

Anti-dumping Measures: Easing the transition to free trade

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Many businesses in Asean countries continue to adjust to the changes brought about by the elimination of import duties, in the context of both the Asean Economic Community and other bilateral and multilateral free trade agreements. While reductions in barriers to trade – tariff or non-tariff – can open foreign markets to domestic producers, they also bring additional competition for domestic producers in their home markets.

In a world without barriers to trade, the idea is that each country would produce those goods in which it has a comparative advantage. While the economic efficiency this brings benefits everyone in the long term, the transitions are not always smooth. To address problems caused by dumping, countries can assess anti-dumping duties, subject to certain regulations.

Though there are some regional and country-specific differences, anti-dumping regimes are quite standardised across borders. This is largely because the Anti-Dumping Agreement of the World Trade Organization governs application of anti-dumping measures by WTO member countries. In Thailand, the relevant law is the Anti-Dumping and Subsidised Imports Act B.E. 2542 (1999).

Simply put, a product is "dumped" when it is exported to another country for sale at a price below the normal value of that product, or a like product, in the exporting country. However, for dumping to be actionable, it is also necessary to prove that there was injury to domestic industry in the country to which the dumped goods were exported, and that such injury was caused by the dumping. It can be challenging to prove all three elements.

For a country's regulator to determine whether dumping is occurring, the export price of the allegedly dumped goods must be compared to their normal value. The WTO agreement provides three options, the most preferred one being to determine normal value on the basis of the exporter's price in the exporter's home market. There is also some allowance to use similar goods if the exact good is not sold in the home market.

However, in some cases, the product of interest might not be sold in sufficient quantities in the exporter's domestic market, making this method unviable. In this case, pricing in a third country's market can be used. If that is not viable, the third option is to determine normal value by the constructed value method, which can be used for investigations of exports from countries that are not market economies.

In making the comparison between export price and normal value, there are many prescribed adjustments to make the comparison more indicative of real differences; these include, for example, those to account for product differences and level of trade.

The next element is injury to domestic industry. This can consist of present injury, threat of injury, or retardation in the establishment of domestic industry.

The last element is causation: did the dumping actually cause the injury, or was it caused by some other factor?

To initiate an anti-dumping investigation, a domestic industry must make a request to the relevant domestic regulator (in Thailand, the Department of Foreign Trade at the Commerce Ministry). To be valid, at least 25% of the domestic industry must be represented, and opposition must be less than 25% of the domestic market.

In applying for an investigation, domestic producers seek to build a prima facie case of dumping, injury, and causation, to make it more likely that the action will proceed. Assuming the investigation proceeds, accused foreign producers are asked to complete questionnaires about their pricing, costs, and related matters.

On the basis of these questionnaires, a preliminary determination is made (to which responses can also be filed), and eventually a public hearing is held, at which testimony can be given. Investigations are to be completed within one year, but this deadline can be extended by six months. There are mechanisms for provisional measures when warranted, and also to impose measures retrospectively.

If, at any point during an investigation, the authorities determine that dumping is zero or negligible, the investigation must immediately cease. Assuming the investigation reveals that dumping is occurring, that domestic industry is injured, and that the dumping has caused the injury, the authorities issue an order setting anti-dumping rates, which can be in effect for up to five years. After this period they must expire, unless an interim review indicates that ending the measures would injure domestic industry.

While foreign producers are not compelled to respond to an anti-dumping investigation, a failure to respond can allow the authorities to determine the exporter's dumping margin on the basis of the best information available. As such, a failure to participate can ultimately result in a higher anti-dumping rate.

In petitioning for an anti-dumping investigation, it is necessary to use strategy to make the best case. Likewise, when responding to an investigation, it is important to use strategy to present the best case that one is not dumping, or to minimise the apparent margins. Whether one is a petitioner or a respondent, anti-dumping investigations are considerable work, but the results can make a big difference in profits, and even business survival.