the International Trade Law Review

Eighth Edition

Editors
Folkert Graafsma and Joris Cornelis

THE LAWREVIEWS

ACKNOWLEDGEMENTS

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

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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

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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 remedy 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.

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 other things, 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 remedy 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 remedy investigations in India.[12] From January 1995 to June 2021, India initiated 1,096 anti-dumping investigations, followed by the United States with 828 investigations.[13] During this period, China was subjected to 1,099 anti-dumping measures, followed by South Korea with 304 measures.[14] Overall, from January 1995 to December 2021, WTO member countries initiated a total of 651 countervailing duty investigations; the majority of these (301) were initiated by the United States, followed by the European Union (92) and Canada (77).[15] During same period, WTO members initiated total of 408 safeguard investigations with the highest number of 46 investigations by India, followed by 38 investigations by Indonesia.[16]

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

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 remedy 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 remedy investigations are being conducted by the DA of the DGTR.

13 https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsByRepMem.pdf.

14 https://www.wto.org/english/tratop_e/adp_e/AD_MeasuresByExp.pdf.

15 https://www.wto.org/english/tratop_e/scm_e/CV_InitiationsByRepMem.pdf.

16 https://www.wto.org/english/tratop_e/safeg_e/SG_InitiationsByRepMember.pdf.

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 remedy 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 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

17 Rule 3 of the Anti-dumping Rules.

18 Rule 17 of the Anti-dumping Rules.

19 Rule 18 of the Countervailing 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.

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.

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

29 Section 9A (5) of the Act read with Rule 23 of the Anti-dumping Rules, Notification No. 15/2011 Customs (N.T.) 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 (N.T.) 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.

36 Refer to Explanation to Section 9 of the Act.

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:

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.[38]

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]

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.

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.

41 Article 2 of the AOS.

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. Various trade agreements including the India–Korea Comprehensive Economic Partnership Agreement (Bilateral Safeguard Measures) Rules 2017[42] and the India–Japan Comprehensive Economic Partnership Agreement (Bilateral Safeguard Measures) Rules 2017[43] 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.

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.[44] 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.[45]

The safeguard duty ceases to have effect on the expiry of four years from the date of its imposition unless revoked earlier.[46] The DA also conducts a review of the need for continuance of safeguard duty.[47] 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.[48] If the duty so recommended is for more than a year, the DA is to recommend progressive liberalisation adequate to facilitate positive adjustment.[49]

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.[50] Formation of FTAs is one of the permitted exceptions to the MFN principle. Like other countries, India too has entered into FTAs and preferential

42 The legal text of the India–Korea Comprehensive Economic Partnership Agreement (Bilateral Safeguard Measures) Rules 2017 is available at https://www.cbic.gov.in/resources//htdocs-cbec/customs/cs-act/notifications/notfns-2017/cs-nt2017/csnt77-2017.pdf

43 Notification No. 7/2017 – Customs (N.T.) dated 24 January 2017, available at https://www.cbic.gov.in/resources//htdocs-cbec/customs/cs-act/notifications/notfns-2017/cs-nt2017/csnt07-2017.pdf.

44 Section 8B of the Act.

45 Rule 13 of the Safeguard Rules.

46 Section 8B(4) of the Act.

47 Rule 18 of the Safeguard Rules.

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

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

50 Free Trade Agreements Frequently Asked Questions (FAQs) available at https://commerce.gov.in/international-trade/faqs-on-ftas/.

trade agreements (PTAs).[51] India is also involved in other formats of bilateral and pluralistic partnerships such as comprehensive economic cooperation agreements (CECAs), comprehensive economic partnership agreements (CEPAs)[52] 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.[53]

It is known that FTAs and RTAs through their preferential tariffs accelerate trade and investment 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 Association of Southeast Asian Nations (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 remedy measures and sharing of data before initiation of investigations.[54] Similarly, the India and Iran CEPA includes a separate chapter on trade remedy measures laying additional obligations concerning anti-dumping, anti-subsidy and bilateral safeguard investigations.[55]

In November 2019, the government took a decisive step to withdraw from the Regional Comprehensive Economic Partnership (RCEP) signed by 15 member countries, namely the 10 ASEAN member states and Australia, China, Japan, New Zealand and South Korea.[56] This decision to opt out of the RCEP was based on the understanding that the treaty's structure did not address outstanding issues and key concerns for India.[57] As at January 2022, most of the member countries ratified RCEP, paving way for world's largest free trade agreement.[58]

Although trade negotiations were marred by the covid-19 pandemic, India and Mauritius signed a comprehensive economic cooperation and partnership agreement

51 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/wp-content/uploads/2020/02/FAQ_on_FTA_9April2014.pdf.

52 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.

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

54 Press Information Bureau release dated 17 February 2019 available at https://pib.gov.in/newsite/PrintRelease.aspx?relid=178405.

55 Chapter 7 of India - Iran CEPA on trade remedy measures is available at https://commerce.gov.in/wp-content/uploads/2022/03/Chapter-7.pdf.

56 Details of RCEP member countries is available at https://rcepsec.org/official-documents/.

57 Reply by the Minister of Commerce and Industry before the House of the People of the Parliament of India, available at https://commerce.gov.in/wp-content/uploads/2020/03/MOC_637098544642957722_LS-20-11-2019-1.pdf.

58 https://rcepsec.org/2022/01/14/rcep-agreement-enters-into-force/.

(CECPA) on 22 February 2021.[59] One of the unique features of the India–Mauritius CECPA is its automatic trigger safeguard mechanism (ATSM), wherein both countries may impose a safeguard duty (once duties are eliminated or reduced) on imports of highly sensitive products after reaching a certain threshold.[60] On 18 February 2022, the India–UAE CEPA was concluded in a record time of 88 days.[61] The India–UAE CEPA aims to achieve bilateral merchandise trade of US$250 billion by 2030.[62] Recently, India and Australia also signed an interim economic cooperation and trade agreement (ECTA), which emphasises trade in goods as well as services.[63] For India, this interim agreement is the first agreement with a major developed economy in more than a decade. Currently, the government is actively negotiating an India–UK FTA, and an interim agreement is expected to be concluded within one year.[64]

IV RECENT CHANGES TO THE REGIME

Over the past few years, the DGTR has taken multiple steps to streamline the information to be filed by interested parties during a trade remedy investigation. Considering genuine difficulties faced by parties and the voluminous information required for an investigation, the DGTR has simplified the application format for Indian industry and the questionnaire format for foreign producers and exporters, importers, user industry and fragmented Indian industries.[65] To promote digitalisation, the DGTR is currently working on overhauling a web portal for filing the application, questionnaire responses and other information.[66] This will enable seamless dissemination of information within the DGTR and ensure ready availability of public version submissions to all interested parties.

Another recent change relates to the amendment of the Anti-dumping Rules in 2021 whereby the timeline for completion of an expiry review investigations has been revised.[67] As per amended Rule 22, the expiry review shall be completed at least three months prior

59 The legal text of the India–Mauritius CECPA is available at: https://commerce.gov.in/wp-content/uploads/2021/08/India-Mauritius-CECPA-Text-for-Upload.pdf.

60 Refer Annexure III of India – Mauritius CECPA.

61 Press Release dated 27 March 2022, available at: https://pib.gov.in/PressReleasePage.aspx?PRID=1810279#:~:text='The%20negotiations%20for%20India%2DUAE,force%20on%2001%20May%202022.

62 Press Release dated 29 March 2022, available at: https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1811109.

63 https://www.mea.gov.in/virtual-meetings-detail.htm?35140.

64 Press Release dated 14 September 2021, available at: https://commerce.gov.in/press-releases/india-uk-aim-for-launching-the-negotiations-on-fta-by-1st-november-2021-two-sides-look-for-interim-agreement-by-march-22-and-later-a-comprehensive-agreement/.

65 On 17 July 2021, DGTR issued four Trade Notices Nos. 6–9 of 2021 simplifying and streamline the filing of information by fragmented industry, Indian importers, user industry and foreign participating producers.

66 Press Release dated 17 May 2022, available at: https://pib.gov.in/PressReleseDetail.aspx?PRID=1826070.

67 Notification No. 10/2021-Customs (N.T.) New Delhi, the 1 February 2021, available at: https://www.cbic.gov.in/resources/htdocs-cbec/customs/cs-act/notifications/notfns-2021/cs-nt2021/csnt10-2021.pdf.

to expiry of anti-dumping duty under review. This amendment was introduced to make the legal framework consistent with the judgment of the Supreme Court titled *Union of India v. Kumho Petrochemicals Company Ltd.*[68]

Regarding circumvention investigations, the central government has now permitted the DGTR to recommend provisional assessment of import during a circumvention of duty investigation.[69] This provisional assessment of imports will empower the DA to extend immediate relief to the domestic industry being adversely impacted due to circumvention of existing duty. More importantly, the central government has recently introduced a detailed framework to tackle absorption of anti-dumping and countervailing duty imposed earlier.[70] As per the Rules, existing duty is absorbed where the export price of the article decreases post imposition of anti-dumping or countervailing duty without any commensurate change in cost of production or export price to countries other than India or the resale price of the article in India imported from the exporting countries.[71] In terms of the timeline, the Indian industry may file an application seeking initiation of anti-absorption normally within two years from the date of imposition of definitive duty. Further, no anti-absorption application shall be entertained with less than a 12-month period remaining for definitive duty to expire.[72]

V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

As stated above, the DA conducts trade remedy investigation, and the Ministry of Finance in its discretion may accept the recommendation imposing definitive duty. The decision of the Ministry of Finance is statutorily appealable to the CESTAT. 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).

From January 2021 to December 2021, the DGTR issued 34 final findings in the original anti-dumping investigations and recommended levy of duty in 32 original investigations. However, the Ministry of Finance only accepted 15 recommendations and levied definitive duties. The recommendations to levy duty were rejected in the remaining 17 final findings. During this period, the DGTR issued 21 anti-dumping expiry review final findings and recommended continued imposition of duty in 19 final findings. The Ministry of Finance, however, only accepted four positive expiry review recommendations and decided not to implement duty recommended by the DGTR in the remaining 15. Similarly, in the countervailing duty investigation, the Ministry of Finance accepted only one recommendation and decided not to accept the recommendation in other two investigations. The sole safeguard investigation concluded by the DGTR from January 2021 to December 2021 also resulted in no levy of duty. As per legal provisions, the Ministry of Finance issues a notification when recommendation to levy duty is accepted.[73] In the event of non-acceptance of a recommendation, the Ministry of Finance normally issues an office memorandum that is an interdepartmental communication addressed to the DGTR.

68 Judgment by the Supreme Court dated 9 June 2017 in Civil Appeal Nos. 8309-8310 of 2017 arising out of SLP (C) Nos. 29269-29269 of 2014.

69 Rule 26(4A) of the Anti-dumping Rules.

70 Notification No. 83/2021-Customs (N.T.) and 84/2021-Customs (N.T.) dated 27 October 2021.

71 Rule 29(2) of the Anti-dumping Rules and Rule 25 (2) of Countervailing Rules.

72 Rule 29(3) of the Anti-dumping Rules and Rule 25 (3) of Countervailing Rules.

73 Rule 18 of the Anti-dumping Rules.

Since the Ministry of Finance did not accept positive recommendations in a majority of findings, numerous Indian producers filed a statutory appeal before the CESTAT impugning the decision not to accept the DGTR recommendation to levy definitive duty. On this critical issue, the CESTAT in its judgment titled *Jubilant Ingrevia Limited v. Union of India & Ors*[74] held that the Office Memorandum issued by the Ministry of Finance not accepting the DGTR recommendation is a non-speaking order and is unsustainable. The CESTAT extended relief to the Indian producer and remitted the matter to the Ministry of Finance for a fresh decision.

In *All India Laminated Fabrics Manufactures Association v. Designated Authority & Ors*,[75] the domestic industry filed an appeal before the CESTAT against decision of the DA recommending withdrawal of anti-dumping duty. The appellant specifically submitted that the DA committed an error in rejecting the market research report submitted by the domestic industry for evaluation of likelihood analysis. In reply, the DA submitted that the market report was not considered since the complete information and credentials of the market research report were not made available by the appellant during the investigation. In line with the appellate body decision in *US – Corrosion-Resistant Steel Sunset Review*,[76] the tribunal rejected the claim of the appellant and held that the DA was justified in not placing reliance on the unauthenticated report. Based on overall evaluation of the economic parameters, the CESTAT upheld the final findings recommending discontinuation of duty.

In one of its cases, the DGTR in an ongoing investigation concerning solar cells and modules rejected as many as 63 questionnaire responses filed by the foreign producers.[77] In this investigation, the DA had not extended the timeline for filing responses despite multiple extension requests and rejected questionnaire responses filed after the stipulated time prescribed by the DGTR. Consequently, numerous foreign producers filed writ petitions before the High Court. The High Court in its judgment titled *Shanghai JA Solar Technology Co Ltd & Ors v. Union of India* granted relief to the foreign exporters and directed the DGTR to accept belated responses filed by the petitioners.[78]

As the world witnessed global supply chain issues during the pandemic, the government took multiple steps to boost trade and the economy. In 2022, the Ministry of Finance suspended trade remedy measures on an array of steel products.[79] The Ministry has also imposed export duty on steel products to boost domestic supply.[80] To promote domestic manufacturing and self-reliance across various sectors, the government also enhanced the scope of product linked incentive (PLI) scheme.[81] This scheme was launched to promote

74 CESTAT judgment dated 27 October 2021 in Anti-Dumping Appeal No. 50461 of 2021.

75 CESTAT judgment dated 28 February 2022 in Anti-Dumping Appeal No. 52173 of 2021.

76 WT/DS244/AB/R dated 15 December 2003.

77 DGTR Clarification dated 16 December 2021 regarding acceptance of questionnaire responses filed beyond the stipulated time for filing of responses in Anti-Dumping Investigation concerning imports of 'Solar Cells Whether or Not Assembled into Modules or Panels'.

78 Judgment dated 19 April 2022 in Writ Petition No. 1501/2022.

79 Refer Finance Act 2022, Notification Nos. 1/2022-Customs (CVD), Notification No. 5/2022-Customs (ADD); Notification No. 6/2022-Customs (ADD). Copy of Finance Act, 2022. Relevant Notifications is available at: https://www.indiabudget.gov.in/.

80 Refer Notification No. 28/2022-Customs dated 21 May 2022, available at: https://www.cbic.gov.in/resources//htdocs-cbec/customs/cs-act/notifications/notfns-2022/cs-tarr2022/cs28-2022.pdf.

81 Production Linked Incentive Scheme (PLI) for Large Scale Electronics Manufacturing, available at: https://dpiit.gov.in/production-linked-incentive-scheme/production-linked-incentive-scheme-pli-white-goods.

manufacturing to promote employment and import substitution. The scheme offers benefits to various sectors, including mobile manufacturing, speciality materials, active pharmaceutical ingredients, medical devices, solar modules, speciality steel, advanced chemistry cell batteries and auto components, among other things.[82]

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.[83]

As at December 2021, WTO members had referred 607 disputes to the DSB. 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 177 disputes, India acted as a third party.[84] Of the 24 WTO disputes filed by India, one dispute is at an advanced stage.[85]

Over the past few years, the WTO and its members have been facing a crisis on account of the non-functioning of the WTO Appellate Body due to non-appointment of the Appellate Body members. Under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, the Appellate Body comprises seven members appointed by the DSB to serve a one-year term, with the possibility of being reappointed for one additional term. Currently, there are no members on the Appellate Body as the term of the last sitting member expired on 30 November 2020.[86] Recently, at a DSB meeting held on 28 March 2022, many WTO members raised concerns about the effectiveness of the dispute resolution mechanism and proposed appointment of WTO Appellate Body members.[87] On this issue, the United States raised systemic concerns with the Appellate Body and proposed fundamental reform of the dispute resolution framework.[88]

82 Press Release dated 7 April 2022, available at https://pib.gov.in/PressReleasePage.aspx?PRID=1710134.

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

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

85 www.wto.org/english/tratop_e/dispu_e/cases_e/ds547_e.htm.

86 Term of last member of the Appellate Body, Prof. Dr. Hong Zhao, completed on 30 November 2020.

87 Refer document no. WTO/AIR/DSB/119 dated 14 APRIL 2022, available at: https://www.wto.org/english/news_e/news22_e/dsb_agenda_27apr22_e.pdf.

88 www.wto.org/english/news_e/news22_e/dsb_28mar22_e.htm.

i Trade remedy disputes filed by India

On 9 September 2016, in the WTO dispute *US – Renewable Energy*,[89] 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 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.[90] Currently, the Report of the Panel is the subject of an appeal to the WTO Appellate Body at the request of the United States.[91] Later, India also notified the DSB of its decision to cross-appeal. On 14 October 2019, the chair of the Appellate Body informed the DSB that regrettably the Appellate Body would not be able to circulate a report in this case within the required 90 days. The chair of the Appellate Body noted that there was a queue of appeals pending, as was well known, and the Appellate Body was considering them in the order in which they were appealed. Owing to non-availability of Appellate Body members, the outcome of this dispute is unlikely to be issued in the near future.

In 2018, the US imposed additional import duties of 25 per cent and 10 per cent on certain steel products and aluminium products.[92] 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.[93] Since the selective levy of additional duty distorts international trade, eight other WTO members, namely Canada, China, the European Union, 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.[94] In February 2021, the panel conveyed its inability to issue a panel report within the stipulated

89 WTO Dispute Settlement DS510: United States – Certain Measures Relating to the Renewable Energy Sector.

90 United States – Certain Measures Relating to the Renewable Energy Sector – Report of the Panel WT/DS510/R dated 27 June 2019.

91 United States – Certain Measures Relating to the Renewable Energy Sector – Communication from the Appellate Body WT/DS510/7 dated 14 October 2019.

92 Only imports of steel, and not those of aluminium, from South Korea have been exempted from the measures at issue by the United States.

93 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.

94 www.wto.org/english/news_e/archive_e/dscases_arc_e.htm?dscase=547.

time due to delay caused by the covid-19 pandemic.[95] On 9 December 2021, the chair of the panel informed further delay, and the final report is expected to be issued no earlier than the first half of 2022.[96]

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 States claimed that India had failed to comply with the ruling and sought suspension of concessions accorded to India.[97] Subsequently, in 2018, India requested the DSB to establish a panel to resolve the disagreement between India and the United States.[98]

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*.[99] Aggrieved by this decision, Japan filed the dispute *India – Iron and Steel Products*[100] 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.[101] Subsequently, both India and Japan gave notice of their decisions to appeal this ruling before the Appellate Body.[102] Owing to the limited number of members available, the Appellate Body has not issued its report yet owing to the backlog of appeals.[103]

Another WTO trade remedy case, *India – Export Related Measures*,[104] 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.[105] By the end of 2019, the government of India had notified the DSB of its decision to appeal to the Appellate

95 United States – Certain Measures on Steel and Aluminium Products – Communication from the Panel WT/DS547/11 dated 8 February 2021.

96 Refer document No. WT/DS547/12 dated 10 December 2021 issued by the Panel.

97 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/DS456/20 dated 29 January 2018.

98 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.

99 Notification No. 1/2016-Customs (SG) issued by the Ministry of Finance, government of India dated 29 March 2016 levying safeguard duty of 20 per cent *ad valorem*.

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

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

102 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.

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

104 WTO Dispute Settlement DS541: India – Export Related Measures.

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

Body.[106] Notwithstanding this appeal, the government has taken initiatives to modify, amend or terminate the programmes found to be inconsistent with the ASCM.[107] One such initiative is replacement of the Merchandise Exports from India Scheme by the Remission of Duties and Taxes on Exported Products Scheme (the RoDTEP scheme).[108]

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 sugar cane industry.[109] 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 competitiveness of other exporting WTO members. On 14 December 2021, the Panel issued its report to members. The Panel in its decision held that domestic support and export subsidies granted by the central and state government are inconsistent with Article 7.2 (b), Article 3.3 and Article 8 of the Agreement on Agriculture.[110] Later, on 24 December 2021, India announced its decision to appeal, claiming errors by the Panel on interpretation of legal provisions.[111]

VII OUTLOOK

Since early 2020, global trade has been significantly disrupted by the covid-19 pandemic and lockdown restrictions. Global trade was further adversely impacted by geopolitical issues such as to Russia–Ukraine conflict. This led to surge in global prices of crude oil and other commodities. As a result, all major economies including India are witnessing a surge in inflation. To overcome these external headwinds, the Indian government has taken multiple initiatives including reduction in tariffs on essential imports, suspension of duty imposed earlier and not levying duty on numerous imported products. The aim of these measures is to extend relief to small- and medium-sized enterprises, encouraging manufacturing, promoting exports and employment.

At the 12th Ministerial Conference (MC12) scheduled at WTO headquarters, issues associated with public health, agriculture, food security and dispute resolution process are likely areas of focus. On public health, Indian and global institutions including the World Health Organisation are expected to arrive at a consensus on exemption of intellectual

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

107 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.

108 Ministry of Commerce and Industry, government of India. See Notification No. 19/2015-20 dated 17 August 2021 notifying the 'Scheme Guidelines for Remission of Duties and Taxes on Exported Products'. On 1 June 2022, the Ministry of Finance revised the rate on exported products effective from 1 May 2022.

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

110 India – Measures Concerning Sugar and Sugarcane – Communication from the Panels – WT/DS579/R, WT/DS580/R, WT/DS581/R, dated 14 December 2021.

111 India – Measures Concerning Sugar and Sugarcane – Communication from the Panels – WT/DS579/R, WT/DS580/R, WT/DS581/R, dated 11 January 2022.

property restriction for covid vaccines and future emergency health crises. India, being a key member of the WTO, will explore permanent solutions on long-standing issues of the public stockholding programme and fisheries subsidy, among other things.

India also witnessed a sharp decline in imposition of trade remedy measures. This can be attributed to numerous factors, such as: (1) an increase in import price due to higher freight costs which provide a competitive edge to Indian producers over imports; (2) geopolitical developments and surge in commodity prices; (3) rising global inflation; and (4) the government's emphasis on employment, domestic manufacturing and export. Looking ahead, the number of trade remedy investigations by the DGTR and imposition of definitive duty by the Ministry of Finance may decline further, unless there is change in geopolitical sentiments and global supply chain changes.

Appendix 1

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ISBN 978-1-80449-102-7