Union Of India vs Agricas Llp on 26 August, 2020

Equivalent citations: AIRONLINE 2020 SC 696

Author: Sanjiv Khanna

Bench: Sanjiv Khanna, Dinesh Maheshwari, A.M. Khanwilkar

REP

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

TRANSFER PETITION (CIVIL) NOS. 496-509 OF 2020

UNION OF INDIA AND OTHERS ..... PETITIO

VERSUS

AGRICAS LLP AND OTHERS ETC. ..... RESPOND

WITH

TRANSFER PETITION (CIVIL) NO. OF 20
(DIARY NO. 8823 OF 2020)

JUDGMENT

SANJIV KHANNA, J.

Applications seeking intervention/impleadment are allowed.

2. Considering the nature of controversy involved, this Court, with the consent of the counsels for the parties, vide order dated 29 th June 2020 had deemed it appropriate to hear and decide challenge to the validity of the notifications dated 29 th March 2019 bearing S.O. Numbers. 1478-E,1479-E, 1480-E and 1481-E pending in several Writ Petitions filed before different High Courts. We have also examined and decided the connected challenge to the Trade Notice dated 16th April 2019 issued by the Directorate General of Foreign Trade on the ground of excessive delegation as not being in accord with sub-section (2) to Section 3 read with the bar under sub-section (3) to Section 6 of the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as 'FTDR Act').

3. Accordingly, we had heard arguments and by this common judgment would be disposing of the respective Writ Petitions, subject matter of these Transfer Petitions. This decision would also apply to the Writ Petitions filed by the intervening applicants.

4. For the sake of convenience, we would be referring the Central Government and the authorities collectively as 'the Union of India' and the Writ Petitioners synchronously as 'importers'. For clarity and wherever necessary we have referred to the Directorate General of Foreign Trade, as the 'DGFT'. DGFT is an authority constituted under the FTDR Act and appointed by the Central Government to advise them on foreign trade policy and is responsible for carrying out that policy.

A. Factual background and legal issues.

5. The Union of India, vide Notification dated 29 th March 2019, had exercised the powers conferred to it under Section 3 of the FTDR Act, read with paragraphs 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020 and amended the import policy conditions of items of Chapter 7 of the Indian Trade Classificatio`n (Harmonized System), 2017, Schedule-I (Import Policy) as under:

> "S.O. 1478(E).- In exercise of powers conferred by section 3 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1922), read with paragraphs 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020, as amended from time to time, the Central government hereby amends the Import Policy Conditions of items of Chapter 7 of the Indian Trade Classification (Harmonized System), 2017, Schedule-I (Import Policy), as under:
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> Exim Item Description Existing Revised Policy Code Policy Condition 0713 Beans of the SPP Restricted Import of Moong shall be subject an 3110 Vigna Mungo (L.) annual (fiscal year) quota of 1.5 lakh MT Hepper. per procedure to be notified by Directorate 0713 Split General of Foreign Trade: -
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> |---|---|---|
> | 90 10
0713
90 90 | Other | Provided that this restric
apply to Governmen
commitments under any bila
Regional Agreement or Memo
Understanding. |
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> 2. This notification shall come into force from the date of its publication in the official Gazette.
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> xx xx xx S.O. 1479(E).- In exercise of powers conferred by section 3 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1922), read with paragraphs 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020, as amended from time to time, the Central government hereby amends the Import Policy Conditions of items of Chapter 7 of the Indian Trade Classification (Harmonized System), 2017, Schedule-I (Import Policy), as under:
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> Exim Item Description Existing Existing Policy Revised Policy Code Policy Condition Condition 0713 Peas (Pisum Restricted Restricted for the During the period 1000

Sativum) including period from 1st from 1st April, 2019 Yellow peas, January, 2019 to to 31st March, Green peas, Dun 31st March, 2019 2020, total quantity peas and Kaspa of 1.5 Lakh MT of peas Peas shall be 0713 Split allowed against 90 10 licence as per the 0713 Other procedure to be 90 90 notified by Directorate General of Foreign Trade

2. This notification shall come into force with effect from 1st April, 2019.

xx xx xx S.O. 1480(E).- In exercise of powers conferred by section 3 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1922), read with paragraphs 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020, as amended from time to time, the Central government hereby amends the Import Policy Conditions of items of Chapter 7 of the Indian Trade Classification (Harmonized System), 2017, Schedule-I (Import Policy), as under:

Exim Item Description Existing Policy Revised Policy condition Code Condition 0713 Beans of the SPP Restricted. Import of Urad shall be subject to 31 90 Vigna Radiata (L.) an annual (fiscal year) quota of Wilezek 1.5 lakh MT as per procedure to 0713 Split be notified by Directorate 90 10 General of Foreign Trade:

0713 Other 90 90 Provided that this restriction shall not apply to Government's import commitments under any Bilateral or Regional Agreement or Memorandum of Understanding.

2. This notification shall come into force from the date of its publication in the official Gazette.

xx xx xx S.O. 1481(E).- In exercise of powers conferred by section 3 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1922), read with paragraphs 1.02 and 2.01 of the Foreign Trade Policy, 2015-2020, as amended from time to time, the Central government hereby amends the Import Policy Conditions of items of Chapter 7 of the Indian Trade Classification (Harmonized System), 2017, Schedule-I (Import Policy), as under:

Exim Item Description Existing Policy Revised Policy condition Code Condition 0713 Pigeon Peas Restricted. Import of Pigeon Peas (Cajanus 60 00 (Cajanus Cajan)/ Cajan)/Toor Dal shall be subject Toor Dal to an annual (fiscal Year) quota 0713 Split of 02 lakh MT as per procedure 90 10 to be notified by Directorate 0713 Other General of Foreign Trade:

90 90 Provided that this restriction shall not apply to Government's import commitments under any Bilateral

2. This notification shall come into force from 1 st April, 2019."

6. The Trade Notice dated 16th April 2019 issued by the DGFT had laid down the modalities for making applications for import of Peas, beans of Moong and Urad and Pigeon Peas and had inter alia stipulated as under:

> "a. Applications are invited online from the intending millers/refiners (having own refining / processing capacity) of pulses for its import as per ANF-2M of FTP 2015-20 to DGFT, at policy2-dgft@nic.in besides the concerned jurisdictional Regional Authorities."

7. Earlier, the Union of India had issued a notification dated 25 th April, 2018 under Section 3 of FTDR Act read with the paragraphs 1.02 and 2.01 of the Export – Import (EXIM) policy 2015-2020 by which peas were revised from 'free' to 'restricted' category for a period of three months, with a stipulation that during the period 1 st April, 2018 to 30th June, 2018 total quantity of 1 lakh MT of Yellow Peas minus the quantity already imported from 1 st April, 2018 would be allowed against licence as per the procedure to be notified by the DGFT. The words 'already imported' were defined to include shipment already arrived from 1st April,2018 to 25th April, 2018 and those shipments backed by irrevocable letter of credit or advance payments made through banking channel before 25 th April, 2018.

8. Considering the hardships faced by the traders who had made advance payments, the DGFT vide Trade Notice No. 19 dated 5 th July 2018 had allowed the import of Peas proportionate to the advance payments made before 25th April 2018. By another Trade Notice dated 6th July 2018, Peas, other than Yellow Peas, imported during the intervening period between 25 th April 2018 to 15th May 2018 and awaiting clearance at customs or consignment of Peas with Bill of Lading prior to 16 th May 2018 were permitted freely. By the third Trade Notice dated 17 th August 2018, import of maximum 125 MT of Peas per contract, irrespective of the advance payment, made before 25th April 2018, was allowed.

9. The Union of India had even earlier issued notifications dated 5 th August 2017 and 21st August 2017 revising import of beans of Urad/Moong and Pigeon Peas/Toor dal from 'free' to 'restricted' with stipulations as to annual (fiscal year) quota and requirement of a prior licence from the DGFT. By notifications dated 24 th April 2018 import of beans of Urad/Moong and Pigeon Peas/Toor dal was to remain restricted requiring a prior licence with stipulation as to annual quota for the fiscal year 2018-19.

10. M/s. Hira Traders had filed Writ Petition Nos. 15921-15924 of 2018 before the High Court of Judicature at Madras challenging Notification No. 4/2015-20 dated 25th April 2018 and Trade Notices No. 05/2018 dated 9th May 2018, No. 10/2018-19 dated 16 th May 2018 and No. 12/2018 dated 18 th May 2018 respectively. It had also prayed for permission by way of an interim order to import Peas as per the contracts. By interim order dated 28 th June 2018, the operation of Notification dated 25 th April 2018 was stayed by the Madras High Court, thereby permitting imports without an import licence.

11. Several traders had thereafter filed Writ Petitions before different High Courts challenging imposition of restrictions on import of Peas and pulses and interim orders were passed staying the notifications which had the effect of permitting imports without any restriction as to quota or licence. The primary grounds raised in the Writ Petitions before the High Courts were:

> (a) The impugned notifications issued by the DGFT had the effect of modifying or amending the EXIM policy as the specified items were withdrawn from the free category and moved to restricted category. But, the DGFT, a statutory authority under the provisions of FTDR Act, was not authorised to authenticate/issue an order amending or modifying the EXIM policy as this power vests with the Central Government in terms of sub-section (2) to Section 3, read-with sub-section (3) to Section 6 of the FTDR Act, which states that powers exercisable under Section 3, 5,15,16 and 19 of the FTDR Act cannot be delegated to the DGFT or any other officer subordinate to the Director General.
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> (b) Section 19(3) of the FTDR Act provides that every rule or every order passed by the Central Government shall be laid, as soon as may be after it is made, before each House of the Parliament while it is in session or thereafter. The impugned notifications had not been laid before the Houses of the Parliament.
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> (c) The Notifications and trade notices suffer from the vires and defects mentioned by this Court in Director General of Foreign Trade and Another v. Kanak Exports and Another.1
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> (d) The notifications and the trade notices offend the right to equality and violate Article 14 of the Constitution.

1 (2016) 2 SCC 226.

12. The Writ Petitions filed by M/s. Hira Traders were dismissed by the Madras High Court on 4th April 2019. The Bombay High Court dismissed akin Writ Petitions filed by M/s. Taj Agro Commodities Pvt. Ltd. and others on 3 rd July 2018. Similarly, Writ Petitions filed by M/s. Premium Pulses Products and others were dismissed by the Gujarat High Court on 19th December 2018. The Madhya Pradesh High Court had also dismissed similar petitions including the petition filed by M/s. Siddhi Vinayak and another, vide judgment dated 25th October 2018. Judgment of the Gujarat High Court was challenged before this Court in Special Leave Petition (Civil) No. 1922 of 2019 by M/s. Kusum Agency and the same was dismissed vide order dated 28 th January 2019. Subject matter of these Writ Petitions were the Notifications dated 5 th August 2017, 21st August 2017 and 25th April 2018 and the corresponding trade notices issued by the DGFT.

13. Notwithstanding the aforesaid dismissals, as many as 90 Writ Petitions were filed before the Rajasthan High Court at Jaipur challenging the Notifications dated 29 th March 2019 and the Trade Notice dated 16th April 2019. Similarly, Writ Petitions were filed before the High Courts of Delhi, Punjab and Haryana, Andhra Pradesh, Bombay and Calcutta. In several cases interim orders were

passed permitting the importers to import Peas/pulses notwithstanding the fact that they had not been issued authorisation/import licences or the total imports would exceed the maximum or total quantity fixed in the impugned notifications.

14. Before us, the importers had urged a new legal issue/point which was not specifically raised in the Writ Petitions; the impugned notifications were in the nature of 'quantitative restrictions' under Section 9A of the FTDR Act, which could be only imposed by the Central Government after conducting such enquiry, as is deemed fit, and on being satisfied that the "goods are imported into India in such quantities and under such conditions as to cause or threatens to cause serious injury to domestic industry." Further, in exercise of power under sub-section (3) to Section 9A the Central Government has framed the Safeguard Measures (Quantitative Restrictions) Rules, 2012, that prescribe mandatory and detailed procedure for initiation, investigation, hearing to parties and adjudication by the Authorised Officer, which statutory mandate has not been followed. Under sub-rule (4) to the above Rule, the Authorised Officer has power to initiate suo moto action if he is satisfied with the information received from any source that sufficient evidence exits regarding increased imports; serious injury or threat of serious injury to the domestic industry; and causal link between increased imports and serious injury or threat of serious injury to the domestic industry. Taking note of the submission, we had directed the parties to file brief written submissions and the propositions which they propose to canvass in the context of the issues to be dealt with by this Court. The Union of India was also asked to file a Statement/Note disclosing number of registered licences dealing with import of goods and quantity of average annual consumption of the concerned goods in the country. By another order dated 2 nd July, 2020 the Union of India was directed to file an affidavit clearly stating whether the impugned notifications are in the nature of 'quantitative restrictions' and if so whether the procedure under Section 9A of the FTDR Act read with Safeguard Measures (Quantitative Restrictions) Rules, 2012 had been followed and to produce the relevant record thereof. We shall elaborate and decide the argument subsequently.

B. Discussion on the challenge to the role and authority of the DGFT to issue the Notifications and Trade Notice and interpretation of the words "total quantity".

15. At the outset, we must record that the importers, and in our opinion rightly, have not raised the contention that the DGFT could not have notified the impugned notifications. The notifications themselves record that they were published by the Ministry of Commerce and Industry, Department of Commerce, Directorate General of Foreign Trade. The first paragraph of the notification states that they had been issued by the Central Government in exercise of powers conferred under Article 77 of the Constitution. Clearly, the notifications were issued by the Central Government, and not the DGFT that had performed the ministerial act of publication. The decision to amend and issue the notification was of the Central Government. Neither Section 3(2) nor Section 6(3) of the FTDR Act was violated. This Court in Delhi International Airport Limited v. International Lease Finance Corporation and others2, had referred to Articles 77 and 166 of the Constitution and held that the Constitution stipulates that whenever executive action is taken by way of an order or instrument it shall be expressed to be taken in the name of the President and Governor in whose name the executive power of the Union and the States, respectively, are vested. Article 77 does not provide for delegation of any power, albeit under sub-section (3) of Article 77, the President is to make Rules for

more convenient transaction of business and allocation of same amongst Ministers. Under the Government of India (Transaction of Business) Rules, 1961, the government business is divided 2 (2015) 8 SCC 446 amongst Ministers and specific functions are allocated to different Ministries. The Director General of Foreign Trade is an ex officio Additional Secretary in the Government of India and is appointed by the Central Government under sub-section (1) to Section 6 of the FTDR Act to advise the Central Government in formulation and carrying out the Foreign Trade Policy. Wherefore, even the website of the Ministry of Commerce and Industry, Department of Commerce, states that the DGFT is an agent of the Central Government and attached office to it. Further, clause (2) of Article 77 provides that validity of an order or instrument made or executed in the name of the President, authenticated in the manner specified in the Rules made by the President, shall not be called in question on the ground that it is not an order or an instrument made or executed by the President. Therefore, the contention of issuance of the impugned notification sans authority, cannot be sustained.

16. FTDR Act vide Section 3(2), as elucidated and examined below, authorises the Central Government to prohibit, restrict or otherwise regulate the import or export of goods, by an order published in the Official Gazette. FTDR Act vide Section 11(1) prohibits imports or exports of goods in contravention of the FTDR Act, the rules and orders made thereunder and the EXIM Policy. Section 5 of the FTDR Act authorizes the Central Government to formulate and announce the EXIM Policy by notification in the Official Gazette. Under Section 11(2) of the FTDR Act, when a person makes or abets or attempts to make any import or export in contravention of the FTDR Act, any rule or order made thereunder or the EXIM policy, he is liable to pay penalty upto Rs.10,000/- or five times the value of the goods, services or technology, whichever is greater. Section 11 of the Customs Act,1962 provides that the Central Government may by a notification in the Official Gazette prohibit, absolutely or subject to conditions as specified, import or export of any good. The listed purposes are wide and range from conservation of foreign exchange and safeguarding of balance of payments, avoiding shortage of goods, prevention of surplus of any agricultural or fisheries product, prevention of serious injury to domestic production, establishment of any industry and lastly compendiously includes “any other purpose conducive to the interest of the general public”. Under clause (d) to Section 11 of the Customs Act goods imported or exported (or attempted to be imported or exported) contrary to any prohibition are liable to confiscation.

17. We would also without any hesitation reject the contention raised by some of the importers that the impugned notification is illegal because of vagueness or allows restricted quantity of 1/1.5 lakh MT of Peas (Pisum Sativum) including Yellow Peas, Green Peas, Dun Peas and Kaspa Peas as against a licence, meaning thereby each licensee is allowed to import the maximum quantity specified in the notification. In other words, the total quantity specified in the notification is per licensee and not for the total imports of the commodity specified in the notification. The submission has no merit as the notification expressly uses the expression ‘total quantity’ of the commodity specified which could be imported. There is no ambiguity or vagueness in the notifications, relevant portions of which have been quoted above. Even otherwise the expression ‘total quantity’ cannot be construed as quantity per licence issued as the number of licences issued concerning the subject goods could be numerable (as per the Union of India 2248,1016 and 2915 licences were issued in 2019-20 for import of Tur, Moong and Urad dals against restricted quota of 4,1.5 and 4 lakh MT,

respectively). If each licence holder is allowed to import 1/1.5 lakh MT of Peas, the total import would well exceed the total annual consumption after we account for the production within India. In our opinion, the plea and interpretation of the importers if accepted will not only be contrary to the express language of the notification but would frustrate the intent and object of restricting the imports of the stated goods by prescribing a quota. We decline and would not accept this farfetched and somewhat drivel interpretation of simple and straight forward words.

18. We would also reject the contention raised by the importers that the Trade Notices issued by the DGFT violate Sections 3 and 5 read with sub-section (3) of Section 6 of the FTDR Act as they had the effect of superseding the Notifications or imposing a new criterion and eligibility condition not envisaged by the notifications. The legal effect of the notifications was to amend the EXIM policy whereby the specified commodities would henceforth not be 'free' (importable without restriction) but would fall in the restricted category. Once the commodities were shifted to the restricted category, the requirement of licence would flow from the mandate of Section 3 of the FTDR Act read with Rule 4 of the Foreign Trade (Regulation) Rules, 1993. Rule 4 reads as under:

> "4. Application for grant of licences– A person may make an application for the grant of a licence to import or export goods in accordance with the provisions of the Policy or an Order made under section 3." Further, the EXIM Policy regulates the restricted goods under Paragraphs 2.04, 2.08 and 2.10 of Policy, which read as under:
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> "2.04 Authority to specify Procedures DGFT may specify procedure to be followed by an exporter or importer or by any licensing/Regional Authority (RA) or by any other authority for purposes of implementing provisions of FT (D&R) Act, the Rules and the Orders made there under and FTP. Such procedure, or amendments, if any, shall be published by means of a Public Notice.
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> xx xx xx 2.08 Export/Import of Restricted goods/Services Any goods/service, the export or import of which is 'Restricted' may be exported or imported only in accordance with an Authorisation/Permission or in accordance with the procedure prescribed in a Notification/Public Notice issued in this regard.
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> xx xx xx
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> 2.10 Actual User Condition
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> Goods which are importable freely without any 'Restriction' may be imported by any person. However, if such imports require an Authorisation, actual user alone may import such good(s) unless actual user condition is specifically dispensed with by DGFT." Paragraph 2.08 states that any goods or services, import or export of which is restricted, can be exported or imported only in accordance with the authorisation/permission or in accordance with the procedure prescribed in the notification/public notice in this regard. Paragraph 2.04 states that the DGFT may specify procedures to be followed by an exporter or an importer or by a

> licencing/regional authority, etc. for the purpose of implementing provisions of the FTDR Act, the rules and orders made thereunder. Such procedures or amendments, if any, shall be published by means of a public notice. Paragraph 2.10 sets the matter beyond controversy as it states that the goods which are freely importable without a restriction may be imported by any person. However, if goods require authorisation, 'actual user' 3 alone may import such goods. However, the DGFT can dilute and dispense with the 'actual user' condition.

19. The effect of the Notifications, as noticed and beyond doubt, is to bring the specified commodities from free to the restricted category and therefore the imports in question would require a prior authorisation for import. The requirement of licence is nothing but authorisation. Therefore, in terms of paragraph 2.10, the imports of the specified commodities would only be by the 'actual user', unless the 'actual user' condition was specifically 3 9.03 "Actual User" is a person (either natural or legal) who is authorized to use imported goods in his/its own premise which has a definitive postal address.

(a) "Actual User (Industrial)" is a person (either natural & legal) who utilizes imported goods for manufacturing in his own industrial unit or manufacturing for his own use in another unit including a jobbing unit which has a definitive postal address.

(b) "Actual User (Non-Industrial)" is a person (either natural & legal) who utilizes the imported goods for his own use in:

> (i) any commercial establishment, carrying on any business, trade or profession, which has a definitive postal address; or
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> (ii) any laboratory, Scientific or Research and Development (R&D) institution, university or other educational institution or hospital which has a definitive postal address; or
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> (iii) any service industry which has a definitive postal address.

dispensed with or diluted by the DGFT. The Directorate by specifying that the licence would be issued to the miller or refiner has, therefore, just clarified that the 'actual user' alone will be permitted to import the restricted goods mentioned in the notification for which a prior authorisation or licence is required. The importers are traders and it is not the case of any of the importers that they are the 'actual users'. Further, none of the importers have applied for a licence or authorisation for import of the restricted commodities. Violation of clause 9.03 of the EXIM Policy defining the expression 'Actual User', is neither alleged nor argued before us.

20. The importers have raised the contention that the expression 'if such imports' used in the second sentence of paragraph 2.10 only qualifies the first sentence of paragraph 2.10. We do not accept the contention, for paragraph 2.10 consists of two parts. The first part relates to goods which are freely importable without any licence and states that such goods that can be imported by any person. The

second part refers to such imports which require authorisation and not the imports which are freely importable without any restriction. 'Actual user' condition, therefore, applies by default when imports require an authorisation. However, the DGFT can specifically dispense with or dilute the 'actual user' condition.

C. Section 9A of the FTDR Act and it's interpretation.

(i) General Agreement on Tariff and Trade – 1947 and 1994.

2. Conference at Bretton Woods, New Hampshire in 1944 lead to establishment of the 'International Monetary Fund' and the 'World Bank', but the attempt to establish 'International Trade Organisation' to develop and coordinate international trade faltered and was finally given up in 1950. However, multilateral trade negotiations had continued with the objective to prepare a multilateral treaty containing general principles of international trade and a schedule of tariff reductions. By the end of 1947, the work on the General Agreement on Tariff and Trade ('GATT'), 1947 and tariff reduction was finalised and agreed upon. Interim commission of the 'International Trade Organisation' became the GATT Secretariat based in Geneva, Switzerland. On or about 8 th July 1947, Government of India became a signatory and ratified GATT-1947. However, GATT-1947 is considered to be a failure or at best had a limited impact. Most jurists and economists hold that the GATT-1947 suffered from 'birth defects' as it did not have a legal personality, lacked established procedures and organizational structure in the absence of a charter; had 'provisional application' as it had provisions permitting contracting parties to maintain legislations in-force inconsistent with the 'grandfathering rights' and there was ambiguity and confusion about the GATT's authority and decision making ability 4.

3. What followed was several years of intense negotiations involving over 100 nations that finally ended in 1994 at Marrakesh, Morocco, with a multilateral international treaty of over 400 pages of basic text with substantive rules and tariff schedules. The final act signed exceeded 26,000 pages. This treaty popularly known as GATT-1994 was signed by 128 countries including India on 1 st January 1995. On the same day, the World Trade Organisation (WTO), an institution with a secretariat and staff, replaced GATT and came into existence, as the international organisation for overseeing and regulating functioning of the multilateral trade system. GATT-1994 in nutshell is a rule-oriented package consisting of multilateral trade agreements annexed to a single document and works on the basis of single undertaking approach whereby all agreements annexed become binding on all the members as single body of law. The main agreement consists of 4 The World Trade Organization, law, practice and policy Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis, and Michael Hahn, 3rd Edition 2015 at page Nos. 2 – 3. the preamble and XVI articles establishing the WTO, four annexures and declarations, decisions and understandings. Annexure I to the multilateral agreement is divided into three parts. Annexure 1A consists of the GATT-1994 and twelve other agreements on agriculture; application of sanitary and phytosanitary measures; textiles and clothing; technical barriers to trade; trade related investment measures; anti-dumping duty; rules of customs valuation; rules of pre-shipment valuation; rules of origin; import licensing procedures; subsidies and countervailing measures; and safeguards. Article II of GATT- 1994 limits tariff charges to those agreed in the Schedules of Concessions, while Article I lay down the principle

of Most- Favoured-Nation giving benefit of the concessions to all WTO members. Article III mandates requirement of national treatment of import with respect to taxes and regulations. Articles VI and XVI relate to subsidies, antidumping and countervailing duties. Article VII incorporates rules on valuation for customs purposes. Article XI, which we shall subsequently examine, prohibits quotas, import or export licences and other non-tariff measures, with some exceptions. Annexure 1A includes schedule of concessions from each major trading country and a general interpretative note that provides that in case of a conflict between provisions of GATT- 1994 and another Annexure A-1 agreement, the provisions of latter would control. Annexure 1B consists of the General Agreement on Trade in Services. Annexure 1C consists of the Agreement on Trade Related Aspects of Intellectual Property Rights. Annexure 2 consists of the Understanding on Rules and Procedures Governing Settlement of Disputes, referred to as the Dispute Settlement Understanding, providing mechanism for resolution of trade disputes among WTO members. Annexure 3 establishes the trade policy review mechanism, with procedure for periodic review of compliance with the WTO agreement by each member. Annexure 4 consists of plurilateral trade agreements binding only on the parties that have accepted them.

4. GATT-1994 also has provisions that allow and permit exceptions.

There are exceptions to quotas for balance-of-payments purposes in Article XII, XIII, XV and XVII, Section B, exceptions for developing countries vide Article XVIII and Part IV and exception for health, safety, protection of natural resources and other matters in Article XX. Article XIX, which we would again refer to, is an exception and sometimes referred to as the escape clause, that provides emergency action where serious injury is caused or threatens domestic industry. There are exceptions for national security vide Article XXI, customs unions and free trade areas vide Article XXIV, waivers by the contracting parties vide Article XXV and 'opt out' option on 'one-time basis' when a new member joins GATT vide Article XXXV5.

5. The 'Marrakesh Agreement' enacts and incorporates rules-

oriented approach regulating the conduct of the WTO members and are designed to ensure that the tariff concessions and the multilateral trade treaty works as intended and not undermined. Articles XXII6 provides for sympathetic consideration and consultation and satisfactory solution with respect to any matter affecting the operation of GATT-1994. Article XXIII 7 allows a 5 The World Trade Organization, law, practice and policy Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis, and Michael Hahn, 3rd Edition 2015 at page No. 3. 6 XXII. Consultation

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement. 2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

7 XXIII. Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in GATT contracting party to make a complaint should it consider that another contracting party is directly or indirectly nullifying, impairing the GATT-1994 or otherwise impeding attainment of its objective: (a) by failure in carrying out its obligations; (b) by measures, even when they are not in conflict with GATT-1994; and (c) in any other situation. These Articles emphasise on the need for consultation, withdrawal of conflicting measures and mutual satisfactory solution of the matter by the contracting parties concerned, consistent with the GATT-1994. Albeit on failure to reach a satisfactory adjustment within reasonable time or in case of (c) (supra), the matter is to be referred to the Contracting Parties to investigate and make recommendations to the offending party or make a ruling on the matter, as appropriate. As the question of invocation and jurisdiction of the national or domestic court arises for consideration in the present case, we would like to slightly elaborate on the dispute resolution mechanism in Annexure 2. It contains 27 Articles totalling about 143 paragraphs and four appendices. For the present case, it would be suffice to record that the WTO, at the top, consists of Ministerial Conference cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary[1] to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him. which meets not less than every two years. Next there are four councils, including the General Council which has an overall supervising authority and to carry out many functions of the Ministerial Conference. In addition, we have Council for Trade Inputs, Council for Trade and Services, and Council for Trade Related Aspects of Intellectual Property Rights. The General Council, as per the WTO Charter, discharges the responsibility of the Dispute Settlement Body (DSB). Thus, the WTO Charter adopts a legalistic and a rule-oriented approach for

resolving issues relating to violation of the GATT agreements. The DSB establishes Panel(s) and on adoption of Panel (and the Appellate Body) reports, provides for implementation of the recommendation and rulings, and can authorise action for failure to comply with the recommendation(s) and ruling. The DSB, though a part of the General Council, has its own Chairman and follows separate procedures. The Panels are normally composed of three persons, and in exceptional cases five, who are well qualified government or non-government individuals selected from a roaster of persons suggested by WTO members. The panel members serve in their individual capacities and not as representatives of WTO members. The Appellate Body reviews Panel decisions. The Appellate Body is a standing institution composed of seven persons appointed by DSB for four-year term. Members of the Appellate Body must be persons with recognised authority with demonstrated expertise in law and international trade who are not affiliated with any government. Membership of the Appellate Body is broadly representative of the membership of the WTO. The procedure adopted for the dispute resolution mechanism is to facilitate prompt settlement of situations with the objective and purpose that the 'Marrakesh Agreement' is preserved and not nullified or impaired.

(ii) Obligations of the contracting party and effect of international treaty, namely, GATT-1994 on the domestic law.

6. Application of treaties into national legal systems and the hierarchical status of the norms to be so applied are extraordinarily complex and vary from country to country depending upon constitutional and other municipal rules. Further, a number of legal and constitutional issues regarding international treaties arise in domestic law, like the power to negotiate, sign and exit a binding international obligation or treaty, validity of a treaty under the national constitutional law, power to implement the treaty obligations and applicability of treaty in domestic law including the principle of invocability or justiciability as contrasted from direct applicability and hierarchy of norms in domestic law where the treaty norms conflict with the norms of the domestic law. There is no uniformity in approach on these aspects as there are different national systems of treaty applications 8. Two aspects relevant in the present case are; (i) applicability of the international treaty in domestic law and (ii) 'invocability' of the treaty in municipal law and before the municipal courts.

7. In spite of there being different constitutional and statutory approaches on applicability, the States as signatories to the international treaty are under an obligation to act in conformity and bear responsibility for breaches, be it as a consequence of legislative enactment, executive action or even judicial decisions. The State cannot plead and rely upon internal law including judicial decisions as a defence to a claim for breach of an international obligation. Acts of legislation, executive measures and judicial decision making are not treated as third party acts for which the State is not responsible. The national law, executive mandate and action and the decisions of the domestic courts are facts which express the will and constitutes activities of the State. In international law, municipal laws cannot prevail upon the treaties as internal actions must comply with the international obligation. They may constitute breach of the treaty. 8 Prof. John. H. Jackson in his essay- Status of Treaties in Domestic Legal Systems; a policy analysis.

8. Thus, breach of a stipulation in international law cannot be justified by the State by referring to its domestic legal position. This rule of international law is unexceptionable and prosaic, as the contra view would permit the international obligations to be evaded by the simple method of domestic legislation, executive action or judicial decision. Contracting States are under an obligation to act in conformity with the rules of international law and bear responsibility for breaches whether committed by the legislature, executive or even judiciary. In a way, therefore, international treaties are constraint on sovereign activity, albeit voluntarily agreed.

9. For the purpose of GATT-1994, municipal laws are evidences of fact, including evidence of conduct in violation of the norms and objective of the treaty. At the same time, failure to enact an internal domestic law in conformity with the international obligation is not a breach of international law, unless there is such requirement and obligation created by the international treaty. In the absence of any such binding clause, breach arises only when the State concerned fails to observe its obligation on a specific occasion.

10. Various theories have been put forward to explain applicability of international customary and treaty law in domestic law. The dualist position is that the international municipal law operates separately and before any rule or principle of international law can have effect within the domestic jurisdiction, it must be expressly or specifically transformed into municipal law by use of appropriate constitutional machinery. Dualism stresses that international law and municipal law exist separately and cannot have effect on or overrule the other. Consequently, the municipal laws and international laws can operate simultaneously as they regulate different subject matters. International law is between sovereign States, while the municipal law applies within the State and regulates legal relationship between the citizens/subjects inter se and the citizen/subject and the State. Monistic legal systems include international treaties in domestic law. Monism takes the form of assertion of the supremacy of the international law even within the national sphere, with the understanding and belief that an individual is a subject of international law. International norms provide the basic norms for the national legal order, and both are a part of the same systems of norms.

11. Most jurists draw distinction between 'direct application' of treaties in domestic law, and national legal systems that mandate and require 'act of transformation' for an international treaty to apply and be a part of domestic law. 'Direct application' means and mandates that the treaty norms, either wholly or to some extent, are directly treated as norms of domestic law and enjoy the statutory law status by default in the domestic legal system. The term 'direct application' will also cover situations in which government or different levels of government utilise treaty norms as part of domestic jurisprudence and is not limited to situations in which private parties can sue on the basis of the treaty norms. As explained below, there is distinction between direct application and 'invocability'. 'Act of transformation' principle means and implies that an international treaty is not directly applicable in the domestic law system and requires provision in the domestic rules before it is applied. 'Transformation' is a word of wide amplitude and does not refer to mere implementation as it includes the right of the country to adopt, amend or modify the treaty language into domestic jurisprudence. The 'act of transformation' is different from 'direct application' as in the former the treaty is not received and treated as part of domestic jurisprudence until it is published and made

part of the domestic jurisdiction in the same manner as other law.

12. The Constitution of Netherlands is generally regarded as monistic since it expressly provides that certain treaties are directly applied and the treaties are superior to all law including constitutional laws. The 1958 Constitution of France also calls for the direct application and a higher status for treaties than later legislations. Similar provisions are to be found in different ways in the Constitutions of Belgium and Switzerland. Under the United States jurisprudence, a differentiation is made between 'self- executing treaties' which can be directly applied and 'non-self- executing treaties'9. Courts have ruled that a directly self- executing treaty has same status as federal laws and the latest in time therefore prevails. Consequently, a later internal federal statue will prevail over the international agreement. GATT-1994 in the United States legal system is a 'non-self-executing treaty'. The European Union is established by two treaties namely the Treaty of European Union and the Treaty on the Functioning of the European Union. Member States have attributed the European Union with competence that may either a-priori render the 9 Prof. John. H. Jackson in his essay-Status of Treaties in Domestic Legal Systems; a policy analysis.

pertinent state activity incompatible with European law or may, through use of such legal title, pre-empt the states from continuing to act or legislate. This could lead to exclusive European Union external competence even in the area of shared internal competence. European Union Law enjoys primacy over the laws of the member states and may have direct effect. Union legislators are on equal footing and are directly elected to the European Parliament and the Council for the European Union. However, both European Union and member States are members of the WTO and are contracting parties to GATT-1994. International agreements concluded by European Union become integral part of the European Union's legal order and are hierarchically positioned between the two founding treaties and the ordinary secondary legislation, which principle applies to GATT-1994. On this basis it has been held that the European Union law is to be interpreted in light of the WTO obligation to ensure GATT-1994 consistent interpretation of the European Union legislation. At the same time, authors and jurists have observed that individuals and member States challenge for GATT- 1994 incompatibility secondary legislation have received different answers as in some cases it has been held that international agreement will only be granted direct effect if the provisions are capable of conferring rights on citizens of the community which they can invoke before the court10. (Aspect of 'invocability' has been separately examined below.)

13. United Kingdom, being a parliamentary democracy, the treaties generally do not have direct statute like application, though they may have other internal effects. United Kingdom and other parliamentary democracies, like Canada and Australian systems, are generally considered as prime example of a dualist system. In United Kingdom, the Crown is the constitutional authority to enter into treaties and this prerogative power cannot be infringed by the courts. Further, treaties cannot operate by themselves and require passing off an enabling statute. Lord Oliver in the House of Lords decision in Maclaine Watson & Co. Ltd. v. Department of Trade and Industry & Anr.11 had noted:

> "...as a matter of the constitutional law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in

> domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation." 10 The World Trade Organization, law, practice and policy Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis, and Michael Hahn, 3rd Edition 2015 at page Nos. 33–40. 11 (1989) 3 All ER 523 Except to the extent that a treaty becomes incorporated into the laws by a statute, the courts in United Kingdom have no power to enforce treaty rights and obligations at the behest of foreign government or even a citizen of the United Kingdom. It has been also held that decision as to whether the terms of the treaty have been complied with are matters exclusively for the Crown as 'the court must speak with the same voice as the executive' 12. This principle is subject to the exceptions in cases where reference to the treaty is needed to explain the relevant factual background in cases where terms of the treaty are incorporated in a contract or the legislation refers to a relevant but un-incorporated treaty.

However, an unincorporated international treaty can give rise to legitimate expectations that the executive, in the absence of statutory or executive indications to the contrary, will act in conformity with the treaty. In all other cases, rights and duties of the British subjects are affected by an Act of Parliament which is necessary for the provisions of the particular treaty to be operative within the United Kingdom. Further and at the same time, there is a presumption in English law that legislation is to be construed as to avoid conflict with international law. This specifically applies when interpretation to the Act of Parliament is in question, i.e. while interpreting the enactment as a consequence of the 'act of 12 Lonrho Exports v. ECGD, [1998] 3 W.L.R 394.

transformation'. The courts would intend to bring the treaty into effect if the provisions are unambiguous unless they have no choice. In United Kingdom, the legislature is required to enact laws, that incorporate and transform treaties or treaty norms into domestic law. Variation of this approach is to be found in other countries like Germany and Italy. Thus, there is great diversity of national constitutional systems regarding international treaty application.

14. It would be now appropriate to refer to the principle of 'invocation'.

Invocability in simple terms refers to justiciability; admissibility of a claim before the national courts. It is not connected with the defence or merits of the defence. In case where an 'act of transformation' is required, treaties may partially or entirely become part of the domestic law. Where the treaty or portion thereof become a part of the domestic law by 'act of transformation', it is obvious that only the part incorporated or transformed into domestic law is invocable and justiciable and not the parts that are not codified into domestic law. However, invocability can embrace several ideas which are intertwined and is of specific concern in cases of constitutions allowing direct application. Here 'invocability' is a generic term which means to embrace a small inventory of means of judicial control over the use in a particular law suit of the direct applicability of the treaty. As in case of 'act of transformation', even in direct application cases, some jurisdictions accept the principle of partial direct application and, therefore, the treaty is directly applicable for some purposes and not others. Professor John H. Jackson, a leading jurist on this subject, whose

treatise and essays have helped us understand the GATT and the complexities, in his essay 'Status of Treaties in Domestic Legal System; A Policy Analysis' referring to 'invocability' even in cases of direct application in domestic law, has observed as under:

> "Even when the rule of direct application covers most, or theoretically all, treaties or certain broad categories of treaties, courts will find ways to avoid applying the treaty norm in particular cases, perhaps by relying on one or another concept that can be lumped under the rubric of invocability (e.g. standing), or by holding that the treaty norm is designed to constrain or assist certain government agencies and not private litigants. Or the court may refuse to apply a treaty directly because it is not "specific and precise" enough for that purpose, a concept akin to "justiciability". Other disqualifying concepts may also be employed."

(iii) Legal position in India.

15. The law in India is not very different from other Commonwealth Countries. Article 73 of the Constitution delineates the extent of executive power of the Union which extends to all matters with respect to which the Parliament has the power to make laws and it extends to the exercise of such rights, authority and jurisdiction as are exercisable by the Central Government by virtue of any treaty or agreement. Proviso to the Article deals with limitation of the executive power under sub-clause (a) with which we are not concerned. Chapter I of Part XI of the Constitution, captioned 'Relations between the Union and the Sates' vide different Articles stipulates that in respect of List 1 of the 7th Schedule the Parliament has exclusive power to make laws for the whole or any of the territory of India; in respect of List II (State List) the legislatures of the States have exclusive power to make laws for the whole or any part of the States; and in respect of List III (Concurrent List) the Parliament and the State Legislatures have the power to make laws. For the purpose of the present case, Article 253 of the Constitution is important as it states that notwithstanding anything in the foregoing provisions of this Chapter, the Parliament has the power to make laws for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or decisions made at any international conference, association or body.

16. Constitutional Bench of this Court in Maganbhai Ishwarbhai Patel Etc. v. Union of India13 had examined the question whether the Government of India should be restrained from ceding without approval of the Parliament the 'undemarcated area' in the Runn of Kutch to Pakistan as awarded in the award dated 19 th February 1968. In the judgment authored by Hidayatullah, C.J., on behalf of himself and three other Judges, he referred to the earlier decisions of this Court in In re. Berubari Union (I) 14, Rai Sahib Ram Jawaya Kapur and Others v. State of Pubjab15 and Ram Kishore Sen and Others v. Union of India and Others 16 and noticed the distinction between (i) formation of the treaty; and (ii) performance of the treaty obligation. The first is an executive act and the second a legal act if domestic law is required. Unless the Parliament assents to the treaty and accords its approval to the first executive act, the performance has no force of law though the treaties created by the executive action bind the contracting States and, therefore, means must be found for their implementation within law. Consequently, whenever a peace treaty involves municipal execution, statutes have to be passed. While accepting the contention that precedents of this Court are 13

(1970) 3 SCC 400 14 AIR 1960 SC 845 15 AIR 1955 SC 549 16 AIR 1966 SC 644 clear that no cession of Indian territory can take place without constitutional amendment, the Constitution Bench held that the settlement of a boundary dispute cannot be held to be cession of territory. Accordingly, the decision to implement the award by exchange of letters treating the award as an operating treaty by demarcating the correct boundary line was within the executive power of the government, and no constitutional amendment was required.

17. More important for our purpose is the concurring opinion of Shah, J. who had quoted the effect of international treaty on the rights of the citizen/subjects of the State as stated in Oppenheim's International Law, 8th Edition, in the following words:

> "…Such treaties as affect private rights and, generally, as required for their enforcement by English Courts a modification of common law or of a statute must receive parliamentary assent through an enabling Act of Parliament. To that extent binding treaties which are part of International Law do not form part of the law of the land unless expressly made so by the Legislature.
>
> (page 40) The binding force of a treaty concerns in principle the contracting States only, and not their subjects. As International Law is primarily a law between States only and exclusively, treaties can normally have effect upon States only. This rule can, as has been pointed out by the Permanent Court of International Justice, be altered by the express or implied terms of the treaty, in which case its provisions become self- executory. Otherwise, if treaties contain provisions with regard to rights and duties of the subjects of the contracting States, their Courts, officials, and the like, these States must take steps as are necessary according to their Municipal Law, to make these provisions binding upon their subjects, Courts, officials, and the like.
>
> (page 924)" Referring to the power under Article 73 of the Constitution and the power of the Parliament to make laws in terms of Article 253, Shah, J. had further observed:
>
> "80…By Article 73, subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which the Parliament has power to make laws. Our Constitution makes no provision making legislation a condition of the entry into an international treaty in times either of war or peace. The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. The Executive is qua the State competent to represent the State in all matters international and may by agreement, convention or treaties incur obligations which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the State. If the rights of the

> citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty."

18. It was also clarified that Article 253 deals with the legislative power of the Parliament and thereby confers power on the Parliament which it may not otherwise possess. This provision does not seek to circumscribe the extent of power conferred under Article 73. In other words, in consequence of the exercise of executive power, rights of the citizens or others are restricted or infringed, or laws are modified, the exercise of power must be supported by legislation; where there is no such restriction, infringement of the right or modification of the laws, the executive is competent to exercise the power. The dictum in Maganbhai Ishwarbhai Patel (supra) can be summarised17 as under:

> "(i) The stipulations of a treaty duly ratified by the Central Government, do not by virtue of the treaty alone have the force of law.
>
> (ii) Though the Executive (Central Government) has power to enter into international treaties/agreements/ conventions under Article 73 (read with Entries 10 & 14 of List I of the VII Schedule to the Constitution of India) the power to legislate in respect of such treaties/agreements/conventions, lies with Parliament.

It is open to Parliament to refuse to perform such treaties/agreements/conventions. In such a case, while the treaties/agreements/conventions will bind the Union of India as against the other contracting parties, Parliament may refuse to perform them and leave the Union of India in default.

(iii) Though the applications under such treaties/agreements/conventions are binding upon the Union of India (referred to as "the State" in Maganbhai's case) these treaties/agreements/ conventions "are not by their own force binding upon Indian nationals".

(iv) The making of law by Parliament in respect of such treaties/agreements/conventions is necessary when 17 Karan Dileep Nevatia v. Union of India, (2010) 1 Bom CR 588 the treaty or agreement restricts or affects the rights of citizens or others or modifies the law of India,

(v) If the rights of citizens or others are not affected or the laws of India are not modified then no legislative measure is needed to give effect to such treaties/agreements/conventions."

19. Even earlier in Gramophone Company of India Ltd. v. Birendra Bahadur Pandey and Others18, this Court had held as under:

> "5. There can be no question that nations must march with the international community and the Municipal law must respect rules of International law even as nations respect international opinion. The comity of Nations requires that Rules of International law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the

> Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with Act of Parliament. Comity of Nations or no, Municipal Law must prevail in case of conflict. National Courts cannot say yes if Parliament has said no to a principle of international law. National Courts will endorse international law but not if it conflicts with national law. National courts being organs of the National State and not organs of international law must perforce apply national law if international law conflicts with it. But the Courts are under an obligation within legitimate limits, to so interpret the Municipal Statute as to avoid conformation with the comity of Nations or the well- established principles of International law. But if conflict is inevitable, the latter must yield." 18 (1984) 2 SCC 534

20. In Jolly George Varghese and Another v. The Bank of Cochin19 this Court, while dealing with the application of an international covenant pertaining to prohibition of civil imprisonment on non-discharge of decree debt, observed that even though India be a signatory of a covenant and Article 51(c) of the Constitution obligates the State to "foster respect for international law and treaty obligations in the dealings of organised people with one another", the provisions of the international covenant is to be applied by an Indian Court when there is a specific provision in the Indian law. The positive commitment in the international agreement ignites legislative action at home but does not automatically make the covenant an enforceable part of the corpus juris of India. The international conventional law must go through the process of transformation into municipal law before the international treaty can become an internal law. The Court, dealing with the enforceability of the international law at the instance of individuals, observed that the remedy for breaches of International Law in general is not to be found in the law courts of the State because International Law per se or proprio vigore has not the force or authority of civil law, till under its inspirational impact actual legislation is undertaken. The individual citizens, 19 (1980) 2 SCC 360 therefore, cannot complain about their breach in the municipal courts even if the country concerned has adopted the covenants and ratified the operational protocol.

21. Afore-quoted decisions are on the legal effect of international treaties in the domestic law in India. The ratio of these decisions primarily relates to and is confined to the requirement and mandate of the need for 'act of transformation' to be a part and parcel of domestic law, which confers a right to invocability. The ratio of the above decisions has to be distinguished from decisions interpreting domestic law after the 'act of transformation' consequent to which portions of GATT-1994 stand enacted thereby conferring right of invocability to parties. The decisions referred to in paragraphs 41 to 44 and relied upon by the importers fall in the second category.

22. This Court had the occasion to examine and interpret Customs Valuation Rules, 1988 that were framed keeping in view the GATT protocol and WTO agreement in Associated Cement Companies Ltd. v. Commissioner of Customs20 and it was observed:

> "45. It will be appropriate to note that the Customs Valuation Rules, 1988 are framed keeping in view the 20 (2001) 4 SCC 593 GATT protocol and the WTO agreement. In fact our rules appear to be an exact copy of GATT and WTO.

For the purpose of valuation under the 1988 Rules the concept of "transaction value" which was introduced was based on the aforesaid GATT protocol and WTO agreement. The shift from the concept of price of goods, as was classically understood, is clearly discernible in the new principles. Transaction value may be entirely different from the classic concept of price of goods. Full meaning has to be given to the rules and the transaction value may include many items which may not classically have been understood to be part of the sale price."

23. Similarly, in State of Punjab and Another v. Devans Modern Breweries Ltd. and Another21, this Court while examining the rationale behind imposition of countervailing duty had referred to the WTO agreement to observe and hold as under:

> "305. The economic rationale is very doubtful, as the effect of a countervailing duty is to make the product more expensive in the importing country. However, there has been some level of an explanation provided. Every time a tariff barrier is negotiated and agreed on, WTO members have reasonable expectations that they can profit from the conditions of competition established in the market of the member, binding its tariff and gain market share. Moreover, members have "paid" for the binding by promising to open up their market, that is, by binding their own tariffs. WTO members may not frustrate their promises by subsidising their domestic industry producing the product for which a tariff binding has been previously offered. If this were allowed WTO members might lose the incentive to make concessions in the future. (See The World Trade Organisation — Law, Practice and Policy by Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, p. 279.)" 21 (2004) 11 SCC 26

24. In S&S Enterprise v. Designated Authority and Others 22, this Court while examining the question of levy of anti-dumping duty had referred to the terms of GATT and WTO to observe:

> "4. In our opinion, the interpretation of Rule 14(d) by Respondent 1 and the Tribunal is incorrect and contrary to its language. The imposition of anti- dumping duty is under Section 9-A of the Customs Tariff Act, 1975 and the Rules and is the outcome of the General Agreement on Tariff and Trade (GATT) to which India is a party. The purpose behind the imposition of the duty is to curb unfair trade practices resorted to by exporters of a particular country of flooding the domestic markets with goods at rates which are lower than the rate at which the exporters normally sell the same or like goods in their own countries so as to cause or be likely to cause injury to the domestic market. The levy of anti-dumping duty is a method recognised by GATT which seeks to remedy the injury and at the same time balances the right of exporters from other countries to sell their products within the country with the interest of the domestic markets. Thus the factors to constitute "dumping" are

> (i) an import at prices which are lower than the normal value of the goods in the exporting country; (ii) the exports must be sufficient to cause injury to the domestic industry."

25. In Commissioner of Customs, Bangalore v. G.M. Exports and Others23, again while examining the question of levy of anti- dumping duty, this Court had emphasised that the correct approach to the construction of a statute made in response to international treaty obligation is to give effect to the obligations in international law. If there be a difference in the language of the 22 (2005) 3 SCC 337 23 (2016) 1 SCC 91 statutory provision and that of the corresponding provision of the convention, then the statutory language should be construed in the same sense as that of the convention if the words of the statute are reasonably capable of bearing that meaning. 24 It was emphasised that the municipal law should not only carry out the treaty obligation but should be construed in a way not to be inconsistent with the terms of the treaty. This principle of interpretation is embodied in the principle that the statute needs to be construed uniformly by all member nations who are signatories and should, therefore, not be controlled by domestic precedents. The interpretation should be based on broad principles of general application in a purposive and not in a narrow literal manner. At times the answer to ambiguity can be found in the object and the structure of the convention, the language used and the subject matter with which it deals and what was sought to be achieved is a uniform international code. The legal position was summarised as under:

> "23. A conspectus of the aforesaid authorities would lead to the following conclusions:
>
> (1) Article 51(c) of the Constitution of India is a Directive Principle of State Policy which states that the State shall endeavour to foster respect for international law and treaty obligations. As a result, rules of international law which are not contrary to domestic law are followed by the courts in this country. This is a

24 The Eschersheim Anr v. The Jade Erkowit And Anr. (1976) 1 All ER 920 (HL) situation in which there is an international treaty to which India is not a signatory or general rule of international law are made applicable. It is in this situation that if there happens to be a conflict between domestic law and international law, domestic law will prevail.

(2) In a situation where India is a signatory nation to an international treaty, and a statute is passed pursuant to the said treaty, it is a legitimate aid to the construction of the provisions of such statute that are vague or ambiguous to have recourse to the terms of the treaty to resolve such ambiguity in favour of a meaning that is consistent with the provisions of the treaty.

(3) In a situation where India is a signatory nation to an international treaty, and a statute is made in furtherance of such treaty, a purposive rather than a narrow literal construction of such statute is preferred. The interpretation of such a statute should be construed on broad principles of general acceptance rather than earlier domestic precedents, being intended to carry out treaty obligations, and not to be inconsistent with them.

(4) In a situation in which India is a signatory nation to an international treaty, and a statute is made to enforce a treaty obligation, and if there be any difference between the language of such statute and a corresponding provision of the treaty, the statutory language should be construed in the same sense as that of the treaty. This is for the reason that in such cases what is sought to be achieved by the international treaty is a uniform international code of law which is to be applied by the courts of all the signatory nations in a manner that leads to the same result in all the signatory nations." This Court also referred to clause (c) of Article 51 of the Directive Principles of State Policy, which states that the State shall endeavour to foster respect for international law and treaty obligations.

26. We would also refer to Entertainment Network (India) limited and Anr. v. Super Cassette Industries Ltd and Ors. 25, wherein this Court dealt with the application of international conventions in India and observed that while interpreting the domestic/municipal laws, conventions/norms can be relied for the following purposes:

> (i) as a means of interpretation; (ii) justification or fortification of a stance taken; (iii) to fulfil spirit of international obligation which India has entered into, when they are not in conflict with the existing domestic law; (iv) to reflect international changes and reflect the wider civilisation; (v) to provide a relief contained in a covenant, but not in a national law; and (vi) to fill gaps in law.

Thereafter, reference was made on case-laws, beginning from His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Another26, wherein it was held that international conventions or the norms of international law can be used to interpret domestic law provided they are not inconsistent with domestic legislation i.e. by reason thereof, the tenor of domestic law should not be breached, and further in case of inconsistency the domestic legislation shall prevail. It was also observed that if there is no statutory law in India in the field, 25 (2008) 13 SCC 30 26 (1973) 4 SCC 225 interpretation, if any, must give a regard to the ever-changing global scenario. This principle was accordingly applied in Pratap Singh v. State of Jharkhand and Anr27 to interpret Juvenile Justice Act. It was further elucidated:

> "78. However, applicability of the international conventions and covenants, as also the resolutions, etc. for the purpose of interpreting domestic statute will depend upon the acceptability of the conventions in question. If the country is a signatory thereto subject of course to the provisions of the domestic law, the international covenants can be utilised. Where international conventions are framed upon undertaking a great deal of exercise upon giving an opportunity of hearing to both the parties and filtered at several levels as also upon taking into consideration the different societal conditions in different countries by laying down the minimum norm, as for example, the ILO Conventions, the court would freely avail the benefits thereof.
>
> 79. Those conventions to which India may not be a signatory but have been followed by way of enactment of new parliamentary statute or amendment to the existing enactment, recourse to international convention is permissible. This kind of stance is

reflected from the decisions in People's Union for Civil Liberties v. Union of India, Madhu Kishwar v. State of Bihar, Kubic Darusz v. Union of India, Chameli Singh v. State of U.P., C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Swaminathaswami Thirukoil, Apparel Export Promotion Council v. A.K. Chopra, Kapila Hingorani v. State of Bihar, State of Punjab v. Devans Modern Breweries Ltd. and Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I." GATT-1994 is an international convention framed after great deliberation and exercise, to develop and promote international trade.

27(2005) 3 SCC 551

27. While interpreting the domestic law enshrining Human Rights (and sometimes environment issues) this Court on some occasions has relied on international conventions and treaties where the terms of any legislation are absent, not clear or are reasonably capable of more than one meaning. In such cases, where there are statutes, rules etc. the meaning which in consonance with the treaties can be relied upon, for there is a prima facie presumption that the Parliament did not intend to act in breach of international law, including State treaty obligations. Part-III of the Indian Constitution a-priori incorporates and recognises the Human Rights, consequently recourse to international conventions can be made to interpret and borrow explicit terminologies and nuances to bailiwick Human Right jurisprudence. However, in the present case we are examining an economic and fiscal legislation or rather economic policy decision taken by the Union of India. These decisions on human rights therefore would not be of much assistance.

(iv) Text of Articles XI and XIX of GATT-1994 and the statutory scheme vide Sections 3 and 9A of FTDR Act and the Safeguard Measures (Quantitative Restriction) Rules, 2012.

28. Having regard to the general law on the question of treaties and its application in domestic law in India and other countries, we would now reproduce Articles XI and XIX of the GATT-1994, which read as under:

" Article XI General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

2. The provisions of paragraph 1 of this Article shall not extend to the following:

(a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;

(b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;

(c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or

(ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or

(iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to sub-paragraph

(c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors* which may have affected or may be affecting the trade in the product concerned.

xx xx xx

Article XIX
Emergency Action on Imports of Particular Products

1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the

extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

(b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in sub-paragraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

3. (a) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(b) Notwithstanding the provisions of sub-paragraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

29. Indian Parliament, two years prior to the signing of GATT-1994, had enacted the FTDR Act which was enforced with effect from 7 th August 1992. Sections 11 to 14 of the FTDR Act came into force immediately and other provisions came into force on 19 th June 1992. The FTDR Act had repealed the Imports and Exports (Control) Act, 1947 and the Foreign Trade (Development and Regulation) Ordinance, 1992 with the stipulation that anything done or any action taken under the

Ordinance shall be deemed to have been done or taken under the corresponding provisions of the FTDR Act. The Statement of Objects and Reasons for enacting the FTDR Act, as recorded, are to acknowledge that foreign trade is the driving force of economic activity as this spurs economic growth and there is increasing interdependence and that the goals of the new policy were to increase productivity and competitiveness by ensuring that the trade policies serve as an instrument to create an environment that will provide a strong impetus to exports, facilitate imports and render export activity more profitable.

30. In order to appreciate the contentions of the parties, we would now like to reproduce Sections 3 and 9A of the FTDR Act, which read as under:

> "3. Powers to make provisions relating to imports and exports.– (1) The Central Government may, by Order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports.
>
> (2) The Central Government may also, by Order published in the Official Gazette, make provision for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order, the import or export of goods or services or technology:
>
> Provided that the provisions of this sub-section shall be applicable, in case of import or export of services or technology, only when the service or technology provider is availing benefits under the foreign trade policy or is dealing with specified services or specified technologies.
>
> (3) All goods to which any Order under sub-section (2) applies shall be deemed to be goods the import or export of which has been prohibited under section 11 of the Customs Act, 1962 (52 of 1962) and all the provisions of that Act shall have effect accordingly.
>
> (4) Without prejudice to anything contained in any other law, rule, regulation, notification or order, no permit or licence shall be necessary for import or export of any goods, nor any goods shall be prohibited for import or export except, as may be required under this Act, or rules or orders made thereunder.
>
> xx xx xx 9A. Power of Central Government to impose quantitative restrictions.– (1) If the Central Government, after conducting such enquiry as it deems fit, is satisfied that any goods are imported into India in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic industry, it may, by notification in the Official Gazette, impose such quantitative restrictions on the import of such goods as it may deem fit:

Provided that no such quantitative restrictions shall be imposed on any goods originating from a developing country so long as the share of imports of such goods from that country does not exceed three per cent. or where such goods originate from more than one developing country, then, so long as the aggregate of the imports from all such countries taken together does not exceed nine per cent. of the total imports of such goods into India.

(2) The quantitative restrictions imposed under this section shall, unless revoked earlier, cease to have effect on the expiry of four years from the date of such imposition:

Provided that if the Central Government is of the opinion that the domestic industry has taken measures to adjust to such injury or threat thereof and it is necessary that the quantitative restrictions should continue to be imposed to prevent such injury or threat and to facilitate the adjustments, it may extend the said period beyond four years:

Provided further that in no case the quantitative restrictions shall continue to be imposed beyond a period of ten years from the date on which such restrictions were first imposed.

(3) The Central Government may, by rules provide for the manner in which goods, the import of which shall be subject to quantitative restrictions under this section, may be identified and the manner in which the causes of serious injury or causes of threat of serious injury in relation to such goods may be determined.

(4) For the purposes of this section—

(a) "developing country" means a country notified by the Central Government in the Official Gazette, in this regard;

(b) "domestic industry" means the producers of goods (including producers of agricultural goods)—

(i) as a whole of the like goods or directly competitive goods in India; or

(ii) whose collective output of the like goods or directly competitive goods in India constitutes a major share of the total production of the said goods in India;

(c) "serious injury" means an injury causing significant overall impairment in the position of a domestic industry;

(d) "threat of serious injury" means a clear and imminent danger of serious injury.]

31. Section 9A of the FTDR Act is the only section in Chapter IIIA with the heading 'Quantitative Restrictions' 28 and this section was inserted by Amendment Act 25 of 2010 with effect from 27 th August 2010. Subsequently, in exercise of powers conferred by sub-section (3) to Section 9A of the FTDR Act, the Central Government had published and notified the Safeguard Measures (Quantitative Restrictions) Rules, 2012, which became applicable on the date of their publication in the Gazette of India dated 24 th May 2012, the relevant portion of which reads as under:

xx xx xx

2. Definitions

(b)"Authorised Officer" means the Authorised Officer designated as such under sub-rule(1) of rule 3; 28 The report of WTO Dispute Settlement Body's panel on "India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products" has interpreted the expression 'Quantitative Restrictions' in Art.XI of GATT,1994. The decisions of the panel are binding on parties and are not binding interpretation of WTO agreements, as they have no precedential value and the doctrine of stare decisis has no application. The reasoning being persuasive can be adopted.

(c) "increased quantity" includes increase in import whether in absolute terms or relative to domestic production;

(d) "interested party" includes –

(i) an exporter or foreign producer or the importer of goods (which is subject to investigation for purposes of imposition of safeguard quantitative restrictions) or a trade or business association, majority of the members of which are producers, exporters or importers of such goods;

(ii) the Government of the exporting country; and

(iii) a producer of the like goods or directly competitive goods in India or a trade or business association, a majority of members of which produce or trade the like goods or directly competitive goods in India;

(e) "like goods" means goods which is identical or alike in all respects to the goods under investigation, or in the absence of such goods, other goods which has characteristics closely resembling those of the goods under investigation;

(f) "quantitative restrictions" means any specific limit on quantity of goods imposed as a safeguard measure under the Act;

(g) "specified country" means a country or territory which is a member of the World Trade Organization and includes the country or territory with which the Government of India has an agreement for giving it the most favoured nation treatment;

3. Responsibility of Authorised Officer for making enquiry in respect to safeguard quantitative restrictions— (1) The Central Government shall, by notification in the Official Gazette, designate an officer not below the rank of Additional Director General of Foreign Trade as an Authorised officer for making investigation for the purpose of this rules.

(2) The Authorised Officer shall be responsible for conducting investigation, under sub-section (1) of section 9A, for the purpose of imposition of safeguard quantitative restrictions and making necessary recommendation therein to the Central Government. (3) The Directorate General of Foreign Trade shall provide secretarial support and the services of such other persons and such other facilities as it deems fit.

4. Duties of Authorised Officer .-- It shall be the duty of the Authorised Officer --

(a) to investigate the existence of serious injury or threat of serious injury to domestic industry as a consequence of increased import of a goods into India;

(b) to identify the goods liable for quantitative restrictions as a safeguard measure;

(c) to submit its findings, to the Central Government as to the serious injury or threat of serious injury to domestic industry consequent upon increased import of goods into India from the specified country;

(d) to recommend--

(i) the nature and extent of quantitative restrictions which, if imposed, shall be adequate to remove the serious injury or threat of serious injury to the domestic industry; and

(ii) the duration of imposition of safeguard quantitative restrictions and where the period so recommended is more than one year, to recommend progressive liberalisation adequate to facilitate positive adjustment; and

(e) to review the need for continuance of the safeguard quantitative restrictions.

5. Initiation of investigation.---

(1) The Authorised Officer shall, on receipt of a written application by or on behalf of the domestic producer of like goods or directly competitive goods, initiate an investigation to determine the existence of serious injury or threat of serious injury to the domestic industry, caused by the import of a goods in such increased quantities, absolute or relative to domestic production.

(2) The application referred to in sub-rule (1) shall be made in Form appended to these rules and be supported with-

(a) the evidence of -

(i) increased imports as a result of unforeseen development;

(ii) serious injury or threat of serious injury to the domestic industry; and

(iii) a causal link between imports and the alleged serious injury or threat of serious injury;

(b) a statement on the efforts being taken, or planned to be taken, or both, to make a positive adjustment to increase in competition due to imports; and

(c) a statement mentioning whether an application for the initiation of a safeguard action on the goods under investigation has also been submitted to the Director General of Safeguards, Department of Revenue.

(3) The Authorised Officer shall not initiate an investigation pursuant to an application made under sub-rule (1), unless, it examines the accuracy and adequacy of the evidence provided in the application and satisfies himself that there is sufficient evidence regarding--

(a) increased imports;

(b) serious injury or threat of serious injury; and

(c) a causal link between increased imports and alleged serious injury or threat of serious Injury.

(4) Notwithstanding anything contained in sub-rule (1), the Authorised Officer may initiate an investigation suo moto, if, it is satisfied with the information received from any source that sufficient evidence exists as referred to in clause (a), clause (b) or clause (c) of subrule (3).

6. Principles governing investigations. — (1) The Authorised Officer shall, after it has decided to initiate investigation to determine serious injury or threat of serious injury to domestic industry, consequent upon the increased import of a goods into India, issue a public notice notifying its decision which, inter alia, contain information on the following, namely:-

(a) the name of the exporting countries, the goods involved and the volume of import;

(b) the date of initiation of the investigation;

(c) a summary statement of the facts on which the allegation of serious injury or threat of serious injury is based;

(d) reasons for initiation of the investigation;

(e) the address to which representations by interested parties should be directed; and

(f) the time-limits allowed to interested parties for making their views known.

(2) The Authorised Officer shall forward a copy of the public notice to the Central Government in the Ministry of Commerce and Industry and other Ministries concerned, known exporters of the goods, the Governments of the exporting countries concerned and other interested parties.

(3) The Authorised Officer shall also provide a copy of the application referred to in sub-rule (1) of rule 5, to-

(a) the known exporters, or the concerned trade association;

(b) the Governments of the exporting countries; and

(c) the Central Government in the Ministry of Commerce and Industry:

Provided that the Authorised Officer shall also make available a copy of the application, upon request in writing, to any other interested person.

(4) The Authorised Officer may issue a notice calling for any information in such form as may be specified in the notice from the exporters, foreign producers and governments of exporting countries and such information shall be furnished by such persons and governments in writing within thirty days from the date of receipt of the notice or within such extended period as the Authorised Officer may allow on sufficient cause being shown.

Explanation.--For the purpose of this rule, the public notice and other documents shall be deemed to have been received one week after the date on which these documents were put in the course of transmission to the interested parties by the Authorised Officer. (5) The Authorised Officer shall provide opportunity to the industrial user of the goods under investigation and to representative consumer organisations in cases where the goods is commonly sold at retail level to furnish information which is relevant to the investigation including inter alia, their views if imposition of safeguard quantitative restrictions is in public interest or not.

(6) The Authorised Officer may allow an interested party or its representative to present the information relevant to investigation orally but such oral information shall be taken into consideration by the Authorised Officer only when it is subsequently submitted in writing.

(7) The Authorised Officer shall make available the evidence presented to it by one interested party to all other interested parties, participating in the investigation.

(8) In case where an interested party refuses access to or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation, the Authorised Officer may record its findings on the basis of the facts available and make such recommendations

to the Central Government as it deems fit under such circumstances.

xx xx xx

8. Determination of serious injury or threat of serious injury.— The Authorised Officer shall determine serious injury or threat of serious injury to the domestic industry taking into account, inter alia, the following principles, namely:-

> (a) in the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry, the Authorised Officer shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the goods concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment; and
>
> (b) the determination referred to in clause (a) shall not be made unless the investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the goods concerned and serious injury or threat thereof:
>
> Provided that when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports and in such cases, the Authorised Officer may refer the complaint to the authority for anti- dumping or countervailing duty investigations, as appropriate.

9. Final findings.-- (1) The Authorised Officer shall, within eight months from the date of initiation of the investigation or within such extended period as the Central Government may allow, determine whether, as a result of unforeseen developments the increased imports of the goods under investigation has caused or threatened to cause serious injury to the domestic industry, and a casual link exists between the increased imports and serious injury or threat of serious injury and recommend –

(i) the extent and nature of quantitative restrictions which, if imposed, would be adequate to prevent or remedy 'serious injury' and to facilitate positive adjustment, as the case may be;

(ii) the extent of quantitative restrictions so that the quantity of imports is not reduced to the quantity of imports below the level of a recent period which shall be the average of import in the last three representative years for which statistics are available and justification if a different level is necessary to prevent or remedy serious injury;

(iii) the quota to be allocated among the supplying countries, and the allocation of shares in the quota for such specified countries which have a substantial interest in supplying the goods;

(iv) the duration of imposition of quantitative restrictions and where the duration of imposition of quantitative restrictions is more than one year, the progressive liberalisation adequate to facilitate positive adjustment.

(2) The final findings if affirmative shall contain all information on the matter of facts and law and reasons which have led to the conclusion.

(3) The Authorised Officer shall issue a public notice recording his final findings.

(4) The Authorised Officer shall send a copy of the public notice regarding his final findings to the Central Government in the Ministry of Commerce and Industry and a copy thereof to the interested parties.

10. Imposition of safeguard quantitative restrictions.— The Central Government may based on the recommendation of the Authorised Officer, by a notification in the Official Gazette, under sub-section (I) of section 9A of the Act, impose upon importation into India of the goods covered under the final determination, a safeguard quantitative restrictions not exceeding the amount or quantity which has been found adequate to prevent or remedy serious injury and to facilitate adjustment.

11. Imposition of safeguard quantitative restrictions on non-discriminatory basis.— Any safeguard quantitative restrictions imposed on goods under these rules shall be applied on a non-discriminatory basis to all imports of the goods irrespective of its source.

12. Date of commencement of safeguard quantitative restrictions.— The safeguard quantitative restrictions levied under these rules shall take effect from the date of publication of the notification in the Official Gazette, imposing such quantitative restrictions.

13. Duration .— (1) The safeguard quantitative restrictions imposed under rule 10 shall be for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment.

(2) Notwithstanding anything contained in sub-rule (1), safeguard quantitative restrictions imposed under rule 10 shall, unless revoked earlier, cease to have effect on the expiry of four years from the date of its imposition: Provided that if the Central Government is of the opinion that the domestic industry has taken measures to adjust to such serious injury or threat thereof and it is necessary that the safeguard quantitative restrictions should continue to be imposed, to prevent such serious injury or threat and to facilitate adjustments, it may extend the period beyond four years: Provided further that in no case the safeguard quantitative restrictions shall continue to be imposed beyond a period of ten years from the date on which such restrictions were first imposed.

14. Liberalization of safeguard quantitative restrictions. – If the duration of the safeguard quantitative restrictions imposed under rule 10 exceeds one year, the restriction shall be progressively liberalised at regular intervals during the period of its imposition.

(v) Contention of the importers on Sections 3 and 9A of the FTDR Act and the response by the Union of India.

32. Before we go on the interpretation of respective sections, namely, Sections 3 and 9A of the FTDR Act, we would like to reproduce in brief the contentions of the importers. The importers submit that the FTDR Act was introduced and enacted for development and regulation of foreign trade by facilitating imports and augmenting exports from India and to make India competitive in conformity with GATT-1994 obligations. Section 3 of the FTDR Act reflects the said position and incorporates Article XI of the GATT-1994 which stipulates that there shall not be any provision or restrictions other than duty, taxes and other charges by any contracting party. Section 9A is almost a replica of Article XIX of the GATT-1994 and this is the only provision which confers power on the Central Government to impose 'quantitative restrictions' on imports. It, therefore, follows that unless the conditions of Section 9A of the FTDR Act are satisfied and the procedure prescribed under the Rules is followed, no 'quantitative restrictions' could have been imposed by the Union of India through the medium of the impugned notifications. Section 9A is a special provision dealing with 'quantitative restrictions', whereas Section 3 is a general provision. The Union of India cannot take recourse to Section 3 when conditions of Section 9A are not satisfied and impose 'quantitative restrictions', otherwise, Section 9A would become redundant for the reason that Union of India could always impose 'quantitative restrictions' under the general power. This would be in conformity with the India's obligation under GATT-1994 and the domestic or municipal law must be construed in consonance with the GATT-1994 obligations.

33. For quantitative restrictions to be imposed under Section 9A of the FTDR Act, following conditions must be cumulatively satisfied, namely, (a) increased quantities of imports (b) that have caused

(c) serious injury or threaten to cause serious injury to domestic industries. Further, as per the procedure prescribed by the Rules, the Appropriate Authority has to initiate proceedings, investigate, hear parties and adjudicate on the satisfaction of the conditions. In the present case, there has been no increase in imports as per the following table:

> 1 Apr – 31 Mar Peas in metric ton 2014-2015 19,51,973 2015-2016 22,45,390 2016-2017 31,02,75729 2017-2018 28,77,032 2018-2019 8,51,408 2019-2020 6,66,69630 'Quantitative restrictions' were imposed in the financial year 2018-19. Further, the Union of India has themselves stated that there was serious injury to the domestic industry due to import of pulses and Peas. Our attention was drawn to paragraphs 5 and 9 29 As per the Union of India, the import of Peas in 2016-17 was 31,72,758 MT. 30 As per the Union of India, the import of Peas in 2016-17 was 6,52,607 MT.

of the written submissions filed by the Union of India, which read as under:

> "5. It is submitted that the farmers are one of the most important stakeholders in matters related to import / export of agricultural goods and the Government is

> required to strike a balance between the interests of domestic producers and importers. Thus, whenever it is observed that large scale imports of an item is adversely impacting the interest of the domestic producers, due to fall in prices in the local market, the Government in consultation with stakeholders concerned, tries to uphold the interests of domestic producers through suitable measures like restriction on import quotas etc. Xx xx Xx
>
> 9. It is submitted that since domestic production of pulses / grams has been very good, therefore the Government has imposed restrictions on the import of peas. Yellow Peas which are largely imported to India are mainly grown in countries like Canada, Russia, Ukraine etc. Due to agro-climatic conditions of these countries they export peas in bulk. Therefore, price of Yellow Peas is lower in comparison to other imported / domestically available pulses, including Gram. It is to be noted that the end use of Gram is mainly flour, commonly known as "Besan", used in preparations of Indian savouries. As per industry estimates, about 70% of the Gram produced is used in manufacture of Besan. It is informed that Yellow Peas are a near perfect substitute for Gram in the making of Besan. As the price of imported Yellow Peas in India is cheaper than the domestic market price of Gram, a huge shift in industry usage from Gram to Yellow Peas had happened. Increased supply of Yellow Peas had taken away Gram demand, the resulting in fall in prices of Gram. Thus, despite large scale procurement of Gram under the PSS scheme in Rabi 2018 and 2019, prices of Gram continued to be below the MSP announced by the government." Thus, the Union of India themselves have accepted that the conditions of Section 9A had impelled then to issue the impugned notifications but they did not follow the procedure prescribed by the applicable Rules.

34. The Union of India, in their affidavit filed on 26 th June 2020, have pleaded that they were required to strike a balance between the farmers and the importers as largescale imports would adversely impact the interests of the farmers due to fall in prices in the local market. Reference was made to the Minimum Support Price (MSP) for Moong, Urad and Toor dal and Gram fixed on the recommendation of the Commission for Agricultural Costs and Prices. Further, the Central Government under the schemes being run had procured 85 lakh MT of pulses directly from 53 lakh farmers by paying them MSP in the last five years. There was also increase in production of pulses from 25.42 Million MTs in 2017-18 to 26.66 Million MTs in 2020-21. Imported Yellow Peas are the perfect substitute for Gram in making of Besan which is primarily used in preparation of Indian savouries. As the price of imported Yellow Peas in India is cheaper than the domestic price of Gram, a huge shift in industry usage from Gram to Yellow Peas has taken place. In these circumstances that the government has imposed restrictions from April, 2018 onwards with a small window of annual quota for permitted imports. However, in view of the interim orders passed by the various High Courts, the actual imports of peas were to the tune of 8,51,408 MT and 6,52,607 MTs in 2018-2019 and 2019-2020 respectively, though the annual quota for these two years was 1/1.50 lakh MTs. The Government is presently holding a buffer stock of 26.94 lakh MT of Gram, against the target quantity of 3 lakh MTs. The Gram is being sold at Rs.4,000 – 4,200 per quintal, which is below the MSP of Rs.4,875/- per quintal. Imported CIF value of Yellow Peas is Rs.2,028/- per

quintal. Due to the pandemic, the farmers could be compelled to make panic disposal at much lower prices. In the further affidavit filed on 1st July 2020, the Union of India has stated that they had not issued any quota for Peas, Yellow Peas etc. as inspite of restricted quota of 1 lakh and 1.5 lakh MTs for Peas in the Financial Years 2018-19 and 2019-20, due to interim orders passed by the various High Courts, the actual import was 8.51 lakh MTs and 6.67 lakh MTs during the Financial Years 2018-19 and 2019-20, respectively. Consequently, it has been decided not to import Yellow Peas in the current Financial Year 2020-21. In the affidavit filed on 6th July 2020, with reference to Section 9A of the FTDR Act, the Union of India has stated that the said section is attracted only when the goods are imported into India in increased quantity and under such conditions as to cause or threaten to cause serious injury to domestic industry. Section 9A is enacted as a safeguard mechanism in terms of Article XIX of the GATT-1994 and Article II of the WTO Agreement on Safeguards vide the Amendment Act, 2010. The notifications under challenge have been issued within the express terms of Section 3 of the FTDR Act which permits the Central Government to impose restrictions without any qualification of the nature specified in Section 9A. Power of the Central Government to restrict imports to limited quantities under Section 3 and quantitative restrictions under Section 9A of the FTDR Act are completely distinct and have no connection or interplay. The power under Section 3(2) of the FTDR Act is of a wide amplitude. Reference is also made to Rule 5(2) to assert that there is necessity of evidence that the imports had increased as a result of 'unforeseen developments' in addition to the necessity for evidence disclosing serious injury or threat of serious injury to domestic industry and a causal link between imports and serious injury. The restrictions have been imposed not due to increased quantities of imports but to prevent panic disposal by farmers as the prices of Gram would come down. It is submitted that special provisions like 9A of the FTDR Act would be limited to areas within its scope leaving the general provision free to operate in other areas.

(vi) Discussion and interpretation of Sections 3 and 9A of the FTDR Act.

35. Section 3 of the FTDR Act, as enacted, had undergone amendments by addition of proviso to sub-section (2) and by insertion of sub-section (4) vide Act 25 of 2010 with effect from 25th August 2010. Sub-section (1) of Section 3 states that the Central Government may, by an Order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports. It is a general provision which has no reference to GATT-1994. It authorises the Central Government to publish an order in the Official Gazette for development and regulation of foreign trade, i.e. imports and exports. Sub-section (2) states that the Central Government can, by an order in the Official Gazette, make a provision for prohibiting or restricting or otherwise regulating, in all or specified cases and subject to such exceptions, if any, the import or export of goods and after the amendment vide Act 25 of 2010, services or technology. Sub-section (2) to Section 3, therefore, authorises the Central Government to, by an Order published in the Official Gazette, make provisions restricting the imports or exports. Imposition of quantitative restrictions on imports or exports would clearly fall within sub-section (2) to Section 3 of the FTDR Act. We are not concerned with the proviso to sub-section (2) in the present case. Sub-section (3) to Section 3 states that where an order is passed under sub-section (2) whereby the import or export of goods is prohibited, restricted or otherwise regulated, the goods in question would be deemed to be prohibited goods under Section 11 of the Customs Act, 1962 and accordingly

the provisions of the latter Act would apply.

36. Sub-section (4) to Section 9A of the FTDR Act introduced by Act 25 of 2010 with effect from 27 th August 2010, requires some elucidation. The sub-section on one hand states that no permit or licence shall be necessary for imports or exports of goods, nor any goods shall be prohibited from import or export, except as may be required under the FTDR Act, or the rules or orders made thereunder. At the same time, by using the phrase 'without prejudice to anything contained in any other law, rule, regulation, notification or order', it protects the operation of the other law, rule, regulation, notification or order to the extent that they do not directly or indirectly deal with the permit or licence necessary for import or export of goods or prohibit import or export of goods.

Operation of such law, rule, regulation, notification or order not dealing with the permit or licence necessary for import or export on a prohibition of import of goods is, therefore, protected and not overridden. Sub-section (4) to Section 3 therefore gives limited primacy to the FTDR Act, restricting it to the scope and subject matter of the FTDR Act, and not to override other laws. This is also clear from Section 18A of the FTDR Act which was also enacted and inserted by Act 25 of 2010 with effect from 27 th August 2010 and reads as under:

> "18A. Application of other laws not barred.– The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force." The provisions of FTDR Act, therefore, are in addition to, and not in derogation of, the provisions of any other law for the time being in force. This would be the correct way to harmoniously read and interpret sub-section (4) to Section 3 and Section 18A of the FTDR Act. We may, at this stage, notice that the original amendment had used the phrase 'Notwithstanding anything contained in any other law, rule, regulation, notification or order', but the Standing Committee had noticed the contradiction and also the object and purpose behind enacting sub-rule (4) and had recommended that the said expression should be replaced with the expression 'Without prejudice to anything contained in any other law, rule, regulation, notification or order'. Sub-section (4) to Section 3 of the FTDR Act, therefore, in the context of import and exports or prohibition of imports or exports of goods states that no permit or licence shall be necessary or required except as may be required under the FTDR Act, rules or orders made thereunder. The expression 'order', as per clause (h) to Section (2) of the FTA means any Order made by the Central Government under Section 3. It is, therefore, clear to us that there is no violation of Section 3 of the FTDR Act in the issuance of the impugned notifications or orders, which are intra vires and not ultra vires.

37. We have already reproduced and quoted Article XI 31 of the GATT-

1994 and have to say that the same has not been statutorily made a subject of 'act of transformation' and incorporated in the domestic legislation, i.e. the FTDR Act. The FTDR Act does not legislate and transform Article XI of the GATT-1994. As noticed above, Section 3 of the FTDR Act empowers and authorises the Central Government, i.e. the Union of India to frame policy, rules 31 Paragraph 47

(supra).

or regulations for import or export of goods. The policy is framed under Section 5 of the Act, which reads as under:

> "5. Foreign Trade Policy. – The Central Government may, from time to time, formulate and announce, by notification in the Official Gazette, the foreign trade policy and may also, in like manner, amend that policy:
>
> Provided that the Central Government may direct that, in respect of the Special Economic Zones, the foreign trade policy shall apply to the goods, services and technology with such exceptions, modifications and adaptations, as may be specified by it by notification in the Official Gazette." Thus, the Central Government i.e. the Union of India has been given the necessary discretion and election with regard to framing of policies for import and export of goods, services and technology. Therefore, implementation of GATT-1994, including Article XI, is left to the Central Government by means of delegated legislation.
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> 38. Clause (2) of Article XI of GATT-1994 states that provisions of paragraph (1) shall not extend to three specified situations as stated in sub-clauses (a), (b) or (c). Clause (c) deals with import restrictions on any agricultural or fisheries product, imported in any form necessary for enforcement of governmental measures specified therein. Similarly, Article XII of GATT-1994 states that notwithstanding the provisions of paragraph (1) of Article XI, any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of paragraphs of that Article. Paragraph 23 (supra) lists a number of other provisions, which allow and permit exceptions.

We have referred to these provisions to highlight that paragraph (1) to Article XI is not an absolute rule. It is subject to exceptions in the form of paragraph (2) to Article XI, Article XII and other provisions. Of course, the conditions specified the respective Articles have to be satisfied for a contracting party to be GATT- 1994 compliant.

39. Reference to this position is necessary and required when we interpret Section 9A of the FTDR Act which we would accept incorporates into the domestic law Article XIX of GATT-1994, but neither Article XI and nor all exceptions by implication. Consequently, Section 9A for the FTDR Act, is to be understood an enabling provision empowering imposition of 'quantitative restrictions' after following the procedure in the situations referred to therein. However it does not limit and restrict the expans and power of the Central Government to prohibit, regulate or restrict imports of goods in terms of Section 3(2) of the FTDR Act. As a sequitur, it has to be held that notwithstanding Section 9A, the Central Government continues and has authority to impose quantitative restrictions by an order under Section 3(2) of the FTDR Act. Principle of Lex specialis derogat legi generali, therefore, is not applicable to the case in hand.

40. Section 9A of the FTA was enacted by Act 25 of 2010 pursuant to the recommendations of the Standing Committee which has opined as under:

> Clause 9 seeks to insert a new Chapter IIIA, with heading "Quantitative Restrictions", after Section 9 of the Act, pertaining to Power of the Central Government to impose Quantitative Restrictions. The Committee was informed that the proposed amendment seeks to make a clear provision in the Foreign Trade (Development and Regulation) Act for allowing Quantitative Restrictions (QRs) to be imposed to protect domestic industry from serious injury in case of a surge in imports. While such measures are available for all the WTO member countries, yet safeguard measures in the form of Quantitative Restrictions are not provided for under any Indian law. This is in accordance with the provision to incorporate safeguard measures in the form of Quantitative Restrictions, as provided in Article XIX of GATT and the WTO Agreement on Safeguards.
>
> Section 9A substantially incorporates, with some modifications, provisions of Article XIX of GATT-1994. Rules made in 2012 are also in conformity with the provisions of the WTO Agreement on Safeguards made in terms of Article XIX of GATT-1994. Sub-rule (3) to Rule 5 of the Safeguard Measures (Quantitative Restrictions) Rules, 2012 states and sets out the conditions for applicability of Rule 9A, which are: (i) increased imports; (ii) serious injury or threat of serious injury; and (iii) a causal link between increased imports and alleged serious injury or threat of serious injury. The expression 'increased imports' has been defined in terms of increased quantity to mean increase in imports in absolute terms or relative to domestic production. The expressions 'serious injury' and 'threat of serious injury' have been defined in clauses (c) and (d) of sub-clause (4) to Section 9A to mean injury causing significant overall impairment in the position of a domestic industry and a clear and imminent danger of serious injury respectively. The expression 'domestic industry' has also been defined in clause (b) to sub-section (4) to Section 9A.
>
> Similarly, the expression 'interested party' has been defined in sub-rule (d) to Rule 2 of the Safeguard Measures (Quantitative Restriction) Rules, 2012 and includes exporter or foreign producer or the importer of goods for the purposes of imposition of safeguard quantitative restrictions on trade or business association. It also includes the government of the exporting country or producer of goods or directly competitive goods in India or a trade or business association32.
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> 32 The words "unforeseen developments" are not to be found in Section 9A of the FTDR Act and Rule 5(3) but they find mention in Rule 5(2). It is clarified that we have not examined and decided the need to establish "unforeseen developments".

41. The need to enact Section 9A arose from the obligations flowing from Article XIX, as restriction in form of 'quantitative restriction', require a procedure to be followed. Affected parties including exporters, importers have to be heard. Consequently, 'act of transformation' was required. Article

XIX of GATT-1994 is an escape provision, i.e. a provision which entitles a contracting state to escape from the rigours of paragraph (1) of Article XI of GATT- 1994. Similar 'acts of transformation' have been undertaken by enacting Custom Valuation Rules, provision of antidumping, countervailing duty etc. but the entire GATT-1994 does not stand transposed and enacted by way of statutory law or delegated legislation.

42. This being the position, Section 9A has to be interpreted as an escape provision when the Central Government i.e. the Union of India may escape the rigours of paragraph (1) of Article XIX of GATT-1994. Section 9A is not a provision which incorporates or transposes paragraph (1) of Article XI into the domestic law either expressly or by necessary implication. To hold to the contrary, we would be holding that the Central Government has no right and power to impose 'quantitative restrictions' except under Section 9A of the FTDR Act. This would be contrary to the legislative intent and objective. Section 9A of the FTDR Act does not elide or negate the power of the Central Government to impose restrictions on imports under sub-section (2) to Section 3 of the FTDR Act.

43. In other words, the impugned notifications would be valid as they have been issued in accordance with the power conferred in the Central Government in terms of sub-section (2) to Section 3 of the FTDR Act. The powers of the Central Government by an order imposing restriction on imports under sub-section (2) to Section 3 is, therefore, not entirely curtailed by Section 9A of the FTDR Act.

44. To be fair, learned counsel appearing for the importers had conceded that they cannot enforce or claim violation of paragraph (1) of Article XI of GATT-1994 in the domestic courts in India unless the said Article has been expressly or by necessary implication incorporated and transposed in the domestic law, that is, the FTDR Act.

45. In the present case, this Court is not called upon to decide and examine the obligations of the Contracting Parties in terms of GATT-1994. Our findings and ratio are confined and restricted to interpretation of Section 3 and 9A of the FTDR Act and in that context we have referred to GATT-1994.

D. Contention of the importers of bona fide imports under interim orders and prayer for partial relief.

46. Learned counsel for some of the importers had placed reliance on Raj Prakash Chemical v. Union of India33, which judgment, in our opinion, has no application. In Raj Prakash Chemical (supra), the petitioner had acted under a bona fide belief in view of judgments and orders of High Courts and the interpretation placed by the authorities. In this background, observations were made to giving benefit to the importers, despite the contrary legal interpretation. In the instant case, the importers rely upon the interim orders passed by the High Court's whereas on the date when they filed the Writ Petitions and had obtained interim orders, the Madras High Court had dismissed the Writ Petition upholding the notification. Similarly, the High Court of adjudicature at Bombay, High Court of Gujarat and the High Court of Madhya Pradesh had dismissed the Writ Petitions filed before them and upheld the notifications and the trade notices. Notwithstanding the dismissals, the

importers took their chance, obviously for personal gains and profits. They would accordingly face the consequences 33 (1986) 2 SCC 297 in law. In these circumstances, the importers it cannot be said had bona fide belief in the right pleaded.

E. What is not decided

47. Learned counsel for some of the importers had submitted that they have preferred statutory appeals against orders suspending or terminating import export code. The said aspect has not been examined and decided and hence we make no comment and observation. The statutory appeals, if any, preferred by the importer(s) will be decided in accordance with law.

F. Conclusion

48. Accordingly, we uphold the impugned notifications and the trade notices and reject the challenge made by the importers. The imports, if any, made relying on interim order(s) would be held to be contrary to the notifications and the trades notices issued under the FTDR Act and would be so dealt with under the provisions of the Customs Act 1962. The Writ Petitions subject matter of the Transfer Petitions, subject to E above (What is not decided) are dismissed. Writ Petitions filed by the intervenors before the respective High Courts shall stand dismissed in terms of this decision. Pending application(s), if any, also stand disposed of in the above terms. No order as to costs.

.....J. (A.M. KHANWILKAR) .....J. (DINESH MAHESHWARI) .....J. (SANJIV KHANNA) NEW DELHI;

AUGUST 26, 2020.