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## Contents

### Article

Consequence of non-participation by  
India in CVD investigations conducted  
by USA..... 2

### Trade Remedy News

Trade remedy measures by India ..... 6

Trade remedy measures against India 7

WTO News ..... 7

### India Customs & Trade Policy

Update..... 9

Ratio Decidendi..... 10

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## Article

# Consequence of non-participation by India in CVD investigations conducted by USA

By **Bhargav Mansatta**

Government of the exporting country is an interested party in a countervailing duty investigation. Apart from exporters of the subject product, Government of the exporting country is also required to file response to the questionnaire issued by the investigating authority and provide necessary information.<sup>1</sup>

The United States is one of the biggest users of countervailing duty investigation against imports from India. In many cases, the USDOC has determined that Government of India did not provide complete information in response to the questionnaire issued by the United States Department of Commerce (“USDOC”). In other words, as per the USDOC, there was absence of complete information or response by Government of India regarding certain subsidy programs under investigation. Section 776(a) of the Tariff Act 1930 (“The Act”) provides that the USDOC can rely on facts available when an interested party does not provide complete information. Section 776(b) of the Act further provides that the USDOC may use an adverse inference in selecting from among the facts otherwise available.

USDOC has the discretion in deciding the application of adverse facts available in a given case. Final determinations issued by the USDOC in the following countervailing duty investigations against India illustrates the practice adopted by the USDOC in applying adverse facts available

when complete information is not provided by GOI:

- (i) Polyethylene Terephthalate Film, Sheet and Strip from India, Administrative Review, Final Determination dated March 18, 2019
- (ii) Polytetrafluoroethylene Resin from India, Original Investigation, Final Determination dated May 14, 2018
- (iii) Stainless Steel Flanges from India, Original Investigation, Final Determination dated August 10, 2018

In *Polyethylene Terephthalate Film, Sheet, and Strip from India*, the USDOC, among others, examined the countervailability of the income tax program under Section 32AC (1A) (“sub-section 32AC”) of the Income Tax Act.<sup>2</sup> Sub-section 32AC provides that when a company is engaged in the business of manufacture acquires and installs new assets exceeding prescribed amount, then such company shall be allowed in computing total income a deduction of 15 percent of the actual cost incurred for such new assets.

During this administrative review proceedings, the exporters of the subject product and the mandatory respondents namely SRF and Jindal provided full data of the benefits received during the POR under sub-section 32AC. Jindal reported that it received benefit under sub-

<sup>1</sup> Article 12 of the SCM Agreement.

<sup>2</sup> Issues & Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet and Strip from India, AR 2016, Comment 2, March 18, 2019.

section 32AC of the Income Tax Act. SRF submitted and demonstrated that it did not benefit from this program. However, GOI did not provide program description, explanation and other requested information in the appendix in the questionnaire response.<sup>3</sup>

The USDOC determined that GOI withheld the information and an adverse inference is warranted under section 776(b) of the Act. Consequently, the USDOC determined that the GOI *vide* sub-section 32AC provides financial contribution in the form of revenue foregone and benefit is equal to the difference between the amount of income tax that would be payable absent this program and the actual amount of taxes paid by recipient after availing this benefit.<sup>4</sup> The USDOC specifically relied on the application of adverse facts to summarily determine that the income tax program is *de facto* specific.<sup>5</sup> The USDOC did not deem it appropriate to analyze claims concerning non-specificity in absence of relevant information in this regard from the GOI.<sup>6</sup>

Determination of specificity of a subsidy program is crucial. Subsidy program will not be considered as countervailable if it is not specific. Subsidy program is not specific if the eligibility of the program is based on objective criteria and conditions i.e. criteria or conditions which are neutral, which do not favor certain enterprise over others and which are economic in nature and horizontal in application (eg. Size of enterprise, number of employees).<sup>7</sup> Section 771(5A)(D) of the Act also provides that if the relevant statute incorporates objective criteria and conditions

governing the eligibility of the program, then such program will not be considered as specific.

Sub-section 32AC of the Income Tax Act provides eligibility for enterprises based on objective criteria i.e. the amount of investment made in new assets and is therefore not specific. However, as already noted, the USDOC resorted to the application of adverse facts available and determined that the program is *de facto* specific because GOI did not provide any explanation regarding the sub-section 32AC in its questionnaire response.<sup>8</sup> It is acknowledged that absence of specificity is a difficult legal criterion to establish and practice shows that it is not easily accepted by the investigating authorities.<sup>9</sup> However, full co-operation by the GOI may have rendered a different result regarding the specificity and countervailability of this program.

Be that as it may, it is also noted that the USDOC did not reject the information provided by the mandatory respondents namely, Jindal and SRF entirely. The USDOC determined the subsidy margin for this program based on the data furnished by the mandatory exporters. The USDOC determined the benefit for Jindal under this program by dividing the amount of benefit with the total sales during the POR and accepted the substantiated and verified claim of SRF that it

<sup>3</sup> Issues & Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet and Strip from India, AR 2016, March 18, 2019, pg. 6.

<sup>4</sup> *Ibid.*, pg. 14

<sup>5</sup> *Ibid.*, Comment 2, pg. 24

<sup>6</sup> *Ibid.*

<sup>7</sup> Section 771(5A)(D) of Tariff Act 1930; Article 2, SCM Agreement, Footnote 2.

<sup>8</sup> Issues & Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet and Strip from India, AR 2016, Comment 2, March 18, 2019.

<sup>9</sup> In *Certain graphite electrode systems originating in India*, the European Commission evaluated Section 80IA of Income Tax Act by which an amount corresponding to the profit generated by the power generating activities was exempted from tax for 10 consecutive years for companies that started operation on or after the 1 April 2003 and up to 31 March 2010. The European Commission determined that the subsidy program is not specific because scheme appears to be available to all companies on the basis of objective criteria. Council Regulation (EC) No 1354/2008 of 18 December 2008 amending Regulation (EC) No 1628/2004 imposing a definitive countervailing duty on imports of certain graphite electrode systems originating in India and Regulation (EC) No 1629/2004 imposing a definitive anti-dumping duty on imports of certain graphite electrode systems originating in India, Official Journal of the European Union, L 350/24, 30.12.2018, paras. 60 to 66.

did not benefit from this program. To this extent, it is required to be acknowledged that the USDOC's application of adverse facts available did not penalize mandatory respondents by imposing high rate of countervailing duty for the concerned program.<sup>10</sup>

In *Polytetrafluoroethylene Resin from India*, the GOI filed questionnaire response. However, the USDOC noted that GOI did not provide any substantive response regarding two programs namely (i) Exemption from electricity duty by the State Government of Gujarat (SGOG)<sup>11</sup> and (ii) Renewable Energy Certificates program by the GOI.<sup>12</sup> Consequently, USDOC determined that application of adverse facts available is warranted in accordance with Section 776(b) of the Tariff Act. The exporter of the subject product and the mandatory respondent Gujarat Fluorochemicals Limited ("GFL"), provided complete information regarding the use of both these programs.

Regarding exemption from electricity duty by SGOG, GFL reported that it received two different types of exemptions from electricity duty, (i) electricity consumed by its new manufacturing unit in accordance with the Electricity Duty Act, 1958 and (ii) duty exemption for its wind power generation in accordance with Wind Power Policy-2013. However, because GOI did not provide information regarding the nature of the program, the USDOC applied adverse facts

available for determined countervailability of the program. USDOC determined that GOI conferred a financial contribution in the form of revenue foregone, benefit and the program is specific.<sup>13</sup> For this purpose, USDOC relied on the information provided by the domestic industry in the petition.<sup>14</sup> Once again, the USDOC determined that because GFL provided information regarding the benefits it received under this program during the POI, it is relying on this information to calculate the subsidy margin and the countervailing duty rate for GFL.

Regarding Renewable Energy Certificate ("REC") Program, GFL explained that GOI identifies energy intensive consumers and requires them, through the Central Electricity Regulatory Commission ("CERC"), to generate a certain percentage of green energy either from self-generation or by purchasing RECs through a CERC administered power exchange. GFL reported that it generated a number of RECs during the POI through its captive windfarm and these RECs were sold during the POI at prices set by CERC.<sup>15</sup> The USDOC specifically observed that it normally relies on the government to provide specific program information with regard to the administration and specificity of programs. Because the GOI did not provide any information regarding this program, USDOC was not able to confirm GFL's description of how this program is administered.<sup>16</sup> Therefore, USDOC determined that this program provides financial contribution, benefit and is *de facto* specific.<sup>17</sup> However, the USDOC

<sup>10</sup> Issues & Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet and Strip from India, AR 2016, Comment 2, March 18, 2019

<sup>11</sup> GOI provided only a brief statement that information regarding this program, administered by the State Government of Gujarat, could be collected from the mandatory respondent; Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Polytetrafluoroethylene Resin from India, February 28, 2018, pg. 9.

<sup>12</sup> Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Polytetrafluoroethylene Resin from India, May 14, 2018, Comment 2.

<sup>13</sup> Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Polytetrafluoroethylene Resin from India, February 28, 2018, pg. 17

<sup>14</sup> *Ibid.* footnote, 92

<sup>15</sup> *Ibid.*, pgs. 18 & 19

<sup>16</sup> *Ibid.*, pg. 19

<sup>17</sup> *Ibid.* Preliminary determination was confirmed by the USDOC in the Final Determination issued on August 10, 2018.

determined subsidy margin for GFL based on the verifiable benefit amount actually reported by GFL during the POI to arrive at a countervailable subsidy rate.<sup>18</sup>

In *Stainless Steel Flanges from India*, the United States examined host of subsidy programs alleged by the petitioners.<sup>19</sup> The USDOC noted that GOI did not provide complete information regarding eight programs<sup>20</sup> including (i) Provision of stainless steel, billet and bar by SAIL at less than adequate remuneration and (ii) Ten State Government of Andhra Pradesh Programs (“SGAP”). Exporter of the subject product from India and a mandatory respondent in the investigation, Echjay Forging Industries Pvt. Ltd (“Echjay”) provided complete information regarding the use of these two subsidy programs.

Regarding provision of stainless steel, billet and bar by SAIL, domestic industry in the United States argued that GOI failed to provide response to USDOC questionnaire and therefore adverse facts available should be applied for Echjay to determine countervailing duty rate of this subsidy program.<sup>21</sup> The USDOC determined the provision of steel inputs by SAIL at less than adequate remuneration provides a countervailable subsidy. The USDOC did not accept the GOI’s argument that the provision of steel inputs by SAIL for less than adequate remuneration is not a program that confers a benefit from the GOI because SAIL is not a public body and it neither possesses governmental authority nor discharges any government

function.<sup>22</sup> However, USDOC observed that Echjay reported properly regarding this program and submitted that it had no purchases of any kind from SAIL during the POI. USDOC observed the no evidence was uncovered during the verification that called into question the claim of Echjay. Accordingly, USDOC determined that Echjay did not benefit from this program.<sup>23</sup>

Similarly, in absence of information regarding SGAP programs from the GOI, the USDOC applied adverse facts available to determine that SGAP programs provides countervailable subsidy.<sup>24</sup> However, the USDOC accepted the verifiable claim that Echjay did not receive any benefit under ten SGAP programs.<sup>25</sup>

### Conclusion

Following conclusions are evident regarding the application of adverse facts available by the USDOC when it determined that GOI has not provided complete information regarding certain subsidy programs:

- (i) Application of adverse facts available is determined for each subsidy program. Absence of information regarding certain subsidy programs by the GOI will not result in rejection of the entire GOI questionnaire response.
- (ii) GOI information and explanation of the program is necessary to determine the nature of subsidy programs and its countervailability in accordance with the provisions of the SCM Agreement as incorporated in the US Statute and as implemented by the USDOC.

<sup>18</sup> *Ibid.*

<sup>19</sup> Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Stainless Steel Flanges from India, August 10, 2018

<sup>20</sup> (i) GOI Loan Guarantee (ii) Status Certificate Program (iii) Provision of Stainless Steel, Billet and Bar by SAI at LTAR (iv) Infrastructure Assistance for Mega Projects under the Maharashtra Industrial Policy of 2013 (v) Other State Government of Maharashtra Industrial Promotion Policy to Support Mega Projects & (vi) Incremental Export Incentive Scheme (vii) Steel Development Fund. *Ibid.*, Comment 6

<sup>21</sup> *Ibid.*, Comment 3.

<sup>22</sup> Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Stainless Steel Flanges from India, August 10, 2018, pg. 16

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, Comment 6.

<sup>25</sup> Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Stainless Steel Flanges from India, Programs Preliminarily Determined to Be Not Used by, or Not Confer a Measurable Benefit to Echjay, S.No. 28, January 16, 2018.

(iii) When the GOI does not provide details regarding the benefit provided to the mandatory respondent under the concerned program, the USDOC will rely on the actual information and data provided by the exporter for determining subsidy

margin and countervailing duty rate for such co-operating exporter for the concerned program.

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## Trade Remedy News

### Trade Remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Clear Float Glass	Pakistan, Saudi Arabia, UAE	F.No.7/3/2019-DGTR	01-05-2019	Initiation of Sunset Review Investigation.
Digital Offset Printing Plates	China PR, Japan, Korea RP, Taiwan and Vietnam	F.No.6/7/2019-DGTR	16-5-2019	Anti-dumping investigation initiated
Ductile Iron Pipes	China PR	21/2019-Customs - (ADD)	09-05-2019	Anti-dumping duty extended for a period of 45 days from 9 <sup>th</sup> May, 2019 up to 23 <sup>rd</sup> June 2019 in pursuance of the Order of the Gujarat High Court dated 3 May 2019.
Jute Products	Bangladesh	F No. 7 / 09 / 2017 - DGAD	02-05-2019	Final Findings issued recommending continuation of residual rate of anti-dumping duties with respect to concerned New Shippers.
New/Unused Pneumatic Radial Tyres	China PR	F No. 7 / 08 / 2018 - DGAD	02-05-2019	Final Findings issued recommending continuation of residual rate of anti-dumping duties with respect to 3 concerned New Shippers.

Product	Country	Notification No.	Date of Notification	Remarks
Saccharin	Indonesia	20/2019-Customs (ADD) -	03-05-2019	Definitive anti-dumping duty imposed.

### Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Frozen Warmwater Shrimp	United States of America	84 FR 16843 [A-533-840]	23-04-2019	Preliminary Results of Antidumping Duty Administrative Review; 2017-2018.
Glycine	United States of America	84 FR 18487 [A-533-883]	01-05-2019	Final Determination of Sales at Less Than Fair Value.
Glycine	United States of America	84 FR 18482 [C-533-884]	01-05-2019	Affirmative Final Determination of CVD investigation.
Polyester Textured Yarn	United States of America	84 FR 19036 [C-533-886]	03-05-2019	Preliminary affirmative Countervailing Duty determination, and alignment of final determination with final Antidumping duty determination.
Stainless Steel Bar	United States of America	84 FR 15582 [A-533-810]	16-04-2019	Preliminary Results of Antidumping Duty Administrative Review; 2017-2018.



## WTO News

### Japan disputes Indian tariff on telephone and parts

Japan has on 10-5-2019 requested consultation with India in WTO on import duties of certain goods which are alleged to be inconsistent with

India's Schedule of Concessions and Commitments annexed to GATT 1994. As per Japanese communication circulated on 14<sup>th</sup> of May, import duties on Telephones for cellular networks or for other wireless networks, and

parts, Base stations, and Machines for the reception, conversion and transmission or regeneration of voice, images or other data, and parts, allegedly violate Article II:1(a) and (b) of GATT.

## WTO issues panel report regarding Chinese tariff rate quotas on agricultural imports

On 18 April, the WTO circulated the panel report in the case brought by the United States in “China — Tariff Rate Quotas for Certain Agricultural Products” (DS517). The United States challenged China’s administration of tariff rate quotas pertaining to wheat, rice and corn. Various aspects of the administration, including the basic criteria for eligibility to receive the allocations, the procedures for amount of allocations and reallocation of unused or returned TRQ amounts, etc. The Panel found:

- The basic eligibility criteria used in China’s administration of its TRQs for wheat, rice, and corn are inconsistent with the obligations to administer TRQs on a transparent, predictable, and fair basis, and to administer TRQs using clearly specified requirements;
- The allocation principles used in China’s administration of its wheat, rice, and corn TRQs are inconsistent with the obligations to administer TRQs on a transparent, predictable, and fair basis, and to administer TRQs using clearly specified administrative procedures;
- The reallocation procedures used in China’s administration of its wheat, rice, and corn TRQs are inconsistent with the obligation to administer TRQs using clearly specified administrative procedures;
- The public comment process used in China’s administration of its wheat, rice, and

corn TRQs is inconsistent with the obligations to administer TRQs on a transparent, predictable, and fair basis, and to administer TRQs using clearly specified administrative procedures;

- The administration of STE and non-STE portions of China’s wheat, rice, and corn TRQs is inconsistent with the obligations to administer TRQs on a transparent, predictable, and fair basis, to administer TRQs using clearly specified administrative procedures, and to administer TRQs in a manner that would not inhibit the filling of each TRQ;
- The United States has not demonstrated that the extent of the public notice provided in connection with the allocation, return, and reallocation of China’s wheat, rice, and corn TRQs is inconsistent with the obligations to administer TRQs on a transparent and predictable basis, and to administer TRQs in a manner that would not inhibit the filling of each TRQ;
- The usage requirements for imported wheat and corn used in China’s administration of its TRQ for wheat and corn are inconsistent with the obligations to administer TRQs on a predictable basis, to administer TRQs using clearly specified administrative procedures, and to administer TRQs in a manner that would not inhibit the filling of each TRQ;
- The United States has not demonstrated that the usage requirement for imported rice used in China’s administration of its TRQ for rice is inconsistent with the obligation to administer TRQs in a manner that would not inhibit the filling of each TRQ;

Finally, the Panel determined that China’s administration of its wheat, rice, and corn TRQs is, as a whole, inconsistent with the obligations to administer TRQs on a transparent, predictable,



and fair basis, to administer TRQs using clearly specified requirements and administrative procedures, and to administer TRQs in a manner that would not inhibit the filling of each TRQ. It recommended that the DSB request China to bring its measure into conformity with its obligations under Paragraph 116 of China's Working Party Report, as incorporated into the WTO Agreement pursuant to Paragraph 1.2 of China's Accession Protocol.

### **EU releases joint statement on electronic commerce**

European Union has on 26<sup>th</sup> of April released its joint statement on electronic commerce, a proposal for WTO disciplines and commitments relating to electronic commerce. The statement

covers text proposals for the WTO Rules on e-commerce and revision of the WTO reference paper on telecommunications services. EU also requests other members to join the Information Technology Agreement and its expansion, to commit to the Understanding on Computer and Related Services, and to make certain commitments on telecommunications services.

### **Philippines submits request for observer status in WTO Committee on Government Procurement**

On 6 May, the Ambassador Manuel A. J. Teehankee of the Philippine Permanent Mission submitted to the WTO the request of the Philippine government to become an observer in the Committee on Government Procurement.



## **India Customs & Trade Policy Update**

### **Exports – New Shipping Bill Regulations introduced**

CBIC has introduced Shipping Bill (Electronic Integrated Declaration and Paperless Processing) Regulations, 2019. The new Regulations issued in supersession of Shipping Bill (Electronic Integration Declaration) Regulations, 2011 requires authorised person to retain assessed copy of shipping bill and all supporting documents in original, for a period of 5 years. Provision has also been made for generation of authenticated copy of shipping bill. As per the Regulations issued on 25-4-2019, penalty upto Rs. 50,000 is imposable in case of any contravention.

### **SEZ - Management and Business Consultant services is authorized service**

SEZ Board of Approval in its 85th meeting has decided that “Management and Business Consultant Services” may be included in the list of default authorized services in SEZ. As per SEZ Instruction No. 94, dated 8-5-2019, such services would be limited to the extent of such value of services availed of/consumed by the SEZ entity only. Further, the unit will have to produce evidence that the said service was consumed in relation to their authorized operations only. It may be noted that 66 services are already permitted as default authorized services.

## Exports – 250 shipping bills can now be filed online in single ANF 3D

The number of entries of shipping bills/ airway bills which can be filed in a single online ANF 3D application has been increased from 50 to 250 for claiming Merchandise Exports from India Scheme (MEIS) benefit. ANF 3D which itself was notified recently has been amended for this purpose by DGFT Public Notice No. 7/2015-2020 issued on 7-5-2019. MEIS is a duty credit scrip issued under Chapter 3 of the Foreign Trade Policy with an objective to provide rewards to exporters to offset infrastructural inefficiencies and associated costs.

## Foreign Trade Policy - No requirement to submit physical copy of RCMC for incentives

The requirement to submit physical copies of RCMC for the purpose of availing incentives under the Foreign Trade Policy 2015-20 will be

discontinued from 1-7-2019. According to DGFT Trade Notice dated 13-5-2019, validity of RCMCs will be checked directly from the DGFT's database which has the uploaded data of RCMCs from EPCs. The Trade Notice while noting that as on 31<sup>st</sup> April, 32,060 valid RCMCs are available on DGFT's data base, also advises all exporters to ensure that their valid RCMCs are duly uploaded by their respective EPC in the DGFT server.

## Milk and milk products from China – Import prohibition extended

Prohibition on import of milk and milk products including chocolates, candies, confectionary, food preparations with milk or milk solids as ingredients, from China has been extended. As per DGFT Notification No. 1/2015-20, dated 23-4-2019 this prohibition will be in place until the capacity of all laboratories at ports of entry has been suitably upgraded for testing melamine. The ban was earlier effective till 23-4-2019.



## Ratio Decidendi

### Customs valuation - Rules 3 to 5 to be exhausted before going to Rule 7 & 9

Supreme Court of India has reiterated that Rules 3 to 5 of Indian Customs Valuation Rules are to be exhausted before proceeding to Rules 7 & 9. The Apex Court observed that if statutory rules exist and provide for sequential implementation, assessing authority has no option. It noted that electrical decorative lighting is normally not highly branded product and import of the same under trademark *Diyas* and *mAntra* does not make them exclusive. It observed that since data was available on prices of similar goods from UK, it could be utilised. [*Anil Kumar Anand v.*

*Commissioner* - Civil Appeal No. 3138 of 2018, decided on 22-4-2019, Supreme Court]

### Santa Clause suit comprising 9 pieces sold as set classifiable separately under respective headings

US Court of Appeals for Federal Circuit has upheld US CIT Order on classification of goods consisting of 9-piece Santa Claus costume packaged and sold together as a set. The US CIT had held such goods to be classifiable under HTSUS 6110.30.30, 6103.43.15, 6116.93.94 and 4209.92.30 separately. Appellant-importer had contended that all 9 pieces of Santa Suit fall under HTSUS Chapter 95 as 'festive . . . articles'

requiring duty-free entry. The Court, however, observed that jackets and pants were durable and that the articles were normal wearing apparel. [*Rubies Costume Company v. US* – Opinion dated 29-4-2019 in 2018-1305, US Court of Appeals for Federal Circuit]

### **Casings made of textile with plastic coating – Classification**

US Court of Appeals of Federal Circuit has affirmed US Court of International Trade decision on classification of sausage casings. CIT had

classified casings as made-up textiles under subheading 6307.90.98 while the appellant had pleaded for classification under Ch. 39 as plastics. The product comprised of woven textile sheet coated with a thin layer of plastic on one side to only fill interstitial spaces between textile fibers. It rejected the argument that casings were completely embedded in plastics and thus excluded from Section XI. [*Kalle USA, Inc v. US* – Opinion dated 2-5-2019 in 2018-1378, US Court of Appeals of Federal Circuit]

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