

Informed Counsel

Analysis of Recent Legal Developments in Southeast Asia



Antidumping, Countervailing Duties, and Safeguard Measures

David Duncan
Consultant
david.d@tilleke.com



c o n t e n t s

- 1 **Antidumping, Countervailing Duties, and Safeguard Measures**
Free trade agreements between ASEAN countries are becoming a frequent occurrence. What trade remedies are available to ease the transition toward freer trade?
- 3 **Product Liability Act**
It is integral to business owners' interests to have sound knowledge of the actions they can take to manage and mitigate their liability when accused of involvement with an "unsafe product."
- 4 **The DSI's Mandate**
Due to recent developments in Thai administrative law, the Department of Special Investigation is now obligated to investigate customs infractions and other business-related crimes.
- 5 **Franchising in Vietnam**
Food and beverage franchising has proven to be a lucrative form of business in Vietnam. In this article, we discuss franchising regulations, procedures, and the keys to success in this industry.
- 6 **Vietnam's Well-Known Marks**
How does a trademark obtain the coveted status of a well-known mark in Vietnam?
- 7 **Well-Known Mark Recordation Suspended in Thailand**
The recordation of well-known marks in Thailand has come to a halt for the time being.
- 7 **Copyright Registration**
We take a fresh look at an age-old subject and discuss the necessity of a copyright registration system in the context of the digital environment.
- 8 **Damages in Trade Secret Litigation**
A complex and unpredictable science, the amount of damages awarded to a successful party to litigation varies for seemingly unascertainable reasons.
- 9 **Online Monitoring**
As the general public takes more to purchasing goods on the Internet, IP infringement has increased online, as well. How can this breach of the law be tackled?
- 10 **Indonesia's Trademark Law**
Proposed amendments to Indonesia's Trademark Law will rewrite the book in several important ways, in large part due to imminent regional integration.
- 12 **Tilleke & Gibbins Updates**
Managing IP names Tilleke & Gibbins IP Firm of the Year in Vietnam, and Asian Legal Business awards our firm top rankings.

ASEAN countries have entered into a broad range of free trade agreements (FTAs), and many more FTAs are currently in the process of being negotiated. As both bilateral and multilateral FTAs begin to phase in, tariffs will be reduced or eliminated and business owners will be faced with advantages and disadvantages. On one hand, producers can benefit from tariff-free access to sell their goods to customers in overseas markets, and they may have access to potentially cheaper raw materials purchased from foreign suppliers. On the other hand, however, they are exposed to increased competition.

From the standpoint of a buyer, this increased competition is generally good, because it offers increased choices and reduced prices. For domestic producers, however, the increased competition from cheaper imports may put them out of business. Countries typically do not want to lose whole industries that they regard as important to their economies.

In order to address the problems incumbent with freer trade, a number of trade remedies are available. This article will provide an overview of antidumping duties, countervailing duties, and safeguard measures, all of which are temporary in nature to ease the transition toward freer trade.

Antidumping Duties

A foreign exporter is "dumping" when it sells goods in a foreign country at prices lower than it charges in its home country. Countries into which goods are dumped are permitted to respond in certain ways, as provided under Article VI of the General Agreement on Tariffs and Trade (GATT) and the Antidumping Agreement. In Thailand, these measures take the form of the Antidumping and Countervailing Duties Act B.E. 2542 and a number of regulatory notifications. Though the definition of dumping may seem simple, there are many determinative factors as to whether dumping is actually occurring, and if so, to what extent (known as the "dumping margin").

Before imposing antidumping duties, a country must undertake an investigation to determine whether dumping activities are occurring, whether its domestic industry has been or will be injured, and whether there exists a causal link between the two. Investigations can be initiated at the request of the "domestic industry," which refers to producer(s) representing at least 25% of domestic production. When an investigation is launched, foreign exporters who are the subject of the investigation will be sent questionnaires or they can request them on their own accord. Completed questionnaires must be received by a specified deadline (which may be extended), in order to be considered.

In dealing with the first issue—whether dumping is occurring—the country undertaking the investigation is required to make a fair comparison between normal value and export price. There are detailed requirements that must be heeded to make these calculations. In determining the normal value of the goods at issue, the first choice is to use pricing data from the exporter's home market. If this data is unavailable, the alternatives are to use pricing charged by the exporter in a third country or the constructed-value method. Once determined, the normal value is compared with the export price to determine whether and to what extent dumping is occurring.

Continued on page 2

Antidumping (from page 1)

In the event that initial investigations reveal a dumping margin of 2% or less, the investigation is to end immediately. Assuming that the investigation proceeds, however, one or more hearings may follow and there may also be visits to the foreign exporter's facilities. It is typically in the interest of a foreign exporter to complete the questionnaire and to participate in the investigation; otherwise, the country undertaking the investigation may use whatever other information it has in order to determine the dumping margin.

The investigation should be concluded within 1 year, but it can be extended to 18 months in special circumstances. In normal cases, dumping duties cannot be imposed until the determination of dumping, injury, and cause is made. When a preliminary determination of dumping, injury, and cause is made, provisional measures may be imposed commencing from 60 days after the investigation was launched. Depending on the results of the investigation, it is possible that antidumping duties can be retroactively imposed, going back to the date of the imposition of provisional measures. They can even be imposed up to 90 days before the application of provisional measures in exceptional circumstances involving a history of massive dumping.

Importantly, when antidumping duties are imposed, they are to be in place for no more than five years, unless it is proven that ending them would result in injury. Reviews are to be conducted upon request of an interested party.

Countervailing Duties

In concept, countervailing duties are meant to address subsidies granted by foreign countries when those subsidies cause injury to the industry of another country. Countries are permitted to respond to injurious subsidies as permitted in GATT Article VI and the Agreement on Subsidies and Countervailing Measures. Many countries have enacted a single law that addresses both antidumping and countervailing duties. This is the case in Thailand, which enacted the Antidumping and Countervailing Duties Act B.E. 2542.

Where trade is truly free, one country's subsidization of a particular business can distort international trade and damage business in other countries. In order to impose countervailing duties, a country must conduct a formal investigation that finds: (i) the existence of a subsidy; (ii) the domestic industry has suffered injury; and (iii) a causal link between the two. To address these distortions, the agreement defines "subsidy" as a financial contribution from a government/public entity, which confers benefit. The agreement goes into some detail in defining "financial contribution," but suffice it to say that it is defined broadly, including, for example, the giving of funds, the giving of goods or services, loans, loan guarantees, the purchase of goods, among other things. To fall within the scope of the regime, a subsidy must be "specific," i.e., that it is provided to a specific enterprise or industry or group thereof, that it targets producers in a particular region, or that it is a prohibited subsidy (as defined in the agreement).

In contrast to antidumping duties, which address behavior of foreign private parties, countervailing duties are meant to address behavior of a foreign country (i.e., its government). Subsidies are divided into two categories: "prohibited subsidies" and "actionable subsidies." Prohibited subsidies include export subsidies as listed in the agreement, as well as local content subsidies. The agreement also

sets out provisions on how to determine the amount of benefit received from the subsidies and on injury and causation. It is also important to keep in mind that developing countries are granted special treatment under this regime.

Many of the procedural requirements with respect to commencing an investigation are analogous to those applicable to antidumping. Among these, investigations are initiated at the request of the domestic industry, which is defined to be at least 25% of domestic production. If imposed, countervailing duties must not exceed five years in duration, unless it is necessary to avoid subsidization and injury.

Safeguard Measures

Safeguard measures are meant to be temporary measures that are used in the face of increased levels of imports that have seriously injured or threaten to seriously injure a country's domestic industry. A country's imposition of safeguard measures is regulated by GATT Article XIX and the Safeguards Agreement. In Thailand, these are implemented in the form of the Safeguard Measures on Increased Imports Act B.E. 2550.

The regime addresses how one determines whether there has been "serious injury" and what must be considered in determining whether the imports at issue are to blame. In contrast to the agreements relating to antidumping and countervailing duties, the Safeguards Agreement does not set out detailed procedures, but instead imposes basic requirements, such as requiring that an investigation be conducted pursuant to procedures already published, requiring public notice, and requiring that interested parties have the opportunity to present their views. The findings of the investigation must be published.

Safeguard measures are to be applied only to the extent necessary to address the serious injury and to provide for adjustment. In contrast to antidumping duties and countervailing duties, safeguard measures are, in principle, to be applied regardless of the exporting country, though there are a number of exceptions such as for apportionment of quota and to accommodate low volume exports from developing countries.

The duration of safeguard measures must not exceed four years, but this can be extended, as provided for in the agreement (typically, this does not extend for more than eight total years). In order to be extended, it must be shown that the measure is necessary to address the serious injury and that the industry is actually adjusting. When a measure is imposed for longer than a year, it must be periodically liberalized. There are also restrictions on repeating safeguard measures.

In considering antidumping duties, countervailing duties, and safeguard measures, it is important to keep in mind that each is meant to address a different issue, though particular problems faced by domestic producers may fall within the scope of more than one. From the standpoint of a domestic producer seeking the implementation of trade remedies, some strategy is needed in considering the type of investigation to pursue; how the best case can be presented; and which will have the greatest likelihood of being launched by the authorities. Of course, foreign exporters that are subject to investigation are not in a position to choose the type of investigation, but strategy is nonetheless important in making submissions and/or preparing responses to questionnaires (where applicable), and likewise, in the context of subsequent reviews. 🛠️