



Presentation on Anti Dumping and Safeguards Agreement

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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.

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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
- Safeguards-Additional import duties or quotas
- First two permit violation of MFN and binding tariff principle of WTO whereas the third permits violation of binding tariff principle

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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**

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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

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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

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Preconditions For AD Action

- Dumping
- Injury
- Causal link between injury and dumping

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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

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Determination of Normal Value

- NV defined as:
 - i. The comparable price
 - ii. In the ordinary course of trade
 - iii. For the like product
 - iv. 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
 - i. Export price to a third country; or
 - ii. A constructed value

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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:
 - a. Where sales are made at prices below per unit fixed and variable costs plus administrative, selling and general costs;
 - b. Such sales are made within an extended period of time (normally one year, but not less than six months)
 - c. 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

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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; taxations, quantities; physical characteristics; levels of trade; any other difference demonstrably affecting price comparison.

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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:
 - a. If home market sales constitute 5% or more of the export sales in the country conducting the investigation;
 - b. A lower ratio "should" be accepted if the volume of domestic sales nevertheless is "of sufficient magnitude" to provide for a fair comparison

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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

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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

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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

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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

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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

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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

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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.

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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

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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.

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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.

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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

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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

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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

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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

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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.

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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.

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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.

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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

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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

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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

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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

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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

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**Major users of AD Agreement
from 1.1.1995 to 31.12.2011**

S.No	Country	Number of AD Measures Imposed	Number of AD measures Faced
1	India	478	94
2	United States	305	136
3	European Union	282	56
4	Argentina	206	19
5	Turkey	151	28
6	China	145	630
7	South Africa	128	40
8	Brazil	119	82
9	Canada	96	17
10	Australia	89	12
11	Mexico	85	32
12	Korea, Republic of	72	171

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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

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

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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)

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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

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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

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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

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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

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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))

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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

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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

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Domestic Industry

Defined as:

- > Producers as a whole of the like or directly competitive products within a Member's territory
- or
- > 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

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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

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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)

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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

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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))

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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

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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)

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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

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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

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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)

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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)

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Transparency Requirement

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

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

Country	Number of Safeguard Measures
India	14
Indonesia	13
Turkey	13
Chile	7
Jordan	7
Philippines	7
United States	6
Czech Republic	5
Argentina	4
Ecuador	4
Egypt	4
Total safeguard measures imposed	118

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Thank you

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