SAFEGUARD MEASURES

By

R. K. GUPTA

Former
Chairman, Settlement Commission;
Director General (Safeguards); and
Director, Ministry of Commerce
SAFEGUARD MEASURES

- MEASURES TO PROTECT DOMESTIC PRODUCERS
- FROM THE ONSLUAUGHT OF INCREASED IMPORTS
- ACT AS A SAFETY VALVE MECHANISM
- **ARTICLE XIX OF GATT 1994-EMERGENCY ACTION**
- **AGREEMENT ON SAFEGUARDS (AOS)**
- GATT 1994 is “legally distinct” from the GATT 1947-GATT 1994 and the AOS both being Multilateral Agreements on Trade in Goods contained in Annex 1A of the WTO Agreement, both are “integral parts” of the WTO Agreement, and are “binding on all Members”
UNFORESEEN DEVELOPMENTS

OF THE EFFECT OF OBLIGATIONS INCURRED

ANY PRODUCT BEING IMPORTED IN SUCH INCREASED QUANTITIES AND UNDER SUCH CONDITIONS

CAUSING SERIOUS INJURY OR THREAT THEREOF

TO DOMESTIC PRODUCERS OF LIKE AND DIRECTLY COMPETITIVE PRODUCTS
AGREEMENT ON SAFEGUARDS

- A COVERED AGREEMENT
- CLARIFIES DISCIPLINE OF GATT 1994 AND SPECIFICALLY THOSE OF ARTICLE XIX
- ESTABLISHES MULTILATERAL CONTROL OVER SAFEGUARDS BY ESTABLISHING RULES FOR THE APPLICATION OF SAFEGUARD MEASURES
UNFORESEEN DEVELOPMENTS

- “Unforeseen”, particularly as it relates to the word “developments”, is synonymous with “unexpected”
- “Unforeseeable”, on the other hand, is defined in the dictionaries as meaning “unpredictable” or “incapable of being foreseen, foretold or anticipated”
- There must be a “logical connection” linking the “unforeseen developments” and an increase in imports
- Not referred to in the AOS, but needs to be specifically satisfied
- Investigation Report to include a finding on this
Safeguard measures relate to obligations incurred—Reduction in tariffs and removal of QRs.

If the increase in imports not because of obligations incurred, remedy would not lie in suspending obligations or in withdrawing concession.
INCREASED IMPORTS

- Increase in absolute terms or compared to domestic production
- In terms of quantity or value
- Compared to a previous level of imports - Base Period or Period of investigation
- “Is being imported”
SERIOUS INJURY

- Significant overall impairment of domestic industry
- A matter of economic and social judgment
- Evaluation of all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry
- In particular rate and amount of increase in imports and other listed factors
FACTORS THAT MUST BE EXAMINED

- Rate and amount of increase in imports in absolute and relative terms
- Share of the domestic market taken by increased imports
- Changes in the level of sales, production, productivity, capacity utilisation, profits, and employment
- All other relevant factors
SERIOUS INJURY OR THREAT THEREOF

- Facts, as a whole must certainly tend to show that some degree of adverse effect has been caused or threatened.
- Existence of a threat of serious injury must be based on facts and not merely on allegation, conjecture or remote possibility.
- Threat of serious injury must be clearly imminent—a high degree of likelihood that the anticipated serious injury will materialize in the very near future.
CAUSAL LINK BETWEEN IMPORTS AND INJURY

- Serious injury must be caused by increased imports
- Injury caused by other factors cannot be attributed to increased imports
- To be demonstrated on the basis of objective evidence
- Simultaneous injury by other factors
- There must be a genuine and substantial relationship of cause and effect
DOMESTIC INDUSTRY

- Domestic Producers of ‘like and directly competitive products’
- Domestic producers as a whole or a major proportion thereof
- Major proportion does not necessarily mean more than 50 percent
Purpose of safeguard measure is to prevent or remedy serious injury to the domestic industry and to facilitate adjustment

Only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment

Applied on all imports—Customs Union

Price based measures

Public interest
FORM OF SAFEGUARD MEASURES

- Safeguard Duty
- Import Quotas
- Tariff Rate Quotas
- Measures to be prospective; retroactive application not permissible
Existence of critical circumstances where delay would cause damage which it would be difficult to repair

A preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury

They can be applied only in the form of duties,

The duration is restricted to 200 days

This period of 200 days shall be counted as a part of the total period
DURATION OF SAFEGUARD MEASURES

- Emergency actions and, therefore, of limited duration
- Initial period shall not exceed four years
- This initial period takes into account the period of provisional safeguard measures
- Can be extended to a maximum of eight years (ten years for developing countries)
- Can be reapplied after mandatory period
Positive adjustment by the domestic industry
Progressive liberalization of safeguard measure where the duration is over one year
Mid-term review where the duration of safeguard measure exceeds three years
COMPENSATION AND RETALIATION

- Compensation to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT
- Members concerned may agree on any adequate means of trade compensation
- If no agreement reached on consultation, the affected exporting Members can retaliate
SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES

- Safeguard measures not to be applied on imports originating in a developing country if its share < 3%, provided that such imports collectively are < 9%.
- Can extend the period of application up to two years beyond the maximum period (i.e. 10 years instead of 8 years).
- Can reapply safeguard measures after a period of time equal to half that during which such a measure has been previously applied, provided that the period of non-application is at least two years.
AOS applies to all products, including agricultural products.

For agricultural products ‘Special Safeguard Measures’ can be taken as per Article 5 of the AOA.

Such an agricultural product should have been designated in the Member’s Schedule of Concessions with the symbol “SSG”.

The extent of duty would depend upon trigger level of volume and trigger prices.
Generally same requirements but certain flexibilities given for imposition of product specific transitional safeguards against imports from China

‘Market disruption’ instead of ‘Serious Injury’

Market disruption shall exist whenever imports are increasing rapidly so as to be a significant cause of material injury, or threat thereof

No requirement of ‘Unforeseen Developments’ or of ‘Progressive Liberalization’
SAFEGUARD MEASURES UNDER RTA/PTA/FTA

- Safeguard measures under RTA/PTA/FTA can be taken in terms of the provisions contained in the RTA/PTA/FTA

- Such protective measures, though in the nature of safeguard measures, are not the safeguard measures under the AOS but as per specific provisions of RTA/PTA/FTA

- Remedy is restricted to the withdrawal of the concessions granted under the RTA/PTA/FTA
INVESTIGATION PROCEDURE

- No safeguard measures without investigation
- Initiation of investigation:
  - On application by domestic industry
  - Suo Motu
- Public Notice of Initiation
- Interested parties-their rights and obligations
- Public files
- Public hearings
- Public notice of any provisional findings or final findings
CONFIDENTIAL INFORMATION

- Information supplied by any party on a confidential basis
- Information which is by nature confidential
- Not to be disclosed without permission of party submitting it
- Non-confidential summaries or reason why it cannot be done
- Authorities may disregard such information unless it can be demonstrated that the information is correct
Consultation

WTO consistency of the safeguard measure can be questioned before the dispute settlement body of the WTO

Panel can examine both a provisional measure, as well as the final measure

Panels not to conduct a de novo review of the evidence, nor to substitute their own conclusions

Panel to find whether an explanation is reasoned, or is adequate
NOTIFICATION TO WTO COMMITTEE ON SAFEGUARDS

- Upon initiating an investigation process relating to serious injury or threat thereof and the reasons for it
- Making a finding of serious injury or threat thereof caused by increased imports
- Taking a decision to apply or extend a safeguard measure
- No prescribed format of Notification but Notification to include information on
  - Serious injury or threat thereof caused by increased imports;
  - Precise description of the product involved;
  - The proposed measure; and
  - Proposed date of introduction, expected duration and time table for progressive liberalization
- In cases of extension of a measure, evidence that the industry concerned is adjusting shall also be provided
ROLE OF DOMESTIC INDUSTRY

- Collect complete information about all domestic producers
- Collect authentic data of the quantum and value of imports
- Should seek a consensus among themselves
- Identify injury parameters clearly and segregate injury caused by increased imports
- Draw plans to make positive adjustment
- Be ready for verification of information provided
- Co-operate with the investigating authorities
- Make a fully substantiated application at the earliest
ROLE OF GOVERNMENT AGENCY

- Appointment of an investigating authority
- Maintain an authentic import data base
- Represent interests of SMEs
- To meet with the WTO notifications requirements
- To consider the recommendations of the investigating authority and decide whether or not to impose safeguard measures
- Enter into consultations
PRECAUTIONS TO BE TAKEN

- Safeguard measure must comply with the provisions of both Article XIX of GATT and the Agreement on Safeguards (AOS).
- Investigation report must specifically record a finding regarding unforeseen developments.
- Safeguard measures shall be applied to all imports except de-minimis imports from developing countries.
- The type of measure, its level and duration needs to be restricted only to the extent necessary to remedy or prevent serious injury and allow for readjustment.
PRECAUTIONS TO BE TAKEN

- The intervening trends of imports over the period of investigation need to be analyzed.
- Investigating authorities must examine recent imports, and not simply trends in imports.
- Circumstances under which increased imports are entering and the circumstances of the market must be addressed.
- There are different ways in which products can compete—sales price clearly is one, but not the only one.
PRECAUTIONS TO BE TAKEN

- Investigating authorities must evaluate factors specifically mentioned in the Agreement
- They must examine all other relevant factors as well
- If the competent authorities consider that a particular ‘other factor’ may be relevant to the situation of the domestic industry, they must consider the same
- They must also give a finding that the concerned domestic industry has undergone a ‘significant overall impairment’
PRECAUTIONS TO BE TAKEN

- For data to be “objective and quantifiable”, such data would have to be both sufficient and representative of the domestic industry.

- Interested parties play a central role in investigation and are primary source of information-they must be given full opportunity.

- Investigation report must include an explanation of the rationale for the determinations from the facts and data contained in the report.

- Confidential information must be protected.
PRECAUTIONS TO BE TAKEN

- A determination of a threat of serious injury is to be based on facts and not merely on allegation, conjecture or remote possibility.
- Identification of ‘like or directly competitive’ products is the first step to identify the ‘producers’ of those products.
- Safeguard measures to be applied only to the extent necessary.
□ Goods imported-LED TVs 26”
□ Import Price-160 US$
□ Import Duty-25%
□ Landed Price-160+40 (25% of 160=40) =200
□ Price at which sold in the domestic market of exporting country-220
□ Sale price of 26” LCD TVs-225 US$
□ Price difference between LED and LCD TVs-US$ 15
ADD, CVD and SGD

- **Case-1**
  - Difference between US$ 220 and 160 = US$ 60
  - US$ 20-Domestic tax rebate (Taxes borne on inputs)
  - US$ 40-The loss in export sales borne by the exporter

- **Case-2**
  - Difference between US$ 220 and 160 = US$ 60
  - US$ 20-Domestic tax rebate (Taxes borne on inputs)
  - US$ 40-On account of tax relief on export income and cheaper finance for export production etc.
ADD, CVD and SGD

- Case-3
- Import Price-160 US$; Import Duty-25%
- Landed Price-160+40 (25% of 160=40) =200
- Price at which sold in the domestic market of exporting country-160 US$
- Sale price of 26” LCD TVs-225 US$
- Price difference between LED and LCD TVs-US$ 15
- Injury to domestic producers (225+15=240) 240-200=40US$ or 40/160=25%
Safeguard Duty, Positive adjustment and Progressive liberalization

- Injury of US$ 40 on account of:-
- US$ 10-On account of higher fixed cost, production capacity to be increased-in 3 Yrs.
- US$ 15-On account of higher raw material costs-Sourcing from int. market likely to take two yrs-Benefit flowing 5 and 10 US$ in the first and the second year
- US$ 15-On account of debts-It would take three years to convert debts into equity-Benefits flowing US$ 7, 6 and 2 resp. in 3 years
- SGD for the first year-25%
- Benefit flowing at the end of first year-US$ 12; SGD for the second year-40-12=28/160 i.e. 17.5%
- Benefit flowing at the end of second year-US$ 16; SGD for the third year-28-16=12/160 i.e. 7.5%
- After three years-Nil
- Mid-term review say after 18 months, SGD then @ 17.5%- Period can be extended but SGD cannot be > 17.5%