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Article

India-EU free trade agreement: State of play and way forward

By **Edouard Descotis**

India and the European Union (EU) have been negotiating a bilateral free trade agreement known as the Broad-based Trade and Investment Agreement (BTIA) since 2007. The negotiations cover a wide range of topics including tariff reductions, market access for services, intellectual property rights and investments. The last round of discussions took place in November 2013 and the negotiations have stalled ever since. Recent events including the ongoing Brexit negotiations and the termination of investment treaties might however have a direct impact on the BTIA and one can expect negotiations to resume in the near future.

Trading partners with different interests

The BTIA is a comprehensive agreement covering all aspects of trade in goods, services, intellectual property and investment. The EU is India's largest trading partner (13.5% of India's overall trade in 2015-16, well ahead of China (10.8%), the USA (9.3%), the UAE (7.7%) and Saudi Arabia (4.3%)). India was the EU's 9th trading partner in 2016 and Indian exports accounted for 2.2% of EU's overall trade. Despite the mutual interest in fostering bilateral trade and investments, India and the EU have diverging interests in the BTIA negotiations.

India is aiming to get a greater market access for services, especially for mode 1 services which cover cross border activities such as business process outsourcing (BPO) and knowledge process outsourcing (KPO). India is also interested in more liberal rules for the temporary movement of workers (mode 4

services) which would allow more skilled professionals like IT engineers to access the EU labour market and send higher remittances back to India in return. Non-tariff barriers such as sanitary and phytosanitary measures and technical barriers to trade are also a key aspect of the negotiations for India. The EU has been imposing stringent sanitary measures and labelling rules which hinder India's exports to the EU. In 2014 the EU temporarily banned the imports of Alphonso mangoes and four vegetables from India due to fruit flies and other pest infestation.

The EU is particularly interested in tariff reductions on imports of cars, wine and spirits on which India still levies stiff customs duties. The EU also wishes to negotiate more favourable rules governing the commercial presence (mode 3 services) for retailing, banking, legal services and insurance. Intellectual property protection is also at the core of the negotiations. Brussels wants New Delhi to adopt stringent intellectual property protection which goes beyond the obligations of the so-called Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. According to the TRIPS, India is allowed by the WTO to disregard intellectual property in order to protect public health which is seen by several developed countries, including the EU, as a threat of their intellectual property rights. The EU also wants more protection for foreign direct investment in India.

Despite several rounds of negotiations, the agreement is still far from being concluded. India and the EU have failed to agree on substantial

issues, including tariffs cut, intellectual property protection and liberalization in trade in services. The recent Brexit decision and the denunciation of investment treaties by India have modified the conditions prevailing during the last round of talks in 2013. Hence there is a possibility of resumption of the negotiations in the near future.

Ongoing Brexit and its consequences for the BTIA

In June 2016, the UK decided to pull out of the EU. Negotiations on the UK withdrawal are ongoing and the Brexit may make it easier for India and the EU to conclude the BTIA. Indeed, amongst the elements that have stalled the negotiations are the liberalization of visa rules for Indian workers and the reduction of tariffs on spirits. The UK has a substantive interest in both issues as it is opposed to liberal visa rules for Indian skilled labour and wants its whiskey and other spirits to face lower customs duties in India. Once the UK is out of the BTIA talks, one can safely expect easier negotiations. However, the recent decision of India to terminate bilateral investment treaties appears to be the main reason for the stalemate.

Termination of bilateral investment treaties

India signed bilateral investment treaties (BITs) with several Member States of the EU in order to protect investments. However, in 2016 India unilaterally decided to terminate BITs with 57 countries including the UK, Germany and France scraping key protection for foreign investors. The BIT with the Netherlands expired on 30 November 2016 meaning that Indian investments in the Netherlands and vice versa made before the termination will still be protected for a 15-year period but new investments will not receive any protection. New Delhi decided to terminate the BITs in order to re-negotiate the old treaties on the basis of a new model text BIT. The contentious issue with the new model BIT

lies with a refined Investor State Dispute Settlement (ISDS) provision requiring investors to exhaust all domestic procedures before seeking international arbitration. The new ISDS also limits the power of the arbitral tribunal to awarding monetary compensation alone. The EU is opposed to the new ISDS provision and has urged India to extend the old-investment treaties by six months before resuming the BTIA talks. India, however, wants a new BIT based on the model text to be part of the free-trade negotiations. The recent visit of Indian Prime Minister to Germany and France might help in finding a solution to break the deadlock as German companies are calling for a swift solution to protect investments.

Way forward

A year ago, everyone was expecting the conclusions of two mega-trade agreements: the Trans-Atlantic Trade and Investment Partnership (TTIP) between the EU and the USA and the Trans-Pacific Partnership (TPP) involving 12 Pacific-rim countries including the USA. However, the Brexit and the new trade policy of the United States following the election of new US President have dramatically changed the picture. Indeed, the USA decided to pull out of the TPP, and the TTIP negotiations are stalled. In addition, the EU is now entering uncharted waters in the Brexit negotiations and India is busy negotiating the Regional Comprehensive Economic Partnership (RCEP), a mega-regional trade agreement with the ASEAN countries plus Australia, China, Japan, South Korea and New Zealand. However, RCEP negotiations are complex and involve sixteen countries at different level of development and with diverging interests. Resuming the BTIA negotiations could therefore be good move for India for the following reasons: first, the EU is India's first trading partner; the benefits might thus be easier to reap given the trade volume. Second, both parties have a

substantial market and big population. Third, an improved market access for services and a better integration in the global value chains are key elements for India's continuous economic development. It is hence believed that the

upcoming months might see the revival of the BTIA.

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Trade Remedy News

Trade Remedy measures by India

| Product | Country | Notification No. | Date of Notification | Remarks |
|--|-------------------------------------|---|----------------------|---|
| Ceramic Rollers | China | F.No. 14/47/2016-DGAD | 30-5-2017 | ADD – Time for submission of questionnaire extended till 26-6-2017 |
| Ceramic Tableware and Kitchenware, excluding knives and toilet items | China | 27/2017-Cus. (ADD) | 12-6-2017 | Provisional ADD imposed |
| Digital Offset Printing Plates | China | 24/2017-Cus. (ADD) | 2-6-2017 | ADD extended till 3-6-2018 consequent to initiation of sunset review |
| Digital Offset Printing Plates | China | F.No. 15/24/2016-DGAD | 2-6-2017 | ADD sunset review – Time for submission of questionnaire response extended till 27-6-2017 |
| Diocetyl Phthalate (DOP) | Chinese Taipei and Korea RP | F.No.6/2/2017-DGAD [Case No.OI/03/2017] | 1-6-2017 | ADD investigation initiated |
| Elastomeric Filament Yarn of all deniers upto and including 150 deniers excluding coloured yarns and Beam type Elastomeric yarns | China, South Korea, Taiwan, Vietnam | No.15/2017-Cus. (ADD) | 3-5-2017 | Definitive anti-dumping duty imposed |
| Glazed/Unglazed Porcelain/Vitrified tiles | China | 29/2017-Cus. (ADD) | 14-6-2017 | Definitive ADD imposed |

| Product | Country | Notification No. | Date of Notification | Remarks |
|-----------------------------|---|--------------------------|----------------------|---|
| Hydrogen Peroxide | Bangladesh, Taiwan, Korea RP, Pakistan and Thailand | 28/2017-Cus. (ADD) | 14-6-2017 | Definitive ADD imposed |
| Naphthalene | Crude Naphthalene from China, EU, Russia, Iran, and Japan. Refined Naphthalene from China, EU and Taiwan. | F.No.354/86/2017-TRU | 30-5-2017 | ADD – Time period for completion of investigation extended till 31-8-2017 |
| Non-Woven Fabric | Malaysia, Indonesia, Thailand, Saudi Arabia and China | File No. 14/23/2015-DGAD | 6-6-2017 | ADD – Time period for completion of investigation extended till 14-9-2017 |
| O-Acid | China | F. No. 14/31/2016-DGAD | 23-5-2017 | ADD - Preliminary Findings issued recommending provisional duties |
| Plain Gypsum Plaster Boards | China, Indonesia, Thailand and UAE | 26/2017-Cus. (ADD) | 7-6-2017 | ADD extended till 6-6-2018 as consequent to initiation of sunset review |
| Saturated Fatty Alcohols | Indonesia, Malaysia, Thailand, Saudi Arabia | F.No.14/51/2016-DGAD | 2-6-2017 | ADD – Time for submission of questionnaire response extended till 26-6-2017 |
| Sewing Machine Needles | China | F.No.15/02/2016-DGAD | 23-5-2017 | ADD sunset review recommends definitive duty |
| Toluene Di-Isocyanate (TDI) | China, Japan and Korea RP | 25/2017-Cus. (ADD) | 5-6-2017 | Provisional ADD imposed |
| Viscose Filament Yarn | China | 14/2017-Cus. (ADD) | 3-5-2017 | ADD extended till 3-5-2018 subsequent to initiation of sunset review |

Trade Remedy measures against India

| Product | Country | Notification No. | Date of Notification | Remarks |
|-------------------------------------|-----------|---------------------------------|----------------------|--|
| Frozen Warmwater Shrimp | USA | A-533-840 [82 FR 25242] | 1-6-2017 | ADD Order continued after sunset review |
| New Pneumatic Off-the-Road Tires | USA | A-533-869 [82 FR 25598] | 2-6-2017 | Goods produced and exported by M/s. Balkrishna Industries Ltd. excluded from ADD order |
| Welded Carbon Steel Pipes and Tubes | USA | A-533-502 [82 FR 25599] | 2-6-2017 | ADD sunset review initiated |
| Zinc Coated (Galvanised) Steel | Australia | Anti-Dumping Notice No. 2017/81 | 31-5-2017 | Preliminary ADD and CVD determined |



WTO News

India requests consultations with USA over compliance in 'Carbon Steel' dispute

India has on 5-6-2017 sought consultations with USA with respect to the measures taken by the latter to comply with the recommendations of the WTO Dispute Settlement Body in the dispute *"United States - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products From India"* (DS436). According to the consultations sought under Article 21.5 of the DSU, India considers that United States' failure to amend its provisions, requiring the US authorities to cumulate the effects of subsidized imports with the effects of dumped, non-subsidized imports, is inconsistent with the DSB recommendations as well as Articles 15.1, 15.2, 15.3, 15.4 and

15.5 of the SCM Agreement. It may be noted that the DSB had in 2014 found that the United States had imposed countervailing duties on certain hot-rolled carbon steel flat products from India in a manner that breached its obligations under the Agreement on Subsidies and Countervailing Measures.

Panel established to review India's compliance in 'Poultry' dispute with USA

On May 22, the DSB has agreed to establish a panel to review India's compliance with the DSB's recommendations and rulings in *"India - Measures Concerning the Importation of Certain Agricultural Products"* (DS430) pursuant to India's second request for Panel establishment. Australia, Brazil, China, the European Union, Guatemala, Japan, Kazakhstan, Korea, the Russian Federation,

Singapore and Viet Nam have reserved third-party rights to participate in the panel's proceedings.

It may be noted that USA had opposed India's first request for Panel establishment and has already initiated Article 22.6 proceedings seeking for authorization from the DSB to suspend concessions. It has also refused to enter into a "sequencing" agreement with India. In 2015 the Appellate Body had agreed with the Panel that Indian measures are inconsistent with Articles 5.1 and 5.2 of the Sanitary and Phytosanitary Measures because they are not based on a risk assessment. Indian measures were also found to be inconsistent with the first sentence of Article 2.3 because they arbitrarily and unjustifiably discriminated between Members where identical or similar conditions prevail.

Mexico granted authorization to suspend concessions in 'Tuna' dispute with USA

The Dispute Settlement Body (DSB) has on 22nd of May, 2017 granted authorization to Mexico for suspending the application of tariff concessions to the United States in "*United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*" (DS381). In April, the arbitrator had concluded that Mexico could request the DSB to authorize the suspension of concessions to a level which did not exceed US\$ 163.23 million annually. The US however maintained that Mexico's request for authorization to suspend concessions was regrettable as it has already amended the provisions in 2016, bringing them into compliance.

Safeguard Investigations initiated by USA, Vietnam and Turkey

Following Safeguard investigations have been initiated and notified to the WTO's

Committee on Safeguards –

- a) Large residential washers and certain parts thereof - On June 10, by USA
- b) Crystalline silicon photovoltaic cells - On May 17, by USA
- c) Mineral or chemical fertilizer - On May 12, by Vietnam
- d) Toothbrushes - On April 22, by Turkey

Australia eliminates farm export subsidies

On May 22, Australia's modified schedule of commitments became effective. The schedule eliminates agricultural export subsidies and makes Australia the first WTO member with export subsidies entitlements to eliminate them from its WTO schedule of commitments. Australia's elimination of export subsidies follows in line with the landmark 2015 commitment by WTO members in Nairobi to eliminate farm export subsidies.

Meanwhile Committee on Agriculture in its meeting held on 7th of June also noted that among the 18 WTO members that have scheduled export subsidy commitments as a result of the Uruguay Round, two members — New Zealand and Panama, have already phased out their export subsidies. India's policy on wheat stocks was also questioned by number of members while USA, EU, Ukraine, Russia, New Zealand, Paraguay, Canada, Colombia, Costa Rica, Thailand, Mexico, Argentina and Pakistan urged India to share more information on its price support programmes.

Russia files complaint against Ukraine over restrictions on trade and transit for goods and services

Russia has on 22nd of May notified the WTO regarding its consultation request with Ukraine. According to Russia, various

measures adopted by Ukraine including restrictions, prohibitions, and procedures discriminate persons, goods and services of the Russian Federation as well as transit, and are in violation of Ukraine's obligations under various WTO agreements including GATT, GATS, TBT, SPS and the Import Licensing Agreement. These measures are also alleged

to violate specific commitments undertaken by Ukraine in its Accession Protocol. Interestingly, last year Ukraine had requested consultations with the Russian Federation regarding alleged multiple restrictions imposed by Russia on traffic in transit from Ukraine through Russia to third countries.



Ratio Decidendi

Extension of anti-dumping duty, pending sunset review, to be made before expiry of original notification

The Supreme Court of India has held that extension of anti-dumping duty pending the outcome of a sunset review investigation has to be necessarily made before the expiry of the notification which originally levied the definitive anti-dumping duty for a period of 5 years. The Apex Court in this regard while observing that the word used is 'may', agreed with the view of the High Court that proviso to sub-section 9A(5) of the Customs Tariff Act is an enabling provision, and that the duty would not automatically get continued after the expiry of five years simply because review exercise is initiated before the expiry of the aforesaid period. It was held that notification was hence necessarily to be issued before the expiry of the original notification. Reliance in this regard was also placed on provisions of WTO's Anti-dumping Agreement by the Court while it held that sub-section 9(5) was in tune with Articles 11.1, 11.2 and 11.3 of the ADA and hence is to be interpreted in that hue.

Further, the question as to whether the initiation of Sunset Review investigation was correct when the Public Notice announcing the

initiation of such review was published after the expiry of the 5 year period, was answered by the Apex court in affirmative. It was held that first proviso to Section 9A(5) when read along with Rule 6 of the Indian AD Rules, do not lead to the conclusion that intention to review, has to be necessarily published and made available to all. The Court was hence of the view that the date on which the decision to initiate the investigation was taken by the Government, would be the relevant date and not the date on which the same was made public.

In the present case, the anti-dumping duty which was in force for a period of 5 years was set to expire on 01.01.2014. Though the decision to initiate the sunset review investigation was taken on 31.12.2013 and the public notice announcing the initiation of investigation was sent to the official gazette for publication, the same was published and made available for sale to the public only on 06.01.2014 i.e. after expiry of the anti-dumping duty. Secondly, the notification extending the validity of the original notification was issued only on 23-1-2014, after expiry of the original notification. [*Union of India v. Kumho Petrochemicals Ltd.* – Judgement dated 9-6-2017 in C.A. Nos. 8309 to 8314/2017, Supreme Court]

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