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In Focus

- Government Procurement Agreement among 42 countries
- Russia, Samoa and Montenegro formally welcomed in WTO
- Court upholds EU's decision to impose carbon tax on aviation sector
- U.S. Court rules against CVD on Chinese goods
- Effectiveness of dispute settlement mechanism in WTO – Some issues
- U.S. to bring law to make foreign manufacturers accountable
- FTAs set to push behind multilateralism in 2012

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Contents

Article
Effectiveness of dispute settlement mechanism in WTO – Some issues 3

Trade Remedy News
Anti-dumping/Safeguard actions by India
Anti-dumping actions against India 5

WTO News 6

FTA News 7

News Nuggets 8

Article

Effectiveness of dispute settlement mechanism in WTO – Some issues

By **Manoj Gupta**

Last week when USA raised the issue of continuing subsidy in relation to civil aircraft from the EU, even after the adoption of the panel and appellate body's report (DS316) concerning the same by the WTO Dispute Settlement Body (DSB), the question of effectiveness of the remedies available to the countries when the decisions of the DSB are not honored, arose again. This write-up discusses various aspects concerning the 'Undertaking on Rules and Procedures Governing the Settlement of Disputes' in the WTO and effectiveness of its implementation.

DSU and remedies available thereunder

Dispute Settlement Undertaking (DSU) or the Undertaking on Dispute Settlement is a fundamental instrument for ensuring effective functioning of the multilateral trading system as sought to be promoted by the WTO. It works on the principle that the member countries should not take unilateral actions against each other without trying to settle their trade-related disputes among themselves. The objective of DSB, however, is not adjudication but prompt settlement. Various agreements between the countries (Anti-dumping Agreement, Agreement on Technical Barriers to Trade, etc) also provide that if a member-country feels that the trade regulating mechanisms of another country are not in line with a particular article of relevant agreement, the aggrieved country can approach WTO and if consultations fail, seek setting up of Dispute Settlement Panel to adjudicate whether the disputed mechanisms violate some provisions.

Articles 19, 21 and 22 of the DSU provide the procedure for time-bound working of the panel or the appellate body and for implementation of their reports by the member-countries. Article 19 of the Undertaking states that if the panel finds that measures are inconsistent with certain agreement, then it shall recommend to the member concerned to bring such measures in conformity with the provisions. Article 21, while acknowledging the fact that prompt compliance is essential in order to ensure effective resolution of the dispute, provides that members should implement the panel or appellate body's recommendations within a specified time-frame and in case of dispute relating to time for implementation, go for arbitration to decide the implementation time. Further, as per Article 21.5, if the member is not satisfied with the measures taken on the recommendations, it can further seek dispute settlement and constitution of the panel. Article 22 further provides for compensations and sanctions, with the authorization of DSB, in case the recommendations of the panel are not implemented. Again an arbitrator can be appointed to look into the fact whether the sanctions suggested are in line and level with the provisions.

The provisions under the DSU lay down clear time-lines for every stage, but this schedule is rarely followed. Moreover, there are numerous ways by which implementation of the recommendations can eventually be postponed while the loss to the concerned member-country continues[1].

GATT v. DSU of WTO

While both GATT dispute settlement and the new DSU are handicapped by delays and uncertainty, it can be said that the dispute settlement provisions in the WTO are a shade better than those available under GATT before establishment of WTO. The new provisions provide for setting up of compliance panel (Article 21.5), which was absent in the

[1] Even if the party raising the dispute wins, the recommendations are largely prospective.

earlier GATT provisions [2], but the effectiveness of the same is diluted to a large extent mainly due to the time involved to reach that stage.

Effectiveness of DSU provisions

Justice delayed is justice denied

As discussed earlier, enormous time taken to effectively oppose controversial provisions of member-countries and implement recommendations of the panel or the appellate body is a major drawback. For example, in DS103 the consultations were sought on 8-10-1997 but after the usual round of panel and appellate body reports, reports of the panel and the appellate body under Article 21.5 and then second recourse to panel and appellate findings under Article 21.5, agreement was reached between the parties only on 9-5-2003. In DS174 while consultations were requested on 1-6-1999, the panel report was circulated only on 15-3-2005. In DS207 consultations were sought on 5-10-2000 but compliance report of the appellate body under Article 21.5, with the finding of non-compliance, came only on 7-5-2007. There are a number of disputes where even the first panel report came after 3 years from commencement of consultations (e.g. US COOL) which, in effect, calls for looking into the effectiveness of the provisions.

Most recently, Ambassador of Antigua and Barbuda on 17th December 2011, in the 8th session of the WTO Ministerial Conference, stated that even 8 years after they brought the dispute regarding US measures affecting cross border supply of gambling and betting services in the WTO (DS285), they are yet to receive full justice even though the reports of the panel and appellate bodies were in their favour.

Sanctions how far effective

The reports/recommendations in this case (DS285 – Gambling) called/approved sanctions against the U.S., but as per the words of the Ambassador of Antigua and Barbuda *"That remedy, which might have been appropriate had the case been between the European Union and the United States, calls into question whether the dispute settlement mechanism of the WTO can find innovative solutions that fit the peculiar circumstances of individual cases"*. As can be seen, sanctions are effective only when the member bringing dispute to the WTO is equally economically sound and has the potential to provide some kind of equally balanced measures in case of non-implementation of the recommendations. The DSU provides some relief for the developing and the least developed countries but to what extent the goal has been reached is doubtful.

Sanctions are frequently used in the UNO to compel compliance with international law and here, in WTO also, the main objective of the sanctions is to induce compliance, but the old and outdated law of "eye for an eye" or the "mirror punishment" does not serve the purpose for two reasons. First, when the opponents are economically dissimilar and secondly imposing sanctions against another country may in turn harm the economy of appellant. Resorting to the same measure (imposing trade restrictions) or authorizing similar measures would not remove or compensate the loss already caused. The DSU authorizes the same but the WTO objective of "rule-based trade" and "trade without restrictions" is practically not met.

Looking forward

On the question of delay in setting up of the panel and in implementation of their reports, WTO should take up the issue more seriously [3] and if necessary even amend the Undertaking to put a time line for completion of various stages of the process. On the implementation part the DSU provides for some sort of settlement but to make the provisions more effective, the Dispute Settlement Undertaking should also have some penal provisions before the member-countries eventually go for imposition of sanctions. This would put in place some mechanism, under the authority of the WTO, to monitor implementation of the panel or appellate body's recommendations and would also provide for adequate deterrence against such non-implementation. To put it shortly in the words of the Ambassador of Antigua and Barbuda *"If innovative solutions are not found, cases like these can only serve to undermine the credibility of the WTO itself, an outcome that we should all do everything to avoid".*

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[2] Presently the threat of sanctions can only be avoided by consensus vote of DSB which is difficult as no appellant would vote against self.

[3] Moreso, considering the slow-down in major economies, the number of disputes is expected to rise.

Trade Remedy News

Anti-dumping/Safeguard Actions by India

Sodium Hydrosulphite from China – ADD extended: Anti-dumping duty on Sodium Hydrosulphite originating in, or exported from, China has been extended till 13th October, 2012 by the Indian Ministry of Finance by Notification No. 111/2011-Cus., dated 20-12-2011. The notification amends earlier Notification No. 133/2009-Cus. which had expired on 15th October, 2011.

Morpholine from China, EU and USA – Definitive ADD recommended: The Designated Authority in the Ministry of Commerce has, on 5th December, 2011 by Notification No. 14/41/2010-DGAD recommended imposition of anti-dumping duty on import of Morpholine from China, EU and USA. The ADD has been recommended considering lesser duty rule so as to remove the injury to the domestic industry.

Silk fabrics from China – ADD recommended to be maintained: Consequent to sunset review of anti-dumping duty on import of specific variety of silk fabrics from China, India's Designated Authority has recommended continuance of the levy. The Notification No. 15/24/2010-DGAD, dated 5th December, 2011 seeks to enhance ADD rate while recommending continued imposition.

Saccharin from China – ADD extension recommended: The Indian Ministry of Commerce, by Notification No. 15/20/2010-DGAD, dated 7th December, 2011after sunset review, has recommended extension of ADD on saccharin imported from China. The ADD recommended is USD 2.69/kg.

Carbon black from China – Safeguard investigation initiated: The Directorate General of Safeguards in the Ministry of Finance in India has initiated safeguard investigation on imports of carbon black from China. The initiation dated 2nd December, 2011, based on application filed by Association of Carbon Black Manufacturers, is consequent to prima facie finding of increased imports of subject goods causing market disruptions to the domestic producers.

Flexible Slabstock Polyol (FSP) from Singapore – ADD withdrawn: Anti-dumping duty on FSP originating in, or exported from, Singapore has been withdrawn. Notification No. 15/2008-Cus. imposing ADD on the product from Singapore, USA and Japan has been amended by the Central Board of Excise and Customs in the Ministry of Finance by Notification No. 112/2011-Cus., dated 20-12-2011 issued in this regard.

Polypropylene from Saudi Arabia – ADD withdrawn: Anti-dumping duty on Polypropylene originating in, or exported from, Saudi Arabia has been withdrawn. The Notification No. 130/2011-Cus., dated 30-12-2011 issued in this regard omits relevant entries from the parent Notification No. 119/2010-Cus., dated 19th November, 2010.

Anti-dumping actions against India

Stainless steel wire rods – U.S. extends ADD on imports from India: The U.S. International Trade Commission (USITC) on 16th December, 2011, determined that revoking the existing anti-dumping duty order on stainless steel wire rod from India may lead to continuation or recurrence of material injury within a reasonably foreseeable time. The action, as per news release 11-163, came under the sunset review initiated by the US ITC on 1st July, 2011.

Circular welded carbon-quality steel pipe – ADD and countervailing duty determination by U.S. against India: The US International Trade Commission has, on 9th December, 2011, made preliminary affirmative anti-dumping and countervailing injury determinations on circular welded carbon-quality steel pipe from India, Oman, the United Arab Emirates and Vietnam. As per the determinations, U.S. industry has suffered material injury due to imports of circular welded carbon-quality steel pipe, from such countries, that are allegedly subsidized.

Cut-to-length carbon-quality steel plate - ADD and countervailing duty by U.S. to continue: The US ITC has, on 5th December, 2011, consequent to sunset review, determined that revoking the existing antidumping and countervailing duty orders on cut-to-length carbon-quality steel plate from India, Indonesia and Korea may to lead to continuation or recurrence of material injury. The ADD and countervailing order will, therefore, remain in force as far as these countries are concerned. The Commission, however, revoked the order in case of imports from Italy and Japan.

WTO News

Safeguard measure on PET – India seeks consultations with Turkey

India has sought consultations with Turkey on questions relating to imposition of some safeguard measures by the latter on imports of Polyethylene Terephthalate (PET). Consultations are being sought under Article 12.3 of the Agreement on Safeguards under the WTO. As per the communication dated 1st December, 2011 circulated in the WTO at the behest of the Indian delegation, the Turkish investigating authority had made an overall finding of threat of serious injury, inter alia, based on the determination that production and domestic sale of the item decreased in 2010 in comparison to 2009. According to India, the conclusion of threat of serious injury was not convincing as the production and domestic sales had shown increasing trends over the period 2006 – 2010 and that only for the first quarter of 2011, declining trend was seen when compared with first quarter of 2010. India has sought clarification from Turkey stating that it may not be correct to assess threat of serious injury based only on one quarter of a year when Turkey had chosen period of investigation from 2006 to 2010. Incidentally, in another dispute concerning safeguard measures by Turkey on cotton yarn imports from India, Turkey has forwarded its reply on 20th of December, 2011.

Government Procurement Agreement among 42 countries

An agreement providing for opening up of domestic procurement markets for foreign traders was reached between 42 countries on 15th December, 2011. The optional agreement, termed as Government Procurement Agreement (GPA), calls for increased market access to foreign companies in relation to public procurement by the respective governments. The agreement seeks to provide for more transparent set of rules for international public procurement. Governments concerned are not expected to open up all of their procurements and can specifically exclude some sensitive sectors like defence-related procurements. The agreement comes at a time when major economies are badly hit and need palliatives. India is not a signatory to this agreement and is, at present, only an observer with 21 other countries.

WTO holds internal taxes by Philippines on distilled spirit as discriminatory

The World Trade Organisation (WTO) appellate body, in its report circulated on 21st December, 2011, has held that the excise tax on distilled spirits, as prevalent in Philippines, whereby spirit manufactured from specified raw materials attract lower rates of tax with a higher rate for using non-designated raw materials, is violative of Article III.2 of the GATT.

Earlier, EU and USA had brought the issue before the WTO contending that lower rate was being applied on domestic spirits as the same were principally made from the designated materials like sap of the nipa, coconut, cassava, camote, or buri palm, or from juice, syrup, or sugar of the cane and a higher rate was being imposed on the imported spirits which mainly used cereals or grapes. The appellate body however, while reversing the Panel's finding that all imported distilled spirits made from non designated raw materials, irrespective of their type, are "like" all domestic distilled spirits made from designated raw materials, upheld the findings that all imported and domestic distilled spirits under consideration are "directly competitive or substitutable" within the meaning of Article III:2, second sentence, of the GATT 1994. India along with Australia, China, Mexico, Thailand and Chinese Taipei had represented before the DSB as third party.

Russia, Samoa and Montenegro formally welcomed in WTO

WTO Ministers, on 16th December, 2011, at the 8th Ministerial Conference in Geneva, adopted Russia's WTO terms of entry. The Russian Parliament has to now ratify the accession for Russia to become a full-fledged member of WTO. The accession which came after 18 years of constant consultations/negotiations was termed by the Russian Economic Development Minister as a "starting

point for Russia". Russia was the last large economy which was not part of the WTO till now. As part of the accession, Russia concluded 30 bilateral agreements on market access for services and 57 on market access for goods. Russia will now have to cut its import tariffs to bring them to the prescribed level. In respect of service sector, Russia will have to allow foreign companies in banking, insurance and telecommunication sectors after prescribed period.

On 17th December 2011, WTO Ministers adopted the terms of entry of Samoa and Montenegro. While Samoa - the small South Pacific island nation has to ratify its accession package by 15th June, 2012, Montenegro has time till 31st March, 2012. Both countries will become fully-fledged WTO members 30 days after they notify ratification of their respective accession packages to the WTO.

FTA News

FTAs set to push behind multilateralism in 2012

With major economies showing signs of slow down, it is the Free Trade Agreements (FTAs) which seem to catch the eyes of all the countries while they desperately try to win partners in bilateral trade. Year 2012 will witness many such FTAs concerning major countries. India's FTAs with Israel, Russia, Thailand, EU, New Zealand; its trilateral agreement with South Africa and Brazil; China's tripartite agreement with Japan and South Korea and Japan's FTA with Australia would be some of the interesting agreements to watch in 2012.

While India's FTA with Russia (Comprehensive Economic Partnership Agreement) is at an advanced stage, studies on FTAs with Israel and Thailand have also begun. Here, it may be noted that India and Thailand are already under agreement of free trade, with eight other members under the umbrella of ASEAN. Israel, as per reports, is in the process of setting up seven centers of excellence in India which will facilitate transfer of cutting edge agricultural technology to Indian farmers.

India-EU and India-New Zealand FTAs are also on track and may become operational by mid 2012. While the FTA of two of the most industrialised nations of the East - Japan and South Korea, with resurgent China would definitely alter trade equations in this part of the world, Japan has also restarted talks with Australia on Economic Partnership Agreement (EPA) with the 14th round of talks scheduled in Tokyo in February, 2012. Talking of Pacific nations, one can witness inking of the United States promoted multilateral trading agreement – the Trans Pacific Partnership in 2012. TPP involves nine countries on both sides of the Pacific.

EU starts negotiations with Moldova and Georgia

The European Union has decided to launch negotiations with Moldova and Georgia (two of the erstwhile USSR States) in order to have a deep and comprehensive Free Trade Agreement. These free trade areas, as per the reports, will be part of the Association Agreement, under negotiation with Georgia and Moldova since July 2010 and January 2010, respectively, under the framework of the Eastern Partnership and the European Neighbourhood Policy. Both the countries currently enjoy preferential access to the EU market by way of lower import duties through the Generalised System of Preferences with further incentives for good governance ("GSP+") (Georgia) and Autonomous Trade Preferences (Moldova).

News Nuggets

Court upholds EU's decision to impose carbon tax on aviation sector

Europe is standing by the decision to tax emission by including the aviation sector in the emissions allowance trading, commonly referred to as carbon tax on aircrafts flying into or from any of the member states of the EU. The Court of Justice for European Union in its decision dated 21-12-2011 has ruled that the use of a 'market-based-measure' such as the trading system setting a cap on emissions and making those who exceed the limits buy credits did not contravene any international treaty or law. It stated that it is not a tax and applied equally to domestic and foreign operators. There was no infringement on sovereignty nor was it a measure to impede free passage of aircrafts over European air space. Only operators choosing to arrive at or depart from a destination in the EU for commercial routes are covered by the provisions.

A report by the Centre for WTO Studies (India) argues that border tax adjustment measures as sought to be brought in by EU and USA in respect of goods from carbon-intensive industries is WTO non-complaint. The present move to bring aviation – a service sector industry within the scope of environment protection measures has also drawn criticism. It remains to be seen whether the measure, which will distort trade patterns between members, can be supported under Article XX (WTO agreement) providing for certain exceptions, inter alia to protect exhaustible natural resources.

U.S. Court rules against CVD on Chinese goods

China recorded another success on the issue of simultaneous levy of countervailing duty (CVD) and anti-dumping duty (ADD) on its products, in this case, tyres. Echoing the effects of the WTO Panel's March 2011 decision which held against 'double counting' or 'double remedy' of an anti-dumping duty and CVD on a non-market economy (NME), the United States Court of Appeals for the Federal Circuit (USCAFC), has also held that Department of Commerce (DOC) cannot impose CVD on goods from an NME. For the purpose of calculating ADD, China is classified as a non-market economy. The USCAFC reasoned that the prevailing US statute after repeated amendments had ratified the Commerce Department's own stand prior to 2007 that it could not impose CVD on goods from an NME. It examined legislative history and intent and found that 'government payments cannot be characterized as "subsidies" in a non-market economy context, and thus that countervailing duty law does not apply to NME countries'. It was held that CVD could be applied only on finding that China was no longer an NME country or that China had a market-oriented industry and China was till date classified as NME by the DOC.

The issue is likely to be debated at higher fora and could spark a request for legislative amendment to overturn this decision following Georgetown Steel, 801 F.2d at 1308 wherein the court had held that countervailing duty law was not applicable to non-market economy countries.

U.S. to bring law to make foreign manufacturers accountable

The U.S. Congress will shortly debate on the ' Foreign Manufacturers Legal Accountability Act of 2011' Bill which seeks to require foreign manufacturers and producers of foreign products distributed in the United States to register an agent in the U.S. who is authorized to accept service of process for such manufacturer or producer. It is stated that foreign manufacturers can easily avoid liability arising out of injury/damages caused by unsafe products imported into the U.S. due to difficulties in serving processes to overseas entities. The products covered by the bill include drugs, cosmetics, consumer products, biological products and parts intended to be component of a product. All foreign manufacturers will be required to register an agent located in a state with substantial connection to importation, distribution, or sale of the product. By such registration a foreign manufacturer would consent to jurisdiction of the appropriate court. The bill provides for civil and criminal penalties also. An exemption threshold is envisaged under different categories to be decided by appropriate authorities.

The National Association of Manufacturers has voiced concerns that this bill could discourage investments in America besides spurring other countries to reciprocate by similar legislation against exporters in the U.S. and subjecting U.S. companies to the jurisdiction of foreign courts.

India extends ban on Chinese milk products

The prohibition on import of milk and milk products into India from China has been further extended till 24th June, 2012. The items covered under the ban include chocolates and chocolate products and candies/ confectionary/ food preparations with milk or milk solids as an ingredient. The ban on import of such products was first notified by the Indian Government in September, 2008 and since then, has been extended time and again. The present Notification No. 91, dated 26-12-2011 talks about extension of the ban. But as per the amendments made in January, 2011 the prohibition was to be in force for one year from 24-12-2010 indicating that the same has lapsed on 23-12-2011. It appears that there was no restriction on such imports for the intervening two days.