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Article

Emerging jurisprudence in export restraint measures in trade

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Export restraints generally refer to measures imposed by an exporting country on the export of certain goods which may take the form of export quotas, duties, and licensing or minimum price requirements. As compared to the frequently discussed topics of import controls under WTO law, like customs duties, import quotas, anti-dumping, subsidies and safeguard measures, export restraints and duties have received very little discussion in the past. This may be attributed to the fact that when the GATT 1947 was negotiated, negotiators were preoccupied with mercantilism in relation to import controls, such as high import tariffs, and thus did not foresee that export restrictions would become a prominent trade issue in the future.[1]

But this is not the situation today. Export restraints of goods have become extremely important, considering the emergence of developing nations like Brazil, India and China, the growing population of developing countries and climate change considerations, all of which have highlighted the issue of scarcity of natural resources. The issue of export restraints has also come to the forefront with two China-related disputes which were decided by the WTO Dispute Settlement Body recently. *China – Raw Materials* and *China – Rare Earths* both highlighted the growing significance of export controls of as a trade measure.

Legal framework applicable to export restraints

i. *Export Duties: Article II:1(a)*

Pursuant to Articles II:1(a) and II:1(b) of GATT 1994, a Member is not allowed to impose customs duties on imports of a product above the maximum level it has agreed upon. With regard to export duties, however, *Article II:1(b) specifically mentions "importation", and therefore does not prohibit or regulate export duties.*

However, it is generally agreed that Article II:1(a) of GATT 1994 applies to export duties as well as import duties[2], and is worded in the following manner:

"1. (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement."

From the above, it can be concluded that Article II:1(a) of GATT 1994 extends the operation of MFN Treatment principle to export duties as well.

ii. *Export Quotas: Articles XI and XX*

Export quotas, on the other hand, are generally prohibited by Article XI of GATT

[1] Mitsuo Matsushita, *Export Control of Natural Resources: WTO Panel Ruling on the Chinese Export Restrictions of Natural Resources,* Trade, Law & Development, Vol III. No. 2, p. 270 (2011).

[2] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization,* CUP Third Edition, p. 480 (2013) (hereinafter referred to as "Van den Bossche and Zdouc").

1994 subject to certain exceptions. Article XI: 2 (a) and (b) of the GATT permit Members to restrict export *in order to prevent and mitigate critical shortage of foods and other essential resources and to apply technical standards respectively.*

Members are also allowed to take recourse to the general exceptions contained in Article XX to GATT 1994, which allows WTO Members to adopt measures including, but not limited to, the following:

i. Article XX(b) - measures necessary to protect life and health of humans, animals and plants;
ii. Article XX(d) - measures to enforce domestic laws and regulations which are not inconsistent with the GATT;
iii. Article XX(f) - measures to protect national treasures and articles of archaeological value;
iv. Article XX(g) - measures relating to the conservation of exhaustible natural resources;
v. Article XX(h) - measures to implement obligations provided in international commodity agreements;

The above are in the nature of defences which may also be used to defend an export restraint measure, provided it satisfies the conditions present in Article XX of GATT 1994.

Disputes relating to export restraints

While the number of disputes involving export restraints is generally lesser as compared to import controls, *China – Raw Materials* and *China – Rare Earths* have highlighted certain key trends in the interpretation and application of the provisions relating to export restraints. The key findings are summarized below:

i. *China – Raw Materials*

This dispute dealt with China's use of certain export restraints, consisting of export duties, export quotas, export licensing and minimum export price requirements, on the exportation of certain forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc ("raw materials")[3]. It is to be noted that para 11.3 of China's Accession Protocol ("Accession Protocol") contains specific obligations with respect to export duties and provides the following:

> "China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994."

The Panel held that, with the exception of yellow phosphorous, none of the raw materials were provided in Annex 6 (Products subject to Export Duty) of the Accession Protocol and therefore China had acted inconsistently with its obligations under para 11.3 of the Accession Protocol. With regard to yellow phosphorous, the Panel found that China had removed the "special" export duty rate as of 1 July 2009, before the date of the Panel's establishment and did not rule on the same[4]. The Panel also

[3] Panel Report, *China – Raw Materials*, paras 2.1 – 2.2.
[4] Ibid., para 7.71.

held that nothing in para 11.3 of the Accession Protocol allowed China to take recourse to the general exceptions contained in Article XX of GATT 1994. Both these recommendations of the Panel were upheld by the Appellate Body.[5]

With regard to export quotas introduced by China on Refractory-Grade Bauxite, the Appellate Body upheld the finding of the Panel and observed that China had not introduced the export quota as a measure that was "temporarily applied", within the meaning of Article XI:2(a) of the GATT 1994, to either prevent or relieve a "critical shortage", and deemed the measure inconsistent with WTO obligations.[6]

ii. *China – Rare Earths*

Here, the measure at issue consisted of export duties on 58 rare earth products, 15 tungsten products, and 9 molybdenum products; export quotas related to 75 rare earth products, 14 tungsten products, and 9 molybdenum products; and the application of these measures by China. In this dispute, China did not appeal the ruling that its export restraints were inconsistent with para 11.3 of the Accession Protocol, but contended that the Article XX defences were indeed available to it to under para 11.3 of the Accession Protocol, an issue that had previously been settled in *China – Raw Materials* by the Appellate Body.

China argued on the basis of the Marrakesh Agreement Establishing the World Trade Organization ("Marrakesh Agreement") and para 1.2 of the Accession Protocol. China contended that the above provisions must be interpreted in a such a way *that the legal effect of para 1.2 is to make the Accession Protocol, an 'integral part' of the Marrakesh Agreement, and the individual provisions thereof are also integral parts of Multilateral Trade Agreements annexed to the Marrakesh Agreement.* By arguing this, China hoped to avail the defences present in Article XX of GATT 1994 to para 11.3 of its Accession Protocol.[7]

However, the Appellate Body upheld the finding of the Panel and held that a reading of para 1.2 of the Accession Protocol and Article XII:1 of the Marrakesh Agreement did not support the understanding that a specific provision in the Accession Protocol is an integral part of the Marrakesh Agreement or one of the Multilateral Trade Agreements to which it intrinsically relates.[8] The Appellate Body also upheld the Panel's analysis of China's defence under Article XX(g) of GATT 1994, and dismissed the same.

Conclusion

From the above rulings, it is clear that the jurisprudence relating to export restraints is still developing into a settled body of law. However, the Appellate Body has definitively clarified that defences available under Article XX of GATT 1994 cannot be invoked in

[5] Appellate Body Report, *China – Raw Materials,* para 307.
[6] Ibid., para 344.
[7] Appellate Body Report, *China – Rare Earths,* para 5.1.
[8] Ibid., para 5.73.

situations where China's Accession Protocol is involved. Of course, the question of whether export restraints can be justified under Article XX by countries without an accession protocol, or whose accession protocol is worded differently, can only be answered on a case-by-case basis. However, *China – Raw Materials* and *China – Rare Earths,* have kick-started the jurisprudence pertaining to export restraints, and future disputes can refine and clarify the law in this area.

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Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Ceftriaxone Sodium Sterile/ Ceftriaxone Disodium Hemiheptahydrate-Sterile	China	39/2014-Cus. (ADD)	14-8-2014	ADD re- imposed for 5 years
Flexible Slabstock Polyol	China, Korea RP and Chinese Taipei	15/18/2014-DGAD	28-8-2014	ADD sunset review initiated
Gliclazide	China	14/5/2014-DGAD	28-8-2014	ADD investigation initiated
Phenol	Taiwan and USA	14/17/2012-DGAD	6-8-2014	Imposition of definitive ADD recommended
Polypropylene	Singapore	15/14/2014-DGAD	28-7- 2014	Sunset review initiated
Polypropylene	Singapore	38/2014-Cus. (ADD)	13-8-2014	ADD extended till 29-7-2015 pending sunset review
Saturated Fatty Alcohols	All countries, except developing countries other than Malaysia, Thailand and Indonesia	3/2014-Cus. (SG)	28-8-2014	Provisional safeguard duty imposed
Sodium Nitrate	European Union, China, Ukraine and Korea RP	15/1009/2012-DGAD	1-8-2014	Extension of time up to 4-12-2014 for completion of investigation and notification of final findings.
Sodium Nitrite	European Union	37/2014-Cus. (ADD)	8-8-2014	ADD re-imposed for five years
Tubes, pipes and hollow profiles, seamless of iron, alloy or non-alloy steel	All countries, except developing countries other than China	2/2014-Cus. (SG)	13-8-2014	Safeguard duty imposed

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Oil country tubular goods	Canada	Canada Border Services Agency Notice	27-8-2014	Time extended till 10-9-2014 for government response to subsidy request
Polyethylene Terephthalate (PET)	EU	2014/C 250/07	1-8-2014	Initiation of partial interim review of countervailing measures
Polyethylene Terephthalate film, sheet, and strip	USA	79 FR 50616 [C-533-825]	25-8-2014	Preliminary results of Administrative Review - Determination of subsidy rates for SRF Ltd (2.08%) and Jindal Poly Films Ltd (8.36%).
Polyethylene Terephthalate film, sheet, and strip	USA	79 FR 50620 [A-533-824]	25-8-2014	Preliminary results of Administrative Review - Determination of dumping margin for SRF Ltd (0%) and Jindal Poly Films Ltd (1.57%).

WTO News

India and USA appeal against panel report on countervailing duties on steel products

Both India and the USA have appealed against the panel report in respect of certain countervailing measures of USA on hot-rolled carbon steel flat products from India (DS436). As per notification dated 8-8-2014 (circulated in WTO on 15-8-2014), India has requested the Appellate Body to reverse the panel's finding that USA's provisions namely, 19 CFR § 351.511(a)(2)(i)-(iii) are not "as such" inconsistent with Article 14(d) of the Subsidies and Countervailing Measures (SCM) Agreement. According to India, the panel incorrectly interpreted Article 14(d) inasmuch as it held that the said article does not require an assessment of 'adequacy' of remuneration actually received prior to determining the quantum of benefit and that government transactions can be completely ignored by investigating authorities in assessing the 'prevailing market conditions'. Further, question of consistency of 19 CFR § 351.511(a)(2)(iv) "as such" with Article 14(d) has also been raised by India in this appeal which also states that the panel incorrectly interpreted Article 12.7 of the SCM. On the same lines, India has also challenged panel's interpretation of Articles 1.1(a)(1) [finding on NMDC being a public body], 1.2 and 2 of the SCM Agreement.

The United States, on the other hand, has sought review of the panel's legal interpretation of the term "public body" under Article 1.1(a)(1). According to USA's notification dated 13-8-2014 (circulated in WTO on 18-8-2014), panel's finding that 'the relevant entity (to be

held as public body) must be shown to have been vested with governmental authority, or to have actually exercised such authority through the performance of governmental functions', needs modification inasmuch as an entity may be a public body within the meaning of said Article if a government controls that entity such that the government can use the entity's resources as its own. Panel's conclusions that 19 U.S.C. §1677(7)(G) is inconsistent with Articles 15.3 and 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement, both "as such" and "as applied", are also sought to be reviewed by the Appellate Body.

China appeals against panel report in USA's countervailing duty measures

In another dispute relating to countervailing duty measures by USA, China has sought, on 22-8-2014, review of the panel report in the dispute *United States – Countervailing duty measures on certain products from China* (DS437). According to China, Panel's interpretation of Article 14(d) and Article 1(b) of the SCM Agreement were not correct inasmuch as it upheld US Department of Commerce's rejection of in-country private prices as potential benchmarks on the grounds that such prices were distorted. Panel's finding in respect of legal standards for determination of 'government' provider under Article 14(d) is also being contested by China in this appeal.

Interestingly, on 7-8-2014, USA issued a counter-notification in respect of State Trading Enterprises, listing some 153 Chinese entities, out of which some 44 entities are new and have not been notified by China before the working committee on State Trading Enterprises under the Understanding on the Interpretation of Article XVII of the GATT. As per the US communication circulated on 14-8-2014 in the WTO, China has not submitted any notification concerning this since 2003.

Organic products related issues whether covered under SPS or TBT Agreements?

Responding to concerns raised by India in July 2014, the Secretariat of the Committee on Sanitary and Phytosanitary (SPS) Measures has stated that presently there is no authoritative legal interpretation as to whether measures concerning organic products are necessary for protection of human life or health from the risks identified in Annex A of the SPS Agreement. The Secretariat in its note dated 21-8-2014 reports that WTO Member countries have submitted notifications relating to organic products both under SPS and Technical Barriers to Trade (TBT) Agreements, but it was the first time that someone had raised a trade concern relating to organic products in the SPS Committee. Four earlier trade concerns relating to organic products as raised by Members in TBT Committee meetings are also listed in this note.

India had, in the July meeting of the Committee, raised concerns against the EU stating that though India has already revoked it's guidelines issued in 2012, which permitted inclusion of less than 5% non-Indian ingredients in its value-added blended organic products for export to EU, the European Union has not restored the terms and conditions of the equivalency agreement under which the latter had recognized India's National Programme for Organic Products (NPOP) standards as equivalent to EU organic

standards.

Jordan launches safeguard investigation on writing and printing papers

Jordan has, on 28th August, 2014, initiated a safeguard investigation on writing and printing papers of size A4. Jordan subsequently notified the WTO Committee on Safeguards on 29 August about such initiation. The deadline for identification of the interested parties is 18 September 2014 and the deadline for providing written statements, information, etc. is 27 October 2014.

Malaysia launches safeguard investigation on hot rolled steel plates

Malaysia has, on 18-8-2014, initiated a safeguard investigation against imports of hot rolled steel plates. The products under investigation are *hot-rolled steel plate products of iron or non-alloy steel and other alloy steel, of a width of 600 mm or more, hot rolled, not clad, plated or coated, of a thickness between 6 mm to 75 mm.* Hot rolled steel plate products used for electrical and electronic industry, automotive industry and the boiler and pressure vessel applications are excluded from the investigation. Interested parties may register themselves within 15 days, and submissions of questionnaires may be made within 30 days of publication of the initiation notification in the Government Gazette of Malaysia.

News Nuggets

Force feeding to free trade

The WTO Compliance Panel report as regards compliance with decision on COOL (Country of Origin Labelling) requirements is expected to be released shortly. COOL requirements were supposed to be fortifying the right of consumers. Meanwhile the battle for free trade on a similar yet different plank waits in the US Supreme Court.

The dispute revolves around the health and safety regulations implemented by California (referred to as § 25982) which prohibit sale of a product 'in California' if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size. Force feeding is explained to include 'delivering feed through a tube or other device inserted into the bird's esophagus'. At issue is the product *'foie gras'* made from fattened duck's liver – produced outside California – notably producers from New York and Canada who are petitioners and who do not conform to the methods prescribed to raise livestock. California has enacted a law which makes it illegal for a person to force feed for the purpose of enlarging the bird's liver. Instate producers have had seven years to bring their methods in conformity with the law prior to its enactment.

The petitioners urge that the law is unconstitutional as in effect it regulates commerce outside the state and hampers free trade. Some of the interesting arguments are that the supposed 'cruelty to animals' is not legitimate ground to force persons outside the state to change their method of operations. Canada, a NAFTA partner and host of other states in the US are equally opposed to Californian laws.

The Court of Appeals for the Ninth Circuit had upheld the lower court's holding that there was no need to grant injunction preventing California from enforcing the law. It did not find force in the argument of discrimination stating that the product *per se* was not banned and the law only required producers to switch over from a profitable method of feeding the bird to an alternative which was perceived as burdensome. Though the petitioners urged the California could not impose conditions on food which was otherwise approved by the USDA, the court opined that State has an interest in preventing animal cruelty in California.

Interestingly California is to bring in another law from January 1, 2015, banning sale of eggs from hens that are not provided "as much" room in their cages as is the approved practice in California.

Ratio Decidendi

Adverse Facts Available analysis – Data corroboration

The United States Court of International Trade has upheld the argument of the Department of Commerce that no corroboration is required in determining the Adverse Facts Available (AFA) margin when the data was obtained in the course of instant review. It was noted that the Department of Commerce followed its standard corroboration procedure to select AFA rate in respect of an uncooperative exporter and measured the rate's appropriateness by analyzing prior transaction-specific data. The court in this regard also noted that the other party (whose data was perused), who had the greatest incentive to minimize the impact of its own high-margin data, did not argue that the transaction (perused here) resulting in the said margin should be excluded for any reason.

It was also held that the burden was not on the department to corroborate the data, but instead on the appellant itself inasmuch as they were required to analyze their own prior transactional data, provide a compelling narrative of its "commercial reality", and propose an alternative total AFA proxy, so as to demonstrate unreasonableness of the selected AFA rate. [*Nan Ya Plastics Corporation Ltd.* v. *United States* - Slip Op. 14-94, dated 14-8-2014, US CIT]