Anti-Dumping and Safeguards: Flexibility for Public Interest

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Introduction

The determination of a policy approach with respect to trade remedies is important and necessary. The latitude with which the WTO Agreements have provided the issue of trade remedies is such that countries have sufficient discretion to employ these measures in various ways. However, this is not implicitly desirable particularly so far as the Philippines is concerned and this can be seen from the apparently conflicting attitudes that are allegedly said to prevail during previous trade remedy cases: that of a government seemingly intent on upholding a trade liberalization agenda and of a business sector increasingly seen to be protectionist. Whether those perceptions are true or not is actually symptomatic of the confusion as to the expectations to be derived from Philippine trade remedy laws. Thus, there is a need to lay down a policy regarding trade remedies that would not necessarily be liberal or protectionist but yet provide sufficient flexibility to the implementing authorities in imposing measures that would redound for the benefit of the general public interest. The determination of such a policy is therefore the underpinning theme of this article.

Dumping and Safeguards

Anti-dumping (R.A. 8752) and safeguards (R.A. 8800) measures are often confused with one another (at least in the Philippine setting), sometimes understandably so as they both deal with imposing measures against foreign imports, usually outside the regular tariff protection system. Public discussions sometimes use these two terms interchangeably and there have been cases in the past when an anti-dumping application has been withdrawn and re-filed as a safeguards petition. However, there are significant differences between these two trade remedies and they must be carefully noted for the procedure chosen will have a substantial impact

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on the outcome of the applications, as well as on the consequences of the imposed measures.

Some of the differences are basic in nature. Thus, anti-dumping measures are employed when foreign goods are said to be "dumped" into the importing country (i.e. if the export price is less than the normal value of that product in the exporting country). Stated in another way, there is dumping if a country exports a product to another country at a price lower than the price of the like product in the exporting country.

Safeguards measures, on the other hand, are imposed in response to a surge of imports. The increase may be in absolute terms or merely relative to domestic production. Again, however, import price is particularly relevant because the increase in imports will not automatically result in the imposition of safeguards measures unless such increase results in "serious injury" to domestic producers of a like product. Serious injury, like material injury, has not been categorically defined (although general definitions can be found in legislations: "significant overall impairment in the position of a domestic industry"). Nevertheless, it has been understood that serious injury connotes a higher standard or level of injury than material injury.

One of the rationales for the difference in injury standards actually points to another difference between the two trade remedies. Dumping is considered to be an unfair trade practice while the importations for which safeguards measures are applied are not. Safeguards measures are imposed simply because the quantity of imports is harming the local industry. Thus, as opposed to anti-dumping, the application of safeguards measures is viewed by some commentators as actually an acknowledgement by the applicant of the higher level of efficiency of the foreign competitors.

Another difference between anti-dumping and safeguards measures is their application. Anti-dumping measures tend to be specific, in the sense that they are imposed against only those countries whose companies are exporting to the Philippines at "dumping" prices. Countries whose companies are not engaged in dumping are not affected by anti-dumping measures. Under safeguards, however, such measures are applied to all countries that export to the Philippines (save for those countries falling under the de minimis provisions). Safeguards measures, viewed in that light, are therefore encompassing in nature.

Finally and most importantly, safeguards measures (unlike anti-dumping) require the country imposing it to give compensation to the countries against whom the measures are applied. Thus, if the Philippines were to impose safeguards measures against countries x, y, and z it would be necessary to give these three countries compensation in the form of tariff reductions on certain products exported by the latter to the Philippines. If the Philippines fails to give such compensation, then countries x, y, and z would have the right to withdraw substantially equivalent concessions that they give to the Philippines (under certain conditions however laid out by the WTO Agreements).

Public Interest

From a reading and analysis of the WTO rules pertaining to anti-dumping and safeguards, pertinent Philippine constitution and laws that relate to trade, and from a study of trade remedy practice both domestic and foreign, it may be considerably argued that RA 8752 and RA 8800 should be amended as to clearly express the necessity of having government make a determination that the imposition of an anti-dumping or safeguard measure will benefit public interest. This should be coupled, however, with the added determination by government to actively and clearly communicate to the private sector a declared policy that the impositions or non-imposition of trade remedy measures are to be done from the primary perspective of developing Philippine economic competitiveness and of upholding public interest.

Section 2 of the Anti-Dumping Act states that it shall be the "declared policy of the State to protect domestic enterprises against unfair foreign competition and trade practices", nevertheless, the better rule would be that espoused in Section 2 of the Safeguard Measures Act. Thus:

> "The State shall promote the competitiveness of domestic industries and producers based on sound industrial and agricultural development policies, and the efficient use of human, natural and technical resources. In pursuit of this goal and in the public interest, the State shall provide safeguard measures to protect domestic industries and producers from increased imports, which cause or threaten to cause serious injury to those domestic industries and producers."

From the foregoing provision, one would see that the application of safeguard measures is merely secondary to - and but an implement to achieving the goal of - achieving "competitiveness of domestic industries and producers based on sound industrial and agricultural development policies, and the efficient use of human, natural and technical resources". Note that the application of safeguard measures, aside from the condition mentioned in the immediately preceding sentence, is further conditioned on such being "in the public interest". In other words, the application of this trade measure is to be done for purposes only of promoting "competitiveness" and "public interest".

It needs pointing out that the words "domestic industries" can be interpreted two ways: either in general (as in to refer to all Philippine industries) or narrow form (referring only to those industries in need of protection). Going by the narrow interpretation, it can be argued that the promotion of competitiveness should merely be from the perspective of the domestic industry in need of protection. Hence, it is only the problems, circumstances, and implications peculiar to that specific industry that need to be considered in imposing a safeguard measure. Nevertheless, a complete reading of Section 2 would show that either interpretation (i.e., general or narrow) would render the same result due to the further condition of "public interest".

Accordingly, and for reasons to be laid out below, it may be argued that the better interpretation would be to consider "domestic industries" as referring to all Philippine industries. Hence, the application of safeguard measures should be done merely for the purpose of promoting competitiveness of all Philippine industries, as well as to promote public interest. This interpretation is certainly in conformity with the preambular provisions of the Safeguard Agreement:

> "Having in mind the overall objective of the Members to improve and strengthen the international trading system based on GATT 1994;
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> x x x

> Recognizing the importance of structural adjustment and the need to enhance rather than limit competition in international markets;"

The afore-mentioned standards of competitiveness and public interest is completely applicable and pertinent so far as the Anti-Dumping Act is concerned. Arguments have certainly been made that focus of the anti-dumping measures are actually to ensure continuation of competitive conditions by way of protecting domestic industries from imported "dumped" products (and not the other way around). This can be implied from the considerably mild wording of Article VI.1 of GATT 1994[1] (regarding the approach to "dumping") and Article VI.2 of GATT 1994 (which limits anti-dumping duties generally to the margin of dumping).

Note should also be made of the authority given to the Tariff Commission by RA 8752 with regard to "welfare". Thus:

> "Even when all the requirements for the imposition have been fulfilled, the decision whether or not to impose a definitive anti-dumping duty remains the prerogative of the [Tariff] Commission. It may consider, among others, the effect of imposing an anti-dumping duty on the welfare of consumers and/or the general public, and other related local industries."

EU and the US

It must be emphasized that this "public interest" clause is not unique to the Philippines. Under European Community anti-dumping rules, it must first be shown that the imposition of anti-dumping measures must be in the "Community interest". Community interest essentially involves a political decision, taking into account the interests of users, consumers, and upstream and downstream industries. In short, it must be determined that the imposition of such measures will be to the benefit of the overall interest of the EC. It must be emphasized that this Community interest requirement, like the public interest clause quoted above are not provided

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[1] "…dumping … is to be condemned if it causes or threaten material injury to an established industry in the territory of a contracting party …"

for under the WTO Agreements but are nevertheless legal and is a useful tool in determining overall propriety of a trade measure.[2]

Furthermore, this position of taking the "general" perspective (i.e., giving due attention to competitiveness and public interest) rather than limiting perspective merely from that of specific industries is not unique to the Safeguard Measures Act or of the Anti-Dumping Act, nor is it novel. There are three additional trade measures (aside from the three generally considered "trade remedy" measures) that can be found in the provisions of the Tariff and Customs Code. These are Sections 304, 401, and 402, all of which empower the President of the Philippines to either increase or lower tariffs (or even exclude imports) according to certain conditions that are essentially similar to each of these provisions and that of the Safeguard Measures Act. Thus, Section 304 can be employed provided that "public interest will be served thereby"; Section 401 only if such will be in the "interest of national economy, general welfare and/or national security"; and Section 402 "for the purpose of expanding foreign markets for Philippine products as a means of assistance in the economic development of the country, in overcoming domestic unemployment, in increasing the purchasing power of the Philippine peso, and in establishing and maintaining better relations between the Philippines and other countries". Finally, although Article XII, Section 1 of the Constitution does provide that "the State shall protect Philippine enterprises against unfair foreign competition", the same provision also declares as State policy the promotion of an economy based on industries "which are competitive in both domestic and foreign markets". No less significant are the provisions of Article XII, Section 13 of the Constitution, which also takes the "general" perspective in terms of trade policy. Thus:

> "The State shall pursue a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity." (underscoring supplied)

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[2] see Council Regulation (EC) No. 384/96, 22 December 1995, as amended by Council Regulation (EC) No. 2331/96, 2 December 1996, Council Regulation (EC) No. 905/98, 27 April 1998, and Council Regulation (EC) No. 2238/2000, 9 October 2000; also Business Guide to Trade Remedies in the European Community, published by the International Trade Centre, 2001, p.3

One argument that can be raised is that the requirement of determining the impact of trade remedy measures on overall competitiveness and, more importantly, public interest would have the result of adding elements or requirements that are not expressly found in the Anti-Dumping or Safeguard Agreements, or even in the Anti-Dumping Act or Safeguard Measures Act. However, the propriety of such an argument is more apparent than real. As far as the Anti-Dumping and Safeguard Agreements are concerned, note that both are mere annexes to the Marrakesh Agreement Establishing the WTO, the preambular portion of which declares that "[WTO Members'] relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services".

It must be emphasized that by adding an additional factor in determining the imposition of a trade remedy measure, the Philippines would certainly not be alone in doing so. Aside from its anti-dumping rules, the safeguard rules of the EC also provide for the requisite of "Community interest". Thus, aside from determining the presence of increase in imports, serious injury, and causality, the European Commission should also make a finding that the "interests of the Community call for intervention". Accordingly, the EC may still not impose safeguard measures even if the other three elements have been found to be present if such safeguard measures are contemplated to be against Community interest.[3]

The United States also implements implicitly the factor of public interest in imposing safeguard measures. It is emphasized that the power of the U.S. president to apply such a measure is to a large extent hugely discretionary. Nevertheless, at the same time, the U.S. Section 201 requires his decision to be based upon "implementing relief that provides greater economic and social benefits than costs, with a host of additional related factors to be weighed".[4] Accordingly, the U.S. president, in determining the propriety of safeguard measures, must consider the

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[3] see Council Regulation (EC) No. 3285/94 and Council Regulation (EC) No. 519/94; also Council Regulation (EC) No. 3030/93 and Council Regulation (EC) No. 517/94

[4] see U.S. Section 201; also, Business Guide to Trade Remedies in the United States, 2001, published by the International Trade Centre, p.133

following factors[5] in addition to the elements of increased imports, serious injury, causality, unforeseen developments, and trade obligations:

- "Adjustment efforts by the domestic industry;
- Effectiveness of import relief actions to facilitate industry adjustment;
- Other factors related to national economic interests of the U.S.;
- Extent to which there is diversion of foreign exports to the U.S. marked by reason of foreign restraints;
- Potential circumvention of any import action taken; and
- National security interests of the U.S." (underscoring supplied)

In Conclusion …

The addition of "public interest" as a factor to be considered when making determinations for anti-dumping and safeguard cases should not, contrary to perhaps common thinking, result in making it more difficult for domestic industry to ask for and receive anti-dumping or safeguard measures (as well as for government to apply the said measures). It must be considered that historically the U.S. and the E.U. rank among the highest in terms of anti-dumping or safeguard cases initiated and with measures ultimately imposed. In anti-dumping proceedings, for instance, as of a WTO Secretariat Report,[6] covering the period of 1 July to 31 December 2002, the E.U. was second highest in imposing final anti-dumping measures despite the additional requirement of "Community interest" (the U.S. was third highest). With respect to safeguards, in a 2002 WTO report, the presence of "Community interest" did not hamper the imposition of a final measure with regard to certain steel products, and the requirement of "other factors related to national economic interests" did

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5 ibid.

6 see WTO document G/ADP/N/98

not prevent the U.S. from imposing such measures on certain steel products,[7] lamb meat, line pipe, and wire rod.[8]

Furthermore, on the domestic level, it is axiomatic that every legislation passed by the Philippine Congress always contains the caveat that the rights afforded by such laws are subservient to the dictates of public interest. Thus, even constitutional rights such as those for privacy of communication and correspondence, property, of abode, and those pertaining to contracts are all subject to the dictates of public interest. The reason for this is that "public welfare is superior to private rights".[9] The same is clearly true for whatever is provided in the Anti-Dumping and Safeguard Measures Acts.

RA 8752 and RA 8800 could and should be amended as to clearly express the necessity of having government make a determination that the imposition of an anti-dumping or safeguard measure will benefit public interest. As stated, the government should actively and clearly communicate to the private sector a declared policy that the impositions or non-imposition of trade remedy measures are to be done from the primary perspective of developing Philippine economic competitiveness and of upholding public interest. It must be emphasized that this proposed policy is neither supportive of trade liberalization nor of protectionist policies, nor does it represent an attempt at a mere compromise between the two. Rather, it tries to strike a balance between the rights of the particular affected industry and public interest, and in doing so taking note of existing international and domestic trade, economic, and political realities.

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7 a WTO panel has declared the imposition of safeguard measures in this regard as violating WTO rules

8 see G/L/583, Report by the Committee on Safeguards, 04 November 2002

9 see Antonio B. Nachura, Political Law, 2002, p.124; citing PNB vs. Remigio, GR No. 78508, 21 March 1994