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Article

Notes from the WTO's 12th Ministerial Conference – India saves the day

By Jayant Raghu Ram

Introduction

The World Trade Organization ('WTO') concluded the 12th Ministerial Conference ('MC 12') in Geneva on 16 June 2022. Being the first Ministerial Conference since the outbreak of the Covid pandemic in 2020 and being held after a more than four-year hiatus, MC 12 was one of the most anticipated Ministerial Conferences.

In the run up to MC 12, analysts and trade experts were skeptical of any success being achieved at the conference. Some commentators were 'cautiously optimistic' about the outcome of MC 12. Given the rigid positions adopted by Members on different issues leading up to MC 12 and the tense geopolitical climate due to the conflict in Ukraine, the negotiating atmosphere had indeed become pessimistic.

However, contrary to such expectations, MC 12 has surprisingly delivered a package of decisions, dubbed the Geneva Package, which has been hailed as an achievement in the WTO's negotiating history. With outcomes on a Fisheries Subsidies agreement, decisions on food security, and a TRIPS waiver for COVID purposes, among others, the WTO has seemingly broken the stalemate that existed after the Bali Ministerial Conference.

On the face of it, it would indeed appear that MC 12 has achieved significant success in delivering key outcomes. However, to truly understand the achievements of the MC 12, it becomes necessary to dig deeper into the contents of the Geneva Package, particularly in light of the negotiating background and the

outcomes that were sought to be achieved. With this objective, this article provides a broad analytical overview of the key contents of the Geneva Package.

Decisions on food security – Membership left hungry for more

An issue that was on top of the negotiating table was that of food security. Towards this objective, Members had successfully arrived at two decisions: one was on Members not restricting or prohibiting food exports for the purposes of World Food Programme; the second was a declaration on the emergency response to food insecurity.

Though both decisions are welcome, particularly in today's context where there is a lot of uncertainty regarding food availability, both decisions are low-hanging fruits in comparison to that of finding a permanent solution for public stockholding for food security purposes. This issue was particularly important for India, whose public stockholding programs flirt with the risk of violating domestic support prohibitions in the Agreement on Agriculture.

Though such programmes are protected by the peace arrangement agreed to post the Bali Ministerial Conference, India and its developing country allies have been legitimately expecting a permanent solution to this issue. However, MC 12 has decided to continue negotiations on this issue and postponed the decision on arriving at a permanent solution to the next Ministerial Conference.

E-Commerce Moratorium – The system hangs once again

An item on the negotiating agenda that had generated a lot of debate in the run up to MC 12 was the moratorium on the imposition of customs duties on electronic transmissions. Initially agreed to at the 1998 Ministerial Conference, this moratorium has been extended at every successive Ministerial Conference for two additional years.

Prior to MC 12, India along with likeminded developing countries made a very strong case against the continuation of this moratorium. India's compelling arguments showed how the moratorium was not just causing significant revenue losses to developing countries but also throttling the development of their domestic digital industries. Members however did not agree on removing the moratorium and instead extended it to March 2024, leaving this battle to be fought on another day.

TRIPS waiver for Covid vaccines – Too little, too late

Developing countries backed by civil society organizations have often been at loggerheads with developed countries over intellectual property rights and access to medicines. This issue came to the fore in 2020 during the outbreak of Covid, when developing countries led by India and South Africa sought a waiver of TRIPS obligations concerning key IPRs for the free trade of pharmaceutical products required for responding to the pandemic.

The initial proposal, which went well beyond vaccines and covered diagnostics, was watered down in the final decision to cover only limited exemptions on patents, and that too only for vaccines. Commentators have argued that this decision has impacted the WTO's legitimacy to

adequately respond to the needs of the developing countries in a time of grave crisis.

Fisheries agreements – Fishing in shallow waters

The Membership has been negotiating disciplines to address harmful fisheries subsidies since the mandate was given by the Doha Ministerial Declaration in 2001. At MC 12, certain Members attempted to repeat the injustices of the Uruguay Round by asking developing countries to limit subsidies on developing fishing capacity while they themselves had already developed significant capacity. In this regard, India's Hon'ble Commerce Minister deserves the highest praise for resisting such attempts by articulating the position of India's resource poor fishers and highlighting the inequities in the fisheries industries in developing countries.

Though it is welcome that the MC 12 has finally concluded an agreement on fisheries subsidies after so many years, the agreement's achievements are rather limited as the prohibitions on grant or maintenance of subsidies concern only limited aspects. Further, provisions for special and differential treatment have been limited to just a two-year transition period for developing countries. Nonetheless, the silver lining is that Members have decided not to stop with this text but have agreed to negotiate further disciplines concerning fisheries subsidies.

Conclusion

The last two Ministerial Conferences (Nairobi in 2015 and Buenos Aires in 2017) failed to make any significant achievements. This had raised significant expectations from the Membership at MC 12. Further, given the paralysis of the Appellate Body caused by the United States' refusal to join the consensus for appointing new appellate members, it became all the more important for the WTO to show progress at least in its negotiating arm. However, given the

difference in negotiating positions of WTO Members, limited gains have been made at MC 12.

The Indian negotiating team must be complimented for putting its best foot forward and displaying exemplary leadership by vigorously defending the interests of the developing countries in key areas such as food security, TRIPS waiver for vaccines, and fisheries subsidies. Though MC12 could have achieved much more, the alternative would have been for the Membership being unable to agree on any significant outcomes. This would have further hurtled the WTO towards irrelevance and raised serious concerns on its future.

In this regard, India must be crowned as the hero of the day for saving the WTO from risk of

irrelevance and showing foresight and maturity in recognizing the importance of a multilateral body such as the WTO. India must be complimented for agreeing to let the Membership realizing hope at MC 12 and postponing the Membership's opportunity to achieve greater success on key issues to the next Ministerial Conference. However, in case no progress is achieved on these key issues at the next Ministerial Conference, India must insist that the WTO identify the real factors for any such impediment and not allow other stakeholders to cast the blame on India.

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Trade Remedy News

Trade Remedy actions by India

Product	Country	Notification No.	Date of notification	Remarks
Aluminium Primary Foundry Alloy Ingot	Malaysia	F. No. CBIC-190354/282/2021-TO(TRU-I)-CBEC	23 May 2022	Finance Ministry declines to accept recommendations of DGTR to impose countervailing duty
Ammonium Nitrate	Russia, Georgia and Iran	F. No. 7/11/2021-DGTR	10 June 2022	Sunset review of anti-dumping duty recommends to discontinue ADD on imports from Georgia and continue ADD on imports from Russia and Iran.
Fluoro Backsheet excluding transparent backsheet	China PR	22/2022-Cus. (ADD)	15 June 2022	Definitive anti-dumping duty imposed

Product	Country	Notification No.	Date of notification	Remarks
Hydrogen Peroxide	Bangladesh, Taiwan, Korea RP, Indonesia, Pakistan and Thailand	20/2022-Cus. (ADD)	7 June 2022	Notification imposing anti-dumping duty rescinded
Jute Yarn/ Twine, Hessian fabric, and Jute sacking bags (Jute Products)	Bangladesh and Nepal	18/2022-Customs (ADD)	31 May 2022	Anti-dumping duty extended till 30 November 2022
Low Density Polyethylene (LDPE)	Qatar, Saudi Arabia, Singapore, Thailand, United Arab Emirates and United States of America	F. No. CBIC-190354/211/2021-TRU Section CBEC	6 June 2022	Finance Ministry declines to accept recommendations of DGTR for imposing anti-dumping duty
New/unused pneumatic radial tyres for buses and trucks	China PR	21/2022-Cus. (ADD)	8 June 2022	Anti-dumping duty extended till 17 December 2022
Rubber chemicals	TDQ from China PR, EU and Russia; PVI from China PR; and CBS from China PR and EU	F. No. CBIC-190354/144/2022-TRU Section-CBEC	23 June 2022	Finance Ministry declines to accept recommendations of DGTR for imposing anti-dumping duty
Saccharin	China PR	3/2022-Cus. (CVD)	2 June 2022	Provisional assessment for countervailing duty ordered for imports from Thailand, pending anti-circumvention investigation
Styrene-Butadiene Rubber (SBR)	European Union, Korea RP, and Thailand	17/2022-Cus. (ADD)	30 May 2022	Anti-dumping duty extended till 31 October 2022

Product	Country	Notification No.	Date of notification	Remarks	
Toluene Di-Isocyanate (TDI)	China, Japan, and Korea RP	PR, and	19/2022-Cus. (ADD)	3 June 2022	Anti-dumping duty extended till 27 September 2022
Toluene Di-Isocyanate (TDI)	China, Japan, and Korea RP	PR, and	F.No.7/26/2021-DGTR	24 June 2022	Sunset review recommends continuation of anti-dumping duty

Trade remedy actions against India

Product	Investigating Country	Document No.	Date of Document	Remarks
Barium Chloride	USA	87 FR 36460	17 June 2022	Preliminary affirmative countervailing duty determination
Finished carbon steel flanges	USA	87 FR 34251	6 June 2022	Initiation preliminary results of changed circumstances review of anti-dumping duty order
New Pneumatic Off-the-Road Tires	USA	87 FR 34654	7 June 2022	Affirmative final result of sunset review of the anti-dumping duty order
Raw Honey	USA	87 FR 35501	10 June 2022	Anti-dumping duty orders issued
Sodium Nitrite	USA	87 FR 36824	21 June 2022	Preliminary affirmative countervailing duty determination
Steel Nails	USA	87 FR 34654	7 June 2022	Preliminary affirmative determination of countervailing subsidies
Sulfanilic Acid	USA	87 FR 35968	14 June 2022	Final results of sunset reviews and revocation of anti-dumping and countervailing duty orders issued



WTO News

The 'Geneva Package' of WTO's 12 Ministerial Conference – Highlights

WTO's 12th Ministerial Conference ('MC') concluded on 17 June 2022 with some great results. Among the 9 Ministerial declarations/decisions, the prominent ones include Agreement on Fisheries Subsidies and Ministerial Decision on the TRIPS Agreement. Some of the major decisions are highlighted below.

- **TRIPS waiver for Covid-19 vaccines** - An eligible Member (Developing country) may authorize the use of the subject matter of a patent (includes ingredients and processes necessary for the manufacture of the Covid-19 vaccine) without the right holder's consent, whether or not a Member has a compulsory license regime in place. Further, Members may allow any proportion of the products manufactured under the authorization in accordance with this decision to be exported to eligible Members. This decision will apply till 5 years. The General Council may however extend such period. It may be noted that the Members will also decide within 6 months on extension of this decision to cover the production and supply of Covid-19 diagnostics and therapeutics.
- **Agreement on fisheries subsidies** – The Agreement applies to subsidies, within the meaning of Article 1.1 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) that are specific within the meaning of Article 2 of that Agreement, to marine wild capture fishing and fishing related activities at sea. According to the Agreement, no Member shall grant or maintain any subsidy to a vessel or operator engaged in illegal, unreported and unregulated (IUU) fishing or fishing related activities in support of IUU fishing. IUU fishing refers to activities set out in paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing adopted by the UN Food and Agriculture Organization (FAO) in 2001. Further, no Member shall grant or maintain subsidies for fishing or fishing related activities regarding an overfished stock, and shall not grant or maintain subsidies provided to fishing or fishing related activities outside of the jurisdiction of a coastal Member or a coastal non-Member and outside the competence of a relevant Regional Fisheries Management Organization or Arrangement (RFMO/A).
- **Customs duties on electronic transmissions** - Current practice of not imposing customs duties on electronic transmissions has been extended till MC13, which should ordinarily be held by 31 December 2023. The decision however notes that should MC13 be delayed beyond 31 March 2024, the moratorium will expire on that date unless Ministers or the General Council take a decision to extend.
- **Other decisions** – Other than the above, there were ministerial declaration on the emergency response to food insecurity, ministerial decision on world food programme food purchases exemption from export prohibitions or restrictions, ministerial declaration on the WTO response to the Covid-19 pandemic and preparedness for future pandemics, work programme on small economies, sanitary and phytosanitary declaration for the twelfth WTO ministerial conference, and the TRIPS non-violation and situation complaints.



India Customs & Trade Policy Update

Mega Power Projects – Exemption condition relaxed

Vide Notification No. 31/2022-Cus., dated 7 June 2022, the time for furnishing the final Mega Power Project Certificate has been extended from 120 months to 156 months in respect of exemption claimed under Notification No. 50/2017-Cus., dated 30 June 2017. Further, the validity of security in the form of Fixed Deposit Receipt or Bank Guarantee has been extended from 126 months to 162 months in case of provisional mega power projects.

SCOMET items/technology/software – Amendment in procedure for global authorisation for intra-company transfers

Existing entry at Paragraph 2.79F of the Handbook of Procedures Vol. 1 has been substituted to amend the procedure for issue of Global Authorisation for Intra-Company Transfer (GAICT) of SCOMET items including software and technology. Henceforth, GAICT policy would be applicable only for export / re-export of items as against only re-export earlier including software and technology under SCOMET Category 8 (except items listed in Annexure-I). Further this will only be applicable when such exports/re-exports are made to the countries listed in Table 1 under Para 2.79F. Revised ANF (Aayat Niryat Form) - applying for GAICT has also been notified. DGFT Public Notice 14/2015-2020, dated 13 June 2022 has been issued for the purpose.

Chip import monitoring system clarified

The Directorate General of Foreign Trade has clarified on scope of the Chip Import Monitoring System (CHIMS). As per DGFT Circular No.

40/2015-20, dated 27 June 2022, though importer may include multiple products in one registration number, for each shipment a separate registration number is required. The Circular also clarifies that CHIMS is applicable for air and sea shipments also and that the registration can also be made on the day of arrival of imports. It may be noted that according to this Circular, microprocessors covered under ITC(HS) Code 8473 30 10 and memory modules under Code 8473 30 99 are excluded from CHIMS.

Fish meat – India-Japan CEPA Rules of origin amended

The Customs Tariff (Determination of Origin of Goods under the Comprehensive Economic Partnership Agreement between the Republic of India and Japan) Rules, 2011 has been amended for 'wholly obtained' products falling under Heading 0301 to 0307 of the First Schedule to the Customs Tariff Act, 1975. Thus, the amended rules now envisage a tariff sub-heading jump to sub-heading 0304.99 from any other chapter, and goods falling under sub-heading 0301.10 to 0304.92 and sub-heading 0305.10 to 0307.99 of the First Schedule to Customs Tariff Act, 1975, must be manufactured using wholly obtained material. Notification No. 44/2022-Cus (N.T.), dated 20 May 2022 has been issued for the purpose.

Water melon seeds import free till 30 September 2022

Import of water melon seeds has been permitted under the 'free' category till 30 September 2022. As per DGFT Notification No. 13/2015-20, dated 21 June 2022, import of said product is permitted only through Kandla and Mundra ports. Further, shipments made by 30 September 2022 are to be handed over to Customs authorities for examination by 31 October 2022.



Ratio Decidendi

Sunset review of ADD – Injury analysis – Level of future imports cannot be evaluated by considering only surplus capacity of producers who exported or participated in investigations

In a case involving sunset review of anti-dumping duty, the Anti-dumping Bench of the CESTAT has held that the level of future imports (for purpose of likelihood of injury) cannot be evaluated by taking into consideration only the surplus capacity of the producers who have exported goods during period of investigation or those who have participated in the investigations. According to the Tribunal, information in regard to a small percentage of the total exporters and producers for the injury likelihood analysis would not be a correct method for determination. The Designated Authority was thus directed to re-examine whether the cessation of anti-dumping duty would likely lead to continuation or recurrence of injury so as to warrant imposition of anti-dumping duty for a further period of five years. The dispute involved sunset review of anti-dumping duty on Grey Viscose Stable Fibre, excluding Bamboo Fibre from China and Indonesia. [*Association of Man-made Fibre Industry of India v. Designated Authority – 2022 VIL 371 CESTAT DEL CU*]

Anti-dumping duty – Continuation after sunset review – Not mandatory to issue notification under Section 9A(5) during lifetime of earlier notification

The Anti-dumping Bench of the CESTAT has rejected the contention that since there was a gap in imposition of anti-dumping duty

consequent to affirmative sunset review, the anti-dumping duty could not have been imposed, in view of the judgment of the Supreme Court in *Kumho Petrochemicals*. Pointing out the difference between the first proviso and the second proviso to Section 9A(5) of the Customs Tariff Act, 1975, the Tribunal was of the view that there was no requirement under the first proviso to Section 9A(5) for the Central Government to issue notification only during lifetime of earlier notification imposing anti-dumping duty. The challenge to the final findings dated 8 July 2016 of the Designated Authority and the consequential notification dated 8 August 2016 issued by the Central Government imposing anti-dumping duty on Viscose Staple Fibre from Indonesia, was thus set aside. [*PT South Pacific Viscose v. Union of India – 2022 VIL 383 CESTAT DEL CU*]

Iron ore only crushed and screened without any special process cannot be classified as iron ore concentrate

The CESTAT Mumbai has held that the process of crushing and screening undertaken on the iron ore after it was mined in Brazil and its subsequent blending at Oman with 5-10% iron ore concentrate, would not result in the goods imported being classifiable under CTI 2601 11 50 as Iron Ore concentrate. The Tribunal was of the view that the goods will be classifiable under CTI 2601 11 31 as Iron Ore fines and consequently the benefit of the exemption from payment of CVD would be available to the imported goods in question under Serial. No. 56 of Notification No. 12/2012-C.E., dated 17 March 2012. It noted that as per HSN Explanatory Notes as also from the

judgment of the Supreme Court in *National Minerals Development Corporation* case and the dictionary meanings relied upon therein, 'iron ore concentrate' refers to an ore that has been subjected to 'special processes' for removal of all or part of the foreign matter. The Court observed that as per CBIC Circular dated 17 February 2012, crushing and screening followed with processes such as milling, hydraulic separation, magnetic separation, floatation and concentrate thickening must be undertaken for ores to be converted into concentrate, and that the Department had failed to produce that other processes were done on the goods. [*Amba River Coke Ltd. v. Principal Commissioner* – 2022 VIL 391 CESTAT MUM CU]

Pea protein powder, with less than 90% protein concentrate, classifiable under Heading 2106

The Customs Authority for Advance Rulings, Mumbai has held that pea protein powder is not classifiable under Heading 3504 of the First Schedule to the Customs Tariff Act, 1975. The Authority noted that Heading 3504 covers protein isolates obtained by extraction from a vegetable substance with protein concentrate not less than 90% and that the product under consideration did not satisfy the 90% threshold and is different from protein isolate. Classification under the residuary Heading 2106 of the First Schedule was hence concluded. [In RE: *Anshul Life Sciences* – Ruling Nos. CAAR/Mum/ARC/13/2022, dated 18 May 2022, Customs AAR, Mumbai]

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