INDIA'S IMPORT LICENSING REGIME– IS IT WTO COMPATIBLE?

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Background

Recently the Indian Government vide Notification No. 12/2015-2020 dated June 12, 2020 (**the Notification**), issued by the Ministry of Commerce and Industry, revised the import policy of certain categories of new pneumatic tyres used in motor cars, busses, lorries and motorcycles. As per this notification the import policy for tyres falling under ITC HS Code 4011 10, 4011 20, 4011 40 and 4011 50 (**Products**) has been amended from 'free' to 'restricted'. This change will be applicable prospectively (from the date of Notification, viz. June 12, 2020)

In addition to the above products, several other products are already among items whose import is 'restricted' in India. These include certain types of animals, chemicals, waste products etc. For a full list please see here. The placing of an item on the 'restricted' list for imports does not imply that imports are prohibited, rather the import of such *goods* can only take place with an authorization or permission granted in accordance with the prescribed procedure.[1]

This note analyses the legal framework regarding import restriction/licensing in India as against WTO principles.

Legal Framework

The import and export policy of India is governed by the Foreign Trade (Development & Regulation) Act, 1992 (**FTDR Act**) as well as the Foreign Trade Policy (**FTP**) issued from time to time by the Central Government.

Section 3(2) of the FTDR Act empowers the Central Government to *inter alia* restrict import of specified goods. Further, Section 11 of the Customs Act, 1962, (**Customs Act**) elaborates on the reasons for which imports may be prohibited/restricted, including for the maintenance of the national security of India, protection of human, animal or plant life or health, etc., including a broad provision for *any other purpose conducive to the interests of the general public.* Goods restricted under Section 3 of the FTDR Act are deemed to fall within the ambit of Section 11 of the Customs Act.[2]

In this regard, an applicant seeking to import an item that is *restricted* is required to make an application as per Form ANF 2B with the Regional Authority (**RA**) of the concerned jurisdiction where they are located.[3] Also, individual applications are required to be filed for each port of registration. The said port of registration cannot be changed subsequently. The application must contain, amongst others, reason and justification for the proposed imports. The information to be provided also includes the quantity and value of the imports sought to be made under the authorization. Import authorizations are ordinarily valid for 18 months.[4]

The WTO and Import Licensing

The placing of items on a restricted list by the Government of India, may be termed, as 'import licensing' within the framework of the World Trade Organization (**WTO)** rules governing multilateral trade.

In particular, import licensing is defined in the Agreement on Import Licensing Procedures (**Import Licensing Agreement**), to which India is a signatory, as "*administrative procedures used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member*."[5] As the present restriction on imports places requirements over and above the ordinary documentation required for import for customs purposes, it may be considered an import licensing measure.

The Import Licensing Agreement identifies primarily two types of licensing procedures (i) automatic i.e. wherein approval is granted automatically for all applications (ii) non-automatic i.e. wherein approval may not be granted in every case. The latter is often considered the more trade restrictive of the two. Under the FTDR Act as well as the FTP, the Indian authorities may decline the request for a license/authorization based on reasons recorded in writing.[6] Therefore, India's import licensing regime is non-automatic as approval may not be granted in all cases.

A non-automatic import licensing procedure, like the case of India, is not *per se* prohibited under the Import Licensing Agreement. However, as per Article 3.2 of the Import Licensing Agreement, such licensing should not "*have trade-*

[1] Para 2.08 of Foreign Trade Policy 2015-2020.
[2] Section 3(3) FTDR Act.
[3] Para. 2.03 of the Foreign Trade Policy, Handbook of Procedures 2015-2020.
[4] Para. 2.16 of the Foreign Trade Policy, Handbook of Procedures 2015-2020.
[5] Article 1.1, Agreement on Import Licensing Procedures.
[6] Section 4 (2), FTDR Act and Section 2.18, Foreign Trade Policy 2015-2020.

restrictive or distortive effects on imports additional to those caused by the imposition of the restriction"[7]. The Import Licensing Agreement also requires that the rules for import licensing procedures be neutral in application and administered in a fair and equitable manner.[8] Furthermore, the WTO Members are also required to ensure that the administrative procedures used to implement import licensing are in conformity with the relevant provisions of General Agreement on Tariffs and Trade 1994 (**GATT**).

In particular, Article XI:1 of the GATT prohibits Members from imposing 'quantitative restrictions' on imports, including those that are made effective through import or export licensing. The WTO dispute settlement panels as well as the Appellate Body have in the past, recognized that discretionary or non-automatic import licensing requirements may constitute a quantitative restriction on trade under Article XI:1, as they may impose a condition that has a 'limiting effect' on imports.[9] Whether the imposition of an import license creates a 'limiting effect' on the quantity of a product being imported into India must therefore be assessed on a case to case basis in determining whether the same can be considered a quantitative restriction.

It may therefore be useful to examine the practical operation of India's import restriction regime. In particular, it would be relevant to examine the basis and circumstances under which the Indian authorities grant or refuse import licenses for items under the 'Restricted' list to determine whether they operate as quantitative restrictions by creating a 'limiting effect' on imports. It is noted that refusal of a license is guided by the Foreign Trade (Regulations) Rules, 1993, which lists the circumstances wherein a license may be refused, for example, if an applicant has provided false or fraudulent documentation or if the applicant has contravened any law relating to customs or foreign exchange, etc.[10] Therefore, whether the refusal of licenses is based on sound reasons backed by appropriate guidance, or whether it is implemented in a discretionary manner to restrict imports, are relevant questions when considering whether a non-automatic licensing regime operates as a quantitative restriction.

Similarly, the basis for which an item is placed on the restricted list is also relevant. Trade restrictive measures may be justified under Article XX of the GATT for certain purposes such as protection of human, animal, plant life or health and conservation of natural resources, subject to further conditions. However, in contrast, the broad provision in the Customs Act as per which imports may be restricted for "*any other purpose conducive to the interests of the general public*" may not be justifiable under the WTO and could lead to questions regarding the WTO consistency of measures taken pursuant to the same.

Furthermore, limiting such licenses to imports through specific registered ports may be another cause for concern. Any trade-restrictive or distortive effects caused by such limitation that are additional to those caused by the imposition of the import license itself, would be problematic from the perspective of Article 3 of the Import Licensing Agreement. The limitation to a few ports may also be independently considered a quantitative restriction if it is found to have a 'limiting effect' on imports.[11] Whether such licenses are granted in a timely manner, may also be relevant in considering the possible 'limiting effect' on imports as there do not appear to be standard time frames set out.

Lastly, from the perspective of transparency, it is pertinent to note that the Import Licensing Agreement obliges WTO Members to notify the introduction or changes in import licensing procedures as well as promptly publish the same for the benefit of all Members. Any interested Member which considers that another Member has not notified the institution of a licensing procedure or changes therein may bring the matter to the attention of such other Member. The Import Licensing Agreement also requires Members to provide other Members which wish to make comments in writing an opportunity to make and discuss these comments upon request. In addition to the Import Licensing Agreement, the WTO's Agreement on Trade Facilitation also places an obligation on Members to allow opportunities and an appropriate time period to traders and other interested parties to comment on the proposed introduction or amendment of laws and regulations of general application related to the movement, release, and clearance of goods.[12] It is noted that India has not been in the practice of regularly notifying its import licensing procedures to the WTO, which may not be in line with its transparency obligations under the WTO.

[7] Article 3(2) Agreement on Import Licensing Procedures.
[8] Article 1(3) Agreement on Import Licensing Procedures.
[9] Panel Report, *India – Quantitative Restrictions* at paras. 5.128-5.131; Panel Report *Japan – Trade in Semi-conductors*, at para.118.
[10] Rule 7, FTDR Rules, 1993.
[11] *See Generally,* Panel Report, Colombia – Ports of Entry.
[12] Article 2.1 Agreement on Trade Facilitation.

Conclusion

As elaborated above, the WTO consistency of an import licensing regime depends on various factors and must be determined on a case by case basis. Further clarity on the practical application of such import licensing may be relevant in determining whether the same is in line with India's WTO obligations. Furthermore, regular notification and publication of such orders at the WTO would be valuable in facilitating dialogue and mitigating the risk of potential challenges from India's trading partners.

We trust you will find this an interesting read. For any queries or comments on this update, please feel free to contact us at insights@elp-in.com.