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Article

India and its recent comprehensive trade agreements – Attempting success for market access

By Devinder Bagia and Jayant Raghu Ram

Introduction

In November 2019, the Government of India ('GOI') surprised the international trading community by withdrawing from the negotiations for the Regional Comprehensive and Economic Partnership Agreement (RCEP), which it had been part of for several years. The GOI's apprehensions were primarily on larger market access for merchandise from China. This was followed by an intense scrutiny of some of the existing trade agreements that India has entered into with certain Asian countries wherein India has been facing a negative balance of trade. With this experience in hand, India was looking to partner with countries which could offer more balanced trade opportunities and market access for Indian goods. Nearly two years after the RCEP withdrawal, the GOI has found new trade partners to open the doors for increased international trade.

The first half of the calendar year 2022 has marked two important milestones in this regard. In February 2022, India signed the Comprehensive Economic Partnership Agreement with the United Arab Emirates. Closing following it, in April 2022, India signed the Economic Comprehensive Trade Agreement with Australia (this agreement is yet to come into force). Both agreements signal India's commitment to deepening trade and economic relations with the rest of the world.

While these comprehensive trade agreements are not the first such agreements, they are also not the last. In fact, with the objective of concluding more comprehensive trade agreements, the GOI has commenced negotiations with a number of other countries as well.

The objective of this article is to broadly provide an advisory perspective of comprehensive trade agreements for trade and industry in India. It begins by briefly discussing India's previous and recent comprehensive trade agreements and also those that are in the pipeline. It then proceeds to discuss certain aspects of these comprehensive trade agreements that are relevant from the perspective of trade and industry in India.

India's engagements with comprehensive trade agreements – Past and future

Besides being a founding and active member of the World Trade Organization at the multilateral level, India has also actively focused on trade initiatives at the bilateral and plurilateral levels. At present, India has comprehensive trade agreements with over ten countries. As the nomenclature suggests, the agreements are comprehensive in the sense they do not just contain provisions concerning tariffs on goods, but also chapters such as non-tariff measures, intellectual property rights, electronic commerce, and market access for trade in services.

Of these, the comprehensive trade agreements with ASEAN, Korea and Japan have facilitated significant flow of trade with India. As far as the recent trade agreements are concerned, India's comprehensive trade agreement with Australia deserves mention for providing market access for Indian traditional chefs and yoga teachers.

It is notable that a limited number of India's comprehensive trade agreements such as those with Singapore have a chapter on protection and promotion of investments, so much so that they have a chapter on investor-state dispute settlement. However, in light of India's unpleasant experiences with the investment treaty provisions, India has consciously moved away from any negotiations on them. In fact, even though the India-Australia trade agreement has provisions on investment, the chapter only serves to clarify that decisions and requirements under their respective investment framework are expressly excluded from the applicability of the dispute settlement chapter.

Besides the above-mentioned agreements, and as mentioned earlier, India has begun negotiating comprehensive trade agreements with other countries as well. Some of these countries are Canada, the United Kingdom, the GCC, and the European Union ('EU').

Of these countries, the negotiations with the EU, which have resumed after a long hiatus, are being keenly followed by all stakeholders for the significant trade potential between the two countries that could be unlocked. However, they are also being keenly watched as they raise contentious issues such as standards of protecting intellectual property rights, market access for automobiles and spirits, etc. It remains to be seen how these tricky issues will be resolved and what shape the final agreement will take.

Mapping of benefits under trade agreements

One of the key benefits of trade agreements is availability of tariffs on import of goods at concessional or nil rates. However, it is important to note that a country may have numerous trade agreements and one trading partner may get covered in more than one such trade agreement. For instance, India is signatory to the comprehensive trade agreement with the ASEAN wherein Thailand is a partner country. At the same time, Indian also has a separate trade agreement with Thailand. In such a scenario, importers and exporters from the two countries may have to map the benefits under the applicable trade agreements to take the maximum advantage.

Further, the concessional tariff rates for a particular tariff item may not be uniform across trade agreements. In fact, there may be a number of goods which will not be eligible to receive tariff benefits under a trade agreement with a particular country. In such a scenario, it becomes important to have thorough knowledge of not just the tariff benefits available under a particular trade agreement, but also the tariff benefits available under other trade agreements. In order to have a better understanding, it becomes important to engage in the exercise of *mapping* the tariff benefits available under a trade agreement.

Trade and industry would be well advised to closely map the benefits under different trade agreements as it would also help them in formulating inputs to be given to GOI for the purposes of negotiations.

Rules of Origin and CAROTAR

In order to be eligible for tariff concessions available under a trade agreement, the trade agreement require that the goods must *originate* from the partner country. Provisions governing

the same, called Rules of Origin, vary between products (product specific rules) and agreement to agreement.

It may be recollected that in Budget 2020, the GOI introduced Section 28DA into the Customs Act, 1962 for strengthening the rules of origin mechanism. To give effect to Section 28DA, the GOI introduced the Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 ('**CAROTAR**'), which impose comprehensive substantive and procedural obligations on the importer for ensuring that the rules of origin imposed under trade agreements are complied with.

Thus, while members of trade and industry in India may be enthusiastic in utilizing the tariff benefits available under the trade agreements, they should be equally cautious about ensuring that the applicable rules of origin are complied with. Further, since CAROTAR requires some information that only the producer/exporter can provide, cooperation of the producer/exporter becomes important for the importer to demonstrate that the imported goods meet the origin criteria.

Dispute settlement chapter in trade agreements

One of the salient aspects of almost all trade agreements these days is the presence of a dispute settlement chapter to resolve any disputes between the partner countries. With the exception of an appellate system, these dispute settlement chapters largely mirror the system of settling disputes at the WTO under the dispute settlement understanding.

Though the dispute settlement provisions in trade agreements have been seldom used, the existence of these provisions give legal certainty for their enforcement and convey that the partner countries are committed to the same.

Conclusion

At a time when the progress of negotiations at the WTO is tepid due to steep political differences among its Members, it is welcome that India has resorted to comprehensive trade agreements for boosting its global footprint in the world trading system. While these comprehensive trade agreements would surely boost bilateral trade between India and its trading partners, it is expected that these comprehensive trade agreements would also boost political relations not just between the governments, but also between their peoples and members of trade and industry.

However, it is important for all stakeholders, including the GOI, and trade and industry, to remember that the engagement through comprehensive trade agreements should not end with the signing or the entering into their force. All stakeholders should periodically and intensively review whether these trade agreements have delivered the benefits they are expected to, and exercise options where necessary, for appropriate course correction.

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Trade Remedy News

Trade Remedy actions by India

Product	Country	Notification No.	Date of notification	Remarks
Amoxicillin (Amoxicillin Trihydrate)	China PR	13/2022-Cus. (ADD)	11 May 2022	Notification imposing anti-dumping duty rescinded
Ceramic Tablewares and Kitchenwares, excluding knives and toilet items	China PR	16/2022-Cus. (ADD)	24 May 2022	Anti-dumping continued after sunset review. Anti-circumvention duty on such goods declared as originating from Malaysia, also to continue.
Clear Float Glass	Iran	F. No. 190354/89/2022-TRU	24 April 2022	Finance Ministry decides not to impose anti-dumping as recommended by DGTR
Copper Tubes and Pipes	Malaysia, Thailand and Vietnam	2/2022-Cus. (CVD)	28 April 2022	Countervailing duty imposed
Décor Paper	China PR	15/2022-Cus. (ADD)	24 May 2022	Duty table substituted
Dispersion Unshifted Single-mode Optical Fibre	China, Indonesia and South Korea	F. No. 6/1/2022-DGTR	6 May 2022	Anti-dumping investigation initiated
Elastomeric Filament Yarn	China PR, South Korea, Taiwan and Vietnam	F. No. CBIC-190354/85/2022-TRU	18 May 2022	Finance Ministry decides not to impose anti-dumping as recommended by DGTR
Melamine	European Union, Japan, Qatar and the United Arab Emirates	F. No. CBIC-190354/101/2022-TRU Section-CBEC	26 May 2022	Finance Ministry decides not to impose anti-dumping as recommended by DGTR
N, N' – Dicyclohexyl Carbodiimide (DCC)	China PR	12/2022-Cus. (ADD)	28 April 2022	Definitive anti-dumping duty imposed

Product	Country	Notification No.	Date of notification	Remarks
Opal Glassware	China PR and UAE	F.No.7/23/2021-DGTR	6 May 2022	Sunset review recommends continuation of anti-dumping duty
Plastic Processing Machines	China PR	F. No. CBIC-190354/84/2022 -TO(TRU-I)-CBEC	26 May 2022	Finance Ministry decides not to impose anti-dumping duty as recommended by DGTR
Polytetraflouro ethylene (PTFE) and PTFE products	China PR	F. No. 7/4/2021 - DGTR	26 April 2022	Sunset review recommends continuation of anti-dumping duty and anti-circumvention duty
Polyurethane Leather	China PR	14/2022-Cus. (ADD)	20 May 2022	Anti-dumping duty imposed
Textured Tempered Coated and Uncoated Glass	China PR	F. No. 7/10/2021-DGTR	13 May 2022	Sunset review recommends continuation of anti-dumping duty for two more years

Trade remedy actions against India

Product	Investigating Country	Document No.	Date of Document	Remarks
Carbon and Alloy Steel Threaded Rod	USA	87 FR 27107	6 May 2022	Preliminary determination of sale below normal value during 25 September 2019 till 31 March 2021
Finished carbon steel flanges	USA	87 FR 25617	2 May 2022	Sunset review of anti-dumping and countervailing duties initiated
Frozen warmwater shrimp	USA	87 FR 25617	2 May 2022	Sunset review of anti-dumping duty initiated

Product	Investigating Country	Document No.	Date of Document	Remarks
New Pneumatic Off-the-Road Tires	USA	87 FR 31860	25 May 2022	Affirmative sunset review of countervailing duty
Organic Soybean Meal	USA	87 FR 29735	16 May 2022	Countervailing and anti-dumping duties Orders issued
Stainless Steel Flanges	USA	87 FR 27563	9 May 2022	Finding of countervailable subsidies during 1 January 2019 till 31 December 2019
Stainless Steel Flanges	USA	87 FR 27568	9 May 2022	Finding of sales at prices below normal value during 1 October 2019 till 30 September 2020
Stainless Steel wire rod	USA	87 FR 25617	2 May 2022	Sunset review of anti-dumping duty initiated
Welded Stainless Steel Pressure Pipe	USA	87 FR 26782	5 May 2022	Affirmative sunset reviews of anti-dumping and countervailing duties



WTO News

European Union's safeguard measures on steel violate WTO provisions

A DSB Panel of the WTO has held that European Union's safeguard measures on certain steel products violate the provisions of GATT and the Agreement on Safeguards. In a dispute brought by Turkey against the European Union, the Panel was of the view that the European Commission did not ascertain that the increase in imports took place as a result of the unforeseen developments it had identified and did not identify in its published reports the obligations whose effect

resulted in the increase in imports. Article XIX:1(a) of the GATT 1994 was hence held to be violated. The Panel also held that the measures by the European Union were inconsistent with the Article 4.1(b) of the Agreement on Safeguards, because two central elements of the European Commission's determination of a threat of serious injury were not 'based on facts' as required by that provision.

The European Union had applied the measures on the grounds that three unforeseen developments - increased global steel

overcapacity, increase in the use of trade restrictive and trade defence measures on steel, and the US Section 232 measures on steel, had resulted in an increase in imports of certain steel products into the EU market, and that the increase in imports was threatening the EU industry with serious injury.

India along with Argentina, Brazil, Canada, China, Japan, Norway, Russian Federation, Korea, Republic of, Switzerland, Chinese Taipei, Ukraine, United Arab Emirates, United Kingdom and United States were the third parties in the dispute.

WTO Members deepen discussions on trade and environmental sustainability

WTO members taking part in the Trade and Environmental Sustainability Structured Discussions (TESSD) held the first round of in-

depth discussions on 17-18 May on four specific issues under the TESSD heading.

The Working Group on Subsidies focused on questions relating to fossil fuel subsidies and agricultural subsidies, including how the environmental effects and trade impacts of relevant subsidies can be identified. The facilitators said many members 'recognise the circular economy as an important policy objective for environmental sustainability, while setting different policy scopes and employing various policy tools at the national level.'

Additional formal TESSD meetings are tentatively scheduled to take place on 19-20 July and 26-27 October, with further informal working group meetings tentatively scheduled for 27-28 September.



India Customs & Trade Policy Update

India-UAE CEPA – First tranche comes into force from 1 May 2022

The Indian Finance Ministry has issued Notification No. 22/2022-Cus. dated 30 April 2022, to grant exemption from Basic Customs Duty to many specified goods originating in the UAE and imported into India, subject to fulfillment of prescribed conditions. The extent of exemption from BCD, as provided in the Notification, varies as per the Tariff Items. For certain goods enlisted in the Notification, exemption from Agriculture Infrastructure and Development Cess (AIDC) has also been provided. The said notification has

come into effect from 1 May 2022. Further, it may be noted that electronic filing and issuance of Preferential Certificate of Origin ('CoO') for India's exports under India-UAE Comprehensive Economic Partnership Agreement is effective from 1 May 2022. Applications under the above-mentioned Trade Agreement may be submitted on the eCoO Website. The guidelines to the Indian exporters with respect to requirement of Digital Signature Certificate for electronic submission, initial registration of new applicant exporter on the portal, etc. have been provided in Trade Notice 05/2022, dated 29 April 2022 issued for the purpose.

Iron ore and specified iron and steel products – Export duties increased/imposed

The Indian Central Government, exercising its powers under Section 8(1) of the Customs Tariff Act, 1975, has revised export duties on iron ore and certain iron and steel products. Export duty on iron ore and concentrates (both agglomerated and non-agglomerated), has been revised from 30% to 50%. Further, export duty @ 15% has been imposed on flat-rolled products of stainless steel, of a width of 600 mm or more (Heading 7219), on other bars and rods of stainless steel, angles, shapes and sections of stainless steel (Heading 7222), and on bars and rods, hot-rolled, in irregularly wound coils, of other alloy steel (Heading 7227). Also, description of the goods covered under Heading 7210 or 7212, has been revised to 'flat rolled products of iron or non-alloy steel, clad, plated or coated', from 'flat rolled products of iron or non-alloy steel, plated or coated with zinc'. Notification No. 28/2022-Cus., dated 21 May 2022 amends the Second Schedule to the Customs Tariff Act, with effect from 22 May 2022, for this purpose.

Wheat exports prohibited with effect from 13 May 2022

The Indian Ministry of Commerce has placed exports of wheat (Durum wheat) under prohibited category with effect from 13 May 2022. Notification No. 6/2015-20, dated 13 May 2022 notes that there has been sudden spike in the global prices of wheat arising out of many factors and as a result of which food security of India, neighboring and other vulnerable countries is at risk. It may however be noted that exports are allowed in case of shipments where Irrevocable Letter of Credit has been issued before 13th. Export is also allowed on permission by government of India based on request of other countries.

Waste and scrap of precious metals – Imports placed under restricted category

The DGFT has amended Import Policy of ITC (HS) Codes 7112 30 00, 7112 91 00, 7112 92 00, 7112 99 10, 7112 99 20, 7112 99 90, from 'Free' to 'Restricted' with immediate effect. DGFT Notification No. 01/2015-2022, dated 29 April 2022 amends Chapter 71 of Schedule I to the ITC(HS) for this purpose. Heading 7112 covers waste and scrap of precious metal or of metal clad with precious metal.

Onion seeds – Export Policy relaxed

Onion seeds classifiable under 1209 9130 of the ITC (HS) have been placed under 'Restricted' category with effect from 13 May 2022. Till then the export of onion seeds was prohibited. Notification No. 5/2015-20, dated 13 May 2022 amends Notification No. 43/2015-20, dated 29 October 2020 for this purpose.

Fresh ginger wholly produced in Bhutan is freely importable

The Ministry of Commerce has relaxed the Import Policy of fresh ginger which is wholly produced in Bhutan. The product, which is otherwise in the restricted category, is freely importable if wholly produced in Bhutan. Such imports would be subject to Article I of Agreement on Trade, Commerce and Transit between India and Bhutan. Import of fresh ginger which is wholly produced in Nepal is already free. Notification No. 7/2015-20, dated 19 May 2022 amends policy condition in Tariff Item 0910 11 10 of Chapter 09 of ITC (HS) Classifications.

Bamboo charcoal made from bamboo obtained from legal source freely exportable

Export of bamboo charcoal made from bamboo obtained from legal source is now allowed freely subject to conditions. According to the Policy

conditions as incorporated by Notification No. 8/2015-20, dated 19 May 2022, Certificate of Origin issued by the concerned Range Forest Officer of the State Forest Department from where the bamboo has been procured, needs to be produced for this purpose.

Sugar exports placed under 'Restricted' category from 1 June 2022 till 31 October 2022

Export of sugar (raw, refined or white) has been placed under 'Restricted' category for the period from 1 June 2022 till 31 October 2022. Such exports will, from 1st of June, will only be allowed with specific permission from Directorate of Sugar, Department of Food and Public Distribution, Ministry of Consumer Affairs, Food and Public Distribution. It may be noted that as per Notification No. 10/2015-20, dated 24 May 2022, the restriction is not applicable to sugar being exported to the European Union and USA under CXL quota and Tariff Rate Quota (TRQ) quota.

Crude soya bean oil and crude sunflower seed oil exempted from BCD and AIDC till 31 March 2024

The Ministry of Finance has exempted crude soya bean oil (whether or not degummed) and

crude sunflower seed oil from Basic Customs Duty and Agriculture Infrastructure and Development Cess, from 25 May 2022 till 31 March 2024. The exemption is available to only 20 lakh MT of each product under Tariff Rate Quota (TRQ). The TRQ will be allotted to the importer by the Directorate General of Foreign Trade, in accordance with the relevant procedures as specified in the Hand Book of Procedures, 2015-20.

Paper Import Monitoring System (PIMS) notified

The Indian Ministry of Commerce has notified a new Paper Import Monitoring System ('PIMS') requiring mandatory prior registration in case of import of certain 201 specified tariff lines under Chapter 48 of the ITC (HS) Classifications. The importer can apply for registration not earlier than 75th day and not later than 5th day before the expected date of arrival of import consignment. As per Notification No. 11/2015-20, dated 25 May 2022, importer would have to enter the Registration Number and expiry date of registration in the Bill of Entry to enable Customs for clearance of consignment. This system will come into force from 1 October 2022. Online registration would be available from 15 July 2022.



Ratio Decidendi

No special circumstances required for extension of anti-dumping duty beyond 10 years

The Anti-dumping Bench of the CESTAT New Delhi has rejected the contention that the anti-

dumping duty cannot be continued beyond ten years in the absence of special circumstances. The Tribunal in this regard noted that neither Article 11.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs

and Trade 1994, nor Section 9A(5) of the Customs Tariff Act, 1975 require any existence of special circumstances for extension of anti-dumping duty beyond a period of five years. It observed that the pre-requisites for every extension of duty, whether for five years or up to five years, are the same and they are that there should be a likelihood of continuation or recurrence of dumping and injury. It may be noted that the Tribunal also held that mere continued levy of anti-dumping duty for 11 years cannot be made a ground to conclude that there is no requirement to continue anti-dumping duty. [*Association of Man-made Fibre Industry of India v. Designated Authority* – 2022 VIL 371 CESTAT DEL CU]

Valuation – Transaction value cannot be rejected by extrapolations

Observing that each assessment is a quasi-judicial order based on the transaction value in it, the CESTAT Hyderabad has held that transaction values cannot be rejected under Rule 12 of the Customs Valuation Rules, 2007 by way of extrapolations. It observed that if one is found to have undervalued goods in one case, inference cannot be drawn that he has undervalued in all other imports as well. The Tribunal was of the view that penalties and pecuniary liabilities based on extrapolation is impermissible and is inconsistent with the known legal principles. Affirming the setting aside of the re-determination of value by the Department, the Tribunal observed that rejection of the transaction value in the imports covered in specified worksheets of

the show cause notice, by extrapolation had no legal basis. [*Principal Commissioner v. Sachdev Overseas Fitness Private Limited* – 2022 VIL 293 CESTAT HYD CU]

Customs debt extinguishes when goods confiscated even after being unlawfully introduced – Liability to excise duty and import VAT however not extinguishes

The Court of Justice of the European Union has ruled that a customs debt is extinguished where goods are seized and subsequently confiscated even after they have already been unlawfully introduced into the customs territory of the European Union. It noted that wording of Article 124(1)(e) of Union Customs Code does not refer to the time at which the seizure of goods takes place as a condition for the extinguishment of the customs debt. The Court was however of the view that such extinguishment of customs debt cannot prevent application of penalties or undermine deterrent effect of those penalties. In this case where the unlawfully detained goods (cigarettes) were confiscated and destroyed, entailing the extinguishment of customs debt, the EU's Apex Court also held that the extinguishment of the customs debt does not lead to the extinguishment of the debt linked, respectively, to excise duty and to import VAT in respect of goods smuggled into the customs territory of the EU. [*UB v. Kauno teritorinė muitinė* – Judgement dated 7 April 2022 in C-489/20, CJEU]

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