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Article

The upcoming WTO Ministerial Conference: What to expect for India

By **Edouard Descotis**

Every two years the 164 Members of the Word Trade Organization ("WTO") gather in a Ministerial Conference to give political direction to the world trade body and negotiate new instruments to better regulate international trade. The next meeting is scheduled to be held in Buenos Aires on 10-13 December 2017 and the agenda is yet to be decided. Over the last few months, developed and developing countries have been battling to impose their own items for the discussions. On the one hand, developed countries are pushing for discussions on new issues such as e-commerce and investment. On the other hand, developing countries led by India first wish to reach a deal on issues still under negotiation before moving on to open new discussions. The outcome of the Ministerial Conference is likely to reflect the diverging interests of WTO Members. Over the last few years, India has adopted a strong stance at the WTO and has battled to clinch a peace clause on food security at the Bali Ministerial Conference in 2013. India is expected to play hard ball on this issue in Buenos Aires but what about the other issues?

India's stance and priorities

India has been a key player in WTO negotiations and the position taken by India is likely to influence the talks in Buenos Aires. Indeed, India has often led the discussions on behalf of the developing countries. Ahead of the Ministerial Conference, India has argued that the negotiations of the Doha Development Round should first be concluded before turning to new issues. The Doha Development Round has been ongoing since 2001 without any agreement so far. The discussions have dragged on due to the fact that "nothing will be agreed unless everything is agreed". Two elements of the Doha Development Round are of particular interest for India: agriculture and trade in services. Over the last few months, India has been at the forefront of discussions on trade in services and even called for a trade facilitation agreement for services by submitting a proposal in February 2017. The priorities of India are clear for the upcoming WTO gathering - Circumscribe the discussions to the pending issues of the Doha Development Round and rally around the proposal on trade facilitation for services.

E-commerce

Developed countries including the United States and the European Union are pushing for discussions on e-commerce in Buenos Aires. India appears extremely reluctant to make any commitments on these issues as it believes that they could limit its policy space. Despite the huge discrepancy between developed and developing countries on e-commerce capacity, developing countries do not form a homogeneous group on e-commerce. China has said they are open to engage in discussions on new rules to liberalize cross-border e-commerce. While China argues the new rules should focus on the promotion and facilitation of cross-border trade in goods sold on the internet and take into account the specific needs of developing countries, India claims that the proposal supported by developed countries could provide unfair

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market access to foreign companies and threaten the domestic e-commerce platforms.

Investment

Important developments in the field of investment recently happened in India. In July 2016, India decided to unilaterally terminate Bilateral Investment Treaties (BITs) signed with 58 countries. Reportedly, the BITs were allowed to expire on April 1, 2017. India has been pushing for the conclusion of new BITs based on a template text providing for new provisions. The decision to negotiate new BITs has been guided by the disputes initiated by several foreign investors suing India under multiple BITs. Proposals to launch discussions on investment facilitation have been made by developed countries and several WTO Members, including China, Korea and Russia. The strategy followed by India is to negotiate investment provisions on bilateral ground and not to support any multilateral talks on investment facilitation at the WTO.

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Trade Remedy News

Trade Remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Caustic Soda	Saudi Arabia, USA	F. No. 7/16/2017 -DGAD	20-11-2017	ADD Sunset Review initiated
Cellophane Transparent Film	China	F. No. 14/7/2005 - DGAD	9-11-2017	ADD Sunset Review terminated pursuant to Delhi High Court Order
Cold Rolled Flat Product of Stainless Steel	China, Korea, EU, South Africa, Taiwan, Thailand and USA	52/2017-Cus. (ADD)	24-10-2017	Definite anti-circumvention duty imposed on circumventing products
Colour coated/pre-painted flat products of alloy or non-alloy steel	China, EU	49/2017-Cus. (ADD)	17-10-2017	Definitive anti-dumping duty imposed (benchmark basis)
Geogrid/ Geostrips/ Geostraps made of Polyester or	China	Office Memo in F.No.15/14/2016-DGAD	9-11-2017	ADD Sunset Review terminated pursuant to Delhi High Court Order

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Product	Country	Notification No.	Date of Notification	Remarks
Glass Fiber in all its forms (including all widths and lengths)				
Metronidazole	China	F.No. 7/6/ 2017 -DGAD	9-11-2017	ADD Sunset Review terminated pursuant to Delhi High Court Order
Para Nitro Aniline (PNA)	China	46/2017-Cus. (ADD)	4-10-2017	Definitive anti-dumping duty imposed
Phosphoric Acid	Israel, Taiwan	F. No. 15 / 21 / 2016 - DGAD	9-11-2017	ADD Sunset Review terminated pursuant to Delhi High Court Order
Rubber Chemicals, namely, MOR from China & PX-13 from EU	China, EU	54/2017-Cus. (ADD)	17-11-2017	Definitive anti-dumping duty imposed
Soda Ash	Turkey, Russia	51/2017-Cus. (ADD)	18-10-2017	Rescinds Notification 18/2013-Cus. ADD in supersession of 56 / 2016-Cus. (ADD) subject to outcome of SCA No. 14202/ 2017 pending before Gujarat High Court
Soda Ash	China, EU, Kenya, Pakistan, Iran, Ukraine, USA	50/2017-Cus. (ADD)	18-10-2017	Rescinds Notification 34/2012-Cus. ADD in supersession of 55/ 2016-Cus. (ADD) subject to outcome of SCA No. 14202/ 2017 pending before Gujarat High Court
Sodium Chlorate	Canada, China and EU	53/2017-Cus. (ADD)	2-11-2017	Definitive anti-dumping duty imposed
Solar Cells whether or not assembled partially or fully in modules or panels or on glass or some other suitable substrates	China, Malaysia, Taiwan	F.No. 6 / 30 / 2017 - DGAD	3-10-2017	Final list of sampled parties published and oral hearing re-scheduled to 12-12-2017

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Product	Country	Notification No.	Date of Notification	Remarks
Uncoated Copier Paper	Indonesia, Thailand, Singapore	F.No. 6/32/ 2017 - DGAD	2-11-2017 and 23-11-2017	ADD investigation initiated and time for filing questionnaire response extended till 1-1-2018
Veneered Engineered Wooden Flooring	China, Malaysia, Indonesia, European Union	F. No. 14 / 34 / 2016 - DGAD	14-11-2017	Oral Hearing to be held on 28-11-2017
Wire Rod of Alloy or Non-Alloy Steel	China	48/2017-Cus. (ADD)	9-10-2017	Definitive anti-dumping duty imposed (benchmark basis)

Trade Remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Fine Denier Polyester Staple Fiber	USA	82 FR 51387 [C-533-876]	6-11-2017	Preliminary affirmative CVD determination
Lined Paper Products	USA	82 FR 46764 [A-533-843]	6-10-2017	Preliminary Results of ADD Administrative Review and Preliminary Determination of No Shipments; 2015-2016
Lined Paper Products	USA	82 FR 51390 [C-533-844]	6-11-2017	Affirmative CVD sunset review
Polyethylene Terephthalate Resin	USA	82 FR 48213 [C-533-862]	17-10-2017	Notice of Rescission of Countervailing Duty Administrative Review, 2015-2016
Polytetrafluoroethy-lene Resin	USA	82 FR 49592 [C-533-880]	26-10-2017	CVD investigation initiated
Stainless Steel Bar	USA	82 FR 51393 [A-533-810]	6-11-2017	Affirmative ADD sunset review

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Product	Country	Notification No.	Date of Notification	Remarks
Steel Wires	EU	2017 / C 334 / 03 [Case AD591a]	6-10-2017	Re-opening of investigation *qua* one exporter, Viraj Profiles Limited, pursuant to judgment of General Court of the EU dated 11 July 2017

WTO News

US AD measures on Korean oil country tubular goods violate WTO provisions

On 14 November, the WTO circulated the panel report in "*United States — Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea*" (DS488). The Panel Report is yet to be adopted and is subject to appeal by either party.

Korea challenged the USDOC's failure to use actual data of participating Korean exporters in their determination of constructed value profit rate even though the same was available on record. Korea challenged the same as inconsistent with the chapeau of Article 2.2.2 of the AD Agreement. The Panel upheld that even where the actual sales of Korean exporters were discarded for purposes of normal value, Article 2.2.2 requires the investigating Authority to accept and rely on the amounts for administrative, selling and general costs and for profits on the basis of actual data of the Korean exporters. A similar claim was raised with respect to whether USDOC should have considered the actual data of the exporters' third-country market sales to derive profit, but the Panel exercised judicial economy with respect thereto.

Korea also challenged the USDOC's investigation with respect to the provisions contained under Article 2.2.2 (i) and (iii), whereby the Authority defined "same general category of products" too narrowly and rejected Article 2.2.2(i) as a basis to calculate constructed value profit and determined that it could not calculate a profit cap under Article 2.2.2(iii). The Panel upheld the Korean claim.

With respect to other issues raised by Korea pertaining to the export prices, public notice and disclosure, the Panel rejected Korea's claims and found no inconsistency with respect to the conduct of investigation by USDOC.

Indonesia's appeal against Panel report in dispute involving import restrictions on horticultural and animal products dispute, rejected

On 9 November 2017, the WTO Appellate Body issued its report in the cases brought by New Zealand and the United States in "*Indonesia – Importation of Horticultural Products, Animals and Animal Products*" (DS477 and DS478). US and New Zealand had challenged 18 measures of Indonesia, covering, as a whole as well as elements of, Indonesia's import licensing regime for horticultural products, animals and animal products as well as the Indonesian requirement whereby importation of horticultural products, animals and animal products depends upon Indonesia's determination of the sufficiency of domestic supply to satisfy domestic demand. The Panel had found that all 18 measures at issue

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were prohibitions on importation or restrictions having a limiting effect on importation inconsistent with Article XI:1 of the GATT 1994 and were not justified under Article XX of the GATT 1994. The Panel also rejected Indonesia's reliance on Article XI:2(c)(ii) of the GATT 1994 observing that this exemption was rendered inoperative by virtue of Article 4.2 of the Agreement on Agriculture.

Indonesia appealed the Panel Finding in four parts:

(i) Indonesia claimed that the Panel was not justified in analysing claims under Article XI:1 of the GATT, 1994 prior to examining claims under Article 4.2 of the Agreement on Agriculture, the *lex specialis*.

(ii) Indonesia claimed that the burden of proof under the footnote to Article 4.2 of the Agreement on Agriculture rested with the complainants as it was "*not possible for a complainant to present a prima facie case of violation under Article 4.2 without offering any evidence or argumentation that the challenged measure is not justified under Article XX of the GATT 1994*".

(iii) Indonesia claimed that the Panel erred in finding that Indonesia cannot invoke Article XI:2(c)(ii) of the GATT 1994 to exclude certain measures from the obligation under Article XI:1 because Article XI:2(c) has been rendered "inoperative" by Article 4.2 following the entry into force of the Agreement on Agriculture.

(iv) Indonesia claimed that the Panel erred in its analysis of certain measures and Indonesia's defence thereto where it examined the chapeau of Article XX of GATT, 1994 prior to examining the applicable paragraphs of Article XX.

The Appellate Body rejected Indonesia's claims and upheld the findings contained in the Panel Report.

USA's revised "dolphin-safe" tuna labelling measure not violate WTO provisions

The WTO on 26-11-2017 issued the panel reports in the cases brought by the United States and Mexico in "*United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States*" and "*United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico*" (DS381).

The Panels concluded that the 2016 Tuna Measure accorded to Mexican tuna products treatment no less favourable than that accorded to like products from the United States and other countries, and therefore was consistent with Article 2.1 of the TBT Agreement. Resultantly, the Panels also concluded that the 2016 Tuna Measure was not applied in a manner that constituted a means of arbitrary or unjustifiable discrimination, and was therefore, justified under Article XX of the GATT, 1994.

Indonesian restrictions on chicken imports inconsistent with GATT and SPS provisions

On 17 October, the WTO issued the panel report in the case brought by Brazil in "*Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products*" (WT/DS484).

Brazil challenged the Indonesian regulations concerning imports of chicken meat and chicken products into Indonesia which have effectively led to zero trade between the parties with respect to the subject goods. It developed claims pursuant to Articles III:4 and XI of the GATT 1994, Article 4.2 of the Agreement on Agriculture, Article 3.2 of the Agreement on Import Licensing Procedures, and Article 8 and Annex C(1)(a) of the SPS

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Agreement. Indonesia however invoked defences under Article XX of the GATT 1994, relating to food safety and enforcement of halal requirements and of consumer protection.

The Panel found that the Indonesia import mechanism and certain specific elements thereof amounted to an informal licensing mechanism which qualified as a "legal ban" inconsistent with Article XI of GATT 1994 and unjustified under Article XX(d) of GATT 1994. With respect to certain conditions having an equivalent domestic measure, the Panel found its enforcement, though not the measure itself, to be inconsistent with Article III:4 of GATT 1994 resulting in a competitive disadvantage for imported products. The Panel also found that Indonesia had caused an undue delay in the approval of the veterinary health certificates from Brazil due to non-submission of information relating to halal assurances (non SPS information) by Brazil and therefore, violated provisions of Article 8 and Annex C(1)(a) of the SPS Agreement.

With respect to the measure concerning surveillance and implementation of halal slaughtering and labelling requirements for imported chicken meat and chicken products established by different Indonesian regulations, the Panel found that Brazil had failed to demonstrate less favourable treatment between fresh domestic chicken and frozen imported chicken, within the meaning of Article III:4 of the GATT 1994. Finally, the Panel found no merit in Brazil's claim regarding the existence of an alleged (unwritten) general prohibition contained in Indonesia's regulations or policy.

Ukraine files WTO complaint over Russian import, transit restrictions

On October 19, the WTO circulated Ukraine's request to enter into consultations with Russia regarding certain Russian measures affecting trade in certain products such as juice, alcoholic beverages, confectionery and wallpaper from Ukraine. The dispute (DS 532) raises challenges under the WTO Agreements pertaining to GATT, TBT and SPS. More interestingly, Ukraine has also challenged consistency with certain provisions of the Trade Facilitation Agreement.

GCC Countries launch Safeguard investigation on prepared additives for cements, mortars or concretes

On 3 October, Bahrain notified the WTO's Committee on Safeguards that the GCC's competent authority initiated on 20 September 2017 a safeguard investigation on prepared additives for cements, mortars or concretes (chemical plasticizers). According to the Notification under Article 12.1(A) of the Agreement on Safeguards, the data showed a situation of overall deterioration of the GCC (Cooperation Council for the Arab States of the Gulf) industry indicators such as decline of sales, market share, profits, return on investment, production, capacity utilization rate, cash flow, employment, as well as the large increase in inventory, in conjunction with the increase of imports.

China, US measures under review at WTO Committees on subsidies and safeguards

The subsidy programmes and countervailing actions of China and the United States were the focus of the WTO Members at the meeting of the WTO's Committee on Subsidies and Countervailing Measures (SCM Committee). India also was asked when it intends to phase out its export subsidy programmes for domestic industries.

United States and China also faced criticism, in the Meeting of WTO's Committee on Safeguards, regarding their new safeguard actions. Members expressed concern regarding the renewed use of

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safeguard actions being undertaken by WTO members, mostly pertaining to imports of iron or steel products. It may also be noted that the number of new safeguard actions notified to the WTO and addressed at the 23 October committee meeting rose to 24 compared to 16 at the last meeting in April.

Ratio Decidendi

Invoice, for company-specific ADD, can be presented after declaration

In a case where valid commercial invoice was presented to Customs authorities after Customs declaration, Court of Justice of the European Union has held that such presentation for the purpose of fixing a company-specific anti-dumping duty is not invalid, provided all other conditions are satisfied.

The EU Customs Office had refused importer's application for refund contending that a valid commercial invoice which was drawn up or presented retrospectively was not acceptable. The importer had paid higher anti-dumping duty at import due to unavailability of said invoice. The Court in this regard noted that though the presentation of a valid commercial invoice conforming to the requirements is an indispensable condition for the application of an individual anti-dumping duty rate, the wording of the provisions provided no information whatsoever as to when that invoice must be presented. Fact that the provisions prescribed a procedure enabling customs authorities, on their own initiative or at the request of the declarant, to amend the customs declaration after release of the goods covered by that declaration, i.e., after that declaration has been made, was taken into consideration by the Court while answering the reference in favour of the importer. [*Tigers GmbH* v. *Hauptzollamt Landshut* – Judgement dated 12-10-2017 in Case C‑156/16, CJEU]

EU anti-circumvention provisions – Investigation of origin of parts and reliance on certificate of origin

In a case involving investigation of circumvention of anti-dumping duty imposed on bicycles from China, by imports of said product from Pakistan, the Court of Justice of the European Union has held that the European authorities committed error of law in applying 'by analogy' Article 13(2)(b) of the Basic Regulation to the bicycle parts purchased in Sri Lanka in order to verify their origin in assembly operations in Pakistan. It annulled the Commission Implementing Regulation (EU) 2015/776 of 18 May 2015 extending definitive anti-dumping duties imposed on imports of bicycles originating in China to imports of bicycles consigned from Cambodia, Pakistan and the Philippines, to the extent that it applied to an exporter (appellant) from Pakistan. The case involved import of bicycle parts from Sri Lanka for assembling in Pakistan and then export to EU. The Court was of the view that by applying 'by analogy' Article 13(2)(b) of the basic regulation, the EU authorities examined whether the manufacture of the bicycle parts in Sri Lanka circumvented the anti-dumping measures on bicycles originating in China, which was not, however, the aim of the investigation.

The Court however also observed that although it is sufficient to refer to where the parts used for assembling the final product are 'from' for the purposes of applying Article 13(2)(b) of the EU's Basic Regulation, it may be necessary, in case of

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doubt, to verify whether the parts 'from' a third country actually originated in another country. The Court was of the view that European authorities' argument that the 'origin' of the parts is not relevant for the purposes of applying Article 13(2) of the basic regulation does not fully reflect the interpretation which the European Union judicature gave to that provision.

Further, upholding the rejection by the European authorities on the reliance placed by the exporter on 'From A' certificate of origin issued by Sri Lankan authorities, it was held that although it has evidentiary value in relation to origin of goods to which it relates, same is not absolute. The Court was of the view that such a certificate, completed by a third country, cannot bind the EU authorities with regard to the origin of those goods by preventing them from verifying the origin by other means where there is objective, sound and consistent evidence creating a doubt as to the true origin of the said goods. [*Kolachi Raj Industrial (Private) Ltd.* v. *European Commission* - Judgement of the General Court (Seventh Chamber) dated 10-10-2017 in Case T-435/15]

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