Commission Implementing Regulation (EU) 2020/526 of 15 April 2020 re-imposing a definitive countervailing duty on imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron) originating in India as regards Jindal Saw Limited following the judgment of the General Court in T-300/16

COMMISSION IMPLEMENTING REGULATION (EU) 2020/526

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union[(1)], and in particular Articles 15 and 24(1) thereof,

Whereas:

1. PROCEDURE

(1) On 17 March 2016 the Commission adopted Implementing Regulation (EU) 2016/387[(2)] imposing a definitive countervailing duty on imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron) originating in India ('the regulation at issue').

1.1. The Judgement of the General Court of the European Union

(2) Jindal Saw Limited ('Jindal') and its related importer, Jindal Saw Italia SpA (together 'the applicants'), challenged the anti-subsidy regulation at issue before the General Court. On 10 April 2019 the General Court issued its judgment in case T-300/16[(3)] regarding the Regulation at issue ('the judgment').

(3) The General Court found that the calculation of the amount of benefit for Jindal resulting from the provision of iron ore for less than adequate remuneration was in breach of Article 6(d) of the basic anti-subsidy Regulation in force at the time of the original investigation[(4)] (the basic anti-subsidy Regulation). In particular, the General Court held that the transport costs actually incurred by Jindal from the mine to its plant in India were higher than those that the Commission took into account in the calculation of the average purchase price for iron ore in India. In the General Court's view, such difference in transportation costs means that the price at which Jindal sources iron ore on the Indian market was, in fact, higher than the average purchase price used by the Commission to determine the level of remuneration, which had an inevitable impact on the benefit that could be granted to that exporting producer[(5)]. Accordingly, the General Court found that the Commission infringed Article 3(2) and Article 6(d) of

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the basic anti-subsidy Regulation (by wrongly selecting at random certain items in the delivery costs of Jindal for the calculation of the standard average transport costs) and the third subparagraph of Article 15(1) of the basic anti-subsidy regulation (by fixing the countervailing duty at a level higher than the countervailable subsidies).

(4) The General Court also found that the Commission had committed an error in respect of its undercutting calculations as far as the applicants were concerned. In this case, on the one hand, in respect of the Union industry the Commission took into account either the prices at an ex-works level[6] of the production entities when they sold directly to independent buyers, or the prices at an ex-works level of the selling entities. On the other hand, in respect of Jindal's sales in the Union market, the Commission used as a starting price to arrive at a comparable landed price in the EU the export price as constructed in the context of the determination of the dumping margin (thus, taking out SG&A costs plus profits of Jindal's related selling entities in the EU). According to the General Court, the marketing of products carried out not directly by the producer, but through related selling entities, implies the existence of costs and a profit margin specific to those entities, so that the prices charged by them to independent buyers are generally higher than the prices charged by producers in their direct sales to such buyers and thus cannot be assimilated to those latter prices[7]. As a result, the General Court considered that by carrying out, for the price comparison made in the context of the undercutting calculation, the assimilation between the prices charged by the selling entities to independent buyers and the prices charged by producers in their direct sales to such buyers, only as regards the like product of the Union industry, the Commission took into account for that product a price which was inflated and therefore unfavourable to Jindal Saw, which performed the majority of its sales in the Union by way of selling entities[8]. For the General Court, this was an error in calculating the price undercutting of the product concerned, as the undercutting calculation was not made by comparing prices at the same level of trade. Therefore, the General Court found an error in that the Commission deducted the selling expenses and profits of Jindal's related selling entities in the Union from the sales to the first independent buyer, while the selling expenses and profits of the Union industry's related selling entities were not deducted from the Union industry sales prices to the first independent customer. The General Court considered that the two prices were not compared symmetrically at the same level of trade.

(5) As a result, the General Court found that the Commission had also infringed Article 8(1) of the basic anti-subsidy Regulation. Since the undercutting, as calculated in the regulation at issue, was the basis for the conclusion that imports of the product concerned were at the root of the injury to the Union industry, the General Court found that the existence of a causal link between the subsidised imports and the injury to the Union industry, as a necessary condition for the imposition of an anti-subsidy duty in accordance with Article 8(5) of the basic anti-subsidy Regulation, could have been tainted as well[9].

(6) Moreover, the General Court found that it could not be excluded that, if the price undercutting had been calculated correctly, the injury margin of the Union industry would have been established at a level below that of the subsidy rate. In that case,

in accordance with the third subparagraph of Article 15(1) of the basic anti-subsidy Regulation, the amount of the countervailing duty should be reduced to a rate, which would be sufficient to remove that injury[10].

(7) In light of the above considerations, the General Court annulled the Regulation at issue insofar as Jindal Saw Limited was concerned.

1.2. **Implementation of the General Court's Judgment**

(8) According to Article 266 of the Treaty on the Functioning of the European Union ('TFEU'), the Union institutions are obliged to take the necessary steps to comply with the Court's judgments. In case of an annulment of an act adopted by the Union institutions in the context of an administrative procedure, such as the anti-subsidy investigation in this case, compliance with the General Court's judgment consists in the replacement of the annulled act by a new act, in which the illegality identified by the General Court is eliminated[11].

(9) According to the case-law of the Court of Justice, the procedure for replacing an annulled act may be resumed at the very point at which the illegality occurred[12]. That implies, in particular, that in a situation where an act concluding an administrative procedure is annulled, that annulment does not necessarily affect the preparatory acts, such as the initiation of the anti-subsidy procedure. For instance, where a regulation imposing definitive countervailing duties is annulled, the proceeding remains open because it is only the act concluding the proceeding that has disappeared from the Union legal order[13], except in cases where the illegality occurred at the stage of initiation. The resumption of the administrative procedure with the re-imposition of countervailing duties on imports that were made during the period of application of the annulled regulation cannot be considered as contrary to the rule of non-retroactivity[14].

(10) In the present case, the General Court annulled the regulation at issue as regards Jindal Saw Limited on the grounds that the Commission had, with respect to the provision of iron ore, wrongly calculated the subsidy amount benefitting Jindal and that it had made an error when determining the existence of significant undercutting. The latter error, potentially, could have tainted the causation analysis, as well as the injury margin.

(11) Findings in the anti-subsidy regulation at issue, which were not contested, or which were contested but rejected by the General Court or not examined by the General Court, and therefore did not lead to the annulment of the Regulation at issue, remain fully valid[15].

(12) Following the Court's judgments in case T-300/16 of 10 April 2019, the Commission decided by means of a Notice ('the re-opening Notice') to partially re-open the anti-subsidy investigation concerning imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron) that lead to the adoption of the regulation at issue and to resume the investigation at the point at which the irregularity occurred. The re-opening was limited in scope to the implementation of the judgment of the General Court with regard to Jindal Saw Limited.

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(13) Subsequently, on 22 July 2019, the Commission decided to make imports of certain tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron) originating in India and produced by Jindal Saw Limited subject to registration and requested national customs authorities to await the publication of the relevant Commission Implementing Regulation re-imposing the duties before deciding on the claim for repayment and remission of countervailing duties insofar as imports concerning Jindal Saw Limited were concerned[16] ('the registration Regulation').

(14) The Commission informed interested parties of the re-opening and invited them to comment.

2. COMMENTS FROM INTERESTED PARTIES

(15) The Commission received comments from the Union industry and two exporting producers.

(16) With regard to the subsidy calculation the complainant (SG PAM) recalled that the General Court only found that the Commission had overestimated the benefit granted to Jindal in respect of the purchase of iron ore for less than adequate remuneration due to an improper assessment of the transportation costs while the General Court otherwise upheld the reasoning of the Commission and rejected all other challenges. Therefore, the implementation of the judgment only required the Commission to re-assess the transportation costs for its re-calculation of the benefit at stake.

(17) Jindal claimed that the Commission could not instruct the national customs authorities not to repay and/or remit anti-dumping duties that had been collected pursuant to the regulation at issue. It claimed that the situation in the present case is different from the one in the Deichmann judgment[17]. Jindal also claimed that the duties cannot be re-imposed retroactively. According to Jindal, the regulation at issue was annulled in its entirety, which means that it had been removed from the legal order of the Union with retroactive effect, whereas in the Deichmann judgment there were no factors 'capable of affecting the validity of the definitive regulation'. In addition, Jindal claimed that the illegality found with respect to the price undercutting analysis has the result of 'invalidating the Commission's entire analysis of causation'. This, in Jindal's view, means that the duties in its entirety should neither have been imposed, nor re-imposed, since the entire injury and causation analysis was flawed. Following disclosure, Jindal repeated these claims without providing further arguments.

(18) The Commission recalled that it is settled case-law that, when the Court declares that a regulation imposing duties is invalid, such duties are to be considered as never having been lawfully owed within the meaning of Article 236 of the Customs Code and, in principle, are required to be repaid by the national customs authorities under the conditions set out to that effect[18]. However, the Court has also held that the exact scope of a declaration of invalidity by the Court in a judgment and, consequently, of the obligations that flow from it must be determined in each specific case by taking

into account not only the operative part of that judgment, but also the grounds that constitute its essential basis[19].

(19) In the case at hand, the General Court found an error when calculating the amount of benefit as regard the provision of iron ore for less than adequate remuneration. This error only affected one of the subsidies countervailed in the original investigation (amounting to 3,91 % out of 8,7 % of total *ad valorem* subsidisation). Thus, the error could not bring the level of the duties below the *de minimis* thresholds.

(20) Moreover, the General Court put into question the method of calculating undercutting with respect to Jindal and its impact on causality as well as its possible impact on Jindal's injury margin in paragraphs 255-259 of the judgment. However, those elements did not call into question the validity of all other findings made in the regulation at issue and which can support the validity of the Commission's ultimate injury findings, as further elaborated in recital (30). In any case, even if the findings of the re-opened investigation were that no countervailing duties should be re-imposed, customs authorities would have the possibility to repay the entire amount of duties, which have been collected since the regulation at issue was adopted.

(21) Furthermore, the Court of Justice has consistently held that Article 10(1) of the basic anti-dumping Regulation[20] does not preclude acts from re-imposing anti-dumping duties on imports that were made during the period of application of the regulations declared to be invalid[21]. The Commission considers that those findings apply equally to countervailing duties since also Article 16 of the basic anti-subsidy regulation currently in force[22] does not preclude acts from re-imposing countervailing duties on imports that were made during the period of application of the regulations declared to be invalid. Consequently, as explained in recital (15) of the registration Regulation, the resumption of the administrative procedure and the eventual re-imposition of duties cannot be considered as contrary to the rule of non-retroactivity[23]. In fact, the re-opening Notice already informed interested parties, including importers, that any future liability, if warranted, would emanate from the findings of the re-examination. Accordingly, Jindal's claim that the duties cannot be re-imposed pursuant to the re-opening of the original investigation was rejected.

(22) Jindal also claimed that in order to comply with the General Court's judgment the Commission must use Jindal's actual prices to its first independent customers. It emphasised that the Commission must not construct the prices of the Union industry's sales subsidiaries. It claimed that this would be contrary to paragraph 251 of the judgment in which the Court ruled: '*…that prices used in the undercutting calculation should be prices negotiated with independent buyers, namely prices, which could have been taken into account by them in order to decide whether they purchased the Union industry's product or the product of the exporting producers in question, and not the prices at an intermediate stage'*. In this respect, the Commission considered that in *Kazchrome*[24], i.e. the source quoted by the General Court in *Jindal*, the General Court did not go as far as making the categorical conclusion now drawn by Jindal (namely, that in all cases when conducting undercutting calculations what matters is the actual prices charged by the exporting producer's related selling entities in the EU). In fact, the