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## Article

# Understanding India's WTO challenge to United States' additional import tariffs on steel and aluminium articles

By Ankur Sharma

When countries join the WTO, they sign-up to bring transparency, predictability and stability to import tariffs on various goods among many other commitments. It is felt necessary to agree to tariff bindings. This means that if a country A agrees to bind its import tariff on a good X at 10%, A will never impose import tariff above 10% on import of X except in certain conditions. This is the principle of bound tariffs – that member countries shall not impose import tariffs more than what they commit to the WTO membership. However, in certain situations member countries can impose tariffs beyond their bound tariffs.

A will also ensure that import of X shall get the same treatment (including tariff treatment) whether it is imported from a member country B, country C or from any other WTO member. This means that A will make sure that import of X shall not face tariff above 10% when it is imported from any other WTO member. This is called the most-favoured nation principle or the MFN principle.

In certain situations, A could take measures in the interest of public morals, health, environment, etc., if such measures conform to the very high standards of Article XX of the General Agreement on Tariffs and Trade 1994 (GATT)<sup>1</sup>.

On rare occasions, A could take measures in the interest of its security. But such measures must conform to the very high standards of Article XXI of the GATT.

Since A also wants to shield its industry from unfair trade, the WTO agreements allow it to impose trade remedy measures, namely, anti-dumping duty on unfairly low priced and injurious imports, countervailing duty on unfairly subsidised and injurious imports, and safeguard duty on imports that are in such increased quantities that could cause or threaten serious injury to the importing country's industry.

If A derogates from its bound tariffs and violates its MFN commitment, the WTO agreements allow other member countries to challenge such actions/measures. India has recently challenged certain measures of the United States at the WTO.

On 23 March 2018, the United States brought into effect additional import tariffs of 25% and 10% on imports of steel and aluminium articles, respectively. In doing so, the United States offered permanent exemptions to steel imports from Argentina, Australia, South Korea and Brazil in exchange of certain concessions. The United States also offered permanent exemptions to aluminium imports from Australia, Argentina and Brazil in exchange of certain concessions. Canada, Mexico and the EU have received temporary exemptions until 31 May 2018. On the other hand, exports of steel and aluminium articles from other countries including India to the United States face 25% and 10% additional duties, respectively.

India has challenged the above import tariffs of the United States at the WTO. India's request

<sup>1</sup> GATT is a part of the WTO agreements.

for consultations with the United States, which is the first formal step in initiating a dispute at the WTO, raises many issues in this regard<sup>2</sup>.

A summary of the important issues raised by India is as below:

1. The import tariffs violate the MFN principle under Article I of the GATT, as the United States has failed to grant an advantage, favour, privilege or immunity due to the measures immediately and unconditionally to all members of the WTO. The United States has done this by exempting certain member countries permanently, while imposing the measures on other member countries including India.
2. The United States has imposed import tariffs on steel and aluminium articles above its bound tariffs, thus violating Article II:1(a) and Article II:1(b) of the GATT.
3. The United States has indirectly imposed import quotas on WTO member countries by imposing import tariffs on steel and aluminium articles, as the effect of these measures is to reduce the imports of these items from the levels that existed before the measures. Import quotas are not allowed under Article XI:1 of the GATT.
4. The United States has failed to administer its laws, regulations, decisions and rulings in relation to the import tariffs in a uniform, impartial and reasonable manner. This seems to be a violation of Article X:3(a) of the GATT.
5. India believes that the United States' import tariffs are safeguard duties, even though, the United States has rejected this

characterisation on record. India claims that these safeguard duties do not conform to substantive and procedural aspects of Article XIX of the GATT read with the relevant provisions of the Agreement on Safeguards. A safeguard duty is allowed under Article XIX of the GATT only when it is established that a product is imported in such increased quantities into a territory as a result of unforeseen developments and of the effect of GATT obligations including import tariff related concessions. Such increased imports cause or threaten serious injury to the domestic industry in that territory. India claims that the United States has failed to meet its obligations to satisfy Article XIX of the GATT along with several provisions of the Agreement on Safeguards.

6. India has challenged the legality of Section 232 of the Trade Expansion Act, 1962 and the accompanying reports on imports of steel and aluminium by the US Department of Commerce (USDOC) along with several Presidential proclamations that authorise and give effect to the import tariffs on steel and aluminium.

The United States is expected to defend its measures primarily under Article XXI of the GATT, which deals with security exceptions. Article XXI has not been tested under WTO dispute settlement mechanism before. This could be the first case where a WTO panel may be required to interpret Article XXI. The United States may possibly argue that it has taken the measures as there is an emergency in international relations.

To establish its defence, the United States may refer to the reports of the USDOC to justify that steel and aluminium are critical to its essential security interests as both commodities have important defence applications. To cater to defence needs, there should be a viable and

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<sup>2</sup> US – Certain measures on Steel and Aluminium Products (DS547). Official information regarding the dispute can be accessed at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds547\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds547_e.htm).

thriving domestic industry that not only meets defence needs but also attracts commercial business. With excess global capacities and increase in imports of steel and aluminium articles to the United States, despite existing trade remedy measures, the United States' industry's performance has been declining over the years.

This case will pose many interesting questions and a WTO panel may be required to understand whether the United States' measures are safeguard duties; the essential security

interests of the United States, which it aims to protect by these measures; and whether the United States is facing an emergency in international relations.

Whether this dispute goes in India's favour or not, the result will have a significant impact on how member countries approach their security interests vis-à-vis not only their trade interests but also of other WTO members.

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## Trade Remedy News

### Trade Remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Cefadroxil Monohydrate	European Union	F. No. 7/17/2018-DGAD	25-05-2018	Initiation of Sunset Review investigation rejected
Ceramic Rollers	China	27/2018-Cus. (ADD)	17-05-2018	Definitive anti-dumping duty imposed
Diocetyl Phthalate	Korea RP and Chinese Taipei	F. No. 6/2/2017 - DGAD	27-04-2018	Final Findings issued terminating the ADD investigation
Ductile Iron Pipes	China	F.No. 7/18/2018-DGAD	17-05-2018	Initiation of Sunset Review investigation rejected
Epoxy Resins	China, European Union, Thailand, Taiwan, Korea RP	F.No.6/10/2018- DGAD	16-05-2018	Extension of time for submission of questionnaire response till June 04, 2018

Product	Country	Notification No.	Date of Notification	Remarks
Ethylene Vinyl Acetate (EVA) Sheet for Solar Module	China, Malaysia, Saudi Arabia, South Korea, Thailand	F.No.6/9/2018-DGAD	16-05-2018	Extension of time for the submission of the questionnaire response till June 06, 2018
High Tenacity Polyester Yarn	China	F.No.6/12/2017-DGAD	24-05-2018	Final Findings issued recommending imposition of ADD
Jute Products	Bangladesh and Nepal	24/2018-Cus. (ADD)	7-05-2018	Provisional assessment for certain New Shippers in the pendency of New Shipper Review
Meta-Phenylene Diamene-4-Sulphonic Acid (MPDSA)	China	F. No. 6/35/2017-DGAD	16-05-2018	ADD investigation terminated
Methylene Chloride	European Union and the United States of America	F.No.7/15/2018-DGAD	03-05-2018	Initiation of sunset review investigation
New/unused Pneumatic Radial Tyres	China	Case No. 02/2018	16-05-2018	Initiation of New Shipper Review
Non-Plasticized Industrial Grade Nitrocellulose excluding Nitrocellulose damped in Ethanol and Waterwet	Brazil, Indonesia, Thailand	F.No.6/12/2018 - DGAD	17-05-2018	Extension of time for submission of questionnaire response till June 4, 2018
Nylon Filament Yarn	European Union, Vietnam	F.No. 14/33/2016-DGAD	27-04-2018	PCN methodology notified
Ofloxacin Ester / O-Acid	China	F. No. 7/14/2018-DGAD [AC] 02/2018	04-05-2018	Initiation of Anti-Circumvention Investigation

Product	Country	Notification No.	Date of Notification	Remarks
Paracetamol	China	F.No.07/16/2018-DGAD	24-05-2018	Initiation of sunset review investigation
Peroxosulphates (Persulphate)	China	26/2018-Cus. (ADD)	14-05-2018	Anti-dumping duties extended till May 14, 2019 consequent to initiation of sunset review
Saturated Fatty Alcohols	Indonesia, Malaysia, Thailand	28/2018-Cus. (ADD)	25-05-2018	Definitive anti-dumping duty imposed
Veneered Engineered Wooden Flooring	China, Indonesia and European Union	25/2018-Cus. (ADD)	10-05-2018	Customs Notification rectified in furtherance to corrigendum in final findings relating to product under consideration

### Trade Remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Ductile pipes (tubes and pipes of ductile cast iron)	European Union	2018/C 157/04 [Case R690]	04-05-2018	Notice of initiation of a partial interim review of the anti-dumping measures (Anti-Absorption Investigation)
Ductile pipes (tubes and pipes of ductile cast iron)	European Union	2018/C 151/08 [Case R691]	30-04-2018	Notice of reopening the anti-dumping investigation (Partial Interim Review)
Glycine	United States of America	US ITC News Release 18-055	11-5-2018	ADD and CVD – Affirmative finding of material injury
Glass fibres (certain open mesh fabrics of glass fibres)	European Union	2018/C 171/05 [Case R605a]	18-05-2018	Reopening of exemption investigation concerning imports originating in China or consigned from India, whether declared as originating in India or not
Polyethylene Terephthalate	European Union	2018/C 173/07 [Case R694]	22-05-2018	Initiation of expiry review of the countervailing measures

Product	Country	Notification No.	Date of Notification	Remarks
Polytetrafluoroethylene Resin	United States of America	83 FR 23422 [C-533-880]	21-05-2018	Final Affirmative Countervailing Duty Determination
Polytetrafluoroethylene Resin	United States of America	83 FR 20035 [A-533-879]	07-05-2018	Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures
Stainless Steel Wire Rod	United States of America	83 FR 17802 [A-533-808]	24-04-2018	Rescission of Antidumping Duty Administrative Review; 2016-2017



## WTO News

### Korea initiates WTO dispute against US Safeguard duties on washers, solar cells

On 16 May 2018, the WTO circulated Korea's consultation request with the United States regarding US Safeguard duties imposed on imports of large residential washers and crystalline silicon photovoltaic products. In both requests (DS545 and DS546), the claims are similar and pertain to the failure of the United States to follow procedural and substantive requirements in terms of the Agreement on Safeguards. Korea expresses its concerns that the safeguard measures on imports of crystalline silicon photovoltaic products and large residential washers are inconsistent with the relevant obligations of the United States under the GATT 1994 and the Agreement on Safeguards. According to Korea, the United States' measures appear to nullify or impair the benefits accruing to Korea directly or indirectly under the above Agreements.

### EU subsidy duties on PET from Pakistan - Appellate Body issues report

The WTO Appellate Body has on 16-5-2018 issued its report in *European Union — Countervailing Duties on Certain Polyethylene Terephthalate from Pakistan* (DS486). In the appeal the following challenges were raised:

- The European Union claimed that the Panel acted inconsistently with Article 11 of the DSU in making findings regarding Pakistan's claims, considering that the measure at issue had expired.
- The European Union claimed that the Panel, in connection with findings concerning Pakistan's Manufacturing Bond Scheme (MBS), erred in its interpretation of Article 1(1)(a)(1)(ii), footnote 1 and Annexes I to III to the SCM Agreement that, in the context of duty drawback schemes, a subsidy exists only when an "excess" remission occurs

representing government revenue foregone that is otherwise due.

- Pakistan had appealed the Panel findings on a singular issue, that the Panel was incorrect in so far as it rejected Pakistan's claim that the EU Commission's use of "break the causal link" approach was inconsistent with Article 15.5 of the SCM Agreement.

The Appellate Body, however, upheld the Panel's findings with respect to all of the foregoing issues.

### **Appellate Body issues report on EU compliance in Airbus dispute**

WTO's Appellate Body on 15-5-2018 issued its report in *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft — Recourse to Article 21.5 of the DSU* (DS316).

Based on its review of the Panel's analysis, the Appellate Body ultimately upheld the Panel's conclusion that insofar as significant lost sales in the twin-aisle markets (in which Airbus and Boeing sell certain products) and significant lost sales and impedance in the very large aircraft markets are concerned, the European Union had failed to comply with the recommendations and rulings of the DSB in the original dispute because the underlying subsidies continued to exist and cause adverse effects. The Appellate Body, however, did not uphold the Panel's findings of displacement in these two markets or its finding of impedance in the twin-aisle market.

With regard to the market for single-aisle aircraft, the Appellate Body observed that the Panel's findings concerned primarily the effects of subsidies that had expired before 1 December 2011 (the time by which the European Union had been required to comply with the recommendations and rulings of the DSB in the

original dispute). The Appellate Body was not convinced that the Panel's analysis in this regard provided a sufficient basis to find that subsidies provided to Airbus continued to cause adverse effects in the market for single-aisle aircraft.

On this basis, in respect of subsidies existing in the post-implementation period, the Appellate Body upheld, albeit for different reasons, the Panel's conclusions that European Union had acted in violation of the recommendations, rulings and findings of the DSB in the original dispute and that the findings continued to remain operative and should be complied with.

### **US countervailing duty dispute with China - US appeals against compliance panel ruling**

On 27 April 2018, the United States filed an appeal against a WTO compliance panel report in a case brought by China in "*United States — Countervailing Duty Measures on Certain Products from China — Recourse to Article 21.5 of the DSU by China*" (DS437).

The United States has sought review of issues pertaining to the Compliance Panel's findings regarding its terms of reference, use of benchmark determinations in various investigations, establishment of the criterion of specificity in various investigations and the coverage of the Compliance Panel's findings of certain final determinations as well as subsequent administrative reviews and sunset reviews presuming them within the scope of the Compliance proceeding under Article 21.5 of the DSU.

### **Turkey launches safeguard investigation on iron and steel products**

Turkey has on 2<sup>nd</sup> of May 2018 notified the WTO's Committee on Safeguards that it has



initiated on 27<sup>th</sup> of April, 2018 a Safeguard investigation on iron and steel products. The interested parties have been asked to fill in the questionnaires within 30 (thirty) days from the date of publication of the Communiqué and forward it to the General Directorate.

## India initiates WTO dispute against US steel, aluminium duties

On 23 May 2018, the WTO circulated India's consultation request with the United States of America concerning certain US duties imposed on imports of steel and aluminium products.

According to India, the measures, imposing additional *ad valorem* rate of duty on imports of certain steel and aluminium products and exempting certain selected WTO Members, are inconsistent with various provisions of the GATT 1994 and the Agreement on Safeguards. Specifically, India's request challenges violation of Articles I:1, II:1(a) and (b), X:3(a), XI:1, XIX:1(a) and XIX:2 of the GATT 1994 as well as Articles 2.1, 2.2, 3.1, 4.1, 4.2, 5.1, 7, 9.1, 11.1(a), 11.1(b), 12.1, 12.2 and 12.3 of the Agreement on Safeguards.



## India Customs & Trade Policy Update

### Directorate General of Trade Remedies created

India has created an integrated single umbrella national authority to be called the Directorate General of Trade Remedies (DGTR) in Department of Commerce under Ministry of Commerce & Industry, to deal with Anti-dumping, CVD, Safeguard measures as well as quantitative restrictions. At present, Directorate General of Anti-dumping and Allied Duties deals with anti-dumping and CVD cases, Directorate General of Safeguards deals with safeguard measures and DGFT deals with quantitative restrictions. Government of India (Allocation of Business) Rules, 1961 have been amended for this purpose.

### India expands import restrictions on pulses, while issue raised at WTO

*Urad* and *moong* in split and other forms, classifiable under HS 0713 90 10 and 0713 90 90, have been put in restricted import category with annual import quota of 3 lakh MT. Notification No. 6/2015-20 issued for the purpose, amends import policy and condition for these items from 4-5-2018.

DGFT, under Indian Ministry of Commerce had in August 2017 restricted import of *urad* and *moong* covered under HS 0713 31 00. The annual (fiscal year) quota will now be applicable for all 3 HS codes.

Meanwhile, Australia, EU, Canada, USA, Ukraine and Japan have, in WTO Committee on Import Licensing, raised concerns against these quantitative restrictions.

### Duty free import of certain inputs in specified sectors, restored

Entitlement for duty free import of certain sector specific inputs, which was available in Chapter 1B of Foreign Trade Policy 2009-14, has been re-inserted in Chapter 1 of FTP 2015-20 with effect from 1-4-2015. Notification No. 9/2015-20, dated 28-5-2018 inserting Para 1.41 however states that term 'Duty' shall mean Basic Customs Duty from 1-7-2017. These special focus initiatives for handlooms, handicraft, leather, marine, sports goods and toys sectors will be provided according to a specified percentage of exports made in preceding financial year.

## Customs Regulations for audit at premises of importer/exporter replaced

Ministry of Finance by Notification No. 45/2018-Customs (N.T.) dated 24-5-2018 has replaced the On-site Post Clearance Audit at the Premises of Importers and Exporters Regulations, 2011 with the new “Customs Audit Regulations, 2018”. Defining the term ‘auditee’, the new regulation substantially expands the scope of the person who can be audited. The definition of ‘auditee’ is wide enough to cover any person and is not restricted to importer and exporter. The ‘Auditee’ is under an obligation to preserve records including ‘electronic records’ and produce them before the proper officer. While the proper officer has to mandatorily inform outcome of audit to auditee, audit at premises of auditee is to be completed within 30 days, extendable for 30 days only by Commissioner. Officer can also take assistance of professionals.

## Foreign Trade Policy Appendix 3A – Scope of word ‘Duty’ clarified

DGFT has clarified that word ‘Duty’ appearing in Sl. No. 3 of Appendix 3A of Foreign Trade Policy

2015-20 has to be read as Basic Customs Duty (BCD) and not all customs duties (BCD + IGST). Appendix 3A of FTP 2015-20 provides list of items not allowed for import under Export From India Schemes (MEIS and SEIS) under Ch. 3 of FTP, unless otherwise specified. Sl. No. 3 of said appendix covers all spices with a duty of more than 30% under Ch.09 of ITC (HS) Classification (except cloves). Policy Circular No. 7/2015-20, dated 23-5-2018 has been issued for the purpose.

## SFIS/SEIS benefit available to actual service provider and not aggregators

DGFT has clarified that benefit under Served from India Scheme (SFIS) or Service Exports from India Scheme (SEIS) is available to actual exporters providing port related services and not to Ports who are aggregators of services. Policy Circular No. 6/2018, dated 22-5-2018 states that Ports would be eligible to benefit for services exclusively rendered by them and cannot claim benefit in respect of foreign exchange earnings simply routed through them. Regional authorities have been directed to ensure that there is no double claim.



## Ratio Decidendi

## Anti-dumping duty review – Determination of normal value for exporters no longer eligible for MET

In a case where the two Chinese exporting producers were denied Market Economy Treatment (MET) during the review investigation, and the normal value was constructed on the basis of the costs of production in an analogue country while not using that country’s domestic sales prices, as was done when conducting the initial investigation in respect of exporting producers who had not requested MET, the

General Court of the European Union has held that there is violation of Article 11(9) of the EU’s Basic Regulation. Observing that Article 11(9) refers to applying the same method in the initial investigation and in the review investigation, the Court was of the view that there was a change in methodology by the EU authorities within the meaning of the said provision.

It held that the EU institutions are required to apply the same method in order to calculate the normal value for exporting producers not granted MET during the initial investigation and the

review investigation, subject to a change in circumstances or the fact. The Court noted that authorities cannot justify the change in methodology merely by considering that the method used by the contested regulation is more appropriate, where that former method is consistent with Article 2 of the Basic Regulation. The General Court in this regard also observed that there is no reason for the normal value to differ in the case of several exporting producers that are denied MET where the calculations of the normal value are carried out on the basis of data from an analogue country.

The Court annulled the Council Implementing Regulation (EU) No 626/2012 of 26 June 2012 amending Council Implementing Regulation (EU) No 349/2012 imposing a definitive anti-dumping duty on imports of tartaric acid originating in China. [*Distillerie Bonollo SpA v. Council of the European Union* – Judgement dated 3-5-2018 in Case T-431/12, EU General Court (Eighth Chamber, Extended Composition)]

## Foreign Trade Policy benefit available even if Customs delay exemption notification

Relying on Supreme Court decision in *State of Punjab v. Nestle India*, CESTAT Mumbai has held that failure of Customs authorities to issue notification on time cannot be held against the assessee when Foreign Trade Policy was already amended providing the benefit. It noted that the importer was issued EPCG authorization prescribing 3% rate of duty, though the Customs delayed corresponding notification revising the duty from 5% to 3%. The Tribunal in this regard also observed that Ministry of Finance is required to act in tandem with the DGFT and the Ministry of Commerce. In the instant case, while policy was amended with effect from 1-4-2008, the Customs notification implementing the said change was issued on 9-5-2008, i.e. 39 days after the issue of DGFT notification. [*Commissioner v. Chiripal Industries* - Order No. A/86379/2018, dated 16-5-2018, CESTAT Mumbai]

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