

amicus

An e-newsletter from
Lakshmikumaran & Sridharan, India

March 2019 / Issue – 93

Contents

Article

US withdrawal of GSP benefits for
India 2

Trade Remedy News

Trade remedy measures by India 4

Trade remedy measures against India 5

WTO News 5

India Customs & Trade Policy

Update..... 7

Ratio Decidendi..... 8

March
2019



Article

US withdrawal of GSP benefits for India

By **Bhargav Mansatta**

Generalised System of Preferences (GSP) means a mechanism by which imports from developing countries are subject to lower tariffs in the importing country. This system has been implemented by the developed countries such as Canada, EU, US, Australia, Japan, Iceland and Switzerland. The Enabling Clause permitting implementation of GSP by WTO Members is “1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries”. GSP is an exception to the principle of non-discrimination between WTO member countries, i.e. Most-Favoured Nation Principle.

The United States Trade Act, 1974 provides for preferential tariff for several identified products when it is imported from developing countries. However, the GSP beneficiary country is required to, *inter alia*, assure the United States that it will provide “reasonable and equitable market access”.¹ It states:

“FACTORS AFFECTING COUNTRY DESIGNATION
In determining whether to designate any country as a beneficiary developing country under this subchapter, the President shall take into account—

.....

(4) the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets and basic commodity resources of such country and the extent to

which such country has assured the United States that it will refrain from engaging in unreasonable export practices.”

Failing this requirement, the duty-free treatment to imports of the developing country may be withdrawn.² India is a beneficiary country under the GSP regime of the United States. The review of GSP benefits granted to India was initiated in April 2018 by the US Trade Representative (USTR). The USTR concluded that India does not provide reasonable and equitable market access and has therefore failed to meet the eligibility criteria as provided in the statute. The United States has notified its intention to withdraw the GSP benefits to India on all applicable tariff lines. The United States has cited “wide array of trade barriers” by India that create serious negative effects on United States Commerce.³ Over time the United States has opposed, among others, the introduction or existence of following ‘trade barriers’ by India:

- Price caps on sale of medical devices such as stents, knee implants, etc.
- The certification requirements that seek to ensure that dairy product is sourced from animal that has never been fed animal derived blood meal.
- High customs duties on motorcycles, mobiles, telecom network equipment, smart watches, etc.

² 19 U.S.C. Section 2462(d)

³ *United States will Terminate GSP Designation of India and Turkey*, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/march/united-states-will-terminate-gsp>, 4th March 2019.

¹ 19 U.S.C Section 2462(c)(4)

- Localisation of data rules mandating that companies collecting critical data about consumers must store and process them within the borders of the country.
- Export incentives to industries under various schemes.

The United States is India's second biggest trading partner after China. India's export to the US is approximately \$50 billion. Almost 16% of India's exports is to the United States. India has a trade surplus with the United States⁴. Withdrawal of GSP benefits will not affect all critical sectors of export interest because not all products of export interest were eligible for duty-free treatment. For example, textile products (Chapters 50 to 62), which are of critical export interest, were not eligible for duty-free treatment when imported into the United States from India. Steel and aluminium products, which is also of substantial export interest for India, are already subject to very high additional duty⁵. Customs duty by the United States on import of goods is very low on many products even without the GSP benefit and therefore absence of GSP benefit will not have significant impact. However, it seems that the withdrawal will indeed impact some products of export interest such as chemical products, which will become costlier by 5%.⁶

⁴ India-US trade spat: Higher tariffs on exports under GSP will kick in after 60 days, available at [https://economictimes.indiatimes.com/news/economy/foreign-trade/india-us-trade-spat-higher-tariffs-on-exports-under-gsp-will-kick-in-after-60-](https://economictimes.indiatimes.com/news/economy/foreign-trade/india-us-trade-spat-higher-tariffs-on-exports-under-gsp-will-kick-in-after-60-days/articleshow/68279178.cms?utm_source=ETMyNews&utm_medium=HPMN&utm_campaign=AL1&utm_content=17)

[days/articleshow/68279178.cms?utm_source=ETMyNews&utm_medium=HPMN&utm_campaign=AL1&utm_content=17](https://economictimes.indiatimes.com/news/economy/foreign-trade/india-us-trade-spat-higher-tariffs-on-exports-under-gsp-will-kick-in-after-60-days/articleshow/68279178.cms?utm_source=ETMyNews&utm_medium=HPMN&utm_campaign=AL1&utm_content=17)

⁵ On March 8, 2018, under 19 U.S.C. 1862, additional import duties for steel mill and aluminium articles were imposed by the United States, which became effective from March 23, 2018.

⁶ India-US trade spat: Higher tariffs on exports under GSP will kick in after 60 days, available at [https://economictimes.indiatimes.com/news/economy/foreign-trade/india-us-trade-spat-higher-tariffs-on-exports-under-gsp-will-kick-in-after-60-](https://economictimes.indiatimes.com/news/economy/foreign-trade/india-us-trade-spat-higher-tariffs-on-exports-under-gsp-will-kick-in-after-60-days/articleshow/68279178.cms?utm_source=ETMyNews&utm_medium=HPMN&utm_campaign=AL1&utm_content=17)
[days/articleshow/68279178.cms?utm_source=ETMyNews&utm_medium=HPMN&utm_campaign=AL1&utm_content=17](https://economictimes.indiatimes.com/news/economy/foreign-trade/india-us-trade-spat-higher-tariffs-on-exports-under-gsp-will-kick-in-after-60-days/articleshow/68279178.cms?utm_source=ETMyNews&utm_medium=HPMN&utm_campaign=AL1&utm_content=17)

Be that as it may, it is clear that the United States' decision is anything but fair and India may not accept it lying down. Special and differential treatment to developing countries is recognised under the GATT and WTO framework. Preamble to the WTO Agreement notes that there is a need for 'positive efforts' to ensure that developing countries secure a share in their growth in international trade commensurate with the needs of their economic development. GSP is one of the few effective ways of implementing this principle. It is, by definition, a unilateral extension of tariff preferences by developed countries. Thus, non-reciprocity is the very essence of GSP system. The United States has effectively introduced reciprocity as the requirement for enjoying continued benefit under the GSP. The United States also cannot unilaterally determine what type of 'trade barriers' are acceptable to it. It is nobody's case that there should not be any 'trade barriers' by India. Many of these so-called trade barriers, for example high import tariffs, are well within India's scheduled commitments under the WTO.

More importantly, keeping aside the fairness of the decision, the United States' decision also goes against the fundamental principle of most favoured nation enshrined in the WTO. The United States is continuing its GSP benefits in favour of host of other developing countries. Withdrawal of GSP benefit will result in discrimination between developing countries which are in similar situation. The United States is under an obligation to not discriminate between "similarly situated" developing countries. Differential treatment between developing countries, if introduced, should be to respond to "different financial, developmental and trade needs of developing countries". GSP benefit to India is not being withdrawn by the United States because it is un-comparable to other developing countries in terms of its developmental or trade needs.

In the case of *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries (EC-Tariff preferences)*, WTO Appellate Body, decided that discrimination between similarly situated developing countries is not consistent with the WTO obligations of the member country.

As of now India has downplayed the impact of the announcement of withdrawal of GSP benefits by the United States. Even if some of the

trade barriers are WTO inconsistent or unduly harsh, it is clear that the United States has jumped the gun. If India wishes to fight back and is unwilling to allow, what the United States considers as ‘reasonable and equitable market access’ or impose retaliatory tariffs, a formal WTO dispute is the clear way forward.

[The author is a Joint Partner in International Trade Practice, Lakshmikumaran & Sridharan, New Delhi]

Trade Remedy News

Trade Remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Acetone	European Union, Singapore, South Africa and USA	File No. 7/26/2018-DGAD	05-03-2019	Final Findings issued in sunset review recommending continuation of anti-dumping duties
Jute Sacking Bags	Bangladesh	File No. 7/3/2018-DGAD	19-3-2019	Final findings in anti-circumvention investigation – ADD recommended to be imposed on jute sacking cloth also
Saturated Fatty Alcohols	Indonesia, Malaysia, Thailand and Saudi Arabia	13/2019-Cus. (ADD)	14-3-2019	Provisional assessment of imports from specific entity
Soda Ash	Turkey and Russia	File No. 7/4/2018-DGAD	14-03-2019	Final Findings issued in sunset review recommending non-extension of anti-dumping duties
Textured Tempered Coated and Uncoated Glass	Malaysia	12/2019-Cus. (ADD)	26-2-2019	Definitive anti-dumping duty imposed

Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Carbon and Alloy Steel Threaded Rod	USA	84 FR 10040 [C-533-888] and 84 FR 10034 [A-533-887]	19-3-2019	Initiation of CVD and less-than-fair-value investigations
Large Diameter Welded Pipe	USA	84 FR 8079 [A-533-881] and 84 FR 8085 [C-533-882]	6-3-2019	ADD and CVD Orders issued
Polyethylene Terephthalate Film, Sheet, and Strip	United States of America	84 FR 9092 [A-533-824] and 84 FR 10789 [C-533-825]	13-03-2019	Final Results of ADD and CVD Administrative Review; 2016-2017



WTO News

Brazil, Australia and Guatemala dispute India's support to sugarcane and sugar

Brazil, Australia and Guatemala have requested consultations with India, at WTO, concerning domestic support measures and alleged export subsidies provided by India to producers of sugarcane and sugar. Listing various domestic support measures and export subsidies, Brazil states that India has massively increased level of domestic support for sugarcane and sugar. The measures are alleged to be violating various provisions of the WTO's Agreement on Agriculture as they exceed the *de minimis* level of 10% provided for in Article 6.4(b) of the said

Agreement. Violation of Article 3 of the SCM Agreement is also alleged in respect of export subsidies. It is alleged that with production exceeding domestic demand, India regularly intervenes in the market. The requests were circulated in WTO on 5th, 7th and 25th of March, respectively.

Chinese agricultural subsidies violate WTO provisions: Panel report

On 28 February, the WTO circulated the panel report in the case brought by the United States in "China — Domestic Support for Agricultural Producers" (DS511). In this dispute, United States challenged China's provision of domestic support by way of market price support to

producers of wheat, indica rice, japonica rice and corn in 2012 to 2015. The Panel examined the elements of the mathematical formula for calculating the allowable support, i.e., the Applied Administered Price (AAP), the fixed external reference price (FERP) and the quantity of production eligible to receive the AAP (QEP). With respect to each of these elements the Panel held that:

- The FERP should be based on years 1996-1998, drawn from Part IV of China's Schedule, rather than the years 1986-1988, set out in paragraph 9 of Annex 3 of the AoA. The Panel reached this conclusion including by assessing the context provided by the MPS commitments of the 36 Members that have acceded to the WTO since 1995, which generally used a base period other than 1986-1988. The Panel reasoned that the use of years 1996-1998 also maintained consistency between the manner in which China's support for agricultural producers was calculated at the time of China's accession to the WTO and during the Panel proceedings, allowing an apples-to-apples comparison.
- The AAP was not in dispute between the parties, as both agreed that it was the price set out in the relevant legal instruments for each product for each year.
- Regarding the QEP, the Panel found that in the absence of any explicit or implicit limits in China's challenged measures, the QEP for wheat and rice is the entire volume of production in the relevant specified provinces. Other than the exclusion of grain of insufficient quality, the Panel found no such limitations in the content of the measures, nor in Part IV of China's Schedule.

Applying these findings to determine the percentage of market price support extended by

China for wheat, indica rice and japonica rice, the Panel found that in each of the years 2012-2015, China exceeded its 8.5% *de minimis* level of support for each of these products. The Panel then found that because China's level of support exceeded the *de minimis* level, it was also in excess of China's commitment level of "nil" specified in Section I of Part IV of China's Schedule CLII. On that basis, the Panel concluded that China acted inconsistently with its obligations under Articles 3.2 and 6.3 of the AoA.

Tunisia initiates WTO complaint against Moroccan duties on exercise books

On 27 February, the WTO circulated to its Members Tunisia's request for consultation with Morocco. The request pertains to the final anti-dumping duties imposed by Morocco on imports of school exercise books from Tunisia. According to Tunisia, the measures violate various provisions of the Agreement on Implementation of Article VI of the GATT 1994. It is alleged that application filed by the domestic industry does not contain sufficient evidence of dumping, injury or a causal link. It may be noted that Tunisia had in July 2018 initiated a dispute (DS555) against Morocco on latter's provisional anti-dumping measures on exercise books.

Safeguard investigations

- Philippines has, on 19th of February 2019, initiated a safeguard investigation on clear and tinted float glass. The matter was notified to the WTO's Committee on Safeguards on 13th March 2019.
- South Africa has, on 1st of March 2019, initiated a safeguard investigation on threaded fasteners of iron or steel. The matter was notified to the Safeguard Committee on 4th of March.

Russian Federation has initiated two safeguard investigations: (a) On microwave ovens imported into the customs territory of the Eurasian Economic Union, initiated on 1 March 2019 and (b) On imports of welded tubes of stainless steel

imported into the customs territory of the EEU, initiated on 4 March 2019. Both the matters were notified to the Safeguard Committee on 19th of March.



India Customs & Trade Policy Update

Advance Authorisation, EPCG and EOU - IGST and Cess exemption extended

Exemption from Integrated Tax (IGST) and Compensation Cess for imports under Advance Authorisation, EPCG scheme and by EOUs has been extended again. This time the exemption has been extended for full one year, and would now be available till 31st of March 2020, instead of 31st March 2019. Amendments have been made in Para 4.14, 5.01(a) and 6.01(d)(ii) of the Foreign Trade Policy by DGFT Notification No. 57/2015-20, issued on 20-3-2019.

Transport and Marketing Assistance scheme for agriculture produce approved

The Indian Government has approved a scheme titled Transport and Marketing Assistance (TMA) for specified agriculture produce scheme. The scheme will provide for reimbursement of international component of freight and marketing assistance for export by air as well as by the sea. This scheme will mitigate disadvantages of higher cost of transportation of export of specified agriculture products and promote brand recognition for Indian agricultural products in the overseas market. Department of Commerce & Industry has issued a notification on 27-02-2019 in this regard.

SEZ – Value of indigenous inputs not includible in net forex earning

Indian Ministry of Commerce has amended Special Economic Zone Rules, 2006 to provide that sum of value of inputs in the formula for calculating positive net foreign exchange [B in formula $A-B>0$], will not include value of indigenous inputs, used for authorised operations. It may be noted that prior to 21-9-2018 the position was same and the reference to indigenous inputs was inserted in Rule 53 of SEZ Rules by Notification dated 19-9-2018. SEZ Notification No. G.S.R. 200(E), dated 7-03-2019 has been issued for this purpose.

Trust can also establish SEZ – SEZ (Amendment) Ordinance promulgated

President of India has, on 2nd of March, promulgated the Special Economic Zones (Amendment) Ordinance, 2019. According to the latest amendments, which came into effect from 2nd of March 2019, trust or any entity notified by the Central Government, can also establish an Special Economic Zone for manufacture of goods or for rendering of services. Definition of 'person' as available in clause (v) of Section 2 of the Special Economic Zones Act, 2005 has been amended for this purpose. The Union Cabinet had approved the Ordinance on 28-2-2019.



Ratio Decidendi

Anti-dumping duty – Locus standi for appeal against regulation imposing ADD – Capacity as exporter essential

Court of Justice of the European Union has set aside the Order of the General Court which had, on application by an undertaking, Marquis Energy, annulled the Council Implementing Regulation (EU) No. 157/2013 imposing a definitive anti-dumping duty on imports of bioethanol originating in USA, in so far as it concerned the undertaking. It held that the General Court erred in law, in concluding that Marquis Energy was directly concerned by the regulation at issue. The court observed that an undertaking cannot be considered directly concerned by a regulation imposing an anti-dumping duty solely on account of its capacity as a producer of the product subject to the duty, since the capacity as an exporter is essential in that regard. The Commission had earlier notified the undertaking (Marquis Energy) as part of the sample of exporting producers, and then finally envisaged imposing definitive measures at the rate of 9.6% countrywide. [*Council of the European Union v. Marquis Energy LLC – Judgement dated 28-2-2019 in Case C-466/16 P, CJEU*]

Anti-dumping duty – Duty drawback adjustment in normal value as circumstance of sale adjustment

In a case involving anti-dumping duty on certain corrosion-resistant steel products from India, US Court of International Trade has concluded that Commerce's (department's) modified calculation of weighted-average dumping margin in respect of an exporter from India (Appellant – Uttam Galva) is not in accordance with the law.

The department had recalculated exporter's duty drawback adjustment by allocating import duties rebated and exempted by reason of export of finished product over total exports and had made an additional 'circumstance of sale adjustment' (in normal value), pursuant to which appellant's weighted-average dumping margin changed from 3.05% in the final determination to 3.11%. It added to exporter's normal value the difference between the duty drawback amount on US sales and the amount of import duties in exporter's reported cost of production. The appellant argued that increase in normal value nullifies the duty drawback adjustment provided for in the export price.

Distinguishing an earlier order in the case of *Saha Thai Steel Pipe (Public) Co. Ltd. v. United States*, the Court however held that department's revised calculation of duty drawback adjustment was not in accordance with the law. It observed that the quoted passage in *Saha Thai* relates to an adjustment to normal value with respect to the particular facts, exemption program, and recordkeeping practices presented in *Saha Thai*, and should not be expanded to encompass all duty drawback adjustment calculations. [*Uttam Galva Steels Limited v. United States - Slip Op. 19-34, dated 12-3-2019, US CIT*]

Anti-dumping duty not to be imposed on second hand machinery

CESTAT Chennai has held that import of second hand machinery cannot be subjected to imposition of anti-dumping duty (ADD) meant for new machinery. It observed that purpose of anti-dumping is served, in case of second-hand machinery, by way of re-appraisal of declared value, and imposition of ADD would be nothing but double jeopardy. The Tribunal while

holding so, dismissed the appeal for ADD imposition and for transfer of the matter to the ADD Bench. It also observed that anti-dumping duty notification which came in 2009, cannot be back-pedalled to be imposed on goods which have been manufactured and exported in 2007 from a particular country. [*Commissioner v. Trinity Exporters* - Final Order No. 40357/2019, dated 20-2-2019, CESTAT Chennai]

Valuation – Demurrage not includible – Explanation to Valuation Rule 10(2) is bad

Observing that demurrage is a kind of penalty and that the legislature did not intend to include it

in the value of goods under Section 14 of the Customs Act, 1962, Orissa High Court has held that provisions for inclusion of demurrage charges, under the Customs Valuation Rules, are *ultra vires* Customs Section 14. Explanation to Rule 10(2) was hence struck down. Observing that the provisions in the Customs Act were silent about demurrage, High Court held that thus it is beyond the legislative powers to include demurrage charges in the rules for Customs valuation. Supreme Court judgements in *Wipro Ltd*, *Essar Steel Ltd.* and *Mangalore Refinery and Petrochemicals Ltd.* were relied on. [*Tata Steels v. UOI* – W.P.(C) No. 7917 of 2009, decided on 14-2-2019, Orissa High Court]

NEW DELHI

5 Link Road, Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014

Phone : +91-11-4129 9811

B-6/10, Safdarjung Enclave
New Delhi -110 029

Phone : +91-11-4129 9900

E-mail : lsdel@lakshmisri.com

MUMBAI

2nd floor, B&C Wing,
Cnergy IT Park, Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025

Phone : +91-22-24392500

E-mail : lsbom@lakshmisri.com

CHENNAI

2, Wallace Garden, 2nd Street
Chennai - 600 006

Phone : +91-44-2833 4700

E-mail : lsmds@lakshmisri.com

BENGALURU

4th floor, World Trade Center
Brigade Gateway Campus
26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.

Ph: +91(80) 49331800

Fax:+91(80) 49331899

E-mail : lsblr@lakshmisri.com

HYDERABAD

'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church,
Nampally

Hyderabad - 500 001

Phone : +91-40-2323 4924

E-mail : lshyd@lakshmisri.com

AHMEDABAD

B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009

Phone : +91-79-4001 4500

E-mail : lsahd@lakshmisri.com

PUNE

607-609, Nucleus, 1 Church Road,
Camp, Pune-411 001.

Phone : +91-20-6680 1900

E-mail : ls pune@lakshmisri.com

KOLKATA

2nd Floor, Kanak Building
41, Chowringhee Road,
Kolkatta-700071

Phone : +91-33-4005 5570

E-mail : lskolkata@lakshmisri.com

CHANDIGARH

1st Floor, SCO No. 59,
Sector 26,

Chandigarh -160026

Phone : +91-172-4921700

E-mail : lschd@lakshmisri.com

GURGAON

OS2 & OS3, 5th floor,
Corporate Office Tower,
Ambience Island,

Sector 25-A,

Gurgaon-122001

phone: +91-0124 - 477 1300

Email: lsurgaon@lakshmisri.com

ALLAHABAD

3/1A/3, (opposite Auto Sales),
Colvin Road, (Lohia Marg),

Allahabad -211001 (U.R)

phone . +91-0532 - 2421037, 2420359

Email:lsallahabad@lakshmisri.com

Disclaimer: *International Trade Amicus* is meant for informational purpose only and does not purport to be advice or opinion, legal or otherwise, whatsoever. The information provided is not intended to create an attorney-client relationship and not for advertising or soliciting. Lakshmikumaran & Sridharan does not intend to advertise its services or solicit work through this newsletter. Lakshmikumaran & Sridharan or its associates are not responsible for any error or omission in this newsletter or for any action taken based on its contents. The views expressed in the article(s) in this newsletter are personal views of the author(s). Unsolicited mails or information sent to Lakshmikumaran & Sridharan will not be treated as confidential and do not create attorney-client relationship with Lakshmikumaran & Sridharan. This issue covers news and developments till 26th March 2019. To unsubscribe, e-mail Knowledge Management Team at newsletter.itrade@lakshmisri.com

www.lakshmisri.com

www.gst.lakshmisri.com

www.addb.lakshmisri.com

www.lakshmisri.cn