

India Challenges the United States' Compliance on Cross-Cumulation

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Earlier this month, India requested consultations with the United States at the WTO on the United States' compliance with a WTO Appellate Body (AB) ruling from 2014. That AB ruling held, in part, that the U.S. ITC had inappropriately "cross-cumulated" both dumped and subsidized subject imports in determining whether hot-rolled steel from several countries caused material injury to the domestic hot-rolled steel industry.

The United States had two years to comply with the AB ruling, pursuant to an agreement reached with India. In March 2016, after briefing by interested parties, including Kelley Drye on behalf of domestic hot-rolled steel producer ArcelorMittal USA LLC, the ITC issued a "Section 129 Consistency Determination" (USITC PUB. 4599). The ITC concluded that, under U.S. law, it was required to cumulate subject imports from India – whether subject to an antidumping or countervailing duty investigation – with imports from the other subject countries because the statutory requirements for cumulation had been met (and also continued to find that the domestic industry had been materially injured by cumulated subject imports). In its April 2016 final determination in the investigation on PET Resin from four countries (USITC Pub. 4604), the ITC explained:

We have determined that we will not change our longstanding practice in antidumping and countervailing duty investigations and reviews of cross-cumulating dumped and subsidized imports. Rather, we continue to follow the binding precedential opinion of the U.S. Court of Appeals for the Federal Circuit in *Bingham & Taylor*. In that case, the Federal Circuit held that cross-cumulation was mandatory when the requirements for cumulation were otherwise met.

India's latest request for consultations at the WTO on this issue is based on India's allegation that the United States (and, specifically, the ITC) has failed to comply with the 2014 AB ruling notwithstanding the ITC's 2016 consistency determination. The countries must hold consultations within 14 days of the request, or by approximately June 23rd. If the countries cannot reach a solution, India may request the formation of a dispute panel and then, ultimately, permission to impose retaliatory trade measures against the United States. This will be an important case to watch not only for the underlying cross-cumulation issue, but for potential retaliation by India that could impact other U.S. industries.