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## Article

### Implications of facilitating trade — India and the Trade Facilitation Agreement

By **Greetika Francis**

The Trade Facilitation Agreement (TFA) negotiations were concluded in 2013, and the Agreement is set to come into force, in terms of Article X:3 of the Marrakesh Agreement, upon domestic ratification by two-thirds of the WTO membership, i.e., by 110 members. Nepal recently became the 108th member to ratify the TFA, setting off the clock for effectuating the TFA. With only two more ratifications, India's Category A commitments submitted to the WTO at time of ratification would become binding and enforceable. It is hence important to take a look at the commitments undertaken by India.

#### How does TFA work?

The TFA works through “self-designation” in a three tier manner. Members undertake three categories of commitments, Categories A, B and C. Category A commitments are determined by the individual Member and are enforceable on the date when the agreement comes into force. This is to say that on the date the TFA becomes enforceable, India should have implemented its Category A commitments. Category B commitments are enforceable at a self-designated future date, after the date of entry into force of the TFA. Finally, Category C commitments are those which come into force after a self-determined transition period but which require assistance and support for capacity building.

#### What are India's Category A and Category B commitments?

India had notified its Category A commitments by Notification No. WT/PCTF/N/IND/1 in March, 2016. The commitments include:

- a) the publication in an accessible manner of certain details such as the procedures for importation, exportation, and transit and required forms and documents; fees and charges imposed in connection therewith; customs valuation / classification; laws, regulations, and administrative rulings of general application relating to rules of origin;
- b) notification through the internet of a description of its procedures for importation, exportation, and transit, including procedures for appeal or review, that informs governments, traders, and other interested parties of the practical steps needed for importation, exportation, and transit, if practicable in one of the WTO's official languages, as well as the forms and documents required for the same;
- c) provision of opportunity for regular consultations between border agencies and traders or other stakeholders located within India's territory;
- d) ensuring publication of advance rulings as well as the tightening of procedures for appeal and review;

- e) with respect to SPS measures, undertake the publication of notifications based on risks, terminate measures immediately where the requisite circumstances no longer exist and notify such termination immediately as well as notification of the names and addresses of laboratories whose tests would be accepted for release of goods having SPS restrictions;
- f) enforcement of certain obligations pertaining to the fees and charges imposed on or in connection with importation, exportation and penalties;
- g) obligations pertaining to pre-arrival processing of goods, e-payments at customs ports, post-clearance audits, maintenance of records regarding average release time of goods, maintenance of procedures for expedited release of goods, provide priority clearance to perishable goods and /or an opportunity to arrange for suitable storage of the same;
- h) cooperation amongst inter-member border agencies;
- i) subject to certain conditions, permit movement of goods within the customs territory from port of entry to port of clearance;
- j) application of international best practices / sharing thereof for ensuring eased formalities in connection with importation, exportation and transit, removing the requirement for submission of original or copy of export declarations submitted to the exporter's member country, usage

of international standards, reduction of restrictions under the Agreement on Pre-shipment Inspection, shall not mandate the use of customs brokers, introduction of common and uniform border procedures and documentation requirements throughout India, permit re-consignment of goods failing to meet SPS /TBT requirements, temporary admission of goods meant for specific purpose, re-export and have undergone no change other than depreciation and wastage;

- k) ensure freedom of transit; and
- l) promote customs cooperation.

India has also notified its Category B commitments vide Notification No. WT/PCTF/N/IND/2 in January, 2017. It includes all commitments contained in Section I of the TFA, except those designated under Category A. It may be noted that Section I contains provisions for expediting the movement, release and clearance of goods, including goods in transit. According to the latest communication, Category B provisions would be implemented by India within 5 years from the date of entry into force of the TFA. Since the date of entry into force is fast approaching, India's five-year window will soon begin narrowing.

### **What happens now?**

India's Category A commitments are primarily related to measures that are already in place and do not impose an additional burden for implementation. However, the Category B commitments would require forethought

and planning for proper implementation, tentatively five years down the line.

### What does India stand to gain?

The most important question is that of dividend for India in implementing the TFA. As per the WTO's study<sup>1</sup>, the TFA would bring down trade costs, by streamlining customs procedures and timelines. It is estimated that trade costs would be reduced by 14.3%,

leading to increased exports upto \$ 1 trillion. It is also estimated that more than fifty percent of these gains would go to developing countries. While economic gains for India cannot be predicted with certainty, it is certain that eased trading norms would boost trade for India.

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## Trade Remedy News

### Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Ammonium Nitrate	Russia, Indonesia, Georgia and Iran	F.No. 14/01/2016-DGAD	11-1-2017	Time limits for filing of Rejoinder Submissions extended
Cellophane Transparent Film	China	F.No. 15/18/2016-DGAD (Case No. SSR 5/2017)	12-1-2017	ADD Sunset Review investigation initiated
Cold-Rolled flat products of alloy or non-alloy steel	China, Japan, Korea RP and Ukraine	6/2017-Cus. (ADD)	7-2-2017	Provisional anti-dumping duty extended till 16-4-2017
Colour coated/ pre-painted flat products of alloy or non-alloy steel	China, EU	2/2017-Cus. (ADD)	11-1-2017	Provisional anti-dumping duty imposed
Geogrid/ Geostrips/ Geostraps made of Polyester or Glass Fiber in all its forms (including all widths and lengths)	China	F.No. 15/14/2016 (Case No. SSR 6/2017)	23-1-2017	ADD Sunset Review investigation initiated
Hot-rolled flat products of alloy or non-alloy steel	China, Japan, Korea RP, Russia, Brazil and Indonesia	5/2017-Cus. (ADD)	7-2-2017	Provisional ADD extended till 7-4-2017

<sup>1</sup> "Speeding up trade: Benefits and challenges of implementing the WTO Trade Facilitation Agreement", World Trade Report 2015, World Trade Organization

Product	Country	Notification No.	Date of Notification	Remarks
Nylon Filament Yarn	China, Chinese Taipei, Malaysia, Indonesia, Thailand and Korea RP	F.No.15/17/2016-DGAD (Case No. SSR-2/2017) and 4/2017-Cus. (ADD)	9-1-2017 and 19-1-2017	ADD Sunset Review investigation initiated and ADD extended till 12-1-2018
Phosphoric Acid of all grades and all concentrations (excluding Agriculture/ Fertilizer Grade)	Israel and Taiwan	F.No. 15/21/2016 (Case No. SSR-4/2017)	12-1-2017	ADD Sunset Review investigation initiated
Saccharin	China	F.No.15/23/2016-DGAD (Case No. SSR-3/2017) and 3/2017-Cus. (ADD)	10-1-2017 and 19-1-2017	ADD Sunset Review investigation initiated and ADD extended till 12-1-2018

### Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Finished Carbon Steel Flanges	USA	[A-533-871] 82 FR 9719	8-2-2017	ADD - Preliminary determination of sales at less than fair value
New Pneumatic Off-the-Road Tyres	USA	A-533-869 [82 FR 9056]	2-2-2017	ADD - Final affirmative determination of sales at less than fair value and final determination of critical circumstances
New Pneumatic Off-the-Road Tyres	USA	C-533-870 [82 FR 2946]	10-1-2017	CVD - Final affirmative determination, and final affirmative critical circumstances determination, in part
Resealable Can End Closures	Australia	Anti-Dumping Notice No. 2017/06	20-1-2017	ADD - Time granted to issue final report extended upto 17 February, 2017
Zinc Coated (Galvanised) Steel	Australia	Anti-Dumping Notice No. 2017/08	25-1-2017	ADD - Time to issue Statement of Essential Facts extended

## WTO News

### WTO IP rules amended to ease access to affordable medicines

On 30 January, the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS) met to mark the entry into force of the first amendment to WTO rules since its establishment. According to the Chair of TRIPS Council, “the amendment provides a secure legal pathway to access affordable medicines and puts this new procurement tool on par with other TRIPS flexibilities directly relevant to public health”.

Adopted in 2005, and entered into force on 23 January, 2017, the *Decision on the Amendment of the TRIPS Agreement* ensures access to generic medicines, under compulsory licensing, for countries that have limited or no pharmaceutical production. This amendment allows exporting countries to grant compulsory licences to generic suppliers exclusively for the purpose of manufacture and export the required medicines to countries lacking production capacity.

### Russia seeks consultation with EU over anti-dumping duties on Russian steel

Russian Federation has requested consultations with the European Union regarding anti-dumping duties imposed by the latter on imports of certain cold-rolled flat steel products originating from Russia (DS 521).

In its communication dated 27-1-2017 which was circulated on 2-2-2017, Russia alleges that measures by EU were inconsistent

with its obligations under GATT and the Anti-dumping Agreement. According to document WT/DS521/1, EU’s conduct of Anti-dumping investigation specifically violates Article 2 in calculation of Russian exporter’s costs of production, treating a Russian exporter as non-cooperating and discounting their sales for the purposes of conducting the ordinary course of trade test, and non-consideration of all domestic sales of the like product, etc. Similarly, violation of Article 3 is alleged contending that the European Union’s determination of injury to the Union industry failed to make an objective examination. It is also stated that EU failed to determine whether there was sufficient evidence to justify initiation of the investigation. It may be noted that currently there are 8 disputes before the WTO, between the two neighbours.

### Panel report on Russian duties on vehicle imports from Germany and Italy, issued

WTO’s DSB panel has issued its report in the case brought by the European Union - “*Russia — Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*” (DS479). The Panel has upheld the claims by EU concerning mis-identification of the domestic industry. Russia had considered the domestic industry as having one producer, having 87.8% of domestic production, and ignoring another known producer that had also responded to the Russian questionnaire. The Panel held that such exclusion risked



material distortion of the injury analysis and resultant violation of the AD Agreement. The Panel also found that Russia's actions were inconsistent with the AD Agreement with regard to their failure to account for the impact of the economic crisis in determining the appropriate rate of return in its consideration of price suppression and the consequent analysis with regard to causation.

The Panel however found that EU did not establish sufficiently its claims in respect of violation of certain provisions of the AD Agreement by the Department for Internal Market Defence of the Eurasian Economic Commission (EEC). In particular, it was held that the European Union failed to establish that Russian authorities acted inconsistently with Articles 3.1 and 3.4 by failing to evaluate the domestic industry's return on investments, actual and potential effects on cash flow and the ability to raise capital or investments. Similarly, certain claims in respect of causation and non-attribution were also rejected by the panel. This report is yet to be adopted by the WTO Members and may be appealed by either party.

### **Chinese agricultural subsidies — Panel established**

On 25 January, the Dispute Settlement Body (DSB) has established a panel to examine subsidies provided by China to domestic producers of wheat, Indica rice, Japonica rice and corn. The dispute was instituted by United States of America. According to USA, China provides domestic support in excess

of its product-specific *de minimis* level of 8.5 per cent for each of the specified products, and which is in excess of what is stated in China's Accession Protocol. Chinese measures are hence alleged to be inconsistent with its obligations under Articles 3.2, 6.3, and 7.2(b) of the Agriculture Agreement. It may be noted that India along with 25 other countries (considering EU as one unit) are participating as third parties in the dispute which has large ramifications for developing countries.

### **USA seeks consultation with China over aluminium subsidies**

In yet another dispute between USA and China, United States has sought consultations with China regarding alleged subsidies provided by the latter to its producers of primary aluminium (also known as electrolytic aluminium). It is alleged that loans and other financing to primary aluminium producers, as well as the provision by the Chinese government of coal, alumina and electricity to one producer of primary aluminium, are subsidies that appear to be causing adverse effects. According to the communication dated 12-1-2017, USA alleges that China provides loans and other financing to primary aluminium producers, at lesser interest rates, through banks that are government agencies or entities, public bodies, or private bodies. US alleges that the measures are inconsistent with Articles 6.3(a), (b), (c) and (d) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and Article XVI:1 of the GATT 1994.

## USA disputes Canadian measures affecting sale of wine in stores

United States of America has requested WTO dispute consultations with Canada regarding measures maintained by the Canadian province of British Columbia governing the sale of wine. US alleges that these measures discriminate against imported wine by applying different conditions of sale in grocery stores, in contravention of Canada's obligations under

the General Agreement on Tariffs and Trade (GATT) 1994. According to the communication circulated by US on 18-1-2017, the measures appear to discriminate against imported wine by allowing only domestic wine to be sold on regular grocery store shelves while imported wine may be sold in grocery stores only through a so-called "store within a store". The challenge hinges on the interpretation of Article III:4 of GATT 1994.

### FTA News

#### FTA – Asia update

Last month saw some hectic developments on the FTA front. While the USA's decision to withdraw from the Trans-Pacific Partnership Agreement (TPP) was not a surprise, there were many other developments compelling Asian international trade community to deliberate internally on re-working of strategies.

As per reports while India is considering comprehensive FTA with Peru, UK has also expressed its eagerness for a trade agreement with India. Further, India will formally launch negotiations with the Russia-led Eurasian Economic Union in 2017. There was news that India wants to pursue an agreement with Gulf Cooperation Council. Further, though

China-Sri Lanka FTA is in the final stages of agreement, India is pursuing negotiations to conclude an Economic and Technology Cooperation Agreement (ECTA) with Sri Lanka in order to take the FTA to the next level.

Another round of negotiations concluded among China, Japan and Republic of Korea last month, in respect of their trilateral FTA. According to reports, negotiations have been stepped up for 16-member Regional Comprehensive Economic Partnership (RCEP) comprising of 10 ASEAN members along with China, India, Japan, South Korea, Australia and New Zealand.

### Ratio Decidendi

#### Circumvention of anti-dumping duty – Non-cooperation by party does not prove transshipment

Court of Justice of the European Union has upheld the decision of the General

Court wherein the lower court had held that the European authorities (Council) had no evidence to conclude that the entity in question was involved in transshipment operations. The issue involved alleged circumvention of anti-



dumping duties imposed on bicycles from China, by goods imported from Sri Lanka. Additionally, the lower Court had held that the Council was not entitled to conclude that the company was engaged in transshipment, just because the company was unable to prove that it was a Sri Lankan bicycle producer or that it satisfied the criteria laid down in Article 13(2) of the Basic Regulation.

Dismissing the appeal, the CJEU was of the view that it is not possible to conclude on the basis of two findings - change in the pattern of trade and failure of the producer-exporters to cooperate, that the company was involved in transshipment operations as an individual producer-exporter or that such practices existed at national level in Sri Lanka. Observing that for existence of circumvention each of the four conditions, including the condition that the change in the pattern of trade must stem from circumvention practices should be met, the court was of the view that

the authorities cannot infer directly from an interested party's failure to cooperate that transshipment has occurred.

The conditions for circumvention of anti-dumping duty according to Article 13(1) of the EU's Basic Regulation as stated in the judgement are – first there must be a change in the pattern of trade between a third country and the EU or between individual companies in the country subject to measures and the EU; second, that change must stem from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty; third, there must be evidence of injury to EU industry or that the remedial effects of the anti-dumping duty are being undermined; and fourth, there must be evidence of dumping. [*Council of European Union, and Ors. v. City Cycle Industries – Judgement dated 26-1-2017 in Joined Cases C-248/15 P, C-254/15 P and C-260/15 P, CJEU*]

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