

INDONESIA – IRON OR STEEL PRODUCTS (VIET NAM) & ITS IMPLICATIONS ON US 232 TARIFFS

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SUBJECT MATTER OF THE DISPUTE

- Subject Matter – The dispute concerned the specific duty imposed by Indonesia on “galvalume”.
- The relevant legal provisions in this dispute are –
 - Article 1 and Article 9.1 of the Agreement on Safeguards (AoS)
 - Article I:1 and XIX:1(a) of the GATT



FACTUAL BACKGROUND

- The dispute concerns the specific duty that Indonesia imposed on imports of galvalume. The duty was imposed following an investigation initiated and conducted under Indonesia's domestic safeguards legislation.
- The duty was imposed for 3 years from 2014 on imports of galvalume from all sources with the exception of 120 countries.
- The imposition of duty was duly notified to the WTO Committee on Safeguards.
- Indonesia had no binding tariff obligation on galvalume in its Schedule of Concessions. The duty imposed was in addition to the existing MFN and preferential duty rates.



ISSUE

- Whether Indonesia's specific duty is a safeguard measure within the meaning of Article 1 of AoS?
- Whether Indonesia's safeguard measure was adopted and applied consistent with its following obligations –
 - Article I and XIX of the GATT
 - Article 2.1, 3.1, 4.1 and 4.2 of the AoS



FINDINGS

1. Whether the specific duty is a safeguard?
 - Article 11 of the DSU requires the Panel to undertake “an objective assessment of the matter”. This requires the “that we must examine this issue for ourselves, rather than simply proceeding on the basis of the parties' concurring positions.”.
 - After stating this the Panel proceeded to examine whether the specific duty constitutes a “safeguard measure” within the meaning of Article 1 of AoS.



FINDINGS

CONTD.

- Article XIX:1(a) of GATT defines the features of a safeguard measure –
- If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.



FINDINGS

CONTD.

- Violation of Article II of GATT
 - Indonesia had no binding tariff obligation on galvalume.
 - According to the Panel, therefore imposition of the duty does not violate Article II of GATT.
- Violation of Article XXIV of GATT
 - Indonesia had bound tariff obligations in its RTAs. According to Indonesia, the specific duty on its RTA partners violates Article XXIV of the GATT.
 - According to the Panel, Article XXIV is a permissive obligation to enter into RTAs. It does not impose a positive obligation to maintain its duties under the RTAs.



FINDINGS

CONTD.

- Violation of Article I of the GATT
 - According to Indonesia, the non-application of the specific duty to 120 countries has violated its MFN obligation. This was done to satisfy the requirements of Article 9.1 of the AoS.
 - According to the Panel, compliance with Article 9.1 does not suspend the obligation in Article I:1 of the GATT. This is because of the 2 reasons –
 1. Article 9.1 provides Special and Differential Treatment by requiring products originating in a developing country to be exempted from the safeguard measure. This is provided such products does not exceed 3% of the total imports and the total imports from such developing countries does not exceed 9%.
 2. Article 9.1 dilutes the protective impact of a safeguard measure in order to provide S&D treatment and therefore cannot result in the suspension of MFN obligations.
 3. By virtue of the General Interpretative Note to Annex 1 of the WTO Agreement, in case of a conflict between GATT and a covered agreement, the latter would prevail. In this case, there is a conflict between Article I and Article 9.1 and the Interpretative Note permits the Member to follow Article 9.1 without violating Article I. Moreover, Article 9.1 is a legal requirement.



CONCLUSION (PANEL)

- According to the Panel, one of the defining features of a safeguard measure is the “suspension, withdrawal, or modification of a GATT obligation or concession that precludes a Member from imposing a measure to the extent necessary to prevent or remedy serious injury, in a situation where all of the conditions for the imposition of a safeguard measure are satisfied”.
- Indonesia’s measure imposing specific duty on galvalume has not met this requirement because –
 - it does suspend, withdraw, or modify the operation of Indonesia’s obligations under Article II of the GATT 1994 for the purpose of Article XIX:1(a);
 - there is no basis to assert that Article XXIV precluded Indonesia from raising tariffs on imports of galvalume and that, for this reason, the specific duty “suspended” “the GATT exception under Article XXIV” for the purpose of Article XIX:1(a);
 - discriminatory application required under Article 9.1 of AoS does not violate MFN obligations; and
 - The specific duty was described as a safeguard measure in the implementing measure and that it was investigated and imposed under the domestic safeguard law does not render it a “safeguard measure” under Article 1 of AoS.



APPELLATE BODY – ISSUES & FINDINGS

- Relevant issues raised in the appeal –
 - Whether the Panel exceeded the scope of its terms of reference or failed to carry out an objective assessment of the matter?
 - Whether the Panel erred in its interpretations and application of Article 1 of the AoS and Article XIX of the GATT?
- On the first issue in the appeal, the AB stated that Article 11 of the DSU requires the Panel to conduct an objective and independent examination. This includes assessing whether the measure in question is a safeguard measure.



FINDINGS

- Regarding the 2nd issue in the appeal, the AB was of the opinion that the Panel has conflated the factors pertaining to legal characterization of the measure and WTO-consistency of the measure.
- Rejecting the Panel's approach, the AB made the following statement on essential features for a valid safeguard measure –
 - *“First, that measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession.*
 - *Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product.”*



FINDINGS

CONTD.

- For determining whether a measure presents such features, it is required to “assess the design, structure and expected operation of the measure as a whole”. And for assessing, the Panel is required to –
 - *“identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure, and, thereby, properly determine the disciplines to which the measure is subject. As part of its determination, a panel should evaluate and give due consideration to all relevant factors, including the manner in which the measure is characterized under the domestic law of the Member concerned, the domestic procedures that led to the adoption of the measure, and any relevant notifications to the WTO Committee on Safeguards. However, no one such factor is, in and of itself, dispositive of the question of whether the measure constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.”*



CONCLUSION

- Findings of the AB –
 - Article 11 of the DSU requires the Panel to undertake a threshold examination of whether measure at issue is a safeguard measure.
 - If certain constituent features are absent, then a measure is not a safeguard measure.
 - Exemption provided to 120 countries has suspended Indonesia's MFN obligation, but was not designed to prevent or remedy serious injury.



OVERVIEW OF THE US 232 TARIFFS

- The Secretary of Commerce initiated an investigation into the effect of imports of steel and aluminum articles on the national security of the United States. The investigation was conducted under Section 232 of Trade Expansion Act.
- Section 232 authorizes the President, through tariffs or other means, to adjust the imports of goods or materials from other countries if it deems the quantity or circumstances surrounding those imports to threaten national security.
- Section 201 is the domestic law governing safeguard investigations and imposition of duty.
- Pursuant to the investigation report, the President imposed 25% and 10% duties on steel and aluminum respectively. These rates were above the bound duties in US' schedule of concessions.
- Australia has been exempted from these tariffs.



US 232 TARIFF WTO DISPUTE

- As of date, the WTO has received 14 request for consultations on US 232 tariffs.
- 9 requests have alleged that the US 232 measure is a safeguard measure and violate the AoS.



EXCERPTS – PRESIDENTIAL PROCLAMATION

- “The Secretary found and advised me of his opinion that steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States. The Secretary found that the present quantities of steel articles imports and the circumstances of global excess capacity for producing steel are “weakening our internal economy,” resulting in the persistent threat of further closures of domestic steel production facilities and the “shrinking [of our] ability to meet national security production requirements in a national emergency.” Because of these risks and the risk that the United States may be unable to “meet [steel] demands for national defense and critical industries in a national emergency,” and taking into account the close relation of the economic welfare of the Nation to our national security, see 19 U.S.C. 1862(d), the Secretary concluded that the present quantities and circumstances of steel articles imports threaten to impair the national security as defined in section 232 of the Trade Expansion Act of 1962, as amended.” (emphasis added)



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