Issue 5 of 2020 May

ADHYATAN

TPM Newsletter

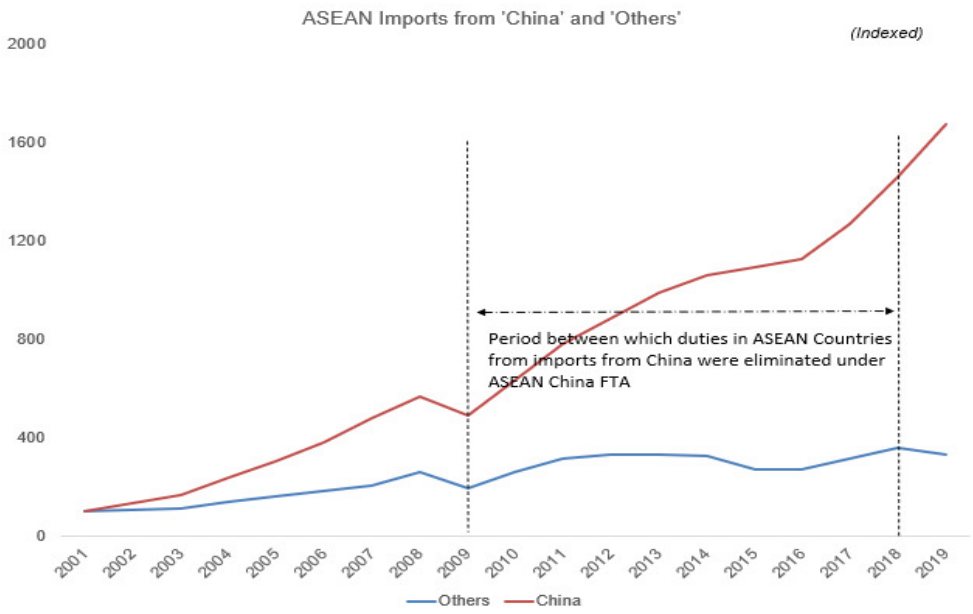
As the world's largest export-oriented economy, the fastest-growing consumer market and the largest trading nation, China has always played a prominent role in international trade. Keeping pace with the increased globalization, China has been taking steps to increase its participation in trade organizations and to sign treaties and free trade agreements / regional trade agreements. One such regional trade agreement signed by China PR was the ASEAN–China Free Trade Area (ACFTA), signed in November 2002.

The Agreement creates a free-trade area among the ten member states of the Association of South-East Asian Nations (ASEAN) and the People's Republic of China. Pursuant to the ACFTA, China and ASEAN signed the 'Agreement on Trade in Goods' of the China-ASEAN FTA, the 'Agreement on Trade in Services' and the 'Agreement on Investment' in July 2005, January 2007 and August 2009, respectively.

The objective of the ACFTA was to enhance the economic and trade relations between China and the ASEAN member nations. Further, it was expected to help in the development of the ASEAN member nations, through greater trade liberalization, deregulation, lowering the cost of doing business and influx of capital from China. The ACFTA has also accelerated the growth of direct investments by China and commercial cooperation between China and ASEAN.

However, the ACFTA has had an unexpected side effect. Till date, most of the other WTO members consider China as a Non-Market Economy (NME) in anti-dumping investigations. This implies that the costs and prices, including the costs of raw materials and energy in China, are considered to be distorted as a result of government intervention and not governed by free market-forces. As a result, China has seen extremely high anti-dumping duties being levied against its exports. This has adversely impacted the exports from China. Presumably, this may have been one of the reasons that China has consciously pushed for increased trade and economic integration with ASEAN region.

It would be seen that post relaxation of customs duty under ACFTA, the imports of goods from China into ASEAN have increased steeply, when compared to imports from other sources. A major share of these imports is meant for the purpose of production of export goods, and not for domestic consumption.



With the increase in imports from China, it would be seen that the exports from ASEAN to the world have increased sharply.

These trends show that the producers in China have increased exports of intermediary products to ASEAN, for processing into the finished product for export to other countries. Reports suggest that anti-dumping duties imposed against Chinese exports may have been one of the reasons which prompted Chinese companies to relocate their manufacturing plants to ASEAN member nations. There are a number of reports which suggest that Chinese investments in ASEAN have been encouraged through subsidies provided by the Government of China to expand in overseas markets. The movement of raw materials from China to ASEAN member nations has increased for conversion into finished goods. In some cases, the value addition involved is nominal.

There have also been allegations that finished goods from China are exported to ASEAN, for the purpose of further trading. It has been alleged that these finished goods are re-packaged in the territory of ASEAN member nations and exported to the rest of the world by mis-declaring the country of origin as one of the ASEAN member nations, instead of China. There have been apprehensions of such mis-declaration in many sectors, ranging from agriculture, materials used in FMCG industry to core sectors like Steel & Aluminium.

The Rules of Origin under the India-ASEAN Free Trade Agreement provide that the country of origin shall be considered as the FTA partner, if certain minimum value addition is being carried out within the ASEAN region. However, in some cases, it has been alleged that the Rules of Origin have not been followed, and the exporters have been able to obtain Certificates of Origin, in contravention of the value addition requirements.

Another issue arising as a result of increased export of intermediary goods from China to ASEAN is the pass-through of subsidies in raw materials as well as finished goods. Pass through of subsidies implies a situation wherein a downstream producer obtains subsidized inputs from an upstream producer. In such cases, the benefits of subsidies availed by the upstream producer flow down to the downstream producer. Normally, such pass-through subsidies are covered within the scope of anti-subsidy investigations and subjected to countervailing / anti-subsidy duty.

However, a problem arises in case of cross-border pass through subsidies. A cross-national pass through of subsidies occurs where a downstream producer in a country obtains subsidized inputs from an upstream producer from another country. In the context of the present discussion, it refers to a situation where the primary raw material is subsidized by the Government of China and the same subsidized raw material is imported by the producer/exporter in the ASEAN member nations. However, these subsidies cannot be covered within the scope of an anti-subsidy investigation against the ASEAN member nation. Under the Agreement on Subsidies and Countervailing Measures, there must be a financial contribution by the Government that confers a benefit to a recipient. Here, the Agreement refers to the Government of the country exporting the product under consideration only. Thus, any subsidies provided by the Government of China in respect of the inputs exported by China to ASEAN cannot be covered within the scope of investigation into export of finished goods

from ASEAN. Thus, the countervailing duties levied do not adequately address trade distortion.

Lastly, the export of intermediary products from China to ASEAN also prevents adequate anti-dumping duties from being levied, to offset the extent of price distortion. As mentioned above, China is considered as a Non-Market Economy, due to which its costs and prices are not considered for determination of the dumping margin. However, the members of ASEAN are considered as market economies, which means that their costs are to be considered in the determination of dumping margin, including those related to procurement of inputs from China or otherwise. While there are certain exemptions to this principle, it largely implies that the anti-dumping duties cannot adequately counteract any Government influence on costs of inputs imported from China.

It is thus clear that the ACFTA has adversely impacted the interests of the Indian producers as well as global trade. While on one hand, there are allegations of mis-declaration of country of origin; on the other hand, the anti-dumping and anti-subsidy investigations against imports from ASEAN member nations are unable to adequately remedy the unfair pricing. Therefore, there is a need for increased discussions to examine the issue in detail, to lift the Chinese veil and look behind with particular focus on establishing general Rules of Origin, ensuring stricter compliance, capturing of cross-national subsidies and the effect of price distortion in respect of inputs imported from China into ASEAN.

Defying the defence: Increase in import duties by USA

Prafful Dawani, Associate

In January this year, the United States of America (USA) raised the import duties leviable on steel and aluminium derivatives, which came in addition to the hike in duties back in March, 2018. India had then raised the issue to the World Trade Organization's (WTO) Safeguard Committee, to which USA had responded that the taxes imposed were not safeguard measures. As per USA, the increase in duty is pursuant to XXI of GATT, for reasons of national security.

India has, however, again, raised the issue at the WTO since it considers this measure of the US to be a safeguard measure within a provision of General Agreement on Tariffs and Trade 1994, and the Agreement on Safeguards. The primary contention raised by India is that the increase in tariffs by 25% on steel derivatives and by 10% on aluminium derivatives, is violative of the provisions of the Agreement of Safeguards.

The tug of war in the classification of the measure between an increase in import duties for national interest, and a safeguard measure is intriguing. Article II, first paragraph, of the GATT provides that parties shall adhere to the Schedule of Concessions which encompasses the structure of maximum import duties that can be levied on other members on MFN (Most Favoured Nations) basis and non-MFN basis. However, the GATT provides certain exceptions, wherein a member may be allowed to detract from obligations under the GATT. One such exceptions is that a member may take such action as is necessary for the protection of its essential national interests. The Safeguards Agreement, on the other hand, allows Member nations to impose additional tariffs to prevent or remedy serious injury to the domestic industry of the Member, pursuant to a detailed investigation as per the Agreement.

USA has continued to maintain that the increase in import tariffs was prompted by a need to protect the domestic producers of steel and aluminum products, which supply USA's defense equipment requirements, from foreign competition. Thus, it has claimed that it would be in the long-term interests of USA to secure them. Therefore, the USA maintains that it is entitled to claim exceptions of national security under Article XXI of the GATT, and accordingly, the measures do not fall under the purview of Safeguards Agreement.

The difference between increase in tariff being classified under GATT versus the Agreement of Safeguards is that the security exceptions are only available

under the GATT and not the Agreement of Safeguards. The security exception has been interpreted as a self-judging clause, thereby significantly reducing the burden on the measure imposing Member to prove that the measure has in fact been taken regarding national security. Such disputes carry a presumption of good faith. The Panel, in Russia – Transits, stated the measure should objectively relate to any of the situations mentioned in Article XXI, and one such situation mentioned is supplies for military establishment. If the measure is connected to any of these situations objectively, it would be justified in the security exceptions clause.

Therefore, if the measure is considered as pursuant to Article XXI, the USA has to merely show that steel and aluminium are required as implements of war or as supplies for military establishment, directly or indirectly. According to US, steel and aluminium is important for the defense industry. This connection of the products in the measure to the second situation under Article XXI is sufficient for the measure to pass the good faith analysis, and the inconsistency with GATT provisions would, in conclusion, be justified.

However, if the measure is treated as a safeguard measure, then the USA was required to conduct a detailed investigation, to examine whether there is an increase in imports and consequent injury to the domestic industry of USA. Such an investigation would have also allowed interested parties an opportunity to defend their interests by participating in the investigation and making submissions. Moreover, the USA would also be required to allow India and other exporting members of the product, concessions in lieu of the increase in imports. Thus, the classification of the measure as a safeguards measure would require compliance by USA to the various substantive and procedural requirements of the Agreement.

This issue is currently under consultations between India and US. If the consultations fail, the issue regarding the classification of measures under the Safeguards Agreement, would be decided by the WTO Panel. The result of these consultations, and potential eventual adjudication of the dispute by the Panel would open a pandora's box. If the current circumstances prevail, national security exceptions under the Article XXI would become a road-block in resolution of countless disputes between member states. The world has seen a shift towards countries pushing for protectionism and at such cross-roads, any encroachment by International law agreements in the domain of governments would not be taken with ease.

Updates from DGTR

Initiatives taken to minimize impact of lockdown

While the present lockdown has affected operations in nearly every field, the effect has been somewhat contained in the field of trade remedies because of efforts being made by DGTR in addressing practical difficulties and ensuring continuity of work. The following developments are notable in this regard.

- *While the officers continued to work from home with start of lockdown, the DGTR reopened its office sometime back.*
- *The DGTR has issued Trade Notice 1/2020 dated 10th Apr, 2020, laying down temporary procedures that would be followed for the duration of the lockdown. The trade notice shall be valid till 30th Jun, 2020. The trade notice provides for the following:*
  - *filing of applications, submissions and documents electronically,*
  - *conducting oral hearing and consultations through video conferencing and*
  - *undertaking verifications based on supporting data or information provided electronically*
- *The DGTR is also holding meetings through audio and video conferencing.*
- *While DGTR has not allowed the work to suffer, the stakeholders have expressed difficulties in filing questionnaire responses. This has necessitated several and repeated extensions of time to be granted in view of challenges faced.*

Deadlines for filing sunset review applications relaxed

Vide Trade Notice 2/2020 dated 20th Apr, the deadlines prescribed for filing applications for initiation of sunset reviews have been revised. The following deadlines shall be applicable now.

- *General deadline – 270 days before expiry of duty*
- *In case of difficulties faced – 180 days before expiry of duty*
- *In exceptional situations – 120 days before expiry of duty*

Trade Remedial Actions in India

Initiation of investigations

- *Sunset review investigation into imports of Fully Drawn Yarn from China PR and Thailand (15 Apr)*
- *Anti-circumvention investigation into imports of Polytetrafluoroethylene from Russia imported through Korea RP (16 Apr)*
- *Mid Term Review investigation into imports of Polytetrafluoroethylene from Russia (16 Apr)*
- *Anti-dumping investigation into imports of Copper and Copper Alloy Flat Rolled Products from China PR, Korea RP, Malaysia, Nepal, Sri Lanka and Thailand (20 Apr)*

Duties recommended

- *Provisional anti-dumping duty recommended on imports of 1-Phenyl-3-Methyl-5-Pyrazolone from China PR (13 Apr)*
- *Continuation of anti-dumping duty recommended in sunset review investigation concerning imports of Sodium Citrate from China PR (30 Apr)*

Termination of Investigation

- *Termination of anti-dumping investigation concerning imports of Mono Ethylene Glycol originating in or exported from Saudi Arabia. However, investigation in respect of imports from Kuwait, Oman, UAE and Singapore shall continue. (6 Apr)*
- *Termination of safeguard investigation concerning imports of Phenol into India (13 Apr)*

Customs Notifications

- *Extension of anti-dumping duty on imports of Acetone from Chinese Taipei, Korea RP and Saudi Arabia till 14th Oct 2020 (15 Apr)*

Ongoing anti-dumping investigations **45**
Ongoing anti-subsidy investigations **6**
Ongoing safeguard investigations **4**
Investigations initiated **5**
Findings issued **2**

Trade Remedial Actions against India

United States of America

United States International Trade Commission (USITC) votes to continue investigations concerning Common Alloy Aluminium Sheet (22 Apr)

USITC made affirmative determination that there is reasonable indication that US industry is getting materially injured by reason of imports of common alloy aluminium sheet from Bahrain, Brazil, Croatia, Egypt, Germany, Greece, India, Indonesia, Italy, Korea, Oman, Romania, Serbia, Slovenia, South Africa, Spain, Taiwan and Turkey.

As a result, U.S. Department of Commerce (USDOC) will continue with its anti-dumping (AD) and countervailing duty (CVD) investigations concerning the subject good, with its preliminary CVD determinations due on June 3, 2020 and its AD determinations due on August 17, 2020.

USDOC extends anti-dumping duty originally levied on exports of hydrofluorocarbon (HFC) blends from China, to exports from India, finding that the exports from India are circumventing the duty (06 Apr)

USDOC announced an affirmative preliminary anti-dumping duty (AD) circumvention ruling involving exports of HFC blends (R-404A, R-407A, R-407C, R-410A, R-507A) that are processed in India using both Chinese and Indian components, and subsequently exported to USA. Such exports from India were circumventing the existing anti-dumping duty on imports of HFC blends from China.

Applicable cash deposit rate for HFC blends from India blended with Chinese HFC component will be 216.37 per cent.

Other Trade Remedial Actions

Canada

- *Expiry review determinations notified regarding certain carbon steel fasteners originating in or exported from China PR and the separate customs territory of Taiwan, Penghu, Kinmen and Matsu (26 Mar)*

Egypt

- *Initiation of safeguard investigation into imports of raw aluminium (16 Apr)*

Eurasian Economic Union

- *Initiation of anti-dumping investigation into imports of graphite electrodes from China PR (09 Apr)*

European Union

- *Imposition of provisional anti-dumping duty on imports of certain hot rolled stainless steel sheets and coils originating in Indonesia, China PR and Taiwan (07 Apr)*
- *Anti-dumping duty on imports of ceramic tableware and kitchenware from China PR (27 Apr)*

United States of America

- *USITC finds US industry is materially injured by reason of imports of ultra-high molecular weight polyethylene from Korea (17 Apr)*
- *USITC finds that US industry is not materially injured by reason of imports of sodium sulfate anhydrous from Canada (23 Apr)*
- *Commencement of preliminary phase anti-dumping and countervailing duty investigation against import of Prestressed Concrete Steel Wire Strand from Argentina, Colombia, Egypt, Indonesia, Italy, Malaysia, Netherlands, Saudi Arabia, South Africa, Spain, Taiwan, Tunisia, Turkey, Ukraine and United Arab Emirates (23 Apr)*
- *USITC determines that US Industry is materially injured by reasons of imports of ceramic tile from China which have been determined to be subsidized by USDOC (30 Apr)*

WTO Updates

WTO issues report on trade in COVID-19 medical products (03 Apr)

The product scope includes medical products spread in different Chapters of the Harmonized System (HS) classification. The report focuses solely on the final form of these products and does not extend to the different intermediate products used by global value chain in production.

As per the report, medical products are critical and in severe shortage due to COVID-19 crisis. Medical products account for approximately 5% of total world trade i.e. imports and exports; more than half imports are medicines. Further, the report states that commitments under various WTO agreements have helped slash import tariff on medical products and improve market access. The statistics show that 52% of 134 WTO members impose a tariff of 5% or lower on medical products and four members do not levy any tariffs at all. The report also identified market where tariffs remain as high as 55% on product such as face masks in some countries.

WTO Trade Forecast – World Trade expect to fall amid COVID-19 pandemic (08 Apr)

The key points highlighted in the WTO report were as under:

- *World merchandise trade set to plunge by between 13% and 32% in 2020 due to COVID-19,*
- *Though recovery in trade is expected in 2021, it would be dependent on the duration of the outbreak and effectiveness of policy response,*
- *All regions likely to suffer double digit decline in trade with exports from North America and Asia affected the most,*
- *Trade likely to fall in sectors with complex value chains, particularly electronics and automotive products,*
- *Service trade directly affected by pandemic,*
- *Merchandise trade volume already low by 0.1% in 2019. World merchandise exports in 2019 fell by 3% to US$ 18.89 trillion, and*
- *Value of commercial services exports rose 2% to US$ 6.03 trillion in 2019.*

Free Trade Agreements (FTA)

- *Indian Government allows Retrospective Certificate of Origin under India's Trade Agreement*
- *The European Council has approved a decision to conclude the European Union-Vietnam Free Trade Agreement (EVFTA)*
- *EU and Mexico conclude negotiations for a new trade agreement*

Foreign Trade Policy (FTP)

Export/ Import Policy Changes

- *Export policy for formulations of Paracetamol, Export Policy changed from restricted to free*
- *Export policy for certain APIs falling under Chapter 29 and 30 changed from restricted to free*
- *Export policy applicable to diagnostic kits changed from free to restricted*
- *After prohibiting exports of hydroxychloroquine initially, regulated exports have now been allowed*

Export Schemes/ Benefits

- *The export obligation period available under Advance Authorization, DFIA and EPCG schemes has been extended by 6 months*
- *Requirements for physical submission of application relaxed for availing transport and marketing assistance on agriculture products*
- *Sugar export quota to USA increased by 745 MT for the period Oct'19 to Sep'20*

Non-Tariff BIS Notifications In India	Non-Tariff WTO Notifications by Others
0	**333**

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.

TPM Consultants

Ish Kriti, J-209, Saket, New Delhi – 17

011 – 4989 2200

info@tpm.in

www.tpm.in

TPM Solicitors & Consultants