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Article

All is fair in trade and war – Panel ruling on interpretation of security exceptions in *Russia – Traffic in transit*

By **Jayant Raghu Ram**

Introduction

On 05th April 2019, the WTO circulated the Panel report in *Russia – Traffic in Transit* (DS512), a dispute which was initiated by Ukraine against Russia. In its complaint, Ukraine challenged various transit restrictions imposed by Russia for goods exported from Ukraine. For example, Russian measures restricted (i) transit through road and rail routes across Ukraine-Russia Border for goods from Ukraine, which are destined to Kazakhstan, (ii) transit through road and rail routes at all for particular categories of goods from Ukraine to Kyrgyz Republic and Kazakhstan, (iii) similar traffic in transit for goods from Ukraine destined to Mongolia, Tajikistan, Turkmenistan, etc.

Ukraine's complaint was that the challenged measures were in violation of the various provisions of GATT Article V:2. Article V:2 provides that:

> "There shall be *freedom of transit* through the territory of each contracting party, *via the routes most convenient* for international transit, for traffic in transit to or from the territory of other contracting parties. *No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination*, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport." (emphasis added)

Russia claimed that the measures were enacted by Russia in 2014 in the context of political and military tensions prevailing then between Russia & Ukraine. Russia argued that the impugned measures were necessary for the protection of its essential security interests, which it took due to a prevailing emergency in international relations that arose in 2014 and continued to exist. Accordingly, Russia claimed that its measures were justified under Article XXI(b)(iii) of GATT. Article XXI allows a Member to derogate from its obligations under the GATT for protecting its security interests. Paragraph (b) of Article XXI permits a Member to take any action which it considers necessary for protection of its essential security interests, taken in three circumstances. One of these circumstances recognized in sub-clause (iii) of clause (b) covers action "taken in time of war or other emergency in international relations".

Russia also argued that as per the text of Article XXI, Russia alone had the sole discretion as the invoking Member, to determine the necessity of the measures taken. Thus, the Panel had no jurisdiction to evaluate the justifiability of Russia's measures with the provisions of Article XXI.

The Panel noted that the objectives of "security" and "predictability" of the multilateral trading system established by the WTO Agreements (see Article 3.2 of the DSU) foreclosed the possibility of an invoking Member from unilaterally interpreting Article XXI. The Panel noted that there are no special or additional rules or procedure for disputes

concerning Article XXI. Therefore, the impugned measures were within the Panel's terms of reference and could be reviewed under the provisions of the ordinary dispute settlement procedures under the GATT and the DSU.

The Panel ruled that the power to review whether the requirements of Article XXI have been met is not entirely self-judging. The Panel ruled that there existed no basis for treating the invocation of Article XXI as an exception shielding a challenged measure from all scrutiny. The Panel noted that "emergency in international relations" generally refers to a situation of armed conflict, or latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state; giving rise to interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests.[1]

The Panel stated that recognizing the existence of "other emergency in international relations" under Article XXI(b)(iii) requires objective examinations based on facts. In the present case, the Panel noted that, beginning in 2014, relations between Ukraine and Russia had deteriorated to such a degree that it became a matter of concern to the international community, so much so that the situation was recognized by the UN General Assembly as involving an armed conflict. The Panel also noted that a number of countries had imposed sanctions against Russia in connection with the situation. On this basis, the Panel concluded that the situation between Russia and Ukraine constituted an emergency in international relations. Further, since the measures were taken in 2014 and 2016, which was the period of the conflict, the Panel concluded that the measures were "taken in time of" the emergency.

The Panel also discussed what might constitute an "essential security interest". While it recognized that every Member had the discretion to define what it considers to be in "its essential security interests", it drew a red line by holding that this did not mean that a Member was free to elevate any concern to that of an "essential security interest". The Panel also drew strength from the good faith principles of the Vienna Convention on the Law of Treaties for interpreting Article XXI(b)(iii) to hold that the designation of a concern as an essential security interest must be in "good faith".

Moreover, the Panel observed that the measure must be connected and be plausible in relation to the essential security interest articulated by the defending Member. The invoking Member thus had to articulate what the essential security interest was that arose from an emergency in international relations and that the impugned measures were connected to or related to the emergency. The Panel observed that even though Russia had not explicitly articulated its essential security interest, the Panel recognized that the emergency with Ukraine affected Russia's security at the border with Ukraine.

Since the Panel found that Russia was justified in invoking Article XXI, the Panel did not deem it necessary to rule on Ukraine's grievances under Article V of the GATT.

Conclusion

Russia - Traffic in Transit is the first dispute where a Panel has interpreted the provisions of Article XXI. The Panel has struck balance between a Member's right to invoke the security exception under WTO law with the duty of a

[1] The Panel also referred to the 1947 negotiations of the International Trade Organization (ITO) Charter, the GATT's stillborn predecessor, on the security exceptions provisions. The Panel noted the broad position of ITO negotiators, particularly that of the US delegation, was that of caution against any security provision having too wide an exception. ITO negotiators had recognized the imperative for a balance in interpreting the security exceptions.

Panel to scrutinize the impugned measures against the provisions of the security exceptions.

The Panel Report, subject to the review by Appellate Body, offers something to cheer about to both set of WTO Members i.e. those invoking Article XXI for defending its trade restrictive measures and Members challenging such measures as WTO inconsistent. On the one hand, the Panel has confirmed the jurisdiction to conduct an objective examination of the measure while at the same time it has accorded significant deference to the Members own assessment of its security interests upon an objective examination.

The Panel report in *Russia – Traffic in Transit* has important ramifications for WTO disputes challenging the United States' Section 232 measures. By not refusing to adjudicate the provisions of Article XXI, the decision therefore comes as a much-needed bulwark against the United States consistent position that measures taken under Section 232 are non-justiciable.[2]

Though neither Ukraine nor Russia have yet announced their intention to appeal, it would be interesting to see how the Appellate Body reviews the Panel's decision and if it would confirm the Panel's findings.

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Trade Remedy News

Trade Remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Acetone	European Union, Singapore, South Africa and United States of America	14/2019-Customs - (ADD)	25-03-2019	Anti-dumping duties continued for a period of 5 years pursuant to sunset review investigation
Aluminium and Zinc Coated flat products of Steel	China PR, Vietnam and Korea PR	F No. 6 / 4 / 2019 - DGTR	02-04-2019	ADD - Initiation of Original Investigation
Cast Aluminium Alloy Road Wheels	China PR, Korea RP and Thailand	17/2019-Customs - (ADD)	09-04-2019	Definitive anti-dumping duty imposed for a period of 5 years pursuant to sunset review investigation

[2].The United States, as a third party, submitted that the dispute is non-justiciable because there was no legal basis for judging a Member's consideration of its essential security interests. The US argued that the self-judging nature of Article XXI(b)(iii) establishes that its invocation by a Member is not amenable to a panel's jurisdiction.

Product	Country	Notification No.	Date of Notification	Remarks
		16/2019-Customs - (ADD)	09-04-2019	Rescinds previous notification imposing anti-dumping duty pursuant to previous investigation
		F No. 7 / 31 / 2018 - DGTR	29-03-2019	Final Findings issued recommending continuation of anti-dumping duties
Chlorinated Polyvinyl Chloride (CPVC)	Korea RP and China PR	F.No. 06 / 03 / 2019 - DGTR	28-03-2019	ADD - Initiation of Original Investigation
Ductile Iron Pipes	China PR	18/2019-Customs - (ADD)	10-04-2019	Anti-dumping duty extended for a period of one month up to 9th May, 2019 in the pendency of legal proceedings before Gujarat High Court
		F No. 7 / 18 / 2018 - DGAD	01-04-2019	Final Findings issued without recommendations for continuation of anti-dumping duties
Ethylene Vinyl Acetate (EVA) sheet for Solar Module	China PR, Malaysia, Saudi Arabia and Thailand	15/2019-Customs - (ADD)	29-03-2019	Definitive anti-dumping duties imposed
New Pneumatic Tyres for Buses and Lorries	China PR	F. No.6/8/2018-DGAD	25-03-2019	Definitive Countervailing duty recommended
Paracetamol	China PR	19/2019-Customs (ADD)	16-04-2019	Anti-dumping duty withdrawn subsequent to sunset review
Saccharin	Indonesia	F No. 6 / 13 / 2018 - DGAD	29-03-2019	Final Findings issued recommending imposition of anti-dumping duties

Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Carbon and Alloy Steel Threaded Rod	United States of America	84 FR 14971 Investigation Nos. 701-TA-618-619 and 731-TA-1441-1444 (Preliminary)	12-04-2019	ITC issues positive injury findings
Corrosion-Resistant Steel Products	United States of America	84 FR 11053 [C-533-864]	25-03-2019	Final Results of Countervailing Duty Administrative Review; 2015-2016
Frozen Warmwater Shrimp	United States of America	84 FR 10792 [A-533-840]	22-03-2019	Rescission of Antidumping Duty Administrative Review; 2017-2018
Polyethylene Terephthalate	European Union	2019 / C 111 / 12	25-03-2019	Notice of initiation of a partial interim review of the countervailing measures

WTO News

Korean restrictions on Japanese food imports - Appellate Body issues report

On 11 April, the Appellate Body issued its report in the case brought by Japan in "*Korea — Import Bans, and Testing and Certification Requirements for Radionuclides*" (DS495). Korea appealed the interpretation and findings pertaining to Articles 2.3, 5.6, 5.7, 7 and Annexes B(1) and B(3) of the SPS Agreement and Japan cross-appealed the interpretation and application of Annex C(1)(a) to the SPS Agreement and Article 8 of the SPS Agreement.

The Appellate Body found as follows:

- In relation to Korea's claim that the Panel erred in its application of Article 5.6, the AB found that Korea had an appropriate level of protection (ALOP) consisting of quantitative and qualitative elements. However, the Panel in its assessment of Japan's proposed alternative measure, only compared the alternative to fulfill the quantitative elements of Korea's ALOP and erred by failing to account for qualitative elements in its assessment under Article 5.6. Accordingly, it reversed the Panel's findings regarding the inconsistency

of Korea's measures as being more trade-restrictive than required to achieve Korea's ALOP.

- In relation to Korea's claim under Article 2.3, the AB found that the Panel erred in its interpretation of Article 2.3 by considering that relevant "conditions" under this provision may be exclusively limited to "the risk present in products", to the exclusion of other conditions, including territorial conditions, that have the potential to affect the products at issue. The AB reversed the Panel findings under Article 2.3.
- In relation to Korea's claim that the Panel erred in finding that Korea's measures do not fulfil the requirements of Article 5.7, Korea argued that these findings were outside the Panel's terms of reference. The Appellate Body agreed that, before the Panel, Japan had not made a claim of inconsistency under Article 5.7 and neither was the same invoked as a defence by Korea. For this reason, the Appellate Body declared the Panel's findings under Article 5.7 moot and of no legal effect.
- In relation to Korea's claims pertaining to Annex B(1) of SPS and the publication requirements, the AB upheld the Panel's findings pertaining to Korea measures, finding inconsistency in the manner in which Korea failed to publish sufficient content to enable other interested Members to know the "sufficient information, including the product scope and the requirements of the adopted SPS regulation, to give the means to interested Members to become familiar with that SPS regulation." To a certain extent, the rigid language of the Panel's findings regarding the principles governing Annex B(1) were modified.
- Korea claimed that the Panel erred in its interpretation and application of Annex B(3) in finding that Korea acted inconsistently with this provision because its SPS enquiry point provided an incomplete response to one request for information by Japan and failed to respond to another. The Appellate Body agreed that a single failure of an enquiry point to respond would not automatically result in an inconsistency with Annex B(3). The Appellate Body thus reversed the Panel findings at issue.
- With respect to Japan's claim regarding interpretation and application of Annex C(1)(a) in articulating the conditions for presuming likeness under this provision and in finding that Japanese products and Korean domestic products could not be presumed to be "like". Upholding the Panel findings at issue, the Appellate Body found that the Panel did not err in declining to presume that Japanese products and Korean domestic products are "like".

US anti-dumping duties on Canadian lumber – Panel report issued

On 9 April the WTO circulated the panel report in the case brought by Canada in "*United States — Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada*" (DS 534). Canada had challenged the anti-dumping measures imposed by the United States Department of Commerce (USDOC) against certain softwood lumber products from Canada, particularly the USDOC's dumping determinations in the investigation under the weighted average-to-transaction (W-T) methodology provided in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. Canada challenged (a) how the USDOC met the conditions for the use of the W-T methodology in

the investigation using the "Differential Pricing Methodology" (DPM); and (b) the USDOC's use of zeroing under the W-T methodology when applying the DPM in the investigation. With respect to Canada's claims:

- The Panel upheld Canada's claim (under (a) above) that the USDOC acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement by finding "a single pattern of export prices which differed significantly among different purchasers, regions ***and*** time periods" in the underlying investigation, rather than, as the language requires, "a pattern of export prices which differ significantly among different purchasers, regions ***or*** time periods".
- The Panel rejected Canada's claim (under (a) above) that the USDOC acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement by finding that an identified "pattern" may include export prices to purchasers, regions or time periods which "differ significantly" even when they are significantly higher relative to export price to other purchasers, regions or time periods. Canada asserted that a "pattern" may be identified only where the significant difference is such that these prices are significantly lower only. The Panel rejected this aspect of Canada's claim, finding that the relevant pattern could include export price to purchasers, regions or time periods "which differ significantly" because they are significantly higher (and not just significantly lower) relative to export prices to other purchasers, regions or time periods.
- The Panel also rejected Canada's claim (under (b) above) regarding the USDOC's use of zeroing methodology under the W-T methodology. Canada considered such type of zeroing to be inconsistent with the second sentence of Article 2.4.2, as interpreted in past cases. The Panel agreed with the United States that such type of zeroing is permissible under the second sentence of Article 2.4.2, and thus rejected Canada's claim. In making its finding, the Panel noted that the second sentence of Article 2.4.2 would become inutile if zeroing was prohibited under the W-T methodology, as this methodology, which is designed to unmask targeted dumping, would not be able to do so.

US compliance in the Boeing dispute – Appellate Body issues report

On 28 March the WTO's Appellate Body issued its report on US compliance in the dispute brought by the European Union in "*United States — Measures Affecting Trade in Large Civil Aircraft — Second complaint*" (DS353). The Appellate Body, ruling on the claims of European Union as well as the cross-claims asserted by the United States found:

- The Appellate Body reversed the Panel's rejection of the European Union's claim that the USDOD procurement contracts constituted a financial contribution that conferred a benefit on Boeing, but was unable to complete the legal analysis to determine whether they involved financial contributions under Article 1.1(a)(1) of the SCM Agreement.
- The Appellate Body reversed the Panel's rejection of the European Union's claim that the tax concessions at issue involved a financial contribution under Article 1.1(a)(1)(ii). The Appellate Body completed the legal analysis and found that, to the extent that Boeing remains entitled to Foreign Sales Corporation (FSC) / Extraterritorial Income (ETI) tax concessions in the post-implementation period, the

United States has not withdrawn FSC/ETI subsidies with respect to Boeing.

- The Appellate Body reversed the Panel's rejection of the European Union's claim under Article 2.1 regarding South Carolina's economic development bond (EDB) subsidies, but was unable to complete the legal analysis to find that they constitute specific subsidies. Separately, the Appellate Body considered that the explicit requirement that taxpayers be located in a multi-county industrial park (MCIP) in order to receive tax credits constituted a limitation on access to subsidies within the meaning of Article 2.2 of the SCM Agreement. The Appellate Body therefore reversed the Panel's rejection of the European Union's claim that the MCIP subsidies is specific within the meaning of Article 2.2 and completed the legal analysis to find that they constituted specific subsidies.
- The Appellate Body found that, for purposes of assessing whether disproportionately large amounts of subsidy have been granted to certain enterprises within the meaning of Article 2.1(c) of the SCM Agreement, the Panel did not err in concluding that the relevant time period over which to consider disproportionality was as from the end of the implementation period. The Appellate Body, however, reversed the Panel's application of Article 2.1(c) in finding that no disparity existed between the expected and actual distribution of the tax abatements provided through City of Wichita's Industrial Revenue Bonds (IRB), but was unable to complete the legal analysis to find that they constitute specific subsidies.
- The Appellate Body clarified that, in assessing whether appropriate steps have been taken to remove the adverse effects of a subsidy within the meaning of Article 7.8 of the SCM Agreement, the time period for assessing the removal of adverse effects may include developments subsequent to the time of order, including through the point of delivery. The Appellate Body therefore faulted the Panel for excluding from its inquiry evidence relating to transactions where the orders arose in the original reference period but deliveries remain outstanding in the post-implementation period. Ultimately, however, the Appellate Body agreed with the Panel that the European Union's arguments were unsupported by the evidence and/or in contradiction with the findings made in the original proceedings, and therefore upheld the Panel's finding rejecting the European Union's claim that the original adverse effects of the pre-2007 aeronautics R&D subsidies continue into the post-implementation period as a present serious prejudice in relation to the A330 and A350XWB.
- The Appellate Body considered that the counterfactual inquiry in these compliance proceedings was different from the one at issue in the original proceedings, and faulted the Panel for failing to assess in its counterfactual analysis whether the acceleration effects of the pre-2007 aeronautics R&D subsidies had an impact, not just on the launch of the 787, but also on the timing of first delivery of the 787 (both in terms of promised as well as actual first delivery). The Appellate Body therefore reversed the Panel's rejection of the European Union's claim, but was unable to complete the legal analysis with regard to whether there remain acceleration effects of the pre-2007 aeronautics R&D subsidies in the post-implementation period.

- The Appellate Body agreed that the Panel had a basis to assume that Boeing was able to use the benefits of the subsidies arising from all its Large Civil Aircraft (LCA) sales to lower prices in particularly price-sensitive sales campaigns in the single-aisle LCA market, and that the Panel was not required to establish that the per-aircraft amount of the subsidies available for these sales campaigns exceeds the differentials in the net prices of Airbus' and Boeing's competing aircraft. The Appellate Body therefore upheld the Panel's finding that a Washington State B&O tax rate reduction caused significant lost sales, and a threat of impedance, in relation to five particularly price-sensitive campaigns in the single-aisle LCA market. The Appellate Body also upheld the Panel's rejection of any such effects in sales campaigns that were not particularly price sensitive in the single-aisle and twin-aisle LCA markets.
- The Appellate Body clarified that the legal standard for causation under Articles 5 and 6.3 of the SCM Agreement does not require a showing that the cash flow subsidies (including certain federal, state, and local measures) actually altered Boeing's pricing of its LCA. The Appellate Body therefore reversed the Panel's finding that the European Union was required to demonstrate that the untied subsidies actually led to price reductions of Boeing LCA sales in order to establish that the subsidies caused adverse effects through the lowering of Boeing LCA prices. However, the Appellate Body was unable to complete the legal analysis to find that any of these subsidies complemented and supplemented the effects of the Washington State B&O tax rate reduction by contributing to such adverse effects in the single-aisle LCA market.

Turkish duties on Thai air conditioners – Panel established

On 11 April, at a meeting of the WTO's DSB, WTO members agreed to Thailand's request for the establishment of a dispute panel to rule on duties levied by Turkey on imported Thai air conditioners. The tariffs were imposed in response to Thailand's earlier decision to extend safeguard duties on imports of non-alloy hot rolled steel flat products for an additional three years. India along with Brazil, Canada, China, EU, Japan, Korea, Russia, Singapore, Ukraine and the United States have reserved their third-party rights to participate in the panel proceedings.

EU initiates dispute against Turkish measures affecting pharmaceuticals

On April 10, the WTO circulated European Union's request for consultations with Turkey regarding various requirements imposed by Turkey on the production, import and approval for reimbursement, pricing and licensing of pharmaceutical products. As per document circulated on 10th of April in WTO, the Turkish authorities have adopted plans to achieve progressively the localisation in Turkey of the production of a substantial part of the pharmaceutical products consumed in Turkey, and that localisation requirement accords to

imported pharmaceutical products treatment less favourable than that accorded to like products of national origin. Violation of various provisions of the GATT, TRIMs, TRIPS and SCM Agreement is alleged.

EU initiates dispute against Indian tariff on ITC products

On April 9, the WTO circulated European Union's request for consultations with India regarding duties imposed by India on imports of certain information and communications technology

(ITC) products. According to EU, India applies duties in excess of the rates bound in its Schedule of Concessions and Commitments annexed to the GATT 1994 on imports of certain goods in the information and technology sector. These measures are alleged to be inconsistent with India's obligations under Article II:1 (a) and (b) of the GATT 1994, because, through the specified measures, India accords to the EU goods in the information and communications technology sector treatment less favourable than that provided for in its Schedule.

Safeguard notifications

- Egypt has on 2nd of April notified the WTO's Committee on Safeguards that it has initiated on 31st March 2019 a safeguard investigation pertaining to the imports of semi-finished products of iron or non-alloy steel and steel rebar (bars, rods and coils) for construction purposes.
- Columbia has on 16th of April notified the WTO's Committee on Safeguards that it has initiated on 9th of April a safeguard investigation on certain sheets of cardboard and polyethylene.

India Customs & Trade Policy Update

Customs duty reduced on import of specified goods from Japan

Rate of Customs Duty on specified goods imported from Japan has been considerably reduced with effect from 01-04-2019. The new rates will be applicable on goods falling under 806 Tariff lines as specified in Notification No. 69/2011-Customs. Notification 10/2019-Customs, dated 28-03-2019 has been issued for this purpose. This concessional rate is available only if importer proves that the goods for which exemption is being claimed are of the origin of Japan as per the Rules notified for this purpose.

Rebate of State and Central Taxes and Levies scheme – FTP and HoP amended

Scheme for Rebate of State and Central levies and Taxes (RoSCTL), as notified by the Ministry of Textiles Notification No. 14/26/2016-IT(Vol II), by issuance of scrips to support textile sector (garments and made-ups) has been incorporated in the FTP and Handbook of Procedures Vol.1. As per Paras 4.95 and 4.96 inserted in HoP by DGFT Public Notice No. 83/2015-20 dated 29-03-2019, rates of RoSCTL are notified as Schedules to Notification dated 8-3-2019 of the Textile Ministry. Duty credit scrips with a validity of 24 months, if registered at EDI port can be used at any EDI port.

Transport and Marketing Assistance for agri. products – FTP and HoP amended

Provisions relating to Transport and Marketing Assistance for specified agricultural products to specified destinations have been notified by the DGFT through Chapter 7(A) in FTP and HoP Vol.1. Aayaat Niryaat Form 7A(A) has also been notified. As per chapters inserted by Notification No. 58/2015-20 and Public Notice No. 82/2015-20, both dated 29-03-2019, assistance will be paid only to exporter who receives payment in foreign currency. Application must be filed online

on DGFT website and is not maintainable after completion of 1 year from quarter in which exports made.

Physical copies of MEIS/SEIS scrips phased out for EDI ports

Physical copies of MEIS or SEIS duty credit scrips will not be issued by the DGFT from 10-4-2019 onwards, in case where the port of registration is an EDI port. As per CBIC Circular No. 11/2019-Cus. dated 9-4-2019, the scrips will continue to be transmitted electronically by the DGFT to the Customs system and would be visible to concerned officers involved in imports. While no TRA shall be issued in respect of these paperless scrips issued electronically, DGFT will continue to issue scrips in physical form as per current practice for non-EDI ports.

Ratio Decidendi

Anti-dumping duty – Price undercutting – Prices must be compared at same level of trade

Observing that EU's Basic Regulation does not contain any definition of the concept of price undercutting and does not lay down any method for the calculation of that concept, European Union's General Court has held that in order to guarantee the fairness of that comparison, prices must be compared at the same level of trade. The Court annulled the regulation concerning definitive anti-dumping duty on imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron) originating in India, in so far as it concerns the appellant (Jindal Saw).

It observed that since the Commission took into consideration the prices of sales made by the selling entities linked to the main EU producer in order to determine the price of the like product of the EU industry while not taking into account the prices of sales of Jindal Saw's selling entities to determine the price of the product concerned produced by Jindal Saw, it cannot be considered that the undercutting calculation was made by comparing prices at the same level of trade.

The Court however dismissed the plea of infringement of Article 20(4) and (5) of the EU Basic Regulation and of the rights of defence. [*Jindal Saw Ltd.* v. *European Commission* – Judgement dated 10-4-2019 in Case T-301/16, EU's General Court (First Chamber, Extended Composition)]

DFIA scheme – Import of popcorn maize – Word 'maize' is not generic

Bombay High Court has allowed the benefit of DFIA scheme for import of popcorn maize against export of maize starch powder. Contention that SION entry for import inputs mentioned only 'maize', and hence any quality of maize was importable, was upheld. Court for this purpose observed absence of actual user condition. Department's view that non-mentioning of specific input in shipping bill violates FTP Para 4.12(i), was rejected, noting that term maize is not generic but specific, and that popcorn was capable of use in manufacture of export goods. [*Shah Nanji Nagsi Exports* v. *UoI* – Judgement dated 29-3-2019 in Writ Petition No. 8268/2017, Bombay High Court]

Demurrage charges are justified unless waiver mandated by Rules

Delhi High Court has held that warehouse service provider is justified in not providing waiver and returning demurrage charges deposited in a case where detention was held justified, even when penalty and confiscation by Customs was set aside. Court in this regard held that fee payable for duration for which warehousing was done cannot be removed by court unless rules or relevant policy clearly mandates it. It observed that even otherwise warehousing is a commercial activity for which service provider invests in resources, deploys manpower and creates infrastructure. [*International Lease Finance Corp.* v. *UoI* - Order dated 27-3-2019 in W.P.(C) No. 6490/2018, Delhi High Court]

Difference between 'wrench' and 'plier' – Classification in USA

US Court of Appeals for the Federal Circuit has affirmed US CIT's interpretations of term 'wrenches' in 8204.12.00 and 'pliers' in 8203.20.6030. CIT had found wrenches to mean a hand tool having a head with jaws or sockets having surfaces adapted to snugly or exactly fit and engage the head of a fastener and a singular handle with which to leverage hand pressure to turn the fastener. Plier was held as a hand tool with two handles and two jaws on a pivot, which must be squeezed together to enable it to grasp an object. [*Irwin Industrial Tool Company* v. *United States* – Decision dated 9-4-2019 in 2018-1215, United States Court of Appeals for the Federal Circuit]

DFIA – Classification under particular tariff heading not relevant

Walnuts in shell are covered under description of food flavour/flavouring agent/flavour improvers or dietary fibre, and eligible for benefit of transferred DFIA issued against export of biscuits. Rejecting plea that walnuts fall in different heading than food flavour, CESTAT Hyderabad noted that neither SION nor notification specifies relevance of ITC (HS) for DFIA. On usability of walnuts, it held that walnuts can be used in biscuits with some processing as a dietary fibre, flavour, etc. [*Uni Bourne Food Ingredients LLP* v. *Commissioner* – 2019 VIL 181 CESTAT HYD CU]

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