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## Article

### Export promotion programmes and SCM Agreement – Has the countdown begun?

By **Bhargav Mansatta**

Article 3 of the WTO SCM Agreement provides for two types of subsidies which are considered as prohibited subsidies, namely (i) export contingent and (ii) import substitution. A member-country is not allowed to grant or maintain these types of subsidies. Article 3 provides as below:

*3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:*

- (a) subsidies contingent, in law or in fact<sup>1</sup>, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I<sup>2</sup>;*
- (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.*

*3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.*

However, under Article 27 of the SCM Agreement which provides for 'special and differential treatment' towards developing countries, prohibition on export contingent subsidies shall not apply to developing country members referred to in Annex VII [Article 27.2(a)] and other developing country members for a period of eight years from the date of entry into force of the WTO Agreement [Article 27.2(b)].

Article 27.2 provides as below:

*27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:*

- (a) developing country Members referred to in Annex VII.*
- (b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.*

Annex VII exempts India from the prohibition under Article 3.1(a) of the Agreement. However, it conditions the exemption with the clause that when GNP per capita reaches \$1000 per annum, then the country will be subject to provisions of paragraph 27.2(b). Annex VII in relevant part provides as below:

- (b) Each of the following developing countries which are members of the WTO shall be subject to the provisions which are applicable to other developing country members which are applicable to paragraph 2(b) of Article 27 when GNP per capita has reached \$1000 per annum<sup>3</sup>... Guyana, India, Indonesia...*

At the time of Uruguay round of negotiations which resulted in the WTO covered Agreement in the year 1995, GNP per capita income of India was

<sup>1</sup> This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

<sup>2</sup> Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

<sup>3</sup> The inclusion of developing country members in the list in paragraph (b) is based on the most recent data from the World Bank on GNP per capita.

much below \$1000. India was allowed to maintain and grant export contingent subsidies. However, it has to be noted that there was no exemption from imposition of countervailing duty on the exported product which benefits from such export contingent subsidies.<sup>4</sup> India is second only to China in facing the highest number of countervailing duty investigations in the world as of date.<sup>5</sup>

It should be noted that many of the export contingent programmes can be argued as not amounting to financial contribution under Article 1 of the SCM as they squarely fall under footnote 1 to Article 1.1(a)(1)(ii) of the SCM Agreement. Under footnote 1 a mere exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts *not in excess* of those which have accrued are not considered as subsidy.<sup>6</sup>

Be that as it may, this article intends to convey the

issue regarding expiry of the exemption clause under Article 27.2(a). India's GNI<sup>7</sup> per capita crossed \$1000 mark in the year 2008.<sup>8</sup> However, this would not invite any immediate consequences and is only an alarm bell given the fact that the Doha Ministerial Conference decided to put a condition that not only the GNI per capita income should cross \$1000 mark in current dollars, it should also reach \$1,000 *in constant 1990 dollars for three consecutive years*.<sup>9</sup> As per the latest assessment by the committee on subsidies and countervailing measures, as of 2010, India's GNI per capita income in constant 1990 dollars was at 926<sup>10</sup>, whereas India's GNI per capita income at current dollars was measured at 1399 as of 2010.<sup>11</sup> Whether India has crossed the \$1000 mark in the subsequent year will more certainly be known once the Committee on Subsidies and Countervailing Measures will update the list in its meeting in June 2013 which will state the GNI per capita income of India as of 2011.

Another issue which will stem out of this is that under paragraph 27.2(b), prohibition on export

<sup>4</sup> Export contingent subsidies have been subjected to countervailing duty once it is established that the subsidy is 'specific' in nature in accordance with Article 2 of the SCM Agreement and it causes material injury or threat of material injury or material retardation to the establishment of domestic industry in the country of import. As per Article 2.3 of the SCM Agreement, subsidies which are not otherwise specific in terms of it being available only to a specified sector, industry or region are considered as deemed to be specific if they are contingent on export performance. Export contingent schemes like Advance Authorisation, Export Promotion of Capital Goods (EPCG), Duty drawback, etc. are considered as deemed to be specific by investigating authorities in European Union (EU) and United States (US). Exemption from Article 3 will not affect reliance on its provision for definitional purport to ascertain specificity of a particular subsidy.

<sup>5</sup> Countervailing duty initiations by Exporting Country, available at [http://wto.org/english/tratop\\_e/scm\\_e/CV\\_InitiationsByExpCty.pdf](http://wto.org/english/tratop_e/scm_e/CV_InitiationsByExpCty.pdf)

<sup>6</sup> Investigating authorities in EU, United States etc. are not convinced that there is 'no excess' remission or exemption of duties taxes or charges and hence export contingent programs are considered as subsidies.

<sup>7</sup> The World Bank data series

<sup>8</sup> GNI Per Capita Income. World Bank Data, available at <http://data.worldbank.org/indicator/NY.GNP.PCAPCD>

<sup>9</sup> Countries will be re-included when their GNI per capita falls again below \$1,000. See WT/MIN(01)/17, 14 November 2001, paras. 10.1 and 10.4. Precise methodology for arriving at the GNI per capita income in 1990 dollars is contained in the proposal by the Chairman of the Committee set forth in G/SCM/38. The secretariat calculated the GNI per capita income as per the prescribed methodology and the same is contained in the Committee Decision.

<sup>10</sup> See G/SCM/110/Add.9, dated 20 June 2012. Precise methodology for arriving at the GNI per capita income in 1990 dollars is contained in the proposal by the Chairman of the Committee set forth in G/SCM/38. The secretariat calculated the GNI per capita income as per the prescribed methodology and the same is reflected in this document.

<sup>11</sup> Ibid.

contingent subsidy is not applicable to other developing countries (i.e. countries except for the ones covered under Annex VII) members for a period of *eight years from the date of entry into force of WTO Agreement*. In a recent proposal, a number of Annex VII(b) countries including India sought to ‘clarify’ that this flexibility under Article 27.2(b) would indeed still be available.<sup>12</sup> They have submitted that developing countries graduating out of Annex VII when their GNP per capita has reached US\$1,000 per annum, shall have a period of 8 years from the year of graduating out of Annex VII to phase out their export subsidies covered under Article 3.1(a).<sup>13</sup> The *stricto sensu* interpretation or the plain textual interpretation of Annex VII of SCM Agreement read with paragraph 2(b) of Article 27 goes against the above proposal. However, if one is

to adopt a harmonious interpretation, the eight year period can be counted from the date of graduation. India as well as other Annex VII(b) countries who are approaching gradually towards the required benchmark have apprehended the situation.

Be that as it may, India maintains a large number of export contingent benefit programs which are viewed and treated as prohibited subsidy by the investigating authorities in other countries. India’s local content requirement in certain sectors has already come under the WTO scanner.<sup>14</sup> Once India’s GNI per capita income will touch the \$1000 mark for three consecutive years in terms of 1990 dollars, it may face the ire of WTO law.

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<sup>12</sup> TN/RL/GEN/177/Rev.2, 18 March 2011.

<sup>13</sup> *Ibid.*, para. 4

<sup>14</sup> US files dispute against India on solar panel products, available at [http://wto.org/english/news\\_e/news13\\_e/ds456rfc\\_06feb13\\_e.htm](http://wto.org/english/news_e/news13_e/ds456rfc_06feb13_e.htm), 6 February, 2013; See India — Certain Measures Relating to Solar Cells and Solar Modules, WT/DS456.

## Trade Remedy News

### Anti-dumping actions by India

Product	Country	Notification No.	Date of Notification	Remarks
Carbon Black used in rubber applications	Australia, China, Russia and Thailand	9/2013-Customs (ADD)	26-4-2013	ADD continued after recommendations to this effect in mid-term review
Electrical Insulators	China	14/6/2011-DGAD	20-3-2013	ADD investigation terminated
Plain Gypsum Plaster Boards	China, Indonesia, Thailand, and UAE	6/2013-Customs (ADD)	12-4-2013	Definitive ADD imposed
Soda Ash	Turkey and Russia	8/2013-Customs (ADD)	18-4-2013	Definitive ADD imposed
Sodium Nitrite	European Union	4/2013-Customs (ADD)	10-4-2013	ADD extended till 10-4-2014 after initiation of sunset review investigation
Sulphur Black	China	5/2013-CUSTOMS (ADD)	10-4-2013	ADD extended till 10-4-2014 after initiation of sunset review investigation

### Safeguard action by India

Product	Country	Notification No.	Date of Notification	Remarks
Seamless pipes, Tubes and Hollow profiles of iron or non-alloy steel	All Countries	D-22011/17/2012	22-4-2013	Initiation of safeguard investigation

### Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Certain open mesh fabrics of glass fibres	European Union	Commission Regulation (EU) No. 322/2013	9-4-2013	Anti-circumvention investigation initiated on imports originating in China but consigned from India or Indonesia
Nonyl Phenol	China	MOFCOM Announcement No. 15 of 2013	28-3-2013	Continuation of ADD after expiry review

## WTO News

### India & the US - Renewable energy, subsidy and domestic content requirement take centre stage

India has asked the United States, to provide details as to which of the state or regional or local level renewable energy programs provide subsidies including incentives or additional incentives or rebates or credits, contingent upon compliance of domestic content requirements. As per the Indian communication dated 15-4-2013 in the WTO, India has also requested United States to provide information with respect to the specific renewable energy sector (solar) subsidy programs of the four States in the United States, namely Delaware, Minnesota, Massachusetts and Connecticut. India has sought clarification as to clarify as to how the provisions of the specified programmes are not in violation of Article 3.2 read with Article 3.1 (b) of the ASCM. Questions on these and some of the other measures were also raised by India in the TRIMS committee on 15-4-2013. The US had, two months before, requested consultations with India on the domestic content requirements under Jawaharlal Nehru National Solar Mission for solar cells and solar modules calling it to be violative of the same provisions.

Similarly, India has also raised questions on the USA's mandatory domestic content requirements with regard to supply of ductile iron pipes and fittings for use in water utilities in South Carolina, Pennsylvania, West Virginia and some of the New England States. As per document circulated by India in the Committee on Trade-Related Investment Measures on 17-4-2013, 'domestic content requirements' in the tenders of specified water utilities require that investors use domestically

manufactured ductile iron pipes and fittings in order to be considered as eligible for the tenders. India has hence asked the US to explain how these domestic content requirements are not mandatory measures that must be complied with in order to obtain an advantage and that require the purchase of domestic products as set out in the Illustrative List of the TRIMS Agreement.

### Indonesia - Panel established on import licensing for horticultural products, animals and animal products

Pursuant to complaint against Indonesia by the United States before the WTO, the Dispute Settlement Body has established a Panel to examine the alleged violations of Articles X:3(a) and XI:1 of the GATT 1994; Article 4.2 of the Agriculture Agreement; and Articles 1.2, 3.2 and 3.3 of the Import Licensing Agreement (DS455). As per USA's allegations Indonesia subjects the importation of horticultural products, animals and animal products into Indonesia to non-automatic import licenses and quotas, thereby restricting import of goods. Meanwhile, as per reports, Indonesia has eased the import restrictions and simplified procedures for import of horticulture products. The list of products now regulated has been pruned to 39 from 57 while also ensuring that the process of granting import permits is completed within 2 working days.

### China - Panel Report adopted on definitive ADD on security equipment from EU

On 24th April 2013, the Panel Report in China - Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union (DS425) was adopted. The European Union claimed that China's measures were inconsistent with various provisions of the Antidumping Agreement related to

the process of anti-dumping investigation as well as the antidumping determination at issue.

The Panel had upheld European Union's claims against MOFCOM, China's price effects analysis, on the basis that MOFCOM failed to ensure that the prices it was comparing as a part of its price effects analysis were actually comparable. The Panel further had concluded that China acted inconsistently with Articles 3.1 and 3.4 because MOFCOM failed to consider all relevant economic factors, in particular, the "magnitude of the margin of dumping". It was found that MOFCOM's examination of the state

of the industry lacked objectivity, and was not always reasoned and adequate. Failure to take into consideration the differences in the products under consideration in the price effects analysis and to provide a reasoned and adequate explanation regarding how the prices of the dumped imports caused price suppression in the domestic industry were found inconsistent with Articles 3.1 and 3.5. The Panel had concluded that MOFCOM failed to consider certain "known factors", and failed to consider evidence relating to other factors that it did explicitly consider, in its non-attribution analysis.

## News Nuggets

### Specified electronic and IT products – Mandatory registration and self-declaration before import into India

India has deferred implementation of its regulations requiring mandatory self-declaration of safety standards in respect of specified 15 electronic and IT products, both in case of imports as well as those manufactured in India. Notification dated 20-3-2013 of the Department of Electronics and Information Technology under the Indian Ministry of Communications and Information Technology now prescribes 3rd July, 2013, in case of imports, as the new date from which the provisions will be brought into force. Manufacturers have been given time of three months (from 4th July) to comply with the requirements, subject to certain conditions. As per the provisions, no person can manufacture, import, store for sale, sell or distribute such specified goods which do not conform to relevant Indian Standards. A self-declaration that the goods are as per the specified standards will be required to be placed on the goods in

addition to the unique registration number linked to manufacturer, location of factory (even if located abroad) and the product. This registration number has to be obtained from Bureau of Indian Standards (BIS). Clarification issued by the Ministry on 16-4-2013 states that desktop computer is automatic data processing equipment and the latter (ADP equipment) finds mention in the list of specified goods, but desktop or personal computers would not be covered under the said provisions.

### European Commission plans to modernise trade defence tools

European Commission proposes to modify its trade defence measures, including anti-dumping and anti-subsidy instruments. The measures are being seen as major step since 1995. As per Press Release dated 10-4-2013, while anti-dumping and anti-subsidy instruments will be more efficient, importers will enjoy greater predictability in terms of changing duty rates. There are number of non-legislative proposals

as well. Some of the proposals are;

- Businesses will be informed about any provisional anti-dumping or anti-subsidy measures two weeks before the duties are imposed.
- Duties collected during expiry review would be refunded if the said review is negative.
- General lesser duty rule will be deviated from in case of imports from countries which use unfair subsidies and create structural distortions in their raw material markets.
- Extension of certain deadlines during the investigations.
- Ex-officio (on its own, without official request from industry) anti-circumvention investigations to ensure faster action.

According to EU Trade Commissioner Karel De Gucht, this is a balanced package with real improvements for all stakeholders affected by trade defence duties – producers, importers and users.

### Annual Supplement to Indian Foreign Trade Policy, released

Annual Supplement to India's five year Foreign Trade Policy 2009-14, for facilitating and regulating exports and imports, was announced on 18-4-2013. While no new scheme has been introduced, many functional schemes have

been relaxed to provide for more concessions to the exporters and importers. Certain important changes are:

- 3% Export Promotion Capital Goods (EPCG) scheme has been merged with zero duty EPCG scheme. Import of motor cars, SUVs, etc. by hotels, travel agents, etc., will not be allowed under this scheme.
- Import of second-hand goods will not be allowed under the new EPCG scheme.
- All Chapter 3 (of Foreign Trade Policy) duty credit scrips can now be utilized for payment of application fees for obtaining any authorization, payment of composition fees and for payment of value shortfalls in export obligation.
- Scrips under Focus Market Scheme (FMS), Focus Product Scheme (FPS) and Vishesh Krishi Gram Udyog Yojana (VKGUY) can also be utilized for payment of Service Tax.
- Served From India Scheme (SFIS) can now also be used for importing/procuring capital goods for the manufacturing business of the service provider subject to actual user condition.
- Exemption from Anti-dumping duty and Safeguard duty under DFIA scheme would not be available after transfer of the authorization.

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