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ADHYATAN

TPM Newsletter

Safeguard measures are the protectionist measures available to the domestic industry in order to provide them a breathing time to adjust to compete with the increased imports. Safeguard measures are applied when product is being imported in increased quantities, to cause or threaten to cause injury to the domestic industry. Safeguard measure are applied to a product being imported irrespective of its source. The relief that was available to the domestic industry in India under safeguard law was in the form of additional import duties or quantitative restrictions.

In the recent Budget, an amendment has been introduced to the law relating to Safeguard measure, which has empowered the Central Government to impose safeguard measure in the form of tariff rate quota, an additional form of relief under safeguard measure.

Tariff Rate quota acts as an upper limit of imports into India from the exporting country. As long as the exporting country will export the goods to India within the prescribed limit/quota, no or low duty will be charged by the investigating country. However, if the exporting country exhausts the prescribed limit, a safeguard duty/tariff will be levied. For instance, under safeguard measure, a quota of 25,000 MT has been allocated to a country for exports and if the said country exhausts the allocated limit, a higher Safeguard duty will be levied on exports exceeding the volume of 25,000 MT. Thus, this provision has elements of both quantitative restrictions as well as an additional tariff, in the event when the quota is exhausted.

Article XIII of the General Agreement on Tariffs and Trade (GATT) 1994 read with Article 5 (1) of the WTO Agreement on Safeguards provides for quantitative restrictions as a safeguard measure and the conditions which a Member country must fulfill before applying for such a measure. Article 5 (1) of the WTO

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Agreement on Safeguards governs how quota shares are to be allocated among the exporting countries. The member countries may do away with level of quota (i.e. the quota levels may be modulated) if (i) the percentage increase in imports from certain Members has been disproportionate to the overall increase in imports, (ii) the reasons for the departure from the general rule are justified, and (iii) the conditions of such a departure are equitable to all suppliers of the product concerned.

Other WTO member countries such as USA, European Union, Canada, Australia, Japan, New Zealand etc. have been using Tariff Rate Quota as one of the safeguard measures. This measure is most suitable in the situation where there is demand supply gap in the importing countries.

Steel Safeguard Investigation by European Commission- An example of Tariff Rate Quota

The European Commission after finding that the increased imports of steel have caused serious injury to the European Union Industry, allocated tariff rate quotas against imports of Certain Steel Products. To the question whether the tariff allocation should be country specific or global, the European Commission was of the view that there are two specific factors with needs to be consider while deciding this (i) since the product scope is wide, there are various exporting countries, and hence it will be difficult to allocate tariff quota for each exporting country and (ii) exports from some of the countries have reduced in recent period due to countervailing or anti-dumping duties in force. The Investigating Authority finally decided to adopt a mixed approach, wherein, country specific allocation was given to those countries which had significant supplying interest, based on their imports over the last 3 years. The commission, for the purpose of this Regulation considered that countries with a share of more than 5 % of imports for the product category concerned have a significant supplying interest. The global tariff-rate quota ('the residual

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quota') was based on the average of the remaining imports over the last three years and it was allocated to all other supplying countries. Since there was a wide variety of product under investigation, the quota was allocated on the basis of product category. For every category, quotas were allocated country wise as well as residual.

Tarif quotas, once allocated, are revised on yearly basis. But in the present case the Commission considered that the residual tariff-rate quota should be divided quarterly in order to ensure that imports are evenly distributed over the year and prevent that significant imports of standard products are stockpiled at the beginning of the period in order to avoid possible duties. The commission also decided not to allocate country specific quota to those countries whose imports have declined in the recent period due to anti-dumping/countervailing duty in force. Those countries were allocated the residual category of quota.

Introduction of Tariff Rate Quota, as a Safeguard measure is a welcomed step from the Government of India since it provides for a discretion to the Authority to apply a mix form of relief in a case to case basis. India has only applied additional tariffs as a safeguard measure, in all its investigations till now. However, there is an ongoing case of safeguard measures, concerning imports of "Isopropyl Alcohol", where the domestic industry has sought a relief in the form of quantitative restrictions. Now that the usage of TRQ is imminent, there is need for introduction for Rules governing its allocation, implementation, revisions and monitoring. It should, however, be kept in mind that methodology for the allocation must be on case to case basis owing to difference in the market situation and complexity of the product involved, number of exporting countries, countries facing trade remedial measures etc.

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Under the WTO Agreement, a countervailing duty may be imposed in respect of a subsidy, which has the following elements:

- *It involves a financial contribution (example a grant or loan) by a government or public body, or by a private body, and*
- *It provides a benefit to a producer or an exporter and*
- *It is specific i.e. it is limited to an enterprise or industry or group of enterprises/industries, or a region.*

Where any subsidy, having the above listed elements, allows an exporter to export any product at a price which causes injury or threatens to cause injury to the domestic industry, the importing country may levy countervailing duty as a remedy against the unfair subsidized imports.

For years, some US policymakers have argued that currency undervaluation should also be treated as an countervailable subsidy. This is because when a currency is undervalued, it would allow the exporters to export the goods at cheaper prices, in terms of foreign currency, for the same price in domestic currency.

Some US policymakers had increasingly expressed concerns that US industries have suffered due to unfair exchange rate policies of Government of other countries. It has been argued that other countries have purposefully undervalued their currency relative to US dollar to boost exports, at the expense of U.S. firms. To assuage these growing concerns, the, US Department of DOC ("DOC") published a final rule ("Final Rule") on February 4, 2020, which allows the DOC to consider whether a benefit is conferred to foreign producers as a result of currency undervaluation in terms of exchange of US dollars for the currency of country under review.

Whether currency undervaluation satisfy the requirements of a countervailable subsidy?

As per the Final Rule of the DOC, currency undervaluation satisfies the requirements of a countervailable subsidy, in terms of the following key elements:

1. *Financial Contribution: Under the Final Rule, DOC has defined financial contribution as the receipt of domestic currency from an authority in exchange of U.S. dollars. Such an exchange would be treated as "direct transfer of funds".*
2. *Undervaluation: Currency undervaluation is a perquisite to an affirmative benefit determination, and, to assess whether there is undervaluation. The Final Rule states that DOC "normally will" examine the gap between the subject country's real effective exchange rate (REER) and an equilibrium exchange rate.*

3. *Government Action on the Exchange Rate: DOC indicated that an affirmative finding of currency undervaluation will be made only if there has been a government action. The Final Rule specifies that such government action will not normally include monetary and related credit policy of an independent central bank or monetary authority.*
4. *Specificity: Under the Final Rule, DOC expanded the definition of specificity to include companies engaged in international trade as a single group for specificity determination. As per the Final Rule, DOC "normally will consider enterprise that buy or sell goods internationally to comprise such a group".*

***Benefit Calculation**:*

*The Final Rule has also laid down the methodology for calculation of benefit. In this regard, it is important to note that "**X percent undervaluation**" will not lead to "**X percent duty**". DOC has indicated that calculation of benefit under the Final Rule will be "firm-specific" and based on exporter's questionnaire response. Further, DOC will determine the existence of a benefit after examining the difference between (a) the amount of domestic currency that the foreign company at issue received in exchange of US dollars and (b) the amount of currency that the company would have received based on exchange rate consistent with the equilibrium exchange rate.*

Potential Impact:

The Final Rule will apply to all segments of CVD proceedings initiated on or after April 6, 2020. These modifications represent a significant departure from DOC's long held position that undervaluation of currency is not a countervailable subsidy. Given the significant change in Commerce's Final Rule, the initial proceedings will be important in terms of clarifying and developing the jurisprudence regarding the treatment of currency undervaluation as a countervailable subsidy.

Historically, China has been a target of US currency/CVD proposals, which may be the reason why several policy experts as well as retail firms and the China Chamber of International Commerce opposed the change. Concerns have been raised by such parties that there is no precise way to measure exchange rate undervaluation, whether CVD is the most effective tool for addressing currency undervaluation and whether the rule change is consistent with WTO agreements. It is highly likely that Final Rule will face legal challenge before the US Court of International Trade or the WTO's Dispute Settlement Body.

The same may also be challenged by major trading partners of the US, such as Indonesia, India, Vietnam, Thailand, etc due to the potential impact on their trade. However, the extent to which the Final Rule would be challenged will depend upon on the countries targeted by future currency undervaluation investigations.

India designated as a developed country by the United States

Earlier the US Trade Representative ("USTR") considered a country having 2 percent or more share of the world trade as developed. The threshold has now been changed to 0.5 percent. Thus, India has been classified as developed country. Other countries such as Brazil, Malaysia, Thailand and Vietnam have also been classified as developed countries.

WTO Appellate Body issues report in the case brought by Ukraine regarding Russian Federation

Ukraine challenged Russia's application of its conformity assessment procedures for railway products to suppliers from Ukraine of roiling stock, railroad switches and other railroad equipment. Russia suspended certificates of conformity issued to suppliers of Ukrainian railway products. The Panel found that Ukraine did not establish that (a) Russia applied its assessment under conditions less favorable than those granted to Russian and European suppliers, (b) Russia applied its conformity assessment procedure more strictly than necessary and (c) Russia certification body did not transmit precise results. Further, the Panel noted that the situation in Ukraine was not comparable to other exporting countries due to security situation. However, the Appellate Body has overturned the findings of the Panel and recommended Russia to bring its measure in conformity with TBT Agreement and the GATT 1994.

Trade Remedies Authority constituted by United Kingdoms

The UK government has passed a legislation to set up the Trade Remedies Authority, which is a new public body responsible for trade defence in the UK after Brexit. The Trade Remedies (Amendment) (EU Exit) Regulations, SI 2020/99, provides for the Trade Remedies Authority (TRA) to conduct reviews and investigations of anti-dumping, countervailing or safeguard measures following international dispute decisions. They shall also make amendments to reflect the appealable decisions derived from these new reviews and investigations. However, the UK has requested to be treated as a member of EU during the transition period and hence currently not applying its own policy. In the meantime, the authority is in progress to undertake investigations into unfair trade practices.

Trade Remedial Actions in India

Initiation of investigations

- *Anti-dumping investigation into imports of Toluene Di-Isocyanate originating from European Union, Saudi Arabia, Chinese Taipei and United Arab Emirates (31 Jan)*
- *Mid-Term Review to review the product scope of definitive anti-dumping duty imposed on imports of Nylon Filament Yarn from European Union and Vietnam (31 Jan)*
- *Sunset Review investigation concerning imports of Fluoro-elastomers (FKM) from China PR (07 Feb)*
- *Anti-dumping investigation into imports of Self-Adhesive Polyvinyl Chloride Film originating from China PR (07 Feb)*
- *Sunset Review investigation concerning imports of Caustic Soda from China PR and Korea RP(07 Feb)*
- *Sunset Review investigation concerning imports of Acrylonitrile Butadiene Rubber from Korea RP (07 Feb)*
- *Anti-dumping investigation into imports of Black Toner in powder form from China PR, Malaysia and Taiwan (10 Feb)*
- *Sunset Review investigation concerning imports of Float Glass from China PR (10 Feb)*
- *Mid-Term Review to review the product scope of definitive anti-dumping duty imposed on imports of Float Glass from China PR (10 Feb)*
- *Anti-dumping investigation into imports of Phenol from Thailand and USA (25 Feb)*
- *Sunset Review investigation concerning imports of Plain Medium Density Fibre Board from China PR, Malaysia, Thailand and Sri Lanka*

Duties recommended

- *Final findings issued recommending imposition of anti-dumping duty on imports of Aluminium and Zinc coated flat products from China PR, Vietnam and Korea RP. (19 Feb)*
- *Final findings issued recommending imposition of anti-dumping duty on imports of Chlorinated Polyvinyl Chloride (CPVC) Resin from China PR and Korea RP. (19 Feb)*
- *Final findings issued recommending continuation of anti-dumping duty in sunset review investigation on imports of Sheet Glass from China PR. (21 Feb)*
- *Final Findings issued recommending imposition of bilateral safeguard duty on imports of Refined Bleached Deodorised Palm Oil" and "Refined Bleached Deodorised Palmolein" for a period of 180 days from the date of imposition of the provisional duty vide Notification No. 29/2019- Customs dated 04th September 2019*

Customs Notifications

- *Revocation of anti-dumping duty on imports of Purified Terephthalic Acid from China PR, Iran, Indonesia, Malaysia, Taiwan, Korea RP and Thailand. (02 Feb)*
- *Extension of anti-dumping duty on imports of Acetone from Korea RP, Taiwan and Saudi Arabia till 15th April 2020. (10 Feb)*

Ongoing anti-dumping investigations	Ongoing anti-subsidy investigations	Ongoing safeguard investigations
48	**5**	**5**

Investigations initiated	Findings issued
10	**4**

Trade Remedial Actions against India

Canada

Canadian International Trade Tribunal ("CITT") issues notice of initiation of Expiry Review Investigation

On 25th February, CITT initiated an expiry review of its finding made on April 2, 2015, concerning the dumping of certain oil country tubular goods originating or exported from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei), India, Indonesia, the Philippines, South Korea, Thailand, Turkey, Ukraine and Vietnam.

As a result, CBSA also has initiated an expiry review investigation. The CBSA is expected will make a determination no later than July 23, 2020 and will issue a Statement of Reasons by August 7, 2020.

Other Trade Remedial Actions

Argentina

- *Initiation of Anti-Dumping investigation on imports of certain weeding machines and lawnmowers originating or exported from China PR. (03 Feb)*

Canada

- *Initiation of expiry review concerning the dumping and subsidizing of certain oil country tubular goods originating or exported from China PR. (06 Feb)*

Japan

- *Raises second WTO dispute complaint against Korea RP for alleged subsidies provided by Korean Government to its shipbuilding industry affecting trade in commercial vessels. (10 Feb)*

European Union

- *Notice for the impending expiry of certain anti-dumping measures against imports of wire rod, originating or exported from China PR , due for expiry on 16th October 2020. (03 Feb)*
- *Notice for the impending expiry of certain anti-dumping measures against imports of tube and pipe fittings of iron or steel, originating or exported from China PR , due for expiry on 29th October 2020. (05 Feb)*
- *Notice for the impending expiry of certain anti-dumping measures against imports of certain grain-oriented flat-rolled products of silicon-electrical steel, originating or exported from China PR, Japan, Korea RP, Russia and USA , due for expiry on 31st October 2020. (06 Feb)*
- *Notice for the impending expiry of certain anti-dumping measures against imports of acesulfame potassium, originating or exported from the China PR, due for expiry on 1st November 2020. (11 Feb)*
- *Initiation of Anti-dumping investigation on imports of aluminum extrusions originating or exported from China PR. (15 Feb)*
- *Initiation of investigation concerning possible circumvention of anti-dumping measures on imports of monosodium glutamate originating in the China PR. (20 Feb)*

Ukraine

- *Initiation of safeguard investigation concerning imports of caustic soda. (11 Feb)*
- *Imposition of anti-dumping measures on imports of certain cables and ropes originating in the Russian Federation. (25 Feb)*
- *Initiation of safeguard investigation into imports of polymeric materials. (25 Feb)*

United States of America

- *Initiation of anti-dumping and countervailing duty investigations of corrosion inhibitors originating from China PR. (05 Feb)*

Preferential Trade Agreements (PTA)

India and Chile have started negotiations on further expansion of PTA signed in 2006. Earlier in 2016 the two countries had expanded scope of India-Chile PTA.

Foreign Trade Policy (FTP)

DGFT issued a circular indicating relief in Export Obligation in terms of Para 5.19 of Handbook of Procedures. The relief is in respect of export obligation in those sectors where exports have declined by 5%.

Notice of intention to make BIS mandatory

- *Sodium Tripolyphosphate*
- *Foods of Animal Origin and Food Additives*
- *Safety Glass*
- *Toys*
- *Barium Carbonate*
- *Plain Copier Paper*
- *Sodium Formaldehyde Sulphoxylate*
- *Phosphorus Trichloride*
- *Potassium Carbonate Anhydrous*
- *Pyridine*
- *Sodium Sulphide*
- *Gamma Picoline*
- *Hydrogen Peroxide*
- *Morpholine*
- *Phenol*
- *Phosphorus Oxychloride*
- *Phosphorus Pentachloride*
- *Acetone*
- *Beta Picoline*
- *Ethylene Glycol*
- *Melamine*
- *N Butyl Acrylate*
- *Terepthalic Acid*
- *Toulene*
- *Ether*
- *Aniline,*
- *Acetic Acid and*
- *Methanol*

Mandatory BIS notified

- *IS 15392 for 'Aluminium and Aluminium Alloy Bare Foil for Food Packaging' from 17th August, 2020.*

Non-Tariff BIS Notifications In India	Non-Tariff WTO Notifications by Others
25	**276**

M/s Jindal Poly Film Limited versus Designated Authority, DGAD & Allied Duties & Anr.

Final Order No. 50231/2020

In the above case relating to anti-dumping investigation into imports of Non-Woven Fabric, originating in or exported from Malaysia, Indonesia, Thailand, Saudi Arabia and China PR, the Designated Authority issued a disclosure statement, wherein the facts of dumping, injury and causal link were established. However, in the final findings issued, the Authority noted that the dumping margin was below de minimis for most exporters, and there was no causal link between the dumping and injury. Accordingly, the Designated Authority terminated the investigation, without recommending duties.

The findings of the Authority were challenged by the domestic industry. The key issue before the Hon'ble Tribunal was whether the Designated Authority can give final findings contrary to the essential facts stated in the disclosure statement without informing the interested parties.

The Tribunal examined the scope and object of disclosure statement and opined that the purpose of disclosure of essential facts, is to provide parties, the necessary information so as to enable them to comment on the completeness and correctness of the facts being considered by the Authority. It has been stated that essential facts are not merely a replica of information received from parties, rather are an analysis by the Authority. Thus, the final findings must be based on an analysis given in the disclosure statement.

The Tribunal noted that the conclusions arrived at by the Designated Authority in the final findings were not only at variance with the disclosure statement but were also contrary to what was stated in the disclosure statement. The material and facts that were relied upon by the Authority in its conclusions did not form part of the disclosure statement. The Tribunal held that, if decision is not in line with the essential facts under consideration as were disclosed to all the parties, then it is incumbent upon the Authority to state reasons for such deviation. Any additional data/information/submission or methodology used by the Authority in its findings must be made known to the parties prior to taking a final decision.

About Us

TPM was founded in 1999 at a time when the practice of trade remedies in India was in its infancy and there were only a handful of firms in the field. While other firms added these services to their existing portfolios, TPM dealt exclusively in cases in the domain of trade remedies.

TPM began its journey with a staff of merely 2 professionals. Today, it has a team of more than 40 professionals including Cost Accountants, Chartered Accountants, Company Secretaries, Lawyers, Engineers and MBAs.

From the beginning, TPM was focused on providing consultancy in the field of trade remedies. TPM helps domestic producers suffering due to cheap and unfair imports into India to avail the necessary protection under the umbrella of the WTO Agreements. TPM has also assisted the domestic producers in other countries to avail similar measures in their respective countries. Besides assisting domestic producers in India and other countries, TPM also assists exporters and importers facing trade remedial investigations in India or other countries. TPM has assisted Indian exporters facing investigations in a number of jurisdictions such as Argentina, Brazil, Canada, Egypt, European Union, GCC, Indonesia, Korea RP, Turkey and USA.

TPM has an enviable experience in the field, of more than 700 cases. Its unique experience in the field sets it apart from other firms. While the firm is primarily dedicated to trade remedies, it also provides services in the field of trade policy, non-tariff barriers, competition law, trade compliance, indirect taxation, trade monitoring and analysis. It also represents industries before the Government in matters involving customs policy.

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