Presentation on Anti Dumping and Safeguards Agreement

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IIFT

3 Trade Defence Instruments
- WTO provides for 3 trade defence instruments for imposing duties beyond the bound rate
  - Anti-Dumping duty
  - Countervailing duty
  - Safeguard duty
- Detailed investigation procedure has to be followed before imposition of any of the above duties.

Where Does Trade Remedy Measures Fit In?
- WTO system allows “protection” in specific cases by means of trade remedy measures
- Anti-Dumping-Additional import duties
- Countervailing-Additional import duties
- Safeguard-Average duties or quotas
- First two permit violation of MFN and binding tariff principle of WTO whereas the third permits violation of binding tariff principle

What is not dumping?
- Sale of goods at low prices per se
- Sale of goods which are unwanted or unsaleable in home market
- Fundamental notion of dumping- Price discrimination

Anti-dumping Agreement: Essential Features
- Injurious dumping considered to be unfair trade practice
- Deals with the price behaviour of exporters and not the exporting country as a whole
- Dumping exists when Export Price is less than the Normal Value
- Injury to domestic industry & Causal link are required to be proved

Introduction
- Specific action against dumping is required to be taken in accordance with Article VI of GATT 1994 and the Anti-Dumping Agreement
- DGAD responsible for conducting investigations and recommending duty level
- Duty imposed by DOR
Preconditions For AD Action

- Dumping
- Injury
- Causal link between injury and dumping

What is Dumping?

- Dumping—When exporter sells a product for export to the importing country at a lower price, than the price at which the same (or similar) product is sold on its own domestic market—called Normal Value
- Dumping is essentially Price discrimination between national markets
- Dumping per se is not objectionable
- Injurious dumping has been condemned and remedy provided for under ADA

Determination of Normal Value

- NV defined as:
  - The comparable price
  - In the ordinary course of trade
  - For the like product
  - When destined for consumption in the exporting country (i.e. home market)
- NV can be rejected when no sale of like product or when such sales do not permit a proper comparison. NV can then be
  - Export price to a third country; or
  - A constructed value

Test of Sales in Ordinary Course of Trade

- Normal Value established only if goods are sold in exporting country market in “ordinary course of trade”
- Sales are not regarded to be in “ordinary course of trade” in following situations:
  - Where sales are made at prices below per unit fixed and variable costs plus administrative, selling and general costs;
  - Such sales are made within an extended period of time (normally one year, but not less than six months)
  - Such sales are made in substantial quantities (tests: weighted average SP below weighted average cost or 20% of sales by volume below costs)
- Such sales are disregarded in determination of Normal Value

Fair Comparison between NV and Export Price

- For price comparison to be fair, a number of adjustments need to be made.
- Comparison must be made at the same level of trade (normally ex-factory level) and in respect of sales made at as nearly as possible the same time.
- Due allowance to be made for differences which affect price comparability, including differences in: Conditions and terms of sale; taxation, quantities; physical characteristics; levels of trade; any other difference demonstrably affecting price comparison.

Sufficiency of Volume Test

- If sales in home market is very low in volume, such sale price is not suitable for comparison with export price
- Volume sufficiency test:
  - If home market sales constitute 5% or more of the export sales in the country conducting the investigation;
  - A lower ratio “should” be accepted if the volume of domestic sales nevertheless is “of sufficient magnitude” to provide for a fair comparison
Alternative Bases for Calculating NV
- Two alternatives:
  a. The price at which the product (or like product) is sold to a third country;
  b. The “constructed value” of the product, calculated on the basis of cost of production, plus selling, general, and administrative expenses, and profits
- The Agreement has detailed and specific rules for determination of constructed value
- No hierarchy between two
- DA of importing country free to choose either of the two methods

NV in Non-Market Economies
- Applies to economies where Government has complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State
- Strict comparison with home market prices may not be appropriate
- Importing countries can exercise significant discretion in calculation of NV

Determination of Export Price
- General rule is that export price be based on transaction price at which foreign producer sells the product to an importer in the importing country
- This condition may not be fulfilled if export transaction is not a sale but an internal transfer or barter sale or sale involves a compensatory arrangement between exporter and importer
- In such cases, alternative method to be adopted

Fair Comparison of NV and Export Value
- Basic requirement is that prices being compared be those of sales made at the same level of trade (normally ex-factory level) and as nearly as possible, the same time
- Investigating authorities required to inform parties of the information needed to ensure a fair comparison
- e.g. Information regarding adjustments, allowances and currency conversion

Allowances
- Allowances be made in NV or export price or both for differences in conditions and terms of sale, taxation, quantities, physical characteristics, and other differences demonstrated to affect price comparability

Calculation of Dumping Margins
- The Agreement provides for two methods:
  a. Comparison of the weighted average normal value to the weighted average of all comparable export prices; or
  b. A transaction-to-transaction comparison of normal value and export price
- Strongly disputed issue is zeroing of negative dumping margins
Definition of “Domestic Industry” (Art. 4)
- In general terms, domestic industry is composed of producers as a whole of the like product.
- Certain categories of producers of like product are excluded:
  a. Producers related to exporters or importers under investigation (i.e. if there is a relationship of control between them which affects their commercial behavior).
  b. Producers who are importers of allegedly dumped products.
- An alternative definition of 'Domestic industry' is the producers whose collective output of the product constitutes a major portion of the domestic production of the like products.
- Domestic industry determination important for: who may file a petition; whose data are considered in injury analysis.

DI Standing Requirement (Art. 5.4)
- 25% test and 50% test.
- Those supporting the petition must account for at least 25% of the total domestic production of the product concerned.
- In respect of those who express an opinion on the petition (i.e. either support or oppose it), those supporting the petition must account for at least 50% of the production.

Definition of “Like Product” (Art. 2.6)
- Like Product is “a product which is identical, i.e. alike in all respects to the product under consideration or, in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.”
- The determination involves first examining the imported product(s) alleged to be dumped and then establishing what domestic products are appropriate “like product.”
- Decision regarding like product forms the basis of determining which companies constitute the domestic industry – this determines scope of injury investigation, injury determination and causal link.

Indian Examples of Like Product
- NBR Case – Acrylonitrile Butadiene Rubber (NBR) imported from Japan – DA held that all nitrile rubbers are copolymers of Acrylonitrile & Butadiene and served same general purpose (resistance to petroleum chemicals) though may have different end uses.
- Bisphenol Case – Epoxy grade and polycarbonate grade held to be ‘like’ as manufactured out of same chemical, had same molecular formula & other properties.

Meaning of the term “Injury”
- To impose anti-dumping measure, there must be a determination of injury.
- The Agreement defines the term “injury” to mean either:
  i. Material injury to a domestic industry (“current or present injury”): “Harm which is not inconsequential, immaterial, or unimportant”.
  ii. Threat of material injury to a domestic industry (“future injury”): Lesser used provision. Used along with material injury claim.
  iii. Material retardation of the establishment of a domestic industry: Not generally used - applies to ‘developing industry’ or ‘nascent industry’ which are yet to start production.
- The agreement elaborates parameters for evaluation of material injury and threat of material injury but is silent on evaluation of material retardation.

Basic Principles for Determination of ‘Injury’
- Determination of injury be based on positive evidence and involve an objective examination of:
  i. The volume of the dumped imports.
  ii. The effect of the dumped imports on prices in the domestic market for like products.
  iii. The consequent impact of dumped imports on domestic producers of like products.
Determination of Threat of Material Injury
- Some additional factors are to be considered to evaluate threat of material injury
- These include:
  a. The rate of increase of dumped imports;
  b. The capacity of exporter(s);
  c. The likely effects on prices of dumped imports;
  d. Inventories;
- Agreement has no further elaboration on these factors, or on how they are to be evaluated.

Elements of Analysis
- The investigating authorities have to consider the following:
  a. Volume effect—whether there has been a significant increase in dumped imports, either absolutely or relative to production or consumption in the domestic industry
  b. Price effect—whether there has been significant price undercutting, price suppression or price depression by the dumped imports as compared with the price of a like product of the importing Member

Examination of Impact of Dumped Imports on Domestic Industry of Like Products
- The examination of impact must include an evaluation of all relevant economic factors and indices having a bearing on the state of industry involved in the investigation.
- Injury factors include:
  i. Actual and potential decline in sales, profits, output, market share, productivity, return on investment, utilization of capacity.
  ii. Factors affecting domestic prices
  iii. Magnitude of margin of dumping
  iv. Actual and potential negative effects on cash flow, inventories, employment, wages, growth, etc.

Evaluation of Parameters
- The listed parameters are not exhaustive
- One or several of these factors do not necessarily give decisive guidance
- Some factors may project adverse effect while some others none or even better state of affairs
- Example: prices may show a decline but volume of sale may remain same or increase
- Isobutyl Benzene Case (IBB) – IBB imported from China into India. Total sales increased but price realization fell & domestic producers suffered losses. DA held that material injury was proved.

Demonstration of Causal Link
- The agreement requires that it must be demonstrated that the dumped imports cause injury through the effects of dumping
- In the causal relationship analysis, known factors other than the dumped imports which are injuring the domestic industry shall be examined.
- Illustrative list of such “other factors”: The volume and price of undumped imported goods; contraction in demand; restrictive trade practices; developments in technology; export performance; and productivity of domestic producers.

Investigation (Art.5)
- Investigation to be initiated on the basis of written request submitted “by or on behalf of” a domestic industry
- They need to fulfil “standing” requirement – i.e. numerical limits for determining whether there is sufficient support by domestic producers
- Evidence to be submitted for dumping, injury and causality
- Information to be also submitted regarding the product, industry, importers, exporters etc.
- In special circumstances, authorities can initiate investigation without a written application from a domestic industry, if there is sufficient evidence of dumping, injury and causality.
Investigation (Art.5) (contd.)

- Some safeguards to legitimate trade is built into the process of investigation
- There should be immediate termination of investigation if volume of imports is negligible (less than 3% for one country and less than 7% where more than one country shows dumping margin of less than 3%) or margin of dumping is de minimis i.e. less than 2% of export price (Art.5.8)
- Investigations to be completed within one year or maximum within 18 months, after initiation

Conduct of Investigation (Art.6)

- Requirement to guarantee confidentiality of sensitive information and to verify the information on which determinations are based
- Authorities required to disclose to interested parties the information on which determinations are to be based and to provide them adequate opportunity to comment
- Parties have a right to participate in the investigation

Imposition of Provisional Measures (Art.7)

- Provisional measure can be in the form of a provisional duty or preferably a security by cash deposit or bond equal to the amount of margin of dumping determined preliminarily
- Authorities must make a preliminary affirmative determination of dumping, injury, and causality before applying provisional measures
- No provisional measure to apply within 60 days of initiation of investigation
- Provisional measures applied generally for 4 months-extendable by 6 months
- When duties lower than dumping margin-measure to apply for 6 months-extension upto 9 months

Duration (Art.11)

- Dumping duties to normally terminate no later than 5 years after first being applied
- If a review investigation during this period establishes likelihood of continuation or recurrence of dumping and injury, the duration can be extended

Safeguard Measures:

Essential Features

- Protection against sudden surge in imports
- Should cause or threaten to cause serious injury to the Domestic Industry
- Can be in the form of tariff increases or Quantitative Restrictions
- Also concerns issues like Structural adjustment, compensation, retaliation etc.
- Compensation, retaliation etc come into play if measure continues beyond 3 years.
- Duty applicable on global basis subject to developing country exemption

Major users of AD Agreement from 1.1.1995 to 31.12.2011

<table>
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<th>S.No</th>
<th>Country</th>
<th>Number of AD Measures Imposed</th>
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Agreement on Safeguards

Differ from AD/CVD:
- Do not require “unfair” practice (hence no requirement to determine Normal Value or subsidy)
- To be taken on MFN basis (except for DCs having 3%-9% trade share)
- Have to “pay” when take them
- Can take the form of additional duty or quota
- Should be in public interest
- Adjustment required by domestic industry
- Domestic producer’s coverage wider-like or directly competitive products

Meaning of Safeguards

- As per “Dictionary of Trade Policy Terms” Safeguards means “temporary measures designed to slow imports to enable a particular industry to adjust to heightened competition from foreign suppliers”
- Normally ‘safeguards’ refers to action taken under GATT Art.XIX (Emergency Action on Imports of Particular Products)
- Safeguard action also possible under Art.XII and XXVIII (to Safeguard the Balance-of-Payments)

Historical Background

- No Safeguards Agreement during Tokyo Round
- SG Agreement negotiated to put an end to several “grey area” measures (bilateral voluntary export restraints, orderly marketing agreements, etc.) to limit imports of certain products
- These measures were not imposed pursuant to Art. XIX, and hence not subject to GATT disciplines
- The SG Agreement prohibits such measures

Safeguards: Basic Requirements (Art.XIX)

- A determination that,
- As a result of (i) unforeseen developments and (ii) the effect of a Member’s obligation under GATT 1994
- A product is being imported in such increased quantities
- As to cause or threaten to cause
- Serious injury
- To the domestic industry
- Producing like or directly competitive products
- To be applied on MFN basis

Conditions for Application of Safeguards (Art.2)

i. Increased imports - either absolute or relative to domestic production; increase must be sufficiently recent, sudden, sharp and significant

ii. Serious injury or threat thereof caused by such increased imports

Serious Injury (Art.4)

- Significant overall impairment in the position of the domestic industry (Art.4.1(a))
- Serious injury required is higher level than material injury required in AD and CVD
- To determine serious injury, investigating authorities must evaluate all relevant factors having a bearing on the condition of the industry
Serious Injury (contd.)
Evaluation of all relevant factors to include at least:
- Rate of increase of imports
- Market share of imports
- Changes in level of:
  i. Sales
  ii. Production
  iii. Productivity
  iv. Capacity utilization
  v. Profits and losses
  vi. Employment
of the domestic industry (Art.4.2(a))

Causal Link
- There should be objective evidence of causal link between increased imports of the product concerned and serious injury
- If factors other than increased imports are causing injury to the domestic industry at the same time, such injury must not be attributed to increased imports

Threat of Serious Injury (Art.4(b))
- Safeguard measure can also be applied if an imminent threat of serious injury is found
- This be shown by facts and not based on mere allegation, conjecture or remote possibility

Domestic Industry
Defined as:
- Producers as a whole of the like or directly competitive products within a Member’s territory
- Producers who collectively account for a major proportion of the total domestic production of those products
- This definition allows a broader consideration of effects than in AD/CVD cases.
- Differ from AD/CVD Investigation in:
  (i) Having no test of standing requirement (25%/50% test)
  (ii) No provision to apply safeguard measure in a situation of material retardation of an industry

Restructuring by the Domestic Industry
i. Viability of the plan
ii. Time period to substantially achieve the desired goal
iii. Quantification of the likely benefit
iv. Liberalization of SGD – benefits of Restructuring Plan
v. Balancing of SGD – Restructuring V/s liberalization
vi. Whether it is ultimately in the public interest

Safeguards: Causation of Injury
- Causal link between increased imports and serious injury
- “Genuine and substantial relationship of cause and effect between increased imports and serious injury” (AB-US-Wheat Gluten)
Investigation (Art.3)
- Investigating authorities required to hold public hearings or provide other appropriate means for interested parties (importers, exporters, producers, etc.) could present their views or respond to views of others
- Authorities to respect confidentiality of information upon good cause shown – there should be a public summary of such confidential information

Forms of Safeguard Measure
- Application of tariff above bound levels – only a general guideline that SGM be applied only to the extent necessary to remedy or prevent serious injury and to facilitate adjustment (Art. 5.1)
- Application of QRs – the level of QR must not be below the actual import level of the most recent 3 representative years (Art. 5.1)
- Rules laid as to how quota shares are to be allocated among supplier countries based on past market shares (Art.5.2(a))

Provisional Measures (Art.6)
- Provisional SG measures can be imposed under critical circumstances, defined as circumstances where delay would cause damage that would be difficult to repair
- It can be imposed on the basis of a preliminary determination that there is clear evidence that increased imports have caused or threaten to cause serious injury
- Such measures can be in place for a maximum of 200 days and should be in the form of refundable tariff increases
- Period of application of PM to be included in the total period of application of SGM

Duration
- Maximum duration of any SGM is 4 years, unless it is extended consistent with the Agreement’s provisions
- A measure may be extended, only through a new investigation where it is found that its continuation is necessary to prevent or remedy serious injury and there is evidence that industry is adjusting (Art.7.1 & 7.2)
- Initial period of application plus any extension generally cannot exceed 8 years (Art.7.3)

Duration (contd.)
- A safeguard measure in place for longer than one year must be progressively liberalized at regular intervals during the period of application
- If a measure is extended beyond the initial period, it should continue to be liberalized
- Any measure of more than 3 years duration must be reviewed at mid-term – if appropriate, measure be withdrawn or pace of liberalization be increased

Reapplication of Safeguard Measures
- A safeguard may not be applied again to a product until a period equal to the duration of the original safeguard measure has elapsed
- Minimum period of non-application should generally be 2 years – it can be one year where a new safeguard measure has a duration of 180 days or less
Compensation

- A Member applying SGM must maintain a substantially equivalent level of concessions and other obligations with respect to affected exporting Members
- Any adequate means of trade compensation may be agreed among the affected Members
- If no agreement on compensation within 30 days, the affected exporting Member may “retaliate” i.e. suspend equivalent concessions and other obligations (Art.8.1 & 8.2)

Compensation (contd.)

- Right to retaliate, if compensation is not agreed on, cannot be exercised during the first 3 years of application of SGM where measure is taken based on an absolute increase in imports and otherwise conforms to the provisions of the agreement (Art.8.3)

Transparency Requirement

- Notification to WTO – of safeguard legislation and initiation of investigation, finding of serious injury, provisional safeguard measures

Data on Safeguard Measures: 29/03/1995 to 30/04/2012

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<tr>
<th>Country</th>
<th>Number of Safeguard Measures</th>
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Thank you