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Has the clock stopped ticking? India's export subsidies under the SCM Agreement

By **Jayant Raghu Ram**

Introduction

The United States has upped the ante in its efforts to – what it perceives – rebalance its trade dynamic with other countries. This has inevitably led to a trade war between the United States and other major economies, particularly China. In the middle of this trade war, the United States has also aimed its barrels at India, initiating a dispute at the WTO against India (DS 541) in respect of its alleged export subsidy programmes. The United States has challenged a list of India's export subsidy programmes as being in violation of the WTO's Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

In its consultations request of 19 March 2018, the United States has challenged the following programmes operated by India:

i. Export Oriented Units Scheme and sector specific schemes, including Electronics Hardware Technology Parks Scheme
ii. Merchandise Exports from India Scheme
iii. Export Promotion Capital Goods Scheme
iv. Special Economic Zones
v. Duty-free imports for exporters

This article presents a brief overview of the issues involved, the claims by the United States, and India's possible defence at the WTO.

Relevant Provisions of the SCM Agreement

The SCM Agreement disciplines the provision of subsidies by WTO Members to its domestic producers and exporters. Article 3.1(a) of the SCM Agreement specifically prohibits the provision of subsidies that are contingent upon export performance, i.e., export subsidies. However, Article 27 of the SCM Agreement has a special and differential (S&DT) carveout for developing countries in paragraph 1, which recognizes that subsidies may play an important role in the economic development of developing countries.

For the purposes of this objective, Article 27.2 exempts developing countries from the prohibition on providing export subsidies under certain conditions. This category of developing countries has been bifurcated by Article 27.2 as Annex VII countries [Art. 27.2(a)] and non-Annex VII countries [Art. 27.2(b)]. While non-Annex VII countries were permitted to provide export subsidies for a period of eight years from the date of entry into force of the WTO Agreement (i.e., till 2003), a different set of rules applied to countries in Annex VII to the SCM Agreement.

While Annex VII (a) wholly excludes Least Developed Countries (LDC) from the obligation against providing export subsidies, Annex VII(b) identifies a list of 21 countries (including India) which become subject to the provisions of Article 27.2 (b) upon reaching GNP per capita income of $1000 per annum. The 2001 Doha Decision on Implementation-Related Concerns clarified that Annex VII(b) countries can maintain their export subsidies till their per capita income reaches the above income threshold and remains so for three consecutive years ("**graduation**"). However, considerable ambiguity among WTO members

remains over the effect of graduation on an Annex VII(b) Member's right to continue to provide export subsidies.

Claims by the United States

The trigger for the United States' dispute apparently is India's graduation from the income threshold. According to the SCM Committee's latest annual report (2018), India's GNP per capita income has been more than $1000 per annum for the years 2014, 2015, and 2016. Thus, according to the United States, India's provision of export subsidies is inconsistent with the provisions of Article 3.2 of the SCM Agreement, which prohibits countries from either granting or maintaining export subsidies.

Possible defence by India

Before proceeding into the merits of India's possible defence under the SCM Agreement, it would be pertinent to note that, whether some of India's impugned programmes are actually subsidies would depend on the actual design, operation and implementation of the scheme. Under paragraph (i) of Annex I to the SCM Agreement (Illustrative List of Export Subsidies), programmes which are designed to remit or drawback import duties paid on inputs used in the production of exported products would not constitute subsidies unless the import duties remitted or drawn back are in excess of those actually consumed in the production of the exported product. This requires the government of exporting Member, i.e, India in this case, to implement a system or procedure of verifying or confirming which inputs are consumed in the production of the exported product and in what amounts.

If the dispute reaches the panel stage, it is highly anticipated that India would argue that it is within its rights under the SCM Agreement to provide the impugned subsidies. In fact, India's stand has always been that the text of Annex VII(b)[1] when read with Article 27.2 (b)[2] entitles India to maintain its subsidies for another eight years upon graduation and gradually phase them out. In the past, India has argued that it would not be obliged to *eliminate* these export subsidies as such upon graduation.

The problem however is the interpretative ambiguity surrounding the relation between Annex VII(b) and the language of Article 27.2(b). The right to provide export subsidies under Article 27.2(b) is for a period of eight years from the time the WTO Agreement came into force. It is therefore in this context that its application to Annex VII countries becomes incongruous as Article 27.2(b) is a time-bound provision (till 2003) and the eight-year extension may apply beyond 2003. India has therefore argued that the provisions of Annex VII(b) with the provisions of Article 27.2(b) need to be harmoniously constructed, so as to permit it to maintain subsidies for eight more years after it graduates.

In fact, in a joint proposal made to the SCM Committee in 2001 by India and other countries, this interpretative ambiguity surrounding the relation between Annex VII(b) and the language was highlighted by India. It was proposed that Article 27.2(b) be amended to reflect that the eight-year countdown for phasing-out subsidies for Annex VII countries would begin from the year they graduate. However, given the morbidity of rule-making at the WTO, the larger WTO

[1] 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 according to paragraph 2(b) of Article 27 when GNP per capita has reached $1,000 per annum(68): Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

[2] 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.

Membership has maintained status quo on this proposal.

Conclusion

In the midst of the ongoing trade war and the impasse over the appointment of Appellate Body members, the dispute between India and the United States over India's provision of export subsidies has raised the stakes for the multilateral trading system. In any case, if India decides to withdraw its export subsidy programmes, then the government may have to consider alternatives within the policy space available under the WTO Agreements to meet its ambitious export targets. Some of these alternatives could be the provision of consumer subsidies, and domestic producer subsidies that are not contingent upon export performance. In the meanwhile, both India and the United States should strive to arrive at a mutually satisfactory solution as desired by the Dispute Settlement Understanding, given the developmental stakes involved and the WTO's commitment to these goals.

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Trade Remedy News

Trade Remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Atrazine Technical	China PR	F.No. 06/19/2018-DGAD	27-08-2018	Initiation of Countervailing Duty / Anti-Subsidy Investigation
Continuous Cast Copper Wire Rods	Indonesia, Malaysia, Thailand, Viet Nam	F. No. 6/17/2018-DGAD	10-09-2018	Initiation of Countervailing Duty / Anti-Subsidy Investigation
Flat Base Steel Wheels	China PR	46/2018-Cus. (ADD)	13-9-2018	Anti-dumping duty continued after sunset review
Glass Fibre and articles thereof	China PR, Thailand	43/2018-Cus. (ADD)	06-09-2018	Extension of anti-dumping duty in force against China PR to imports of Glass Chopped Strand Mats from Asia Composite Materials (Thailand) Co., Ltd of Thailand

Product	Country	Notification No.	Date of Notification	Remarks
Graphite Electrodes of all diameters	China PR	44/2018-Cus. (ADD)	06-09-2018	Anti-dumping duty discontinued after negative findings in mid-term review
Jute Products namely, Jute Yarn/Twine (multiple folded/cabled and single), Hessian fabric, and Jute sacking bags	Bangladesh and Nepal	41 and 42/2018-Cus. (ADD)	24-08-2018	Provisional assessment for certain New Shippers during the pendency of New Shipper Review
Linear Alkyl Benzene	Iran, Qatar, China PR	F. No. 14/20/2015 - DGAD	05-09-2018	Amendment to the final finding Notification No. 14 / 20/2015-DGAD, dated 6 March 2017
Nylon Filament Yarn (Multi Filament)	European Union, Viet Nam	F.No. 14/33/2016 - DGAD	05-09-2018	Corrigendum to Final findings Notification No. 14/33/2016-DGAD dated 6 August 2018
Ofloxacin	China PR	40/2018-Cus. (ADD)	20-08-2018	Amendment of Column 2 (Heading) in Duty Table previously notified
		Corrigendum to Notification No. 40/2018-Cus. (ADD)	24-08-2018	Corrigendum to the Amendment of Column 2 (Heading) in Duty Table previously notified
Phthalic Anhydride	Korea RP, Taiwan and Israel	7/19/2017-DGAD	13-9-2018	ADD sunset review recommends discontinuation of anti-dumping duty
Straight length Bars & Rods of Alloy Steel	China PR	F. No. 6/10/2017 - DGAD	05-09-2018	Final Findings issued in the Original investigation recommending imposition of anti-dumping duty

Trade Remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Glycine	United States of America	83 FR 44859 [C-533-884]	04-09-2018	Preliminary affirmative CVD determination and alignment of final determination with final ADD determination
Large Diameter Welded Pipe	United States of America	83 FR 43653 [A-533-881]	27-08-2018	Preliminary Determination of Sales at Less Than Fair Value
Quartz Surface Products	United States of America	83 FR 43848 [A-570-084]	28-8-2018	Preliminary Determination in the Less-Than-Fair-Value Investigation postponed
Silicomanganese	United States of America	83 FR 45887 [A-533-823]	11-09-2018	Initiation of Five-Year (Sunset) Review

WTO News

Indian Safeguard duty on solar cells – Malaysia and Customs Territory of Taiwan, Penghu, Kinmen and Matsu seek consultations

Malaysia and separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu have sought consultations with India under Article 12.3 of the Agreement on Safeguards with an objective of exchanging views on the proposed measure and reaching an understanding on ways to achieve the objective set out in Article 8.1 of the Agreement on Safeguards. While Malaysia sought consultations on 29th of August, Taiwan's communication is dated 11th of September.

It may be noted that India has on 30th of July imposed Safeguard duty on solar cells whether or not assembled in modules or panels. The duty was however stayed by the Orissa High Court. The interim order of the High Court has now been stayed by the Supreme Court of India on 10th of September, 2018, bringing back into force the imposition of Safeguard duty on such products.

China disputes USA's additional tariffs on Chinese imports

On 27 August, the WTO circulated to its members a request for consultation by China with the United States, concerning the additional duties applied by the latter, exceeding its bound duty rates against imports of Chinese goods alone. As per WT/DS565/1, the USA tariff measures (additional *ad valorem* duty of 25 percent imposed from 23-8-2018) pertain to goods with the estimated trade value of approximately $16 billion originating from China. The measures, according to the USA appear to be inconsistent with the provisions of Article I.1 and Article II.1(a) and (b) of the GATT 1994.

Paper and cellulose pulp – United States files appeal in dispute with Canada, while Canada seeks consultation with China on compliance

On 27 August, the United States filed an appeal concerning the DSB Panel report in the case brought by Canada in "*United States — Countervailing Measures on Supercalendered Paper from Canada*" (DS505). The panel had circulated its report on 5 July 2018. In its appeal, the United States seeks review of the Panel's findings concerning the "ongoing conduct" measure of the US and whether such a measure could be challenged under the DSU at all. It also challenges the Panel's determination that the "ongoing conduct" measure identified by the Authority is inconsistent with Article 12.7 of the SCM Agreement.

The Notice of Appeal also challenges the Panel's recommendation under DSU Article 19.1 in so far as it allegedly erred in finding that the so-called "Other Forms of Assistance" measures exist and is a "measure" within the meaning of the DSU or because it erred in finding that this alleged "measure" is inconsistent with SCM Agreement Article 12.7. As a contingent claim, the United States also seeks reversal of the Panel's recommendation under DSU Article 19.1.

Canada has sought consultation with China on compliance of the DSB ruling in the dispute involving Chinese anti-dumping duties on cellulose pulp from Canada - *China – Anti-dumping measures on imports of cellulose pulp from Canada* (DS 483). DSB had on 22-5-2017 held that China imposed anti-dumping duties on Canadian exports of cellulose pulp in a manner that breached China's obligations under the Anti-Dumping Agreement. According to a Canadian communication dated 11-9-2018 which was circulated on 12-9-2018, China has not properly implemented the DSB's recommendations and rulings and the anti-dumping duty is inconsistent with various provisions of the Anti-Dumping Agreement.

Ukraine appeals Panel reports in Russian railway equipment import restrictions case and in Ammonium Nitrate from Russia case

On 27th of August, Ukraine filed an appeal concerning the DSB Panel report in the case brought by Ukraine in "*Russia — Measures Affecting the Importation of Railway Equipment and Parts thereof*" (DS499). The panel had circulated its report on 30th of July 2018. Ukraine challenges the Panel's determinations, claiming that the Panel failed to make an objective assessment of the matter in terms of Article 11 of the DSU, and erred in interpretation and application of Article 5.1.1 of the TBT Agreement.

Ukraine, on 23rd of August, also filed an appeal against a WTO Panel report in the case brought by the Russian Federation in "*Ukraine — Anti-Dumping Measures on Ammonium Nitrate*" (DS493). The panel had circulated its report on 20th of July 2018. According to Ukraine, the Panel erred when it held that Ukraine acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the product under investigation based on the records kept by the producers.

United States seeks consultation with Russia on additional duties on US imports

On 29th of August, the WTO circulated to the Members, USA's request for consultation with the Russian Federation. The request pertains to the additional duties applied by Russia on certain imports of US goods. According to the communication, Russia is not imposing additional duties measure on like products originating in the territory of any other WTO Member, and appears to be applying rates of duty to US imports greater

than the rates of duty set out in Russia's schedule of concessions. The communication also states that the measures appear to nullify or impair the benefits accruing to the United States directly or indirectly under the GATT 1994.

Dominican Republic appeals Panel ruling on tobacco plain packaging requirements

On 23 August, the Dominican Republic filed an appeal against a WTO panel report in the case brought by Honduras, the Dominican Republic, Cuba and Indonesia in "*Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*" (DS441). The panel had circulated its report on 28 June 2018.

India Customs & Trade Policy Update

EPCG – Shifting of capital goods, and EO fulfilment intimation

EPCG authorisation holders have been permitted to shift capital goods, imported during entire export obligation period, to their other units mentioned in their IEC and RCMC. Fresh installation certificate however would be required within 6 months. Further, Regional Authority can be intimated on fulfilment of export obligation as well as average exports, without using digital signatures. Amendments in this regard have been made in Paragraphs 5.04(a) and 5.14(b) of Handbook of Procedures Vol.1 by Public Notice Nos. 31 and 32/2015-20, both dated 29-8-2018.

Bio-fuels – Export Policy revised from 'free' to 'restricted'

Ministry of Commerce and Industry has, on 28-8-2018, amended export policy of biofuels from 'Free' to 'Restricted', in line with the National Policy on Biofuels 2018. New entries at Sl. No. 115A, 115B and 115C have been inserted in Schedule 2 of ITC (HS) to cover Tariff Items 2207 20 00, 2710 20 00 and 3826 00 00. Export of bio-fuels enumerated in said entries will now be permitted under license only for non-fuel purposes. Notification No. 29/2015-2020 has been issued for this purpose. It may be noted that Import Policy for such products, with similar conditions, was notified on 21-8-2018.

Export of SCOMET items for repair/display – Procedure

DGFT has laid down elaborate procedure for export of imported or re-imported (indigenous) SCOMET items for repair or replacement purposes and for export of SCOMET items for display, exhibition, tenders, etc. Public Notices Nos. 33 and 34/2015-20, both dated 4-9-2018 insert Paras 2.79C and 2.79D in the FTP Handbook of Procedures Vol. I. It may be noted that both the paragraphs specifically mention that end user certificate will not be insisted in such cases.

System Driven approval of MEIS for exports from EDI ports – Guidelines

DGFT will, from 13-9-2018, start a process of system driven approval of MEIS claim applications for exports through EDI shipping bills. The online module will not accept application if it is not made in one jurisdictional regional office for one financial year. Shipping bills, already attached in earlier applications and disallowed, will not be accepted again under new module, unless re-activated. According to Trade Notice No. 30/2018-19, dated 11-9-2018, all

shipping bills meeting specified requirements like having Let Export date on or after 1-1-2017, total claim value of less than Rs.2 Crore, etc., would be approved by the system automatically.

India again postpones retaliatory measures against USA

India has again postponed implementation of its retaliatory Tariff measures against the USA which are aimed to counter USA's certain measures on import of steel and aluminium from India.

The higher basic customs duty (BCD) in respect of imports of commodities such as almonds, apples fresh and other diagnostic reagents, etc. will now be effective from 2nd of November 2018. It may be noted that the higher duty was initially scheduled for 4-8-2018 but was postponed earlier to 18-9-2018. Notification No. 62/2018-Customs, dated 17-9-2018 has been issued for this purpose.

Ratio Decidendi

Interim review of anti-dumping duty – Changed circumstances to be in respect of all exporting producers

In a case involving anti-dumping duties on ceramic tiles from China, European Union's General Court has upheld the department's action of rejecting the plea of interim review by a Chinese exporter. The Court in this regard observed that since the applicant had not taken part in the investigation that led to the adoption of the definitive regulation, the applicant was to be considered to have failed to cooperate with the investigation and would be liable to duty as non-cooperating exporter.

The Court rejected the appellant's plea that request for an interim review submitted by an exporting producer not included in the sample earlier must not be based on evidence of changed circumstances for all exporting producers. The Chinese exporter had put forward information only on establishment of a new distribution system which included the establishment of a related company and the introduction of a new type of product that did not exist during the investigation period, which according to the department and the court was related only to him and not all exporters. The court for this purpose also noted that the applicant, which did not cooperate in the initial investigation, is not in any way in the same situation regarding the setting of the dumping margin as the exporting producers which did take part in that investigation.

Further, observing that Article 11(5) of the EU's Basic Regulation does not extend to review procedures all the provisions regarding the procedures and conduct of investigations that apply in the context of the initial investigation, it was held that applying Article 17(3) of the basic regulation in such a way as to provide for individual examination also in the context of the assessment of a request for interim review by an exporting producer which did not cooperate in the initial investigation runs counter to the purpose of the interim review procedure. It was also observed that the applicant cannot request an individual examination in accordance with Article 17(3) at any time and thereby require the authorities to review the anti-dumping duty rate

applicable to its imports. [*Foshan Lihua Ceramic Co. Ltd.* v. *European Commission* – Judgement dated 11-9-2018 in Case T-654/16, EU's General Court (Fourth Chamber)]

Pre-cooked and fried noodles to be classified as 'dried' pasta

Taking note of the fact that the term 'dried' is not defined in respect of EU's CN sub-heading 1902 30 10, Court of Justice of European Union has held that pre-cooked and fried noodles which at the end of production stage are packaged in a dry state are dried pasta under said sub-heading. The Court in this regard rejected referring court's argument that goods are covered under 1902 30 90 as 'drying' constitutes a means of preservation by extracting moisture while cooking/frying besides eliminating water also causes numerous other chemical reactions.

Further, considering the scheme of things in Heading 1902, the court was of the view that sub-heading 1902 30, within which 1902 30 10 ('dried' pasta) falls, necessarily covers cooked pasta or pasta, otherwise prepared, which is not stuffed. It was also held that scope of said sub-heading should not be limited to pasta whose dry state has been obtained by processes which are used solely for their preservation and which remove only water from the treated products, without changing them in any other way. [*Kreyenhop & Kluge GmbH & Co. KG* v. *Hauptzollamt Hannover* – Judgement dated 6-9-2018 in Case C-471/17, CJEU]

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