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Article

Anti-absorption provisions: New tool for strengthening trade remedial measures

By Aayush Rastogi

Introduction

In Budget 2021-22, the Finance Minister announced the introduction of statutory provisions to check absorption of anti-dumping duty ('ADD') and countervailing duty ('CVD') measures imposed by the Central Government. These provisions were inserted into Section 9 and Section 9A of the Customs Tariff Act, 1975.

Recently, the Ministry of Finance has notified the *Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Second Amendment Rules, 2021*, and the *Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles and for Determination of Injury) Second Amendment Rules, 2021* detailing the procedure for determination and imposition of anti-absorption measures.

This article intends to give a brief overview of the anti-absorption provisions that have been introduced vide these provisions.

What is Absorption?

The basic objective of applying ADD or CVD measures is to correct the unfair import prices, and thereby ensuring that the unfair price advantage to the foreign exporters from dumping or unfair subsidization is negated. The measures generally lead to increase in the domestic selling prices due to increased landed value of imported goods which creates a level playing field for the domestic producers.

However, the imposition of ADD / CVD measures is not a guarantee that it will lead to

increase in the price levels. With the objective of ensuring that the ADD or CVD imposed does not remove the unfair advantage to exporter, an exporter may reduce its export price so as to absorb the price effect of the applied measure. In effect, this will prevent any increase in the landed prices of imported goods and hence lead to absorption of the ADD or CVD. It is to curb this practice that the Central Government has introduced the anti-absorption provisions to reinforce the effectiveness of applied measures and thereby protect the domestic industry from continuation of unfair practices.

It is important to note that before enactment of the anti-absorption rules, the DGTR had published the draft version of the Anti-Absorption Rules under both the ADD and CVD frameworks. The DGTR had also invited comments from all stakeholders of these draft rules. It would seem that the DGTR has factored comments as most of the anti-absorption provisions of the ADD and CVD rules across have been harmonized with each other.

Overview of anti-absorption provisions

Rule 29(1) of the AD Absorption Rule stipulates that ADD may be considered to be absorbed if the export price of the article decreases without a commensurate change in –

- the (producer's) cost of production; or
- export prices to third countries; or
- resale price of the imported article in India.

Under Rule 25(1) of the CVD Absorption Rules, CVD may be considered to be absorbed if the export price of the article decreases without

any significant change in the resale price of the said imported article in India.

Both the ADD and CVD anti-absorption rules provide for an expedited structure for reviewing the applied trade remedial measures. They stipulate that an investigation should be completed within six months of its initiation and only an extension of three months can be granted¹. Even while the investigation is underway, the rules empower the Authority to recommend provisional assessment of imports till the Authority has reached its conclusion². On such a recommendation being made, the Central Government may order provisional assessment of imports and may ask the importers to furnish bank guarantees covering the differential duty payable, if any, upon the final decision. This would provide interim relief to the domestic industry while the Authority is conducting the investigation.

The rules have limited the scope of anti-absorption review to the reassessment of the dumping/subsidy and the injury margin³. This would mean that while the export price and normal value and the non-injurious price of the domestic industry would be recomputed, the injury and causal link need not be re-established.

This limitation in the scope of review distinguishes an anti-absorption review from a sunset or mid-term Review. In a mid-term review, if the domestic industry or any other interested party is aggrieved by the absorption of duties, it could have approached the Authority and requested for a mid-term review. But during a mid-term review, the Authority can neither recommend provisional assessment nor restrict the scope of the review only to the reassessment of dumping/subsidy and injury margin.

Further, while a mid-term review can take no longer than twelve to eighteen months to conclude an anti-absorption review cannot take more than six to nine months for completion.

Anti-absorption provisions allow any interested party to apply for initiation of a review within two years of the imposition of an ADD or CVD measure⁴. The Authority may even accept an application after two years by recording reasons for its decision, but there is a complete prohibition on acceptance of an application in cases where less than twelve months remain for the ADD/CVD to expire. This provision has been inserted since during this period the Authority may have already initiated a Sunset Review. A similar practice is followed by the Authority in case of new shipper reviews; the Authority does not accept NSR applications filed twelve months before the expiry of the ADD/CVD measure.

It has been Authority's general practice to recompute the dumping/subsidy and injury margins during a sunset review. The reassessment allows the Authority to recommend the continuation of the measure based on the reassessed margins. Therefore, if the imposed duties are being absorbed even a sunset review could remedy it during the last twelve months.

Like a mid-term review, even anti-absorption provisions allow any interested party and not just the domestic industry to file for a review. So, if an exporter is of the view that its exporting competitors are undercutting it by absorbing the ADD/CVD after imposition, then even such exporters it may approach the Authority for an anti-absorption review.

If after the conclusion of its investigation the Authority concludes that the imposed measure was being absorbed then it may recommend⁵ -

¹ Rule 30 (7) of the AD Rules and Rule 26(7) of the CVD Rules.

² Rule 30(5) of the AD Rules and Rule 26(5) of the CVD Rules.

³ Rule 29(2) of the AD Rules and Rule 25(2) of the CVD Rules.

⁴ Rule 29(3) of the AD Rules and Rule 25(3) of the CVD Rules.

⁵ Rule 31(1) of the AD Rules and Rule 27(1) of CVD Rules.

- Modification in the form or basis of ADD/CVD
- Change in quantum of ADD/CVD

The modification to existing duties can be made retrospective from the date of initiation of the absorption review.

Conclusion

The inclusion of anti-absorption provisions in India's ADD and CVD Rules is a welcome step for strengthening the framework of trade remedial measures. The ADD and CVD Rules now provide an additional mechanism for the domestic industry to ensure ADD/CVD imposed are not negated by absorption practice of the exporters.

WTO provisions neither expressly prohibit nor provide for a review mechanism to check absorption of duties. Therefore, apart from India, only a handful of countries like the EU, UK and USA have anti-absorption provisions in their legislations. While the European Union has detailed procedures for an anti-absorption review, the U.S checks absorption of duties through administrative reviews. Both South Africa and Australia, unlike India, consider absorption as a form of circumvention. The Indian provisions seem to be largely modelled around the European Union.

[The author is an Associate in WTO and International Trade practice team at Lakshmikumaran & Sridharan Attorneys, New Delhi]

Trade Remedy News

Trade Remedy actions by India

| Product | Country | Notification No. | Date of notification | Remarks |
|----------------------------------|--|---|----------------------|--|
| Axle for trailers | China PR | F.No. 7/7/2021-TRU | 27 October 2021 | Sunset review recommends continuation of anti-dumping duty |
| Glass Fibre and articles thereof | China PR | F.No. CBIC-190354/108/2021-TO(TRU-1)-CBEC | 28 October 2021 | Central Government decides not to impose anti-dumping duty contrary to the recommendations of DGTR |
| Phenol | European Union, Singapore and Korea RP | 61/2021-Cus. (ADD) | 20 October 2021 | Notification imposing anti-dumping duty rescinded |

| Product | Country | Notification No. | Date of notification | Remarks |
|--|-----------------------|---|----------------------|--|
| Plain Medium Density Fibre Board of thickness of 6mm and above | Indonesia and Vietnam | 65/2021-Cus. (ADD) | 11 November 2021 | Notification imposing anti-dumping duty rescinded |
| Polytetrafluoro ethylene | Russia | 62/2021-Cus. (ADD) | 22 October 2021 | Notification imposing anti-dumping duty rescinded |
| Polytetrafluoro ethylene | Korea RP | 63/2021-Cus. (ADD) | 22 October 2021 | Notification imposing anti-dumping duty rescinded |
| PVC flex films | China PR | F.No. 7/04/2021-TRU | 28 October 2021 | Sunset review recommends withdrawal of anti-dumping duty |
| Seamless tubes, pipes and hollow profiles of iron, alloy or non-alloy steel (other than cast iron and stainless steel), of an external diameter not exceeding 355.6 mm or 14' OD | China PR | 64/2021-Cus. (ADD) | 28 October 2021 | Anti-dumping duty continued after sunset review |
| Steel and Fibre Glass Measuring Tapes and their parts and components | China PR | 67/2021-Cus. (ADD) | 12 November 2021 | Anti-dumping duty imposed on goods from Singapore and Cambodia, after anti-circumvention review |
| Untreated Fumed Silica | China PR and Korea RP | 66/2021-Cus. (ADD) | 11 November 2021 | Definitive anti-dumping duty imposed |
| Vitamin C | China PR | F.No. CBIC-190354/221/2021-TO(TRU-1)-CBEC | 27 October 2021 | Central Government decides not to impose anti-dumping duty contrary to the recommendations of DGTR |

| Product | Country | Notification No. | Date of notification | Remarks |
|--------------------------------------|----------|---------------------|----------------------|--|
| Wire rod of alloy or non-alloy steel | China PR | F.No. 7/17/2021-TRU | 28 October 2021 | Sunset review recommends continuation of anti-dumping duty |

Trade remedy actions against India

| Product | Investigating Country | Document No. | Date of Document | Remarks |
|---|-----------------------|------------------------------------|------------------|--|
| Organic Soybean Meal | USA | 86 FR 60443 | 2 November 2021 | ADD – Preliminary affirmative determination of sales at less than fair value |
| Stainless steel cold-rolled flat products | EU | EC – Directorate General for Trade | 19 October 2021 | Anti-subsidy investigations – Provisional measures not to be imposed |



WTO News

E-commerce negotiations – Negotiators plan to issue statement at MC12 while India questions legal status

The co-convenors of the negotiations on e-commerce have recently said that they plan to issue a statement on behalf of the participating members to take stock of the work achieved so far. However, it may be noted that as per recent reports, India, Namibia, and South Africa have questioned the legality of the so-called plurilateral agreement on e-commerce. According to them, such an approach will undermine balance in agenda setting and result in members

disregarding existing multilateral mandates arrived at through consensus in favour of issues without multilateral mandates, leading to marginalization or exclusion of issues which are difficult but critical to Membership at large.

Meanwhile, the facilitators of small group discussions have reported on the work completed in recent weeks to find common ground in the areas of e-invoicing, cybersecurity, customs duties on electronic transmissions, open internet access and paperless trading. They reported that convergence is within reach for the latter two areas.

Interestingly, amid all the above, Group of Seven wealthy nations (G7) has in late October agreed on principles to govern cross-border data use and digital trade. Digital trade is broadly defined as trade in goods and services that is either enabled or delivered digitally, encompassing activities from the distribution of films and TV to professional services. The G7 comprises the United States, Japan, Germany, Britain, France, Italy and Canada.

Moratorium on IP ‘non-violation’ cases set to be extended

The WTO members have on 5 November 2021 agreed on a draft ministerial decision on so-called non-violation and situation complaints in the area of intellectual property (‘IP’). The decision is expected to be adopted at the WTO’s 12th Ministerial Conference (MC12) to be held in Geneva shortly. The TRIPS Council would be asked to continue its discussions on this issue and to make recommendations to the 13th WTO Ministerial Conference.

Non-violation and situation complaints refer to conditions when members should be able to bring WTO dispute complaints where they consider that another member’s action, or a particular situation, has deprived them of an expected advantage under the TRIPS Agreement, even though no obligation under the Agreement has been violated. It may be noted that as per WTO’s website, members have historically differed on whether such non-violation cases are feasible in intellectual property.

WTO Trade Report 2021 abuzz with ‘economic resilience’

Exploring current debates about economic resilience in a global economy which is being increasingly subjected to natural and man-made shocks, the WTO Trade Report of 2021 (‘Report’), released recently, explains how the WTO can contribute to improving economic

resilience. It may be noted that ‘economic resilience’ is defined in the Report as the ability of firms, households and governments to prepare for, cope with and recover from shocks. The Report notes that though the term ‘resilience’ does not appear in the WTO agreements, the WTO framework supports the conditions underpinning economic resilience by reducing trade barriers, streamlining customs procedures, encouraging transparency, building trade capacity in poorer countries, and collaborating with other international organizations to strengthen the global economy and make it more secure. Discussing how trade can increase countries’ vulnerabilities and be a spreader of shocks, the Report also analyses trade as a source of economic growth and productivity thus giving countries the technical, institutional and financial means to prepare for shocks.

Brazil requests consultations with EU over import restrictions on poultry meat preparations

Brazil has on 8 November 2021 requested for consultations with the European Union over latter’s certain import restrictions on import of poultry meat preparations from Brazil. According to Brazil, the EU presently applies to fresh poultry meat a Salmonella food safety criterion that is different from and less stringent than that applied to poultry meat preparations, without adequate technical or scientific evidence. Brazil alleges that the EU measures appear to be inconsistent with the EU’s WTO obligations, including, various provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (‘SPS Agreement’).

Chinese duties on Australian wine – Panel established

The Dispute Settlement Body of the WTO has on 26 October established a panel to examine Chinese anti-dumping and countervailing duties

on imports of Australian wine. According to Australia, China's measures appear to be inconsistent with China's obligations under the provisions of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ('**Anti-Dumping Agreement**') and the Agreement on Subsidies and Countervailing Measures ('**SCM Agreement**'). Along with interpretation and application of 'like product', 'product under consideration' and 'domestic industry', Australia

also disputes the conduct of the investigation, use of facts available, imposition of provisional measures and dumping/countervailing determination. Determination of injury and causation and imposition of duties by China are similarly disputed. India along with Canada, Japan, Brazil, USA, UK, Ukraine, Turkey, Chinese Taipei, New Zealand, Norway, Switzerland, Singapore, Russia, EU and Viet Nam have reserved their third party rights to take part in the proceedings.



India Customs & Trade Policy Update

Customs duty lowered on imports from Sierra Leone

Sierra Leone has been included in the list of least developed countries under Notification No. 96/2008-Cus. to allow lower rate of customs duties on imports therefrom. Sierra Leone is the 36th country to be granted such benefit subject to compliance of the Customs Tariff (Determination of Origin of Products under the Duty Free Tariff Preference Scheme for Least Developed Countries) Rules, 2015. Notification No. 96/2008-Cus. has been amended for this purpose by Notification No. 50/2021-Cus., dated 22 October 2021.

Tariff rate quota quantity lowered for goods of Heading 1604 and 2208 from Mauritius

The Tariff Rate Quota Quantity for prepared or preserved fish falling under TI 16041410, 16041490, 16042000 of the Customs Tariff Act and Rum and other spirits obtained by distilling

fermented sugarcane products covered under TI 22084011, 22084012, 22084091 and 22084092 has been reduced in case of imports from Mauritius. In respect of goods of Heading 1604, earlier the quantity was 7000 tons for each of the three Tariff Items, which has now been reduced to 7000 tons combined for all goods under the three specified TIs. Similar amendment has also been made in respect of goods of Heading 2208 which now specify 1.50 million litres combined for all goods covered under four Tariff Items. Amendment in this regard have been made in Notification No. 25/2021-Cus. by Notification No. 51/2021-Cus., dated 22 October 2021.

Courier imports – Registration of authorised couriers to be valid for lifetime

The Central Board of Indirect Taxes and Customs has amended the Courier Imports and Exports (Clearance) Regulations, 1998 and Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010

to provide for lifetime validity of registration of authorised couriers. Hitherto, registration of such couriers was valid only for a certain period and had to be renewed each time. The new provisions now also provide for voluntary surrender and deemed invalidity of registration.

The Board has also issued Circular No. 24/2021-Cus., dated 27 October 2021 to explain the above. The Circular also directs Commissioners to rationalise the existence of multiple registration under different regulations, etc.



Ratio Decidendi

- **Appeal to CESTAT maintainable against Central Government's decision not to impose anti-dumping duty as recommended by DA**
- **Central Government to provide reasons for not accepting recommendations**

The CESTAT has allowed an appeal against the Finance Ministry's decision rejecting the Designated Authority's recommendation to impose anti-dumping duty ('ADD') on imports of Choline Chloride originating in or exported from China PR. Examining as to whether the Finance Ministry's decision not to impose ADD, as contained in the OM, was an 'order of determination' as contemplated in Section 9C, the Tribunal held that by deciding not to impose ADD, the Central Government made a 'determination' regarding the existence, degree and effect of dumping in relation to import of any article. However, the CESTAT was of the view that though the Central Government had the discretion to accept or reject the DGTR's final findings, this discretion was required to be exercised in a judicious manner by a reasoned order. According to the Tribunal, recording of reasons assumed more importance in the

present case, because the Customs Tariff Act, 1975 and the Anti-dumping Rules under which such a discretion is required to be exercised by the Central Government, provide for a detailed analysis of host of factors for imposition of ADD. The CESTAT allowed the appeal on the ground that the OM was an order of determination which did not spell out the reasons for not imposing the ADD. [*Jubilant Ingrevia Limited v. Union of India & Ors.* – Order dated 27 October 2021 in Anti-Dumping Appeal No. 50461 of 2021, CESTAT]

EPCG scheme – Surrender of SHIS scrips, issued for same period, enough – Assessee not required to obtain policy relaxation

The CESTAT Chennai has allowed the benefit of EPCG scheme in a dispute where the assessee was issued EPCG authorisations and SHIS certificates for the same period but, the assessee had subsequently surrendered the SHIS certificates which were also cancelled by the JDGFT. Department's contention that DGFT Public Notice No. 30/2015-20, dated 8 September 2016, which allowed for such surrender, also required the assessee to obtain a policy relaxation under Para 2.58 of the Foreign Trade Policy, was rejected by the Court. It

observed that according to the condition the power was to be exercised by the DGFT to relax the provisions and that the Public Notice nowhere stated that the licensee has to apply for, let alone obtain, a policy relaxation. [*ITC Ltd. v. Commissioner – 2021 (10) TMI 94 – CESTAT Chennai*]

Waste paper imports can even be in form of books, old or new – Inspection or investigation required to allege mis-declaration

The Madras High Court has held that merely because the imported waste paper (as declared) was in the form of books – new or old, it cannot be said they were for being sold as books and

not for use a waste paper for making pulp in paper industry. Setting aside department's contention of mis-declaration, the Court noted that otherwise the value of said goods would have been multi-fold. It also observed that the importer had voluntarily offered for mutilation of the imported goods, much before the date when the Customs alleged the goods as mis-declared. The Court was of the view that there is no mis-declaration unless the department finds it as a different item not going to be utilised as waste paper, after their own inspection or investigation. [*Venkatalakshmi Paper & Boards Pvt. Ltd. v. Commissioner – 2021 (10) TMI 311 – Madras High Court*]

NEW DELHI

5 Link Road, Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014
Phone : +91-11-4129 9811

B-6/10, Safdarjung Enclave
New Delhi -110 029
Phone : +91-11-4129 9900
E-mail : lsdel@lakshmisri.com

MUMBAI

2nd floor, B&C Wing,
Cnergy IT Park, Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

CHENNAI

2, Wallace Garden, 2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU

4th floor, World Trade Center
Brigade Gateway Campus
26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Phone : +91-80-49331800
Fax: +91-80-49331899
E-mail : lsblr@lakshmisri.com

HYDERABAD

'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church,
Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail : lshyd@lakshmisri.com

AHMEDABAD

B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE

607-609, Nucleus, 1 Church Road,
Camp, Pune-411 001.
Phone : +91-20-6680 1900
E-mail : ispune@lakshmisri.com

KOLKATA

2nd Floor, Kanak Building
41, Chowringhee Road,
Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH

1st Floor, SCO No. 59,
Sector 26,
Chandigarh -160026
Phone : +91-172-4921700
E-mail : lschd@lakshmisri.com

GURUGRAM

OS2 & OS3, 5th floor,
Corporate Office Tower,
Ambience Island,
Sector 25-A,
Gurgaon-122001
Phone : +91-124-477 1300
E-mail : lsurgaon@lakshmisri.com

PRAYAGRAJ (ALLAHABAD)

3/1A/3, (opposite Auto Sales),
Colvin Road, (Lohia Marg),
Allahabad -211001 (U.P.)
Phone : +91-532-2421037, 2420359
E-mail : lsallahabad@lakshmisri.com

KOCHI

First floor, PDR Bhavan,
Palliyil Lane, Foreshore Road,
Ernakulam Kochi-682016
Phone : +91-484 4869018; 4867852
E-mail : lskochi@lakshmisri.com

JAIPUR

2nd Floor (Front side),
Unique Destination, Tonk Road,
Near Laxmi Mandir Cinema Crossing,
Jaipur - 302 015
Phone : +91-141-456 1200
E-mail : lsjaipur@lakshmisri.com

NAGPUR

First Floor, HRM Design Space,
90-A, Next to Ram Mandir, Ramnagar,
Nagpur - 440033
Phone : +91-712-2959038/2959048
E-mail : lsnagpur@lakshmisri.com

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