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Contents

Article

The Trade Facilitation Agreement – Understanding the nuances 2

Trade Remedy News

Trade remedy measures by India 4

Trade remedy actions against India 5

WTO News 6

News Nuggets 7

Ratio Decidendi 9

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Article

The Trade Facilitation Agreement – Understanding the nuances

By **R. Subhashree**

The Trade Facilitation Agreement (TFA) was signed at Bali eliciting congratulations and relief, apparently lending credibility to the World Trade Organisation (WTO). As always the statistics look promising - reduction in cost by 10% in developed countries and upto 15 % in developing countries. However, what the agreement seeks to achieve rather impose (since it is binding on the WTO members and can be subject of dispute settlement process) has to be studied with reference to the draft available.

The requirements under TFA can be divided into those relating to information-sharing, aid in understanding applicable laws, procedures including documentation, fees and charges, cooperation between agencies of members and those relating to special and differential treatment. As per Section II developing and Least Developed Countries (LDCs) are required to classify the provisions into A (entering into force immediately), B (requiring transitional period) and C (requiring capacity building) and communicate the same.

The TFA creates extra binding force for certain obligations already present in GATT. There is of course a moratorium declared on claims or dispute settlement under the rules. Application of Article XXII (Consultation) and XXIII (Non-violation or Nullification of benefits clause) to developing and LDCs is relaxed for A, B and C categories. However, transition period provided may not be sufficient to these countries.

Information sharing and opportunity to comment

Article 1 of the agreement requires publication of information available through the internet preferably in one of the official languages of the WTO, on applicable laws and regulation relating to import /export and, on the form, documents as also contact information on enquiry points. Also members are encouraged not to require payment of fee for answering enquiries. Much of the requirement on information is already part of GATT Article X. However, the TFA goes beyond merely asking for information to be made available. By Article 2 it enjoins granting an opportunity to traders and 'other interested parties' to comment on proposed amendment or introduction of laws.

Aid in understanding the law

Members shall issue advance rulings on goods tariff classification and origin of the goods and preferably on requirements for quotas and appropriate method or criteria for determining the customs value. The applicant may be an exporter, an importer or *any person with a justifiable cause or a representative thereof*. This definition is wide and vague. For instance, if we look at the current tax provisions in India, an applicant seeking advance ruling has to be either non-resident engaging in business activity in India, residents collaborating with non-residents or specified residents engaging in business activity. The TFA makes members answerable to an amorphous entity - *person with justifiable cause* which is neither easy to define nor immune from subjectivity. A more practical question would be the affordability of compliance cost in administering such provisions by developing countries and LDCs.

Procedures including documentation and fees

Attracting criticism that the agreement goes far beyond trade and policy and extends to rule making,

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the TFA requires members to grant opportunity of second test in case of adverse results during first test on samples drawn in respect of goods entered for import and provide details of approved laboratory for the same. TFA will not diminish the rights and obligations of members under other agreements like Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT). Going by the debates on application of SPS wherein the injured party always complains of lack of scientific basis, perhaps this provision may provide an additional tool to foreign exporters to question the importing member.

GATT Article VIII deals with fees and formalities connected with importation and exportation and requires non-imposition of penalty by a member-country for minor, non-wilful infractions. Going beyond the requirement that fees and charges should approximate to cost of services rendered by the member-country, the TFA requires members to publish information on, reason for fees and accord adequate time period before changes are effected. The fees and charges cannot be applied until they have been published and shall be reviewed periodically to reduce number and diversity.

On penalties, it imposes a condition of furnishing an explanation in writing for the imposition and wherever a person voluntarily discloses the circumstances (not breach itself) of the breach, it should be a mitigating factor in establishing penalty. In tax law and in case of civil breach penalty is usually automatic.

TFA emphasises importance of electronic records, submission of documents, payment of duties, etc., so that processing of documents can begin before arrival of goods. Measures like Risk Management System and Post-Clearance Audit [envisaged in Kyoto Convention of World Customs Organisation (WCO)] are also prescribed for implementation. Members shall also afford possibility to negotiate for mutual recognition of Authorised Economic Operators. Article 8 of TFA requires members to provide for lesser documentation, permit submission of information in advance for expedited shipments and require (allow) applicant for expedited shipments to use tracking technology from pickup to delivery. It also encourages provision of *de minimis* shipment or dutiable value for which customs duties and taxes will not be collected.

Article 10 asks the members to make arrangement to get paper or electronic copies of supporting documents for import, export or transit formalities from the agency holding the original. A member shall also not require original or copy of the export declaration submitted to the customs authority of exporting member as a requirement for importation.

It also requires creation of a single window for submitting documents, obtaining clearance, etc., and forbids request for same documents or data by other participating agencies.

Article 11 of TFA enhances the provisions under Article V of GATT on freedom of transit. Once goods have been put under transit procedure and authorised to proceed, they cannot be subject to any customs charges or unnecessary delays or restrictions.

On cooperation

A committee on trade facilitation has been established and national committees shall be established to coordinate on the domestic front and also ensure implementation of TFA. Provisions are set out to encourage exchange of information and also deal with confidentiality and administrative or cost constraints.

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The criticisms

It has been argued that despite the promise of donation from members and aid to build capacity, the compliance cost is a burden for developing and LDC members. Most of the developed countries do not have to take extra efforts to meet obligations under this agreement. As per OECD's study on trade facilitation indicators, India performs poorly on fees and charges and streamlining of procedures, China, Argentina have to improve on border agency cooperation, Antigua on information availability, involvement of the trade community, advance rulings and automation and Malawi has to improve in respect of advance rulings and harmonisation and simplification of documents. OECD countries like US have to better simplification and harmonisation of documents and Japan has to improve on involvement of trade community.

TFA is more about reducing costs, making exports profitable rather than possible. It leaves an importing country with little choice. Tariffs cannot be increased, charges have to be lowered and yet a country has to find resources to meet its obligations on infrastructure, publish data etc.

Governments are sovereign as regards power to tax. With reduced role for government in business, taxes and other duties, charges collected are an important source of revenue. As such, between DTAAs, bilateral agreements and concessions to business, the tax domain whether on economic activity/ income has been shrinking. TFA insists that charges shall not be more than cost of services rendered. This makes an exporter more than equal. Even a citizen cannot challenge the quantum of levy once the government has the statutory power to tax. At best the challenge would be to power to levy on the ground of violation of certain guarantees enshrined in supreme legal documents like the constitution.

One of the significant factors aiding in export of goods from developing and LDC members is the cost advantage enjoyed by the members as compared to a developed country. If a government's hands are tied as regards imports, it has no option but to increase other taxes. Also with reduced charges imports may be more competitive than local goods.

To conclude, in fairness the TFA seems as difficult as customs valuation provisions in GATT would have been at the time of signing. The WTO is about multilateralism and every member will have to find its own balance between yielding and reaping benefits.

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Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Acetone	European Union, South Africa, Singapore and USA	F.No.15/1/2012-DGAD	13-12-2013	ADD sunset review - Continuation of duty as imposed under Notification No. 33/2008-Cus., recommended

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Product	Country	Notification No.	Date of Notification	Remarks
Cast aluminium alloy wheels or alloy road wheels for motor vehicles	China, Korea RP and Thailand	F.No.14/7/2012-DGAD	18-12-2013	ADD investigation - Extension of time up to 9th March, 2014 for completing the investigation
Caustic Soda	China	F.No.15/23/2013- DGAD	19-12-2013	ADD sunset review initiated
Ceftriaxone Sodium Sterile	China	F.No.15/12/2012-DGAD	9-12-2013	ADD sunset review -Extension of time up to 21st February, 2014 for completing the review.
Meta Phenylene Diamine	China	F.No.14/4/2012-DGAD	17-12-2013	Definitive anti-dumping duty recommended.
Persulphates	Taiwan, Turkey and USA	F.No.14/9/2012-DGAD	26-12-2013	ADD investigation - Second extension of time granted up to 27th January, 2014
Red Phosphorous	China	F.No.14/12/2012-DGAD	27-12-2013	Definitive ADD recommended
Sheet glass	China	F.No.14/22/2013-DGAD	20-12-2013	Initiation of anti-dumping investigation. Period of investigation is 1st July, 2012 to 30th June, 2013
Solar cells	China, Chinese Taipei, Malaysia and USA	F.No.14/5/2012-DGAD	9-12-2013	ADD investigation - Extension of time up to 22nd May, 2014

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Certain oil country tubular goods (OCTG)	USA	C-533-858 78 FR 77421	23-12-2013	Provisional CVD imposed after preliminary determination of presence of countervailable subsidies. Final CVD determination will be issued on the same date as the final ADD determination, i.e. on April 29, 2014.
Open mesh fabrics of glass fibres	EU	Regulation No. 1371/2013	16-12-2013	ADD anti-circumvention investigation - Anti-dumping duty imposed by Implementing Regulation (EU) No. 791/2011 on imports from China extended to same goods consigned from India and Indonesia.

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Product	Country	Notification No.	Date of Notification	Remarks
Polyester staple fibres	EU	Regulation 2013/C 372/12	19-12-2013	Anti-subsidy proceeding has been initiated
Steel threaded rod	USA	C-533-856 78 FR 76815	19-12-2013	Provisional CVD imposed after preliminary determination of presence of countervailable subsidies. Final CVD determination will be issued on the same date as the final ADD determination, i.e. on April 28, 2014.
Synthetic fibre Ropes	EU	Regulation 2013/C 373/11	20-12-2013	Notice of expiry - Anti-dumping duty measures expired on 23-12-2013

WTO News

EU files dispute against Brazil, while Argentina seeks consultations with EU

Last month saw European Union at the centre of two disputes with Mercosur countries (a group of countries in Latin America), Brazil and Argentina in particular. On 19-12-2013, EU notified the WTO Secretariat of a request for consultations with Brazil over tax advantages given by Brazil in the automotive sector; the electronics and related sectors; with regard to goods produced in Manaus and other Free Trade Zones, and tax advantages for exporters. As per EU, the measures are discriminatory as they impose a higher tax burden on imported goods than on domestic goods and provide tax advantages if domestic goods are used besides extending export-contingent subsidies.

On the same day (19-12-2013), Argentina also dragged European Union to the WTO dispute settlement body, alleging that anti-dumping duty measures imposed by EU on biodiesel from Argentina are inconsistent with various provisions of the WTO's Anti-dumping Agreement. [*Please see June 2013 issue of International Trade Amicus for another dispute between EU and Argentina, on the same product, alleging violation of TBT Agreement*].

Interestingly, while both Argentina and Brazil would be denied EU's Generalized System of Preferences programs for developing countries, with effect from 1-1-2014, as they have been listed by the World Bank as upper middle-income economies for the past three years, EU is presently negotiating Free Trade Agreement with Mercosur countries, which as per reports is scheduled to be concluded shortly.

Compliance Panel established for EC-Fasteners dispute

Acceding to China's request, the Dispute Settlement Body, on 18th December 2013, established a panel under Article 21.5 of the Dispute Settlement Understanding to determine whether the DSB's recommendations and rulings have been fully implemented by the measures taken by the European Union in the dispute over steel fasteners (DS397). China had requested determination with regard to consistency of the measures taken by EU to

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comply with its obligations under the Anti-Dumping Agreement and GATT 1994. The DSB had in its July 2011 report upheld the Panel's findings that Article 9(5) of the EU's Basic Anti-Dumping Regulation was inconsistent "as such", and "as applied" in the fasteners investigation, with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.

Korea requests establishment of Panel in DS464

In the dispute "US-Anti-dumping and Countervailing measures on large residential washers from Korea" (DS464), Korea has requested for establishment of DSB panel. According to Korea, consultations held on 3rd October 2013, did not lead to mutually satisfactory resolution of the dispute. The DSB deferred the establishment of a panel, as USA was of the view that the panel request described certain issues that were not measures, hence were not subject to WTO dispute settlement. The dispute is about US DOC's use of 'zeroing' methodology in the final determination of sales at less than fair value. According to Korea, determination to use the Weighted Average-to-Transaction comparison methodology under Article 2.4.2 of the Anti-Dumping Agreement does not provide authority to apply the methodology of "zeroing".

Russia files dispute against EU

Russia has reportedly filed its first dispute at the WTO on 23rd December, 2013. Russia, which joined the WTO in 2012, alleges that the European Union had unfairly charged anti-dumping duties, adjusting the cost of gas in the cost of production of various goods exported from the Russian Federation to the EU. As per communication by EU in the Committee on Anti-dumping Practices, on 19-12-2013, answering various questions raised by Russia, EU says that domestic gas price paid by the exporting producers was around one third of the export price of natural gas from Russia and hence adjusted price was based on the average price of Russian gas when sold for export. In response to the Russian query as to whether the determination of normal value was corresponding to market economy status of Russian Federation, the EU has stated that provisions relating to methodology for non-market economy countries were not used in respect of imports from Russia.

News Nuggets

Time limit for imposition of China-specific safeguard measures expires

Safeguard measures specific to China and provided in Paragraph 16 of its Accession Protocol to WTO expired on 11th December 2013. Paragraph 16.9 of the Accession Protocol states that the Transitional Product-Specific Safeguard Mechanism (TPSSM), shall be terminated 12 years after the date of accession (11th December 2001). The provisions relating to TPSSM provide for special rules, as applicable to China, regarding application of safeguard measures by other WTO members and were meant as a temporary measure to simplify China's entry into the rule-based economy. As compared to EU's Regulation in this regard, Indian Regulations do not provide for the expiry date.

Trade restrictive measures by G-20 countries increase

Most of the G-20 members have, in the last six months, put in place new trade restrictions or measures that have the potential to restrict trade. According to the latest WTO report on G-20 trade measures published on 18th December 2013, 116 new trade restrictive measures were identified since the last WTO report. The number is up

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from 109 measures recorded for the previous seven-month period. As per the report, covering period from mid-May 2013 to mid-November 2013, global economic growth remained slow and uneven and world merchandise trade is expected to grow by 2.5% in 2013 and 4.5% in 2014. The report, highlighting the fact that fewer trade liberalizing or facilitating measures were taken than in the past, records that around 33% of the total recorded measures can be considered as trade facilitating, compared with 40% at the time of the previous trade monitoring report.

China agrees to make a revised offer to join GPA

China has, on 20th December, 2013, agreed to make a revised offer to join the Agreement on Government Procurement (GPA) which is aimed at creating a level playing field for foreign companies competing for government contracts. The announcement was made by senior US and Chinese officials, after two days of talks under the United States-China Joint Commission on Commerce and Trade. China's earlier offers (three since 2007) have been found to be too limited in terms of higher thresholds for inviting bids, non-inclusion of state-owned enterprises and the time line by which the accession to GPA will be complete. Revisions to the GPA agreement itself incorporating role of electronic tools, inclusion of sub-central agencies, reduction of time period for procurement in certain cases like accepting tenders for commercial goods, etc, were adopted by the members in March 2012. It is expected to come into force by March next year.

Canada ratifies the ICSID Convention

The ICSID Convention has come into force in Canada from December, 2013, marking implementation of the country's decision to be bound by the dispute settlement rules of ICSID as applicable to investor-state disputes. It had taken Canada almost 40 years to become a member of the ICSID Convention, and the recent ratification now makes Canada (as the 150th country) one of the last to do so. In November Canada had deposited the 'Instrument of Ratification' of the ICSID Convention with the World Bank. In its recent treaties with China and EU, Canada has incorporated the investor state dispute mechanism provisions. ICSID is one of the forums listed in these agreements. Bigger emerging economies like India and Brazil are currently not members of ICSID.

Partial rendition of a final victory in Kishenganga dispute

The Permanent Court of Arbitration at The Hague announced the final award in the Indus Waters Kishenganga Arbitration on 20-12-2013. As reported in March 2013 issue of International Trade Amicus, the dispute revolved around use of waters for Kishenganga Hydro Electric Project. In the final award, though environmental concerns raised by Pakistan were considered, India's right to use the water as per the treaty was upheld. The minimum flow of water to be maintained was fixed at 9 cumecs. India further sought a clarification whether the prohibition on depletion of dead storage level would be general or will be specific to each site (future projects) wherein unless an alternative method was devised, India could continue to use drawdown flushing. The Tribunal clarified that the prohibition was in general and not specific to any site. This means India will not have unfettered rights to use the waters.

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Ratio Decidendi

Anti-dumping duty – Exempted Customs duty not includible in landed value

Exempted Basic Customs Duty (BCD) is not includible in landed value when anti-dumping duty equal to difference in specified amount and landed value is imposed. The Anti-dumping Bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) rejected assessees' submission that the word 'levied' used in anti-dumping notification refers to levy as per Customs Tariff and not the duty after exemption. CESTAT held that word 'levied' used in Notification No. 16/99-Cus., cannot be interpreted to mean duty as specified in the Tariff. It was observed that this interpretation would lead to ridiculous results inasmuch as person not claiming BCD exemption would not be liable to pay ADD while person claiming exemption with export obligation would be liable to pay ADD. It was noted that for levying Additional Duty of Customs (CVD), exemption notifications are also to be considered and that there is no distinction between duty levied by Parliament and effective rates notified by the executive (government).

Further noting that such interpretation was in contradiction with CBEC Circular No. 25/2002-Cus., the matter was remanded by Tribunal to consider exemption of ADD under Notification No. 51/2000-Cus, though same was not claimed earlier. It was also held that outcome of decisions in *Rajendra Chemicals Corporation* and *K.C. Cement Industries Ltd.* was not consistent with the policy objectives. [*Commissioner* v. *Bhansalai Chemicals (Madras) Ltd.* – CESTAT Order dated 18-12-2013 in Appeal No. C/500/2002]

Anti-dumping duty – Composition of domestic industry in review may not be same as in initial investigation

The CESTAT, New Delhi has held that there cannot be any legal basis for appellant to argue that composition of domestic industry in mid-term review should have remained the same as that was in the original investigation. Noting that review is an examination of post levy situation to ascertain whether cessation of the levy is likely to lead to continuation or recurrence of dumping and injury and that such exercise is undertaken depending on the facts and circumstances of each case, it was held that review cannot be equated with initial investigation as both deal with different sets of provisions. It was held that constitution of domestic industry becomes relevant only in case of initial investigation and that it is immaterial whether 10 or 9 members constituted the domestic industry when producers of major proportion of output of domestic industry participated in review exercise explaining injury to larger interest of domestic industry due to dumping. The tribunal also observed that review governed by Rule 23 of 1995 Rules does not warrant re-examination of constitution of domestic industry which was already known to both parties at the initial investigation stage of levy. Argument of the appellant that change in composition of domestic industry at review stage

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had made dumping margin and injury analysis faulty was found to be without basis by the Tribunal as prospective dumping and injury were well estimated on the basis of past and present dumping statistics as well as impact thereof. [*Hindustan Lever Ltd.* v. *Designated Authority* – CESTAT, New Delhi Final Order No. 58468/2013, dated 3-12-2013]. *Please see International Trade Amicus – August 2013 issue for case law by the European Court upholding continuation of ADD review proceedings after withdrawal of support from part of domestic industry.*

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