

PROPOSED TRADE REMEDY REGIME FOR TIMOR-LESTE

A. Introduction

Timor-Leste is in the process to accede to the Association of Southeast Asian Nations (ASEAN), the Economic Partnership Agreement (EPA) between the EU and the Pacific States, and the World Trade Organization (WTO). Membership in these organizations will require Timor-Leste to make commitments to bind reduction or elimination of tariffs, and reforming other trade restrictions as part of the trade liberalization.

There are flexibilities built into trade liberalization agreements to provide reassurance in difficult times. Under both the WTO and ASEAN agreements, Timor-Leste can suspend trade liberalization commitments by using trade remedies measures: safeguard (SG) measures, anti-dumping (AD) duties, and countervailing (anti-subsidy) duties (CVD). Through trade remedy measures, governments can temporarily stop and even reverse the tariff reductions.

B. Economic and political justifications for trade remedies

Temporary protection of domestic industries is the fundamental purpose of trade remedies. Governments use trade remedies to increase import duties (or in some cases, apply quantitative restrictions, such as quotas) temporarily to shield domestic industries from competition presented by imports. Trade remedies thus allow the government to provide relief to domestic industries only for as long as necessary.

This is typically due to imports increasing in quantities that are too much for the domestic industry to handle (in the case of safeguards), and/or that these imports are benefitting from unfair pricing practices of the exporters (in the case of anti-dumping duties) or unfair subsidies provided by the governments of the exporters (in the case of countervailing duties).

The shield imposed by the trade remedies would be applied only until the domestic industry is able to compete with the imports, and/or the unfair pricing or unfair government subsidies have ended.

Moreover, trade remedies allow governments to deal with political pressures that may result from trade liberalization and the resulting increased competition from imports. Without such relief mechanisms, these political pressures could undermine the entire trade liberalization process.

Finally, trade remedies also can attract new investment into the economy. Foreign and domestic investors will feel reassured that their investments will be protected should they face increased and/or unfair competition from imports. Conversely, when there is no regime for trade remedies, foreign investors may be discouraged from making new or additional investments in domestic industry.

C. Types of trade remedies under the WTO

Trade remedies are governed by three WTO agreements:

- WTO Agreement on Safeguards (“WTO Safeguards Agreement”)
- WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (“WTO Antidumping Agreement”)
- WTO Agreement on Subsidies and Countervailing Measures (“WTO SCM Agreement”)

a. Safeguards

As defined by the WTO Safeguards Agreement, a safeguard measure can be imposed by an importing country when the following conditions are met:

- Increase in all imports (relative or absolute) that compete with the production of domestic industry (known as the “like product”)
- Serious injury or threat of serious injury to that domestic industry
- A causal link between the increased imports and the serious injury

The WTO panels have added another condition, that the situation must have arisen from “unforeseen circumstances,” e.g., an unanticipated situation.

A safeguard measure is therefore generally applied to all imports that compete with the “like product”, regardless of source. The measure can be in the form of import duties,

quantitative restrictions (quotas), or some combination of the two. For example, if a domestic industry producing milk requests a safeguard measure, the government could impose duties or quotas on imports of milk. The government can also require the domestic industry to explain how it will use the protection to restructure or improve its competitiveness.

The administrative process is generally more streamlined, requires fewer personnel, and is generally cheaper to administer. Moreover, the WTO Safeguards Agreement does not require that the safeguard measure be subject to domestic judicial appeal. This means that the government does not have to establish a means for the producers, importers, exporters, or others affected by the decision to challenge the decision in local courts.

Thus, if Timor-Leste pursues a safeguards regime as its first trade remedy option, it would not have to enact a formal Law through the Timor-Leste Parliament but could do so through a Government Regulation under the existing Organic Law.

On the other hand, because a safeguard measure is applied to all imports which compete with the domestic 'like product', whether these are fairly or unfairly traded, the WTO applies a higher legal standard as well as other limitations on the use of safeguard measures.

A higher standard of proof and limitations on the use of safeguards can be seen when compared with anti-dumping and countervailing duties, which involve unfairly traded goods and thus have a lower standard of conduct and evidentiary proof.

"Serious" injury is generally interpreted to mean that the increased imports are the cause of the economic injury suffered by the domestic industry. The WTO dispute resolution panels have found that meeting the "serious" injury standard requires more rigorous data and analysis on injury and causation than the "material" injury standard applied in anti-dumping and countervailing duty investigations. This makes a "serious injury finding less likely than a "material" injury finding.

Importantly, the maximum increase in import duties is limited to the tariff rates that the country agreed to be bound by upon entry into the WTO. Also, safeguard measures can only be applied for a limited period of time, during which the duties should be reduced each year.

Finally, WTO members affected by the safeguard measures can request compensation for the affected trade and/or seek dispute resolution. Recent WTO dispute resolution cases have largely upheld the imposition of safeguard measures, but also found that those decisions must be supported by data and reasoning.

ASEAN Trade in Goods Agreement (ATIGA) and the ASEAN Free Trade Agreements (FTAs) including Regional Comprehensive Economic Partnership (RCEP) expressly allow ASEAN member states to impose safeguard measures that apply to all trading partners by incorporating the WTO Safeguards Agreement.

Moreover, the ASEAN FTAs allow ASEAN member states to apply safeguard measures that apply only to the other FTA parties concerned, without having to apply the measures to all trading parties.

Thus, safeguards can be applied either on a global basis to all imports that compete with the domestic like product, or only to imports that compete with the domestic like product and come from FTA partners.

b. Anti-dumping duties

Anti-dumping duties are applied by governments to deal with unfair trade, in this case, dumping. As defined by the WTO Anti-Dumping Agreement, an anti-dumping duty can be imposed by an importing country when the following conditions are met:

- Goods from a specified country (or countries) are imported at dumped prices (see definition below)
- Material injury or threat of material injury to a domestic industry
- A causal link between the dumped imports and the material injury

Unlike safeguard measures which apply to all imports that compete with the domestic like product, anti-dumping duties are applied only to specified imports that compete with the domestic like product from identified countries that are shown to have “dumped” the products at unfair prices.

“Dumping” occurs when the import prices are lower than a benchmark, also known as “normal value.” Usually, that normal value is based on the exporter’s prices in its home

market or on a hypothetical value based on the costs of production, sales, and distribution, plus a reasonable profit.

Anti-dumping proceedings thus require additional information on the pricing and costs of the goods under investigation. The investigating government officials reviewing the information will require more specialized training and additional resources to analyze such information and confirm whether dumping has taken place. Moreover, the WTO Anti-Dumping Agreement requires that anti-dumping determinations should be subject to court appeals under domestic law, in addition to potential WTO dispute resolution.

On the other hand, because anti-dumping investigations involve unfairly traded goods, the WTO applies a more lenient legal standard to their conduct as well as fewer limitations on their application, especially when compared with safeguard measures, which involve fairly traded goods and thus have a higher standard of conduct and evidentiary proof before they can be imposed.

“Material” injury is generally interpreted to mean that the dumped imports are a cause of the economic injury suffered by the domestic industry.

The WTO dispute resolution panels have found that meeting the “material” injury standard requires less rigorous data and analysis on injury and causation than the “serious” injury standard applied in safeguard investigations, making a “material” injury finding more likely than a “serious” injury finding.

Moreover, anti-dumping duties can be applied at rates exceeding the WTO-bound rates, so long as the duty rates are linked to the extent of dumping or injury. Those duty rates are country-specific and even exporter-specific.

Anti-dumping duties can also be applied as long as the dumping or injury persists. In other words, they can be applied indefinitely, and there is no requirement to reduce the duties over time. WTO members also do not have to compensate trading partners affected by anti-dumping duties.

ASEAN Trade in Goods Agreement (ATIGA) expressly allows ASEAN member states to impose anti-dumping duties by incorporating the WTO Anti-Dumping Agreement. The ASEAN FTAs (including RCEP) have the same provisions, with some relatively minor procedural requirements for the investigation.

c. Countervailing (Anti-subsidy) duties

Countervailing duties are also applied by governments to deal with unfair trade, in this case, subsidization by the exporting country's government. As defined by the WTO SCM Agreement, a countervailing duty can be imposed when the following conditions are met:

- Goods from a specified country (or countries) are subsidized
- Material injury or threat of material injury to a domestic industry
- A causal link between subsidized imports and the material injury

Unlike safeguard measures which apply to all imports from all countries, countervailing duties are applied only to imports from identified countries that have been demonstrated to have been "subsidized" by other governments.

"Subsidization" occurs when the exporter's home government has provided benefits to the exporter which are "specific." Thus, the focus of a countervailing duty investigation is on the exporting country's government's policies and whether they provide an unfair benefit for its exporters. This contrasts with an anti-dumping investigation that focuses on the pricing behavior of exporting companies.

Benefits are typically tax credits or reductions, grants, loans, and the provision of goods or services at reduced rates by the government or its agents. Benefits are "specific" if they are only to a limited number of recipients, such as specified industries or goods for export.

In sum, the WTO SCM Agreement does not prohibit governments from subsidizing their industries, but it does allow WTO members to impose duties to counter the effects of exports that benefit from those foreign government subsidies.

Countervailing duty proceedings thus require additional information on the sales of exporters, as well as the policies of their home governments. The investigating government officials reviewing such information will require more specialized training and additional resources to analyze such information and confirm whether subsidization has taken place.

Moreover, the WTO SCM Agreement requires that countervailing duty determinations should be subject to judicial appeals under domestic law, in addition to potential WTO dispute resolution.

On the other hand, because countervailing duty investigations involve unfairly subsidized goods, the WTO applies a more lenient legal standard to their conduct as well as fewer limitations on their application, especially when compared with safeguard measures, which involve fairly traded goods and thus have a higher standard of conduct and evidentiary proof before they can be imposed.

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Moreover, countervailing duties can be applied at rates exceeding the WTO bound rates, so long as the duty rates are linked to the extent of subsidization or injury. Those duty rates are country-specific and even exporter-specific.

Countervailing duties can also be applied as long as the subsidization or injury persists, e.g., indefinitely, and there is no requirement to reduce the duties over time. WTO members also do not have to compensate trading partners affected by countervailing duties.

ATIGA expressly allows ASEAN member states to impose countervailing duties by incorporating the WTO SCM Agreement. The ASEAN FTAs (including RCEP) have the same provisions, with some relatively minor procedural requirements for the investigation.

II. The proposed implementation of the trade remedies regime in Timor-Leste

As discussed above, Timor-Leste would benefit from the adoption of a trade remedy regime. Domestic industries already in Timor-Leste would be encouraged to support trade liberalization if they knew they could be protected against competition from unfairly traded or increased imports.

Potential investors also would be encouraged to come in, if they know that trade remedies could be imposed to protect their investments. For these reasons, almost all ASEAN members, including the less developed members, have adopted trade remedy regimes.

This policy, therefore, proposes that Timor-Leste adopt a trade remedy regime. This will involve drafting a legal framework for the administration of trade remedies. Capacity building and training for both the government and the private sector will be necessary. Moreover, the government will need to develop institutions to administer the trade remedy regime.

A. Prioritizing a safeguards regime

As a first step in implementing trade remedies, **this paper proposes that Timor-Leste first adopt a safeguards regime.** This is based on recent experience in other Asian LDCs adopted a safeguards regime first to gain experience before implementing a more complex anti-dumping and countervailing duty regime.

Safeguards are more flexible to investigate and implement. They will require fewer resources and less capacity to administer. Moreover, a safeguard regime can be created through regulations under existing organic laws rather than new legislation because there would be no requirement for the domestic court to appeal safeguard decisions under Timorese law.

Once the institutional and legal frameworks are established, the government can then proceed to adopt an anti-dumping and countervailing duty regime.

The government would benefit from the early experience in adopting the safeguard regime and could take the additional time necessary to draft and pass the more detailed legislation involved in anti-dumping and countervailing duty proceedings.

Government Decision and Establishment of Trade Remedies Desk

The first step to establishing a trade remedies regime in Timor-Leste would be to create a desk/unit to handle the development and implementation of the trade remedy regime.

As noted above, trade remedies are handled by the trade and industry ministries in ASEAN governments, so **we would propose that this desk be organically established in the Ministry of Tourism, Commerce, and Industry (MTCI).**

Personnel from other government ministries (such as customs) could be assigned to work with this desk on an ad hoc or permanent basis, depending on availability and necessity.

The desk should be led by government personnel with experience in economic analysis, supported by others with experience in accounting, data management, and legal matters.