

# Trade Defence Measures



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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.



# 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



# 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



# Countervailing Duties

- To deal with the problem of direct and indirect Government subsidies
- Export subsidies main target but also deals with domestic subsidies.
- Only subsidies which are ‘**specific**’ can be subject to countervailing duty
- Injury to domestic industry and Causal link must necessarily be proved






# 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  
Implementation of Art. VI of  
GATT 1994 (Anti Dumping  
Agreement)





# 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:
  - 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



# 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” if following conditions fulfilled:
  - a. Sales made at prices below per unit fixed and variable costs plus administrative, selling and general costs;
  - b. Such sales made within an extended period of time (normally one year, but not less than six months)
  - c. Such sales made in substantial quantities (tests: weighted average SP below weighted average cost or 20% of sales by volume below costs)
- These 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; taxations, 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:
  - 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



# 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



# NV in Cases of Indirect Exports

- Where goods are imported from an intermediate country rather than country of manufacture, NV to be determined on the basis of sales in the market of exporting country
- Where this is not possible, normal value may be determined on the basis of price of the product in the country of origin



# 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





# Alternative Method to Determine Export Price

- It is called “constructed export price”
- It is calculated on the basis of the price at which the imported products are first resold to an independent buyer
- If no such resale or no resale in the condition imported, discretion left to authorities to determine a reasonable basis to calculate the export price





# 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




# Adjustments in Case of Constructed Export Price & Currency Conversion

- Where NV to be compared to constructed export price, allowance must be made for costs, including duties and taxes, incurred between the importation of the product and the resale to the first independent purchases, as well as for profits accruing
- Exchange rate use should be that in effect on the date of sale (date of contract, invoice, etc.)



# 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



# 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 of **like product** 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”)
  - ii. Threat of material injury to a domestic industry (“future injury”)
  - iii. Material retardation of the establishment of a domestic industry
- 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 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.



# 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 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



# Agreement on Subsidies and Countervailing Measures



# Introduction

- A vast universe of governmental activity can be called subsidy
- Subsidies are crucial tool of national governments to promote legitimate government policies to serve their constituents
- Subsidies are of different types: e.g. aid to the poor, aid for technological development, special aids for education, aid to disadvantaged groups and regions etc.



# Introduction (contd.)

- Traffic light approach
- Subsidies are put into various baskets/categories:
  - i. Red (“prohibited”)
  - ii. Yellow or amber (“actionable”)
  - iii. Green (“non-actionable”)





# Broad Scheme of ASCM

- In the Tokyo Round Subsidy Code, substantive obligations were in two parts:
- Track I – dealt entirely with countervailing duties and established international rules in this regard
- Track II – substantive obligations under international law regarding how government should refrain from granting subsidies that affect goods in international trade
- A crucial missing part was definition of “subsidy”



# Broad Scheme of ASCM (contd.)

- UR Subsidies Text is extensive and detailed
- Part I – General Provisions (definition and specificity)
- Part II – Prohibited subsidies (red light)
- Part III – Actionable subsidies (yellow or amber light)
- Part IV – Non-Actionable subsidies (green light)
- Part V – Countervailing duty measures



# Subsidy Defined

- Three key elements when examining whether a programme, scheme, etc. constitutes a subsidy are:
  - i. Financial contribution
  - ii. By a Government or any public body
  - iii. Which confers benefit
- If any of the three elements is missing, then the programme, scheme, etc. is NOT a subsidy under ASCM.
- In addition, subsidy should be specific.



# Financial Contribution

- Direct transfer of funds (grants, loans, equity infusions)
- Potential direct transfer of funds or liabilities (loan guarantee)
- Government revenue, that is otherwise due if foregone or not collected (tax credits, import duty exemption)
- Provision of goods or services other than general infrastructure
- Purchase of goods
- Price support



# By a Government or any Public Body

- Financial contribution granted by a Govt. (e.g. Federal, Regional or Municipal Govt.) OR by a public body (e.g. National Bank, National Power Company, etc.)
- Or Government **entrusts or directs** a private body to make the financial contribution
- Within the territory of a Member





# Concept of Benefit

- Benefit = advantage (to recipient), not cost to Govt.- “Whether the financial contribution places the recipient in a more advantageous position than would have been the case, but for the financial contribution”
- Basis for comparison = Market place- Is the financial contribution “provided on terms which are more advantageous than those that would have been available to the recipient on the market”



## Concept of Benefit (Contd.)

- Govt. equity infusions do not confer a benefit unless: “the investment decision can be regarded as **inconsistent with the usual investment practice (including ...risk capital) of private investors** in the territory of that Member”
- Govt. loans do not confer a benefit unless: “there is a difference between the amount that the firm receiving the loan pays on the Govt. loan and the amount the firm would pay on a **comparable commercial loan which the firm could actually obtain on the market.**”



## Concept of Benefit (Contd.)

- Govt. loan guarantees do not confer a benefit unless: “there is a difference between the amount the firm receiving the guarantee pays on a loan guaranteed by the Govt. and the amount the firm would pay on **comparable commercial loan** absent the Govt. guarantee.
- Govt. provision of goods or services does not confer a benefit unless for less than adequate remuneration based on **prevailing market conditions**



## Concept of Benefit (Contd.)

- Govt. purchase of goods does not confer a benefit unless: for more than adequate remuneration based on **prevailing market conditions**.



## Footnote 1 – Important Exemption

- Exemption of an exported product
- From duties or taxes borne by a like product destined for domestic consumption
- Not deemed a subsidy





# Calculation of Certain Types of Subsidy

- Grant
- Loans
- Loan guarantees
- Provisions of goods and services by the government
- Purchase of goods by government
- Provision of equity capital



# Grants

- Direct Transfer of funds : Amount received
- Tax exemption : Amount of tax payable at applicable rate
- Tax reduction : Amount of tax payable at applicable rate – tax paid
- Accelerated depreciation : Amount of tax payable under normal depreciation schedule – amount actually paid
- Interest rate subsidies : Amount of interest saved by the recipient
- In all above cases add an amount for interest during period of investigation



# Loans from the Government Art 14 (b)

- Subsidy = Interest normally payable on comparable commercial loan during period of investigation – amount of interest paid
- Comparable commercial loan : a loan of a similar amount with similar repayment period obtainable by the recipient from a representative private bank operating on the domestic market
- Commercial interest rate
  - Preferably established on the basis of the rate actually paid by the concerned company on comparable loan from private bank
  - If not, then interest paid on comparable loans to companies in similar financial situation in the same sector/in any sector



# Loan Guarantee Art.14 (c)

- If no guarantee fee paid
- Subsidy = amount of interest payable for comparable loan in absence of government guarantee – amount of interest paid on the guaranteed loan
- If guarantee fee paid
- No subsidy if fee is sufficient to enable the guarantee program to cover all its costs and earn a reasonable profit margin
- If fee is not sufficient to enable operation on a commercial basis then treat as if no guarantee fee paid



# Provision of Goods and Services by the Government – Art. 14 (d)

- Subsidy = Adequate remuneration for the product/service in relation to prevailing market conditions in the domestic market – price paid by the firm
- Adequacy of remuneration
  - Establish that same goods/services provided both by government and private operation
  - Subsidy = price charged by government – price charged by private operators for comparable purchase to
    - i. Concerned company; else
    - ii. Comparable companies in the same sector; else
    - iii. In the economy as a whole





# Purchase of Goods by Government

- Subsidy = Price paid for the like product by government – highest price offered for a comparable purchase of the same goods by the private sector
- If concerned company makes no comparable sales to private operators, then
  - Subsidy = Price paid for the like product by government – price paid by private operators to comparable companies in the same sector / in the economy as a whole



# Types of Specificity

- Enterprise specific
- Industry specific
- Region specific
- Prohibited subsidies are **deemed** to be specific
- Two broad categories:
  - i.* De-jure specific subsidies
  - ii.* De-facto specific subsidies



## Specific Subsidies – de-jure

- A subsidy is de-jure specific if
  - Access to the subsidy explicitly limited to certain enterprises. If access is limited based on objective criteria then it would not be a specific subsidy
  - Prohibited subsidies are deemed specific
- To be determined with reference to the jurisdiction of the granting authority



## *De-facto* Specificity [2.1(c)]

- Notwithstanding any appearance of non-specificity, the subsidy may in fact be specific. Following factors may be considered:
  - Use by a limited number of enterprises
  - Predominant use by certain enterprises
  - Granting of disproportionately large amounts to certain enterprises
  - Manner in which discretion has been exercised



# Prohibited Subsidy

- Certain subsidies are regarded as outright trade distortive – hence prohibited
- These are:
  - i. Export subsidies – subsidies that are contingent on export performance
  - ii. Import substitution subsidies – contingent on use of domestic over imported goods
- Certain agricultural subsidies are subject to AOA





# Export Subsidy

- Subsidies contingent, in law or in fact, whether wholly or as one of several other conditions, upon export performance are called export subsidies
- Examples are: provision of goods or services for use in the production of exported goods in terms more favorable than those for the production of goods for domestic consumption; export related exemption, remission or deferral of direct taxes; excess exemption, remission, or deferral of indirect taxes or import duties; provision of export credit guarantee or insurance programmes at premium rates which are inadequate to cover the operating costs and losses of the programmes



# Remedy against Prohibited Subsidy

- It can be challenged in WTO on the basis of special accelerated procedures
- Complaining Member not obliged to show trade effects as these are regarded as trade distorting subsidies
- It can also be subjected to countervailing action



# Special and Differential Provisions

- No derogation for import substitution subsidies except for fixed transition periods which is already over
- For “Annex VII countries” i.e. LDCs and 21 listed developing countries whose GNP per capita is below \$1000 per annum, prohibition on export subsidies not applicable-India one of them (others include Bolivia, Egypt, Indonesia, Kenya, Nigeria, Pakistan, Philippines, Sri Lanka etc.)
- Other developing countries to phase out export subsidy in a 8 year period
- Doha Ministerial Decision on Implementation Related Issues and Concerns: Listed Annex VII countries will continue to be in this Annex till their GNP reaches US \$1000 in constant 1990 dollars for 3 consecutive years



# Export Competitiveness

- Articles 27.5 and 27.6
  - If an Annex VII developing country's export of a specific product has reached "export competitiveness" i.e.
    - A share of at least 3.25% in world trade (of that product)
    - For two consecutive years
- That Annex VII developing country must phase out its export subsidies for such products over a period of 8 years



# Actionable Subsidy

- Specific subsidies causing adverse effects (injury, serious prejudice, nullification and impairment) are actionable
- Two possible recourse available to the affected country – DSU process and cvd investigation
- Remedy is removal of adverse effects of the subsidy or imposition of countervailing duty on imports





# Non-actionable Subsidy

- No action can be taken against subsidies that are non-specific – determined on the basis of:
  - Criteria are neutral, economic in nature and horizontal in application
  - No predominant use by certain enterprises
  - Eligibility based on objective criteria or conditions
  - Eligibility automatic, criteria strictly adhered to
- Up to 1999 a specific subsidy given for R&D assistance to disadvantaged regions and for environmental purposes were non-actionable. Now lapsed



# Countervailing Duties

- A duty imposed on an imported product to offset a subsidy
- Elements to take account: subsidization, injury and causation
- Strict rules regarding investigation
- Subject to dispute settlement



## Actionable Subsidy (Art.5)

- “No Member should cause, through the use of any subsidy..., adverse effects to the interests of other Members, i.e.
  - (a) injury to the domestic industry of another Member;
  - (b) nullification or impairment of benefits accruing directly or indirectly to other Members;
  - (c) serious prejudice to the interest of another Member.



## Actionable Subsidy (Art.5)

- Subsidies like production subsidy are ‘actionable’ subsidies
- They are not prohibited but can be challenged either through multilateral dispute settlement or through countervailing action if they cause adverse effect to another Member’s interest



# Adverse Effects

- Three types of adverse effects can be challenged multilaterally:
  - i. Injury – to domestic industry caused by subsidized imports
  - ii. Serious prejudice
  - iii. Nullification or impairment





# Serious Prejudice

- Where a subsidy causes
  - i. Displacement or impedance of the complaining Member's imports or exports, either in the market of the subsidizing Member or in a third country market;
  - ii. Significant price undercutting or depression or lost sales, of the complaining Member's product in a given market;
  - iii. An increase in the subsidizing Member's world market share in a subsidized primary product
- Factors other than subsidization which explains displacement or impedance should be taken into account (e.g. export restrictions, import restrictions in third country, non-conformity to standards etc.)
- Serious prejudice claim cannot be invoked against developing country Members



# Nullification or Impairment

- This arises where the improved access to a market that is presumed to flow from a bound tariff reduction is undercut by subsidization in that market
- This can serve as a basis for a complaint related to harm to a Member's exporting interests in an importing country market



# Types of Injury

- There are three types of injury:
  - i. Current material injury;
  - ii. Threat of material injury;
  - iii. Material retardation of the establishment of a domestic industry



# Current Material Injury

- Its determination is to be based on positive evidence
- There should be objective examination of both the volume of subsidized imports and the effect of these imports on prices in the domestic market for like product
- Consequent impact of such imports on the domestic producers of such products



# Threat of Material Injury

- It must be based on facts and not merely on possibility
- Factors to be considered are : Nature of subsidy and trade effects likely to arise therefrom; significant increase of subsidized imports; sufficient freely disposable capacity or an imminent substantial increase in capacity of the exporter, indicating likelihood of substantially increased subsidized exports





## Material Retardation of the Establishment of a Domestic Industry

- The agreement is silent regarding criteria for evaluation of material retardation of the establishment of a domestic industry



## Allocation of Subsidy to per unit of Like Product

- If export subsidies, then amount attributed to POI may be divided by export volume during POI
- For non-export subsidies domestic plus export sales in POI to be used as denominator
- If benefit of subsidy not limited to a particular product, total recipient sales to be used as denominator



# Remedies

- Subsidy that causes injury can be challenged at two levels:
  - i. Unilateral level through countervailing action;
  - ii. Multilateral level through the WTO's Dispute Settlement Mechanism
- Countervailing action can be taken only where there is injury
- Serious prejudice and nullification or impairment can be challenged at the multilateral level only



# Countervailing Measures

- SCM Agreement contains detailed rules regarding initiation and conduct of investigations, imposition of preliminary and final measures and the duration of measures
- These rules are meant to insure that investigations are conducted in a transparent manner, all parties have full opportunity to defend their interests, and investigating authorities explain the basis of their determination
- Most of procedural rules are similar to those applied for Anti-Dumping Agreement



# Special & Differential Treatment

- *De minimis* - if overall subsidy level by a DC does not exceed 2% of the value of the product, countervailing investigation to be terminated immediately
- *De minimis* of 3% for Annex VII Members and DCs which have eliminated their export subsidies before the end of the 8-year transition period
- For other Members, *De minimis* level is 1%





# Special & Differential Treatment (contd.)

- If volume of subsidized imports from a DC is less than 4% of the total imports of the like product in the importing Member, countervailing investigation has to be terminated
- The cut-off percentage is 9% where collective imports from more than one DC is under investigation and share of each DC is less than 4%



# 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 (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 not imposed pursuant to Art. XIX, enhance 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
- 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.



# 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

## Major users of AD Agreement from 1.1.1995 to 30.06.2010

S.No	Country	Number of AD Measures Imposed	Number of AD measures Faced
1	India	436	90
2	United States	289	127
3	European Union	269	52
4	Argentina	190	16
5	Turkey	142	26
6	China	137	563
7	South Africa	128	39
8	Brazil	105	77
9	Canada	94	17
10	Mexico	83	30
11	Australia	81	12
12	Korea, Republic of	70	165

## Data on CVD Action: 01/01/1995 - 30/06/2010

Sl. No.	Country	Number of CVD Measures Imposed	No. of CVD Measures Faced
1.	United States	62	3
2.	European Union	25	9
3.	Canada	16	3
4.	Mexico	8	
5.	Brazil	7	8
6.	South Africa	5	4
7.	Argentina	4	4
8.	New Zealand	4	
9.	Peru	3	
10.	Australia	2	1
11.	China	0	21
12.	India	0	30

## Data on Safeguard Measures: 29/03/1995 to 31/10/2010

Country	Number of Safeguard Measures
India	12
Turkey	12
Chile	7
Jordan	7
Philippines	6
United States	6
Czech Republic	5
Argentina	4
Egypt	4
Poland	4
Ecuador	3
Total	70





Thank you