

国际贸易 法律月刊

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Article 文章

FDI in multi-brand retail – Consistency with international trade law

多品牌零售业的外商直接投资 – 与国际贸易法的一致性

By **Bhargav Mansatta**

After much furore over opening up of the retail sector to foreign investment, Government of India (GOI) announced its decision to allow FDI upto 51% in multi-brand retail trading under the government route, subject to the terms and conditions as stipulated in Press Note No. 5 (2012 Series) dated September 20, 2012. GOI also allows 100% FDI in single-brand product retail trading by only one non-resident entity, whether owner of the brand or otherwise, under the government route subject to the terms and conditions as stipulated in Press Note 4 (2012 Series) dated September 20, 2012.¹

The terms and conditions provided under the press notes may trigger inconsistency of the policy with the international trade law. One of the conditions reads as under²

(1) FDI in multi brand retail trading, in all products, will be permitted, subject to the following conditions:³

(i)

(ii)

(iii)

(iv) At least 30% of the value of procurement of manufactured/processed products purchased shall be sourced from Indian ‘small industries’ which have a total investment in plant & machinery not

exceeding US \$ 100 million. This valuation refers to the value at the time of installation, without providing for depreciation. Further, if at any point in time, this valuation is exceeded, the industry shall not qualify as a ‘small industry’ for this purpose. This procurement requirement would have to be met, in the first instance as an average of five years’ total value of the manufactured/ processed products purchased, beginning 1st April of the year during which the first tranche of FDI is received. Thereafter, it would have to be met on an annual basis.

The aforesaid term can be categorised as ‘local content requirement’. It is mandatory for the investor to source at least 30% of ‘manufactured/processed’ products from Indian ‘small industries’.

The policy of FDI in retail will have to be in conformity with the obligations under GATT 1994 & Trade Related Investment Measure (TRIMs).

At the outset it needs to be noted that GATT 1994 which regulate trade in goods is applicable to requirements imposed by governments in an investment context in so far as such requirements involve trade-distorting measures.⁴ Article III of GATT 1994 provides that imports be treated no less favourably than the same or similar domestically-produced goods once they have passed customs.⁵

¹ See A.P. (DIR Series) Circular No. 32, RBI/2012-13/217, September 21, 2012, available at http://www.rbi.org.in/Scripts/BS_ApCircularsDisplay.aspx

² Circular 1 of 2012-Consolidated FDI Policy, dated 10.04.2012, para 6.2.16.5, available at http://femaindia.in/dynamicimages/344_1_659634716409116591250.pdf

³ Similar condition is provided in case of single-brand product retail trading wherein FDI beyond 51% will be permitted only when 30% of the sourcing for goods is done from India. The characterization of such clause for the purpose of international trade law is likely to be no different from the condition under multi-brand retail.

⁴ See generally, GATT Panel Report, *Canada-Administration of the Foreign Investment Review Act*, BISD 30S/140, 1984, 25 July 1983 (hereinafter *Canada-FIRA*)

⁵ See Article III:1 and Article III:4 of GATT 1994.

The aforesaid condition directly contravenes the principle of national treatment under Article III of GATT 1994. Mandatory requirement to source the products manufactured locally results in less favourable treatment to the imported goods.

TRIMs Agreement desires to promote investment while ensuring free competition. TRIMs do not provide for regulation of foreign investment *as such* but only intends to regulate trade related aspects of foreign investment.⁶ Accordingly, Article 1 of the TRIMs Agreement provides that the ‘Agreement applies to investment measures related to Trade in Goods (TRIMs) Only’. The law permitting FDI in multi-brand retail will undoubtedly qualify as TRIMs. Insertion of local content requirement will further ensure that the law is directly covered within the scope of TRIMs.

The Panel in *Indonesia — Autos*⁷ held that local content requirements were necessarily trade-related:

“[I]f these measures are local content requirements, they would necessarily be ‘trade-related’ because such requirements, by definition, always favour the use of domestic products over imported products, and therefore affect trade.

An examination of whether these measures are covered by Item (1) of the Illustrative List of TRIMs annexed to the TRIMs Agreement, which refers amongst other situations to measures with local content requirements, will not only indicate whether they are trade-related but also whether they are inconsistent with Article III:4 and thus in violation of

Article 2.1 of the TRIMs Agreement.”

The aforesaid observation is categorical with regard to the characterization and position of the ‘local content requirement’ under both GATT 1994 and TRIMs Agreement. The law which is covered within the description of Annex to the TRIMs Agreement will necessarily be considered as inconsistent with Article III:4 of GATT 1994 and Article 2.1 of the TRIMs Agreement. A ‘local content requirement’ is specifically covered within the scope of Item (1) of the Illustrative list in the Annex to the TRIMs Agreement. As required under Item 1 of the illustrative list

- i. requirement is in fact mandatory or enforceable under domestic law or under administrative rulings or when compliance with it is necessary to secure an advantage.
- ii. the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

Local content requirement clearly satisfies the aforesaid criteria and is therefore inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of GATT 1994.

Further, the policy on FDI in multi-brand retail discriminates domestic and foreign investors or domestic and foreign investments *per se* by its ‘enabling policy clause’.⁸ The clause provides as below:⁹

⁶ Preamble, TRIMs Agreement

⁷ Panel Report, *Indonesia-Certain Measures affecting the Auto-mobile Industry*, WT/DS64, paras. 14.82–14.83

⁸ Enabling policy clause is not provided in single-brand retail.

⁹ *Supra* note 2

(viii) The above policy is an enabling policy only and the State Governments/Union Territories would be free to take their own decisions in regard to implementation of the policy. Therefore, retail sales outlets may be set up in those States/Union Territories which have agreed, or agree in future, to allow FDI in MBRT under this policy...

India has signed eighty two bilateral investment treaties (BITs).¹⁰ It incorporates national treatment obligation and is common in all the BITs. It provides as below:¹¹

“Each Contracting Party shall accord to investments of investors of the other Contracting Party, including their operation, management, maintenance, use, enjoyment or disposal by such investors, treatment which shall not be less favourable than that accorded either to investments of its own investors or to investments of investors of any third State .”

Pursuant to the aforementioned provision, India is under an obligation to accord no less favourable treatment to foreign investments than what it accords to its own investors. The enabling policy contravenes the national treatment provision under the BIT. In all likelihood, not all states will permit implementation of the policy. Consequently, unlike domestic investors, foreign investor from a BIT country will not be allowed to set up shops in certain Indian states. This clearly provides less favourable treatment to the foreign investments than what is accorded to domestic investments. Existence of federal structure is not a permissible defence against the obligation under international agreement especially obligations arising out of international trade agreements.

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¹⁰ List of Countries with which India has signed BITs, available at http://finmin.nic.in/bipa/bipa_index.asp

¹¹ Illustratively, See Article 4, BIT between India and United Kingdom. Atleast, three of the top five retailer companies of the world are based in UK, Germany and France. India has signed BIT with all the three countries.

Trade Remedy News 贸易救济新闻

Trade remedy actions against China

对中国采取的贸易救济行动

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Activated carbon 活性炭	USA 美国	Affirmative determination in sunset review 日落复审做出肯定性裁定	USITC News Release 13-020, dated 8-2-2013 2013年2月8日, 美国国际贸易委员会发布新闻13-020
Aluminium road wheels 铝制车轮	Australia 澳大利亚	AD and Countervailing duty – Reinvestigation of certain findings 对反倾销反补贴某些裁定重新调查	Australian Customs Dumping Notice No. 2013/14, dated 5-2-2013 2013年2月5日 澳大利亚海关倾销通知第2013/14
Aluminum section 铝型材	Australia 澳大利亚	AD and Countervailing new shipper review initiated 发起反倾销和反补贴新出口商复审调查	Dated 8-2-2013 2013年2月8日
Bicycles 自行车	Canada 加拿大	ADD investigation – Initiation of re-investigation of normal value and export price 反倾销调查 – 重新调查正常价值和出口价格	Dumping File 4264-52, dated 1-3-2013 2013年3月1日, 倾销文件4264-52
Bicycle for children 儿童自行车	Mexico 墨西哥	AD investigation terminated 终止反倾销调查	Dated 4-3-2013 2013年3月4日
Carbon Black 炭黑	India 印度	ADD continuation recommended in Mid-term review 期中复审继续建议征收反倾销税	15/41/2010-DGAD, dated 28-2-2013 2013年2月28日, 15/41/2010-DGAD
Ceramic tableware 陶瓷餐具	EU 欧盟	30 companies included - individual rate imposed 新增30家企业享有单独税率	Dated 7-2-2013 2013年2月7日
Ceramic tile 瓷砖	Argentina 阿根廷	Conduct final antidumping measure 采取最终反倾销措施	Dated 7-2-2013 2013年2月7日
Citrus fruits (Preserved) 柑橘类水果罐头	EU 欧盟	Definitive ADD re-imposed 再次裁决征收最终反倾销税	Council Implementing Regulation (EU) No. 158/2013, dated 22-2-2013 2013年2月22日, 欧盟委员会执行规定第158/2013

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Coated paper 铜版纸	South Africa 南非	AD investigation initiated 发起反倾销调查	Dated 28-1-2013 2013年1月28日
Copper Pipe Fittings 铜管件	Canada 加拿大	ADD and Countervailing duty re-investigation concluded 裁定继续征收反倾销和反补贴税	Dumping file 4214-12, Subsidy file 4218-21, dated 8-2-2013 2013年2月8日, 倾销文件4214-21
Diamond saw blade 金刚石锯片	USA 美国	Final finding issued in AD administrative review 做出反倾销行政复审终裁	DOC Release dated 15-2-2013 2013年2月15日, 美国商务部发布 公告
Drawn stainless steel sinks 不锈钢拉制水槽	USA 美国	Affirmative final determinations in ADD and CVD investigations 反倾销和反补贴调查作出肯定性最终裁定	US ITA News release dated 20-2-2013 2013年2月20日, 美国商务部发布新闻
Electrolytic tinplate 电镀锡板	Malaysia 马来西亚	AD investigation initiated 发起反倾销调查	Dated 20-2-2013 2013年2月20日
Ferro-silicon 硅铁	EU 欧盟	ADD expiry review initiated 发起反倾销日落复审	2013/C 58/07, dated 28-2-2013 2013年2月28日, 2013/C 58/07
Flat Base Steel Wheels 平底钢圈	India 印度	ADD recommended to be increased in Sunset review 日落复审简易增加反倾销税	15/22/2011-DGAD, dated 20-2-2013 2013年2月20日, 15/22/2011-DGAD
Frozen warmwater shrimp 冷冻暖水虾	USA 美国	Countervailing duty investigation – Determination of material injury 反补贴调查-裁定存在实质损害	USITC News Release 13-018, dated 7-2-2013 2013年2月7日, 美国国际贸易委员 会发布新闻 13-018
Galvanized plate 镀锌板和镀锌铝板	Australia 澳大利亚	Preliminary finding issued 发布反倾销初裁	Dated 6-2-2013 2013年2月6日
Hardwood and decora- tive plywood 硬木和装饰用胶合 板	USA 美国	Preliminary affirmative countervailing duty determination by US DOC 美国商务部肯定性裁定征收临时反补 贴税	US ITA News release dated 27-2-2013 2013年2月27日, 美国商务 部新闻
Hot rolled flat products of stainless steel of series 300 300系列不锈钢热轧 板材	India 印度	Safeguard investigation - Extension of time period till 25th May 2013 for submission of final findings 保障措施调查-延长提交最终裁决的时间至 2013年5月25日	24 / 2013-Cus. (N.T.), dated 26-2-2013 2013年2月26日, 24 / 2013-Cus. (N.T.)

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Hot rolled plate steel 热轧钢板	Australia 澳大利亚	AD and Countervailing duty investigation initiated 发起反倾销和反补贴调查	Australian Customs Dumping Notice No. 2013/18, dated 12-2-2013 2013年2月12日, 澳大利亚海关倾销通知第2013/18
Hot-rolled steel products 热轧碳钢	USA 美国	ADD – USITC to conduct sunset review 发起反倾销日落复审	USITC News Release 13-016, dated 4-2-2013 2013年2月4日, 美国国际贸易委员会发布新闻 13-016
Multilayered Wood Flooring 复合木地板	USA 美国	ADD and Countervailing Administrative Review Initiated 反倾销和反补贴行政复审	DOC Release dated 30-1-2013 2013年1月30日, 美国商务部发布公告
Narrow woven ribbons with woven selvedge 带织边窄幅织带	USA 美国	Final finding issued in AD administrative review 做出反倾销行政复审终裁	DOC Release dated 13-2-2013 2013年2月13日, 美国商务部发布公告
Oil Country Tubular Goods (OCTG) 石油管材	USA 美国	Modified AD administrative review finding 修改反倾销行政复审终裁	DOC Release dated 7-2-2013 2013年2月7日, 美国商务部发布公告
Oil Country Tubular Goods (OCTG) 石油管材	USA 美国	Preliminary finding issued in countervailing administrative review 做出反补贴行政复审初裁	DOC Release dated 8-2-2013 2013年2月8日, 美国商务部发布公告
Oil Country Tubular Goods (OCTG) 石油管材	USA 美国	Countervailing administrative review initiated 发起反补贴行政复审	DOC Release dated 28-2-2013 2013年2月28日, 美国商务部发布公告
Polyester Film 聚酯薄膜	USA 美国	Modified AD administrative review finding 修改反倾销行政复审终裁	DOC Release dated 8-2-2013 2013年2月8日, 美国商务部发布公告
Seamless pipes and tubes of iron or steel 无缝钢铁管	EU 欧盟	ADD investigation initiated 发起反倾销调查	2013/C 45/03, dated 16-2-2013 2013年2月16日, 2013/C 45/03
Socks 袜子	Colombia 哥伦比亚	AD sunset review final finding issued 做出反倾销日落复审终裁	Dated 15-2-2013 2013年2月15日
Solar glass 太阳能玻璃	EU 欧盟	ADD investigation initiated 发起反倾销调查	2013/C 58/06, dated 28-2-2013 2013年2月28日, 2013/C 58/06
Solar panels 太阳能电池	EU 欧盟	Imports subject to registration 进口需登记	Commission Regulation (EU) No. 182/2013, dated 1-3-2013 2013年3月1日, 欧盟委员会规定第 182/2013

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Stainless cold-rolled plate 不锈钢冷轧板材	Taiwan 台湾	AD investigation initiated 发起反倾销调查	Dated 20-2-2013 2013年2月20日
Steel coil 钢盘条	Malaysia 马来西亚	AD final finding issued 做出反倾销终裁	Dated 18-2-2013 2013年2月18日
Synthetic fiber carpet 合成纤维毯	Mexico 墨西哥	AD investigation initiated 发起反倾销调查	Dated 19-2-2013 2013年2月19日
Unitized wall modules 铝制单元式幕墙	Canada 加拿大	AD and Countervailing duty investigation initiated 发起反倾销和反补贴调查	Dumping case number AD/1399 and Subsidy case number CV/135, dated 4-3-2013 2013年3月4日，倾销案件号 AD/1399和补贴案件号CV/135
Tapered roller bearing 圆锥滚子轴承	USA 美国	Modified AD administrative review finding 修改反倾销行政复审终裁	DOC Release dated 21-2-2013 2013年2月21日，美国商务部 发布公告
Warehouse Furniture 木制卧室家具	USA 美国	Preliminary finding issued in AD administrative review 做出反倾销行政复审初裁	DOC Release dated 6-2-2013 2013年2月6日，美国商务部发布 公告

Trade remedy actions by China

中国采取的贸易救济行动

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Cellulose pulp 浆粕	USA, Canada and Brazil 美国、加拿 大、巴西	ADD investigation initiated 发起反倾销调查	MOFCOM Announcement No. 10 of 2013, dated 6-2-2013 2013年2月6日，商务部2013年 第10号公告
Dispersion unshifted single-mode optical fiber 非色散位移单模光纤	USA, Japan and South Korea 美国、日 本、韩国	Midterm Review Ruling announced 发布期中复审裁定	MOFCOM Announcement No. 9 of 2013, dated 1-3-2013 2013年3月1日，商务部2013年 第9号公告
Potato Starch 马铃薯淀粉	EU 欧盟	Affirmative ADD sunset review 肯定性反倾销日落复审	MOFCOM Announcement No. 4 of 2013, dated 5-2-2013 2013年2月5日，商务部2013年 第4号公告
Toluidine 甲苯胺	EU 欧盟	AD preliminary finding announced 发布反倾销初裁公告	MOFCOM Announcement No. 11 of 2013, dated 28-2-2013 2013年2月28日，商务部2013年 第11号公告

WTO News 世贸组织新闻

中欧X射线安全检查设备专家组报告发布
世贸组织争端解决机构就中国对向欧盟进口的某些安全检查设备（X射线扫描）征收反倾销税案发布专家组报告。欧盟称中国征收的反倾销税，以及中国调查机关所进行的调查违反了反倾销协议的许多程序性和实质性条款。专家组认为中国的做法违反了反倾销法第3.1,3.2,3.4,3.5,6.5.1,6.9,和12.2.2条所要承担的义务。

美国对印度太阳能产品提起贸易申诉

美国请求与印度就印度的贾瓦哈拉尔尼赫鲁太阳能计划（NSM）要求使用印度工厂的组件和太阳能电池的做法进行磋商。美国认为印度要求太阳能开发商购买并使用国内太阳能组件和电池从而获得参与NSM项目的优惠，并且根据NSM项目或与国家电力公司签订合同，从而获得某些利益和优

势，包括通过长期的电价保证获得补贴。根据2013年2月11日美国发布的文件看，印度的措施违反了：

- 1994年关税和贸易总协定第III:4条，因为相对印度原产的类似产品，这些措施对进口的太阳能电池和组件存在歧视；
- 与贸易有关的投资措施第2.1条，因为这些措施是与贸易有关的投资措施，违反了1994年关税和贸易总协定第III条；
- 补贴和反补贴协议第3.1(b)和3.2条，因为这些措施对使用国产产品提供了补贴；以及

补贴和反补贴协议第5(c)，6.3(a)和6.3(c)条，因为这些措施通过取代或阻碍美国太阳能电池和组件向印度进口以及通过在印度减少美国太阳能电池和组件的销售，对美国的利益产生严重损害。

News Nuggets 新闻精华

中国较少使用反倾销措施

印度2012-13年经济调查报告于上月2013年预算计划前发布，报告显示与巴西、阿根廷和加拿大那些排名靠前的国家相比，中国较少使用反倾销作为其贸易工具。在1995年至2012年期间，中国一共发起了195件贸易救济案件，在前10名的国家中排名第8。报告还指出与世贸组织谈判的止步不前和全球贸易放缓的情况相比，地区性的贸易协议以及技术

密集型出口正不断发展。报告还提到虽然中美仍继续成为最主要的贸易伙伴，但从地区看，向亚洲、西亚和非洲的出口也在不断增长。

印度河水Kishenganga仲裁案-部分仲裁结果对印度有利

印度河水Kishenganga仲裁案组成的仲裁庭于2013年2月18日就巴西斯坦和印度之间的印度河水协定争议做出了部分判决。争论的主要焦点在于印度位于查谟

和喀什米尔地区水电项目的建设和运营和合法性以及允许根据协定消耗某些印度水电工厂的水库至“死水线”以下。

巴基斯坦认为根据协定印度必须让河水自流而不允许有任何的干扰。因此，将原本流向其他地方的水改道至附属的发电厂违反了该协定。巴基斯坦认为通过阅读1960年的协定以及后续的修正内容的条款，这些条款显示了禁止印度运用新技术如减少水流以控制沉降或明文规定另作他用的。因此，巴基斯坦也认为印度违反了“尽最大努力”并且没有考虑对邻国造成的损害。

印度认为该协定旨在控制水及水的使

用，而不是由水产生的电力。在仲裁庭的判决中认定阅读协定的条款可以看到协定允许巴基斯坦控制水而不是使用水。没有可靠的项目倡议者、融资债权方或政府机关所要产生的费用或安排建造发电厂的可行性将取决于另一方单方面的意愿的行动。

在仲裁庭的部分判决中，仲裁庭认为正如协定设想的，印度可以为了发电厂从Kishenganga河转移水。然而，印度将不得不保持Kishenganga河的最小水流，该流量将在仲裁庭的最终判决中确定。

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<http://addb-lslaw.in>