SOUTH ASIA INTERNATIONAL ECONOMIC LAW NETWORK (SAIELN)
SEPTEMBER 4, 2018 (TUESDAY), 4:00 PM – 5.30 PM

CRIT Conference Hall, 8th Floor, NAFED House, Mathura Road, Siddhartha Enclave, New Delhi - 110024

Discussion Session on Indonesia – Safeguards on Certain Iron or Steel Products and its implications on US 232 Tariffs

The first half of this year have been one of the most eventful periods in the history of the global trading system. The United States citing national security has imposed higher than committed tariffs on steel and aluminium. There is a possibility that United States may extend the unilateral action to other products like automobiles. And on the other hand, despite the United States stating the contrary, major WTO Members have treated the unilateral action as a safeguard action and challenged the measure before the WTO. On 15th August, the Appellate Body of the WTO released its report in the Indonesia — Safeguards on Certain Iron or Steel Products ("Indonesia – Safeguards"). The findings in this case has significant implications for the ongoing challenge against Section 232 tariffs.

Summary of the Dispute

At the Panel stage, the complainants alleged that the imposition of the safeguard measure by Indonesia was inconsistent with the WTO Agreement. They also alleged that the said measure violated Indonesia's MFN obligation because it excluded certain countries from the scope of application of the duty. Indonesia, on the other hand, stated that the safeguard is consistent with the WTO Agreement. Regarding the alleged violation of MFN obligation, Indonesia stated that this violation is permitted under Article XIX:1(a) of the GATT and legally required under the S&D Treatment prescribed in Article 9.1 of the Safeguards Agreement.

At the first stage, the Panel stated that it is required to first determine whether the challenged measure is, in fact, a "safeguard measure". According to the Panel, the requirement in Article 11 of the DSU demands "an objective assessment of the matter". This in the opinion of the Panel requires examination of whether the challenged measure is in fact a "safeguard measure".

The Panel then proceeded to examine whether the challenged measure constitutes as a "safeguard measure". Based on an analysis of Article 1 of the Safeguards Agreement and Article XIX:1(a) of the GATT, the Panel opined that for a measure to constitute as safeguard, it is required that measure suspends, withdraws or modifies 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 safeguard is satisfied.

Once the Panel determined the requirements of a safeguard measure, the Panel proceeded to analyse whether the Indonesian safeguard measure met these requirements. According to the Panel, Indonesia's measure did not constitute a safeguard as it did not suspend, withdraw or modify a GATT obligation. This was because the product in question (galvalume) did not have a binding tariff obligation. Therefore, the imposition of safeguard duty did not violate Article II of the GATT. The Panel also rejected the argument that non-imposition of the safeguard on 120 countries amounted to violation of Article II of the GATT.

On appeal, Viet Nam, Indonesia and Chinese Taipei argued that if a measure is taken pursuant to the procedures provided under Article XIX and the Agreement on Safeguards and is notified as a safeguard measure to the Committee on Safeguards such actions provide strong evidentiary support to characterise a measure as a safeguard measure. The Appellate Body rejected these arguments and stated that –

> *In order to determine whether a measure presents such features, a panel is called upon to assess the design, structure, and expected operation of the measure as a whole. In making its independent and objective assessment, a panel must 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.* (emphasis added)

This particular observation of the Appellate Body makes establishing a measure as a "safeguard measure" and also challenging such a measure considerably more difficult for Member states.

Implications for United States' Section 232 Tariffs on Steel and Aluminium

Till date, 13 WTO Members have filed a request for consultations on the imposition of tariffs under Section 232. Majority of consultation requests characterise the tariffs to be a safeguard measure.

The Appellate Body decision in Indonesia - Safeguards deals with some fundamental issues on what constitutes a 'safeguard measure' under Article XIX of the GATT and the Safeguards Agreement. In light of the WTO complaints against United States Section 232 Tariffs, this decision provides an opportunity to discuss the evidence necessary to establish a measure as a "safeguard measure". This discussion session of the South Asia International Economic Law Network (SAIELN) proposes to engage on the legal nuances of this decision and its consequent impact on the unilateral actions of the United States.

Programme

Chair: Prof. James J. Nedumpara, Professor & Head, Centre for Trade and Investment Law

Case Presentation: Mr. Sandeep Thomas Chandy, Research Fellow, Centre for Trade and Investment Law

Discussants:

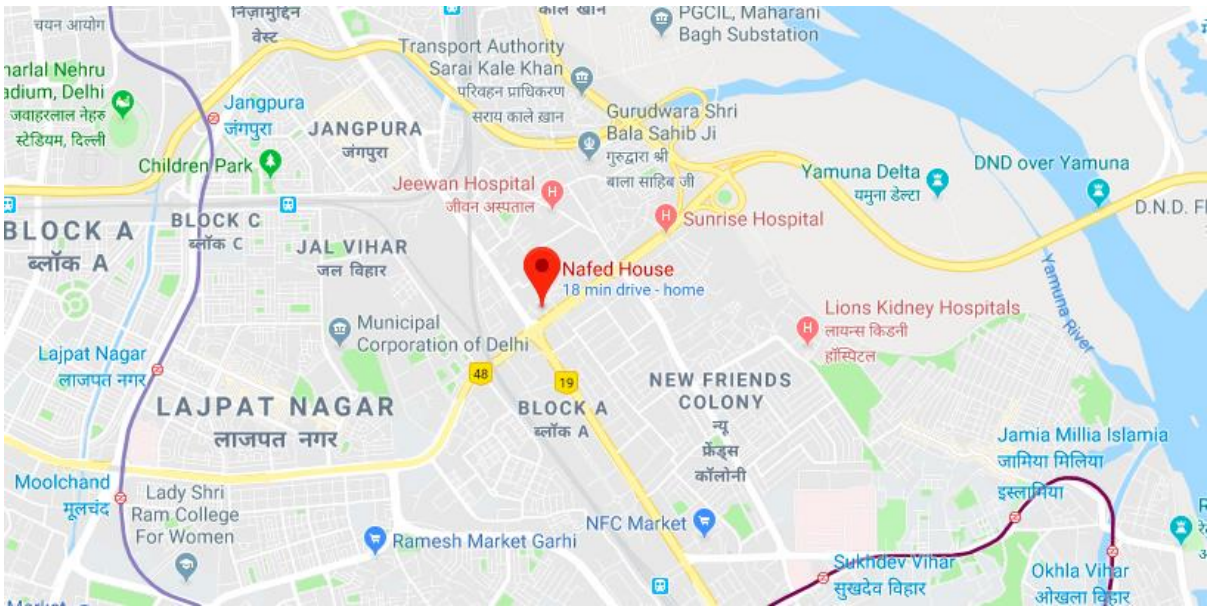
- Prof. Mukesh Bhatnagar, Professor, Centre for WTO Studies
- Mr. Sharad Bhansali, Partner, APJ-SLG Law Offices
- Mr. Vikram Naik, Counsel, VoxLaw
- Mr. Rishab Raturi, Associate Manager, Economic Laws Practice

Floor Discussion

Vote of Thanks: Mr. Prakhar Bhardwaj, Senior Research Fellow, Centre for Trade and Investment Law

Tea and Coffee

Location



About Us

The **Centre for Trade and Investment Law (CTIL)** was established in 2016 by the Ministry of Commerce and Industry, Government of India at the Indian Institute of Foreign Trade. CTIL's primary objective is to provide sound and rigorous analysis of legal issues pertaining to international trade and investment law to the Government of India and other governmental agencies. CTIL will eventually be a part of the Centre for Research in International Trade (CRIT), which is being established by the Ministry of Commerce and Industry. CTIL aims to create a dedicated pool of legal experts who could provide technical inputs for enhancing India's participation in international trade and investment negotiations and dispute settlement.

The **South Asia International Economic Law Network (SAIELN)** is an international non-partisan and non-profit organisation which aims to create a network of academics and practitioners seeking to promote the development of academic research in international economic law in South Asia region. The network also aims to foster, engage and encourage academic understanding of international economic law in South Asian context.