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An e-newsletter from
Lakshmikumaran & Sridharan, India

September 2021 / Issue – 122

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September
2021



Article

Circumvention of ADD on ‘ceramic tableware and kitchenware, excluding knives and toilet items’ from China, by imports from Malaysia – A case analysis

By **Shubhi Khare**

Background

Original anti-dumping investigation

The Designated Authority through anti-dumping investigation and *vide* Final Findings Notification dated 8 December 2017, had recommended imposition of anti-dumping duty (**‘ADD’**) on imports of Ceramic tableware and kitchenware, excluding knives and toilet items (**‘subject goods’**) originating in or exported from China PR.¹

After imposition of ADD in respect of import of subject goods from China PR, the domestic industry observed a trend in shifting of such imports into India from China PR to Malaysia. The industry was of the view that the subject goods produced in China PR were being processed in Malaysia and thereafter being declared as originating in Malaysia and exported to India. They further alleged that the existing ADD imposed on the subject goods originated in or exported from China PR was being circumvented by way of imports from Malaysia.

The domestic industry felt that the change in the pattern of trade was undermining remedial effects of the ADD. Therefore, through the Ceramic Tableware & Kitchenware Manufacturers Association (**‘applicant’**), they

filed a complaint with the Designated Authority. The applicant alleged that the circumvention of ADD was taking place because of following reasons:

- a) There was a significant change in the pattern of trade involving exports of the subject goods whereby while imports from China PR had declined, there was a substantial increase in export of the subject goods from Malaysia to India.
- b) The subject goods were being mostly consigned from Malaysia through exporters who were not the producers of the subject goods.
- c) There was also evidence to show that in significant number of cases, the importers had not availed the concessional rate of Customs duty in respect of the import of the subject goods from Malaysia which is available under both Malaysia-India Comprehensive Economic Cooperation Agreement (**‘MICECA’**) and the ASEAN-India Free Trade Agreement (**‘AIFTA’**) which indicated that the value addition by the exporter in Malaysia was negligible.
- d) The subject goods were getting imported at dumped price. Further, significant price undercutting resulted in loss of Indian industry’s market share.

¹ The definitive ADD was imposed by the Ministry of Finance, *vide* Notification No. 4/2018-Customs (ADD) dated 21st February 2018.

Anti-Circumvention investigation

On 3 August 2021, the Designated Authority notified the final findings in the above investigation into alleged circumvention of ADD on imports of subject goods wherein the Authority recommended the extension of the existing ADD on subject goods originating or exported from Malaysia.

Before delving into the Authority's findings, let us understand the governing provisions in case of circumvention investigation.

Relevant provisions

The provisions relating to circumvention of ADD is provided in Section 9A(1A) of the Customs Tariff Act, 1975 which is reproduced below –

'Where the Central Government, on such inquiry as it may consider necessary, is of the opinion that circumvention of anti-dumping duty imposed under sub-section (1) has taken place, either by altering the description or name or composition of the article subject to such anti-dumping duty or by import of such article in an unassembled or disassembled form or by changing the country of its origin or export or in any other manner, whereby the anti-dumping duty so imposed is rendered ineffective, it may extend the anti-dumping duty to such article or an article originating in or exported from such country, as the case may be, from such date, not earlier than the date of initiation of the inquiry, as the Central Government may, by notification in the Official Gazette, specify.'

Rule 25 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 ('AD Rules') defines circumvention as a 'change in the pattern of

trade' between any country and India or between individual companies in any country subject to measures and India, as result of a 'practice, process, or work' for which:

- i. there is insufficient cause or economic justification, other than the imposition of duty; and
- ii. where there is evidence of injury or that the remedial effects of the duty are being undermined in terms of the prices or quantities or both of the like product; and
- iii. where there is evidence of dumping in relation to the normal values previously established for the like product, if necessary with appropriate changes or adjustments or in accordance with the provisions of rule 10.

The terms 'practice, process or work' referred to in Rule 25(1) have been defined to cover the following situations:

- a. where an article subject to ADD is imported into India from any country in an unassembled, unfinished or incomplete form and is assembled, finished or completed in India or in any other country, such assembly, finishing or completion shall be considered to circumvent the ADD in force if, -
 - i. the operation started or increased after, or just prior to, the anti-dumping investigations and the parts and components are imported from the country of origin or country of export notified for purposes of levy of ADD; and
 - ii. the value added to the inputs brought in, during the assembly or completion operation, is less than 35% of the manufacturing cost.

- b. where an article subject to ADD is imported into India from country of origin or export notified for the levy of ADD, after being subjected to any process involving alteration of the description, name or composition of an article, if the alteration of the description or name or composition of the subject goods results in the article being altered in form or appearance even in minor forms;
- c. where the subject goods are imported into India through any exporter or producer or country not subject to anti-dumping duty, such exports shall be considered to circumvent the ADD in force if the exporters or producers notified for the levy of ADD change their trade practice, pattern of trade or channels of sales of the subject goods in order to have them exported to India through any exporter or producer or country not subject to ADD.

Clause (d) of sub-rule (1) is a residual category which also covers any other manner whereby the ADD so imposed is rendered ineffective.

Accordingly, in a circumvention investigation, the Authority essentially examines whether there is a change in the trade pattern without any economic justification which undermines the remedial effect of the ADD.

Once the Designated Authority determines that the conditions under Rule 25 of the AD Rules are met and circumvention of ADD exists, it may recommend imposition of ADD on imports of goods found to be circumventing an existing anti-dumping duty or on imports of goods originating in or exported from countries other than those which are already notified for the purpose of levy of the ADD.

There is no fresh determination of duty in an anti-circumvention investigation which means that there is no requirement of fresh dumping margin and injury margin determination. The existing duty is extended to cover goods from circumventing countries. This approach was adopted in the present investigation as well.

Findings of the Authority in the present anti-circumvention investigation

Change in pattern of trade

In this investigation, the Authority noted that after the imposition of the anti-dumping duty, the volume of the subject goods imported from China PR into India decreased. At the same time, the volume of subject goods exported to India from Malaysia increased which was non-existent prior to that period.

The Authority thus came to a conclusion that there was a very clear and distinct change in the pattern of trade of import of the subject goods into India from China PR and Malaysia.

Justification - Economic or otherwise, other than imposition of anti-dumping duty

The second essential factor is to analyse if there is 'insufficient cause or economic justification other than the imposition of the duty' for the change in trade pattern. The trend of the Authority has been to undertake a cost benefit analysis to measure if any quantifiable benefits existed for importers to economically justify importing from any other country rather than from the country under ADD. There could be various other factors to understand if there is sufficient economic justification like analysing other export markets, benefits under trade agreements, degree of value-addition, etc.

In the present investigation, the economic analysis hinged around non-availment of concessional rate benefits available under MICECA and AIFTA. Under the said free trade

agreements, the subject goods can be imported into India on payment of concessional rate of customs duties, provided the importer furnishes the certificate of origin and meets the minimum value addition norms as prescribed under the above agreement. If the goods were, in fact, produced in Malaysia and had a valid country of origin certificate, the same would have been eligible for such concessional benefits. However, it was observed from the export data that significant proportion of goods were exported to India without even claiming such concessional duty. Such non-availment hinted at the fact that the value addition being carried out in Malaysia was below the conditions prescribed under the law. There was no other rational justification for an exporter to not avail customs duty concession other than the fact that there was inadequate value addition or that they were merely transshipping the goods from a third country.

Since there was lack of co-operation from parties, the Authority could not ascertain beyond doubt that the subject goods exported to India during the period of investigation (POI) did not constitute goods produced in China and were processed in Malaysia before exporting to India within the meaning of Rule 25. Therefore, the Authority noted that the change in pattern of trade appeared to be a result of imposition of ADD on imports from China.

Undermining of remedial effects of ADD

The third essential factor is that the change in pattern of trade must result in undermining of remedial effects of existing ADD. An ADD is meant to remedy a situation of dumping and material injury *vis-à-vis* domestic industry in India. Remedial effects are undermined in terms of price (price effect) and/or quantity (volume effect) of the subject goods. In the present investigation, the Authority, while examining whether the remedial effects of ADD were undermined in terms of market share and price

undercutting due to the import of the subject goods from Malaysia, observed that during the injury investigation period, there was a steady decline in the market share of the subject goods imported from China PR into India, while the import of subject goods from Malaysia into India increased in the same period.

In terms of price effect, it was observed by the Authority that the landed price of imports was significantly below the selling price of the domestic industry thus making the price undercutting levels very high.

It was observed that even after imposition of ADD, the domestic industry still could not recover its market share. Rather, it lost further market share. This effectively nullified the benefit received by way of ADD.

Evidence of dumping

The Authority also observed that not only there was an erosion of efficacy of ADD in terms of volume and price effect, but there was also continued dumping in respect of the subject goods which ultimately benefitted the producers/exporters.

Conclusion

Keeping all the above observations in view, the Authority recommended an extension of the existing ADD on the subject goods from China PR, to the subject goods originating in or exported from Malaysia.

As per the practice, such extended duties are co-terminus with the originally valid duties. Such an imposition obviates the need for multiple sunset reviews.

It is interesting to note that despite the Applicant's request, the Authority did not recommend a retrospective imposition of ADD on the subject goods imported from Malaysia. As per Rule 27 of the AD Rules, when the Authority

reaches a finding of circumvention of ADD, it may levy the ADD retrospectively from the date of initiation of the circumvention investigation. Considering that there was significantly high dumping and injury was caused to the domestic industry, the present case posed a plausible case for imposing ADD retrospectively.

Having said that, the Ministry of Finance is yet to act on the above recommendation of the Authority. The duty will be applicable only when the same is notified by the Ministry.

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Trade Remedy News

Trade Remedy actions by India

Product	Country	Notification No.	Date of notification	Remarks
Aceto Acetyl derivatives of aromatic or hetrocyclic compounds, also known as Arylides	China PR	F. No. 6/28/2020 – DGTR	19 August 2021	Definitive anti-dumping duty recommended
Aluminium and Zinc coated flat products	China PR, Vietnam and Korea RP	F. No.7/25/2020-DcTR	6 September 2021	Anti-dumping mid-term review for change of name of producer/exporter from Korea RP terminated
Aluminium foil of 80 microns and below	China PR, Malaysia, Thailand and Indonesia	Corrigendum Notification - File No. 06/21/2020-DGTR	17 August 2021	Corrigendum issued to modify Final Findings in Anti-Circumvention Investigation
Axle for Trailers	China PR	46/2021-Cus. (ADD)	25 August 2021	Anti-dumping duty extended till 28 January 2022, pending sunset review

Product	Country	Notification No.	Date of notification	Remarks
Barium carbonate	China PR	45/2021-Cus. (ADD)	24 August 2021	Anti-dumping duty revoked after recommendations in sunset review
Ceramic tableware and kitchenware, excluding knives and toilet items	China PR	F. No. 7/20/2021-DGTR	31 August 2021	Sunset review of anti-dumping duty initiated
Ceramic tableware and kitchenware, excluding knives and toilet items	Malaysia	F.No. 7/33/2020-DGTR	3 August 2021	Anti-dumping duties on imports from China PR recommended on imports from Malaysia
Flat Rolled Products of Aluminium	China PR	F. No. 6/27/2020-DGTR	7 September 2021	Definitive anti-dumping duty recommended
Flexible Slabstock Polyol	Thailand	F. No. 7/19/2021-DGTR	31 August 2021	Sunset review of anti-dumping duty initiated
Glass Fibre and articles thereof	China PR	49/2021-Cus. (ADD)	31 August 2021	Anti-dumping duty extended till 31 October 2021
Glass Fibre and articles thereof	China PR	F. No. 7/34/2020-DGTR	24 August 2021	Anti-dumping duty recommended to be continued after sunset review
Melamine	China PR	F. No. 7/32/2020 - DGTR	23 August 2021	Anti-dumping duty recommended to be continued after sunset review
Natural Mica based Pearl Industrial Pigments excluding cosmetic grade	China PR	47/2021-Cus. (ADD)	26 August 2021	Definitive anti-dumping duty imposed
Phthalic Anhydride	China PR, Indonesia, Korea RP and Thailand	43/2021-Cus. (ADD)	9 August 2021	Definitive anti-dumping duty imposed

Product	Country	Notification No.	Date of notification	Remarks
Polyester Yarn (polyester Spun Yarn)	China PR, Indonesia, Nepal and Vietnam	F. No. 6/10/2020-DGTR	19 August 2021	Definitive anti-dumping duty recommended on imports from China PR, Indonesia and Vietnam
Polytetrafluoro ethylene	Russia	F. No. 7/47/2020-DGTR	23 August 2021	Anti-dumping duty recommended to be continued after sunset review
Self-adhesive Polyvinyl Chloride Film	China PR	F. No. 6/1/2020-DGTR	3 August 2021	Anti-dumping investigation terminated
Toluene Di-isocyanate	China PR, Japan and Korea RP	F. No. 7/26/2021-DGTR	27 August 2021	Sunset review of anti-dumping duty initiated
Tyre curing presses	China PR	F.No.7/37/2020 - DGTR	27 August 2021	Sunset review recommends withdrawal of anti-dumping duty
Uncoated Copier Paper	Indonesia and Singapore	48/2021-Cus. (ADD)	27 August 2021	Anti-dumping duty extended till 28 February 2022, pending sunset review
Viscose Rayon Filament Yarn above 60 deniers	China PR	F. No. 6/26/2020-DGTR	9 August 2021	Countervailing duty not recommended to be imposed
Viscose stable fibre excluding bamboo fibre	China PR and Indonesia	44/2021-Cus. (ADD)	12 August 2021	Anti-dumping duty revoked after recommendations in sunset review
Vitamin C	China PR	File No. 6/32/2020-DGTR	3 September 2021	Definitive anti-dumping duty recommended

Trade remedy actions against India

Product	Investigating Country	Document No.	Date of Document	Remarks
Frozen Warmwater Shrimp	USA	86 FR 46830	20 August 2021	Rescission of anti-dumping duty Administrative Review; 2020-2021, in Part
Grinding media	Canada	GM 2020 IN	13 August 2021	Affirmative determination of dumping and subsidy

Product	Investigating Country	Document No.	Date of Document	Remarks
Organic Soybean Meal	USA	86 FR 49514	3 September 2021	Preliminary affirmative countervailing duty determination
Polyethylene Terephthalate film, sheet and strip	USA	86 FR 41949	4 August 2021	Preliminary results and partial rescission of anti-dumping duty Administrative Review; 2019-2020
Stainless Steel Flanges	USA	86 FR 47619	26 August 2021	Final results of anti-dumping duty Administrative Review; 2018–2019 issued. Duty imposed.



WTO News

WTO Panel rejects China's plea of inconsistency in USA's safeguard measures on CSPV products

The WTO's DSB panel has rejected all the claims of China concerning USA's safeguard measure on crystalline silicon photovoltaic cells, whether partially or fully assembled into other products (CSPV products). In its report circulated on 2 September 2021, the panel in the dispute *United States - Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products* (DS 562) observed that China failed to demonstrate that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards by failing to establish, prior to the application of the measures, that the increases in imports were the result of 'unforeseen developments' and were the 'effect of obligations incurred' under the GATT 1994 by the United States of America. The Panel, similarly, rejected the contentions of

inconsistency with Articles 2.1, 3.1, 3.2 and 4.2(b) of the Safeguard Agreement. India though participated as third party in the dispute it, did not submit any written or oral arguments.

DSB establishes Panel to check China's compliance with ruling on Tariff Rate Quotas for certain agricultural products

On a request from China, the Dispute Settlement Body of the WTO has on 30 August 2021 established a compliance panel to check whether China has complied with the earlier ruling in the dispute *China - Tariff Rate Quotas for Certain Agricultural Products* (DS 517). According to China, though it has fully complied with the earlier ruling, it sought for establishment of the compliance panel because of the United States' decision to request authorization to suspend concessions or other obligations with respect to China under Article 22.2 of the Dispute Settlement Understanding. India, along with few

other countries, has reserved its rights to participate as third party in the proceedings.

Saudi Arabia challenges EU's anti-dumping duty on mono-ethylene glycol

Saudi Arabia has sought consultations with the European Union with respect to the latter's provisional anti-dumping duty on imports of mono-ethylene glycol from the Kingdom of Saudi Arabia. According to Saudi Arabia, the measure put in place by EU, appear to be inconsistent with the EU's obligations under various provisions of the GATT 1994 and the Anti-Dumping Agreement. As per Saudi Arabia's communication dated 17 August 2021, the application before the EU authorities for imposition of anti-dumping duty, contained insufficient evidence on dumping causing injury to justify initiation of the investigation. The communication also states that the application was not made by or on behalf of the relevant domestic industry in the European Union.

Goods Trade Barometer confirms strength of trade recovery

Global merchandise trade continued its recovery from Covid-19 pandemic, according to the WTO's

Goods Trade Barometer which hit a record high in its latest reading as on 18 August 2021. The latest barometer reading of 110.4 is the highest on record since the indicator was first released in July 2016, and up more than 20 points year-on-year. The rise in the barometer reflects both the strength of current trade expansion and the depth of the pandemic-induced shock in 2020.

Indices for air freight (114.0), container shipping (110.8) and raw materials (104.7) continued to rise, signalling faster than average growth of trade. The automotive products index (106.6) also rose even though car production and sales fell in July in some countries due to a shortage of semi-conductors, which is also reflected in a small decline in the electronic components index (112.4). The rise in the air freight index reflects a rebound in air transport due to the easing pandemic-related travel restrictions in mainly developed countries.

The latest barometer reading is broadly consistent with the WTO's most recent trade forecast of 31 March, which foresaw an 8% increase in the volume of world merchandise trade in 2021 following a 5.3% drop in 2020. The full Goods Trade Barometer is available [here](#).



India Customs & Trade Policy Update

Import/export prohibitions and restrictions by DGFT

Para 2.07 of the Foreign Trade Policy regarding principles of restrictions and prohibitions for imports/exports has been amended by the Ministry of Commerce to empower DGFT to

impose prohibitions or restrictions for preventing sudden increase in imports from causing serious injury to domestic producers. Further, prohibitions/restrictions can also be imposed to relieve producers who have suffered such injury. Export prohibitions/restrictions can be imposed

for ensuring essential quantities for the domestic industry. The DGFT Notification No. 17/2015-20, dated 10 August issued for this purpose also mentions that the amendment is in line with international agreements.

Remission of Duties and Taxes on Exported Goods (RoDTEP) scheme notified

The Ministry of Commerce has notified the RoDTEP Scheme by Notification No. 19/2015-20, dated 17 August 2021. Simultaneously, the DGFT has also notified the rates by way of a public notice. The rates are mentioned in the Appendix 4R of the Handbook of Procedures, covering the eligible export goods, rates and per unit and value caps, wherever applicable for a total of 8555 export items. It may be noted that the rates are applicable for the exports already made under the Scheme from 1 January 2021. Products manufactured or exported by EOUs, SEZ units and under the Advance Authorization or Duty-Free Import Authorization scheme, are at present not eligible for this scheme and the implementation dates for these categories of exports will be notified later. It seems that benefit under the RoDTEP Scheme would not be available to exports of iron & steel, chemicals and pharmaceuticals as these items are not covered under Appendix 4R at present.

Integrated Circuits (ICs) – CHIMS implementation extended by two months

The trial period of Chip Import Monitoring System (CHIMS) has been extended by further two

months period i.e. up to 30 September 2021. Facility of online registration at CHIMS portal will be effective from 1 October 2021. As per amendments by Notification No. 15/2015-20, dated 9 August 2021, CHIMS will be effective from 1 October 2021, i.e. for Bills of Entry filed on or after said date. It may be noted that by notification dated 10 May 2021, the Ministry of Commerce had revised the import policy of ICs described in certain HS Codes of Chapter 85. The monitoring system would require importers to submit advance information of imports of ICs in an online system and obtain an automatic registration number.

Aircraft and helicopter imports by Aircraft Leasing Entities in IFSC permitted

The Ministry of Commerce has revised the Policy Conditions for import of aircrafts and helicopters, including the second-hand ones. Effectively, Aircraft Leasing Entities in International Financial Services Centres can now import aircrafts and helicopters without an import licence from the DGFT. As per Notification No. 21/2015-20, dated 31 August 2021, amending Policy Condition No. 1 of Chapter 88 of ITC (HS) 2017, the change is in line with the revised Air Transport Circular 02/2017 issued by the Directorate General of Civil Aviation. Additionally, the notification also removes the requirement of permission by Ministry of Civil Aviation for imports of aircrafts or helicopters for undertaking scheduled/ scheduled commuter/ non-scheduled air transport services or aerial work operations.



Ratio Decidendi

Anti-dumping duty – Companies managed by family members when not affiliated

The United States Court of International Trade has affirmed the US Commerce Department's (DoC) conclusion that there was no affiliation between the Doshi Companies (In India) during the Period of Investigation, after the formal separation agreement set by the Bombay High Court. The DoC had earlier collapsed the entities for the purposes of calculating dumping margin and had concluding that the companies were affiliated. But, later, on remand, the DoC reversed itself and determined not to collapse the entities, finding that the entities were not affiliated. Rejecting the challenge by the Coalition of American Flange Producers to the DoC decision after remand, the Court observed that there was no potential for control between the family members. It noted that there was no evidence suggestive of financial dealings between the companies and that there were no shared board members or employees between the companies during the POI. 'Affiliation' is defined by the statute, 19 U.S.C. § 1677(33), to include '(A) members of a family' and '(F) two or more persons directly or indirectly controlling, controlled by, or under common control with, any person,' among other categories. It may be noted that the Court had earlier, in its remand order, rejected the contention that common ownership of a group of companies by members of the same family, without more, can support a basis for affiliation where legal partitions prevent overlap in management or control between each entity. [*Echjay Forgings Private Limited v. The United States* – Slip Opinion 21-105, dated 20 August 2021, US CIT]

'Bluetooth module' classifiable under Tariff Item 8517 62 90

The CESTAT Delhi has held that Bluetooth module will attract classification under Tariff Item 8517 62 90 of the Customs Tariff Act, 1975 as it is not a 'part' and can be used in many devices like printers, computers, hard drive, etc. The Tribunal in this regard also observed and all these devices could work independently without the Bluetooth module. Department's contention of classification under Tariff Item 8529 90 90 on the basis of Section Note 2(b) for the reason that Bluetooth module was principally used with car infotainment system, was hence rejected by the Tribunal while allowing the appeal. [*Minda D-Ten Pvt. Ltd. v. Commissioner* – 2021 TIOL 457 CESTAT DEL]

Bamboo beakers made of 72% plant fibres and 25% melamine classifiable under Heading 3924 as plastic product

The Court of Justice of the European Union has held that bamboo beakers made up to 72.33% plant fibres and 25.2% melamine resin are classifiable under Heading 3924. The Court noted that even if the plant fibres were predominant in terms of quantity, the melamine resin contained in the goods was of overriding importance for their use. It held that melamine resin gave the concerned goods their essential character within the meaning of Rule 3(b) of the Interpretative Rules. [*BalevBio Eood v. Teritorialna direktsia Severna Morska* - Decision dated 3 June 2021 in Case C-76/20, CJEU]

Fire alarm containing recording system not covered under Heading 9027 as measuring instrument

Observing that recording of an alarm event was not a recording that a particular quantity has been measured or checked, the UK's First Tier Tribunal Tax Chamber has held that fire alarm containing recording system is not covered under Heading 9027. Noting that the product provided only diagnostic function after the fire, it also observed that the product did not record the actual quantity measured, nor the threshold

operating at the time of the alarm event but, only that the alarm was sounded and, in the case of combined detectors, that the product detected either smoke alone, or heat and smoke together. The Tribunal was hence of the view that the principal function of the product was not to be found within Heading 9027. [*Fireangel Safety technology Group Plc. v. Commissioner HMRC – Decision dated 1 June 2021 in Appeal number: TC/2019/01256, United Kingdom's First Tier Tribunal Tax Chamber*]



News Nuggets

India opposes continuation of WTO moratorium on customs duties on electronic transfer

India and South Africa have raised their concerns against continuation of the WTO moratorium against imposition of Customs duties on cross-border electronic transfers.

Notably, the WTO members will discuss the continuation at their 12th ministerial meeting (MC-12) scheduled to begin on 30 November. It may also be noted that India has opposed the plurilateral talks on e-commerce currently underway among some 70 WTO members.

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