The International Trade Law Review

Sixth Edition

Editors
Folkert Graafsma and Joris Cornelis

The LawReviews

© 2020 Law Business Research Ltd

THE INTERNATIONAL TRADE LAW REVIEW

Sixth Edition

Reproduced with permission from Law Business Research Ltd
This article was first published in September 2020
For further information please contact Nick.Barette@thelawreviews.co.uk

Editors
Folkert Graafsma and Joris Cornelis

THE LAWREVIEWS

© 2020 Law Business Research Ltd

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Pawel Frydrych

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Caroline Fewkes and Robbie Kelly

SUBEDITOR
Carole McMurray

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
© 2020 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at August 2020, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above.
Enquiries concerning editorial content should be directed to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-470-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ACTECON

ATSUMI & SAKAI

CROWELL & MORING LLP

DUA ASSOCIATES

INTERNATIONAL LAW FIRM INTEGRITES

JUNHE LLP

LINKLATERS

PINHEIRO NETO ADVOGADOS

PORZIO RÍOS GARCÍA

SKRINE

VAN BAEL & BELLIS

VVGB

WIENER·SOTO·CAPARRÓS

© 2020 Law Business Research Ltd

CONTENTS

PREFACE ... v
Folkert Graafsma and Joris Cornelis

Chapter 1 WORLD TRADE ORGANIZATION ... 1
Philippe De Baere

Chapter 2 A NEW FRAMEWORK FOR UK CUSTOMS AND TRADE ... 15
Charlotte Morgan and Samuel Coldicutt

Chapter 3 ARGENTINA ... 26
Alfredo A Bisero Paratz

Chapter 4 BRAZIL ... 37
Mauro Berenholc and Renê Medrado

Chapter 5 CHILE ... 46
Ignacio García

Chapter 6 CHINA ... 53
David Tang, Yong Zhou, Jin Wang, and Jessica Cai

Chapter 7 EURASIAN ECONOMIC UNION ... 65
Sergey Lakhno

Chapter 8 EUROPEAN COURTS 2019–2020 UPDATE ... 76
Michael-James Clifton and Pekka Pohjankoski

Chapter 9 EUROPEAN UNION ... 84
Nicolaj Kuplewatzky and Nia Bagaturiya

Chapter 10 INDIA ... 115
Shiraz Rajiv Patodia and Mayank Singhal

© 2020 Law Business Research Ltd

Chapter 11 JAPAN 127
Yuko Nihonmatsu and Fumiko Oikawa

Chapter 12 MALAYSIA 138
Lim Koon Huan and Manshan Singh

Chapter 13 TURKEY 149
M Fevzi Toksoy, Ertuğrul Canbolat and Hasan Güden

Chapter 14 UNITED STATES 163
Alexander H Schaefer

Appendix 1 ABOUT THE AUTHORS 177
Appendix 2 CONTRIBUTORS' CONTACT DETAILS 189

© 2020 Law Business Research Ltd

PREFACE

May you live in interesting times! This ancient curse of apocryphal origin could perhaps summarise the recent turmoil and economic disasters our planet has not seen since the Great Depression. Superficially *Jaws in Space*, we endure allegories of the Ancient Plagues. The Appellate Body has vaporised, Brexit did materialise and, to make matters worse, an invisible lethal pathogen has entered the scene. The latter, of course, also has consequences well beyond trade, exceeding the realm of this book.

Staying with trade, not only has the Appellate Body ceased to function, certain WTO Members seem to dismiss the binding nature of its rulings altogether.[1] There are worrying tendencies by some Members to shift from a multilateral to a regional or bilateral trading system – not to speak of unilateral measures. While such systems are usually referred to as 'free trade agreements', they have not always managed to live up to this expectation. Undoubtedly, Members may have some reasons for such policy shifts, but if all start to propagate these types of agreements, we could find ourselves back in the 1920s before too long.

In this light, it is imperative to strengthen the arbiter when the 'soccer (or rugby) game of international trade' may slowly be spinning out of control. When the game is rough, the referee must be tough. Although the Multiparty Interim Appeal Arbitration Agreement (MPIA) (the stopgap Appellate Body) is a good start (see below), some other fixes are also needed. Members *will* need to partially update the rule book, partially rectify a few selected rulings, and look for an improved implementation and enforcement mechanism.

Even the European Union (EU), with 'multilateralism written in its DNA',[2] seems to have caught some early symptoms of unilateralism by formulating responses to some perceived WTO failures outside the multilateral framework. For example, although this is not really new, a few years ago the EU revamped part of its normal value determination by modernising and neutralising its old analogue country methodology.[3] More recently, however, the EU has also started acting against transnational subsidies – something not traditionally understood to be included in the Marrakesh rule book. Indeed, apart from targeting transnational subsidies through its regular Anti-subsidy Regulation,[4] the EU is now also in the process of designing

1 Communication from the United States in *US – Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/12. In the past such decisions were not announced *expressis verbis*.

2 Speech by EU Trade Commissioner Phil Hogan at Dublin business event, 6 December 2019, at https://trade.ec.europa.eu/doclib/press/index.cfm?id=2088.

3 See Regulation 2017/2321 published in OJ L338/1 dated 19 December 2017.

4 See, for example, Commission Implementing Regulation (EU) 2020/776, published in OJ L189/1 dated 15 June 2020.

© 2020 Law Business Research Ltd

a completely new and all-encompassing legal instrument[5] addressing the distortive effect of foreign subsidies in the fields of competition, public procurement, takeovers, investment, etc. If enacted, this powerful and broadly scoped new tool, potentially capable of decapitating any nine-headed water serpent, is something about which we will undoubtedly hear much more in the years to come. Finally, the Chief Trade Enforcement Officer is also new and is designed to increase monitoring and enforcement of environmental and labour obligations under EU trade agreements; while laudable *in se*, it also confirms a shift away from multilateralism.

On the upside, however, some other recent developments illustrate that the EU is simultaneously attempting to uphold the banner of free trade and promote multilateralism. Under an EU initiative, an unprecedented interim appeal arrangement for WTO disputes has become effective (the MPIA), with currently some 20 plus participating Members pledging their commitment to a rules-based trading system. This agreement addresses some efficiency concerns that were raised with respect to the Appellate Body, such as only allowing arbitrators to address issues that are necessary to resolve the dispute, and limiting possibilities to extend the 90-day time limit. This innovative and interesting stopgap agreement also raises important questions for the future of international trade dispute settlement in the post-MPIA era. Importantly, what will be the relevance of MPIA decisions in a future if and when the Appellate Body were to resurrect? How will the dispute settlement system function with fractured jurisprudence? These early questions have recently been addressed in an excellent blog.[6]

Another promising silver lining is the continuing negotiations on fisheries subsidies. Although it has proven extremely difficult to make unanimous decisions with 164 WTO Members, fish are not known to respect national borders and therefore the only possible and effective response to the rapidly depleting global fish stocks is multilateral. These negotiations are a good opportunity, therefore, for the WTO to demonstrate its effectiveness, its capabilities as a rule-making organisation, and its ability to adapt to changing times.

Similarly, the recent announcement of the WTO Director General to step down before the end of his term should be used as an opportunity to usher in some new energy to the organisation. Let us share the hope expressed by the Director General that him stepping down does not mean that 'the ship is . . . going down' but that command will simply be transferred to someone else who will 'hopefully . . . inject precisely that kind of energy and stamina that . . . is badly needed'.[7]

Let us, therefore, not lose all faith in the future of the multilateral trading system. *May we live in hopeful times*. With this in mind, we are deeply grateful for the continued support of our faithful contributors: Charlotte Morgan and Samuel Coldicutt at Linklaters for the Brexit chapter (A New Framework for UK Customs and Trade); Michael-James Clifton at EFTA and Pekka Pohjankoski of the University of Helsinki for the EU Courts chapter; Philippe De Baere at Van Bael & Bellis for the WTO chapter; Alfredo A Bisero Paratz at Wiener•Soto•Caparrós for the Argentina chapter; Mauro Berenholc and Renê Medrado at

5 See the recent 'White paper on levelling the playing field as regards foreign subsidies COM(2020) 253 final', dated 17 June 2020. This latter concept-law is still in its initial 'blueprinting stage' and has not yet formally translated into a new law.

6 See https://ielp.worldtradelaw.net/2020/01/guest-post-update-from-the-void-questions-for-the-new-interim-appeal-agreement-iaaa.html.

7 Bloomberg interview with WTO Director General Roberto Azevedo, at https://www.bloomberg.com/news/articles/2020-05-14/wto-chief-citing-chaos-says-he-s-not-the-right-man-for-the-job.

© 2020 Law Business Research Ltd

Pinheiro Neto Advogados for the Brazil chapter; Ignacio García at Porzio Ríos García for the Chile chapter; David Tang, Yong Zhou, Jin Wang and Jessica Cai at JunHe LLP for the China chapter; Sergey Lakhno at Integrites for the Eurasian Economic Union chapter; Nicolaj Kuplewatzky at the European Court of Justice and Nia Bagaturiya at VVGB for the European Union chapter; Shiraz Rajiv Patodia and Mayank Singhal at Dua Associates for the India chapter; Yuko Nihonmatsu and Fumiko Oikawa at Atsumi & Sakai for the Japan chapter; Lim Koon Huan and Manshan Singh at Skrine for the Malaysia chapter; Dr M Fevzi Toksoy, Ertuğrul Canbolat and Hasan Güden at Actecon for the Turkey chapter; and Alexander H Schaefer at Crowell & Moring LLP for the US chapter.

Finally, as ever, we wish you enjoyable reading during these challenging times.

Folkert Graafsma and Joris Cornelis
VVGB
Brussels
August 2020

© 2020 Law Business Research Ltd

Chapter 10

INDIA

Shiraz Rajiv Patodia and Mayank Singhal[1]

I OVERVIEW OF TRADE REMEDIES

The modern trade system emerged from the ruins of the Second World War and was principally the creation of the United Kingdom and the United States. The Bretton Woods Conference (July 1944) created the International Monetary Fund and the World Bank, the Dumbarton Oaks Conference (August to October 1944) formulated the United Nations organisation and the Havana Conference (November 1947 to March 1948) fashioned the Havana Charter for an International Trade Organization (ITO).[2]

In 1947, the General Agreement on Tariffs and Trade (the GATT 1947) was negotiated as a stopgap measure. Although the GATT 1947 was drafted, the ITO was never created because of inaction on the part of the US Congress. Since inception, the primary objective of GATT 1947 has been to reduce tariffs, enhance international trade and transparency.[3] As tariff rates were lowered over time following the GATT 1947 agreement, member countries realised the need to reform the existing framework.[4] From 1947 to 1994, the GATT contracting parties engaged in eight rounds of negotiations, the last of which was the Uruguay Round (1986–1994). The Uruguay Round agreements were signed in Marrakesh, Morocco on 15 April 1994 and on the same date the World Trade Organization (WTO) was born when the agreement establishing the WTO (the WTO Agreement) was signed.[5]

The WTO Agreement, inter alia, included the GATT 1994 as an integral part, which is binding on all members.[6] The GATT 1994, in turn, encompassed the provisions of the GATT 1947, as well as the provisions of the legal instruments in force under the GATT 1947.[7]

One of the cardinal principles of the GATT 1994 and the WTO is the most-favoured-nation (MFN) treatment.[8] MFN means that each member nation is required to apply tariffs equally to all trading partners. 'National treatment', which is another core principle of the GATT 1994, prohibits discrimination between imported and domestically produced goods

1 Shiraz Rajiv Patodia is a senior partner and Mayank Singhal is a principal associate at Dua Associates. The authors thank Ashish Singh of Dua Associates for his analysis and scholastic contribution.
2 Craig VanGrasstek, The History and Future of the World Trade Organization, Chapter 2.
3 Preamble of GATT 1947.
4 The Tokyo Round negotiations (1973–1979) developed agreements on anti-dumping measures, government procurement, technical barriers to trade and other non-tariff measures.
5 Article 1 of the Marrakesh Agreement establishing the World Trade Organization.
6 Article II.2 of the WTO Agreement.
7 For instance, Article VI of the GATT 1947 provides general guidance on the framework and implementation of trade remedial measures. Consequently, the GATT 1947 member countries codified the Anti-Dumping Agreement and the Agreement on Subsidy and Countervailing Measures.
8 Article I of the GATT 1947.

© 2020 Law Business Research Ltd

with respect to internal taxation or other government regulation.[9] Where, on one hand, the GATT and WTO regimes mandate equal treatment and non-discrimination, on the other, the WTO Agreement provides exceptions by allowing use of trade remedy instruments[10], among others, namely:

a anti-dumping measures targeted against unfair-priced imports;

b subsidy or countervailing measures targeted to offset subsidy given by exporting governments; and

c emergency safeguard measures adopted to combat unforeseen surges in imports.

Pursuant to the GATT 1994, detailed guidelines have been prescribed under the specific agreements that have also been incorporated in the national legislation of the member countries of the WTO. Indian laws were amended with effect from 1 January 1995 by introducing a procedural framework for initiation and conduct of trade remedial investigations, the imposition of measure and judicial review.[11] The Directorate General of Trade Remedies (DGTR) of the Ministry of Commerce and Industry, chaired by the Designated Authority (DA), conducts all trade remedial investigations in India.[12] From 1995 to 2019, India initiated 938 anti-dumping investigations, with the United States the next country in order of number of investigations, with 515 investigations.[13] From July 2018 to June 2019, WTO member countries initiated 179 original investigations, with the Unites States alone initiating 33 original investigations, the highest number among all member countries, followed by India initiating 21 original investigations.[14] On an overall basis, India initiated 55 anti-dumping investigations from July 2018 to December 2019, with anti-dumping duties relating to 255 investigations in force.[15] India also initiated 17 anti-subsidy duty investigations against various countries from July 2018 to June 2019 and countervailing duties were imposed in seven investigations. Currently, India has imposed safeguard measures in one investigation concerning imports of solar cells and modules.[16]

9 Article III of the GATT 1994.

10 Agreement on Implementation of Article VI of the GATT 1994, Agreement on Subsidies and Countervailing Measures and Agreement on Safeguards provides framework of trade remedial measures permissible under the WTO.

11 Customs Tariff Act, 197 read with the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995.

12 Previously, anti-dumping and anti-subsidy investigations were conducted by the Designated Authority of the Directorate General of Anti-Dumping of the Ministry of Commerce and Industry. Safeguard investigations were previously conducted by the Directorate General (Safeguards). Following the merger of the investigating agencies, all trade remedial investigations are being conducted by the DA of the DGTR.

13 https://www.wto.org/english/tratop_e/adp_e/adp_e.htm.

14 Committee on Anti-Dumping Practices, Report (2019) of the Committee on Anti-Dumping Practices (Adopted 20 November 2019), G/ADP/26, dated 21 November 2019. The original investigation refers to fresh investigations and does not include review investigations.

15 Committee on Anti-Dumping Practices, Semi-annual report under Article 16.4 of the Agreement: India (1 July–31 December 2019), G/ADP/N/335/IND, dated 18 May 2020.

16 Notification No. 01/2018-Customs (SG), New Delhi, 30 July 2018.

© 2020 Law Business Research Ltd

II LEGAL FRAMEWORK

i Anti-dumping measures

Under international law, anti-dumping measures are regulated by Article VI of the GATT and the Agreement on Implementation of Article VI of the GATT 1994 (the Anti-Dumping Agreement). Anti-dumping laws allow a country to impose temporary duties on goods exported by a foreign producer when the export price of the goods is less than the normal value of 'like articles' sold in the exporter's domestic market and is causing injury to the domestic producers.

In India, anti-dumping actions are governed by Sections 9A, 9AA, 9B and 9C of the Customs Tariff Act 1975 (the Act) and the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules 1995 (the Anti-dumping Rules) as amended from time to time.

The government agency entrusted with the determination of dumping and injury is the DA and the DGTR.[17] However, the DA only conducts trade remedial investigations and recommends anti-dumping duties.[18] The actual responsibility for imposition and collection of duties lies with the Ministry of Finance.[19]

India's domestic law envisages that where any article is exported[20] from any country or territory to India at less than its normal value,[21] upon the importation of the article into India, the Indian government, through the Ministry of Finance, may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping[22] in relation to the article.[23]

Since dumping per se is not actionable, there is a further requirement to establish that there exists a causal link between dumped imports and injury caused to the domestic industry.[24] The injury margin is arrived at by calculating the difference between the non-injurious price[25] and the landed cost of the imported product.[26] India follows the WTO's lesser duty rule;[27] that is, the Indian government imposes anti-dumping duty to the extent of the margin of dumping or margin of injury, whichever is lower.[28] The Indian government (through the

17 Rule 3 of the Anti-dumping Rules.

18 Rule 17 of the Anti-dumping Rules.

19 Rule 18 of CVD Rules.

20 The Act defines the export price as the price of an article exported from the exporting country to India. In certain circumstances, when this price is considered unreliable, the export price of the article may be determined on another reasonable basis; refer to Explanation (b) to Section 9A(1) of the Act.

21 The normal value is the comparable price at which the goods under investigation are sold, in the ordinary course of trade, in the domestic market of the exporting country; refer to Explanation (c) to Section 9A(1) of the Act.

22 'Margin of dumping' is defined in Explanation (a) to Section 9A(1) of the Act: margin of dumping, in relation to an article, means the difference between its export price and its normal value.

23 Section 9A of the Act. The principles for the determination of the normal value, export price and margin of dumping are set out in Annexure I of the Anti-dumping Rules.

24 Rule 11(2) of the Anti-dumping Rules.

25 Also known as the fair selling notional price.

26 Annexure II of the Anti-dumping Rules sets out the principles for the determination of injury and Annexure III sets out those for the determination of the non-injurious price.

27 Article 9.1 of the Anti-Dumping Agreement.

28 Rule 4(d)(i) of the Anti-dumping Rules.

© 2020 Law Business Research Ltd

Ministry of Finance) has the discretion not to implement the DA's recommendations on levying duty, in which case the findings automatically become infructuous and hold no legal authority.

The DA usually recommends a duty for a maximum period of five years from the date of its imposition unless revoked earlier. However, if the DA, in a review, is of the opinion that the cessation of the duty is likely to lead to continuation or recurrence of dumping and injury, it may from time to time extend the period of imposition for a further five years (known as a 'sunset review').[29] During the five-year period, the DA may carry out a 'changed circumstances' review, which is also called a 'midterm review'.[30]

India also allows 'new-shipper' reviews. In such a review, any exporter who has not exported the product to India during the period of investigation may request a determination of individual dumping duty. However, a new-shipper review is only permissible if the applying exporter is not related to an exporter or producer in the exporting country who is subject to the anti-dumping duties.[31] To prevent evasion of anti-dumping duty, the DA also undertakes anti-circumvention investigations with a view to extending the scope of duty levied in a previous investigation.[32]

The recommendation and imposition of anti-dumping duty is appealable to a specialised tribunal, the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), constituted under Section 129 of the Customs Act 1962.[33]

ii Subsidies and countervailing measures

Article XVI of the GATT 1994 and the Agreement on Subsidies and Countervailing Measures (ASCM) deal with the regulation of subsidies and the use of countervailing measures to offset the injury caused by subsidised imports. Pursuant to the ASCM, a subsidy is deemed to exist if there is a financial contribution by a government or any public body within the territory of a member or there is a form of price support and a benefit is thereby conferred.[34]

In India, countervailing actions are governed by Sections 9, 9B and 9C of the Act. In 1995, the Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidised Articles and for Determination of Injury) Rules 1995 (the Countervailing Rules) were enacted to determine the manner in which the subsidised articles liable for countervailing duty are to be identified, the manner in which subsidy provided is to be determined and the manner in which the duty is to be collected and assessed under the Act.

As with anti-dumping, the DA conducts countervailing investigations and recommends duties pursuant to the provisions given under the Act and the Countervailing Rules.[35] The responsibility for the imposition and collection of duties as recommended by the DA lies with the Ministry of Finance.

29 Section 9A (5) of the Act read with Rule 23 of the Anti-dumping Rules, Notification No. 15/2011 Customs (NT) dated 1 March 2011 and Trade Notice 1/2008 dated 10 March 2008 (Department of Commerce).

30 Section 9A(5) of the Act read with Rule 23 of the Anti-dumping Rules and Notification No. 15/2011 Customs (NT) dated 1 March 2011 and Trade Notification 1/2010 (Department of Commerce).

31 Rule 22 of the Anti-dumping Rules.

32 Rule 27 of the Anti-dumping Rules.

33 Section 9C of the Act.

34 Article 1.1 of the ASCM.

35 Rule 4 of the Countervailing Rules.

© 2020 Law Business Research Ltd

Indian law on countervailing measures is similar to the ASCM and provides that where any country or territory pays or bestows (directly or indirectly) any subsidy[36] upon the manufacture or production therein or the exportation therefrom of articles of any kind, including any subsidy on transportation of the articles, then, upon the importation of such articles into India, whether imported directly from the country of manufacture, production or otherwise, and whether imported in the same condition as when exported from the country of manufacture or production or changed in condition by manufacture, production or otherwise, the central government may, by notification in the Official Gazette, impose a countervailing duty not exceeding the amount of the subsidy.[37]

The DA in determining the subsidy shall ascertain whether it:[38]

a relates to export performance;

b relates to the use of domestic goods over imported goods in the export article; or

c has been conferred on a limited number of persons engaged in manufacturing, producing or exporting the article unless the subsidy is for:
- research activities conducted by or on behalf of persons engaged in the manufacture, production or export;
- assistance to disadvantaged regions within the territory of the exporting country; or
- assistance to promote adaptation of existing facilities to new environmental requirements.

As with anti-dumping practices, the DA is required to assess and accord a finding that the import of a subsidised article into India causes or threatens to cause material injury to the domestic industry. The principles for the determination of injury are set out in Rule 13 read with Annexure I of the Countervailing Rules. Rule 12 read with Annexure IV of the Countervailing Rules provides for the calculation of the amount of countervailable subsidies. However, in a scenario where an article subject to countervailing duty already attracts an anti-dumping duty, a countervailing duty for the amount equivalent to the difference between the quantum of countervailing duty and the anti-dumping duty payable may be imposed by the government.

The countervailing duty ceases to have effect on the expiry of five years from the date of its imposition, unless revoked earlier. However, if the central government, in a review, is of the opinion that the cessation of the duty is likely to lead to continuation or recurrence of subsidisation and injury, it may, from time to time, extend the period of imposition for a further five years.[39] An appeal against the order of determination or DA review regarding the existence, degree and effect of subsidy in relation to the import of any article is made to CESTAT.[40]

36 Refer to Explanation to Section 9 of the Act.

37 Section 9 of the Act.

38 Rule 11 of Countervailing Rules.

39 Section 9(6) of the Act read with Rule 4 of the Countervailing Rules.

40 Section 9C of the Act.

© 2020 Law Business Research Ltd

iii Safeguard measures

Article XIX of the GATT 1994 read with the Agreement on Safeguards (AOS) provides the ground rules for safeguard actions. According to the AOS, a member may apply safeguard measures to a product if the member has determined that it is being imported into its territory in such increased quantities, absolute or relative to domestic production, as to cause serious injury to the domestic industry that produces identical or similar, or directly competitive products.[41] Article 9 of the AOS provides for a special and differential treatment for developing countries.

The national legislation to implement the provisions of the AOS has been enacted under Section 8B of the Act. The Customs Tariff (Identification and Assessment of Safeguard Duty) Rules 1997 (the Safeguard Rules) govern the procedural aspects. Further, Section 8C of the Act and the Customs Tariff (Transitional Products Specific Safeguard Duty) Rules 2002 have been specifically enacted for imposing safeguard duty on any article imported into India from China in such increased quantities and under such conditions as to cause market disruption to the domestic industry. Except in relation to China, the India–Korea Comprehensive Economic Partnership Agreement (Bilateral Safeguard Measures) Rules 2017 also allow safeguard measures in the form of quantitative restrictions to control surges in imports from Korea causing serious injury to domestic producers of like or directly competitive products in India.[42]

Safeguard duty investigations were previously conducted by the Directorate General (Safeguards) of the Department of Revenue of the Ministry of Finance. Post-2018, safeguard investigations are conducted under the aegis of the DA of the DGTR.

Similarly to the provisions of the AOS, Indian law provides that if the central government, after conducting an enquiry, is satisfied that any article is imported into India in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic industry, then it may, by notification in the Official Gazette, impose a safeguard duty on that article.[43] It may be noted that any safeguard duty imposed under the Safeguard Rules shall be on a non-discriminatory basis and applicable to all imports of such an article irrespective of its source.[44]

The safeguard duty ceases to have effect on the expiry of four years from the date of its imposition unless revoked earlier.[45] The DA also conducts a review of the need for continuance of safeguard duty.[46] In no case shall the safeguard duty continue to be imposed beyond a period of 10 years from the date on which it was first imposed.[47] If the duty so recommended is for more than a year, the DA is to recommend progressive liberalisation adequate to facilitate positive adjustment.[48]

41 Article 2 of the AOS.

42 The legal text of the India–Korea Comprehensive Economic Partnership Agreement (Bilateral Safeguard Measures) Rules, 2017 is available at https://commerce.gov.in/writereaddata/trade/INDIA%20KOREA%20CEPA%202009.pdf.

43 Section 8B of the Act.

44 Rule 13 of the Safeguard Rules.

45 Section 8B(4) of the Act.

46 Rule 18 of the Safeguard Rules.

47 Section 8B(4) of the Act read with Rule 16 of the Safeguard Rules.

48 Rule 4 read with Rule 17 of the Safeguard Rules.

© 2020 Law Business Research Ltd

III TREATY FRAMEWORK

Free trade agreements (FTAs) are arrangements between two or more countries or trading blocs that primarily agree to reduce or eliminate customs tariff and non-tariff barriers on substantial trade between them.[49] Formation of FTAs is one of the permitted exceptions to the MFN principle. Like other countries, India too has entered into FTAs and preferential trade agreements (PTAs).[50] India is also involved in other formats of bilateral and pluralistic partnerships such as comprehensive economic cooperation agreements (CECAs), comprehensive economic partnership agreements (CEPAs)[51] and regional trade agreements (RTAs).

India views RTAs and PTAs as 'building blocks' towards achieving the overall objective of trade liberalisation. India's initial foray into RTAs was through the Bangkok Agreement (1975), the Global System of Trade Preferences (GSTP, 1988) and the SAARC PTA (SAPTA, 1993). India has built on these initiatives to engage with countries and regional blocs around the globe.[52]

It is known that FTAs and RTAs through their preferential tariffs accelerate trade among nations. However, to combat surges of imports (including low-price imports) most bilateral treaties preserve the right of members to invoke trade remedy measures. Noted examples are (1) the ASEAN Agreement on Trade in Goods, which permits a member's use of safeguards under the AOS; and (2) the CECA between India and Singapore, which permits the use of subsidy and anti-dumping measures. Some of the bilateral agreements entered into by India also call for strict compliance with the WTO Agreement and incorporate WTO-plus obligations. A memorandum of understanding to this effect was signed between India and Iran in 2018, mandating mutual cooperation in trade remedial measures and sharing of data before initiation of investigations.[53]

India is also actively involved in negotiating a number of agreements,[54] including:

a India–Mauritius Comprehensive Economic Cooperation and Partnership Agreement (CECPA)

b India–EFTA (Iceland, Liechtenstein, Norway and Switzerland) Trade and Economic Partnership Agreement;

c India–New Zealand FTA or CECA;

d India–Israel FTA;

e India–Singapore CECA(third review);

---

49 Free Trade Agreements Frequently Asked Questions (FAQs) available at http://commerce.nic.in/trade/FAQ_on_FTA_9April2014.pdf?id=9&trade=i.

50 In a PTA, two or more partners agree to reductions on an agreed number of tariff lines. The difference between a PTA and an FTA is that in the former there is a positive list of products, on which duty is to be reduced, while in the latter there is a negative list, on which duty is not reduced or eliminated. (Source: Free Trade Agreements Frequently Asked Questions (FAQs) available at https://commerce.gov.in/writereaddata/trade/FAQ_on_FTA_9April2014.pdf?id=9&trade=i&id=9&trade=i.

51 The CECA and the CEPA are agreements that consist of integrated packages on goods, services and investment, along with other areas including intellectual property rights and competition.

52 Paragraph 6.2, Trade Policy Review, Report by India dated 28 April 2015.

53 Press Information Bureau release dated 17 February 2019. Memorandum of understanding available at www.mea.gov.in/Portal/LegalTreatiesDoc/IR18B3496.pdf.

54 Ministry of Commerce and Industry, Press Information Bureau release dated 13 March 2020 available at https://pib.gov.in/PressReleasePage.aspx?PRID=1606300.

© 2020 Law Business Research Ltd

f India – SACU PTA (South Africa, Botswana, Lesotho, Swaziland and Namibia); and
g India–Mercosur PTA expansion (Argentina, Brazil, Paraguay and Uruguay).

In November 2019, the government took a decisive step to withdraw from the Regional Comprehensive Economic Partnership (RCEP). This decision to opt out of RCEP was based on the understanding that the treaty's current structure does not address outstanding issues and key concerns for India.[55]

IV RECENT CHANGES TO THE REGIME

Recently, the DGTR has taken multiple steps to enhance transparency, uniformity and fairness in the investigation process. The government has introduced a Manual of Operating Practices for Trade Remedy Investigations and a Handbook of Operating Procedures of Trade Defence Wing. The Manual of Operating Practices for Trade Remedy Investigations lists step-by-step instructions to be implemented while conducting trade remedial investigations, whereas the Handbook of Operating Procedures of Trade Defence Wing outlines the role of the government in providing institutional support to Indian exporters in investigations conducted by other WTO members against India.

The most significant and recent change in the anti-dumping investigations in India was the introduction of a new set of questionnaires to be filed by the supporting Indian producers participating in the investigation (supporter's questionnaire). The main objective of the supporter's questionnaire is to undertake meaningful examination of injury and to avoid skewed injury analysis based on selective data furnished by a few domestic producers. The supporter's questionnaire overcomes this hurdle and accounts for the information furnished by supporting producers at the time of final determination.[56]

The Indian government is also aiming to reform the legal framework of trade remedial investigation. As a first step, the DA has published a 'stakeholders' consultation', which invites input from the industry with a view to amending the Anti-dumping Rules, the Safeguard Rules and anti-subsidy rules and in the near future.[57]

V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

As stated above, DA determination orders and Ministry of Finance imposition orders are statutorily appealable to CESTAT on the merits. However, determination or imposition orders are also amenable to judicial review by the tribunals, high courts and the Supreme Court of India (India's highest court).

The Supreme Court of India in the 2005 case *Reliance Industries Limited v. Designated Authority and others*[58] came to the conclusion that the nature of proceedings before the DA is quasi-judicial, and that it is well settled that a quasi-judicial decision must be in accordance with the principles of natural justice and hence reasons have to be disclosed by the DA in its decision. In 2011, in the case of *Automotive Tyre Manufacturers Association v. Designated*

55 Reply by the Minister of Commerce and Industry before the House of the People of the Parliament of India, available at http://loksabhaph.nic.in/questions/QResult15.aspx?qref=6738&lsno=17.

56 Trade Notice No. 13/2018 dated 27 September 2018, issued by the DA.

57 Report of Director General published in the DGTR's Annual Report, 2018–19.

58 (2006) 10 SCC 368.

© 2020 Law Business Research Ltd

Authority and others,[59] the Supreme Court declared that the DA is obliged to adhere to the principles of natural justice in the exercise of power conferred on it under the rules. The Supreme Court further declared that when an investigation and public hearing is carried out by one DA and the final order or findings are issued by a successor DA (the new DA), such final findings offend the basic principles of natural justice. Pursuant to this judgment, when a particular DA is transferred or vacates office, the departmental practice that has now emerged is for all cases to be required to be reheard such that the DA who hears the case also renders the final findings.

In 2016, the Supreme Court in the case of *Commissioner of Customs, Bangalore v. M/s GM Exports and Others*[60] reiterated that, as a signatory to the WTO, India must adhere to its international obligations, and held that the domestic legislation must be interpreted in line with the Anti-Dumping Agreement. In 2020, in certain appeals CESTAT adjudicated the DA's findings as not being in compliance with the principles of natural justice. Most recently, in the judgment in *Jindal Poly Films Ltd v. Designated Authority and Others*,[61] CESTAT held that under Rule 17 of the Anti-dumping Rules and Article 6.9 of the Anti-Dumping Agreement non-disclosure of essential facts or issuance of the final findings based on new facts not disclosed to the interested parties leads to a breach of the principles of natural justice.

VI TRADE DISPUTES

Settling international trade disputes between the Member States is the responsibility of the WTO's Dispute Settlement Body (DSB). According to the WTO's dispute settlement system as set out in the Dispute Settlement Understanding, the disputing members countries are first required to undergo a consultation process aimed at resolving disputes amicably, failing which the complainant country may request the DSB to establish a dispute settlement panel. The DSB has the sole authority to establish these panels of experts to consider cases and to accept or reject the panel's findings or the results of an appeal. Either side can appeal a panel's ruling. Sometimes both sides do so. Appeals have to be based on points of law, such as legal interpretation, and cannot re-examine existing evidence or examine new issues.[62]

India has been an active participant before the DSB and has to date raised 24 disputes as a complainant. India has also faced the brunt of 32 cases filed against it by other member nations. In 162 disputes, India acted as a third party.[63] Of the 24 WTO disputes filed by India, three disputes are at an advanced stage.

59 (2011) 2 SCC 258.

60 2015 (324) ELT 209 (SC).

61 CESTAT judgment dated 12 February 2020, in Anti-dumping Appeal No. 53579 of 2018, *Jindal Poly Film Ltd v. Designated Authority*.

62 www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

63 www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm.

© 2020 Law Business Research Ltd

i Trade remedy disputes filed by India

On 9 September 2016, in the WTO dispute *US–Renewable Energy*,[64] India requested consultations with the United States regarding domestic content requirements and other subsidies instituted by the governments of the states of Washington, California, Montana, Massachusetts, Connecticut, Michigan, Delaware and Minnesota, in the energy sector. India claimed that the measures resulted in violation of:

a Articles III:4, XVI:1 and XVI:4 of the GATT 1994;
b Article 2.1 of the TRIMS Agreement; and
c Articles 3.1(b), 3.2, 5(a), 5(c), 6.3(a), 6.3(c) and 25 of the ASCM.

The Report of the Panel was issued on 27 June 2019[65] and found that the measures in dispute were inconsistent with the United States' obligations under Article III:4 of the GATT, as they provided an advantage for the use of domestic products, which amounted to a less favourable treatment for similar or identical imported products.[66] Currently, the Report of the Panel is the subject of an appeal to the WTO Appellate Body at the request of the United States.[67]

In 2018, the US imposed additional import duties of 25 per cent and 10 per cent on certain steel products and aluminium products from all countries except Canada, Mexico, Australia, Argentina, South Korea,[68] Brazil and those in the European Union. Challenging the imposition of additional import duty, India filed the dispute *US – Steel and Aluminium Products (India)* and requested the establishment of a panel by the DSB.[69] Since the selective levy of additional duty distorts international trade, eight other WTO members, namely Canada, China, the EU, Mexico, Norway, Russia, Switzerland and Turkey, have also filed disputes against the United States and almost 30 member countries have reserved their right as third party. In January 2019, the Director General established a panel to adjudicate the dispute.[70] Subsequently, in November 2019, the panel conveyed its inability to issue a panel report within the stipulated time because of the complexity of the issues and panellists' obligations in multiple proceedings.[71]

ii Trade remedy disputes against India

In 2013, the United States filed the case *India – Solar Cells*, wherein both the panel and the Appellate Body found measures introduced by the government of India to be inconsistent with Article III of GATT 1994 and Article 2.1 of the TRIMs Agreement. Although India gave notice of its decision to implement the DSB ruling by December 2017, the United

64 WTO Dispute Settlement DS510: *United States – Certain Measures Relating to the Renewable Energy Sector*.
65 www.wto.org/english/tratop_e/dispu_e/cases_e/ds510_e.htm.
66 *United States – Certain Measures Relating to the Renewable Energy Sector* – Report of the Panel WT/DS510/R dated 27 June 2019.
67 *United States – Certain Measures Relating to the Renewable Energy Sector* – Communication from the Appellate Body WT/DS510/7 dated 14 October 2019.
68 Only imports of steel, and not those of aluminium, from South Korea have been exempted from the measures at issue by the United States.
69 *United States – Certain Measures on Steel and Aluminium Products* – Constitution of the Panel established at the request of India – WT/DS547/9/Rev.2 dated 19 August 2019.
70 www.wto.org/english/news_e/archive_e/dscases_arc_e.htm?dscase=547.
71 *United States – Certain Measures on Steel and Aluminium Products* – Communication from the Panel WT/DS547/10 dated 10 September 2019.

© 2020 Law Business Research Ltd

States claimed that India had failed to comply with the ruling and sought suspension of concessions accorded to India.[72] Subsequently, in 2018, India requested the DSB to establish a panel to resolve the disagreement between India and the United States.[73]

In 2015, the government conducted a safeguard investigation into imports of 'hot rolled flat products' and imposed a safeguard duty of 20 per cent *ad valorem*.[74] Aggrieved by this decision, Japan filed the dispute *India — Iron and Steel Products*[75] with the DSB and submitted that the safeguard measures were imposed in violation of Article 2 of the GATT 1994 and various provisions of the AOS. The DSB panel concluded that India's decision was inconsistent with Articles 3.1 and 4.2(c) of the Agreement on Safeguards, in failing to provide reasoned conclusions on all pertinent issues of fact and law.[76] Subsequently, both India and Japan gave notice of their decisions to appeal this ruling before the Appellate Body.[77] Owing to the limited number of members available, the Appellate Body has not issued its report yet.[78]

Another WTO trade remedy case, *India – Export Related Measures*,[79] is at the appellate stage. In this dispute, the United States challenged numerous programmes applicable to an array of products and in its decision the panel held certain programmes, such as the Merchandise Exports from India Scheme, to be inconsistent with the ASCM.[80] By the end of 2019, the government of India had notified the DSB of its decision to appeal to the Appellate Body.[81] Notwithstanding this appeal, the government is already taking initiatives to modify, amend or terminate the programmes found to be inconsistent with the ASCM.[82]

In 2019, Brazil (DS579), Australia (DS580) and Guatemala (DS581) filed disputes with the WTO challenging domestic support subsidies and export subsidies granted by India to the sugar and sugarcane industry.[83] In these disputes, WTO members claimed various measures to be in violation of the Agreement on Agriculture and the ASCM. The complainants claimed that India has substantially increased domestic support, which adversely impacts the

72 *India – Certain Measures Relating to Solar Cells and Solar Modules* – Recourse to Article 22.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) by the United States – WT/DS456/18 dated 20 December 2017.

73 *India – Certain Measures Relating to Solar Cells and Solar Modules* – Recourse to Article 21.5 of the DSU by India – Request for the establishment of a panel – WT/DS456/20 dated 29 January 2018.

74 Notification No. 1/2016-Customs (SG) issued by the Ministry of Finance, government of India dated 29 March 2016 levying safeguard duty of twenty per cent *ad valorem*.

75 WTO Dispute Settlement DS518: *India – Certain Measures on Imports of Iron and Steel Products*.

76 *India – Certain Measures on Imports of Iron and Steel Products* – Report of the Panel – WT/DS518/R dated 6 November 2018.

77 Notifications of appeals by India and Japan under Article 16.4 and Article 17 of the DSU – WT/DS518/8 and WT/DS518/9 dated 18 December 2018 and 12 January 2019 respectively.

78 *India – Certain Measures on Imports of Iron and Steel Products* – Communication from the Appellate Body – WT/DS518/10 dated 22 February 2019.

79 WTO Dispute Settlement DS541: *India — Export Related Measures*.

80 *India – Export Related Measures* – Report of the Panel – WT/DS541/R dated 31 October 2019.

81 Notification of an appeal by India under Article 16.4 and Article 17 of the DSU – WT/DS541/7 dated 22 November 2019.

82 Ministry of Commerce and Industry, government of India vide Trade Notice No. 03/2020-21 dated 15 April 2020 notifying the 'Introduction of the Remission of Duties and Taxes on Exported Products (RoDTEP) Scheme' to boost exports to global markets.

83 www.wto.org/english/tratop_e/dispu_e/cases_e/ds581_e.htm.

© 2020 Law Business Research Ltd

competitiveness of other exporting WTO members. At present, the dispute is at the panel stage, but the panellists have apprised the DSB that they expect to issue their reports after the second quarter of 2021.[84]

VII OUTLOOK

Recently, global trade has witnessed a sharp deviation from globalisation towards regionalisation. In 2019, the government of India decided to opt out of RCEP, which had been under negotiation for a period of almost eight years. In 2019, WTO members witnessed an increasing delay in adjudication of cases by the DSB. This was due to the expiry of the term of the Appellate Body panellists and a subsequent failure to appoint new members. To overcome this unprecedented situation, in 2020, 20 members of the WTO announced the establishment of a 'multi-party interim appeal arbitration arrangement' as an alternative mechanism for resolution of disputes.[85]

Currently, the world is in crisis because of the covid-19 pandemic declared by the World Health Organization. According to WTO economists, the covid-19 pandemic has led to a trade slump that is likely to exceed the global financial crisis of 2008–2009.[86] During this time, to maintain adequate availability of medical supplies and other essential merchandise, WTO member countries (including India) have introduced a host of emergency export restraint measures.[87] As the global supply chain was affected, the government of India has reviewed its policy framework, putting an emphasis on building up domestic capacity. Considering the current global environment and the non-functioning state of the Appellate Body, individual countries' trade defence measures are expected to surge in the near future, which in turn will require WTO member countries to revisit laws and regulations affecting international trade to tackle this crisis.

84 *India – Measures Concerning Sugar and Sugarcane* – Communication from the Panels – WT/DS579/9 dated 29 April 2020.

85 Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes – JOB/DSB/1/Add.12 dated 30 April 2020.

86 Economists have estimated that world merchandise trade is set to plummet by between 13 and 32 per cent in 2020 because of the covid-19 pandemic; see www.wto.org/english/news_e/pres20_e/pr855_e.htm.

87 A detailed list of trade-related measures introduced during the covid-19 pandemic (as at 14 April 2020) is available at www.wto.org/english/tratop_e/covid19_e/covid_measures_e.pdf.

© 2020 Law Business Research Ltd

Appendix 1

ABOUT THE AUTHORS

SHIRAZ RAJIV PATODIA

Dua Associates

Shiraz Rajiv Patodia is a senior partner at Dua Associates, based at the firm's New Delhi offices. Ms Patodia is a qualified solicitor of the Bombay Incorporated Law Society and an advocate-on-record of the Supreme Court of India. She leads a team of highly qualified and dedicated professionals in international trade law, anti-corruption and dispute resolution practice groups.

Ms Patodia holds a bachelor's degree in commerce from the Sydenham College of Commerce and Economics, University of Bombay, a Bachelor of Laws degree from the Government Law College, Bombay and is a solicitor of the Bombay Incorporated Law Society.

In more than 30 years of professional legal experience, Ms Patodia has served and continues to serve as lead counsel to several leading international corporations in highly contentious litigation pertaining to anti-corruption matters or white-collar crime, intellectual property rights, tortious liability, environmental laws and contract, constitutional and administrative law. She holds the distinction of having created specialised practice groups on international trade, anti-corruption and anti-bribery, and intellectual property at the firm. She regularly represents interested parties in trade remedy investigations conducted by the Indian Ministry of Commerce. She also appears before the Customs, Excise and Service Tax Appellate Tribunal, high courts and the Supreme Court of India.

MAYANK SINGHAL

Dua Associates

Mayank Singhal is a principal associate at Dua Associates, based at the firm's New Delhi offices. Mr Singhal concentrates his practice in international trade and investment transactions, corporate disputes and regulatory investigations. Mr Singhal, holds a bachelor's degree in commerce and an LLM degree with specialisation in corporate law from the National Law University, Jodhpur. He has been actively associated with the practice of international trade law, advising a range of exporters, chambers of associations, importers and user associations in various trade remedy investigations carried out by the Indian Ministry of Commerce, the US Department of Commerce and various WTO member countries.

© 2020 Law Business Research Ltd

DUA ASSOCIATES

202–206 Tolstoy House
15 Tolstoy Marg
New Delhi 110 001
India
Tel: +91 11 4351 1111
Fax: +91 11 2335 7097
shiraz@duaassociates.com
mayanksinghal@duaassociates.com
www.duaassociates.com

© 2020 Law Business Research Ltd

an **LBR** business

ISBN 978-1-83862-470-5

© 2020 Law Business Research Ltd