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Article

Monitoring of steel imports in USA – Consistency under WTO Laws

By **Aman**

The United States maintains a licensing mechanism known as the Steel Import Monitoring and Analysis (hereinafter referred to as the 'SIMA') System. As per the system, any business importing steel mill products covered under the licensing program is required to procure a license. This includes importers, importing agents or brokers. The aggregate data in relation to volume and prices collected from the licenses are made available to the public following review by the relevant authorities. The purpose of the SIMA system is to provide steel producers, steel consumers, importers and the general public with future trends in the volume and prices of steel imports expected to enter the American steel market.

It must also be noted that the monitoring of steel imports is not unique. A similar system for monitoring steel exists in Canada and Mexico as well. The SIMA system was introduced by the United States Department of Commerce (hereinafter referred to as 'US DOC') and has been in force since December 9, 2003. The SIMA System was specifically introduced at the persistence of the domestic steel industry in the United States which was going through a rough patch then. The measure was introduced in

conjunction with the Section 201 case initiated in early 2002¹. The domestic steel industry's stated purpose was to have the government develop a system that would allow them to have an early warning system for imports so that they could file trade cases faster. As discussed later, the Bush Administration made it clear that while they wanted to develop a system, it had to be automatic, with no cost and not an impediment to trade.

This Article discusses the SIMA System and discusses the consistency of the measure under WTO law.

Key Features of SIMA

The list of steel mill products that require steel import licenses are maintained by the Enforcement and Compliance division of the International Trade Administration². The details required for the license include:

1. Name of importer, exporter and manufacturer
2. Country of origin and exportation
3. Expected port of entry
4. Expected date of export
5. Date of import
6. HTS number of product

¹ On March 5, 2002 the President of the United States had signed a proclamation imposing, effective March 20, 2002, increased tariffs on imports of certain steel products. The President's action was taken pursuant to Section 201 of the Trade Act of 1974. The duties are referred to as 'safeguard measures'. In particular, duties were increased on certain flat steel, hot-rolled bar, cold-finished bar, rebar, certain welded tubular products, carbon and alloy fittings, stainless steel bar, stainless steel rod, tin mill products and stainless steel wire. A tariff rate quota was also applied to steel slabs.

² See <http://enforcement.trade.gov/steel/license/SMP_byHTS.pdf> as of January 1, 2016

7. Product description
8. Volume of imports of particular product
9. Value of imports

The license is permitted to be obtained up to 60 days prior to the date of importation and is valid for 75 days. In particular, the license would have to be procured prior to completing the necessary import documentation as the license number would need to be provided in the relevant import documentation. Upto 10 products can be imported on one license if the importer, exporter, manufacturer and country of origin and exportation of the product is the same. More than 10 products would require an additional license. In addition, if any of the aforesaid categories differ, then a different license would be required. As mentioned above, there is no application fee charged for the license and the license is provided immediately on submitting the information, if complete.

As discussed above, the purpose of the SIMA System is to provide the public statistical data on steel imports entering the United States. Such publication takes place seven weeks earlier than it would otherwise be available to the public. On the basis of the information compiled from the licenses, a series of aggregate tables and graphs on imports of steel mill products by country and type of steel product is prepared. The information, prior to being published, is also analyzed against the census data. The statistics on the basis of the information in the licenses is updated on

a weekly basis. Import statistics published are provided up to the 6 digit level. However, it does not provide aggregate port of entry data because of the possibility of inadvertent release of proprietary information.

WTO Consistency of SIMA

It must be noted that the SIMA System has been designed to overcome the problems highlighted by the Panel and the Appellate Body in *Argentina — Measures Affecting the Importation of Goods* (DS 445) with respect to the Argentinian monitoring mechanism called the Advance Sworn Import Declaration (hereinafter referred to as 'DJAI'). The DJAI was held to be WTO-inconsistent (in particular Article XI:1 of the Safeguards Agreement which is discussed in detail below) as the license was not automatic and the period between application and providing license was delayed. As mentioned above, the US administration made it clear that while they wanted to introduce SIMA it had to be automatic, with no cost and not an impediment to trade.

The SIMA System, however, is still open to challenge under the WTO Agreement on Safeguards (hereinafter referred to as the 'Safeguards Agreement'). Certain provisions under the Safeguards Agreement prohibit Members from taking or maintaining, *inter alia*, import-price monitoring schemes or import surveillance *which afford protection*. In particular, Article 11:1(b) of the Safeguards Agreement provides that:

'Further, a Member shall not seek, take or maintain any voluntary

*export restraints, orderly marketing arrangements or **any other similar measures on the export or the import side.***^{3 4} These include actions by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phase out in accordance with paragraph 2.

³ An import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and this Agreement may, by mutual agreement, be administered by the exporting Member.

⁴ Examples of similar measures include export moderation, export-price or **import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection.**'

(Emphasis added)

A measure on the import side such as an import-price monitoring system or import surveillance that affords protection will be considered inconsistent with the requirements of Article 11:1(b) of the Agreement on Safeguards. In particular, as the proposed

mechanism does monitor the price of imports of certain steel products, and may even be regarded as a form of import surveillance, it would be considered inconsistent if it is found to afford protection. Therefore, the WTO consistency of the proposed mechanism would hinge upon on whether it is found to 'afford protection'. It may be argued that the proposed mechanism affords protection to the domestic industry by alerting them to the prices and volumes of imported steel products in advance of such imports entering the US market and allowing them to adjust their own prices, production and sales strategies accordingly.

It may be counter-argued however that the import statistics are available to all interested parties, namely domestic producers, importers and exporters. As all other interested parties have equal access to the information, the monitoring mechanism cannot be considered as providing protection to any one particular party. Even importers or exporters may devise their sales strategies based on statistics provided. Therefore, in providing data access to all parties, the proposed mechanism places all parties at a level playing field. Furthermore, the above import data is published only for tariff lines on a 6-digit level. More disaggregated data beyond the 6 digit level is not made public for reasons of confidentiality and to protect proprietary information.

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Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
2-Ethyl Hexanol	EU, Indonesia, Korea RP, Malaysia, Taiwan & USA	10/2016-Cus. (ADD)	29-3-2016	Definitive anti-dumping duty imposed
Coumarin	China	F.No. 15/26/2014	2-3-2016	Sunset review recommends continuation of Anti-dumping duty
Glazed/Unglazed Porcelain/Vitrified tiles	China	12/2016-Cus. (ADD)	29-3-2016	Provisional anti-dumping duty imposed
Hot Rolled Flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more	All countries excluding developing countries other than China and Ukraine	1/2016- Cus. (SG)	29-3-2016	Safeguard duty imposed
Measuring Tapes	Taiwan, Malaysia, Thailand & Vietnam	F.No. 14/21/2014	10-3-2016	Definitive Anti-dumping duty recommended
Plastic processing machines or injection moulding machines	Chinese Taipei, Philippines, Malaysia or Vietnam	9/2016- Customs (ADD)	15-3-2016	Definitive anti-dumping duty imposed
Polypropylene	Singapore	7/2016-Cus. (ADD)	8-3-2016	Definitive anti-dumping duty continued after sunset review
Seamless tubes, pipes and hollow profiles of iron, alloy or non-alloy steel (other than cast iron and stainless steel)	China PR	F.No. 14/2/2015-DGAD	31-3-2016	Imposition of provisional ADD recommended
Tyre Curing Presses	China	11/2016-Cus.ADD)	29-3-2016	Definitive anti-dumping duty continued after sunset review
Vitrified or porcelain tiles	China	F.No.15/25/2011-DGAD	28-3-2016	ADD New shipper review – Applicants found not entitled to individual dumping margin

Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Cold-Rolled Steel Flat Products	USA	[A-533-865] 81 FR 11741	7-3-2016	Preliminary determination affirms W. Avg. dumping margin at 6.78%
Frozen Warm water Shrimp	USA	[A-533-840] 81 FR 12705	10-3-2016	Anti-dumping margin determined pursuant to Administrative Review 2014-15
Oil Country Tubular Goods	USA	[A-533-857] 81 FR 15508	23-3-2016	Anti-dumping administrative Review 2015 rescinded
Polyethylene Terephthalate Resin	USA	[C-533-862] 81 FR 13334 [A-533-861] 81 FR 13327	14-3-2016	Final determination affirms countervailable subsidy rates from 5.12% to 153.80% Final determination affirms dumping margin from 8.03% to 19.41%
Preserved Mushrooms	USA	[A-533-813] 81 FR 12463	9-3-2016	Preliminary results of anti-dumping administrative review 2014-15 finds nil dumping margin
Stainless Steel Bar	USA	[A-533-810] 81 FR 12694	10-3-2016	Preliminary results of anti-dumping administrative review 2014-15 finds nil dumping margin
Tubes and pipes of ductile cast iron	EU	Commission Implementing Regulation (EU) 2016/387	17-3-2016	Definitive Countervailing duty imposed
Welded Stainless Pressure Pipe	USA	[C-533-868] 81 FR 12871	11-3-2016	Preliminary countervailable subsidy rate determined from 2.96% to 6.21%

WTO News

India disputes USA's measures relating to non-immigrant temporary working visas

India has on 3-3-2016 notified the WTO Secretariat of its decision to initiate a WTO dispute proceeding against the United States

regarding measures imposing increased fees on certain applicants of non-immigrant visas in the L-1 and H-1B visa categories, and measures relating to numerical commitments for some visas. According to India, the measures are

inconsistent with the terms agreed to by the United States in its Schedule of Specific Commitments under the GATS, and accord to juridical persons of India having a commercial presence in the United States a treatment which is less favourable than that accorded to juridical persons of the United States engaged in providing like services in sectors such as the Computer and Related Services sector. India also alleges that hence the provisions affect the movement of natural persons seeking to supply services. It is stated that the measures appear to nullify or impair the benefits accruing to India directly and indirectly under the GATS. The US measures are said to be in violation of Articles III:3, IV:1, VI:1, XVI, XVII, XX, and paragraphs 3 and 4 of the GATS Annex on Movement of Natural Persons Supplying Services. Similarly, measures relating to numerical commitments, are also alleged to be in violation of Articles II, V:4, XVI and XX and paragraph 3 and 4 of the GATS Annex on Movement of Natural Persons Supplying Services.

Meanwhile, in 505th dispute brought to the WTO DSB, Canada has disputed USA's Countervailing duty on imports of super-calendered paper (glossy printing paper) from Canada.

Japan files dispute against Korea over anti-dumping duties on pneumatic valves

On 15 March 2016, Japan has requested consultations with Korea concerning latter's measures imposing anti-dumping duties on valves for pneumatic transmission from

Japan. Korea had earlier imposed anti-dumping duties on the valves between 11.66% and 22.77%. Japan however alleges that South Korea's imposition of anti-dumping duties is inconsistent with the WTO Anti-Dumping Agreement because of flaws in Korea's determination of injury and a causal relationship, as well as flaws in its investigation procedure. Japan states that Korea's analysis of the volume and price effects of the imports under investigation did not involve an objective examination based on positive evidence. Violation of provisions of Articles 3.1, 3.2, 3.4, 3.5, 4.1, 6.5, 6.9 and 12.2 of the Anti-dumping Agreement is hence alleged by Japan in this dispute.

EU duties on biodiesel from Argentina found to violate WTO provisions

On 29 March 2016, the WTO issued the panel report in the case EU's anti-dumping Measures on Biodiesel from Argentina (DS473). Argentina claimed that the EU authorities acted inconsistently inasmuch as while constructing the Argentine producers' Normal Value, the EU authorities replaced the costs reported in the Argentine producers/exporters' records for soybeans with reference prices published by the Argentine Ministry of Agriculture.

The Panel upheld Argentina's claim that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of biodiesel on the basis of the records kept by the producers/exporter under investigation.

Further, EU's use of 'cost' that was not the cost prevailing 'in the country of origin', Argentina, in the construction of the normal value, was

also found to be inconsistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

Ratio Decidendi

Product under consideration – No requirement of any homogeneity or similarity between products at issue

The Court of Justice of the European Union has held that EU's Basic Regulation, read in the light of the WTO Anti-Dumping Agreement, does not in itself require the concept of 'product under consideration' necessarily to refer to a product envisaged as a homogeneous whole composed of similar products. The Court in this regard found nothing in wording of the Basic Regulation to support any specific requirement for homogeneity or similarity between the products at issue. The importer in this case had contended that since various products subject to anti-dumping duties under the concerned Regulation (Regulation No 412/2013) are not similar or homogeneous, thereby not constituting a single product, the pursuit of a single investigation was not justified. The Court however rejected the contention while it held that though the items are different in terms of style, shape and properties, they have same basic physical and technical characteristics in so far as they are ceramic and are intended to come into contact with food. It was hence held that there was no manifest error by the EU authorities in basing their analysis on a definition of the product concerned which encompasses items of ceramic tableware and kitchenware, inasmuch as no evidence was submitted regarding the findings which might have been reached on

the basis of a different definition of the product concerned. [*Portmeirion Group UK Ltd. v. Commissioners for Her Majesty's Revenue & Customs* – Judgement dated 17-3-2016 in Case C-232/14]

Provisional ADD – Challenge thereto when not sustainable

Court of Justice of European Union has upheld the view of the General Court that the provisional regulation could be considered not to have caused any loss independently from that caused by the definitive regulation. The appellant here, one of the domestic producers, had challenged the Regulation imposing provisional anti-dumping duty alleging that the rate of duty neither eliminated dumping nor the loss caused as a result of such dumping. Relying upon precedent case law, the Court however in this regard held that following the entry into force of the definitive regulation, no independent legal effect of the provisional regulation remains. The contentions of the applicant that the relied upon case-law was not relevant to the present case in so far as this case concerned the effects of the regulation at issue not on the importing or exporting producers of the products concerned, but on the European producers who continue to have an interest in bringing proceedings, was also rejected by the ECJ in this regard. [*Solar World AG v. European Commission* – Judgement dated 10-3-2016 in Case C-312/15 P, CJEU]

News Nuggets

France to levy additional tax on palm oil and coconut oil used in food products

Palm oil is an important item of export for Malaysia and Indonesia and an ingredient in many food as well as non-food preparations like shampoos. Certain studies caution against use of palm oil in food stating that it can lead to increased risk of developing cardiovascular disease and Alzheimer's disease. Environmental concerns have also been raised in as much as forest lands are diverted for palm tree plantation. It is also in demand as a biofuel.

Amendment 367 to the French law on biodiversity proposes additional tax on palm

oil and coconut oil intended for use in food products. It is stated that instead of a ban on the product, making it lose its competitive advantage will lead to substitution and lower consumption and help in safeguarding public health. The amendment also records environmental concerns. However, as expected France's trading partners have commented that the amendment violates WTO laws and is not based on sound scientific reasoning. Certain other reactions to the amendment have been that not taxing the use of palm oil as bio fuel will mean that the environmental concerns are not fully addressed.

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