INDIA’S INTERNATIONAL TRADE LAW ISSUES AND THE ROLE OF WORLD TRADE ORGANISATION

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Abstract:
This research paper elucidates upon the less encroached area of International Trade Law and how the provisions of dispute settlement, act as a helping hand in curbing International Trade Law issues faced by India. India being a developing country influences the international market like any other developed country because of its vast geographical structure and huge domestic market. Agreements such as Anti-Dumping, Sanitary and Phytosanitary Measures, Countervailing Duties, Imposition of Tariffs, Safeguard Measures have been imbibed in the India’s national laws from the International Trade Laws formulated by World Trade Organisation (WTO) in order to function in an efficient manner in international markets. India also resorts to ways which will help the growth of domestic markets in international trade. Despite all these measures used there still exists a lacuna in the International Trade Laws, as trading countries import higher tariffs while importing goods in their market in order to decrease the use of international goods and increase the scope of domestically produced goods. India also uses the above-mentioned agreements as a shield to protect its domestic market, which agitates the traders of different nations to sell the goods in Indian markets, after which they resort to illegal means. Such inconsistency between international and national laws emerges trade disputes between member nations of the World Trade Organisation. Dispute Settlement Body (DSB) plays an important role in providing a multilateral platform for the disputing member nations and helps in using a unified structure for the growth of trade in international markets. The DSB under WTO has time and again upheld equity in delivering its pronouncement by highlighting on the growth of developing and least developed countries, thereby, bringing the world trading system under a level playing field.

INDIA’S INTRODUCTION IN INTERNATIONAL MARKET:

“Every man lives by exchanging.”
- Adam Smith
International Trade Law as a concept developed from the theories of economic liberalisation as was developed in Europe during the 18th century. International Trade Laws are set of rules and regulations governing exchange of capital, goods, and services between countries or between private organisations, while trading beyond their territorial limits with an increasing economic, social and political importance. It can also be understood as an aggregate of legal rules of “International Legislation” and new lexmercatoria, wherein international legislation includes international treaties and acts of governments affecting international trade and lexmercatoria means the law for merchants of the land1. International trade relations work in four levels, starting with

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1 Article on “International Trade Law” as published by Singh and Associates, on 28th February, 2013.
unilateral measures, i.e. national laws, the next being bilateral relationships, thirdly, multilateral and lastly plurilateral relationship subsisting amidst World Trade Organisations (WTO), General Agreement on Tariff and Trade (GATT), and General Agreement on Trade and Services (GATS) parties. World Trade Organisation as an authoritative establishment governs the regulation of these activities. Prior to WTO, international trade was governed by GATT which was an agreement between nations, however, with lapse of time there was an emerging need for establishment of an authoritative body having the capability to overlook all aspects of trade.

Trade and commerce are the cornerstones of India’s developing economic growth and also have a lion’s share in positioning India as one of the essential players in the international trade market. The growth of international trade in India began after the year of independence in 1947. Textiles and spices were the initial products sold by India. From 1950’s to late 1980’s India followed a protectionist policy where its average tariffs exceeded 200% and allowed only a few traders with huge quantitative restrictions to enter the Indian market. Indian government ruled its domestic markets by disallowing privatisation of companies and by beholding control over its companies. Such vigilant attitude is also evident while India imposes local content requirement provisions to boost its domestic market. The scenario started to improve after the election of the late Prime Minister Rajiv Gandhi. With the advent of policies such as globalisation and liberalisation, a new era of trade came into existence. India realised the importance of free and unbiased trade and advanced towards the growth of Indian economy in international trade. Since then India has shown prodigious progress and currently, India’s foreign trade norms are a combination of rigidity and flexibility, where on one hand, regulations pertaining to foreign investment, dwindling of non-agricultural tariffs are open ended and on the other anti-dumping measures are still liberally used as a defensive measure. Many foreign economies regard India as a huge trading country while some still regard it as a country with protectionist policies.

HARMONISATION OF INDIA’S NATIONAL LAWS WITH INTERNATIONAL TRADE LAWS:

“If you say that your national law allows you to do something, it is fine as long as you do this inside your own territory. As long as you go international, you really have to be sure that there is an international law which you respect and which you follow”

— Sergei Lavrov

India has been a WTO member since 1st January 1995 and a member of GATT since 8th July 1948. Being a part of which, India has modified its national laws to be at par with the international rules set under GATT and WTO.

Indeed, in the recent years, India has increased the scope of its trade and has set a benchmark for other developing countries around the globe. There has also been an increase in the average Gross Domestic Product (GDP) of the country by reduction in the trade barriers with the help of principles framed by WTO. The integration
of the domestic economy through the twin channels of trade and capital flows has accelerated in the past two decades which in turn led to the Indian economy growing from Rs 32 trillion (US$ 474.37 billion) in 2004 to about Rs 153 trillion (US$ 2.3 trillion) by 2016. Simultaneously, the per capita income also nearly trebled during these years, thereon, throwing light on Indian external sector’s bright future. India is taking steps to attract Foreign Direct Investment by simplifying the rules and promoting the growth of the industry. India has also changed the laws relating to Intellectual Property Rights in order to be at par with the developed countries. The Indian trade policy has been formulated by the government in the Foreign Trade Policy (FTP) for the year 2015-2020 and expects a growth in the exports by 3.5% in 2020. The formulation of GST in the year 2017 has also helped India in levying a uniform tax against the goods imported and produced in India. Owing to the simplified tariff structure due to this aspect, ways of trading in India have been simplified, thereby, resulting in an increased number of exports and imports. Moreover, in an attempt to flourish international trade, India has taken the following steps, inter alia, has set up a logistics division in the commerce ministry “to develop and coordinate implementation of an Action Plan for the integrated development of the logistics sector”, has set up National Trade Facilitation Committee under the Cabinet Secretary, drawn a National Trade Facilitation Action Plan, and has launched Trade Infrastructure for Export Scheme (TIES). Check-posts on state borders have been dismantled with the implementation of GST. Nitin Gadkari, Minister for Roads and Shipping has also been focussing on port-related infrastructure.

Many domestically produced goods are saved by the act of dumping of foreign commodities at less than production cost by implementing measures such as anti-dumping and safeguard duties, and minimum import licensing prices. Anti-dumping laws under the Indian legislation have been included under sections 9A, 9B, 9C of the Customs Tariff Act, 1975 and Custom Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (“Rules”). Since the existing anti-dumping laws are based on WTO’s anti-dumping agreement, the provisions for determining dumping are also by and large similar to those defined under the agreement which are, inter alia, existence of the act of dumping established through a comparison made between the export price and normal price during the ordinary course of trade for products of like nature and also requires existence of a causal link between the material injury and the dumped products. Further, any investigation initiated for dumping remedies to come into action has to be to be applied by or on behalf of the domestic producers. On preliminary findings during the course of investigation, the designated authority may impose a provisional duty on the offender.

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2 Article on “Foreign Trade Policy of India” by India Brand Equity Foundation, last updated in July 2018.
3 Article on “Foreign Trade Policy of India” by India Brand Equity Foundation, last updated in July 2018.
4 Article on “Foreign Trade Policy Review: India should address problems of competitiveness urgently, set an export target” as published on 7th December, 2017.
which however, shall not exceed the margin of dumping and on final findings; relief is provided to the domestic market in the form of levying of anti-dumping duties on the offender which shall subsist for a period of 5 years.

WTO recognises that every country has its own technical regulation and industrial standard, in order to avoid any obstacle to trade, there are set of international standards that the countries are required to abide by while laying out technical trade barriers. India, like other provisions, has also brought standards for trade in consonance with the international line of standards for goods and services. Most Indian standards are accordan with ISO standards and the Bureau of Indian Standards Act of 1986 is the national body which formulates and develops standards. However, on one hand some Indian standards are not at par with the international standards and on the other, some outdo the international standards, and in both the scenarios Indian standards act as trade barriers while trading with countries like US and Europe; for instance: laws for food safety.

As mentioned above, laws for sanitary and phytosanitary measures involving human health, animal health and plant health are an integral part of international and domestic trade and have existed since ages in India. Laws for human health are governed by various Acts and Orders, inter alia, Prevention of Food Adulteration Act, 1954, Fruit Products Order, 1955, Meat Food Product Order, 1973, Milk and Milk Products Order, 1992, Essential Commodities Act, 1955, etc. Likewise, laws for animal health and plant health are provided under the Livestock Importation Act, 1898 and Destructive Insects and Pests Act, 1914, Insecticide Insects, 1968, Plants Fruit and Seeds (Regulation of Import in India) Order, 1989, Plant Quarantine (Regulation of Import in India) Order, 2003, Seeds Act, 1966 and Foreign Trade (Development & Regulation) Act, 1992 respectively. The regulations for protecting animal health in India bind an imposing duty on state to organise animal husbandry on modern and scientific lines and to take every step for preserving and improving animal breeds. Further, the laws for animal health include and regulate the imports of livestock and livestock products in a manner that such imports do not cause infectious and contagious diseases in the animal population of the country. Similarly, Plant Quarantine Order, 2003 has made imports to have phytosanitary certificate in order to prohibit, regulate and protect the imports of plants containing exotic pests and pathogens. These laws have been embodied in India’s legislation keeping in mind the developing aspect of the country and also the economy’s dependency on agriculture and livestock in international trade.

Lastly, before export of any product, pre-shipment practice of verifying shipment details of goods to be exported oversees is done in accordance with Export Quality Control and Inspection Act, 1963 under which the Export Inspection Council is established to overlook the pre-shipment inspection and certification of exports.

IRREFUTABLE REALITY OF INDIA’S INTERNATIONAL TRADE LAWS:

Due to various components ranging from political, economic, legal and environmental, ground reality of India’s international trade remaining stagnant is true in some ways. These components all together act as a catalyst in hampering exports of the country and define India as a novice player. A restriction imposed on the free flow of goods and services act as a trade barrier which can be tariff barriers (levy of Custom duties according to Article II of GATT) or non-tariff barriers (quantitative restrictions). In verity, India’s conservative trading laws influence the imposition of the following provisions, thereby, acting as a protectionist measure:

Anti-Dumping- India being a target market for sale of goods and services owing to its large consuming population, is often a victim of dumped imports by countries like China. Dumping is not against the obligations of GATT. It is condemned only when the domestic markets are at a loss. Thus, WTO has allowed the use of anti-dumping policy in some situations where the dumping of imported goods is a threat to the domestic manufacturers. Though India has made an effort of imbibing international agreement of anti-dumping into its legislation under the Customs Act, there still lacks an independent legislation dealing with the similar trade remedy. Section 9A (5) of the Customs Act elucidates upon revocation of anti-dumping duties on completion of 5 years, but it is ambiguous as to the circumstances under which it can be revoked earlier than 5 years. Rule 23 further contains provisions of continued need for reviewing the imposition of anti-dumping, but, it fails to encroach upon the details as to when and how can the review be done, thereby, handing out discretionary powers to the designated authority. Moreover, India is using this policy in an antagonistic manner and as a protectionist measure in order to safeguard its domestic products which raised concerns against the Due Process of Law followed by Indian officials.

Sanitary and Phytosanitary- Likewise, after the SPS agreement came into force, India had amended its laws to avoid any obstacle to trade. However, as far as health of humans, animals and plants are concerned, laws, orders and policies governing these measures lack in areas as to its specificity of technical skill, the infrastructure, for instance, laboratories, testing equipment, quarantine treatments, the technology needed to produce the required output of international standards, etc. The labelling and testing of quality of food products by the Food Safety and Standards Authority of India under the Food Safety and Standards Act, 2006 has been established in order to check the standard of goods imported in the Indian markets. However, this process of certification is also sometimes used as a protectionist measure and is strictly condemned by the WTO.

Balance of Payment- There exists Balance of Payment (BOP) crises as there are higher import intensity resulting into sluggish growth of exports and burgeoning imports. Due to the increasing amount of government control over the imports and exports of the country. Such increasing imports of elitist products in order to modernise the economy has led to balance of payment crises. It is very important to maintain an equal level of
imports and exports to avoid hindering of economy as compared to other developed countries. There is also a decrease in the value of currency as compared to Dollars which results in higher payment of imported goods and decrease in the foreign exchange of reserves. Dependence on imported goods and machinery for developmental policy has also prolonged the success of India in international trade.

Import Tariff- Other issue faced in the Indian trade scenario is, increased import tariffs which dissuades traders from selling goods into the Indian markets and generally resort to illegal means like smuggling in order to sell the goods at lower than market prices. Owing to lack of infrastructure, India fails to accommodate goods requiring better storage facilities. India's exports will see a considerable boost if Indian traders work on improving the infrastructure facilities. The Foreign Trade Policy (FTP) 2009-14 has also listed infrastructure facilities as one of the three major pillars of the trading policy which needs to be worked upon.

Another irrefutable truth about India's trading policies is its complex trading structure and low promotion of goods. Traders of developed countries will not be attracted towards buying these products if they are not promoted properly. The documentation process before importing and exporting of goods should decrease with a fall in import tariffs in order to expand the economies of trade and have balance of payments. Several initiatives taken up by the top executives do not have a positive outcome and this failure has to be set right immediately.

Transparency Requirements- India often fails to maintain transparency requirements regarding new laws, regulations and publications of non-tariff barriers in its official gazette which has also caused a decrease in the international trade of India as traders face exorbitant non-tariff barriers. Import licensing barrier is the most common non-tariff barrier faced by foreign traders. The US officials have time and again condemned the act of imposing stringent arbitrary restrictions on traders who wish to sell non-insecticidal boric acid in the Indian markets as they aren't allowed to sell their commodity to end users or obtain a “no objection certificate” from the Indian ministry. Whereas the Indian traders are allowed to sell non-insecticidal boric acid with a single requirement of maintaining the records as to show that such a sale is not directed towards end users. The US officials have resorted to means and negotiations in order to curb these trade barriers in the meetings arranged by the WTO import licensing committee. However, US traders encounter such barriers which has reduced their sale.

 Preferential Treatment- Restrictions are also prevalent in the service sectors e.g. telecommunication, construction, retailing, accounting, motion pictures and architecture. The government has a strong control over insurance and banking. Foreign participation is completely disallowed in legal services and thus there exists a service barrier in the Indian economy which leads to discouragement among Foreign Service suppliers. Domestic companies also have a preference as compared to foreign companies. The government of India sticks to domestic companies because the profits which are earned by these companies are retained in the home country and this also works as a developmental measure. Even if
foreign entities have better earning and labour turnover, these companies are not preferred when it comes to government contracts. This is against the National Treatment policy, which asserts that, exports of other member countries will not be discriminated with the domestically produced commodities and is guaranteed by article III of GATT 1947 and incorporated under the 1994 act.

INDIA AND DISPUTE SETTLEMENT BODY (DSB) ESTABLISHED UNDER WTO:
In the reign of international trade, dispute settlement takes form in several ways, one of them being amendments brought due to the trade disputes in the national legislations of the member nations to be at par with the international standards. The other being disputes brought before an international body like the WTO. The cornerstone of the DSB under WTO lies in the inception of GATT, 1947, which provided procedures for consultations and dispute resolutions. Due to the inefficiency prevalent in the execution of dispute settlement provisions, there arose a need for the implementation of a comprehensive process requiring inclusion of panels and various other procedures. Reforms were made under the GATT dispute process, which started from the Uruguay round of Multilateral Trade Negotiations and concluded with the manifestation of Marrakesh Agreement, thereby giving birth to the institution of the World Trade Organisations (WTO) and the much-needed provisions of dispute settlement there under. Dispute settlement Understanding embodies the provisions of dispute settlement arising between member countries by setting out rules and procedures to govern the various agreements under the WTO. To overlook the procedures for settlement of disputes an institution under this agreement called the Dispute Settlement Body has been established.

The system of DSB includes proper timetable with a set of defined rules and procedures for completing a case. Thus, under the DSB of WTO, when a complaint is filed for consultation, the Director tries to mediate the resolution within 60 days. On failure of the consultation within the given time frame a review panel is set up which shall submit for a period of 45 days, further the composition of the panel, which is called as the panel report is given to the disputing parties within six months and the same is circulated amongst the other members within three weeks. In case there lies no appeal, the report of the panel is adopted within 60 days. However, in case the disputing parties are dissatisfied with the panel reports, they shall appeal within 60 to 90 days since the pronouncement of the panel report. The settlement body thereafter adopts the appeal report within 30 days; wherein, if found guilty, the defendant shall state its intention to comply within 30 days and if it fails to comply then it must compensate the plaintiff within 20 days. Further, on failure to compensate, WTO may impose trade sanctions on the request of the plaintiff within 30 days.

As harmonisation is an essential feature under the WTO, developing countries are required to mend their laws in accordance with the international standards in order to grow in the international trade market. India being a founding and active member of both the GATT and WTO is a part of various
agreements which have been taken up by the member nations to establish a unified and unbiased system of trade. India, unlike other developing countries, has been dauntless in using the Dispute Settlement Understanding (DSU) in order to ascertain her rights. Strikingly, the cases brought by and against India under DSU are almost equal in numbers. Given that it participated in the Dispute Settlement Mechanism (DSM) 19 times as complainant and 20 times as respondent, moreover, it has participated as a third party in 63 disputes. Due to the well-proved system of dispute settlement, in the recent years, many countries like India are increasingly using the DSM under the WTO in order to enforce their rights and uphold their trade remedies. The below-mentioned details in the graph depict the resolution of disputes in the consultation stage.

Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all members.

- WTO, Article 21.1 of the DSU.

A dispute under international trade usually arises in case one country is violating trade rules or imposing a trade measure against the defined trade policy. In such an instance, members of WTO, instead of taking an action unilaterally, have an opportunity to approach the DSB and resolve the dispute in a multi-lateral fashion which would benefit all the members. The following cases elucidate the role of DSB in resolving such disputes by upholding the international laws and ensuring that national laws are not prioritised to an extent which would defeat the purpose of international trade.

**Safeguard Measures** - Turkey is yet another jurisdiction which has imposed safeguard measures for the protection of their domestically produced goods. The term of the Safeguard measures is also extended beyond the specified limit and is used as a protectionist measure. Many member nations of the WTO have raised their concerns against these safeguard measures as this has decreased the level of imports and increased the amount of goods produced locally by the domestic companies. India challenged the definitive safeguard measures imposed on cotton yarn (other than sewing thread) and demanded consultations with turkey on 13th February, 2012. India also challenged the extension of safeguard measures imposed by Turkey against the

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7 Statistics as on 27th February, 2013.
laws prescribed under the safeguard agreement.

Turkey had imposed a safeguard duty on cotton yarn imports in July 2008. This resulted in import levies rising from 13%-20% from 5%, which was the bound import duty rate or its commitment to WTO. Under the WTO norms, a safeguard duty could be imposed only for three years and thus the said measures were to expire on 14th July, 2011. With the three-year term ending in July, Turkey decided to review the process of its extension, but at the same time also imposed provisional duties of 12% to 17% for up to 200 days.

India considers that Turkey acted inconsistently with the provisions of Article XIX: 1(a) of GATT 1994 and Articles 2.1, 3.1, 4.2(b), 4.2(c) of the Agreement of safeguard (AoS) as Turkey failed to establish a causal link which caused a serious injury to the cotton industry by the imports of cotton yarn from other nations. Article 7.5 of the AoS states that the safeguard measure will not be applied on the product again for the same time period as it was previously applied and the minimum time for non-application or cooling off period after the expiry of the previous period will be for at least 2 years. India contends that as Turkey failed to apply for extension of period before its expiry, there cannot be any extension within the period of non-application. Also, according to article 7.2 there should be no gap from the period to expiry to the extension period and if there is, then a fresh application has to be filed after the cooling off period. However, after consultations, Turkey removed the wrongful safeguard measures imposed on cotton yarn.

National Treatment- In the year 2010, Jawaharlal Nehru National Solar Mission (JNNSM) was initiated by the Government of India. India imposed certain Local Content Requirements (LCR) such as the use of solar cells and modules to be manufactured in India which was opposed by the US officials. “These domestic content requirements discriminate against US exports by requiring solar power developers to use Indian-manufactured equipment instead of US equipment,” said US Trade Representative (USTR) Mike Froman. Announcing the “trade enforcement action” against India, Froman said it has requested World Trade Organisation (WTO) dispute settlement consultations with India on the issue. The Panel established for the settlement of dispute issued a report finding the LCRs inconsistent with India’s national treatment obligations under Article III:4 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 2.1 of the Agreement on Trade-related Investment Measures (TRIMS Agreement). On 16 September 2016, the Appellate Body report sustained the United States’ claims that India’s LCR measures are inconsistent with WTO non-discrimination obligations under the Articles mentioned above.

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8Article on “India drags Turkey to WTO against import barriers on cotton yarn”, as published by the Vietnam Chamber Of Commerce and Industry, WTO on 15th February, 2012.

9Article on “US challenges India’s domestic rules in national solar mission” as published by IANS, on 11th February, 2014.

**Anti-Dumping** - In a remarkable anti-dumping case against India, Taiwan had approached the WTO in order to take corrective action against India for imposing anti-dumping duties on imports of USB flash drives or as commonly known as pen drives. India had imposed anti-dumping duties on imports of pen drives from China and Taiwan at USD 3.06 per piece and USD 3.12 a piece, respectively, for five years, on the recommendation of the Directorate General of Anti-Dumping & Allied Duties (DGAD) and the Central Board of Excise and Customs (CBEC). The recommendations were given after probing into the matter and the conclusion drawn was that the product was imported into the Indian market at prices less than their normal values. Affected by which, Taiwan initiated a step towards consultations and after analysing the issue in question, the authority observed that the product exported in India is below the normal value of the exporting country’s market, and the exporting country’s market has suffered material injury which has been caused due to the dumping of the product under consideration, thus there exists an act of dumping performed by the plaintiff. The WTO upheld India’s move of imposing anti-dumping duties. This decision of WTO has not only protected the Indian markets, but also preserved the international agreement of anti-dumping on a fair ground.

**Countervailing Measures** - In another instance, India used the dispute settlement provision to ensure a level playing field for its industries in the international trade market and filed a complaint before the WTO against United States for imposing countervailing duty (CVD) on India’s exports of Hot Rolled Carbon Steel Flat Products. India had challenged the determinations made by the US in various investigations / reviews which treated several programmes being subsidised by the Indian Government and also challenged various provisions under US Tariff Act and the Code of Federal Regulations as being inconsistent with the provisions of WTO Subsidy Agreement (ASCM). On being dissatisfied with the panel’s mixed pronouncement, India and US appealed before the Appellate Body (AB), wherein, India hailed to be victorious as the AB held that the Countervailing Duty (CVD) measure which mandates cumulating subsidized imports and dumped imports to arrive at the injury margin as imposed by the United States against “Hot Rolled Carbon Steel Flat Products” are inconsistent with the various provisions of the Agreement on Subsidies and Countervailing Measures (ASCM). This measure hit India as it was leading to extortionate duties against her. WTO’s Appellate Body empathetically endorsed India’s position by highlighting that the sectors under public undertaking are not considered public body unless they explicitly possess authority and discharge governmental functions, thereby, ordering US to amend its national law to be compliant with WTO.

However, despite the expiry of time period for implementing the Appellate Body’s report, US has failed to amend its national laws as per the orders, taking an action against it, DSB has accepted for setting up a panel to inspect the compliance of US in this matter as requested by India.
CONCLUSION:
International Trade Law has influenced India to perpetuate its success in the international market. There has been a tremendous increase in the GDP of India starting from the year India has opened its door to International Markets. Harmonization of India's National Laws and International Trade Laws has helped India to work against the measures of dumping of imported goods. Likewise, inclusion of safeguard measures has also helped the domestic markets to protect themselves against the atrocious activities as executed by the developed countries in conducting international trade. However, these measures have also been used as a protectionist measure by the Indian officials, which have resulted in differentiation between imported and local goods thereby, giving India a repute of moulding the International Trade Laws according to its whims and fancies. The DSU has rightly come to rescue in case when a member nation acted rebelliously and imposed a trade measure against the International Trade Laws. The DSB of WTO has played an important role in resolving such disputes in a time bound and efficient manner without affecting the laws of any trading nation. Overall, India has utilised the measures provided by the Dispute Settlement Understanding in an effective manner to pursue the issues which may hinder the growth of India’s trade in the International Market.

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