FAQs Regarding Trade Remedy Laws

by

Edmund Sim[1]

1. What is a trade remedy?

A trade remedy refers to legal action requested by the domestic industry, labor unions or the government itself. The action can result in the imposition of additional duties on imported goods to offset the extent of unfair pricing (antidumping), unfair government subsidies (countervailing duty) or increased imports (safeguards). The additional import duties are imposed by the customs authorities (in the US, the Bureau of Customs and Border Protection). It is possible to impose multiple trade remedies on the same product.

2. What is an antidumping duty?

An antidumping duty is an additional import duty imposed to offset against unfair pricing by exporters. It is imposed when the investigating authority has established that (1) dumping has taken place, (2) the domestic industry has incurred material injury, and (3) the dumping has a causal link to the material injury.

3. What is dumping?

Dumping is price discrimination by exporters. The traditional theory is that the exporter benefits from excess profits in its home market to cross-subsidize its exports to other markets. In most cases (ie other than in nonmarket economies), the dumping analysis compares the costs and prices for goods sold in the home market with the costs and prices of goods sold for export.

4. What is a non-market economy?

A non-market economy (NME) is a country where the government has such overwhelming influence over prices and costs in the economy, that there is no distinction between the private sector and the public sector. Thus prices and costs from an NME are not usable for the dumping calculation and instead data from a country of similar economic development is used. Countries led by Communist parties are most commonly deemed to be NMEs.

5. How is dumping calculated?

In most cases, the net export price is compared with the net home market price, with adjustments for production costs, distribution expenses, and product characteristics. However, if there are insufficient home market sales or the exporter is located in an NME, the net export price is compared either with a constructed value based on either the exporter's actual costs plus a profit (in most cases) or with a constructed value based on costs and profit in a country of similar

[1] Partner, Hunton & Williams LLP, Singapore office

economic development. The difference between the net export price and the comparison value, divided by the net export price, is known as the dumping rate.

6. What is material injury?

Material injury can be defined as economic loss to a domestic industry. The investigating authorities examine the actual and potential decline in sales, profit, output, market share, productivity, return on investments, capacity utilization, cash flow, inventories, employment, wages, ability to raise capital or investments, among other factors.

7. What is causal link?

The investigating authorities must demonstrate that the dumped imports are, through the effects of dumping, causing material injury. The authorities must examine all relevant evidence, including known factors other than the dumped imports, which may have affected the domestic industry. These factors include volume and prices of imports not sold at dumping prices, contraction in demand or changes in the pattern of consumption, trade restrictive practices, competition between the exporters and domestic industry, developments in technology and export performance and productivity of the domestic industry.

8. What is a countervailing duty?

A countervailing duty is imposed to offset the benefit from unfair subsidies provided by a government to its exporters. It is imposed when the investigating authority has established that (1) unfair subsidization has taken place, (2) the domestic industry has incurred material injury, and (3) the unfair subsidization has a causal link to that material injury. The definitions of material injury and causal link are the same as those for antidumping.

9. What is a subsidy?

A subsidy is a government benefit provided directly or indirectly. Direct subsidies could be paid in cash to companies, whereas indirect subsidies could be foregone revenues from special tax exemptions. Providing services below market levels, such as bank loans at reduced interest rates, can also be considered subsidies.

10. What is an unfair subsidy?

The subsidies are deemed to be unfair because they are linked to exports, or limited to a particular industry or region, thus specifically advantaging the exporters receiving the benefits to the detriment of the domestic industry. A benefit which is shared by all parties in a country, such as fire or police services, would not be considered an unfair subsidy.

11. How is a countervailing duty calculated?

The total value of the subsidies received by the exporter is divided by the total value of exports made by the exporter. This results in the countervailing duty rate.

12. What is a safeguard?

A safeguard measure can be imposed when the investigating authority can establish that there has been an increase (relative or absolute) in imports, which has caused serious injury to the domestic industry. Unlike the other trade remedies, a safeguard measure is not limited to duties and can be in the form of quotas, cash assistance or other programs. Also, the safeguard is imposed on all imports from all countries; the other trade remedies are imposed on imports from selected countries.

13. What is the legal basis for trade remedies?

In the United States, the Trade Act of 1930, as amended, is the legal authority for trade remedies. The U.S. Department of Commerce (DOC) makes determinations on dumping and subsidization, while the U.S. International Trade Commission (ITC) makes determinations on material injury and serious injury. In other countries, trade remedies are usually handled by the trade ministry or customs bureau.

14. What countries have trade remedy laws?

Almost all countries with significant domestic industries have trade remedy laws. Traditionally countries such as the US, EU, Canada and Australia were the primary users of trade remedy laws. More recently developing countries such as India, China, South Africa and Turkey have become active users as well.

15. Who bears the cost of a trade remedy action?

The domestic industry will bear the cost of preparing a trade remedy complaint (also known as a petition), usually through counsel. The exporters and importers subject to the trade remedy investigation will bear the costs of submitting information to the investigating authorities, again usually through counsel. Any resulting duties or measures are borne by the importers.

16. How does a company seek relief under the trade remedy laws?

In the United States, a petition is submitted to both the DOC and the ITC (for antidumping and countervailing duty investigations), or just the ITC (for safeguard investigations). The petition must demonstrate that the petitioners have sufficient legal standing to represent the entire domestic industry, as well as contain prima facie evidence in support of the petition.

17. What is the antidumping procedure?

In the United States, after receipt of the petition, the ITC will conduct a preliminary investigation. If the ITC votes to continue the case, the DOC will conduct a full investigation. After the DOC investigation is concluded, the ITC will conduct a final investigation. If both the

ITC and DOC determine that (1) dumping has occurred, (2) material injury has occurred, and (3) the dumping has caused the material injury, the DOC will direct the Bureau of Customs and Border Protection to impose antidumping duties.

18. What is the countervailing duty procedure?

In the United States, after receipt of the petition, the ITC will conduct a preliminary investigation. If the ITC votes to continue the case, the DOC will conduct a full investigation. After the DOC investigation is concluded, the ITC will conduct a final investigation. If both the ITC and DOC determine that (1) unfair subsidization has occurred, (2) material injury has occurred, and (3) the unfair subsidization has caused the material injury, the DOC will direct the Bureau of Customs and Border Protection to impose countervailing duties.

19. What is the safeguard procedure?

In the United States, after receipt of the petition, the ITC will conduct an investigation on whether the domestic industry has experienced serious injury by reason of increased imports. If the ITC makes this finding, then it will go on to determine suggested forms of the safeguard measure. These findings are then sent to the President who can decide to accept or reject (usually on foreign policy grounds) the proposed safeguard measures.

20. How does the trade remedy procedure differ in other countries?

In most other countries, the trade remedy procedure is handled either by the trade ministry or the customs bureau, which handles all aspects of the case (some countries do follow the US practice of separating dumping/subsidization from injury). All countries follow the WTO agreements (even nonmembers aspire to WTO membership) so the procedure and substantive aspects will be relatively consistent.

21. How does a company defend itself in a trade remedy action?

The investigating authorities will request extensive information from the exporters and importers, with questionnaires often reaching over 500 pages in length, with specialized submission requirements for computer data and foreign language translation. Failure to submit questionnaire responses properly will usually result in punitively high import duties and the resulting loss of the export market. Accordingly it is advisable for companies to seek professional advice in responding to a trade remedy action.

22. How does a company appeal a trade remedy determination?

Companies can appeal trade remedy determinations to the domestic courts, such as the Court of International Trade in US proceedings. In certain cases the appeal can be brought to a dispute resolution panel under a free trade agreement, such as NAFTA. Alternatively the government of the exporter can elect to seek dispute resolution at the WTO.

23. How long do trade remedies remain in place?

Antidumping and countervailing duties can remain in place for up to five years, after which a review proceeding must be conducted by the investigating authorities to determine whether they should be continued. Continuation, subject to such reviews, can be indefinite. The antidumping duty rate and the countervailing duty rate can also be revised through reviews. A safeguard measure may be imposed for up to eight years but cannot be extended.