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## Article

### India – sugar subsidies: A bitter verdict at the WTO

By Jayant Raghu Ram

#### Introduction

On 14 December 2021, a dispute settlement panel of the World Trade Organization ('WTO') circulated its report concerning the subsidies allegedly granted and maintained by India in respect of sugar domestically produced and exported from India. The panel proceedings were initiated subsequent to three separate complaints initiated in July 2019 by Brazil (WT/DS/579), Australia (WT/DS/580), and Guatemala (WT/DS/581) against India. Interestingly, one of India's concerns was that these three countries themselves provide and maintain subsidies for their respective sugar sectors. This article discusses key aspects of the verdict pronounced by the WTO panel in *India — Measures Concerning Sugar and Sugarcane* (WT/DS/579/580/581).

#### Examination of domestic support to the sugar sector

The complainants launched their attack primarily on the basis that India was violating Article 7.2(b) of the Agreement on Agriculture ('AoA') by providing domestic support to its sugar sector in excess of the *de minimis* limit, i.e., 10% of the value of sugar production in a sugar season. An interesting threshold issue that arose before the panel was whether India's system of providing support in the form of Fair Remunerative Prices ('FRP') and State Administered Prices ('SAP') that were paid by the sugar mills to the sugarcane farmers could be considered 'market support' under Annex 3

(*Domestic support – Calculation of Aggregate Measurement of Support*) to the AoA.

India argued that there was no question of any *support* being provided by it since there was no budgetary outlay or revenue foregone by the government or its agents. It was argued that it is the sugar mills that procured sugarcane from the farmers and paid the support in the form of FRP and SAP to the farmers.

Rejecting India's arguments, the panel ruled that mandatory minimum prices fixed by the government but payable by private entities would also constitute 'market price support' in terms of Annex 3 to AoA. The panel did not find any provisions in Annex 3 which imposes limitations on the scope of the phrase 'market price support' by a government.

Relying on statistics from Indian Statistics Ministry, the panel estimated the value of sugar production and calculated India's Aggregate Measurement of Support ('AMS') which included (i) the market price support (the FRP and SAP); (ii) the product-specific direct payments made by various state governments, and (iii) other non-exempt support – for the five sugar seasons / marketing years: 2014-15; 2015-16; 2016-17; 2017-18; and 2018-19.

The panel's analysis showed that India's AMS for sugar was around ten times more than the *de minimis* value of sugar production defined under Article 6.4 of the AoA for each of the sugar seasons. The panel seemingly had no difficulty in

concluding that India was violating the AoA's provisions which prohibit grant of subsidies for the sugar sector.

### **Examination of export subsidies provided to the sugar sector**

The second key issue the panel examined was the export contingent subsidies provided to the sugar sector. The panel was faced with claims of inconsistency of these export subsidies under both the AoA and the Agreement on Subsidies and Countervailing Measures ('**SCM Agreement**'). The claims before the panel concerned four programs - India's Production Assistance Scheme, Buffer Stock scheme, Marketing and Transportation Schemes, and the Duty-Free Import Assistance Scheme.

Article 8 read with Article 3.3 of the AoA expressly prohibit WTO Members from providing export subsidies otherwise than in conformity with the AoA and with the commitments as specified in each Member's Schedule of Concessions. Since India did not specify any commitments for export subsidies concerning the sugar sector in its Schedule of Concessions, the panel found that the four schemes provide subsidies in violation of Article 3.3 and Article 8 of the AoA Agreement.

Under the SCM Agreement, the complainants challenged India's provision and maintenance of export subsidies concerning sugar. India argued that, under the provisions of Article 27.2 (b) read with Annex VII of the SCM Agreement, it was entitled to maintain export subsidies for a transition period of eight years from the time it '**graduated**', i.e., its Gross National Product exceeded US\$ 1000/per capita for three consequent years, i.e., 2015, 2016, and 2017. This was a ground that had already been

examined by a WTO panel in the landmark decision on India's export subsidy programs in *India- Export Measures* (WT/DS/534).

Similar to the panel's decision in *India-Export Measures*, the panel in this dispute as well held that, under Article 27.2(b) read with Annex VII to the SCM Agreement, India was entitled to provide and maintain subsidies only till the time it graduated and was not entitled to any transition period.

Nonetheless, since the panel had already found India's export support programs to be inconsistent under the AoA, it did not consider it necessary to examine the validity of these programs under the SCM Agreement.

### **Conclusion**

Trade in agricultural products has been a very contentious issue at the WTO. The recent panel report has brought to the fore challenges with India's system of providing and maintaining agricultural subsidies. However, since India has appealed the panel's decision to the WTO, and the Appellate Body continues to remain dysfunctional due to absence of members to discharge its function, it will be a long time before this matter can be conclusive determined at the WTO.

This is also the second time in the last two years that India's subsidy programs have been assailed at the WTO. It remains to be seen how the Government of India will address the issues identified in the dispute given the political sensitivity of the issue domestically and the fact the issue becomes more complicated as agriculture is also a State subject.

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## Trade Remedy News

### Trade Remedy actions by India

Product	Country	Notification No.	Date of notification	Remarks
1,1,1,2-Tetrafluoroethane or R-134a	China PR	1/2022-Cus. (ADD)	6 January 2022	Anti-dumping duty revoked
Aluminium and Zinc coated flat products	China PR, Vietnam and Korea RP	F. No. 7/30/2021-DGTR	12 January 2022	Name of one Korean producer changed in mid-term review
Axles for Trailers, including those in SKD/CKD condition	China PR	4/2022-Cus. (ADD)	24 January 2022	Anti-dumping duty continued after sunset review
Cold rolled / cold reduced flat steel products	China PR, Japan, Korea RP and Ukraine	F. No. CBIC-190354/59/2021-TO(TRU-I)-CBEC	5 January 2022	Central Government decides not to accept recommendations for imposing anti-dumping duty
Colour coated / pre-painted flat products of alloy or non-alloy steel	China PR and EU	2/2022-Cus. (ADD)	13 January 2022	Anti-dumping duty revoked
Flexible slabstock polyol	Thailand	F. No. 7/19/2021-DGTR	30 December 2021	Sunset review of anti-dumping duty terminated
Hot-rolled flat products of alloy or non-alloy steel	China PR, Japan, Korea RP, Russia, Brazil and Indonesia	F. No. CBIC-190354/58/2021-TO(TRU-I)-CBEC	4 January 2022	Central Government decides not to accept recommendations for imposing anti-dumping duty
Polyester Yarn (Polyester Spun Yarn)	China PR, Indonesia, Nepal and Vietnam	F. No. 190354/182/2021-TRU	8 January 2022	Central Government decides not to accept recommendations for imposing anti-dumping duty
PVC Flex Films	China PR	3/2022-Cus. (ADD)	24 January 2022	Anti-dumping duty revoked. Notification however stayed for 6 weeks by Gujarat High Court.

Product	Country	Notification No.	Date of notification	Remarks
Soda Ash	UAE and Russia	F. No. 6/5/2021-DGTR	18 January 2022	Anti-dumping investigation terminated
Ursodeoxycholic Acid (UDCA)	China PR and Korea RP	F. No. 6/15/2021-DGTR	24 January 2022	Anti-dumping investigation initiated
Vinyl tiles other than in roll or sheet form	China PR, Taiwan and Vietnam	F. No. 6/17/2021 - DGTR	24 January 2022	Anti-dumping investigation initiated

### Trade remedy actions against India

Product	Investigating Country	Document No.	Date of Document	Remarks
Barium Chloride	USA	87 FR 2901	19 January 2022	Countervailing duty and anti-dumping duty investigations initiated
Glycine	USA	87 FR 2761	19 January 2022	Department of Commerce determines that countervailable subsidies were provided to producers and exporters during 4 September 2018, through 31 December 2019.
Granular polytetrafluoro ethylene resin	USA	87 FR 3765	25 January 2022	Affirmative countervailing duty determination
Granular polytetrafluoro ethylene resin	USA	87 FR 3772	25 January 2022	Determination of sales at less than fair value
Sodium Nitrite	USA	87 FR 3333	21 January 2022	Anti-dumping and countervailing duty investigations initiated
Steel Nails	USA	87 FR 993	7 January 2022	Anti-dumping and Countervailing duty investigations initiated
Zinc Coated (Galvanised) Steel	Australia	Anti-dumping Notice No. 2022/009	21 January 2022	Time granted to issue Statement of Essential Facts and the Final Report extended





## WTO News

### Chinese restrictions on trade with Lithuania challenged by European Union

The European Union has sought consultations with China on the certain Chinese measures which ban or restrict import and export of goods and services with Lithuania. As per the request for consultations, in or around the final quarter of 2021, importers of products originating in Lithuania and/or transiting through Lithuanian ports and/or with some other link to Lithuania began encountering restrictions on securing customs clearance for their goods to enter Chinese territory. Similarly, entities established in Lithuania began encountering difficulties, in or around the final quarter of 2021, relating to goods due to be exported from China to Lithuania.

According to the European Union, the restrictions include in particular: (i) error messages on the IT systems used to input data necessary to secure customs clearance from the Chinese customs authorities; (ii) containers being blocked in Chinese ports pending customs clearance; (iii) failures on the part of the Chinese customs authorities to process requests for customs clearance in due time or at all. The EU also alleges that these restrictions are novel, numerous, recurrent, persisting and strongly correlated in temporal and substantive terms, as well as in terms of the provenance of the goods while also violate various provisions of the GATT, Trade Facilitation Agreement, Agreement on the Application of Sanitary and Phytosanitary Measures and the General Agreement on Trade in Services.

### Egyptian import registration requirements disputed by European Union

The European Union has on 26 January 2022 sought consultations with the Government of the Arab Republic of Egypt on certain registration requirements imposed by Egypt which are affecting the importation of certain categories of goods from the European Union into Egypt. The measures cover 29 categories of products falling under the various HS-codes covering agricultural and food products, cosmetics, toys, textiles, garments, household appliances, furniture and ceramic tiles.

As per the request for consultations, Egypt subjects the importation of the products at issue to prior registration of foreign factories or companies owning trademarks and wishing to import the products at issue into Egypt. According to EU, the complexity of requirements and procedures for the approval of registration make the registration process administratively burdensome, non-transparent, costly and time-consuming. EU in this regard alleges violation of various provisions of the GATT, Agreement on Agriculture and Agreement on Import Licensing Procedures.

### WTO arbitrator decides on level of countermeasures China may request against USA

In its decision dated 26 January 2022, the DSB Arbitrator has determined that the appropriate level of nullification or impairment that China could request authorisation for against the USA was USD 645.121 million per annum. China had requested DSB authorization to suspend

concessions or other obligations to the United States with respect to goods at an annual amount of USD 2.4 billion. According to China, this was equivalent to the level of nullification or impairment caused by the United States' failure to implement the DSB recommendations and rulings concerning the imposition of countervailing duties on a range of Chinese products, and the investigations leading to the imposition of such duties (DS437).

It may be noted that China had requested consultations with the USA in May 2012. The Appellate Body had in 2014 held that the USDOC acted inconsistently with USA's obligations under Articles 14(d) and 1.1(b) of the SCM Agreement by rejecting prices in China as benchmarks in its benefit analyses. Panel's finding upholding the USDOC's rejection of private prices as potential benchmarks in the investigations on the grounds that such prices were distorted, was also reversed by the Appellate Body then.



## India Customs & Trade Policy Update

### Classification of automobile parts – Supreme Court decision in case of *Westinghouse Saxby* does not refer to its wider applicability

Taking cognizance of the divergent practices adopted in assessment of the 'automobile parts', the CBIC has *vide* Instruction No. 1/2022-Cus., dated 5 January 2022 clarified that judgment in the case of *Westinghouse Saxby* should not be applied to wider issues but to classification of commodity 'relays' used in railway signalling equipment of Chapter 86. Further, the Board has advised that classification of parts under Section XVII should be based on relevant facts, relevant section and chapter notes, various Supreme Court decisions and the HS Explanatory notes. The Department has also filed a review petition against the judgment in the case of *Westinghouse Saxby*.

It may be noted that the Supreme Court in this case has held that 'relays' are classifiable as parts of 'railway signalling equipment' under Heading 8608 of the Central Excise Tariff. Here, the Supreme Court, diverging from its earlier decisions, gave precedence to the 'sole or principal use' test of Section Note 3 over Note 2(f) to Section XVII, which specifically excluded 'electric equipment' from being classified under Section XVII. The Apex Court further did not consider whether the part is not a good or article specifically covered under any other chapter heading.

### Steel Import Monitoring System registration when not required

Post issuance of Notification No. 33/2015-2020, dated 28 September 2020 amending import policy of all HSN Codes under Chapters 72, 73 & 86 of Schedule-I (Import Policy) of ITC (HS) from 'Free' to 'Free subject to compulsory registration under Steel Import Monitoring System ('SIMS')',

the DGFT has clarified that re-import of steel for packing purposes will not be covered under SIMS as it is not primarily meant for value addition. DGFT Circular No. 38/2015-20, dated 19 January 2022 also clarifies that in case where the steel/steel item is exported from DTA to SEZ and then imported from SEZ to DTA, without or with value addition, there should be no requirement for SIMS registration.

### General Authorisation for Export of Chemicals and related equipment under SCOMET list specified

Paragraph 2.79G has been added in the Handbook of Procedures of the Foreign Trade Policy to lay down the procedure for General Authorisation for Export of Chemicals and related equipment ('GAEC') under SCOMET list. Public Notice No. 45/2015-20, dated 13 January 2022

amends the Handbook of Procedures for this purpose. As per the new para, the GAEC shall be valid for 5 years and cannot be revalidated in terms of Para 2.80 of the HBP. Guidelines for submission of online application for one-time registration have also been issued by Trade Notice No. 30/2021-22, dated 13 January 2022.

### Human hair – Exports restricted with effect from 25 January 2022

The Export Policy of human hair, unworked, whether or not washed or scoured, waste of human hair or any other form of raw human hair falling under ITC (HS) Code 0501, has been put under restricted category with effect from 25 January 2022. Notification No. 51/2015-20, dated 25 January 2022 has amended Chapter 05 of Schedule 2 of the ITC (HS).



## Ratio Decidendi

### Anti-dumping duty on float glass – Tolerance of thickness not to be considered when actual thickness available

The Customs, Excise and Service Tax Appellate Tribunal ('CESTAT') Mumbai has held that when actual thickness of float glass is available, tolerance of thickness should not be added to demand anti-dumping duty by bringing the imports within the purview of anti-dumping duty. Notification No. 48/2014-Customs (ADD) imposed anti-dumping duty on clear float glass of nominal thickness ranging from 4mm to 12mm

both inclusive. The Revenue department had contended that the nominal thickness and the tolerance as prescribed as per BIS 14900:2000 was 4mm which could have tolerance of 0.33mm, and since admittedly the goods fell within the tolerance limit, the anti-dumping duty was payable. Noting that actual measurement of the thickness of the goods was between 3.73mm to 3.86mm, the Tribunal held that when actual thickness is available, then nobody can extend the tolerance to demand anti-dumping duty. It also noted that nominal thickness was not defined in BIS. [*Nanda Glass Industry v. Commissioner – 2022 VIL 47 CESTAT MUM CU*]



## Valuation – Technical know-how and technical assistance when not includible

The Customs, Excise and Service Tax Appellate Tribunal ('CESTAT') Mumbai has allowed the appeal of the assessee in a case where the Revenue department had sought to include payments made for technical know-how and technical assistance in the value of imported goods. According to the Department, the transaction of purchase of goods and for services were connected through a licence agreement for expansion of capacity. The Tribunal held that rendering of service was not the condition for

sale of goods. It observed that the purchase order for the goods was issued much after those service agreements were finalised. It also noted that the service was to be rendered in India for upgradation of manufacturing facility as a whole and not only for the imported goods on which the service will impact after delivery at the site of the importer. It held that the qualifying expression 'as a condition of sale' cannot be stretched limitlessly to subsume all commercial transactions merely for sharing commercial objective in common. [*Arcil Catalyst Pvt. Ltd. v. Commissioner – 2022 VIL 14 CESTAT CU*]



## News Nuggets

### Anti-dumping duty on PVC Flex Films from China – Gujarat High Court stays revocation of duty for six weeks

Observing that a litigant should not suffer because the Special Bench of the Tribunal was not available, the Gujarat High Court has stayed the operation of the anti-dumping Notification No. 3/2022-Cus. (ADD), dated 24 January 2022 (revoking anti-dumping duty on PVC flex films from China) till a further period of six weeks. The Court has at the same time also ordered that the Notification dated 8 August 2016, as extended by the Notification dated 30 June 2021, which imposed such anti-dumping duty, shall remain in operation for a period of six weeks.

The High Court in its Order dated 27 January 2022 [*Qrex Flex Pvt. Limited v. Union of India*] also directed the Tribunal to take up the appeals filed by the Association for hearing at any cost and decide them in accordance with law before the period of six weeks comes to an end. The Court also stated that they expect the Union of India also to ensure that the Tribunal takes up the appeals for hearing and that the same are decided in accordance with law before the expiry of six weeks.

Earlier the Designated Authority had recommended withdrawal of anti-dumping duty and the writ applicants (before the High Court) had preferred an Appeal before the Appellate Tribunal (CESTAT) which is pending due to non-availability of the Tribunal's Bench.

## Economic Survey pitches for FTAs as India and UK conclude first round of FTA negotiations

India and the United Kingdom have recently concluded the first round of India-UK Free Trade Agreement (FTA) negotiations covering 26 policy areas in 32 sessions. As per reports, this is one of the fastest start of negotiations between any two countries. It may be noted that the two countries had launched the negotiations only on 13 January 2022. It is believed that the pact will double the trade among the two countries by 2030.

Interestingly, the Economic Survey presented before the Indian Parliament on 31 January also pitched for giving a push to the ongoing negotiations for the proposed free-trade agreements as these pacts will help in diversifying the country's export basket and destinations. India is also negotiating FTAs with countries including Australia, European Union (EU), Canada and the UAE. It is also reviewing its existing trade agreements with nations/groups such as Singapore and ASEAN.

## Limitation for judicial or quasi-judicial proceedings – Supreme Court excludes period from 15 March 2020 till 28 February 2022

Taking into consideration the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing

conditions, the Supreme Court of India has directed that the period from 15 March 2020 till 28 February 2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.

The Apex Court in this regard restored its earlier Order dated 23 March 2020. It also stated that in cases where the limitation would have expired during the period between 15 March 2020 till 28 February 2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 1 March 2022.

The Order dated 10 January 2022 also clarifies that that the said period shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits and termination of proceedings.

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