

World Trade Organisation (WTO) Remedies in Malaysia

Introduction

Established in 1995 and based in Geneva, Switzerland, the WTO is the successor to the General Agreement on Tariffs and Trade (GATT), a group founded in 1948 whose rules created the modern multilateral trading system. With the US adversarial Trade Wars introduced by President Trump and the Trade Conflict between Australia and China, the relevance of the World Trade Organisation ("WTO") is increasingly being questioned. Nonetheless the WTO has introduced the global rules of trade.¹

The WTO permits members to impose trade remedies or trade defence measures against imports to protect their domestic industries from unfair practices such as dumping and subsidies, or to cope with a sudden surge of foreign goods². The WTO trade remedies are instruments to safeguard and defend the interest of domestic industry from unfair trade practice, which have been incorporated by many countries into domestic law including Malaysia.³ Unfair trade practice comes in different forms. In 2021, the US accused China of unfair trade practices such as preferential treatment for state business.⁴

Malaysia has been a member of WTO since 1 January 1995 and is also a signatory to the General Agreement on Trade and Tariff ("GATT") shortly after gaining its independence since 24 October 1957. With that, this article focuses on the trade remedies offered by the WTO and how the remedies are then incorporated into the Malaysian law.

WTO Trade Remedies

The WTO put in the effort to ensure that trading is done fairly and openly by having tariffs and other forms of protection.⁵ The kind of protection can be in the form of trade remedies. It is permitted under the WTO is to protect local industries from unfair trading are anti-dumping, subsidies and countervailing measures and safeguard measures. These focused trade remedies aim to prevent unfair trading within the international trade between countries. It allows for member states to challenge another member state which is thought to be breaking the rules by imposing limits for unjustified reason.⁶

There are no WTO laws at the moment that governs unfair trading per se, however, there are a set of rules in relation to this matter.⁷ As the names suggests, these rules aim to protect against unfair trade especially dumping and subsidisation. As of 31 December 2021, WTO members referred 607 disputes to the Dispute Settlement Body.⁸ Between 1995 and 2021, more than 479 panel reports were circulated to advance the settle of the 607 disputes.⁹

Malaysian Laws Governing Trade Remedies

The relevant legislation that governs the trade remedies in Malaysia are the Countervailing and Anti-Dumping Duties Act 1993 ("CADDA") accompanied with the Countervailing and Anti-Dumping Duties Regulation 1994 ("CADDR"). As the name of the legislation suggest, this Act governs the investigation and determination of dumping, imposition of duties to offset such dumping and anything in relation to dumping.¹⁰ It was then amended by virtue of the Countervailing and Anti-Dumping Duty (Amendment) Act 1998 ("Amendment Act"). Additionally, there is also the Safeguard Act 2006 ("SA"). The CADDA and SA are administered by the International Trade and Industry Ministry ("MITI").¹¹

Dumping

Article VI of the GATT and Article 2.1 of the Anti-Dumping Agreement ("ADA") define "dumping" as the introduction of a product into the commerce of another country at a value lesser than its 'normal value'. Only dumping causing injury is condemned and potentially subject to anti-dumping measures under GATT and ADA.

Anti-dumping duty levied on certain goods originating from specific trading partner or partners to offset the dumping margin.¹² The dumping margin is the remaining total of normal value less the export price.¹³ 'Normal value' under section 16(1) of CADDA means the comparable price actually paid or payable in the ordinary course of trade for the product sold for consumption in the domestic market of the exporting country.¹⁴

The normal value can be determined through proper comparison with the sales in the domestic market in the exporting country.¹⁵

Alternatively, the normal value can be determined by comparing the comparable price of the same product when exported to a third country,¹⁶ or by constructing the value of the subject merchandise by adding the cost of production plus a reasonable amount of selling, administrative and other general expenses and for profits.¹⁷ The export price is defined under section 17(1) as the price actually paid or payable for the subject merchandise. As mentioned earlier, it must be established that the subject merchandise caused injury to the domestic industry.¹⁸ 'Injury' is defined to mean material injury or threat of material injury to the domestic industry or material retardation of the establishment of such an industry.¹⁹ Provisional safeguard measure may be imposed if an affirmative preliminary determination is made.²⁰ Section 22A(1) provides that "A determination of injury for the purpose of an anti-dumping duty investigation under this Act shall be based on relevant evidence and shall involve an objective examination of both the volume of imports of the subject merchandise and the effect of the subject merchandise on prices in the domestic market for like products and the consequent impact of these imports on the domestic producers of such products."

To date, there are approximately 70 anti-dumping investigations that have been initiated by Malaysia, and over 30 initiations alone were made between 2011 and 2017.²¹ Recently in 2021, the Government of Malaysia has decided to impose definitive anti-dumping duties on the importation of the stranded steel wires from China, which is equivalent to the amount of the dumping margins.²² MITI conducted and completed a detailed investigation concerning the merchandise in question in accordance with CADDA 1993 and CADDR 1994. MITI will impose 9.47 per cent anti-dumping duties on Silver Dragon Prestressed Materials Co Ltd and 2.09 per cent on Tianjin Dalu Steel Strand for Prestressed Co Ltd and 21.72 per cent on other producers or exporters.²³

The Royal Malaysian Customs Department will enforce the collection of anti-dumping duties for 5 years starting from 25 December 2021.²⁴

Subsidies and Countervailing Measures

Subsidies and countervailing measures are governed under the **Subsidies and Countervailing Measures Agreement** ("SCM Agreement"). The agreement disciplines the use of subsidies and regulates the actions which can counter the effects of subsidies.²⁵ **Article 1.1 of SCM Agreement** defines subsidy as a financial contribution by a government or public body, which confers a benefit.

Article VI of GATT 1994 and the **SCM Agreement** defined countervailing as a special duty levied for the purpose of offsetting any subsidy bestowed, directly, or indirectly, upon the manufacture, production, or export of any merchandise.²⁶ Prohibited and actionable subsidies can also be offset by the application of a countervailing measure.

The SCM Agreement allows for the member states to use WTO's dispute settlement procedure to withdraw from the subsidy or remove its adverse effects.²⁷ Additionally, the member state can also initiate its own investigation and eventually proceed to impose extra duty on the subsidised import that injured the domestic market.²⁸

Countervailing measures are regulated under CADDA and CADDR as the procedural requirements for countervailing measures resemble anti-dumping.²⁹ Similarly, injury and causal link have to be established for there to be an affirmative decision.³⁰ Countervailing duty can only be imposed after a thorough investigation has been conducted, one that is similar to that required for an anti-dumping action.

Countervailing duty is not always the case, alternatively, the subsidised exporter can agree to raise the export prices, or the subsidising government can agree to remove or reduce the subsidy.³¹

Safeguard Measures

A safeguard measure basically protects a specific domestic business or industry from an increase in imports of product that causes or is threatening to cause a serious injury to the said business or industry.³² Safeguard measures are available under the **Safeguards Agreement** which prohibits "grey area" measures and sets time limits on all safeguard actions. **Article 2.1 of the Safeguards Agreement** provides that a member can only apply safeguard measures when all three requirements are met. Firstly, the 'increased' imports requirement which includes unforeseen development requirement. Second is the 'serious injury' requirement and lastly the 'causation' requirement.³³

In Malaysia, this trade remedy is governed under the SA 2006 and is a reflection of the WTO's Agreement on Safeguards.³⁴ The SA came into force on 22 November 2007. As already provided for under the Agreement on Safeguards, the SA reflects the same requirements for a safeguard measure, mainly, there should be a surge in imports must be established, and it must either be shown that the imports caused serious injury;³⁵ or at least carry the threat of serious injury to the domestic industry.³⁶

If an affirmative preliminary determination is made, a provisional safeguard measure will be applicable. Provisional safeguard measure imposed shall not exceed 200 days.³⁷

Conclusion

Ultimately, Malaysia has incorporated the trade remedies into the Malaysian law in accordance with what was provided for by WTO. The trade remedies agreements set out rules that requires the member to follow in the launching, investigation and imposition of anti-dumping, subsidy and countervailing measures and safeguard measures.³⁸

Alternatively, being a member of the WTO is beneficial in a way that it allows Malaysia to enjoy the non-discriminatory treatment of the local products in the WTO members' markets.

- ¹ Andrew Chatzky, 'What's Next for the WTO?', (Council on Foreign Relations, 10 June 2022), <<https://www.cfr.org/background/whats-next-wto>>; World Trade Organisation, 'WTO in Brief', (World Trade Organisation, n.d.) <https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm#:~:text=In%20brief%2C%20the%20World%20Trade,predictably%20and%20freely%20as%20possible>
- ² World Trade Organisation, 'Briefing Note: Anti-dumping, subsidies, and safeguards', (World Trade Organisation, n.d.) <https://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_adp_e.htm>
- ³ Ministry of International Trade and Industry, 'Trade Remedies', (MITI, n.d.) <<https://www.miti.gov.my/index.php/pages/view/1672?mid=1029>>
- ⁴ Katie Silver, 'China's trade practices come under fire', (BBC, 21 October 2022), <<https://www.bbc.com/news/business-58991339>>
- ⁵ World Trade Organisation, 'Principles of the Trading System', (World Trade Organisation, n.d.), <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact12_e.htm>
- ⁶ <https://www.tradeforum.org/Trade-Remedies--What-Business-Needs-to-Know/>
- ⁷ Peter Van Den Bossche, 'The Law and Policy of the World Trade Organization', (Second Ed, Cambridge), 508.
- ⁸ World Trade Organisation, 'Dispute Settlement Activity - some figures', (World Trade Organisation, n.d.) <https://www.wto.org/english/tratop_e/dispu_e/disputats_e.htm>
- ⁹ *Ibid.*
- ¹⁰ Haniff bin Ahamat, 'Developments in Malaysian Anti-dumping Law: An Overview', [2000] 4 MLJ xlix
- ¹¹ Lim Koon Huan and Manshan Singh, 'The International Trade Law Review: Malaysia'
- ¹² Malaysia National Trade Repository, 'Antidumping Measures', (Malaysia National Trade Repository, n.d.), <http://mytraderepository.customs.gov.my/en/nrm/ctp/an_dump/Pages/an_dump.aspx>
- ¹³ Ministry of International Trade and Industry, 'Anti-Dumping and Countervailing Measure', (MITI, n.d.) <<https://www.miti.gov.my/index.php/pages/view/2033?mid=1031>>
- ¹⁴ Lim Koon Huan and Manshan Singh (n 11).
- ¹⁵ Lim Koon Huan and Manshan Singh (n 11).
- ¹⁶ Section 16(2)(a) of CADDA.
- ¹⁷ Section 16(2)(b) of CADDA.
- ¹⁸ Section 22a(2) CADDA.
- ¹⁹ Section 2(1) of CADDA.
- ²⁰ Lim Koon Huan and Manshan Singh (n 11).
- ²¹ Lim Koon Huan and Manshan Singh, 'The International Trade Law Review: Malaysia'
- ²² Bernama, 'Govt impose anti-dumping duties on Chinese stranded steel wires', (Sun Daily, 24 December 2021), <<https://www.thesundaily.my/home/govt-impose-anti-dumping-duties-on-chinese-stranded-steel-wires-CL8692455>>
- ²³ *Ibid.*
- ²⁴ *Ibid.*
- ²⁵ World Trade Organisation, 'Subsidies and Countervailing Measures', (WTO, n.d.), <https://www.wto.org/english/tratop_e/scm_e/scm_e.htm>
- ²⁶ Peter Van Den Bossche, 'The Law and Policy of the World Trade Organization', (Second Ed, Cambridge), 585.
- ²⁷ WTO (n 25).
- ²⁸ *Ibid.*
- ²⁹ Lim Koon Huan and Manshan Singh, 'The International Trade Law Review: Malaysia'
- ³⁰ WTO (n 2).
- ³¹ *Ibid.*
- ³² World Trade Organisation, 'Safeguard Measures', (WTO, n.d.), <https://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm>
- ³³ Peter Van Den Bossche, 'The Law and Policy of the World Trade Organization', (Second Ed, Cambridge), 674.
- ³⁴ *Ibid.*
- ³⁵ Section 8(1) of SA
- ³⁶ Section 9(1) of SA
- ³⁷ Section 22(3) of SA
- ³⁸ WTO (n 2).



Philip Teoh
Partner



Gabrielle Lim Wai Yee
Trainee Solicitor