

Section 4

**SAFEGUARD ACTIONS, COUNTERVAILING
AND ANTI-DUMPING DUTIES
(MEASURES GOVERNMENTS ARE ORDINARILY
AUTHORIZED TO TAKE IF REQUESTED BY
AN AFFECTED INDUSTRY)**

CHAPTER 9

Safeguard measures to restrict imports in emergency situations

Summary of the main rules

*The Agreement on Safeguards authorizes importing countries to restrict imports for temporary periods if, after investigations carried out by competent authorities, it is established that imports are taking place in such increased quantities (either absolute or in relation to domestic production) as to cause **serious injury** to the domestic industry that produces like or directly competitive products. It further provides that such measures, which could take the form of an increase in tariffs over bound rates or the imposition of quantitative restrictions, should normally be applied on an MFN basis to imports from all sources.*

The investigations for the imposition of such measures can be initiated either by the government itself or on the basis of a petition from the affected industry. In practice, however, the investigations are generally initiated on the basis of petitions from the affected industry.

The Agreement lays down the criteria which investigating authorities must consider in determining whether increased imports are causing serious injury to the domestic industry. It also sets out basic procedural requirements for the conduct of investigations. One aim of the procedural requirements is to provide foreign suppliers and governments whose interests may be adversely affected by the proposed safeguard actions with an adequate opportunity to give evidence and to defend their interests.

The primary purpose of providing such temporary increased protection is to give the affected industry time to prepare itself for the increased competition that it will have to face after the restrictions are removed. The Agreement seeks to ensure that such restrictions are applied only for temporary periods by setting a maximum period of eight years for the application of a measure on a particular product. Developing countries can, however, impose them for a maximum period of 10 years.

1. General

To give industries time to adjust gradually to the increased competition resulting from reductions in tariffs and from the removal of other barriers to trade, the GATT practice has been to require that the cuts in tariffs agreed in multilateral trade negotiations should be implemented in stages over an agreed period of years. Thus tariff reductions on industrial products agreed in the Uruguay Round are to be made over five years in five equal instalments. Likewise, reductions in the agricultural sector as well as in domestic and export subsidies are to take place in stages over a period of six years. Developing countries have been given longer periods within which to implement reductions.

The GATT rules recognize that, despite the phased implementation of tariff reductions, certain industrial or agricultural sectors may face, in the short term, problems in adjusting to increased import competition. These problems may flow from their failure to rationalize production structures or to adopt the technological innovations necessary to raise productivity. To provide affected industries time to adjust to competition, Article XIX of GATT provides that where, as a result of tariff reductions, a country finds that a product is being imported “in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers”, it can impose *safeguard measures* to restrict such imports for temporary periods.

GATT 1994, Article XIX:1(a)

2. Circumventing GATT rules through VERs

Largely because of the GATT requirement that safeguard measures should be applied on a non-discriminatory basis, countries entered into volun-

tary export restraints (VERs) or orderly marketing arrangements (OMAs). Under these arrangements, exporting countries with rising exports are required by importing countries to restrain their exports to agreed limits. Though these arrangements are called “voluntary”, in reality they are not always so. As the restraints are applied only to imports from certain countries, they are also inconsistent with the rule that restrictions on imports should be employed on a non-discriminatory basis.

The use of such *grey area measures* (called so because their consistency with GATT rules is in doubt) by some developed countries, notably the United States and members of the European Union, has increased over the past three decades. The governments of these countries have also in some instances either encouraged or supported the initiatives taken by their industries to enter into voluntary export restraint arrangements with their counterparts in exporting countries. It is estimated that there are at present over 200 such bilateral or plurilateral arrangements. They cover products ranging from agricultural goods like beef; simple merchandise such as leather and rubber products, travel goods, pottery and chinaware; to sophisticated manufactures like television sets, motor cars and trucks.

3. Agreement on Safeguards

3.1. Commitment to abolish VERs

The main aim of the Uruguay Round negotiations in this area was to ensure that restrictive measures like VERs and other similar discriminatory measures are brought into conformity with GATT principles and rules. The Agreement on Safeguards (negotiated in the Round) does this by requiring that

existing grey area measures must be phased out within a period of four years (i.e. by 1 January 1999¹²). In addition, countries are committed “not to seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or import side”. They are also required not to “encourage or support the adoption or maintenance” of inter-industry arrangements that are comparable to the governmental measures described above.

3.2 Serious injury standard

The Agreement further provides that safeguard measures should be applied only after it has been determined by the investigating authorities that:

AS, Article 2

- ☐ A product is being imported in increased quantities (absolute or relative to domestic production); and
- ☐ In such conditions as to cause or threaten to cause serious injury to producers of like or directly competitive products.

AS, Article 4:1

The term “serious injury” is defined as the “significant overall impairment in the position of a domestic industry.” It must be established that imports are causing such injury to the domestic industry, defined as the “producers as a whole of the like or directly competitive products” or those “whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.” In other

¹² Each member country can, however, maintain one such measure over an additional period of one year.

words, it is not permissible to take safeguard measures to restrict imports where only a few producers are finding it difficult to meet import competition.

3.3 Rules governing investigations

The Agreement requires each member country to designate authorities to be responsible for carrying out investigations and to publish the procedures it proposes to follow, so that these are known to the public.

The request for the initiation of such investigations can be made by the government itself or by an industry whose collective output constitutes a major portion of the total domestic production of the imported product. However, in practice, investigations are generally triggered by an application made by producers or on their behalf by an association of producers. Such applications typically claim that increased imports are causing the producers serious injury, leading for instance to loss of profits, reduction in production and under-utilization of capacity and/or requiring cuts in the labour force.

AS, Article 3

The investigating authorities must give public notice of investigations and arrange for public hearings or other appropriate means in which “importers, exporters and other interested parties could present evidence and their views.” The authorities should also examine views and comments against the requested safeguard action and on whether the application of such a measure would be in the public interest.

AS, Article 4:2

The investigating authorities can authorize a safeguard action only after an evaluation of all relevant factors of an objective and quantifiable nature establishes that there is a “causal link between increased imports of the product concerned and serious

injury or threat thereof” to the industry. Safeguard actions should not be authorized if the problems the industry is encountering arise from factors other than increased imports (e.g. decline in overall demand for the product). In order to provide transparency, the investigating authorities are further required to publish their reports and conclusions.

3.4 Application of safeguard measures

AS, Preamble

The Agreement emphasizes that, in taking safeguard measures, the aim of the governments should be to promote “structural adjustment” and to “enhance rather than limit competition in international markets”. To this end it provides that such safeguard measures should be applied only for temporary periods to enable the affected industry to take steps to adjust itself to the increased competition that will follow the removal of those measures. Adjustment could take the form of the adoption of improved technology or the rationalization of production structures.

AS, Article 5

Furthermore, safeguard measures should be applied only “to the extent necessary to prevent or remedy serious injury and to facilitate adjustment” and on a “non-discriminatory basis to imports from all sources”. The type of safeguard action to be taken — increase in the bound rate of tariffs or imposition of quantitative restrictions on imports — is decided by the investigating authorities. Where a quantitative restriction is used, quotas may be allocated among the main supplying countries. In such cases, individual shares are allocated in consultation with the supplying countries on the basis of their shares in imports during a previous representative period. In allocating shares on this basis, the interests of new suppliers should also be adequately taken into account.

The Agreement permits, in exceptional situations, member countries to depart from the non-discriminatory rule and to apply quota restrictions only to one or more countries when imports from these countries “have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period”. In order to ensure that such actions are taken only in exceptional situations, the Agreement stipulates that they should be taken after consultations with, and approval by, the Committee on Safeguards. The Committee has been established under the Agreement.

3.5 Compensation for the loss of trade

A member country proposing to apply safeguard measures is expected to offer adequate trade compensation to countries whose trade interests would be adversely affected by such measures.¹³ If agreement on an adequate trade compensation cannot be reached by the country proposing to apply a safeguard measure and the affected exporting member countries, the exporting members may take retaliatory action.¹⁴ However, the right to retaliatory action cannot be exercised for the first three years that the measure is in effect, where the safeguard measure has been taken in accordance with the provisions of the Agreement and as a result of an absolute increase in imports (and not relative to domestic production).

AS, Article 8

¹³ The compensation is generally a concession, in the form of tariff reductions, from the country wishing to take safeguard actions to the countries whose trade would be restricted, on other products of export interest to them.

¹⁴ Such retaliatory action is generally the suspension of a concession or other obligation to which the country applying the safeguard measure is otherwise entitled.

3.6 Special and differential treatment to developing countries

AS, Article 9

The Agreement provides for special and differential treatment to developing countries in the application of safeguard measures. Imports from a developing country are exempt from safeguard measures if its share in the imports of the product concerned into the country taking the measure is less than 3%. This exemption does not apply if developing countries with individual shares of imports smaller than 3% collectively account for more than 9% of the imports.

3.7 Duration of safeguard measures

The other provisions of the Agreement are mainly directed towards ensuring that safeguard measures are applied for temporary periods. It is thus provided that:

- ☐ Safeguard measures in force on 1 January 1995, when the Agreement went into effect, must be terminated after eight years or by 1 January 2000, whichever comes later.
- ☐ The maximum initial period for the application of a safeguard measure is four years. This initial period may be extended up to a maximum of eight years (10 years for developing countries).

AS, Article 7

In order to assist affected industries in preparing themselves for the increased competition that will follow the ultimate lifting of safeguard measures, the Agreement requires any measure with a duration of more than one year to be progressively liberalized. There should also be mid-term reviews

of measures with durations of over three years, to see whether they should be withdrawn or liberalized faster.

In addition, the Agreement prevents countries from circumventing the time limits on safeguard measures by prohibiting the reimposition of protection on the same product for a period equal to that of the original safeguard action. In no event can a measure be reapplied within an immediately following period of less than two years. However, temporary safeguards that have been imposed for six months or less may be reinstated after one year, as long as actions are not taken on the same product more than twice in a five-year period. Here again, developing countries are subject to less rigorous obligations and may reimpose actions on the same product after a period equal to half the duration of the previous measure (but not within a period of less than two years).

4. Business implications

The new and improved rules on safeguards reinforce the GATT rules providing for security of access. Importing countries are prohibited from requesting exporting countries to ask their enterprises to restrain their exports under VERs or similar arrangements. It is important to note that by providing further that governments should not encourage their industries to conclude such arrangements with industries in other countries, the Agreement has cautioned industries against entering into similar arrangements even on an informal basis.

As has been mentioned, almost all tariffs of developed countries and a high proportion of the tariffs of developing countries have been bound against further increases, thus restricting the right of

countries to raise tariffs. Under the rules of the Agreement on Safeguards, importing countries will therefore be able to take measures to restrict imports only when investigations have established that increased imports are causing *serious* injury to their domestic industries. The rules further try to protect the interests of exporting enterprises by giving them the right to defend their interests during the investigations and to produce, if necessary, evidence to establish that the imposition of restrictions would not be in the interest of the consuming public in the importing country.

It is, however, important to note that these general rules on safeguard actions do not immediately apply to textile products. The Agreement on Textiles and Clothing, negotiated in the Uruguay Round, provides that the discriminatory restrictions currently applied to textile products by some importing countries should be phased out in four stages over a period of 10 years. During this phase-out period the Agreement permits countries to take safeguard actions to restrict imports on a discriminatory basis from those exporting country or countries, where as a result of "sharp and substantial increase in imports" from these countries, "serious damage" is caused to the domestic industry.

The trade in textiles will be governed by the rules of the Agreement on Safeguards on non-discriminatory application of safeguard measures only after 1 January 2005. On that date, the Agreement on Textiles and Clothing, after having been under implementation for 10 years, will cease to exist.

It is essential to look at these rules not only from the viewpoint of exporting enterprises but also from the perspective of enterprises which as a result

of a sudden surge in imports are finding it difficult to compete with foreign suppliers in their domestic markets. These enterprises have the right to petition their governments to take safeguard actions to restrict imports. Such petitions cannot be made by a single firm or a few enterprises, but by producers whose “production constitutes a major proportion of total domestic production”. In practice, such petitions or applications are often made on behalf of producers by the associations to which they belong. Petitions can be submitted only when it is possible to establish that there is a *causal link* between increased imports and the alleged *serious injury* to the industry. The ability of the affected industries to take advantage of these provisions will depend on how far they are able to build up the case for such temporary protection, taking into account the Agreement’s strict conditions for the imposition of safeguard measures.