

国际贸易 法律月刊

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Article

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

出口促进计划与补贴和反补贴协议 – 开始倒计时？

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 fact¹, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I²;*
- (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 annum³... 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

¹ 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.

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

³ 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.⁴ India is second only to China in facing the highest number of countervailing duty investigations in the world as of date.⁵

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.⁶

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 GNI⁷ per capita crossed \$1000 mark in the year 2008.⁸ 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*.⁹ 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 926¹⁰, whereas India's GNI per capita income at current dollars was measured at 1399 as of 2010.¹¹ 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

⁴ 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.

⁵ Countervailing duty initiations by Exporting Country, available at http://wto.org/english/tratop_e/scm_e/CV_InitiationsByExpCty.pdf

⁶ 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.

⁷ The World Bank data series

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

⁹ 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.

¹⁰ 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.

¹¹ 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.¹² 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).¹³ 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.¹⁴ 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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¹² TN/RL/GEN/177/Rev.2, 18 March 2011.

¹³ *Ibid.*, para. 4

¹⁴ US files dispute against India on solar panel products, available at 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 贸易救济新闻

Trade remedy actions against China

对中国采取的贸易救济行动

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Aluminium Extrusions 铝挤压品	Australia 澳大利亚	Accelerated review terminated in respect of particular exporter 取消新出口商复审调查	Australian Customs Dumping Notice No. 2013/28, dated 15-4-2013 2013年4月15日, 澳大利亚海关倾销通知第2013/28
Canned mushroom 蘑菇罐头	USA 美国	New shipper review terminated 取消反倾销新出口商复审	US DOC Press Release dated 26-3-2013 2013年3月26日, 美国商务部公告
Caramel 焦糖	Customs Union of Russia, Belorussia and Kazakhstan 欧亚经济委员会	Safeguard duty amended 修改保障措施税	Eurasian Economic Commission Notice dated 26-4-2013 2013年4月26日, 欧亚经济委员会通知
Carbon Steel Welded Pipe 碳钢焊接钢管	Canada 加拿大	Expiry review – Determination of likelihood of resumption of dumping and subsidization 日落复审-确定再次发生倾销和补贴的可能性	Expiry Review No. RR-2012-003, dated 4-4-2013 2013年4月4日, 日落复审第RR-2012-003号
Cold-rolled seamless stainless steel tubes 冷轧不锈钢无缝钢管	Customs Union of Russia, Belorussia and Kazakhstan 欧亚经济委员会	ADD imposed 征收反倾销税	Eurasian Economic Commission Notice dated 12-4-2013 2013年4月12日, 欧亚经济委员会通知
Cold-rolled Stainless Steel Products 不锈钢冷轧板材	Taiwan 台湾	Affirmative preliminary determination of injury in ADD investigation 反倾销调查确定肯定性损害初裁	Taiwan International Trade Commission News Release dated 12-4-2013 2013年4月12日, 台湾国际贸易委员会发布新闻
Electrical Insulators 电绝缘体	India 印度	ADD investigation terminated 终止反倾销调查	14/6/2011-DGAD, dated 20-3-2013 2013年3月20日, 14/6/2011-DGAD

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Enameled cast iron bath 铸铁浴缸	Customs Union of Russia, Belorussia and Kazakhstan 欧亚经济委员会	ADD imposed 征收反倾销税	Eurasian Economic Commission Notice dated 12-4-2013 2013年4月12日， 欧亚经济委员会通知
Fresh garlic 新鲜大蒜	USA 美国	New shipper review terminated 取消反倾销新出口商复审	US DOC Press Release dated 26-3-2013 2013年3月26日， 美国商务部公告
Galvanized steel wire 镀锌钢丝	Canada 加拿大	Preliminary determination of dumping and subsidization 初步裁定存在倾销和补贴	Dumping case number: AD/1397 and Subsidy case number: CV/133, dated 22-4-2013 2013年4月22日，倾销案件号AD/1397和补贴案件号CV/133
Glass fibres (certain open mesh fabrics) 玻璃纤维网格织物	EU 欧盟	Anti-circumvention investigation initiated 发起反规避调查	Council Implementing Regulation (EU) No. 322/2013, dated 10-4-2013 2013年4月10日， 欧盟执行规定第322/2013号
Hand pallet trucks and their essential parts 手动叉车及其主要配件	EU 欧盟	ADD amended after partial interim review 期中复审修改反倾销税	Council Implementing Regulation (EU) No. 372/2013, dated 22-4-2013 2013年4月22日， 欧盟委员会规定第372/2013
Hardwood and Decorative Plywood 木制和装饰胶合板	USA 美国	Preliminary determination of dumping 初步裁定存在倾销	US DOC Fact Sheet dated 30-4-2013 2013年4月30日， 美国商务部情况说明
Hollow Structural Sections 空心型材	Australia 澳大利亚	Initiation of accelerated review for particular exporter 发起部分出口商快速复审	Australian Customs Dumping Notice No. 2013/26, dated April, 2013 2013年4月，澳大利亚海关倾销通知第2013/26
Hot-rolled Steel 热轧卷	Indonesia 印度尼西亚	Expiry Review - ADD to continue 日落复审-继续征收反倾销税	Dated 3-4-2013 2013年4月3日

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
PET 聚对苯二甲酸乙二酯	Argentina 阿根廷	Extended investigation for 6 months 延长6个月调查期限	Dated 4-4-2013 2013年4月4日
Plain Gypsum Plaster Boards 石膏板	India 印度	Definitive ADD imposed 征收最终反倾销税	6/2013-Customs (ADD), dated 12-4-2013 2013年4月12日, 6/2013-Customs (ADD)
PVC Structural Section PVC型材	Argentina 阿根廷	Preliminary finding issued 通过反倾销调查初裁报告	Dated 4-4-2013 2013年4月4日
Resin or Fibre Boards 木制纤维板	India 印度	Investigation extended till 10-5-2013 延长调查期限至2013年5月10日	Dated 10-4-2013 2013年4月10日
Seamless Pipes, Tubes and Hollow Profiles of iron or non-alloy steel 铁、合金或非合金 钢制无缝管和空心 异型材	India 印度	Initiation of safeguard investigation 发起保障措施调查	D-22011/17/2012, dated 22-4-2013 2013年4月22日, D-22011/17/2012
Silicon 金属硅	EU 欧盟	ADD applicable on imports from China also imposed on imports from Taiwan after positive anti-circumven- tion investigation 对自中国台湾转口的涉案产品征收 反倾销税	Council Implementing Regula- tion (EU) No. 311/2013, dated 3-4-2013 2013年4月5日, 欧盟委员会执 行规定第311/2013号
Silicon metal 金属硅	Canada 加拿大	ADD and countervailing duty investigation initiated 发起反倾销和反补贴调查	4214-39 AD/1400 and 4218-37 CVD/136, dated 22-4-2013 2013年4月22日, 4214-39 AD/1400和4218-37 CVD/136
Sodium nitrite 亚硝酸钠	India 印度	Initiated safeguard investigation 发起保障措施调查	Dated 17-4-2013 2013年4月17日
Solar glass 太阳能玻璃	EU 欧盟	Initiation of an anti-subsidy proceeding 发起反补贴调查	2013/C 122/17, dated 27-4-2013 2013年4月27日, 2013/C 122/17
Steel Nail 钢钉	USA 美国	Administrative review – modify final finding 行政复审-修改终裁	US DOC Press, dated 26-4-2013 2013年4月26日, 美国商务部 公告
Steel Strand 钢绞线	Malaysia 马来西亚	ADD investigation initiated 发起反倾销调查	Dated 10-4-2013 2013年4月10日

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Sulphur Black 硫化黑	India 印度	ADD extended till 10-4-2014 after initiation of sunset review investigation 发起日落复审后，反倾销税延长至2014年4月10日	5/2013-Customs (ADD), dated 10-4-2013 2013年4月10日， 5/2013-Customs (ADD)
Vulcanized Rubber Transfer Belt 硫化橡胶传送带	Argentina 阿根廷	Extended investigation for 6 months 延长6个月调查期限	Dated 17-4-2013 2013年4月17日
Welded Tube 焊缝管	Australia 澳大利亚	New shipper review initiated 发起新出口商复审调查	Dated 8-4-2013 2013年4月8日

Trade remedy actions by China

中国采取的贸易救济行动

Product 产品	Country 国家	Measures 措施	Notification No. and date 通知文号及日期
Paper for Electrolytic Capacitor 电解电容器纸	Japan 日本	ADD continued for five years 继续征收5年的反倾销税	MOFCOM Announcement No.19 of 2013, dated 18-4-2013 2013年4月18日，商务部公告2013年第19号

WTO News 世贸组织新闻

印度和美国 – 再生能源、补贴和国内成分要求成为焦点

印度要求美国详细披露提供了补贴的政府、区域或地方层级的可再生能源项目，以及对国内太阳能制造商的退税和贷款措施。根据印度在世贸组织2013年4月15日进行的沟通，印度已经请求美国提供美国四个州的可再生能源行业（太阳能）补贴项目的信息，这四个州分别为特拉华州、明尼苏达州、马萨诸塞州和康涅狄格州。印度要求澄清上述项目的条款如何没有违反补贴与反补贴措施协议第3.1 (b) 和3.2条的规定。印度是在2013年4月15日向与贸易有关的投资措施委员会提出了这些疑问和其他一些措施的疑问。美

国已经在2个月前要求与印度就贾瓦哈拉尔尼赫鲁国家太阳能计划磋商中对太阳能电池和组件的国内成分要求进行磋商，美国指出该要求违反了相同条款。

同样的，印度也对美国在南卡罗莱纳州、宾夕法尼亚州、西佛吉尼亚州和新英格兰州的一些地区在供水设施中要求使用美国的球墨铸铁管和配件的做法提出质疑。根据2013年4月17日印度向与贸易有关的投资措施委员会发布的一份报告来看，美国在一些供水设施招标文件中提出“国内成分要求”，即如果要被视为合格的投标人，投资者需要使用国产的球墨铸铁管和配件。印度因此要求美国解释为了获得优势必须遵守这些

强制性措施以及要求购买国内产品等国内成分要求如何没有违反与贸易有关的投资措施协议的列示清单。

印度尼西亚 – 园艺产品、动物和动物制品采取进口许可制度案成立专家组

根据美国在世贸组织对印度尼西亚提出的抗议，争端解决机构已经成立专家组以评估 (DS455) 是否违反1994年关税和贸易总协定第10.3(a)和第11.1条、农业协定第4.2条以及进口许可协议第1.2、3.2和3.3条。根据美国的主张，印度尼西亚对进口的园艺产品、动物和动物制品实行非自动进口许可和进口配额制度，因此限制了产品的进口。与此同时，据报道，印度尼西亚已经放松了进口限制并且简化了园艺产品的进口程序。目前所规定的产品列表已经从原先的57项减少到39项，并且确保进口许可的程序将在2个工作日内完成。

中国 – 对自欧盟进口的安全设备征收最终反倾销税案的专家组报告被采纳

2013年4月24日，对中国就欧盟的X射线安全检查设备征收最终反倾销税 (DS425) 案的专家组报告被采纳。欧盟主张中国在反倾销调查程序以及认定反倾销方面违反了相关的反倾销协议。

专家组支持欧盟对中国商务部的做法所提出的抗议，认为商务部在价格分析时未能确保作为价格影响分析一部分的所比较的价格事实上是可比的。专家组进一步认为中国的做法违反了第3.1和3.4条，因为商务部没有考虑所有相关的经济因素，特别是“倾销幅度的大小”。商务部的对行业的评估被认为缺乏客观性，并且不是非常合理和充分。由于在价格影响分析时没能考虑到涉案产品之间的不同并且就倾销的进口产品价格如何对国内产业造成削价没有提出合理和充分的解释，因此违反了第3.1条和第3.5条。专家组认为商务部没有考虑某些“已知因素”并且在非归因分析时没有采纳其他需要其明确考虑的因素的证据。

News Nuggets 新闻精华

欧盟计划改进贸易防御工具

欧盟计划修改其贸易防御措施，包括反倾销和反补贴。这些措施自1995年以来一直被作为主要的防御工具。根据2013年4月10日发布的新闻，虽然反倾销和反补贴工具将变得更有效，但是进口商将在修改税率方面享有更多的预见性。另外还有大量的非立法建议。这些建议包括：

- 在征收任何临时反倾销税或反补贴税的两个星期前，相关行业将收到通知。
- 一旦在日落复审中确认没有必要继续征收反倾销税，则在日落复审期间征收反反倾销税将被返还。
- 如果来自别国的进口产品受到不公平的补贴并且在原材料市场造成结构扭曲，则不适用一般的低税原则。

- 在调查过程中延长某些期限。
- 依职权发起 (不需要国内产业的官方请求) 反规避调查以确保更快的行动。

按照欧盟贸易委员会Karel De Gucht，这将是一个对所有受到贸易防御税影响的包括生产商、进口商和用户的真正改进。

印度发布对外贸易年度补充政策

为了促进和规范进出口，印度2009-2014五年对外贸易政策的年度补充政策于2013年4月18日发布。虽然没有引入新的计划，但是放松了许多实施中的计划，以便向出口商和进口商提供更多优惠。这些重要的更新包括：

- 3%鼓励出口资本货物计划与零税率的鼓励出口资本货物计划合并。在该计划中将不允许旅馆、旅行社等行业进口摩托车、SUV等。

- 在新的鼓励出口资本货物计划中将不允许进口二手产品。
- 所有对外贸易政策第3章的税收抵扣证明现在可以被用于支付申请获得任何授权的申请费、学费和出口义务中的价格不足费用。
- 重点市场计划、重点产品计划和VKGUY计划中获得的抵扣凭证也可被用于支付服务税。
- 服务自印度计划现在也可以按照实际用户被服务提供者用于生产性业务而进口、采购资本货物。
- 根据DFIA计划对反倾销税和保障措施税的免除将在权利转让后不再适用。

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