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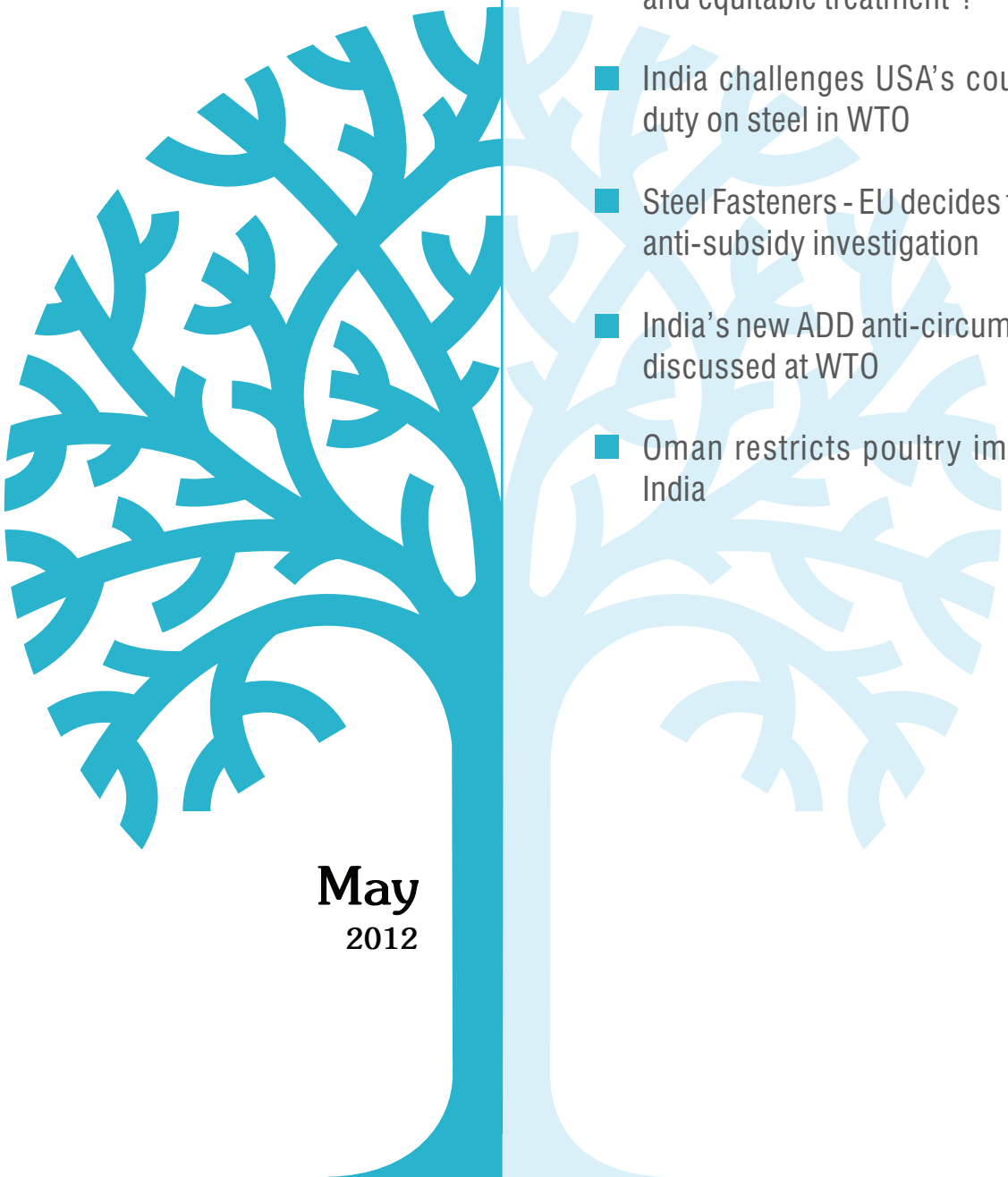

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Article

BITs - Is foreign investor protection 'fair and equitable treatment'?

By **R. Subhashree**

The UNCITRAL (United Nations Commission on International Trade Law) recently ruled in favour of White Industries, Australia[1] holding that, by inordinate delay in enforcing the award granted by the ICC Arbitration Tribunal, India had failed to provide adequate safeguard to foreign investment. Two telecom majors Sistema and Telenor have initiated proceedings under the Bilateral Investment Treaty (BIT) between Russian Federation and India and India-Singapore Comprehensive Economic Cooperation Agreement (CECA) respectively, seeking compensation for the loss arising out of cancellation of licenses by the Supreme Court of India. It is also reported that The Children's Investment Fund (TCI) of UK, as an investor in an Indian coal PSU, has invoked the provisions of the India-UK BIT and the Cyprus-India BIT alleging losses due to improper pricing of coal.

If business is all about entrepreneurial skill, risk bearing and pushing boundaries the investor-state arbitration clause would seem to be all about the opposite, negating risks and widening goalposts. The investor-state arbitration clause in the Bilateral Investment Promotion Treaties or in the investment chapter of trade agreements like FTA or CEPA enables a foreign investor to proceed against the host state - sovereign government to recover damages for any losses caused by change in legislation, failure to maintain stable investment climate or alleged discrimination.

Is it an easy task for an investor (mostly corporate) to sue a foreign government? Treaties between nations are negotiated over years. Would a government fail to arm itself with adequate flexibilities to legislate for public health, national security, financial crises or shield itself from claims by foreign investors? Let us briefly examine some of the clauses in treaties negotiated by India under which it is being proceeded against.

The MFN clause

Bilateral Investment Treaties or BITs generally contain the Most Favoured Nation (MFN) clause which means that the contracting states are obliged to provide equal benefits to investors from the other contracting state as they provide to any other state. They cannot place the other contracting party at a disadvantage. The parties resolve to provide terms more favourable to an investor, negotiated in later treaties as in the case of India-Netherlands BIT.[2] The MFN clause and provision for fair and equitable treatment enable a disputing investor to import more favourable terms from other treaties. In *Siemens* v. *Argentina*[3], the more favourable terms in the Argentine-Chile treaty were invoked to do away with the requirement to approach local courts before seeking international arbitration.

[1] http://ilcurry.wordpress.com/tag/white-industries

[2] Article 4, para 2 of Agreement between Republic of India and Kingdom of Netherlands for Promotion and Protection of Investments

[3] UNCTAD Report prepared by Goh Chien Yen, Third World Network. Statistics and case notes have been taken from various issues of INVEST-SD: Investment Law and Policy News Bulletin and reports by Luke Eric Peterson. They are available at www.iisd.org.

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The India-Japan CEPA defines investment in very broad terms and includes 'expectation of profit' (Note 2 to Article 3)[4]. It would thus be possible to invoke this definition in BITs with Russia, UK or Cyprus when an investor finds that the treaty with his home country does not provide sufficient protection or remedy. The India-Singapore CECA is, however, cautiously worded stating that the parties will consider a request to incorporate such benefits without disturbing the balance of commitments arrived at in the treaty [5].

Ideally treaties which are negotiated between two parties should be unique to them taking into account their relationship, trading pattern and volumes, size of economy and so on.

Multiple forum and remedies

Pursuit of parallel and multiple remedies by approaching various fora simultaneously or in case the award conferred is perceived to be insufficient is another aspect of investor-state arbitration. The foreign investor has a wide choice of forums like ICC arbitration panel, UNCITRAL or the International Centre for Settlement of Investment Dispute (ICSID). The decisions of the forum are binding only on the parties approaching it and not on other fora. In the cases of *CME (Netherlands)* v. *Czech Republic* (Partial Award) and *Lauder (US)* v. *Czech Republic* (Final Award) [6], two claims were pursued simultaneously in UNCITRAL against the Czech Republic.

The India-Singapore CEPA (Article 6.21, para 4) provides that the disputing party shall waive *'its right to initiate or continue any proceedings (excluding proceedings for interim measures of protection referred to in paragraph 5) before any of the other dispute settlement fora referred to in paragraph 3 in relation to the matter under dispute'.* It also lists courts and tribunals of disputing party as an option. The India-Japan CEPA provides an option to approach local court though the foreign investor can withdraw his case within 30 days and approach international agencies for dispute settlement.

However, the Indo-Russian BIT does not provide for local remedy. The foreign investor can try to solve the dispute through consultation or conciliation and, if unsuccessful, he may opt for any chosen international agency. The other party to the dispute has no say in the choice of agency to be approached for arbitration.

Time- limit

There are almost no limitations as to time within which a dispute has to be brought. In recently negotiated agreements like CECA (Singapore) [7] and CEPA (Japan) [8], the investor may not submit a dispute for conciliation or arbitration *'if more than three years have elapsed since the date on which*

4 Note 2 to Article 5 of Comprehensive Economic Partnership Agreement between the Republic of India and Japan - "Where an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take. The characteristics of an investment include the commitment of capital, the expectation of gain or profit through the commitment of the capital, or the assumption of risk."

5 Article 6.17 of Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore

6 OECD Working Papers on International Investment (Number 2006/1)

7 Para No.4 of Article 6.21 of Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore

8 Para No. 9 of Article 96 of Comprehensive Economic Partnership Agreement between the Republic of India and Japan

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the disputing investor acquired or should have first acquired, whichever is the earlier, the knowledge that the disputing investor had incurred loss or damage'. Generally the terms negotiated in a treaty are in effect during the currency of the treaty. The India-UK BIT [9], India-Cyprus [10] and India-Russia BIT [11] provide a further period of 10-15 years during which the provisions will apply to investment made before the date of termination of the treaty.

Rationale

One of the reasons advanced for binding a sovereign government to international arbitration is that the other country may not provide fair, quick or effective legal remedy to a foreign investor. The principle of exhaustion of local remedies was followed by China until recently.[12] Australia has now adopted a stand against incorporating the investor-state arbitration provisions in treaties signed by it reasoning that it has well-functioning legal systems. The Productivity Commission of Australia in its report in 2010 recommended avoiding conditions like MFN and 'the inclusion of investor-state dispute settlement provisions in BRTAs that grant foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors'. [13]

Another argument which is put forth in favour of including investor-state arbitration clause is that it is reciprocal and investors in both countries stand to benefit. However, given the cost and time involved in such processes net-capital importing countries have little to gain from it. Again Australia's veto against this clause has not made it less attractive as an investment destination and it continues to be a strong force in the Trans-Pacific Partnership Agreement negotiations.

In keeping with the preamble of BITs and other agreements which seek to foster enhanced cooperation, prosperity and reciprocal protection for investment, it would be prudent on part of the negotiating states to not bind themselves to broad and vague terms which can be interpreted to the disadvantage of the other.

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9 Article 15 of Agreement between Government of United Kingdom of Great Britain and Northern Ireland and Republic of India for Promotion and Protection of Investments

10 Article 16 of Agreement between the Government of the Republic of India and the Government of the Republic of Cyprus for the mutual promotion and protection of investments

11 Article 13 of Agreement Between The Government Of The Russian Federation And The Government Of The Republic Of India For The Promotion And Mutual Protection Of Investments

12 Yang Shu-dong, *Investment Arbitration and China: Investor or Host State?, Op. J.,* Vol. 2/2011, Paper n. 6, pp. 1 - 19, http://lider-lab.sssup.it/opinio, online publication December 2011

13 Recommendation No.4 in chapter 14 of the Report of Productivity Commission of Australia, 2010

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Trade Remedy News

Anti-dumping actions by India

Aniline from EU – Definitive ADD recommended: The Indian Ministry of Commerce has recommended imposition of definitive anti-dumping duty on imports of aniline from the European Union. Notification No. 14/39/2010-DGAD, dated 13-4-2012 recommends duty of 110.72USD/MT from the date of notification by the Indian Finance Ministry.

Electrical insulators from China – ADD investigation initiated: India has initiated anti-dumping investigation in case of imports of electrical insulators from China. As per Notification No. 14/6/2011-DGAD, dated 9-4-2012 issued in this regard, period of investigation will be from 1-1-2011 to 31-12-2011.

Pentaerythritol from EU (excluding Sweden) – ADD recommended: The Designated Authority in the Ministry of Commerce has recommended levy of definitive ADD on import of pentaerythritol from the European Union (excluding Sweden). Notification No. 14/43/2010-DGAD, dated 10-4-2012 recommends imposition of duty ranging from 379 to 490 USD/MT on such imports.

Peroxosulphates from China or Japan – ADD extended: The Indian Finance Ministry has extended anti-dumping duty on peroxosulphates from China or Japan till 18-3-2013. Notification No. 20/2012-Cus. (ADD), dated 4-4-2012 issued in this regard amends Notification No. 96/2007-Cus. which had expired on 18-3-2012.

Phosphoric Acid from Israel or Taiwan – Definitive ADD imposed: India has imposed definitive anti-dumping duty on phosphoric acid of all grades (excluding fertilizer/agriculture grade) from Israel or Taiwan. The duty presently imposed by Notification No. 19/2012-Cus. (ADD), dated 4-4-2012, in case of Israel, is lesser than the provisional ADD imposed earlier by Notification No. 4/2012-Cus. (ADD) which has now been rescinded.

Tyre curing presses from China – Mid-term review recommends exclusion of specific press: On mid-term review of anti-dumping duty on tyre curing presses from China, the DGAD in the Ministry of Commerce, by Notification No. 15/40/2010- DGAD, dated 29-3-2012 has recommended exclusion of 'Six Day Light Curing Press for curing bi-cycle tyres' from the ambit of anti-dumping duty as recommended earlier. Presently, Notification No. 1/2010-Cus. imposes ADD on the said goods.

New pneumatic tyres from China or Thailand – ADD extended: The Indian Finance Ministry has extended levy of anti-dumping duty on new pneumatic non-radial bus and truck tyres from China or Thailand till 7-10-2012. Notification No. 17/2012-Cus. (ADD), dated 30-3-2012 issued in this regard amends Notification No. 117/2010-Cus. which had expired on 8-10-2011.

Vitamin A Palmitate from China or Switzerland – ADD extended: Anti-dumping duty on Vitamin A Palmitate from China or Switzerland has been extended till 27-3-2013 by the Indian Finance Ministry. Notification No. 21/2012-Cus. (ADD), dated 12-4-2012 issued for this purpose amends Notification No. 112/2007-Cus. which had expired on 27-3-2012.

White cement from UAE or Iran – Sunset review initiated: Ministry of Commerce has initiated sunset review of anti-dumping duty on white cement from

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UAE or Iran. ADD on the said product was covered by Notification No. 56/2007-Cus. which has expired on 11-4-2012. Notification No. 15/13/2011–DGAD issued in this regard initiates sunset review of ADD on such product.

Acetone from Chinese Taipei – ADD withdrawal recommended: DGAD, pursuant to the mid-term review investigation, has recommended withdrawal of anti-dumping duty on the imports of the acetone from Chinese Taipei. Final findings issued vide Notification No. 15/2/2011, dated 10th April 2012 state that subject goods are not likely to enter in to India at prices injurious to domestic industry.

Anti-dumping / Safeguard actions against India

Circular Welded Pipe - USA's preliminary determination in anti-subsidy case: United States Department of Commerce on March 30, 2012 has preliminarily determined that countervailing subsidies are being provided to producers and exporters of circular welded carbon-quality steel pipe ("circular welded pipe") from India. The CVD imposed is 285.95% after viewing schemes like EOU, EPCG, Advance License, DFIA, etc., as subsidies and apportioning and quantifying benefits under each of them.

Steel Fasteners - EU decides to terminate anti-subsidy investigation: EU Commission in its General Disclosure Statement dated 13 April 2012 has decided to terminate the anti-subsidy investigation on the imports of steel fasteners from India. This comes after the EU Commission came to the conclusion that there is an absence of a material causal link between the subsidised imports and the injury suffered by the Union industry.

Nonyl Phenol – China initiates sunset review: China has, on 29-3-2012, initiated sunset review of ADD imposed on imports of Nonyl Phenol from India or Taiwan. As per Announcement No. 7 of 2012, dated 13-4-2012 of Ministry of Commerce of China, the Investigation, which would last for one year, would cover period from 1-1-2011 to 31-12-2011.

Oxalic acid – EU imposes definitive ADD: European Union has imposed definitive anti-dumping duty on imports of Oxalic acid from India or China. Rate of ADD imposed by Council Implementing Regulation (EU) No. 325/2012, dated 18-4-2012, in case of India, varies from 22.8% to 43.6%.

Poultry products - Oman restricts imports from India: Oman has, on 27th of March, imposed restrictions on import of live birds, their products (including poultry meat, day-old chicks, eggs) and by-products from India. As per notification of the emergency measure circulated in the WTO's Committee on Sanitary and Phytosanitary Measures on 5th of April, import restriction is imposed due to the reported detection of Highly Pathogenic Avian Influenza (HPAI) virus serotype H5 in India. Interestingly, USA is presently having consultations with India, under the WTO's DSB, on India's import restrictions of similar goods from USA owing to concerns related to Avian Influenza.

Steel coil pipes - Mexico rejects safeguard duty: Mexico has, on 20th March, rejected imposition of safeguard duty on imports of welded steel coil pipes. As per the final resolution of the safeguard investigation as published by the ministry concerned, the imports did not constitute serious injury to the domestic manufacturers. India along with China, Japan, Russia, Iraq and North Korea are the major exporters of the product to Mexico.

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WTO News

India challenges USA's countervailing duty on steel in WTO

India has taken to the WTO DSB, the matter concerning the imposition of countervailing duties, by USA, on certain Hot Rolled Carbon Steel Flat Products from India. Since 2001, countervailing duties have been imposed on these products from India to offset various alleged government subsidies. As per the communication dated 12th of April, 2012 from the Indian delegation to the WTO's DSB and to the US delegation, India has requested for consultations in this regard.

As per the consultation request, India considers that certain provisions of United States Tariff Act, 1930 and the United States Code of Federal Regulations contained in 19 CFR 351 are "as such" inconsistent with Articles 12, 14, 15, 19 and 32 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). India has further claimed that the findings of subsidy and imposition of countervailing duties with regard to some of the programmes administered by the Government of India, i.e., sale of iron ore by the National Mineral Development Corporation, grant of mining rights in respect of iron ore and coal, and the Steel Development Fund, are inconsistent with Articles 1, 2, 10, 11, 12, 13, 14, 15, 19, 21 and 22 of the SCM Agreement. As a consequential violation, it is also claimed that the measures are inconsistent with Articles I and VI of the GATT 1994 and cause nullification or impairment of benefits accruing to India under those agreements.

In October last year, the United States had sent to the WTO a list of 50 Indian government measures that it said amounted to unfair subsidies that had not been notified.

India takes US to WTO over visa fees hike

India has taken United States of America to the WTO for its discriminatory increase in the L1 and H1B visa fees (formal dispute in this regard is yet to be filed). This will be India's second case against USA after the countervailing duty on steel. Only last month, US on its part had also taken India's import restrictions concerning poultry to the WTO dispute settlement.

The law in dispute which has raised the visa fees (nearly doubling the same to USD 4,500 per visa applicant from the then existing USD 2,320) was enacted in August 2010 for firms with have at least 50 employees in the US and have more than half their US staff on H-1B or L1 visas. The measure is being seen as directly affecting major Indian IT companies.

According to India the provisions are inconsistent with Modes 3 and 4 [Article I.2(c) and (d) of the GATS] for supply of services. Mode 3 for supply of services is by way of commercial presence of the service provider and Mode 4 is by way of presence/movement (temporarily) of natural persons from one country to another. While H1B visa is issued for non-immigrant speciality workers, L1 visa is for intra-company transferees.

It is the first dispute of this kind which, if consultations fail, could come up before the Dispute Settlement Body and would be an interesting one as far as interpretation of a number of terms in the Annex (to GATS) on movement of Natural Persons supplying services under the agreement is concerned.

Appellate Body issues report on clove cigarettes dispute

The DSB Appellate Body, on 4th April 2012, issued its report in the case "United States - Measures Affecting the Production and Sale of Clove Cigarettes" (WT/DS406/AB/R). The report states that competitive relationship between the products and the regulatory concerns underlying a measure, such as the health risks associated with a product, have also to be considered while determining as to whether the products are "like". It was hence held that the clove cigarettes were 'like' menthol cigarettes and that any measure restricting former and not the latter is

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discriminatory. The Appellate Body has requested the US to bring the provisions in line with the TBT Agreement.

India's new ADD anti-circumvention law discussed at WTO

India has clarified on 23rd April some of the doubts raised by USA, China and Turkey on 2nd April, before the WTO, while interpreting India's new anti-circumvention rules in regard to anti-dumping duty. Some of the important questions and their answers are as follows:

- *USA* - On what basis the circumvention determination process is triggered and what evidence is examined to make a determination of circumvention?

  India - Circumvention process may get triggered if the exporters or producers subjected to the levy of anti-dumping duty change their trade practice, pattern of trade or channels of sales of the article in order to have their products exported to India through exporters or producers from a country not subject to anti-dumping duty. These conditions should have occurred without appropriate justification, economic or otherwise, other than the imposition of anti dumping measures in force. It would also have to be seen whether the remedial effects of the anti-dumping measures have been undermined or not on account of such an act of circumvention.

- *Turkey*– Whether Article 5.4 of the Anti-Dumping Agreement is also applicable to initiate circumvention investigation?

  India - The anti-circumvention application could be filed by a domestic industry as defined in India's Anti-Dumping Rules which are modeled on the Anti-Dumping Agreement.

- *Turkey with USA* - Clarify the term "reasonable period of time" in the provisions for review of circumvention.

  India - Reasonable period of time is as enshrined in Article 11.2 of the ADA and normally the Authority considers lapse of 12 months as a reasonable period of time.

- *China* - Will the Indian investigating authority determine injury to domestic industry in the anti circumvention investigations?

  India - There is no obligation to make a fresh determination of injury as anti-dumping duties have already been imposed on a product after determination of injury and anti-circumvention investigation is only with respect to a product which is already subject to anti-dumping duty.

ADD on caustic soda – India answers Norway's queries

India has, on 25th April, clarified some of the queries sought by Norway on 2nd April on the levy of anti-dumping duty by India on imports of caustic soda from the latter. As per the communication circulated in the WTO on 4th of April, Norway had sought clarification as to whether India is levying anti-dumping duty on imports of said product from all countries as presently India levies or has recommended ADD on imports from China, EU, Indonesia, Iran, Japan, Saudi Arabia, Korea, Qatar, USA, Norway, Thailand and Chinese Taipei, which as per Norway is a fairly wide range of countries. India has clarified that the investigations are conducted according to the provisions and not with any predetermined intent. On the question as to why Norway, as an interested party, was not provided extended time to respond to the preliminary disclosure on caustic soda and whether the said practice was consistent with Article 6.9 of the ADA, India has responded by saying that Article 6.9 does not lay down any timelines for the parties to give comments and that while sufficient time is granted by the authority to comment on disclosures, extension of time is decided on the basis of facts of each case.

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News Nuggets

Import curbs invite charge of protectionism

The WTO's Council for Trade in Goods meeting held in last week of March 2012 witnessed strong objection to Argentina's regulations regarding imports including the newly announced regulations, which came into effect in February 2012. While Columbia and EU also lodged separate protests, a joint statement was read out by the USA on behalf of 12 other members including Japan and Australia.

Argentina's measures to better its trade balance and cut imports, insisting on pre-registration, review and approval of each and every import transaction and obligation to either invest in domestic production or export goods of similar value as that of imported goods were seen to be violative of its commitments under WTO agreements, Argentina holds that measures like the new DJAI *(Declaración Jurada Anticipada de Importación)* special import license facilitates processing and imports have actually been rising.

In a related development Mexico's move prescribing reference value method for valuation of imported goods by Customs in specified cases has also drawn criticism.

A template for treaties

The new model for bilateral treaties to be negotiated by the USA was released on 20th April 2012. The fact sheet issued by the US State Department states that the new model will address issues relating to transparency in developing and implementing laws and regulations, explore possibility of review of awards rendered under investor-state arbitrations in a multilateral appellate forum, and obligate states to enforce domestic labour and environmental laws as an encouragement to investment. The new model BIT also talks about obligations of State Owned Enterprises (SOEs) and provides that a contracting state shall not impose performance requirements like export at a given level or purchase of goods from within its territory.

This proposed new model has drawn criticism from different schools of thought. While the general oft-quoted criticism of investor state arbitrations remains, a section of the trade feels that the provisions do not address the impact of SOEs adequately. Further the definition of investment is excessively broad extending to an enterprise, shares, intellectual property and assumption of risk. The denial of benefits clause which covers investments of an enterprise which has no substantial business activities in the territory of the other contacting party is considered insufficient to prevent multinational corporations from suing the home government through a foreign subsidiary.

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