures under, *inter-alia*, GATT Article XXI. Though Article XXI has long been understood to be a self-judging exception, it must be noted that Article XXI allows a WTO Member to derogate from its GATT obligations only in the limited circumstances defined therein. For the purposes of this article, focus is limited to those provisions of Article XXI which are directly applicable and relevant to understanding the impugned measures – paragraph (b), clause (iii). Paragraph (b) allows a WTO Member to take any action which it considers necessary for the protection of its essential security interests in only three limited circumstances, of which clause (iii) pertains to actions "*taken in time of war or other emergency in international relations*.

Factually, it may be argued that there exists both a "time of war" given the US' ongoing war in Afghanistan and also an "emergency in international relations" given the situation in Syria. However, the mere *existence* of either of these factors may not be sufficient to justify the invocation of clause (iii). It would need to be demonstrated that the existence of either of these situations directly or indirectly necessitates the need to resort to the impugned measures. In my opinion, in addition to the above, the threat to the

United States' security interests stemming from such circumstances should be imminent or foreseeable and not based on conjecture or remote possibility.

It would also be important to note that the US has not cited either of the aforesaid factors as reasons for implementing the impugned measures. Instead, the US has cited the weakening of its internal economy on account of increased imports as one of the two major reasons. Even if its internal economy is considered to fall within the ambit of "essential security interests", derogation from GATT obligations for protection of the same can be permitted only if there is a reasonable nexus with a state of war or an emergency in international relations which the US might be facing, which is clearly not the case. To otherwise permit such a derogation would open a Pandora's box whereby every WTO Member would then attempt to defend protectionist measures under the guise of national security, howsoever obscure, thereby throwing the entire multilateral trading system into disarray.

This is not the first time that national security has been invoked in defence of trade measures, nor is the US the only country to have done so. A similar measure was taken way back in 1975 by Sweden when it had established an import quota for certain footwear and sought to defend the same under Article XXI. Sweden argued that the decrease in domestic production had become a critical threat to Sweden's economic defence and therefore necessitated the maintenance of a minimum domestic production capacity in vital industries. Sweden further argued that such capacity was necessary to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations. Though this measure did not culminate into a dispute, many GATT members questioned the feasibility of defending these measures under Article XXI.

The US' import tariffs are similar to Sweden's measure. However, what makes the former hugely unpopular in the world trading community besides the absence of any reasonable nexus with protection of its essential security interests is the very scale of these measures and the protectionist rhetoric underlying them. Though a full-blown global trade war has not broken out (yet) post the implementation of the impugned measures, these actions set a very unhealthy precedent for other WTO Members to provide an excuse for defending their trade measures under the guise of protecting their security interests.

It would be important to note that the possibility that the security exceptions would be exploited to claim protection for everything under the sun was noted way back in 1947 itself during negotiations leading to the GATT. Commenting on the possibility of abuse of this exception, the Chairman of the Preparatory Committee expressed his view that:

> *"I think there must be some latitude here for security measures. It is really a question of a balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose."*

According to the Chairman, the only guarantee against any such abuse would be the spirit of Members while designing their measures. In this regard, it should be mentioned that while the United States and even other Members have implemented measures in the past with the objective of protecting their security interests, the United States' *spirit* and motivation for

implementing the impugned measures is highly suspect for the reasons discussed in the foregoing paragraphs. It would be in the best interests of the United States and the world trading community that such measures are made more rational and designed in keeping with the *spirit* of Article XXI that GATT negotiators envisaged.

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Trade Remedy News

Trade Remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Acrylic Fiber	China, Belarus, Ukraine, European Union, Peru	F.No.14/50/ 2016-DGAD	16-4-2018	ADD investigation terminated
Digital Offset Printing Plates	China	F. No. 15 / 24 / 2016 / DGAD	23-4-2018	Sunset review recommends non-extension of ADD
Ethylene Vinyl Acetate (EVA) Sheet for Solar Module	China, Malaysia, Saudi Arabia, South Korea, Thailand	F.No.6/9/ 2018-DGAD	4-4-2018	ADD investigation initiated
Epoxy Resins	China, European Union, Thailand, Taiwan, Korea RP	F.No.6/10/ 2018- DGAD	4-4-2018	ADD investigation initiated
Fishing Nets	Bangladesh, China	20/2018-Cus. (ADD)	10-4-2018	Definitive anti-dumping duty imposed
Glassware	China, Indonesia	22/2018-Cus. (ADD)	18-4-2018	Definitive anti-dumping duty imposed
Graphite Electrodes	China	F. No. 7/13/ 2018-DGAD	4-4-2018	Initiation of Mid-Term Review

Product	Country	Notification No.	Date of Notification	Remarks
Hydrogen Peroxide	Bangladesh, Taiwan, Korea RP, Indonesia, Pakistan, Thailand	F.No.14/03/2015-DGAD	17-4-2018	Final Findings re-issued pursuant to CESTAT's remand Order No. 58470-58474/2017 dated December 20, 2017
Meta Phenylene Diamine MPDA	China	F. No.7/2/ 2018-DGAD	3-4-2018	Extension of time for submission of questionnaire response till April 20, 2018
Methyl Ethyl Ketone	China, Japan, South Africa, Taiwan	23/2018-Cus. (ADD)	24-4-2018	Definitive anti-dumping duty imposed
New Pneumatic Tyres for Buses and Lorries	China	F.No.6/8/2018-DGAD	27-3-2018	Countervailing duty investigation initiated
Non-Plasticized Industrial Grade Nitrocellulose excluding Nitrocellulose Damped in Ethanol and Waterwet	Brazil, Indonesia, Thailand	F.No.6/12/ 2018 - DGAD	10-4-2018	Anti-dumping investigation initiated
Partially Oriented Yarns	China	F.No. 7/1/2017-DGAD	23-4-2018	Sunset review recommends non-extension of ADD
Phosphoric Acid - Technical Grade and Food Grade	China	18/2018-Cus. (ADD)	6-4-2018	Revokes provisional assessment upon withdrawal of New Shipper Review Application
Phosphorus Pentoxide	China	19/2018-Cus. (ADD)	6-4-2018	Definitive anti-dumping duty imposed
Plain Gypsum Plaster Boards	China, Indonesia, Thailand, UAE	F.No.7/8/2017-DGAD	19-4-2018	Sunset review recommends non-extension of ADD
Saturated Fatty Alcohols	Indonesia, Malaysia, Thailand	F. No. 14/51/ 2016-DGAD	23-4-2018	Definitive anti-dumping duty recommended
Soda Ash	Russia, Turkey	21/2018-Cus. (ADD)	17-4-2018	Anti-dumping duty extended till April 16, 2019 or till conclusion of sunset review, whichever is earlier

Product	Country	Notification No.	Date of Notification	Remarks
		F.No.7/4/2018-DGAD	16-4-22018	Sunset review investigation initiated
Sodium Perchlorate	China	F. No.7/6/ 2018-DGAD	23-3-2018	Rejection of application for initiation of Sunset Review investigation
Veneered Engineered Wooden Flooring	China, Malaysia, Indonesia, European Union	F.No.14/34/ 2016-DGAD	2-4-2018	Corrigendum notification issued regarding final findings
Viscose Filament Yarn	China	F. No. 15 / 16 / 2016 - DGAD	20-4-2018	Sunset review recommends non-extension of ADD

Trade Remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Carbazole Violet Pigment 23	USA	83 FR 15788 [A-533-838]	12-4-2018	Final Results of Antidumping duty Administrative Review; 2015-2016
Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel	USA	83 FR 16296 [A-533-873]	16-4-2018	Final affirmative determination of sales at less than fair value
Cold-Rolled Steel Flat Products	USA	83 FR 13255 [C-533-866]	28-3-2018	Notice of Rescission of Countervailing Duty Administrative Review; 2016
Cold-Rolled Steel Flat Products	USA	83 FR 13257 [A-533-865]	28-3-2018	Notice of Rescission of Anti-dumping duty Administrative Review; 2016-2017
Glycine	USA	83 FR 17995 [A-533-883]	25-4-2018	Initiation of Less-Than-Fair-Value Investigations
Lined Paper Products	USA	83 FR 16054 [A-533-843]	13-4-2018	Final Results of Anti-dumping duty Administrative Review; 2015-2016

Product	Country	Notification No.	Date of Notification	Remarks
Stainless Steel Bar	USA	83 FR 17529 [A-533-810]	20-4-2018	Final results of changed circumstances review and reinstatement of certain companies in the anti-dumping duty order
Stainless Steel Flanges	USA	83 FR 13246 [A-533-877]	28-3-2018	Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, Postponement of Final Determination, and Extension of Provisional Measures
Welded Stainless Pressure Pipe	USA	83 FR 13251 [C-533-868]	28-3-2018	Rescission of Countervailing Duty Administrative Review; 2016

WTO News

USA-China disputes – China disputes US tariffs on steel, aluminium products and tariff measures on certain Chinese goods

On 9 April, the WTO circulated China's consultation request with the United States concerning certain US duties imposed on imports of steel and aluminium products. China, in its request for consultations, has claimed that the duties of 25% and 10% on imports of steel and aluminium products, respectively, from countries other than some specified, are inconsistent with GATT 1994 and the Agreement on Safeguards. Specifically, China's request challenges violation of Articles I:1, II:1(a) and (b), X:3(a), XIX:1(a) and XIX:2 of the GATT 1994 as well as Articles 2.1, 2.2, 4.1, 4.2, 5.1, 7, 11.1(a), 12.1, 12.2 and 12.3 of the Agreement on Safeguards. It may be noted that India along with Russian Federation, Thailand, EU and Hong Kong (China) have also requested to join the consultations.

Earlier, on April 5, the WTO circulated China's request for consultations with the United States regarding latter's tariff measures on certain Chinese goods which would allegedly be implemented through Section 301-310 of the US Trade Act of 1974. China has claimed that the tariffs would be in excess of the United States' bound rates and therefore, inconsistent with Article I.1 and Article II.1(a) and (b) of GATT 1994 and Article 23 of the DSU.

Canadian commercial aircraft dispute - Panel circulates preliminary ruling

WTO's DSB panel has on 17-4-2018 in *Canada – Measures Concerning Trade in Commercial Aircraft* (DS522) circulated a preliminary ruling

issued on 9-4-2018. Canada had sought a preliminary ruling with respect to whether:

- Brazil's "claims" in its Panel request provided a brief summary of the serious prejudice claims sufficient to present the problem clearly - Specific issues were raised with respect to Brazil's failure to identify an allegedly subsidized product in its summary of the legal basis of the complaint, and its failure to specify the Brazilian like products allegedly suffering serious prejudice.
- Brazil's panel request expands the scope of the dispute beyond the consultation request.
- Brazil's panel request fails to identify the specific measure at issue as regards certain alleged subsidies granted by Canada.

With respect to all three questions above, the Panel ruled in favor of Brazil. It found that Brazil's Panel request was formulated to identify its claims with sufficient clarity, including the goods under consideration and the programs under challenge and was in compliance of the requirements of Article 6.2 of the DSU.

Korea-Japan disputes – Panel report in Korean duties on pneumatic valves from Japan, and appeal filed in dispute involving Japanese food import restrictions

A Panel report in the case brought by Japan in *Korea — Anti-Dumping Duties on Pneumatic Valves from Japan* (DS504) was circulated by the WTO's DSB on 12-4-2018. Japan had challenged anti-dumping duties imposed by Korea on Japanese imports of valves for pneumatic transmissions. Specifically, the challenge pertained to Korea's definition of domestic industry, its analysis of significant increase of the imports of subject goods, the impact of the same on prices of the Korean domestic market as well as the causal link. Certain procedural aspects, such as confidential treatment of information, provision of non-confidential summaries, disclosure of essential facts and the provision of detailed findings and conclusions, were also challenged.

At the outset, the Panel determined that certain Japanese claims were beyond the terms of reference owing to flaws in Japan's panel request. The Panel proceeded to determine that Japan failed to establish most of its substantial claims. However, it concluded that Korea's measures were inconsistent with:

- Articles 3.1 and 3.5 of the Anti-Dumping Agreement, as the causation analysis was flawed in its consideration of the effect of the dumped imports on prices in the domestic market;
- Article 6.5 of the Anti-Dumping Agreement with respect to Korea's treatment of information provided by the applicants as confidential without requiring that good cause be shown;
- Article 6.5.1 of the Anti-Dumping Agreement with respect to Korea's failure to require that the submitting parties provide a sufficient non-confidential summary of the information for which confidential treatment was sought.

Earlier, on 9-4-2018, Korea filed an appeal against the WTO panel report in the case brought by Japan in *Korea — Import Bans, and Testing and Certification Requirements for Radionuclides* (DS495). Korea has raised issue with the Panel's expert selection, in so far as it claims that the Panel acted in violation of Article 11 of the DSU by selecting experts that had a conflict of interest in the matter. In addition, Korea also seeks review of certain findings of the Panel pertaining

to the Agreement on Sanitary and Phytosanitary Measures. The panel had circulated its report on 22-2-2018.

USA-Canada disputes on US duties on softwood lumber - WTO establishes two panels

On April 9, the WTO's Dispute Settlement Body (DSB) agreed to establish two panels to examine Canada's complaints regarding anti-dumping and countervailing duties imposed by the United States on imports of Canadian softwood lumber (DS533 and DS534).

Safeguard investigations by Indonesia and South Africa

Indonesia has notified the WTO's Committee on Safeguards that it has on 29-3-2018 initiated a safeguard investigation on ceramic flags and paving, hearth or wall tiles; ceramic mosaic cubes and the like, whether or not on a backing. Meanwhile South Africa has initiated Safeguard investigation on 20 April 2018 in respect of imports of "other screws fully threaded with hexagon heads made of steel". South Africa has asked interested parties to make themselves known within a period of 20 days after the initiation of the investigation.

India Customs & Trade Policy Update

Pre-notice Consultation Regulations notified

Ministry of Finance has notified Pre-notice Consultation Regulations, 2018 under the Customs Act, 1962. It provides for consultations with the proper officer, prior to issue of show cause notice to the person chargeable with duty or interest. According to the new Regulation, pre-notice consultation must be initiated at least 2 months prior to due date for issuance of SCN, and conclude within 60 days from date of communication of grounds. Further, proper officer shall proceed to issue SCN if no response is received from assessee within 15 days. The new provision was part of Budget 2018 proposals, and amendment to Section 28 of the Customs Act came into effect from 29-3-2018 when Finance Bill 2018 was assented by the President of India.

BCD increased on certain parts for use in manufacture of cell phones

Import duty has been increased on camera modules, connectors and certain printed circuit boards for use in manufacture of cellular mobile phones. According to amendments effective from 2-4-2018, Basic Customs Duty on these goods will be 10% instead of nil. Inputs or parts for manufacture of these products, including sub-parts for manufacture of parts for these goods, however will continue to enjoy exemption from Basic Customs Duty. Amendments for this purpose have been made in Notification Nos. 57/2017-Cus., 24/2005-Cus., 25/2005-Cus. and 50/2017-Cus. by Notification Nos. 37-40/2018-Cus., all dated 2-4-2018. Further it may be noted that by Notification No. 36/2018-Cus., also dated 2-4-2018, the tariff rate of BCD for Tariff Item 8517 70 10 has been increased from nil to 10%.

Solar panels/modules equipped with bypass and/or blocking diodes – Classification

CBIC has clarified that solar panels or modules equipped with bypass diodes are to be classified under Heading 8541. Solar panels/modules equipped with blocking diodes are however to be covered under Heading 8501 of the Customs

Tariff. Instruction No. 8/2018-Cus., dated 6-4-2018 further clarifies that solar panels or modules equipped with both blocking diodes and bypass diodes are to be classified under Heading 8501. The Board in this regard deliberated upon the functioning of bypass and blocking diodes with reference to the decisions of World Customs Organization.

Ratio Decidendi

Anti-dumping investigation – Determination of analogue country

Court of Justice of the European Union has held that the investigating authorities are not required to use any country as the appropriate analogue country solely because it was a market economy third country which was subject to the same investigation. The Court upheld the selection of USA over Taiwan, as an analogue country for imports from China, in a dispute involving anti-dumping duty on stainless steel cold-rolled flat products from China and Taiwan. Applicant's plea that the EU authorities made a manifest error in the assessment of the facts and erred in law in concluding that the United States was a more suitable analogue country than Taiwan on account of the competitiveness and size of its market, was also rejected by the Court. It observed that market and prices of the products concerned in Taiwan were driven, to a large extent, by one large group of companies underlining the fact that those prices were not due to a normal competitive interaction. It was also observed that imports did not exert sufficient competitive pressure on the market in Taiwan, since, the market and prices remain driven by one group of companies.

Similarly, the plea of difference in cost of production and differences in sourcing of nickel, an important input for the disputed PUC, was also rejected observing that neither of the differences had influenced the choice of the appropriate analogue country in the present case. Contention of allowing adjustments on account of differences in the production process and access to raw materials, in the context of constructing normal value, was also rejected while noting that EU authorities are not required to make adjustments considering factors which are not directly or indirectly the normal result of market forces, considering the fact that China was not considered as market economy country during relevant time and appellant had not applied for market economy treatment. [*Shanxi Taigang Stainless Steel Co. Ltd.* v. *European Commission* – Judgement dated 23-4-2018 in Case T-675/15, CJEU]

'Use' of product when not to be sole consideration for its classification

US Court of Appeals for the Federal Circuit has rejected Revenue Department's appeal against classification of certain screws as self-tapping screws. The Court declined to consider 'use' of a product as the sole consideration in interpreting classification. It relied on common and commercial meaning and upheld US Court of International Trade's reliance on Explanatory notes, dictionary definitions and expert testimonies. Interestingly the CoA had earlier remanded the matter to consider 'use' of the product. Department's plea of classification as wood screws was hence rejected. [*GRK Canada Ltd*. v. *United States* – Decision dated 20-3-2018 in 2016-2623, United States Court of Appeals for the Federal Circuit]

SAD refund – No condition that subsequent sale has to be in same form

Supreme Court of India has held that mere conversion of imported logs in to sawn timber without loss of identity of original product, before subsequent sale, would not deprive importer of the benefit of notification granting refund of SAD. Upholding the view taken by Tribunal and HC, the Apex Court rejected the plea that subsequent sale must be in the same form in which goods were imported. It observed that the plea was not supported by plain reading of notification dated 14-9-2007 even if construed in the strictest terms. [*Commissioner* v. *Variety Lumbers* – Civil Appeal Nos. 10258-10296/2011 and Ors., decided on 24-4-2018, Supreme Court]

End-use of imported goods when valid for classification

CESTAT Mumbai, in the dispute pertaining to classification of calcium nitrate and mono potassium phosphate, has held that the goods are to be classified under Chapter 31 and not Chapter 28 of Customs Tariff Act, 1975. The Tribunal observed that when grouping of products and their description connotes end-use, disassociation with classification is not correct. It was noted that the goods composed of two out of three fertilizing elements, and that the government had issued licence for these. [*Commissioner* v. *Solufeed Plant Product* - Order No. A/85989-85997/2018, dated 5-4-2018, CESTAT Mumbai]

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