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NEWS, VIEWS AND LAW NOTES

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Editors: ADLA Staff

NEWS

WTO News and Views

Korea Anti-Dumping Duties challenge on Pneumatic Values from

Japan:

Appellate body of GATT dispute settlement mechanism has issued on 10 September 2019 its final verdict on Korea Anti-Dumping duties on pneumatic valves from Japan. The document WT/DSS04/AB/R is available at WTO web. The decision though upheld the panel's findings, yet allowed partial relief to Japan in certain areas.

Safeguard Investigations on Flat-rolled Products

On 27 August 2019 Guatemala initiated safeguard investigation in respect of flat-rolled products of other alloy steels having a width of 600MM or more.

Such investigations seek to determine whether increased imports of a product are causing or threatening to cause, serious injury to the domestic industry. During safeguard investigations, importers, exporters and other interested parties can present evidence, views and respond to the presentations of other parties. A WTO member can take a safeguard action (i.e. restrict imports of a product temporarily) when the increased imports of the disputed product are found to be causing, or threatening to cause, serious injury to domestic industry.

Estate planning

Charitable Lead Annuity Trust (CLAT) Structure

The US Internal Revenue Service (IRS) has recently released a private letter ruling approving a charitable lead annuity trust (CLAT) structure that may prove useful in estate planning for high net worth clients. In the case at issue, the taxpayer proposed to

set up a revocable trust where the trust would first pay certain debts and expenses and then distribute the trust assets to other individuals and trusts if the taxpayer predeceased his spouse. Should the spouse die first, the trust would have paid the relevant debts, made distributions to individuals and trusts and then transfer the remaining assets to the CLAT, which would then pay a 5% annuity to the charity based upon the initial trust's fair market value. The IRS approved this structure even though in most cases, the CLAT must have a payout stream that lasts a predetermined number of years to qualify for tax preferential treatment (deduction of the present value of annuity payments for the estate). Here, the IRS determined that it would eventually be possible to calculate that specified payout term once the CLAT was funded from the revocable trust after payment of debts, expenses and distributions to other beneficiaries.

[Tax Facts on line]

ESSAY

Today and Tomorrow

By Martin Wolf

FD: IMF: JUNE 2019

In this article the author draws our attention towards global changes such as shifts in global economic and political directions. According to the author a transformation has also taken place in the global power rivalry. The author notes the slowdown in the process of globalization. According to the author technological changes are also happening and affecting individuals, nations and continents in a rapid manner. He discusses the financial fragility and weak global demand. The climate change according to him is a serious issue as well.

IMF is confronting all these issues. The author outlines the ways in which fund is moving for help and assistance where required. The author believes that we are passing through a phase of Economic Fragility and accordingly the IMF needs to work in the following directions.

- Helping globalization to survive

- Meeting the challenge of unstable world economy
- Serious engagement on the part of IMF to challenge the ongoing problems confronting the global economy.

The author also draws our attention towards restructuring of many of the functions and structure of the fund in the recent past. According to him the fund has always been providing help and assistance where necessary as the fund constantly adapts to the confronting demands.

The author is, however, of the view that the world in general and the fund member in particular should believe in funds professionalism, and multilateralism and should help the fund in seeking and extending the cooperation amongst its members in order to successfully challenge the global economic problems.

Book Review:

International Law in World Politics By Shirley V. Scott

The book reflects a dramatically changing global context, and introduces the actors, structures, processes, and issues of

international law. The materials in the book include: Current case studies that bring the subject to life; through a chapter on international courts and tribunals, more attention has been given to trade and economic issues; the book also discusses contentious topics such as Iran nuclear deal; Africa and the ICC, the Paris climate agreement, rising tensions in the South China Sea etc. The book effectively explains the role that international law plays in the arena of world politics today.

The book discusses the following topics in details:

- Actors in international law.
- States and non-state actors.
- Intergovernmental organizations.
- International courts and tribunals.
- Structures and processes of international law.
- Implications of a multilateral treaty and evolution of a multilateral treaty regime.
- Human rights.
- The future directions of international law.

RECENT CASES

Principles of judicial review under article 184(3) of the Constitution laid down by the apex court: Ishaq Khan khakwani v. Railway Board PLD 2019. Supreme Court 602.

-Art. 184 (3) – Power of Judicial review under Art. 184 (3) of the Constitution – scope – instances where the Supreme Court may exercise its power of judicial review stated.

The Apex Court ruled, the scope of power of judicial review under Article 184 (3) of the Constitution of Pakistan in the following terms:

- I. Where acts or omissions on the part of State functionaries reflect violation of mandatory provisions of law or the rules;
- II. Breaches of contracts which do not entail examination of minute/disputed questions of fact committed by public functionaries involving dereliction of obligations flowing from a statute, rules or instructions;
- III. Where public functionaries fail to exercise public authority, especially while dealing with public property, public funds or assets, in a fair, just, transparent and reasonable manner,

untainted by mala fides or colorable exercise of power for ulterior motives, without discrimination and in accordance with law, keeping in view the constitutional rights of the citizens, even in the absence of any specific statutory provisions setting forth the process in this behalf;

- IV. Interference with the decision making process is warranted where it is vitiated on account of arbitrariness, illegality, irrationality and procedural impropriety or where it is actuated by mala fides;
- V. Illegal actions from the exercise of powers by the Governmental bodies while exercising powers to dispense and regulate special services by means of leases, licenses, contracts, quotas, etc., as these authorities are expected to act fairly, justly and in a transparent manner and such powers cannot be exercised in an arbitrary or irrational manner;
- VI. Inappropriate dealings of public funds, public property, licenses, jobs or any other government largesse is to be

dealt with by public functionaries on behalf of and for the benefit of the people;

- VII. Scrutinize matters where public money is being expended through procurement or public property is being sold, so as to ensure that transactions by the Government are undertaken and contracts executed in a transparent manner, legally, fairly and justly without any arbitrariness or irrationality and public money and public property is not squandered or stolen;
- VIII. The presence of elements such as personal solicitation and personal influence in the procurement of contracts directly leading to inefficiency in the public service and to unnecessary expenditures of the public funds;
- IX. All agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question,

whether improper means are contemplated or used in their execution; If material changes are brought about in agreements subsequent to the bidding to benefit a particular party, this will in fact negate the notion of a fair and open competitive bidding process; and

- X. Courts should ordinarily refrain from interfering in the policy making domain of the Executive or in the award of contracts and should not substitute its decision for that of the latter unless the acts or omissions smack of arbitrariness, favoritism and a total disregard of the mandate of law.

CASE LAW:

Edited By: Zafar Iqbal

Baluchistan High Court explains the way to re-open an assessment of customs duties.

Validity of penalty imposition order held after assessment of leviable duty and taxes under S.80, Customs Act, 1969 and payment thereof and after clearing the vehicles under S. 83, Custom Act, 1969, the available remedy of filing appeal under S. 193, Customs Act, 1969 was not availed by the concerned officials of the Collectorate of Customs Additional Collector of Customs

(Adjudication) had no jurisdiction under the provisions of the Customs Act, 1969 to issue show cause notice and to pass Order in Original.

[Collector of Customs vs. M/s Al Habib Enterprises and Engineering: 2019 PTD 1712].

Baluchistan High Court, 31st January, 2019

A business organization had imported concrete transit mixer trucks which were allowed clearance for home consumption after submission of prescribed documents. On a subsequent inquiry Customs attributed an act of mis-declaration on the part of importer by alleging that the year of manufacture of imported trucks was incorrect. On the basis of said anomaly, a show cause notice was issued by an authority namely, the Additional Collector of Custom (Adjudication). The show cause notice was assailed by the importer on the ground that Additional Collector who issued show cause notice was not competent to initiate panel proceedings under the law. The adjudication officer namely, Additional Collector however, rejected importer's plea and imposed penalties. The order of penalty imposition was challenged before the Appellate authority who set aside the

penalty order. The appellate authority observed that the adjudication officer who imposed penalties was not competent to pass penalty order since the same was not authorized by law. The customs challenged validity of Appellate authority's order before the Baluchistan High Court. The High Court held that after assessment of leviable duty and taxes under S. 80, of the Customs Act, 1969 and payment thereof and after clearing of the vehicles under S. 83, of the Customs Act, 1969, the available remedy before the department was to file an appeal under S. 193, of the Customs Act, 1969 and since the same was not availed by the department, hence the initiation of penal action by the Additional Collector of Customs (Adjudication) was without jurisdiction.

ICJ DECISION: BOLIVIA V. CHILE¹

OBLIGATION TO NEGOTIATE ACCESS TO THE PACIFIC OCEAN

International Court of Justice – 1904 Treaty of Peace and Friendship (Bolivia-Chile)-obligation to negotiate – intention to be legally bound.

¹ <https://www.icj-cij.org/files/case-related/153/153-20181001-JUD-01-00-EN.pdf>

International Court of Justice, October 1, 2018

The need for universal adherence to and implementation of the rule of law at both the national and international levels” stands reaffirmed by the ICJ in their recent judgement namely, Bolivia V. Chile. Amongst other things ICJ did give findings on important legal issues which are summarized below:

Bilateral Agreements

According to customary international law, as reflected in Article 3 of the Vienna Convention, “agreements not in written form” may also have “legal force”. Irrespective of the form that agreements may take, they require an intention of the parties to be bound by legal obligations. This applies also to tacit agreements.

The Diplomatic Exchanges

In the case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain,² the court had found that

² Qatar v. Bahrain, 1994 I.C.J.112

signed minutes of a discussion could constitute an agreement if they “enumerate[d] the commitments to which the Parties ha[d] consented” and did not “merely give an account of discussions and summarize points of agreement and disagreement”.

Status of Declarations and Other Unilateral Acts

Consider the following declarations/statements of Chile: “Willing to seek that Bolivia acquire its own outlet to the sea” and “to give an ear to any Bolivian proposal aimed at solving its landlocked condition”. And “unchanging purpose of studying, together with that brother country, within the framework of a frank and friendly negotiation, the obstacles that limit Bolivia’s development on account of its landlocked condition”. The wording of these texts does not suggest that Chile has undertaken a legal obligation to negotiate Bolivia’s sovereign access to the Pacific Ocean. With regard to the circumstances of Chile’s declarations and statements, the Court further observes that there is no evidence of an intention on the part of Chile to assume an obligation to negotiate. In the opinion of the Court, “an obligation

to negotiate Bolivia's sovereign access to the sea cannot rest on any of Chile's unilateral acts referred to by Bolivia."

Estoppel

"Essential elements required by estoppel" are "a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it".

Legitimate Expectations

In the opinion of Court legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation.³

The Charter of the United Nations

³ Bolivia's argument based on legitimate expectations thus cannot be sustained.

The Court held that no obligation to negotiate Bolivia's sovereign access to the Pacific Ocean arises for Chile under the United Nations Charter. Concerning the OAS Charter, the Court recalls that its Article 3 (i) provides that "controversies of an international character arising between two or more American States shall be settled by peaceful procedures".

The Resolutions of the General Assembly

General Assembly resolutions merely recommend to Bolivia and Chile that they enter into negotiations over the issue. Moreover, as both Parties acknowledge, resolutions of the General Assembly of the OAS are not per se binding and cannot be the source of an international obligation. Chile's participation in the consensus for adopting some resolutions therefore does not imply that Chile has accepted to be bound under international law by the content of these resolutions. Thus, the Court refused to infer from the content of the resolutions Chile's legal stand position with respect to their adoption that Chile has accepted an

obligation to negotiate Bolivia's sovereign access to the Pacific Ocean.

The Legal Significance of Instruments, Acts and Conduct Taken Cumulatively

The Court noted that Bolivia's argument of a cumulative effect of successive acts by Chile is predicated on the assumption that an obligation may arise through the cumulative effect of a series of acts, even if it does not rest on a specific legal basis. However, given that the Court's analysis shows that no obligation to negotiate Bolivia's sovereign access to the Pacific Ocean has arisen for Chile from any of the invoked legal bases taken individually, a cumulative consideration of the various bases cannot add to the overall result. It is not necessary for the Court to consider whether continuity existed in the exchanges between the Parties since that fact, if proven, would not in any event establish the existence of an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean.

RECENT LEGISLATION

The government has framed and circulated listed companies **(Draft Code of Corporate Governance) Regulations, 2019**. The draft regulations inter alia, provide for the composition of board, its directors and members while defining the procedure for its meetings, issues which can be placed before Board of Directors, their responsibility and functions. It also provides procedure for audit, reporting and constitution of committees.

RECENT GUIDANCE

State Bank of Pakistan EPD Circular Letter No. 07 of 2019.
[April 19, 2019].

Clarification relating to Foreign Currency Accounts

1. Attention of Authorized Dealers is invited to the second proviso of sub-section (4) of the Section (5) of the Protection of Economic Reforms Act (PERA), 1992 which, inter-alia, states as under:

“provided that no cash shall be deposited in an account of a citizen of Pakistan resident in Pakistan, unless the account holder is a filer as

defined in the income Tax Ordinance, 2001 (XLIX
of 2001)”

2. It has come to our notice that some Authorized Dealers are not allowing non-residents to open and maintain foreign currency accounts on the pretext that they are not appearing as ‘filer’ in the Active Taxpayer’s List of FBR.
3. However, it is evident from the aforementioned Proviso that the instructions, contained therein, are not applicable to non-residents.
4. An updated copy of the PERA, 1992 is enclosed herewith for information and meticulous compliance.

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