

# THE SEZ ACT, 2005 – ISSUES OF CONFORMITY WITH THE WTO RULES

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*The Special Economic Zones Act, 2005 is a legislation which was aimed at overcoming the shortcomings of an unstable fiscal regime and to attract larger foreign investments in India. With a view to avoiding multiplicity of controls and clearances and to incentivize entrepreneurs to manufacture goods in these zones, the Act gives certain exemptions in the form of various subsidies. There is thus a danger that the SEZ Act may fall foul of provisions of the WTO Agreement, which India is bound to comply with. This paper analyses the provisions of the SEZ Act especially in light of the WTO Subsidies Agreement in particular, and tests its compliance with the Agreement on Subsidies and Countervailing Measures.*

## I. INTRODUCTION

In the globalised era of the twenty-first century, India has worked towards cementing its credentials as an export-friendly nation by creating dedicated zones in the country with minimum regulations and appealing fiscal packages. These Special Economic Zones [SEZs] are envisioned as harbingers of foreign investment, greater exports and widespread employment. With these benefits in mind, the Centre has given a coveted importance to overlooking the establishment of SEZs across the nation. This rising interest is evidenced by the Government's successful efforts in passing the Special Economic Zones Act, 2005 in order to oversee the stable and uniform expansion of SEZs. Through the medium of the said legislation, the deal of a SEZ has been made attractive by a string of tax and duty exemptions on movement of goods from these zones in the form of imports and exports.<sup>1</sup>

The said Act in fact provides for treatment of these demarcated zones as territories outside the customs zone of India in so far as these SEZs continue their authorised operations.<sup>2</sup> In addition to this, State Governments have been given the opportunity of being hosts to setting up SEZs by offering exemptions from State taxes, duties and levies.<sup>3</sup> A casual reading of the SEZ Act reveals the entire gamut of exemptions from taxes in the Central Sales Tax Act, 1956, Central

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<sup>1</sup> §§ 28, 50, 55(2)(x), Special Economic Zones Act, 2005 [SEZ Act].

<sup>2</sup> § 53, SEZ Act.

<sup>3</sup> § 50, SEZ Act.

Excise Act, 1944, Income Tax Act, 1961, Central Excise Tariff Act, 1985 and the Customs Act, 1985.<sup>4</sup> More importantly, all imports into and exports outside the SEZ are duty free, as outlined in the First Schedule to the SEZ Act.<sup>5</sup> It is clear therefore that these centres of development are a priority for the Government, keeping in mind the huge revenues they offer.

The increasing importance given to the spurt in SEZs and the SEZ Act itself is of paramount value considering India's commitment to the World Trade Organization [WTO]. India has been a signatory to the WTO since its inception<sup>6</sup> and has been a proud ambassador of a stringent rule-based trade regime, one which can lead to a stable and uniform governance of international trade.

The WTO Agreement has not referred to SEZs specifically in its texts. However, the concept of SEZs has not been ignored completely as the footnote to GATT Article XVI and the SCMA keeps away the exemption on import duties and taxes on exports from the very concept of 'subsidy'.<sup>7</sup> The GATT/WTO dispute settlement proceedings have not dealt with the issue of SEZs as such although it is not beyond comprehension to believe that subsidies have and can provide some guidance and the very principle of the SEZ framework has not been criticized as being contrary to the provisions of the WTO in WTO trade policy reviews.<sup>8</sup> There have been recent cases however, when SEZ measures were raised in an accession.<sup>9</sup> A cursory reading of the provisions of the SEZ Act indicates the possibility of a subsidy, which, in terms of the WTO Agreement, may be illegal.

The WTO Panels and Appellate Body, while adjudicating a dispute, apply customary rules of interpretation under public international law.<sup>10</sup> These rules are enshrined in the Vienna Convention on the Law of Treaties [VCLT].<sup>11</sup> For the purpose of interpreting the WTO Agreement on Subsidies and Countervailing

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<sup>4</sup> § 26, SEZ Act.

<sup>5</sup> § 7, SEZ Act.

<sup>6</sup> WTO, *Member Information: India and the WTO*, available at [http://www.wto.org/english/thewto\\_e/countries\\_e/india\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/india_e.htm) (Last visited: 7th March, 2009).

<sup>7</sup> "In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the 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 in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy." as cited in Art.1.1(a)(1)(ii), SCMA.

<sup>8</sup> See, e.g., WTO Secretariat, *Trade Policy Review: China*, pp. 56, 80, 87, WT/TPR/S/199 (April 16, 2008), and Table A.III.5.

<sup>9</sup> See Report of the Working Party on the Accession of Ukraine, ¶ 338, WT/ACC/UKR/152 (January 2008), *C.f.*, Report of the Working Party on the Accession of Vietnam, 34-35, 86-87, WT/ACC/VNM/48 (October 27, 2006), (Reportedly, SEZ measures are also an issue in the accession of the Russian Federation to the WTO).

<sup>10</sup> Art. 3(2), Understanding on the Rules and Procedure Governing the Settlement of Disputes in the WTO, 33 ILM at 1226 [DSU].

<sup>11</sup> See Arts. 31-33, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U. N. T. S. 331 (entered into force: 27 January 1980) [VCLT].

Measures<sup>12</sup> [SCMA] therefore, the author will resort to the rules as mandated by the VCLT.

## II. VIOLATION OF PROVISIONS OF THE WTO

The SCMA regulates the use of subsidies, since not all forms of subsidies are permitted by members of the WTO. Countries may take two kinds of actions to counter the effects of impermissible subsidies. Under the agreement a country can use the WTO's dispute-settlement procedure to seek the withdrawal of the subsidy<sup>13</sup> or the removal of its adverse effects.<sup>14</sup> A second alternative is that the country can launch its own investigation<sup>15</sup> and thereafter charge a countervailing duty on subsidized imports that are found to be injurious to domestic producers.<sup>16</sup>

To avoid the above consequences, it is in India's best interests that its laws are in conformity with the SCMA. More importantly, as a Member of the WTO, India is under a legal obligation not to derogate from the provisions of the covered Agreements under the WTO.<sup>17</sup>

### A. EXISTENCE OF A SUBSIDY

Article 1 of the SCMA defines a subsidy for the purpose of the said Agreement. As per this definition, a subsidy is deemed to exist if there is a financial contribution by a government within the territory of the Member State<sup>18</sup> and a benefit is thereby accrued to the recipient of the same.<sup>19</sup> A financial contribution may occur in any of the four ways enumerated in Article 1.1(a)(1). This includes the foregoing of government revenue which is otherwise due,<sup>20</sup> with an exception given in footnote 1 of the SCMA.

Therefore, to establish the existence of a subsidy in this case, the following need to be established – a financial contribution by way of foregoing government revenue, which is not saved by footnote 1 and a benefit conferred on the recipients of the subsidy.

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<sup>12</sup> Agreement on Subsidies and Countervailing Measures, 15 April 1994, WTO Doc. LT/UR/A-1A/13 [SCMA].

<sup>13</sup> Art. 7.8, SCMA.

<sup>14</sup> *Id.*

<sup>15</sup> Art. 7.9, SCMA.

<sup>16</sup> *Id.*

<sup>17</sup> Art. 26, VCLT, *supra* note 8.

<sup>18</sup> Art. 1.1 (a)(1), SCMA.

<sup>19</sup> Art. 1.1 (a)(1)(b), SCMA.

<sup>20</sup> Art. 1.1 (a)(1)(ii), SCMA.

## 1. Financial contribution by the Government of India

In the *US-FSC* case, the WTO Appellate Body held that “the word ‘foregone’ suggests that the government has given up an entitlement to raise revenue that it could ‘otherwise’ have raised.”<sup>21</sup> The provision calls for a comparison between the revenues due under the contested measure and revenues that would be due in its absence.<sup>22</sup>

Under the provisions of the SEZ Act, the government has clearly foregone revenue in the form of customs, excise and other duties, service tax and sales tax which would have been collected had the impugned measure not been adopted.<sup>23</sup> The same amounts to a financial contribution for determining existence of a subsidy.

## 2. Benefit conferred on the recipients of the subsidy

A financial contribution by the government results in a ‘benefit’ to the recipient if it makes the recipient ‘better off’ than it would have been in the absence of that contribution.<sup>24</sup> A benefit accrues if the financial contribution is made available at terms and conditions more favourable than what would otherwise be available in the market.<sup>25</sup>

In this case, financial contribution by way of duty exemption leads to reduction in actual per unit cost of production of goods manufactured in the SEZs, resulting in downward movement of prices and consequent increase in market share. Thus the duty exemption results in a benefit to the recipients. In light of the foregoing, the provisions of the SEZ Act create a subsidy as defined by Article 1 of the SCMA.

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<sup>21</sup> Appellate Body Report, *United States – Tax Treatment for Foreign Sales Corporations (Complaint by European Communities)*, ¶90, WTO Doc. WT/DS108/AB/R, (February 24, 2000) [US – FSC]. See also Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry (Complaint by Japan, EC)*, ¶91, WTO Docs. WT/DS139/AB/R, WT/DS142/AB/R., (May 31, 2000) [Canada-Autos].

<sup>22</sup> US – FSC, *id.*

<sup>23</sup> *Supra* note 4.

<sup>24</sup> Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft (Complaint by Brazil)*, ¶161, WTO Doc. WT/DS70/AB/R, (14 April 1999) [Canada – Aircraft].

<sup>25</sup> *Id.*; Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain hot-rolled lead and bismuth carbon steel Products originating in the United Kingdom (Complaint by European Communities)*, ¶68, WTO Doc. WT/DS138/AB/R, (10 May 2000).

### 3. Exception in Footnote 1 of SCMA

It is important to note the exception carved out in Footnote 1 of the SCMA.<sup>26</sup> This footnote clarifies that “the 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 in amounts not in excess of those which have accrued”<sup>27</sup> does not amount to a subsidy. This was further expanded by the Appellate Body in the US – FSC Report wherein it held that “the tax measures identified in Footnote 1 as not constituting a ‘subsidy’ involve the exemption of exported *products* from *product-based* consumption taxes”.<sup>28</sup> Since the tax exemption provided by USA was related to a corporate income tax and therefore taxed corporations, not products, therefore the measure was not covered by Footnote 1 of the SCMA and was deemed to be a subsidy.

Under the SEZ Act, exemptions from taxes and duties are provided to developers and entrepreneurs,<sup>29</sup> not to specific products. Hence, the exception under Footnote 1 is not applicable in this case and the measures provided for in the SEZ Act amount to a subsidy. Further, exemptions are provided on imports,<sup>30</sup> not only exports,<sup>31</sup> as envisaged in the footnote. The Act provides for exemptions on customs duty on goods used as inputs<sup>32</sup> and not only on taxes relating to the final product.<sup>33</sup> Therefore, the measure under section 26(1)(a) cannot be treated as a product consumption tax borne by like products of the exported product, which may be entitled to the exemption provided for in Footnote 1.

However, merely because an economic measure is regarded as a subsidy, it does not render the measure illegal under the SCMA. A subsidy as defined in Article 1.1 may be prohibited<sup>34</sup> or actionable<sup>35</sup> if certain conditions are fulfilled under Part II or III of the SCMA.<sup>36</sup>

### *B. PROHIBITED SUBSIDY*

Members may not grant or maintain certain kinds of subsidies as enumerated in Article 3 of the SCMA. Subsidies which are contingent either

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<sup>26</sup> Panel Report, *European Communities – Export Subsidies on Sugar (Complaint by Australia, Brazil, Thailand)*, WTO Docs. WT/DS265/R, WT/DS266/R, WT/DS283/R, ¶, (15 October, 2004).

<sup>27</sup> Footnote 1, SCMA.

<sup>28</sup> US – FSC, AB Report, ¶93.

<sup>29</sup> *Supra* note 4.

<sup>30</sup> § 26(1)(a), SEZ Act.

<sup>31</sup> § 26(1)(b), SEZ Act.

<sup>32</sup> § 26(1)(a), SEZ Act.

<sup>33</sup> § 26(1)(b), SEZ Act.

<sup>34</sup> Part II, SCMA.

<sup>35</sup> Part III, SCMA.

<sup>36</sup> *See* Art. 1.2, SCMA.

solely or partly upon export performance are prohibited under the Agreement.<sup>37</sup> Specificity need not be proved in this case, since such subsidies are deemed to be specific.<sup>38</sup>

“[A subsidy is contingent ‘in law’ upon export performance] “when the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure. The simplest, and hence, perhaps, the uncommon, case is one in which the condition of exportation is set out expressly, in so many words, on the face of the law, regulation or other legal instrument”.<sup>39</sup>

It may also be implicit from the wording of the legislation. As held by the Appellate Body in *Canada – Autos*:

“a subsidy is also properly held to be *de jure* export contingent where the condition to export is clearly, though implicitly, in the instrument comprising the measure. Thus, for a subsidy to be *de jure* export contingent, the underlying legal instrument does not always have to provide *expressis verbis* that the subsidy is available only upon fulfilment of the condition of export performance. Such conditionality can also be derived by necessary implication from the words actually used in the measure”<sup>40</sup>.

In the *Canada – Aircraft* case before the WTO, the mandate of one of the Canadian agencies was “to offer a full range of risk management services and financing products ‘for the purpose of supporting and developing, directly or indirectly, Canada’s export trade’”.<sup>41</sup> Based on this statement by Canada, the Panel held that “export credits granted ‘for the purpose of supporting and developing, directly or indirectly, Canada’s export trade’ are expressly contingent in law on export performance.”<sup>42</sup>

Similarly, the SEZ Act states that its objective is “to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto”.<sup>43</sup> This clearly demonstrates that incentives in the form of tax exemptions

<sup>37</sup> Art. 3.1(a), SCMA; *Canada – Certain Measures Affecting the Automotive Industry (Complaint by Japan, EC)* (31 May 2000), WTO Docs. WT/DS139/AB/R, WT/DS142/AB/R (Appellate Body Report), ¶104 [*Canada – Autos*].

<sup>38</sup> Art. 2.3, SCMA.

<sup>39</sup> *Canada – Autos*, AB Report, *supra* note 37, ¶100.

<sup>40</sup> *Id.*

<sup>41</sup> *Canada – Aircraft*, Panel Report, *supra* note 24, ¶ 6.52.

<sup>42</sup> *Id.*, ¶ 9.230.

<sup>43</sup> Preamble, SEZ Act, 2005.

are provided to developers in SEZs for the sole purpose of promotion of exports. Exports have been expressly delineated to be a fundamental function of a SEZ<sup>44</sup> and can even be inferred from other substantive provisions of the Act.<sup>45</sup> Further, direct tax incentives to exporters are provided under Sections 10A, 10AA, 10B and 10BA of the Income Tax Act. Under Section 10A of the Act, a 100% tax deduction for ten years is available for export profits of manufacturers of goods or computer software located in a special economic zone.<sup>46</sup>

Thus, it may be argued that a prohibited subsidy is conferred by the government of India by way of the SEZ Act.

### C. ACTIONABLE SUBSIDIES

Another form of challenging a subsidy is if it is actionable under Part III of the SCMA. If a subsidy causes adverse effects to the domestic industry of another Member of the WTO,<sup>47</sup> or results in nullification or impairment of benefits accruing to other Members,<sup>48</sup> or leads to serious prejudice to the interests of another Member<sup>49</sup> and the said subsidy is specific as defined in Article 2 of the SCMA, then it is actionable.

#### 1. Specific Subsidy

A specific subsidy is actionable if it causes adverse effects to the interests of any Party.<sup>50</sup> Such a subsidy entitles the affected Party to remedies under Article 7 of the SCMA. A subsidy is said to be specific when *inter alia*, the granting authority explicitly limits access to the subsidy to certain enterprises<sup>51</sup> as opposed to the establishment of objective and neutral criteria governing the access to the subsidy.<sup>52</sup> In particular, a subsidy limited to certain enterprises within a designated geographical region is considered to be specific.<sup>53</sup>

SEZs are certain designated areas, preexisting or set up under the SEZ Act,<sup>54</sup> by or with the approval of the Central or State government. Therefore, the subsidy would be limited to the industries within the country's Special Economic Zones. This is a clear and explicit limitation of the access to the subsidy to certain enterprises, regulated by the SEZ Act. Hence, the subsidy conferred by the SEZ Act can be said to be specific in nature.

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<sup>44</sup> §§ 5(1)(b), 34(1)(b), SEZ Act.

<sup>45</sup> §§ 10(10), 12(1), 12(2)(b), SEZ Act.

<sup>46</sup> §10A, Income Tax Act, 1961.

<sup>47</sup> Art. 5(a), SCMA.

<sup>48</sup> Art. 5(b), SCMA.

<sup>49</sup> Art. 5(c), SCMA.

<sup>50</sup> Art. 5, SCMA.

<sup>51</sup> Art. 2(1)(a), SCMA.

<sup>52</sup> Art. 2(1)(a), Footnote 2, SCMA.

<sup>53</sup> Art. 2.2, SCMA.

<sup>54</sup> § 2(za), SEZ Act.

## 2. Adverse Effects

Article 5 of the SCMA prohibits member countries from causing adverse effects in the form of injury to the domestic industry,<sup>55</sup> nullifying or impairing the benefits accruing to other member countries<sup>56</sup> or causing serious prejudice to the interests of another Member through use of a subsidy.<sup>57</sup> The said provision is applicable to specific subsidies alone.<sup>58</sup> Subsidies given to a specific industry or firm are not tolerated because they alter market costs and prices.<sup>59</sup>

“Therefore, if any of the above adverse effects to any Member country can be established, then it may seek remedies under Article 7 of the SCMA.”

A WTO Member country may claim injury to its domestic industry if the goods which are subsidized in the SEZ are exported to its country as the same would enter that country’s market at a much cheaper rate. This would disadvantage the local manufacturers in the Complainant country, displacing the locally produced goods in the domestic market. Material injury to a domestic industry is to be determined taking into account the factors mentioned in Article 15 of the SCMA.

A serious prejudice in context of Article 5, SCMA may arise when the effect of the subsidy is to displace or impede the imports of a like product of another Member country into the market of the subsidizing Member<sup>60</sup> or a third country market<sup>61</sup> or to cause significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market.<sup>62</sup> Several market factors, as elaborated in Article 6, require to be considered for determination of serious prejudice.

These need to be determined on a case by case basis, and cannot be elaborated in this paper. However, certain legal defences may be given to the above arguments, which would render the provisions of the SEZ Act consistent with the WTO.

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<sup>55</sup> Art. 5(a), SCMA.

<sup>56</sup> Art. 5(b), SCMA.

<sup>57</sup> Art. 5(c), SCMA.

<sup>58</sup> Art. 1.2, SCMA.

<sup>59</sup> Beviglia Zampetti, *The Uruguay Round Agreement on Subsidies: A Forward Looking Assessment*, (1995) 29(6) J. WORLD TRADE 5.

<sup>60</sup> Art.6.3(a), SCMA; Panel Report, *Indonesia – Certain Measures affecting the Automobile Industry (Complaint by Japan)* ¶, WTO Docs. WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, (July 2, 1998), MATSUSHITA, T. SCHOENBAUM, P. MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY, 370-73 (2003).

<sup>61</sup> Art.6.3(b), SCMA.

<sup>62</sup> Art.6.3(b), SCMA.

### III. CONFORMITY WITH WTO RULES

Although there are provisions of the SCMA which may challenge the WTO-conformity of the SEZ Act, not all exemptions in the Act can be so challenged.

#### A. FOOTNOTE 1 OF THE SCMA

It may well be argued that the exemptions provided to developers in SEZs are in the nature of subsidies. However, an exception may be carved out under footnote 1 of the SCMA. Section 26(1)(b) of the SEZ Act exempts customs duty on goods exported from a SEZ to any place outside India. Therefore, this provision is an exemption of an exported product from duties borne by the like product when destined for domestic consumption and the measure merely foregoes the said duty and does not lead to excess remissions.

“The provision in section 26(1)(b) consists of an import duty exemption on inputs used by enterprises operating in SEZs. If the products are moved from a SEZ to any other part of India, duty is chargeable on the same. Thus, the exported product is exempted from duty on imported inputs, a duty borne by like product destined for the domestic market. Thus, the measure can be said to fall squarely within the scheme of footnote 1 and is hence outside the purview of the definition of a subsidy under Article 1 of the Agreement.”

An exemption under footnote 1 requires that the exemption or remission is not in excess of the duty actually borne by the like product. Under this subsection, what is instituted is an exemption and not a remission of duties. Thus, it is the actual value of the duties which would otherwise be payable that is foregone and nothing more. Further, the requirements of accounting under the SEZ Rules<sup>63</sup> coupled with the imposition of duty on any product moved from the SEZ to other parts of the country<sup>64</sup> avoids the chances of remissions occurring other than on actual inputs which are used in the production of the exported product.

Moreover, it is clear from the language employed in Annexes II and III of the SCMA that a remission or exemption of import duty on imported inputs not exceeding the actual duty payable on such inputs does not amount to a subsidy.<sup>65</sup> For instance, Annex II provides that “drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product”.<sup>66</sup> This when coupled with item (i) in Annex I which lists

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<sup>63</sup> Rule 22(2), SEZ Rules.

<sup>64</sup> §30, SEZ Act.

<sup>65</sup> Annex II, Annex III, SCMA.

<sup>66</sup> Annex II, ¶1.1, SCMA.

only those situations where the remission is in excess of the actual duty paid, clearly indicates that where the remission or exemption does not lead to an excess remission, it does not amount to a subsidy.

Section 26(1)(a) only provides for exemption on the import duty which would have otherwise been levied on the inputs used in the production of the exported commodities. Further, the Act provides for the charging of import duty and other duties on any product removed from a SEZ to the domestic tariff area of India.<sup>67</sup> This takes away any incentive on the part of the enterprises in a SEZ to avail the exemption on products destined for the domestic market. Further, even assuming some producers in fact do avail of remissions on their products destined for the domestic market, this excess remission is set off as duties are charged when these products enter the domestic markets from the SEZ.

Also, the exemption of a product exported to other countries from a SEZ, from indirect taxes is not a subsidy, as per footnote 1 of the SCMA. Indirect taxes include sales, excise, value added tax, border taxes, and all taxes other than direct taxes and import charges.<sup>68</sup> Therefore, the exemption under section 26(c) of the SEZ Act is also not inconsistent with the SCMA.

Section 28 of the SEZ Act permits exemption on goods stored in SEZs from duties and indirect taxes. Zones outside the “customs territory” of the country where they are physically located are recognized by multilateral agreement.<sup>69</sup> Therefore, this exemption too, is valid in international law.

## *B. PROHIBITED SUBSIDIES*

Even those measures which amount to subsidies under the SCMA need not necessarily be prohibited subsidies. As has already been stated, no WTO Member may provide a subsidy to goods manufactured in its territory if it (the subsidy) is ‘*contingent, whether in law or in fact ... upon export performance*’<sup>70</sup> or contingent upon the use of domestic over imported goods.<sup>71</sup> The latter is not the case here since the duty exemption was applicable on imports as long as the goods were imported into the SEZ.<sup>72</sup>

A subsidy is contingent upon export performance if its provision is connected by a relation of conditionality<sup>73</sup> to actual or anticipated export

<sup>67</sup> §30(a), SEZ Act.

<sup>68</sup> Footnote 58, SCMA.

<sup>69</sup> WCO Revised Kyoto Convention, Specific Annex D, chapter 2.

<sup>70</sup> Art. 3.1(a), SCMA; *see also* Tsai-yu Lin, *Remedies for Export Subsidies in the Context of Article 4 of the SCM Agreement: Rethinking Some Persistent Issues* (2008) 3 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 21; Andrew Green & Michael Trebilcock, *Enforcing WTO Obligations: What Can we Learn from Export Subsidies?* (2007) 10 J. INT’L ECON. L. 653.

<sup>71</sup> Art. 3.1(b), SCMA.

<sup>72</sup> § 26(1)(a), SEZ Act.

<sup>73</sup> *See Canada – Measures Affecting the Export of Civilian Aircraft (Complaint by Brazil)* (14

earnings.<sup>74</sup> The object of the Act alone, which is to promote exports, is not sufficient to establish export contingency. The burden of proving the existence of the element of contingency lies on the State which is alleging the same.<sup>75</sup> Although promotion of export of goods and services seems to be the pervasive objective of the Act,<sup>76</sup> the same cannot be equated to a condition imposed on developers for availing of the subsidies.

Footnote 4 of the SCMA states: “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>77</sup> As stated in the context of Footnote 1, footnotes in the WTO Agreements may define the extent of a right or an obligation created by such Agreements.<sup>78</sup> Therefore, the fact that a subsidy is granted to an exporting sector does not render it export contingent but rather merely export oriented.<sup>79</sup> The subsidy must be applied to generate export revenues;<sup>80</sup> furthermore, its grant must be conditional upon it being so applied.<sup>81</sup> Also, while determining whether a subsidy is *de facto* contingent upon export performance, the tribunal shall consider the export orientation of the subsidy as a material fact though not the sole one.<sup>82</sup>

Even assuming that there is excess remission because of a subsidy provided under the SEZ Act, it does not support a finding that the measure amounts to a prohibited subsidy by way of export contingency. On the contrary, it negates such a conclusion.

Excess remission implies that in the guise of import duty remission or exemption, the government actually transfers to the firm more than the latter would have paid as import duty. Under the SEZ Act no duty or fee is collected from the entrepreneurs but rather it is being foregone.<sup>83</sup> Thus this is a clear case of exemption and not remission. The only manner in which an excess remission could occur is if import duty exemptions are given even on inputs which are not actually used in manufacture of the exported product. This would support an

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April 1999), WTO Doc. WT/DS70/R (Panel Report), ¶9.331; *Canada – Measures Affecting the Export of Civilian Aircraft (Complaint by Brazil)* (2 August 1999), WTO Doc. WT/DS70/AB/R (Appellate Body Report), ¶166 [*Canada – Aircraft, AB*].

<sup>74</sup> *SCMA*, *supra* note 5, Footnote 4.

<sup>75</sup> *United States – Measure affecting Woven Wool Shirts and Blouses from India (Complaint by India)* (25 April 1997), WTO Doc. WT/DS33/AB/R (Appellate Body Report).

<sup>76</sup> See §§ 5(1)(b), 12(1), 12(2), 34(2)(b), SEZ Act.

<sup>77</sup> Annex II, ¶I.1, SCMA.

<sup>78</sup> See *European Communities – Export Subsidies on Sugar (Complaint by Australia, Brazil, Thailand)* (15 October, 2004), WTO Docs. WT/DS265/R, WT/DS266/R, WT/DS283/R (Panel Reports).

<sup>79</sup> Footnote 4, SCMA; see also *Canada – Aircraft*, Panel, *supra* note 40, ¶173.

<sup>80</sup> See *Canada – Aircraft*, Appellate Body Report, *supra* note 23, ¶169.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*, ¶173.

<sup>83</sup> §26, SEZ Act.

inference that import duty exemptions are made available even on inputs which are used for manufacture of products which are sold in the domestic market. Thus there is again no relationship of conditionality between access to the alleged subsidy and export of the product concerned.

For the aforementioned reasons, assuming the measure amounts to a subsidy; under no circumstance can it be considered a prohibited subsidy.

### *C. ACTIONABLE SUBSIDY*

As already mentioned, only specific subsidies are actionable. Although it may be argued that subsidies granted under the SEZ Act are specific due to geographical criteria, it is also understood within the SCMA that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy.<sup>84</sup> Under the SEZ Act, the only criterion set for access to the duty exemptions is that an enterprise should operate within a designated SEZ. This is an objective criterion which any enterprise can fulfill by opening a production unit in a SEZ. This does not seek to limit access to the subsidy to certain enterprises or certain industries. Thus, though it may be argued that the SEZ Act imposes the criterion of geographical location rendering the subsidy specific, it is equally arguable that the measure is in the form of change of generally applicable tax rates by the government competent to do so and hence cannot be considered specific.

Since actionable subsidies must be specific in nature, the provisions of Part III have thus no application to the subsidies under the SEZ Act if they are proved to be non-specific.

### *D. SPECIAL AND DIFFERENTIAL TREATMENT*

Special and differential treatment [SDT] is intended to improve market access for developing countries and to give them more flexibility regarding trade-related measures by exempting them from certain multilateral disciplines.<sup>85</sup> Developing country Members that utilize export subsidies are accorded special and differential treatment (SDT) under Article 27 of the SCMA.

Certain countries named in Annex VII(b) to the SCM Agreement are excluded from the prohibition on export subsidies until their GNP per capita exceeds USD \$1,000 in 1990 dollars for 3 consecutive years, subject to certain “graduation” and “re-inclusion” provisions.<sup>86</sup> Developing countries referred to in Annex VII of the SCMA, which include India, are not bound by the prohibition in Article 3(1)(a).<sup>87</sup>

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<sup>84</sup> Art. 2.2, SCMA.

<sup>85</sup> See generally, T. Ademola Oyejide, SPECIAL AND DIFFERENTIAL TREATMENT, DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK (ed. Hoekman, Mattoo and English, World Bank 2002).

<sup>86</sup> WT/MIN(01)/17, ¶10.1.

<sup>87</sup> Art. 27.2(a), SCMA.

When the SCMA went into effect in 1995, the interpretation of the SCM Committee was that the \$1,000 threshold reflected current US dollars. However, this interpretation meant that Members could graduate based upon inflation and changes in exchange rates rather than on real economic growth. As a consequence, at the Doha Ministerial Conference in 2001 the WTO adopted an alternative approach, calculating the \$1,000 threshold in constant 1990 US dollars, which must be reached for three consecutive years.<sup>88</sup> It was also agreed that Members that graduate will be re-included in the list if their “GNP per capita falls back below US \$1,000.”<sup>89</sup>

Annex VII(b) Members that reach export competitiveness in any given product must gradually phase out export subsidies for that product over a period of 8 years.<sup>90</sup>

#### IV. CONCLUSION AND SUGGESTIONS FOR WTO – COMPLIANCE

After a careful review of the provisions of the SEZ Act in light of SCMA provisions, it is evident that although not all privileges granted to developers in SEZs are in contravention of WTO obligations, some exemptions may be questionable leading to imposition of countervailing duties. To avoid such a consequence, there should be a thorough review of all applicable measures and identification of possible inconsistencies, after an analysis of market data. WTO-inconsistent measures must be promptly reported and there should be a plan to phase out such measure.

Guidelines for such reporting have been suggested.<sup>91</sup> This is best achieved by using independent advisors and not government officials or local experts that may have a vested interest in defending the existing measures. It may be appropriate to request technical assistance from experts at the WTO, international financial institutions and other donors in connection with such a review. Upon request the WTO Secretariat staff routinely provides confidential advice and in-depth technical assistance to individual Members about their programs, including bringing these into conformity with WTO disciplines.

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<sup>88</sup> WT/MIN(01)/17 (20 November 2001), ¶10.1. (As of 1 January 2003 the calculation methodology in G/SCM/38, Appendix 2 applies.) G/SCM/110/Add.4 (21 December 2007).

<sup>89</sup> *Id.*, ¶10.4.

<sup>90</sup> See Arts. 27.5, 27.6, SCMA; WT/MIN(01)/17, ¶10.5.

<sup>91</sup> Stephen Creskoff and Peter Walkenhorst, *Implications of WTO Disciplines for Special Economic Zones in Developing Countries*, Policy Research Working Paper No. 4892, The World Bank Poverty Reduction and Economic Management Network, International Trade Department, April 2009.

SEZ programs in middle income countries [MICs] are examined by the WTO as part of regularly scheduled trade policy reviews (TPRs), normally every 6 years.<sup>92</sup> Preparation by MICs for scheduled TPRs should include a thorough review of all measures relating to SEZs.

Countries that maintain export subsidies pursuant to Article 27.2 (b) and Annex VII(b) of the SCMA should annually determine whether their per capita GNP has exceeded the limit for 3 consecutive years, and whether specific products have reached “export competitiveness” pursuant to Articles 27.5 and 27.6, SCMA. Members that maintain export subsidies pursuant to Article 27.4 and relevant extensions should also monitor whether specific products have reached “export competitiveness” and comply with all reporting and notification requirements.

Changes with regards to export subsidy exemptions and other measures that are specific subsidies should be notified to the WTO Committee on Subsidies and Countervailing Measures by 30 June of each year.<sup>93</sup> The notifications must contain sufficient detail to enable an understanding of the operation of the subsidy programs and an understanding of their trade effects.<sup>94</sup> Progress made in the removal of export subsidies and other subsidy measures should also be notified to the Committee. Countries entitled to a phase-out period for export subsidies pursuant to Article 27.4 and WTO decisions must also meet annual notification requirements regarding these subsidies.<sup>95</sup>

If these regular reports are sent to the WTO, not only would it ensure transparency, it would also then be difficult for other Member countries to allege violation of or non-conformity with provisions of the WTO Agreement.

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<sup>92</sup> World Trade Organization, “*Understanding the WTO – Trade Policy Reviews: Ensuring Transparency*”, available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm11\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm) (Last visited: February 28, 2010).

<sup>93</sup> Art. 25.1., SCMA.

<sup>94</sup> Art. 25.3, SCMA.

<sup>95</sup> Creskoff and Walkenhorst, *supra* n.91, at 36-37.