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Article 文章

Investor and (host) state protection - India proposes a new model for BIT

投资者和东道国保护-印度建议为双边投资条约建立新的模式

By **Subhashree**

Investor State Dispute Settlement (ISDS) mechanism which allows a foreign investor to sue sovereign states claiming compensation for loss of investment has been in focus for a number of reasons ranging from enormity of compensation awarded¹, use of multiple forums and almost endless litigation in enforcement of award² to genuineness of claims³ and against regulatory laws⁴. India has ratified over 70 such investment protection agreements (including the investment chapters in CEPA, CECA) and has recently faced claims based on taxation and failure to provide proper investment climate and so on. On the international front, the ISDS has been a much debated provision in the Trans

Pacific Partnership (TPP) as well as EU-US Trade Promotion Agreement. It is in this background that India has proposed the new model for Bilateral Investment Treaty (BIT) agreements. This article seeks to highlight provisions which are new, may be unique and perhaps herald a change in the way investment should be attracted/protected without compromising on sustainable growth.

Though every BIT is supposed to be unique, the terms of the existing BITs are broadly similar. Some of the most interesting and important changes in the language of the existing BITs vis-à-vis the model BIT and the provisions are as follows:

Model provision	Existing terms	Issue sought to be addressed
Preamble uses the words - 'Reaffirming the right of Parties to regulate Investments..... including the right to change the conditions applicable to such Investments'	Mostly seek to enhance cooperation and proper protection of investments.	The preamble has often been interpreted to enhance the scope of protection to the investor and interpret investor protection in preference to any other objective a host state may put forth.
Article 1.1 describes enterprise as one having real and substantial business operations in the host state besides having carried out all operations according to applicable domestic law.	Generally reference is only to the entity being incorporated/constituted in the respective states.	A claim like Philip Morris suing as an entity in Hong Kong to take advantage of the provisions of Australia- Hong Kong treaty might be rendered impossible by the new provision.

¹ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11

² *Chevron v. Ecuador* refer Case 1:11-cv-00691-LAK-JCF Document 1874

³ ISDS against Argentina post financial crisis of 2001 refer UNCTAD IIA Issues note No.1 March 2011

⁴ *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12)

Model provision	Existing terms	Issue sought to be addressed
Article 1.6 - Investment means an enterprise which also complies with articles relating to anti-bribery, applicable taxation and domestic laws.	Investment has been defined extensively to include a host of things including immovable property, intellectual property and upto expectation of profit (India-Japan CEPA)	Clarifying the scope of protection to avoid vague, non-exhaustive definition.
Article 2.3 envisages right of parties to modify the treaty and also undertake periodic review	Usually no express provisions exist for modification and review	
Article 3 deals with standard of treatment which shall not be denial of justice, unremedied egregious violations of due process or manifestly abusive. National treatment is denied only if there is intentional and unlawful discrimination on the basis of nationality.	Most treaties call for fair and equitable treatment along with national treatment and MFN provisions.	The MFN clause is frequently used to import more favourable terms from other treaties and terms 'fair and equitable' have worked more often than not against host states [<i>Siemens v Argentina</i>]
Specific exclusion to laws of regional or local governments and exercises of discretion on when to enforce a law from breaching national treatment requirements.	This is not a commonly seen provision.	This can be important in a federal set up and in the context of recent <i>Bilcon</i> decision involving provincial and federal regulations.
Article 5 on expropriation excludes action of state in commercial capacity from the ambit of the treaty as also action to protect public welfare, health, safety and environment.	More recent treaties like India Japan CEPA devote some provisions to protection of environment though there is not much emphasis on public health.	Criticism levelled against the treaties restricting the policy space for governments.
Introduction of concept of mitigating factors like conduct of investor contributing to the damage, relevant considerations need to balance public interest and damage to local community, etc., to decide the quantum of compensation payable.	Provisions relating to calculation of damages are negligible.	The grant of award in an arbitrary fashion with the host state bearing costs of pollution in addition to paying compensation, interest and litigation costs.

Model provision	Existing terms	Issue sought to be addressed
<p>Article 8 on obligations of the investor to act in a responsible manner. Also Article 12 requires the investor to respect rights and customs of local communities, adhere to fair competition and conservation of natural resources and so on.</p>	<p>Some treaties require the investor to comply with applicable local laws but this has not been very effective. For instance the oil major which was held to have violated the law was still considered to have been subject to unfair treatment by the state [<i>Occidental</i>].</p>	<p>Lack of specific obligation cast on investors except vague terms on respecting domestic laws or any discussion on information and reporting requirements in treaties.</p>
<p>Article 8 on disclosures call for maintenance of records by the investor for 10 years (period in which treaty is in force) and further 3 years in case of a dispute after the termination of arbitration.</p>	<p>Such provisions are not usually part of treaties or envisage only protection of confidential information or providing relevant information.</p>	
<p>Article 14 provides for lodging of a counterclaim by the host state. Also the tribunal may award costs if the investor brings a claim to obtain money, property or any other thing of value or threatens to do so.</p>	<p>This provision is not usually present in treaties.</p>	<p>Seeks to address the concern that treaties tend to favour investors who can threaten use of ISDS to force the host state to accede to their claims.</p>
<p>Specific requirement to exhaust local remedies in Article 14. Also the investor has to establish that 'continued pursuit of domestic relief would be futile' before he can seek arbitration.</p>	<p>This is not present in many treaties or is not adhered to. [<i>India-UK BIT</i>]</p>	<p>Ensuring proper procedure and requiring investor to submit to the judicial process in the host state. This can counter the argument that foreign investors are treated more than equal and also bring cost savings for the host state.</p>
<p>There is a limitation period of 3 years '<i>from the date on which the Investor or Investment first acquired, or should have first acquired, knowledge of the Measure in question and knowledge that the Investment, or the Investor with respect to its Investment, had incurred loss or damage as a result</i>' to institute a claim. Also no more than 18 months should have elapsed after the conclusion of domestic proceedings or their abandonment.</p>	<p>Exhaustion of local remedies and limitation are provided in some of the more recent treaties like India-Japan CEPA.</p>	

Model provision	Existing terms	Issue sought to be addressed
The claim by the investor shall be with respect to ‘ <i>actual and non-speculative damages as a direct and foreseeable result of such breach by the Respondent Party</i> ’.	Claims generally relate to expropriation with adequate compensation, other damages, etc.	The use of actual damages is in consonance with definition of a ‘measure’ being one which directly applies on the investment. Also loss of goodwill, reputation, etc., are not covered.
At all times, the investor shall bear the burden of proving the breach of obligations by the host state.	Usually absent in treaty texts	
A separate chapter devoted to general exceptions and state exceptions which reiterates certain protections for the host state.	Generally exceptions are carved out for critical balance of payments positions, war and emergencies.	
Article 24 provides that the treaty shall remain in force for a duration of 10 years and that protection for investments made prior to termination for upto 5 years after date of termination.	Different treaties provide for different periods.	Brings uniformity in duration as opposed to current treaties with varying protection periods.

Other provisions seeking to restrict scope of protection

Article 1.7 excludes goodwill and similar intangible rights, pre-operational expenses, portfolio investments, etc., from the definition of assets. Article 1.11 defines measure as any form of *legally binding action applying directly* to an investment. Any activity pursuant to compliance with sectoral limitations relating to admission of investment is defined as investment activity excluded for purposes of claims. Government procurement and subsidies are excluded for purposes of claims as also disputes arising out of commercial contracts between a state and an investor shall be resolved in accordance with the contract and not as per the treaty. Taxation

has been specifically excluded by Article 2.6. Despite the debate over use of compulsory licensing (CL) as per the flexibilities in TRIPS agreement, CL is specifically excluded. Further revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the law of the host state will also not be within the purview of claims.

ISDS mechanism

Special provisions have been laid down for constitution of arbitral tribunals, qualification of arbitrators, ruling out conflict, conduct and transparency of proceedings. Various bodies like ICSID, ICC and UNCITRAL do not find a mention as appropriate forum. Also under various

exceptions, specific defences are available to the host state as per Article 17 including war, emergency, critical public infrastructure, etc., and they may be asserted at any time during the proceedings. On diplomatic exchanges, the treaty envisages that if a disputing investor has commenced an investment dispute against a respondent host state the non-disputing party shall not give diplomatic protection, or bring an international claim, in respect of that investment dispute between one of its investors and the respondent host state, unless the respondent party has failed to abide by and comply with an award or the decisions of its courts and other applicable law regarding recognition and enforcement of foreign judgments and arbitral awards.

To conclude

Besides the provisions listed above the model BIT contains a number of do's and don'ts to enable investment protection which balances the interest of both parties. However if we look

at the text of recent treaties, Canada-China FIPA or Canada-EU CETA it is doubtful if states will agree to radically change the tenor of investment protection agreements. For instance, the protection of intellectual property rights is among the most negotiated provision in recent ongoing exercises like TPP. Even with elaborate provision for conduct of the arbitral proceedings the host state may find it difficult to put forth its position strongly. Going by the experiences so far exclusion clauses have not been enough and a fair trial is far from reality.⁵ An important question is whether to have ISDS at all since Brazil has not ratified such agreements and the recent Australia-Japan FTA does not contain ISDS provisions and EU is engaged in a massive debate about its desirability. If the objective is to take into account experiences with earlier BITs, common criticisms and protect the host state, the model BIT does quite well.

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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 通知号及日期
Adipic acid 己二酸	Brazil 巴西	Definitive anti-dumping duty imposed 征收最终反倾销税	MOFCOM news, dated 2-4-2014 2014年4月2日, 商务部新闻
Aluminum Presensitized Plate 铝制预涂感光平板	Brazil 巴西	Definitive anti-dumping duty imposed 征收最终反倾销税	MOFCOM news, dated 10-3-2014 2014年3月10日, 商务部新闻
Barium Carbonate 碳酸钡	India 印度	ADD Sunset review initiated 发起反倾销日落复审	F.No.15/27/2014-DGAD, dated 19-3-2015 2015年3月19日, 第15/27/2014-DGAD号

⁵ Occidental – apportioning responsibility for damage - refer *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知号及日期
Boltless steel shelving units prepackaged for sale 无螺栓钢制搁架产品	USA 美国	ADD – Preliminary determination of sale at less than fair value 反倾销-初步裁定低于正常价值销售	80 FR 17409 [A-570-018], dated 1-4-2015 2015年4月1日 , 80 FR 17409 [A-570-018]
Carbazoleviolet Pigment 22 咔唑紫颜料	USA 美国	ADD sunset review initiated 发起反倾销日落复审	80 FR 17388 [A-570-892], dated 1-4-2015 2015年4月1日 , 80 FR 17388 [A-570-892]
Ceramic Appliance 陶瓷器具	Columbia 哥伦比亚	Definitive anti-dumping duty imposed 征收最终反倾销税	MOFCOM news, dated 27-3-2014 2014年3月27日 , 商务部新闻
Ceramic tiles 瓷砖	EU 欧盟	Definitive ADD imposed 征收最终反倾销税	Commission Implementing Regulation (EU) 2015/409, dated 11-3-2015 2015年3月11日 , 欧盟委员会执行公告第2015/409号
Ceramic tiles 瓷砖	Columbia 哥伦比亚	ADD investigation initiated 发起反倾销调查	MOFCOM news, dated 11-3-2014 2014年3月11日 , 商务部新闻
Chloropicrin 三氯硝基甲烷	USA 美国	ADD sunset review initiated 发起反倾销日落复审	80 FR 17388 [A-570-002], dated 1-4-2015 2015年4月1日 , 80 FR 17388 [A-570-002]
Citric acid 柠檬酸	Eurasian Economic Commission 欧亚经济委员会	Definitive anti-dumping duty imposed 征收最终反倾销税	MOFCOM news, dated 16-3-2014 2014年3月16日 , 商务部新闻
Citric acid and Sodium citrate 柠檬酸和柠檬酸钠	Columbia 哥伦比亚	ADD duty imposed on sodium citrate for two years but not imposed ADD duty on citric acid 对柠檬酸钠征收2年的反倾销税单 对柠檬酸不征收反倾销税	MOFCOM news, dated 27-3-2014 2014年3月27日 , 商务部新闻
Cold Rolled Flat Products of Stainless Steel of chromium type 400 series 400系列铬型不锈钢冷轧平板	India 印度	Safeguard investigation terminated 终止保障措施调查	MOFCOM news, dated 25-3-2014 2014年3月25日 , 商务部新闻

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知号及日期
Coumarin 香豆素	India 印度	ADD Sunset review initiated and ADD extended till 22-3-2016 发起反倾销日落复审并且反倾销税被延长至2016年3月22日	F.No.15/26/2014-DGAD, dated 16-3-2015 and 8/2015-Cus. (ADD), dated 7-4-2015 2015年3月16日, 第15/26/2014-DGAD号和2015年4月7日 第8/2015-Cus. (ADD)号
Crepe paper 皱纹纸	USA 美国	ADD sunset review initiated 发起反倾销日落复审	80 FR 17388 [A-570-895], dated 1-4-2015 2015年4月1日, 80 FR 17388 [A-570-895]
Crystalline Silicon Photovoltaic Cells 晶体硅光伏电池	USA 美国	ADD changed circumstances review initiated 发起反倾销情势变更复审	80 FR 15568 [A-570-979], dated 24-3-2015 2015年3月24日, 80 FR 15568 [A-570-979]
Deep drawn stainless steel sinks 不锈钢拉制深水槽	Australia 澳大利亚	Combined Interim Countervailing Duty and Interim Dumping Duty imposed 征收临时反补贴税和临时反倾销税	Anti-dumping Notice No. 2015/41, dated 26-3-2015 2015年3月26日, 反倾销公告第2015/41号
Diamond Sawblades and Parts Thereof 金刚石锯片	USA 美国	ADD – Affirmative result of sunset review 反倾销-肯定性日落复审终裁	80 FR 12797 [A-570-900], dated 11-3-2015 2015年3月11日, 80 FR 12797 [A-570-900]
Fatty alcohol 饱和脂肪醇	India 印度	Safeguard duty imposed 实施保障措施税	01/2015 Cus.(SG), dated 13-03-2015 2015年3月13日, 01/2015 Cus.(SG)
Glass mirror 玻璃镜	Brazil 巴西	ADD investigation initiated 发起反倾销调查	MOFCOM news, dated 24-3-2014 2014年3月24日, 商务部新闻
Hand trucks and parts 手推车和部件	USA 美国	ADD order revoked in part in respect to certain multifunction carts 就某些多功能手推车取消反倾销令	80 FR 18812 [A-570-891], dated 8-4-2015 2015年4月8日, 80 FR 18812 [A-570-891]
Hollow Structural Sections 焊缝管	Australia 澳大利亚	Review of Anti-Dumping Measures in respect of specified exporter initiated 就某些出口商发起反倾销复审	Anti-dumping Notice No. 2015/45, dated 9-4-2015 2015年4月9日, 反倾销公告第2015/45号

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知号及日期
Hot Rolled Flat Products of Stainless Steel 304 Series 304系列不锈钢热轧平板	India 印度	Definitive anti-dumping duty recommended 建议征收最终反倾销税	F.No.14/30/2013-DGAD, dated 9-3-2015 2015年3月9日 , 第14/30/2013-DGAD号
Iron or steel fasteners 钢铁制紧固件	EU 欧盟	Definitive ADD imposed 征收最终反倾销税	Commission Implementing Regulation (EU) 2015/519, dated 27-3-2015 2015年3月27日 , 欧盟委员会执行公告第2015/519号
Kitchen Appliance Shelving and Racks 厨房用搁板和网架	USA 美国	ADD and CVD Order to continue 继续反倾销和反补贴令	80 FR 12983 [A-570-941, C-570-942], dated 12-3-2015 2015年3月12日 , 80 FR 12983 [A-570-941, C-570-942]
Load cells 称重传感器	Argentina 阿根廷	ADD investigation initiated 发起反倾销调查	MOFCOM news, dated 16-3-2014 2014年3月16日 , 商务部新闻
Melamine 三聚氰胺	USA 美国	ADD investigation - Preliminary determination postponed 反倾销调查-延期临时裁决	80 FR 12979 [A-570-020], dated 12-3-2015 2015年3月12日 , 80 FR 12979 [A-570-020]
Methyl methacrylate plate 甲基丙烯酸甲酯制板	Brazil 巴西	Terminated ADD investigation 终止反倾销调查	MOFCOM news, dated 27-3-2014 2014年3月27日 , 商务部新闻
Molybdenum wires 钼丝	EU 欧盟	ADD circumvention investigation initiated 发起反倾销反规避调查	Commission Implementing Regulation (EU) 2015/395,] dated 10-3-2015 2015年3月10日 , 欧盟委员会执行公告第2015/395号
Multilayered Wood Flooring 复合木地板	USA 美国	ADD changed circumstances review initiated 发起反倾销情势变更复审	80 FR 13328 [A-570-970], dated 13-3-2015 2015年3月13日 , 80 FR 13328 [A-570-970]
Oil country tubular goods 石油管材	USA 美国	ADD – Affirmative sunset review 反倾销-肯定性日落复审终裁	80 FR 18604 [A-570-943], dated 7-4-2015 2015年4月7日 , 80 FR 18604 [A-570-943]

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知号及日期
Passenger vehicles and light truck tyres 乘用车和轻型货车轮胎	USA 美国	ADD – Preliminary determination amended 反倾销-修改临时裁决	80 FR 15987 [A-570-016], dated 26-3-2015 2015年3月26日 , 80 FR 15987 [A-570-016]
PET	Malaysia 马来西亚	Definitive anti-dumping duty imposed 征收最终反倾销税	MOFCOM news, dated 25-3-2014 2014年3月25日 , 商务部新闻
Photovoltaic Modules 光伏组件	Canada 加拿大	ADD and CVD - Injury analysis initiated 反倾销和反补贴-发起损害分析	Canadian International Trade Tribunal News Release dated 6-3-2015 2015年3月6日 , 加拿大国籍贸易法院发布新闻
Polyethylene retail carrier bag 塑胶手提袋	USA 美国	ADD sunset review initiated 发起反倾销日落复审	80 FR 17388 [A-570-886], dated 1-4-2015 2015年4月1日 , 80 FR 17388 [A-570-886]
Polyethylene terephthalate resin 聚对苯二甲酸乙二醇酯树脂	USA 美国	CVD investigation initiated 发起反补贴调查	80 FR 18369 [C-570-025], dated 6-4-2015 2015年4月6日 , 80 FR 18369 [C-570-025]
Polyethylene terephthalate resin 聚对苯二甲酸乙二醇酯树脂	USA 美国	ADD – Initiation of less than fair value investigation 反倾销-发起低于正常价值调查	80 FR 18376 [A-533-861], dated 6-4-2015 2015年4月6日 , 80 FR 18376 [A-533-861]
Seamless tube 无缝钢管	Indonesia 印度尼西亚	Preliminary ADD duty terminated 取消临时反倾销税	MOFCOM news, dated 8-4-2014 2014年4月8日 , 商务部新闻
Seamless tube and high pressed pump tube 无缝钢管和高压泵钢管	Ukraine 乌克兰	Safeguard duty continued 继续实施保障措施	MOFCOM news, dated 1-4-2014 2014年4月1日 , 商务部新闻
Sheet Glass 平板玻璃	India 印度	Definitive anti-dumping duty imposed 征收最终反倾销税	7/2015-Cus. (ADD), dated 13-3-2015 2015年3月13日 , 7/2015-Cus. (ADD)
Silicon Metal 金属硅	Australia 澳大利亚	Time granted to provide final report extended 延期发布最终裁决	Anti-dumping Notice No. 2015/46, dated 7-4-2015 2015年4月7日 , 反倾销公告第2015/46号

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知号及日期
Shoes 鞋类	Argentina 阿根廷	ADD sunset review initiated 发起反倾销日落复审	MOFCOM news, dated 31-3-2014 2014年3月31日，商务部新闻
Stainless steel cold-rolled flat products 冷轧不锈钢板	EU 欧盟	Provisional ADD imposed 征收临时反倾销税	Commission Implementing Regulation (EU) 2015/501, dated 24-3-2015 2015年3月24日，欧盟委员会执行公告第2015/501号
Steel Grating 钢格板	Canada 加拿大	Reinvestigation of normal values, export prices and amounts of subsidy initiated 重新发起正常价值、出口价格和补贴金额的再调查	CBSA Notice dated 31-3-2015 2015年3月31日，加拿大边境服务署公告
Steel threaded rod 螺纹钢	USA 美国	ADD – Notice of amended final results of scope ruling 反倾销-就调查范围修改最终裁决	80 FR 18200 [A-570-932], dated 3-4-2015 2015年4月3日，80 FR 18200 [A-570-932]
Tetrahydrofurfuryl Alcohol 四氢糠醇	USA 美国	ADD – Affirmative result of sunset review 反倾销-肯定性日落复审终裁	80 FR 12981 [A-570-887], dated 12-3-2015 2015年3月12日，80 FR 12981 [A-570-887]
Threaded copper pipe 螺纹铜管	Brazil 巴西	Definitive anti-dumping duty imposed 征收最终反倾销税	MOFCOM news, dated 10-3-2014 2014年3月10日，商务部新闻
Toluene diisocyanate 甲苯二异氰酸酯	Japan 日本	Definitive anti-dumping duty imposed 征收最终反倾销税	MOFCOM news, dated 8-4-2014 2014年4月8日，商务部新闻
Trichloroisocyanuric acid 三氯异氰尿酸	EU 欧盟	Terminated new shipper review 取消新出口商复审	MOFCOM news, dated 11-3-2014 2014年3月11日，商务部新闻
Uncoated paper 未涂布纸	USA 美国	CVD investigation – Preliminary determination postponed 反补贴调查-延期发布初步裁决	80 FR 12977 [C-570-023], dated 12-3-2015 2015年3月12日，80 FR 12977 [C-570-023]
Vitamin E 维生素E	India 印度	Sunset review recommends definitive anti-dumping duty 日落复审建议最终反倾销税	F.No.15/31/2013-DGAD, dated 23-3-2015 2015年3月23日，第15/31/2013-DGAD号

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知号及日期
Wheelbarrow 独轮手推车	South Africa 南非	ADD – affirmative preliminary finding 反倾销-肯定性临时裁决	MOFCOM news, dated 10-3-2014 2014年3月10日，商务部新闻
Wooden bedroom furniture 木质卧室家具	USA 美国	ADD – Changed circumstances review initiated 反倾销-发起情势变更复审	80 FR 17719 [A-570-890], dated 2-4-2015 2015年4月2日， 80 FR 17719 [A-570-890]
Wrench 扳手	Argentina 阿根廷	Affirmative ADD preliminary industry injury determination 肯定性反倾销产业损害初裁	MOFCOM news, dated 16-3-2014 2014年3月16日，商务部新闻

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 通知号及日期
Oriented electrical steel 取向电工钢	US and Russia 美国和俄罗斯	Terminated ADD measures 终止反倾销措施	MOFCOM Announcement No.11 of 2015, dated 10-4-2015 2015年4月10日，商务部公告 2015年第11号
Unbleached Sack Paper 未漂白纸袋纸	EU, US and Japan 欧盟、美国和日本	ADD investigation initiated 发起反倾销调查	MOFCOM Announcement No.9 of 2015, dated 10-4-2015 2015年4月10日，商务部公告 2015年第9号

WTO News 世贸组织新闻

欧盟质疑印度的当地成分要求和进口许可或配额

欧盟再次表达了其担忧印度在太阳能发电领域要求当地成分的政策。根据欧盟于2015年3月17日在世贸组织发布的通讯稿，印度的当地成分要求似乎违反了印度在20国集团(G20)做出的不实施保护主义措施的承诺，并且他们的做法是否与关税和贸易总协议以及及与贸易有关的投资措施协定是否兼容的问题。

欧盟的通讯稿中还包括寻求印度最近宣布的两个太阳能项目的进一步信息，同时也质疑提出当地成分要求的理由，特别是印度国内运营商目前没有能力满足这样的需求。

另外，欧盟也就印度对进口大理石和大理石产品的进口许可和配额被向进口许可委员会提出质疑。在2015年3月6日的文件G/LIC/Q/IND/24，欧盟寻求澄清印度的进口许可证和配额体系如何可以合理地保护其国内会枯竭

的自然资源。假设印度的最低进口价格被认为是合理的理由,那么印度将到位哪些措施以确保相应质量的印度国内产业。印度已经在2013年12月早些时回答了欧盟提出的部分问题,认为印度国内的大理石矿业也受到许可和与环境案件有关的生产控制。根据2015年3月17日的文件G/LIC/Q/IND/25 (发布了2015年3月11日印度的通信稿),印度认为有许多司法判决禁止在储备林中开展采矿活动。

根据巴基斯坦、欧盟和韩国的请求成立了专家组

2015年3月25日,世贸组织的争端解决机构成立了三个专家组研究巴基斯坦诉欧盟提出的就欧盟对聚对苯二甲酸乙二醇酯(PET)产品实施反补贴措施案(DS486); 欧盟诉

俄罗斯对农业和制造业产品的关税待遇案(DS485); 以及韩国诉美国的石油管材反倾销措施案(DS488)。印度在DS485和DS488案中保留了其第三方权利。

印度尼西亚就美国对纸产品实施反倾销税案提起争端解决

2015年3月13日,印度尼西亚已通知世贸组织秘书处,请求与美国就美国对来自印度尼西亚的铜版纸实施反倾销和反补贴措施案(DS491)进行磋商。印度尼西亚认为美国的裁决违反了补贴与反补贴协定第2.1、12.7、14(d)、15.5、15.7和15.8条以及反倾销协定第3.5、3.7和3.8条。这是双方之间继丁香香烟纠纷案和与园艺产品、动物和动物产品的进口争端案后的第三个主要争端。

Ratio Decidendi 判决理由

反倾销-调查中/复审中调查当局提供所采纳信息的时限

德里高等法院撤销了调查机关(DA)对来自中国、台湾和韩国的USB闪存驱动建议征收最终反倾销税的最终裁决。法院认为调查机关没有向其他当事人(起诉人)提供调查机关所采纳的信息或材料,因此违反了自然正义原则,给呈现出来的最终结果造成严重影响。法院对此指出调查机关在调查期即将结束的时候(再发起调查的17个月后)依赖了每笔交易的进口数据作为新证据,却没有向起诉人(出口商)提供复印件,因此没有提供一个合理的时间给当事人审查和评论新的证据。法院指出调查机关不仅拒绝提供来源数据的非保密概要,也么有披露他所确定的涉案产品的无损害价格,调查机关认为为了有效的听证,要求调查机关将一方提供的证据提供给参与调

查的另一方,同事调查机关从其他来源获得的证据和材料也应提供给所有当事人。

另外,对于向调查机关发还案件以进行裁决后听证,法院认为由于调查的法定期限已经结束,案件无法被发还给调查机关重新裁决。对此法院认为应当严格遵守根据反倾销法的各项条款规定的时间限制并且调查必须在法定期限内完成。高等法院认为如果调查中无法在相应的法定期间内完成,整个程序将被破坏。最后,法院还支持根据印度宪法第226条,即使在最终裁决被中央政府接受前,当事人有权对该最终裁决提出诉讼。【德里高等法院于2015年3月18日对 *Sandisk International Ltd.* 诉调查机关WP(C) 744/2015 & CM Nos. 1319/2015, 2662/2015的裁决】

反倾销-不给予有效的听证和事后追溯延长调查

在另一个涉及违反自然正义原则的案件中,德里高等法院也撤销了对进口自中国、韩国和泰国的铝制车轮的反倾销调查的最终裁决。最终裁决被撤销,原因是调查机关违反了自然正义原则,因为调查机关在更换了负责人的时候没有向利害关系方给予充分听证的机会。在得出结论时,法院认为给予听证的机会必须不是虚幻的,仅仅因为缺乏时间(由于利害关系方无过错),调查机关不能践踏自然正义的原则。法院认为调查机关必须向利害关系方给予一个有意义的听证机会,并且书面陈述意见或评论不能替代口头听证。

然而,在调查时间结束后延长完成调查的时间是否有效的问题上,法院认为中央政府可以在调查超过一年后延长6个月的调查期,并且总的调查期不能超出18个月的时间。法院认为反倾销法第17条没有禁止中央政府如此做。法院认为在规定的期限和通过继续延长而使原期限的调查再度复活,从某种意义上而言,直到通过给予时候延期为止,调查处于暂停状态。【德里高等法院于2015年3月27日对*Mahindra & Mahindra Ltd.*诉印度联邦 - WP(C) 3022/2014, 3023/2014, 3250/2014, 3251/2014, 633/2015和634/2015做出裁决】

反倾销税-“利害关系方”的范围被确定

德里高等法院认为1995年海关关税(对倾销商品认定、评估和征收反倾销税和确定损害)条例第2(c)条中的“利害关系方”的定义,是指有意参与调查并且对它产生最终结果。法院对此认为利害关系方可以是支持征收反倾销税或可以反对反倾销税,但是“利害”必须是真实的和贴近的,而不只是随意的或学术的。法院

不接受调查机关认为利害关系方只包括在调查期间进口指定国家涉案产品的进口商。[德里高等法院于2015年3月9日对*Bharat Solvent & Chemical Corporation*诉印度联邦 - W.P. (C) 401/2015的裁决]

反倾销规避调查-转运和改变贸易模式

欧洲法院取消对来自斯里兰卡指定的出口商出口的自行车征收反倾销税,不论自行车是否被宣称来自斯里兰卡。在对来自中国的自行车进行了反规避调查并做出裁决后,欧盟对斯里兰卡的自行车实施了反倾销税。对于斯里兰卡出口商的转运操作的裁决问题,法院认为即使申请人无法证明事实上他的确是斯里兰卡生产商或它能够满足基本条例第13(2)条,但仍无法使欧盟调查机关在默认情况下得出申请人是从事转运业务的结论。法院认为基本条例或案例法都没有明显授予这样的权利。法院对此也指出欧盟调查机关没有证据可以明确得出申请人-出口商从事转运业务。

然而,当从中国进口到欧盟的自行车下降了84%,而来自中国向斯里兰卡的进口增长了132%,并且在实施了原始的反倾销税后,从斯里兰卡进口到欧盟的量也增长了3.8倍,法院认为对于贸易模式的变化没有可替代的解释。斯里兰卡出口商认为在2009年斯里兰卡从中国的进口下降了9.9%,而斯里兰卡对欧盟的出口增长了35%的观点,也被法院拒绝了,法院认为这样的年度变化不能改变欧盟机构数据获得的趋势。对此,法院支持了调查机关的裁决,认为由于存在库存,可能在中国和斯里兰卡之间物流的变化以及斯里兰卡和欧盟之间的物流变化的时间差。【欧洲法院(普通法院)于2015年3月19日对*City Cycle Industries*诉欧盟委员会-T-413/13案的裁决】

News Nuggets 新闻精华

印度公布2015-2020年对外贸易政策

旨在到2020年使印度的商品和服务出口翻倍, 印度商工部已在2015年4月1日宣布了2015-2020年新的对外贸易政策。根据对外贸易政策, 该政策旨在通过各种免税和减轻实际用于出口商品生产投入的间接税、以优惠关税进口资本货物、促进服务出口和专注于特定的市场和产品。

新政策为2015年4月1日以后的出口宣布了两个新的出口促进计划。一个旨在促进商品出口而另一个旨在促进服务出口。在促进货物出口方面有5个不同的计划, 即专注产品计划、与市场相关的专注产品计划、专注市场计划、Agri基础设施激励便利和Vishesh Krishi Gram Udyog Yojana (KGUY), 都被合并为一个计划, 即来自印度的商品出口计划(MEIS)。同样的, 来自印度的服务计划(SFIS)也被新的来自印度的服务出口计划(SEIS)代理。这些自由可转让的便利可用于支付为采购货物或服务而需支付的关税、中央货物税或服务税。

新政策进一步宣布了一系列贸易便利化和便利开展业务的措施, 如在线提交文件、在线与部长级的磋商、简化各种程序、数字化等。事前授权持有者的出口义务现在也可以

通过出口到经济特区而实现, 如果EPCG持有人从国内市场获得资本货物可以减少其出口义务。出口型企业(EOUs)也被赋予许多优惠措施以促进他们的出口。

加拿大对它的代理机构由于不公平待遇而负有责任

国际仲裁法院在近期Bilcon(&个人投资者)诉加拿大的裁决中, 展开了新一轮的投资者与国家争端、投资者保护和各种条约条款的解释的讨论。投资者-建筑材料的供应商声称联合审查小组(JRP)对拟建的采石场爆破和在靠近河边设立航运站就环境的影响构成不公平待遇和按国别的歧视。投资者认为加拿大政府在项目开始前给予的鼓励造成投资者期望可以获得批准, 因此它已经在这个项目中投入了数百万美元。投资者也抨击了JRP的构成、(新斯科舍)州的行动和在此之前没有提到过的JRP采纳的社会核心价值观的标准。投资者认为东道主国家不仅应该以非任意和非歧视性的方式行动, 也应合理地采取行动并保护合法的期望。法院认为国家可以就环境自由制定自己的法律, 而仅仅是涉及到环境法规的事实是不会使投资者保护不适用。同样事实上, 就国民待遇以及公正和平等的待遇方面, 国家违反了其义务。

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