

Safeguards, Anti-Dumping and Countervailing Act 2076 (2019)

Introduction

This Briefing provides a general overview of the Safeguard, Anti-Dumping and Countervailing Act 2076 (2019) (“SACA”). SACA, which came into force on *Poush* 27, 2076 (January 12, 2020), aims to protect domestic industries from material injury or threat of serious material injury caused by unanticipated and unusual surge in import of foreign goods or import of goods at a price lower than normal value or import of subsidized goods into Nepal.

The key provisions of SACA, in summary, are discussed hereunder:

Definitions

The key definitions of the SACA include:

- **Domestic Industries:** Domestic industries producing similar, identical or directly competing goods to the goods under consideration.
- **Directly Competing Goods:** Goods, although not similar or identical to the goods under consideration, which are directly competing to goods under consideration and can be used as a substitute.
- **Identical Goods:** Goods alike in design, characteristics, features, and in all respects.
- **Serious Material Injury:** Injury caused or likely to be caused to domestic industries from the unanticipated and unusual surge in import of foreign goods or import of subsidized goods determined on the basis of criteria prescribed in Section 27. However, criteria prescribed in Section 27 are applicable for determination of serious injury for the application of safeguard measures only and not for anti-dumping or countervailing duties. This is one of the major loopholes of SACA.
- **Similar Goods:** Goods although not alike in all aspects but are composed of similar raw materials and perform a similar function and due to their similar characteristics, can be commercially interchanged.
- **Material Injury:** Injury caused or likely to be caused to domestic industries as a result of import of similar, identical or directly competing goods. The term also refers to retardation of the establishment of such industries.

Safeguard Measures

Types for Safeguard Measures

The Government of Nepal (“GON”) is empowered to impose various safeguard measures in the event it is found upon investigation by the Department of Commerce, Supplies and Consumer Protection (“Department”) of the Ministry of Industries, Commerce and Supplies (“Ministry”) that domestic industries have suffered or are likely to suffer serious material injury due to unanticipated and unusual surge

in the import of foreign goods, namely:

- to impose additional duties in addition to custom duties levied as per prevailing laws;
- to impose additional tariffs rate on the top of the additional duty stated above based on tariff quota in the event goods are imported in a larger quantity than those determined by the GON;
- to impose partial or complete restriction on the import of such good;
- to impose any other measures as specified in the Regulation.

Duration of Safeguard Measures

Initially, safeguard measures may be imposed for a term not exceeding four years. The GON may further extend the term for additional four years at the recommendation of the Investigating Officer. In addition, the GON may further extend such safeguard measures for an additional two years if it deems necessary to do so. The GON may also impose provisional safeguard measures for a period not extending 200 days in the event it deems necessary to do so.

Inconsistency with WTO's ASA

Safeguard measures are primarily used against fair-trade as an emergency action for protection of domestic industries. Under Article 7 of Agreement on Safeguard Measures ("ASA") of the World Trade Organization ("WTO"), States are under an obligation to progressively liberalize such safeguard measures at a regular interval after one year of its imposition. Further, safeguard measures imposed during the extended period should not be more restrictive than the initial period. SACA provides that safeguard measures shall be reviewed at a period prescribed in the Regulation. Nevertheless, contrary to ASA, SACA neither requires such measures to be progressive liberal nor does it address that such measures should not be more restrictive than the initial period.

Anti-Dumping Duties

Prohibition on Dumping

Dumping is prohibited under SACA. The GON is empowered to impose anti-dumping duties in addition to prevailing custom duties in case in the investigation by the Ministry, it is found that goods under consideration are being exported to Nepal at a price lower than its normal value thereby causing material injury or threat of serious injury to domestic industries.

Duration

Initially, anti-dumping duties may be imposed for a term not exceeding five years. The GON may further extend the term for additional five years at the recommendation of the Investigating Officer. The GON, in the event an affirmative determination on dumping is made in the preliminary report, may also impose provisional anti-dumping duties for a term not exceeding six months, in case such measure is requested by domestic industries or 120 days in all other cases.

Countervailing Duties

Subsidized Goods

Goods, which have received grants or other forms of concessions from government of exporting country or government owned financial or other organizations or agencies, are regarded as subsidized goods, in particular, those goods:

- which receive direct/indirect financial benefits, grants, discount, or support for their production or export;
- which receive direct or potentially direct transfer of capital fund, share investment for its production or export;

- for which the government or its agency have undertaken liability of manufacturing or have made arrangement for regular purchase of such goods;
- for which tax or revenue have been reduced or waived which otherwise should have been paid by the manufacturer;
- for which manufacturers have received other materials, services or facilities from the government apart from the basic infrastructural facilities.

The GON is empowered to impose countervailing duties in case upon the investigation by the Ministry, it is found that subsidized goods are imported in a manner causing serious material injury or threat of such injury to domestic industries.

Duration

Initially, countervailing duties may be imposed for a term not exceeding five years. The GON may further extend the term for additional five years at the recommendation of the Investigating Officer. Further, the GON, in the event an affirmative determination on the import of subsidized goods is made in the preliminary report, may impose provisional countervailing duties for a term not exceeding 120 days.

Inconsistency with WTO's ASCM

WTO's Agreement on Subsidies and Countervailing Measures ("ASCM") provides that only specific subsidy may be subjected to countervailing measures. Under ASCM, four types of 'specificity' are recognized, namely, enterprise specificity, industrial specificity, regional specificity, and prohibited subsidies. In contrast, SACA does not require subsidies to be specific for countervailing duties to be imposed.

Investigation

The Ministry may initiate investigation through the Department for imposition of safeguard measures, whereas, investigation for imposition of anti-dumping or countervailing duties may be initiated upon an application filed by domestic industries representing at least 25 percent of the total domestic production of similar or identical goods. Such application must be seconded by domestic industries representing at least 50 percent of the total domestic production of the similar or identical goods.

Investigation Report

The Investigating Officer shall submit the final investigation report to the Department generally within one year from the date of initiation of investigation. The report shall then be forwarded to the Ministry for imposition of safeguard measures or anti-dumping or countervailing duties.

Duties Retrospectively

The GON may impose anti-dumping or countervailing duties retrospectively in following situations:

- if it is proved that the goods under consideration were dumped or imported as a subsidized goods before as well;
- if the Ministry is convinced that the dumped or subsidized goods were regularly imported into the country;
- if a large volume of subsidized goods are imported or goods are imported in a relatively shorter period of time and non-imposition of countervailing duties on such goods retrospectively might undermine the remedial effect of the protection provided to domestic industries.

Nevertheless, such retrospective period shall not go beyond 90 days from the date of issuance of the notification imposing anti-dumping or countervailing duties.

Appeal

A person aggrieved by the decision of the Customs Office imposing safeguard measures, anti-dumping or countervailing duties, whether provisional or final, may file an appeal before the concerned High Court within 35 days from the date of the decision.

Conclusion

This is the first instance that a comprehensive legislation on contingency trade remedy is promulgated in Nepal. Several representatives of the GON, industrial federations, etc. have praised the GON's effort in enforcement of SACA aiming to protect Nepali industries from import of foreign substandard goods. The enactment of SACA is seen to be a positive step towards protecting domestic industries from unfair trade practices of the foreign exporters, in reality, it should not be used as a weapon to safeguard incompetent national industries. Further, several provisions of SACA are inconsistent to WTO's ASA and ASCM and lacks clarity, which need to be addressed in future.

This Briefing is authored by:



Devendra P.N. Pradhan
Managing Partner



Aaditty J. Kansakar
Associate



Astha Poudel
Trainee Associate

For further information about the subjects covered in this Briefing, please contact:

Aaditty J. Kansakar
Associate
Tel: +977 1 555 0709
Email: akansakar@pradhanlaw.com

Astha Poudel
Trainee Associate
Tel: +977 1 555 1900 (Ext. 108)
Email: apoudel@pradhanlaw.com



Pradhan & Associates Pvt. Ltd.
Maitri Marg, Bakhundole-3, Lalitpur, Nepal
Tel: +977 1 555 1900 | 552 0220 | 555 0063 | 555 5606 | 552 0711 (Hunting Line)
Fax: +977 1 553 3344
Email: info@pradhanlaw.com
Web: www.pradhanlaw.com

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