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Article

Third party rights under WTO DSU – Ongoing reforms

By **Radhika Sharma**

The WTO Dispute Settlement Understanding (DSU) is a central element in providing security and predictability to the multilateral trading system created under the WTO. Keeping in mind the value that the DSU adds to the WTO mechanism, it was realized that constant reforms need to be carried out in the text of the DSU keeping in mind the interests of member countries.

In the Doha Round, it was decided that the reform of the dispute settlement procedures would be taken up separately from the rest of the negotiations. Though the deadline of 2003 Doha mandate for the negotiations on improvements and clarifications of the DSU has elapsed and the negotiations have so far remained inconclusive, various amendments proposed in the text are well explained in the Report by the Chairman, to the Trade Negotiations Committee Ambassador Ronald Saborío Soto[1].

The main topics which are being discussed at DSU negotiations include Third Party Rights, Strictly Confidential Information, Agreement by Mutual Consent, Developing Countries issues, Sequencing, Post-Retaliations, Remand procedure, Transparency, Compliance and Surveillance, Flexibility and Member Control, Amicus Curiae Briefs and Time frames and Time-savings.

One of the important topics from India's perspective in the negotiations is the discussion around enhanced Third Party Rights and how the proposed amendment will impact India's interests. Issues have been considered for extension of third party rights, keeping in view various disputes where extension to third party right has been granted for eg. *EC-Bananas*[2], *and EC- Export Subsidies on Sugar*[3] and where as extensions have been denied[4], which has made a significant difference.

Current provision and amendments proposed for third party rights

Third party rights have been granted in the present DSU starting from consultation stage under Article 4.11 of DSU, which gives rights to parties which have substantial trade interest in the matter by notifying the consulting members and the DSB within 10 days from the request for consultations being made. Proposed amendment to this Article 4.11 is merely technical. Request to join consultation should be made in writing[5] and if the consulting member has an objection to such joining, it has to revert back in 7 days of such request being made or else the request

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1 TN/DS/25, dated 21 April 2011. Chairman Report.

2 Panel Report WT/DS27/ECU, adopted on 22/05/1997; Appellate BodyReport WT/DS27/AB/R, 5/09/19997.

3 EC- Export subsidies on Sugar (WT/DS/283/R, WT/DS/266/R, WT/DS265/).

4 Australia - Measures Affecting Importation of Salmon - Report of the Panel WT/DS18/R

5 2013-JOB/DS/14.(Dispute Settlement Body - Special session - Compilation of recent draft legal text)

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will be accepted *per se.*[6] This amendment will serve the purpose of automatic addition of the third party in absence of timely objection by the consulting members.

Participation under panel proceeding is currently provided under Article 10.2, 10.3 and Appendix 3 para 6 where any party with substantial interest can request to join a panel proceeding. The present proposed amendment as provided in the Chairman's report[7] is that the third party wishing to join shall request not later than 10 days to the DSB and the parties to the dispute. However, even after the passage of 10 days, such a request may be considered. The proposed amendments relate to right of the third parties to-

(i) Be present in all substantive meetings;

(ii) Make written submissions prior to first substantive meeting;

(iii) Make oral statement and respond to questions in first/each substantive meeting;

(iv) Be granted additional rights after agreement by the parties to the dispute.

However, additional rights to the third parties have been granted in past disputes, as discussed above.[8] In respect of submissions by third parties, this has been a matter of practice which is proposed to be laid down in words. Parties to the dispute are supposed to provide copies of the submission to all third parties and all third parties are supposed to provide submissions to all parties to the dispute, at both appellate[9] and panel stages.

One of the amendments in the panel proceeding is that all third parties may notify their "interests" which at present is required to be a "substantial interest". However, there are no clear terms provided in the proposed amendment in respect of what kind of interest may be considered for making such a request, as "interest" may vary from member to member. Also, submissions by third parties in all substantive meeting may increase the burden on panels and may make it difficult for the panel to meet its deadlines.

Currently, provisions for third party rights at the appellate stage are very limited. Article 17.4 provides that only parties to disputes and not third parties may appeal and only the parties which have previously participated at the panel stage and made submissions therein can participate in the Appellate Body proceeding. The proposed amendment to Article 17.4 is that any third party notifying its interest can join even at appellate stage, notifying its interest not later than 5 days[10] of the filing of the Appeal. Also, right to be heard and to make written submission even during appellate stage is being proposed.

6 TN/DS/26 and JOB/DS/14 as referred under Chairman report.

7 TN/DS/25 (Dispute Settlement Body - Special session - Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee)

8 EC- Banana III, EC-Trade Preference, EC- Export subsidies on Sugar (WT/DS/283/R, WT/DS/266/R, WT/DS265/), EC-Hormones)

9 Proposed amendment to article 17 .4.

10 TN/DS/25

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The proposal for a right to be heard before the Appellate Body without having been heard or having participated before the Panel is not very appealing. While it is true that this may give the Appellate Body a wider perspective and more legal substance for the interpretation of the ongoing dispute, however, it may also increase the workload and hinder the speedy redressal of the dispute. Further, given the strictures of the Appellate Body timelines, this may not always be feasible.

Lastly, the participation of third parties at the arbitration stage is not covered under the present text of the DSU but has been proposed for inclusion in Article 22.6. It is proposed that a third party may request for a right to join in arbitration by notifying to the DSB no later than 10 days after the initiation of the arbitration.

Conclusion

Enhanced third parties rights, as discussed in the foregoing paragraphs, will be beneficial to developing countries. It will provide an opportunity to the parties who cannot initiate disputes due to financial constraints to join as third parties and ensure that their systemic interests are also taken care of. It is also an opportunity for parties unfamiliar with WTO proceedings and the procedure of the panel and appellate stages to participate by way of enhanced third party rights and obtain exposure and garner experience from the same. At the same time, one should note that even today, some of the developed countries such as the United States and the European Union join as third parties in almost all the disputes and try to put on record their views. Enhanced third party rights would give them more leeway in expressing their opinions in a more structured manner in every case. Whether such a course of action is in the best interests of developing countries is a question to be examined separately. In so far as India is concerned, it has participated in 108 disputes as third party. No doubt, India has gained significant exposure to DSB practices through such participation.

However, in contrast, enhanced third party rights may not always be useful considering time obligations imposed with respect to dispute proceedings. While allowing every party to make submissions and to hear would be time consuming, it may also not provide sufficient opportunity to a Panel and the Appellate Body to study, scrutinize and analyze the submissions made by each and every party and include it in its report as all submissions may not be as relevant as the disputing parties' submissions and at the same time they may not be less important to be ignored. While deciding on the revisions to the text of DSU, Members should also keep in mind that a WTO dispute need not necessarily be a multilateral exercise in which every one should be given full rights of participation. There is a strong case to maintain a balance between the rights of third parties to participate in a dispute and the need to dispose the disputes in a time bound manner.

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Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Acetone	Japan and Thailand	F.No.15/29/2014-DGAD	2-6-2015	ADD sunset review - Time for submission of questionnaire response extended till 11-6-2015
Acrylic Fibre	Korea RP and Thailand	27/2015-Cus. (ADD)	1-6-2015	ADD re-imposed after sunset review
Cast aluminium alloy wheels or alloy road wheels used in motor vehicles	China, Korea RP and Thailand	21/2015-Cus. (ADD)	22-5-2015	Definitive anti-dumping duty imposed
Castings for Wind Operated Electricity Generators	China	F.No.17/6/2013-DGAD	27-5-2015	Time period for Countervailing duty (Anti-subsidy) investigation, extended till 28-11-2015
Ceramic Glazed Tiles	China	F. No.15/38/2010-DGAD	2-6-2015	ADD New Shipper Review – Final findings issued
Compact Fluorescent Lamps	China	F. No. 15/22/2013-DGAD	11-5-2015	ADD sunset review recommends extension of duty
Electronic Calculators	China	24/2015- Cus. (ADD)	29-5-2015	Definitive anti-dumping duty imposed
Hot Rolled Flat Products of Stainless Steel of ASTM Grade 304	China, Korea RP and Malaysia	28/2015-Cus. (ADD)	5-6-2015	Definitive anti-dumping duty imposed
Morpholine	China, EU and USA	18/2015-Cus. (ADD)	18-5-2015	Definitive anti-dumping duty continued, subsequent to mid-term review, except on imports from USA
Pentaerythritol	Russia	20/2015-Cus. (ADD)	22-5-2015	Definitive anti-dumping duty imposed
Phenol	Japan and Thailand	F.No.15/5/2015-DGAD	2-6-2015	ADD sunset review - Time for submission of questionnaire response extended till 17-6-2015
Plain medium density fibre board having thickness of 6mm and above	Indonesia and Vietnam	F.No.14/23/2014-DGAD	7-5-2015	ADD investigation initiated

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Product	Country	Notification No.	Date of Notification	Remarks
Poly Vinyl Chloride Paste Resin	Korea RP, Taiwan, China, Malaysia, Thailand and Russia	25/2015-Cus. (ADD)	1-6-2015	Anti-dumping duty extended up to 25-7-2016, after initiation of sunset review
Poly Vinyl Chloride Paste Resin	EU	26/2015-Cus. (ADD)	1-6-2015	Anti-dumping duty extended up to 24-6-2016, after initiation of sunset review
Polytetrafluoroethylene (PTFE)	Russia	17/2015-Cus. (ADD)	1-5-2015	Anti-dumping duty extended up to 2-5-2016, after initiation of sunset review
Purified Terephthalic Acid including MTA and QTA	China, EU, Korea RP and Thailand	23/2015-Cus. (ADD)	27-5-2015	Definitive anti-dumping duty imposed on imports from Korea RP and Thailand. Imports from China and EU found to be de minimis.
Sodium Citrate	China	19/2015-Cus. (ADD)	20-5-2015	Definitive anti-dumping duty imposed
USB Flash Drives	China and Chinese Taipei	22/2015-Cus.(ADD)	22-5-2015	Definitive anti-dumping duty imposed

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Certain Lined Paper Products	USA	[A-533-843] 80 FR 29300	21-5-2015	ADD – Weighted average dumping margin revised pursuant to administrative review
Polyethylene Terephthalate Resin	USA	[C-533-862] 80 FR 27635	14-5-2015	CVD investigation - Preliminary determinations postponed
Zinc Coated (Galvanised) Steel	Australia	Anti-dumping Notice No. 2015/60	11-5-2015	Time granted to issue Statement of Essential Facts, extended

WTO News

Panel established on Indonesia's measures on agricultural products

A panel to examine complaints by New Zealand and the United States about alleged import restrictions by Indonesia on agricultural products has been established on 20 May

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2015. Both the complainants have said that Indonesia's measures were inconsistent with core WTO obligations. According to the consultation papers, the allegations are that Indonesia imposes prohibitions or restrictions on imports of horticultural products, animals, and animal products; imposes unjustified and trade-restrictive non-automatic import licensing requirements on imports of such products; accords less favourable treatment to imported products than to like products of national origin; has imposed unreasonable and discriminatory pre-shipment inspection requirements; and has failed to notify and publish sufficient information concerning its import licensing measures.

Indonesian measures are alleged as violative of Articles III:4, X:1, XI:1 of the GATT 1994; Article 4.2 of the Agriculture Agreement; Articles 1.2, 1.5, 1.6, 2.2, 3.2, 3.3, 5.1, and 5.2 of the Import Licensing Agreement; and Articles 2.1 and 2.15 of the Agreement on Pre-shipment Inspection. To participate in the panel's proceedings, Australia, Brazil, Canada, China, the EU, India, Japan, Norway, Paraguay, Singapore and Chinese Taipei have reserved their third-party rights.

India's prohibitive measures on poultry from USA not correct – DSB Appellate Body

Appellate Body of the WTO DSB has upheld most of the findings of the panel in the dispute *"India – Measures concerning the importation of certain agricultural products"* (DS430), relating to certain prohibitions imposed by India on importation of various poultry products and livestock from USA supposedly because of concerns related to Avian Influenza. The panel had, last year, found the measures put up by India as being violative of various provisions of the Sanitary and Phytosanitary (SPS) Agreement among the WTO members. The Appellate Body in its report circulated on 4-6-2015 found the measures to be in violation of Articles 5.1 and 5.2 inasmuch as they were found not based on risk assessment and Article 5.6 of the SPS because they are significantly more trade restrictive than required to achieve India's appropriate level of protection for such products.

Further, inconsistency with other Articles, namely, 3.1, 6.1, 6.2 was also upheld by the Appellate Body of the WTO. However, it reversed the finding on violation of Article 2.2 (measures to be based on scientific principles and is not maintained without sufficient scientific evidence), finding that the panel had failed to consider that presumption of inconsistency with Article 2.2 was rebutted by the arguments and evidence presented by India.

Russia files disputes against Ukraine over ammonium nitrate and the EU over ADD calculations

On 7 May 2015, the Russian Federation notified the WTO Secretariat of a request for consultations with Ukraine regarding anti-dumping measures adopted by the latter on imports of ammonium nitrate from Russia (DS493). According to Russia, Ukrainian measures are inconsistent with many of the provisions of WTO's Anti-dumping Agreement including Articles 2.1, 2.2, 2.4, 5.8, 9.2, 11.1,

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11.2 and 11.3. In another dispute with the European Union, Russia has challenged anti-dumping duty calculations in respect of certain imports from Russia (DS494). As per the consultation papers dated 7-5-2015, Russia challenges the "cost adjustment" administrative procedures, methodologies or practices of the European Union for calculating dumping margin in certain anti-dumping investigations and reviews. It is alleged that the EU measures are in violation of various provisions of AD Agreement including Article 1, 2.1, 2.2, 2.3, 2.4, 3.1, 3.2, 9.2, 9.3, 11.1, 11.2 and 18.4 besides Articles 10 and 32.1 of the SCM Agreement and Articles I, VI:1, VI:2, VI:6 and X:3(a) of GATT, 1994.

US COOL – Appellate Body report on compliance panel's conclusions issued

The WTO Appellate Body has on 18-5-2015 issued its "compliance report" in the case "United States — Country of origin labelling requirements" (DS384 and DS386). The complainants in this case were Canada and Mexico. The Appellate Body rejected the arguments advanced by the US against the panel's findings under Article 2.1 of the Technical Barriers to Trade (TBT) Agreement. The compliance panel had held that the amended COOL measure violated Article 2.1 of the TBT Agreement because it accorded to Canadian and Mexican livestock less favourable treatment than that accorded to like US livestock.

The Appellate Body has affirmed the conclusions of the compliance panel that the amended COOL measure increased the record-keeping burden for imported livestock entailed by the original COOL measure, which was held in 2011 to be in violation of various provisions of the TBT Agreement. The Appellate Body also reversed the panel's conclusion that Canada and Mexico had failed to make a *prima facie* case that the amended COOL measure violated Article 2.2 of the TBT Agreement. However, no finding was made as to whether the amended COOL measure is inconsistent with Article 2.2. The Appellate Body has recommended the DSB to request USA so that it brings measures consistent with TBT and GATT provisions.

China and Japan file appeals in disputes relating to steel tubes

China and Japan have both notified their desire to file appeals against combined panel reports in two different disputes. While China has filed appeal against the panel report in the *"China – Measures Imposing Anti-Dumping Duties on High Performance Stainless Steel Seamless Tubes from the European Union"* (DS460), Japan disputes panel report in *"China – Measures Imposing Anti-Dumping Duties on High Performance Stainless Steel Seamless Tubes from Japan"* (DS454). The panel in its combined report had concluded that China had acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by failing to determine an SG&A amount on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product. China's injury determination was found to be inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement partly while

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inconsistency with same provisions was found to be not present on some aspects.

Japan disputes Korean food import restrictions

On 21 May 2015, Japan has initiated a new dispute proceedings against Korea regarding the latter's import bans and additional testing and certification requirements that allegedly were affecting importation of food products from Japan. According to reports, Japan has alleged that the measures taken by South Korea violate WTO's Sanitary and Phyto-sanitary (SPS) Agreement and Korea has failed to justify its trade restrictions.

Ratio Decidendi

ADD investigation – Domestic industry – Inclusion of non-cooperating producers and producers who quit manufacturing during investigation period

European Union's Court of Justice has upheld the investigation authority's conclusion of including non-cooperating domestic manufacturers in the definition of domestic industry for the purpose of injury analysis. Further, noting that provisions under Article 4(1) of the EU's Basic Regulations [Definition of 'domestic industry' as available in Rule 2(b) of the Indian ADD Rules] provided for two options, the court was of the view that institutions enjoy a broad discretion as regards the choice between the two options, and that wording of the said provision does not mean that all EU producers must cooperate in order for the authorities to consider the domestic industry as all the EU producers of the like product. It was also held that EU industry (domestic industry) for the purposes of determining injury does not necessarily have to comprise the same EU producers as those taken into consideration in order to ascertain whether the original complaint or the request for a review enjoyed sufficient support. The court also observed that the definition of EU (domestic) industry in context of injury determination [EU producers as a whole of the like product] serves as a basis for examining the economic situation of all the producers concerned.

Appellant's (exporter) argument that the EU authorities should exclude, for the purposes of the injury analysis, the producer which did not manufacture the like product during or after the investigation period, was also rejected by the court. Noting that Article 4(1) does not contain details as to the period during which an EU producer must have manufactured the like product in order to be included in the EU industry for the purposes of injury assessment, the court was of the view that inclusion of all available data relating to the period considered, including that of producers which had ceased their production during that period, in order to obtain a reliable representation of the economic situation of the industry, is compatible with the objective of the first option referred to in Article 4(1). [*Yuanping Changyuan Chemicals Co. Ltd. v. Council of the European Union* – Judgement dated 20-5-2015 in Case T-310/12, EU General Court (Second Chamber)]

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ADD investigation – Non-consideration of lost sales and revenue information when not fatal

United States Court of International Trade has upheld the findings of the International Trade Commission (ITC) abandoning the use of domestic producer's lost sales and revenue information in the price effect analysis. The court had earlier remanded the matter to the ITC for revaluation of such information as the domestic producers (plaintiffs) could not provide such information in the form and manner requested by the ITC. The Commission on remand had however expressly abandoned the use of such information noting that court had anyway affirmed its findings of absence of negative price effects and therefore there was no need to consider absence of confirmed lost sales and revenue information. The court in this regard observed that it is not enough for plaintiffs to proffer an alternate methodology to that relied upon by the agency, even if that alternate methodology is reasonable and not inconsistent with the statute.

The court further sustained the business cycle analysis of the ITC wherein the Commission had determined that the domestic industry's improved performance during the period of investigation stemmed from the economic collapse in 2009 and the subsequent recovery and that the presence of subject imports did not significantly impede the domestic industry's progress.

The anti-dumping and countervailing investigations involved certain circular welded carbon-quality steel pipe from India, Oman, the UAE and Vietnam. The Commission had originally determined that the subject imports neither caused nor threatened to cause material injury to the domestic industry. [*JMC Steel Group* v. *United States* - Slip Op. 15-51, dated 29-5-2015, USCIT]

News Nuggets

Safeguard investigation concerning imports of Cold Rolled Flat Products of Stainless Steel of 400 series, challenged

Indian domestic industry has challenged the final finding in respect of safeguard investigation concerning imports of Cold Rolled Flat Products of Stainless Steel of 400 series. The DG, Safeguards in its finding issued on 23-3-2015 had held that there was no need for any safeguard duty on the said product as there was no serious injury or threat of serious injury to the domestic industry.

The finding had noted that though the import of the product showed increasing trend, the same did not fall under the category of sudden, sharp and significant increase, and hence there was no surge in imports during the period of investigation, both in absolute terms as well as in relation to domestic production. The DG was of the view that it was not imports but some other factors, which were responsible for losses to the domestic industry and hence the causation analysis was negative.

The Delhi High Court has, on 29-5-2015, issued notice to Indian Government and directed filing of counter affidavit in 4

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weeks and rejoinder affidavit within 2 weeks thereafter.

WTO reviews India's trade policy

India's trade policy is under review by the WTO for the sixth time. According to the report by the WTO's Secretariat, though India continued its efforts to liberalize and facilitate trade, its tariff structure remains complex. It further states that the trade regime is less predictable as constantly notifications are being issued by DGFT and Customs to attain short-term objectives. The report accepts India as a strong advocate of multilateral trading system but makes a mention about India's 15 regional trade agreements currently in force. India's recently released new Foreign Trade Policy 2015-20 with the aim to raise its share of global exports to 3.5% by 2020, is also discussed in the report, which further mentions that though around 97.6% of India's imports were processed through the risk management system, India's import regime remains complex, particularly the licensing and permit system.

On the positive side for India, noting that the recent decrease in the current account deficit has been financed through large capital inflows, both foreign direct and portfolio investment, the report observes that India's merchandise trade deficit has been decreasing while services trade surplus continues to increase. In sphere of IPR laws, it is noted that India has taken several initiatives to modernize its IPR administration and continue its efforts to enforce IPRs.

Indian Customs Tariff, with number of types of duties and process of determination of effective rate, was found to be complex by the report which also states that the average MFN tariff rate has risen recently while percentage of duty-free lines has declined slightly.

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