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REMEDIES FOR TRADE REMEDY ACTIONS - WHAT EVERY BUSINESS OUGHT TO KNOW

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Presented by

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TRADE REMEDIES 101

- Legal instruments which domestic businesses may legally use to protect themselves against foreign competition.
- Subject to WTO law and corresponding domestic legislation.
- Trade remedies have its aim to increase tariff (tax on imports) in order to make goods originating from foreign countries less attractive. ie. more expensive.

TRADE REMEDIES 101 (cont.)

Can take the following forms:-

- Safeguards duties;
- Anti-Dumping duties;
- Countervailing duties; and
- Tariff Amendments.



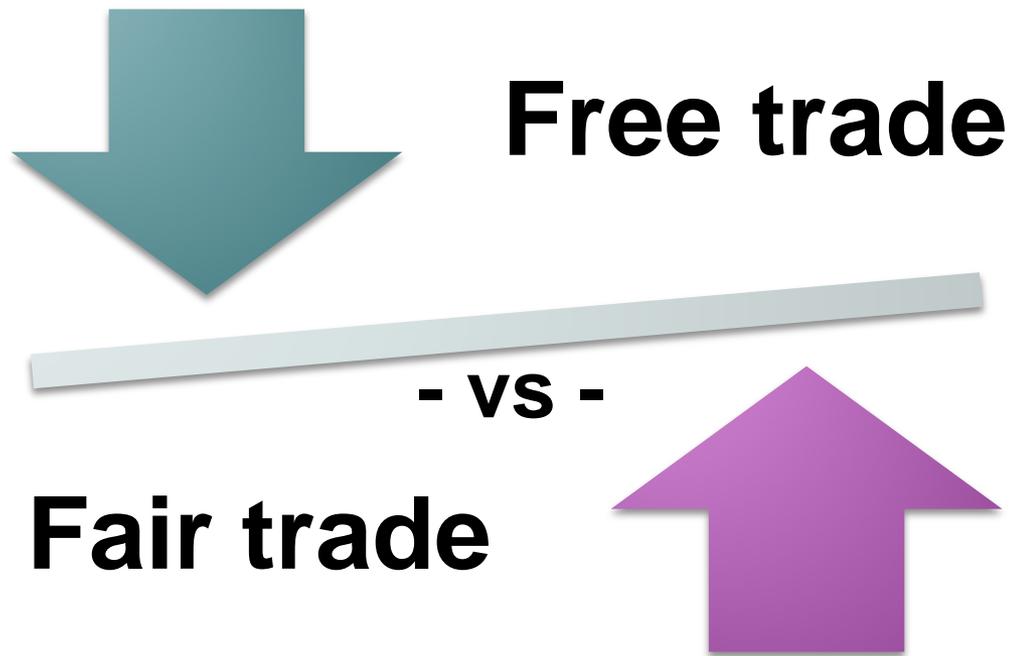
TRADE REMEDIES 101 (cont.)

- The relevant legal framework :-
 - a) The Agreement Establishing the World Trade Organisation (WTO Agreement) and its Annexures;
 - b) Corresponding Domestic Legislation:-

In Malaysia, the Countervailing and Anti-Dumping Duties Act 1993 and the 1994 Regulation, Safeguards Act 2006 and the corresponding regulations.

TRADE REMEDIES- RATIONALE?

- The concept of free trade vs. fair trade
- Is free trade fair?



TRADE REMEDIES- RATIONALE (cont.)

a) Free trade:-

- Businesses should be free to do anything, as they please.
- Risk disrupting market.

b) Fair Trade:-

- WTO agreements upholds the concept of fair trade.
- Binding tariffs and applying them equally (Most Favoured Nation Treatment) - key to ensure smooth flow of trade.
- Predictability and stability.

WHY TRADE REMEDIES- RATIONALE

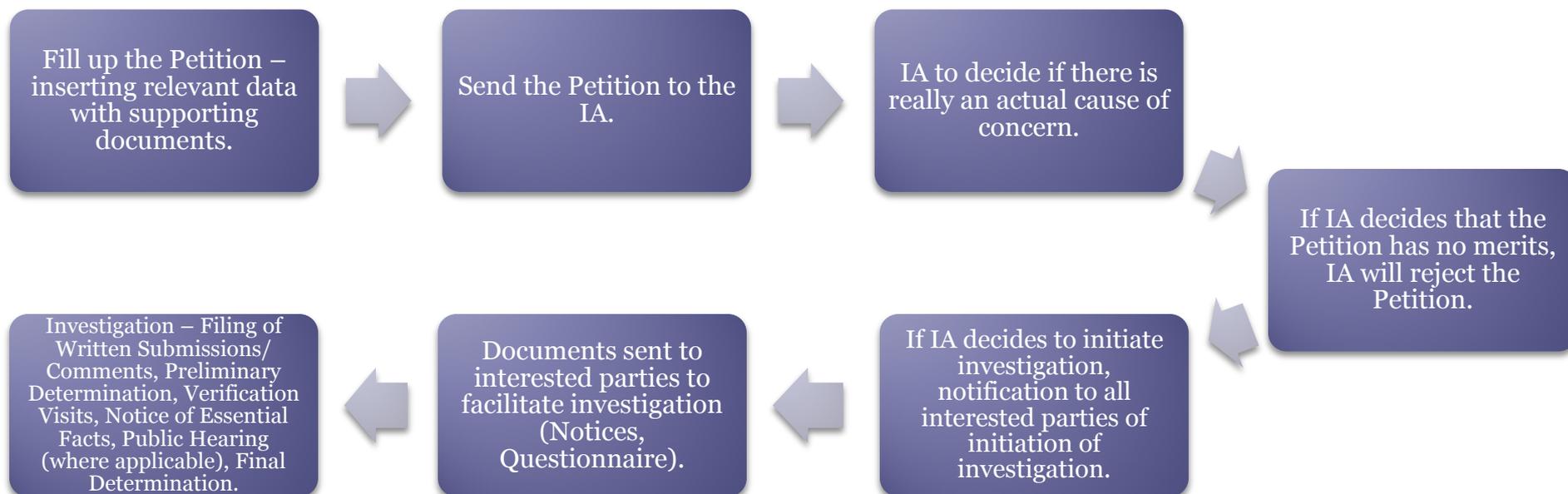
(cont.)

- Trade remedies in the following forms are used to achieve the concept of fair trade :-
 - a) Actions taken against dumping (selling at an unfairly low price)
 - b) Emergency measures to limit imports temporarily, designed to “safeguard” domestic industries.
 - c) Subsidies and special “countervailing” duties to offset the subsidies

TRADE REMEDIES- THE PROCESS

- Usually starts with the domestic industry being unhappy- allegation of injury.
- At least 51% of the domestic industry players get together to discuss.
- Domestic industry reach consensus to complaint to the Investigating Authority (IA) in the form of a Petition.

TRADE REMEDIES- THE PROCESS(cont.)



TRADE REMEDIES- TIMELINE

Anti-dumping/countervailing investigation:-

- decision to initiate the preliminary investigation- within 30 days from the date of receipt of petition.
- preliminary determination -within 120 days from the date of initiation and if necessary, it can be extended for another 30 days.
- final determination to be made within 120 days from the date of the preliminary determination and if necessary, it can be extended for another 30 days.

TRADE REMEDIES-TIMELINE (cont.)

Safeguard investigation:-

- decision to initiate the preliminary investigation – within 30 days from the date of receipt of petition.
- preliminary determination -within 90 days from the date of initiation.
- final determination- within 200 days from the date of the preliminary determination.

ANTI-DUMPING

- Dumping occurs when foreigners sell their goods in another country at prices (“export price”) lower than what they charge for the same product in their country (“normal value).
- Therefore, if export price is lower than the normal value, dumping has occurred. **Price Discrimination.**
- **Note:** Foreign producers are allowed to sell their goods in another market at cheaper prices than the domestic price, so long as they are not selling it at prices below what they would normally would charge their own nationals. Remember fair trade?

ANTI-DUMPING (cont.)

- Dumping is a form of unfair trade.
- An anti-dumping duty is essentially an additional duty imposed on products being dumped to compensate for the difference between the normal value and the export price.
- Eg. If export price is 30% cheaper than normal value, the anti-dumping duty which will be imposed will be an additional 30% on that particular product originating from the countries which are found guilty.

ANTI-DUMPING (cont.)

- In the investigation process, the IA is obliged to fairly compare the 2 different prices. i.e. same level normally at an ex-factory basis.
- Prices will be **adjusted** to allow for different levels of trade, conditions of sale, physical characteristics taxation and any other differences which may affect a fair price comparison.
- There are methods being put in place to determine normal value in the situation where that particular product is not being sold in the exporter's domestic market. $CNV - COP + \text{Selling, general \& administrative costs} + \text{profit}$. OR Surrogate Country Method.

ANTI-DUMPING (cont.)

The Formula :-

Normal value – export price / export price x 100

ANTI-DUMPING (cont.)

- **IMPORTANT:** There must be a causal link between the act of dumping and the material injury (loss of market share, price suppression, employment etc) suffered by the domestic industry.
- Must isolate other factors apart from the act of dumping which could have caused material injury to the domestic industry.
- There can be a situation where dumping occurred but it may not have caused material injury to the domestic industry.

ANTI-DUMPING (cont)

- What Injury?

Production, Capacity, Inventories, Employment & Wages, Productivity, Sales Turnover, Sales Volume and value, Productivity, Sales Price, CTMS, Profitability, Return on Assets & Investment, Cash Flow.

- Public Policy/ Interest- Anti-Competition?

Effect

- Anti-Dumping Duties = 5 years but may be reviewed for further periods. Sunset review.
- Administrative Review?

SAFEGUARD

- A temporary measure to restrain international trade in order to protect a particular home industry from sudden surge of imports.
- Can take the form of quota or safeguard duties.
- Unlike anti-dumping / countervailing measures which are remedies against unfair trade, there is no notion of fair or unfair trade in a safeguard action.

SAFEGUARD (cont.)

- Therefore, important to understand that safeguards are an “extraordinary” remedy to be considered in “unforeseen circumstances” by way of “temporary actions”.
- The “price” of the imported product complained of is not relevant here. Therefore in Malaysia, no questionnaire is distributed to the interested parties.
- The domestic industry requesting for a safeguard measure must show that they have undertaken a feasible adjustment plan during the safeguard period.

SAFEGUARD (cont.)

- In a safeguard action, a public hearing will be held to allow for all interested parties to present their case to the IA :-
 - ❑ Hearing is inclusive – all interested parties given opportunity to present case, electronic submissions possible & very useful for foreign parties.
 - ❑ Hearing conducted in English
 - ❑ Public Hearing, with all parties present
 - ❑ Full disclosure of all interested parties non-confidential submissions given to all participants

SAFEGUARD (cont.)

- Opportunity given for rebuttal submissions, both oral and written
- Public Hearing- Mini UN.
- The duration of a safeguard measure is for 4 years unless extended.

REMEDYING TRADE REMEDY MEASURES

- Understand the 3 underlying factors : **Law, Economics and Politics.**

- **Step 1 : Get Involved!**

- **Step 2 : File Injury Submission**
 - ❑ To engage help? DIY? Why engage help?
 - ❑ Cost Benefit Analysis.
 - ❑ Power in Numbers- Louder Voice, Collection of Evidence.
 - ❑ Market Research :-Conflicting Policies, National Steel Policies, FTA, Petitioner's Promotional and Investor Brochures, Audited Accounts, Connections.

REMEDYING TRADE REMEDY MEASURES (cont.)

- **Step 3: Exclusion request**

Exclusion – Like Product? Product Differentiation. More likely excluded if the differentiating factor has a significant impact on price.

- **Step 4 : Engage**

Ask to be heard. Ex-parte Hearing

- **Step 5 : Lobby**

Press etc.

REMEDYING TRADE REMEDY MEASURES (cont.)

- **Step 5 : Round 2?**

Assess decision and consider Judicial Review or WTO Channel.

OHER FACTORS/IMPORTANT CONCEPTS

- Benefit of Early Warning System.
- Trend analysis.
- Preliminary Determination- Bank Guarantee.
- Verification Visit
- Price Undertaking- when to use?

ROLE OF A TRADE LAWYER

To work with other professionals involved

To get the big picture –
eg. retroactive duties

To simplify and present complicated information in an efficient and easily digestible manner

To advise on strategy- Post Investigation

“The early bird gets the worm”



Thank you!

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