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Playing on the wrong side – United States' Section 232 measures held inconsistent with WTO law

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Introduction

On 8 March 2018, the United States ('**US**') imposed additional duties of 25% *ad valorem* on imports of steel products and 10% *ad valorem* on imports of aluminium products ('**measures**'), into the US. The additional duties were imposed under Section 232 of the Trade Expansion Act, 1962, which permits the US government to impose measures on imports of any product if it is being imported in such quantities or circumstances such that it impairs the US' national security.[1]

Quite naturally, and given the trade impact of the measures, many WTO members including India initiated complaints in 2018 challenging the WTO consistency of the measures under the WTO's dispute settlement process. After nearly four years, the WTO panel, in *United States – Certain Measures on Steel and Aluminium Products* circulated its reports arising out of some of the individual complaints instituted by China (DS544), Norway (DS552), Switzerland (DS556), and Turkey (DS564).

The panel reports, which were circulated on 9 December 2022, have outrightly held the measures to be inconsistent with various provisions of the General Agreement on Tariffs and Trade ('**GATT**'), most notably the security exception in Article XXI.

The panel held the measures to violate GATT Article II as the additional duties imposed under the measures exceeded the US' tariff bindings. The panel also held the measures to violate GATT Article I as the country exemptions granted in favour of certain countries discriminated against other WTO members. Though the panel's findings regarding violations of GATT Article I and Article II are plain and simple, the key highlight are the findings regarding the validity of the US' defense under Article XXI.

Since the very beginning of the imposition of the measures, the US made an argument that these measures were justifiable under Article XXI. The US' defense that measures under Article XXI are self-adjudicating and cannot be scrutinized by a panel seemed to be a jurisprudential challenge to the panel and the complainants. However, with this ruling, the panel has very wisely settled this point of law. This article is intended to discuss the panel's key findings concerning the consistency of the US' measures with GATT Article XXI.

Justiciability of measures taken pursuant to the security clause

In its defense before the WTO panel, the US argued that the said measures were justified under Article XXI (b)(iii) of the GATT, which enables a WTO Member to take measures which are necessary for, inter-alia, the protection of its essential security interests taken in time of war or other emergency in international relations. For ease of reference, the relevant clause is reproduced hereinbelow:

[1] Section 232 empowers the US government to investigate whether any product is being imported in such quantities or circumstances such that it impairs the US' national security. The investigating body (the US Department of Commerce) may accordingly recommend measures on such imports.

Article XXI: Security Exceptions

Nothing in this Agreement shall be construed

(a)…; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i)…

(ii)…

(iii) taken in time of war or other emergency in international relations; or

At the threshold, the US argued that the use of the phrase 'it considers' in the security exception was a self-judging exception in that it was not justiciable, i.e., did not permit a WTO panel to sit in judgment over the validity of the measure. However, the panel boldly pierced through this defense and held that while Article XXI(b) gives a Member a right to take action it considers necessary, this did not detract from the requirement that such action had to be taken in consonance with the conditions and circumstances prescribed in the three paragraphs under clause (b).

It may be recalled that the issue of justiciability of measures taken pursuant to the security exception has previously been adjudicated by a panel in *Russia – Traffic in Transit* (DS512). In that dispute, the panel expressly rejected Russia's argument that the panel lacks jurisdiction to review a Member's invocation of Article XXI. The panel therein ruled that the power to review whether the requirements of Article XXI have been met is not entirely self-judging.

The panel in *Russia – Traffic in Transit* has also explained what might constitute an 'essential security interest'. While it has recognized that every Member has the discretion to define what it considers to be its essential security interests, it has drawn a red line by stating that this does not mean that a Member is free to elevate any concern to that of an 'essential security interest', and the designation of any concern as an essential security interest must be in 'good faith'.

In this context, the panel's ruling in *Russia – Traffic in Transit* set an important precedent for the present dispute in holding that the measure must be connected and be plausible in relation to the essential security interest articulated by the defending Member.

Calling a Spade a Spade – Validity of the measures under Article XXI

Before the panel, the US relied upon Section 232 reports that formed the basis of the measures to argue that the worldwide excess capacity of steel could damage its domestic steel sector such that it would not be able to increase or maintain production of steel required to address national emergencies. This excess capacity, according to the US, constituted an 'emergency in international relations'.

However, the panel wasted no words in dismantling the US' tenuous defense and held that the situation of excess global steel capacity was not one that could be equated to the gravity or severity of tensions on the international scale so as to constitute an 'emergency in international relations'. In fact, the panel relied on the term 'war' to inform the meaning and context of what could be an 'emergency in international relations' since the latter phrase immediately follows the word 'war' in Article XXI(b)(iii).

The panel has also contributed to the jurisprudence on Article XXI by defining an 'emergency in international relations' under Article XXI(b)(iii) as referring to situations of a certain gravity or severity and international tensions that are of a critical or serious nature in terms of their impact on the conduct of international relations.

The panel further held that the Section 232 steel and aluminium reports issued by the US Department of Commerce did not identify or address the existence of an 'emergency in international relations'. This is an important finding that shows the inadequacy of the US' investigation process under section 232 for meeting the criteria under Article XXI.

Conclusion

When President Biden of the less conservative Democratic Party was voted into power in 2020, it was expected that the US Government would tone down its nihilistic rhetoric towards the multilateral trading system and withdraw measures that seemingly violate WTO law, most notably the Section 232 measures. However, irrespective of such change in guard, the United States continues to maintain status quo in respect of such measures.

The US Trade Representative has already put out a bold statement unequivocally expressing its intention to *not* comply with the findings of the panel report.[2] Further, the US is quite likely to appeal the panel report to the Appellate Body, which ironically, the US has driven to the ground. Though the US' detraction from the rule of law in the WTO's rules-based system is not unknown or surprising, WTO Members may find relief in the fact that the panel has outrightly held these infamous measures as inconsistent with WTO law.

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Trade Remedy News

Trade Remedy actions by India

Product	Country	Notification No.	Date of notification	Remarks
Aniline	China PR	F. No. 7/25/2022-DGTR	12 December 2022	Mid Term Review of the anti-dumping duty initiated
Ceramic Rollers	China PR	F. No 07/18/2022-DGTR	7 December 2022	Anti-dumping Sunset review terminated on request of domestic industry
Glycine	China PR	F. No. 190354/308/2022-TRU	22 December 2022	Finance Ministry rejects DGTR's recommendations to impose ADD

[2] https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/december/statement-ustr-spokesperson-adam-hodge

Product	Country	Notification No.	Date of notification	Remarks
Monoisopropyl amine" (MIPA)	China PR	F. No. 7/12/2022-DGTR	20 December 2022	Sunset review recommends continuation of ADD
New/unused pneumatic radial tyres (including tubeless tyres) for buses and lorries/trucks	China PR	F. No. 190354/106/2022-TRU	15 December 2022	Finance Ministry rejects DGTR's recommendation to continue anti-dumping after sunset review
Ofloxacin and its intermediates	China PR	F. No. CBIC-190354/288/2022-TO(TRU-I)-CBEC	2 December 2022	Finance Ministry rejects DGTRs recommendations to impose ADD
Para-Tertiary Butyl Phenol (PTBP)	South Korea, Singapore, and USA	F. No. 6/14/2022-DGTR	21 December 2022	Anti-dumping investigation initiated
Stainless-Steel Seamless Tubes and Pipes	China PR	31/2022-Customs (ADD)	20 December 2022	Anti-dumping Duty imposed for five years
Viscose Staple Fibre	China PR and Indonesia	F. No. 07/03/2021-DGTR	19 December 2022	Sunset review recommends continuation of ADD on imports from Indonesia

Trade remedy actions against India

Product	Investigating Country	Document No.	Date of Document	Remarks
Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel	USA	FR Doc. 2022–27521	20 December 2022	Preliminary results from anti-dumping duty administrative review of company Goodluck India Ltd., for periods 2017-19 and 2019-20 (sale at less than normal value found)

Product	Investigating Country	Document No.	Date of Document	Remarks
Finished Carbon Steel Flanges	USA	FR Doc. 2022–26401	30 November 2022	Anti-dumping order and countervailing duty order continued after investigation by Commerce Department and ITC
Finished Carbon Steel Flanges	USA	FR Doc. 2022–27223	15 December 2022	Final Findings of countervailing duty administrative review (found that various firms received countervailable duties in the period of review)
Frozen Warmwater Shrimp	USA	FR Doc. 2022–27004	16 December 2022	Amendment of DoC's Final Findings for harmonization with the decision of the U.S. Court of International Trade in *Z.A. Sea Foods Private Limited* v. *United States*
Glycine	USA	FR Doc. 2022–27232	15 December 2022	Final Findings of countervailing duty administrative review (found that various firms received countervailable duties in the period of review)
Open mesh fabrics of glass fibers, of a cell size of more than 1.8 mm both in length and in width, and weighing more than 35 g/m^2, excluding fiberglass discs	EU	32022R2457	14 December 2022	Exemption from anti-dumping duty granted after review, to few Indian exporters
Paper File Folders	USA	701 TA-683	28 November 2022	ITC finds sale at less than fair value, which has caused material injury to domestic industry
Polyethylene Terephthalate Film, Sheet, and Strip (PET Film)	USA	FR Doc. 2022–26875	12 December 2022	Final Findings of countervailing duty administrative review (found that various firms received countervailable duties in the period of review)

Product	Investigating Country	Document No.	Date of Document	Remarks
Silicomanganese	USA	FR Doc. 2022–26448	6 December 2022	Final Findings of changed-circumstances review involving one firm (NAVA Limited)
Stainless Steel Flanges	USA	FR Doc. 2022–26404	5 December 2022	Initiation of antidumping duty and countervailing duty administrative review
Stainless Steel Wire Rods	USA	731-TA-638 (Fifth Review)	20 December 2022	Affirmative sunset review issued
Welded Stainless Pressure Pipe	USA	FR Doc. 2022–26449	6 December 2022	Preliminary results of antidumping duty investigation (sale at less than fair value found).

WTO News

US law mandating Hong Kong produced products to be marked as originating from China, is inconsistent with WTO law

A panel of the Dispute Settlement Body of the WTO has held that the requirement in the US law that imported goods produced in Hong Kong, China be marked to indicate that their origin is 'China', is inconsistent with the WTO provisions. The Panel in its report (DS597) circulated on 21 December 2022 found that a difference in treatment resulted from the United States requiring that products of Hong Kong, China be marked with a mark of origin indicating the name of another WTO Member (China), whereas goods of any third country must be marked with the name of that third country, and not with the name of another WTO Member. According to the Panel, this difference in treatment modified the conditions of competition to the detriment of products of Hong Kong, because products of Hong Kong were required to compete in the US market with an indication that their origin is that of another WTO Member (China) and not with an indication of their origin as determined by the United States. The origin marking requirement was hence held inconsistent with Article IX:1 of the GATT 1994.

Further, in respect of United States invocation of Article XXI(b)(iii) of the GATT, the Panel concluded that although there was evidence of the United States and other Members being highly concerned about the human rights situation in Hong Kong, the situation had not escalated to a threshold of requisite gravity to constitute an emergency in international relations

that would provide justification for taking actions that are inconsistent with obligations under the GATT 1994.

Colombian anti-dumping duty on imports of prepared/preserved potatoes and frozen fries, from Belgium, Netherlands and Germany, is wrong

In its first arbitration proceeding based on the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), the WTO Panel has held that that Colombia acted inconsistently with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement while imposing anti-dumping duty on imports of potatoes, prepared or preserved (otherwise than by vinegar or acetic acid), frozen (frozen fries), originating in Belgium, Netherlands and Germany (DS591). Colombia's contention that the term 'dumped imports' in Article 3 of the Anti-Dumping Agreement refers to any imports for which an authority calculates a positive dumping margin, including *de minimis* margins (i.e. less than 2%) was rejected in the Appeal Arbitration Arrangement. According to the Arbitrators, such an interpretation would render ineffective the requirement under Article 5.8 to immediately terminate an investigation where an authority determines a *de minimis* dumping margin.

US measures on imports of steel and aluminium products held inconsistent with WTO provisions

The DSB Panel of the WTO has held that US import duties on steel and aluminium were inconsistent with Article II:1 of the GATT 1994 as they exceeded the bound tariff rates in the United States' WTO Schedule of Concessions (DS544). According to the Panel, exemptions from the duties granted to these products from certain countries were also inconsistent with the requirement of MFN treatment under Article I:1 of the GATT 1994. The Panel in its decision circulated on 9 December also found that the inconsistencies of the measures at issue with certain provisions of the GATT 1994 were not justified under Article XXI(b)(iii) of the GATT 1994, dealing in security exceptions. It was also held that the Agreement on Safeguards did not apply to the measures at issue.

China disputes US measures on semiconductor and related services and technologies

China has disputed certain measures of the United States which are related to trade restrictions on certain advanced computing semi-conductor chips, supercomputer items, semi-conductor manufacturing items and other items, as well as their related services and technologies destined for or in relation to China. According to China (Document WT/DS615/1), the United States not only imposes export controls itself on China, but also compels other WTO Members to follow suit by virtue of its extra-territorial control. The Document also states that US measures constitute restrictions on trade and are inconsistent with the United States' obligations under various provisions of the covered agreements, including the GATT, TRIMs, TRIPS and GATS.

Trade restrictions increasing amidst economic uncertainty, multiple crises

The WTO Director-General's annual overview of developments in the international trading environment shows that trade restrictions are increasing in a context of economic uncertainty exacerbated by the COVID-19 pandemic, the war in Ukraine and the food security crisis. According to the latest WTO Trade Monitoring Report

presented on December 6 at a meeting of the Trade Policy Review Body, WTO members are introducing restrictions at an increased pace, particularly on food, feed and fertilizers. The stockpile of import restrictions in force also continues to grow.

The trade coverage of the trade-facilitating measures was estimated at $1,160.5 billion, and that of the trade-restrictive measures at $278.0 billion. The stockpile of import restrictions in force also continued to grow. By mid-October 2022, over 9% of global imports continue to be affected by import restrictions implemented since 2009 and which are still in force.

Initiations of trade remedy investigations declined sharply during the review period (10.9 initiations per month, the lowest since 2012) after reaching its highest peak in 2020 (36.1 initiations per month). These actions remain an important trade policy tool for many members, accounting for 37.4% of all non-COVID-19-related trade measures on goods recorded. Anti-dumping continues to be the most frequent trade remedy action in terms of initiations and terminations.

India Customs & Trade Policy Update

India-Australia FTA – Economic cooperation and trade agreement effective from 29 December 2022

The Central Government has on 22 December 2022 notified the Customs Tariff (Determination of Origin of Goods under the India-Australia Economic Cooperation and Trade Agreement) Rules, 2022. The Rules are effective from 29 December 2022 and provide for the procedure for determining country of origin also in case of goods not wholly produced or obtained. The Rules in this regard also specify certain operations which when undertaken on non-originating materials to produce a good shall be considered as insufficient working or processing to confer on that good the status of an originating good. The Tariff notification relating to rate of duty on imports from Australia has also been notified to cover products falling under 8500 different Tariff Items. This notification is also effective from 29 December 2022.

RoDTEP – Chemicals, pharmaceuticals and iron & steel items included in list of eligible items

The Ministry of Commerce has included items falling under ITC(HS) Chapters 28, 29, 30 and 73 in Appendix 4R of the FTP-Handbook of Procedures, to be eligible for benefit of RoDTEP (Remission of Duties and Taxes on Exported Goods) scheme. The benefit will be available in respect of exports made from 15 December 2022 till 30 September 2023.

Ratio Decidendi

Valuation – Contemporaneous imports – Effect of exchange rate and time difference in imports

The CESTAT Delhi has found force in the argument of the assessee that the imported goods cannot be compared in value to those which may have been imported a month later. Allowing appeal against rejection of transaction value and the decision of Commissioner (A) upholding valuation under Rule 5 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the Tribunal also observed that assessable value in Bills of Entry were given in Rupees, whereas declared values in disputed Bill of Entry were in US dollars, and it was not clear as to what rate of exchange was applied by the Department to re-determine assessable value under Rule 5.

It may be noted that the Tribunal also observed that the least one would expect while comparing the prices is to specify what goods were imported in the contemporaneous Bills of Entry, their quantity, specifications, country of origin, port of import etc., so that the same can be compared with the disputed goods. [*D M Marketing Inc.* v. *Principal Commissioner* – 2022 VIL 933 CESTAT DEL CU]

Valuation – Related person – Shareholder cannot be a partner in business

In a case of import by alleged related person, the CESTAT Ahmedabad has held that a shareholder cannot be termed as partner in the business carried on by the company [Rule 2(2)(ii) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007]. Observing that Partnership is formed through an agreement, the Tribunal noted that there was no partnership agreement between the importer-Appellants and the foreign exporter, so they cannot be treated as legally recognized partners only because the Appellants held 50% share in the exporter. Department's reliance on Rule 2(2)(vi) relating to direct or indirect control by a third person, was rejected by the Tribunal while it noted that the Revenue had failed to show who is the third person who controls. The Tribunal also rejected the contention of the Revenue department that the assessee-importer and the Department of Fertiliser, Government of India [High seas seller] were officers or directors of one another's businesses [Rule 2(2)(i)]. It observed that the Department failed to prove that as to how the Appellants and DOF, GOI were officers. Upholding the transaction value, the Tribunal also noted that there was a long-term agreement as regards production and sale of goods. [*Indian Farmers Fertilizers Co-operative Limited* v. *Commissioner* – 2022 VIL 860 CESTAT AHM CU]

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