

THAILAND

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I OVERVIEW OF TRADE REMEDIES

Thailand has been an active user of trade remedy measures during the past two decades. To date, Thailand has initiated a total of 52 trade remedy investigations, of which 46 were anti-dumping (AD) investigations and six were safeguard investigations. However, Thailand has never initiated any countervailing (CVD) or anti-circumvention (AC) investigations to date, though this is likely to change in the future as a result of changes to the legal framework and the domestic industries' perceived need for CVD and AC investigations.

The main target countries of trade remedy measures imposed by Thailand are Asian countries, primarily China, South Korea and Taiwan. The majority of trade remedy investigations have revolved around steel and metal products.

In 2020, Thailand experienced a spike in the number of trade remedy investigations initiated by the Department of Foreign Trade (DFT), with a total of 10 investigations and reviews initiated, compared to four investigations and reviews initiated in the previous year.

II LEGAL FRAMEWORK

i Anti-dumping and countervailing legislation

The primary AD and CVD legal instrument under Thai law is the Anti-Dumping and Countervailing Act BE 2545 (1999), which was amended by the Anti-Dumping and Countervailing Act (Issue No. 2) BE 2562 (2019) (the AD/CVD Act). In addition, there are 14 relevant sub-regulations that provide detailed rules and administrative procedures for AD and CVD investigations.

The legal provisions of Thai trade law are modelled on, and broadly consistent with, the World Trade Organization's (WTO) legal framework. Nonetheless, there are also some elements under Thai law that do not appear in the WTO legal framework, as outlined below.

First, Section 7 of the AD/CVD Act imposes a broad obligation on the investigating authorities to take into consideration the impacts on the importers, end users and the public when imposing AD or CVD measures.

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In past investigations, the DFT relied on the public interest clause for providing exemptions to the AD measures. The most common form of application of the public interest clause is a re-export exemption whereby the AD committee collects AD duty at zero per cent on subject merchandise that is imported for production and re-export.²

In addition, the public interest clause is used as the legal basis for providing exemptions to certain product specifications, usage or application in certain downstream industries. The common exemptions under this category include exemptions for the import of products for use in the automotive industry and the home appliance industry that have strategic importance to the Thai economy, as well as certain product specifications that cannot be produced by the domestic industry. It should be noted that the DFT has never relied upon the public interest consideration as the sole reason to terminate outright any investigation or not to impose measures.

Second, Thai law provides a significantly different definition of domestic industry from the definition in the WTO legal framework. Under the WTO Anti-Dumping Agreement (ADA), a domestic industry is defined as the domestic producers whose production output constitutes a major proportion of the total domestic output. However, the AD/CVD Act explicitly provides that the required production output of the domestic producers must be more than half of the total domestic production output. As a result, the DFT has little flexibility when determining legal standing and representation of the domestic industry.

ii Safeguard legislation

The primary legal instrument of safeguard investigations is the Safeguard Measure Against Increased Imports Act BE 2550 (2007) (the Safeguard Act). In addition, there are 10 sub-regulations that are applicable to safeguard investigations.

Thai safeguard laws are broadly transposed from the WTO Agreement on Safeguards. However, the laws are silent on other obligations mandated in Article XIX of the General Agreement on Tariffs and Trade (GATT), including that increased imports must be the result of an unforeseen development. Notwithstanding this, in practice, the DFT has adhered to the obligations under Article XIX of GATT and, in virtually every investigation, has applied the criterion of unforeseen development in safeguard investigations.

iii Anti-circumvention legislation

In 2019, the AD/CVD Act was amended to incorporate a section on AC law (the AC law), which allowed the DFT to extend the application of existing AD or CVD measures to import products that are involved in circumventing activities. In addition, there are nine relevant sub-regulations that were recently issued to provide the detailed rules and administrative procedures of AC investigations.

In broad terms, the AC law requires that the following criteria must be satisfied:

- a* the alleged circumventing activity is related to a slight modification of products, transshipment, channelling, completion operation or assembly operation;
- b* there is a change in the pattern of trade;
- c* the alleged activities do not have sufficient due cause or economic justification;

2 However, the re-export exemption is granted on a case-by-case basis, and does not automatically occur in all measures.

- d* the alleged activities undermine the remedial effect of the original measures in terms of price or volume; and
- e* there is evidence of dumping or subsidy.³

One of the important elements of the AC law is that AC investigations and measures are applicable only to importers and exporters that are allegedly engaged in AC activities – they do not apply on a country-wide basis.⁴ However, the application of AC investigations and measures for specific exporters has created two major practical implications as follows:

- a* Prima facie evidence: when submitting an AC petition, the petitioner must demonstrate prima facie evidence indicating that all criteria for imposing AC measures are satisfied. However, a petitioner generally does not have access to information at the individual exporter level and may have access to only country-wide information. For example, regarding import statistics, which are used to demonstrate a change in the pattern of trade, petitioners would normally be able to access import statistics on a country-wide basis, and would not have access to the import statistics that are specific to the alleged exporters.
- b* Cost and benefit for applying anti-circumvention investigation: the limited scope of application of AC measures to specific exporters may render AC measures to be less attractive tools for the domestic industry, given the extensive amount of evidence, administrative costs and effort required.

III TREATY FRAMEWORK

Thailand is the founding member of the Association of Southeast Asian Nations (ASEAN) trade bloc, and is a contracting party in 13 other bilateral and multilateral free trade agreements with China, South Korea, Japan, Australia, New Zealand, Chile, Peru and India, among others.

On 15 November 2020, Thailand became a signatory to the Regional Comprehensive Economic Partnership (RCEP), the world's largest trade pact covering 2.2 billion people and 30 per cent of the world's GDP,⁵ that built upon the existing multilateral agreements between ASEAN and other nations (the ASEAN+1 Agreements). The RCEP will provide further economic integration between the Asian nations, especially the unified rules of origin and accumulation rules that will apply and facilitate the movement of goods across the region, thereby allowing more import products to qualify for the preferential tariffs scheme.

On 9 February 2021, the Thai parliament ratified the accession to the RCEP and Thailand is currently in the process of submitting its ratification to the ASEAN Secretariat.⁶ The RCEP will not enter into force unless the agreement is ratified by at least six ASEAN Member States and three non-ASEAN states.⁷

3 Section 71/3 of the Anti-Dumping and Countervailing Act BE 2542 (1999) amended by the Anti-Dumping and Countervailing Act (Issue No. 2) BE 2562 (2019).

4 See Clause 3(2) of the Notification of the Ministry of Commerce regarding the List of Information in the Notice of Investigation on Circumvention of Anti-Dumping or Countervailing Measures BE 2564 (2021).

5 See the Association of Southeast Asian Nations (<https://asean.org/asean-hits-historic-milestone-signing-rcep/>), last accessed 5 July 2021.

6 *National News Bureau of Thailand*, Parliament Ratifies RCEP Treaty (<https://thainews.prd.go.th/en/news/detail/TCATG210212112059830>), last accessed 8 August 2021.

7 Article 20.6 of the RCEP.

Thailand announced its interest in acceding to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in 2018. A number of committees were established to assess the benefits and impacts of accession to the CPTPP. There has been strong opposition from the public and political parties, particularly with regard to the CPTPP's requirement to become a member of the International Union for the Protection of New Varieties of Plants (1991).⁸ The decision on whether Thailand will join the CPTPP has not yet been made.⁹

Another key element of Thailand's treaty framework is the free trade agreement between Thailand and the European Union, which has been on hold since 2014. In June 2021, the Thai government announced that it will resume negotiations with the European Union to conclude the free trade agreement.¹⁰ In addition, Thailand is negotiating free trade agreements with Turkey and Pakistan, as well as participating in further negotiations for the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation.¹¹

IV RECENT CHANGES TO THE REGIME

In 2019, major amendments were made to the Thai trade remedy legal framework, especially on AD, CVD and AC investigations, as a result of the promulgation of the Anti-Dumping and Countervailing Act (Issue No. 2) BE 2562 (2019) (the Amended Act). The Amended Act repealed some provisions of the Anti-Dumping and Countervailing Act BE 2542 (1999) (the Original Act) and revised some aspects of the AD and CVD legal provisions to be more consistent with the WTO legal framework.¹² In addition, the Amended Act incorporated AC provisions providing the legal framework for substantive and procedural aspects of AC investigations.

Furthermore, during 2020 and the first half of 2021, 11 sub-regulations were issued to update the detailed rules related to AD and CVD investigations to reflect the Amended Act, as well as to provide detailed rules on AC investigations. The key changes to the legal framework of trade remedy investigations are outlined below.

i Countervailing investigations

A CVD investigation has never been initiated by Thailand. One of the reasons is likely to be the unsupportive legal framework of the old regime.

8 *Bangkok Post*, CPTPP procrastination not an option (<https://www.bangkokpost.com/opinion/opinion/2140151/cptpp-procrastination-not-an-option>), last accessed 5 July 2021.

9 *Bangkok Post*, Trade pact faces day of reckoning (<https://www.bangkokpost.com/business/2139359/trade-pact-faces-day-of-reckoning>), last accessed 5 July 2021.

10 *National News Bureau of Thailand*, Thailand and EU resumes FTA negotiations (https://thainews.prd.go.th/en/news/print_news/TCATG210614182226146), last accessed 5 July 2021.

11 Department of Trade Negotiations (<https://www.dtn.go.th/th/negotiation/category/5cff753c1ac9ee073b7bd2c4>), last accessed 5 July 2021.

12 The remarks regarding the Amended Act mentioned that some legal aspects of the Original Act were inconsistent with international trade practices. Therefore, the revision was necessary to enhance the effectiveness of the enforcement of the AD and CVD measures for the purpose of protecting the domestic industry.

The CVD provisions set out in the Original Act were broad and did not precisely reflect the obligations under the WTO legal framework. In addition, there was a lack of detailed substantive and procedural rules to the extent that the old regime arguably did not permit the DFT to practically carry out a CVD investigation.

The Amended Act repealed nearly all the provisions in the Original Act that were related to CVD investigations and updated the law to be more consistent with the obligations in the WTO Agreement on Subsidies and Countervailing Measures (the SCM Agreement). For example, Section 63 of the AD/CVD Act was revised to provide a list of activities that are regarded as a ‘financial contribution’, which is broadly in line with Article 1.1 of the SCM Agreement.

In addition, sub-regulations have been issued to provide detailed rules on key substantive and procedural aspects of CVD investigations that will enable the investigating authority to carry out CVD investigations, including the calculation of the amount of benefit conferred, an illustrative list of export subsidies and sampling criteria.

ii New anti-dumping and countervailing petition forms

In March 2021, the Ministry of Commerce issued a notification to repeal and update all the existing petition forms for AD and CVD investigations, including petition forms for original investigations, and changed circumstance and expiry reviews.

In broad terms, the new petition forms incorporate practical requirements into written and clearer instructions. For example, in practice, the DFT allows the petitioner to demonstrate and submit only one form of prima facie injury evidence in the petition, on a mutually exclusive basis (i.e., either there is material injury to the domestic industry or threat of material injury thereof, or material retardation of the establishment of the domestic industry). This practice has now been incorporated into the instructions of the new petition form.¹³

Moreover, the new petition form simplifies the data required for the petition. For example, in the injury sections of the new petition forms, petitioners are required to provide information to demonstrate injury based on the yearly data of the past three years, as opposed to the quarterly data required by the old petition form.¹⁴

The new petition form will likely provide more certainty and make the work easier for the would-be petitioner, as well as reduce any excess information. However, some petitioners may find it more difficult to demonstrate injury based on the yearly information, especially if the injury is not clearly discernible in the yearly data but appears in the quarterly data.

iii Particular market situation in anti-dumping investigations

Another important aspect that was introduced in the legal amendments is the notion of a particular market situation (PMS). The PMS authorises the DFT to disregard normal value information submitted by the exporter and apply a third-country representative price, or construct the normal value when there is a market situation in the export countries that could impede an accurate comparison of normal value with export price.

13 The instructions of Section 8 of the Petition Form Por.Ror.1.

14 For example, the instructions in Section 8.1 related to volume effect requires the petitioner to submit yearly information for the past three years.

Although PMS is not a new concept under Thai law as the PMS clause can be found in the Original Act, the PMS clause has rarely been used by the DFT. The reason for this could be due to the lack of a platform for the petitioner to submit PMS arguments.

As a result of the legislative amendments, a new Subsection has been added in the petition form allowing the petitioner in an AD investigation to submit arguments and evidence related to the PMS in the exporting countries.¹⁵ As a result, it is plausible that there will be more arguments on PMS and application of the PMS clause in future Thai AD investigations.

iv Time limit for revising petitions

In the previous legal framework, there was no time limit imposed on the DFT to consider a petition. This meant the DFT could ensure that every aspect of the submitted information was accurate and verifiable. However, often, the information and evidence required to demonstrate injurious dumping exceeded the prima facie standard and nearly reached the standard required to be proved in the actual investigations. Consequently, the time required by the DFT to consider and approve the submitted petition was usually prolonged and ranged from several months to several years. However, in March 2021, the notification of the Ministry of Commerce on repealing and updating petition forms (see Section IV.ii) came into effect and imposed a time limit for the petitioner to revise any shortcomings in the petition as identified by the DFT within four months of the date of the first submission of the petition. If a petitioner fails to revise the petition or provide the requested information within the four-month period, the petition will be regarded as abandoned.

At a glance, the imposition of the time limit for revising a petition will also result in a shorter time period for the DFT to consider petitions, as it will not be able to continue requesting additional information. In addition, the requirement may dissuade the DFT from issuing several supplemental questions to perfect all aspects of the petition, which may result in a lower prima facie standard to be proven by the petitioners.

V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

Significant practical developments and key issues in Thai trade remedy investigations are highlighted below.

i Public interest implications in light of global surges in steel price and covid-19 impacts

Since late 2020, there has been a surge in the prices of various steel and metal products globally, which has had a significant impact on downstream users.¹⁶ In addition, a large number of downstream industries have been severely affected by the covid-19 pandemic. As the majority of trade remedy measures in Thailand revolve around steel and metal products,¹⁷ the situation has come to the attention of the Thai government and has prompted the authority to pivot its application of trade remedy investigations, as witnessed in three recent AD investigations.

15 Section 4.4 of the Petition Form Por.Ror.1.

16 *Bangkok Post*, Rising metal prices to affect key industries (<https://www.bangkokpost.com/business/2106615/rising-metal-prices-to-affect-key-industries>), last visited 5 July 2021.

17 Refer to the discussion in Section I.

In the AD investigation on pre-painted Galvalume steel (PPGL) from China and Korea, the Committee on Dumping and Subsidy (the Committee) issued its final determination on 30 April 2021,¹⁸ stating that AD measures will be imposed for a period of five years. However, during the first six months, AD duty is collected at zero per cent. The final determination cites the current situation in relation to global steel and metal prices and the impact of the covid-19 pandemic on the Thai economy as the reasons for providing an exemption during the first six months.

The expiry review determination on hot-rolled steel from 14 countries issued on 8 June 2021 also contained a similar hardship exemption clause.¹⁹ Although the Committee decided to continue imposing AD measures for another five years, the AD duty rate of zero per cent is collected during the first six months of the measures.

Finally, in the AD investigation on galvanised iron from China (which was initiated on 21 February 2020),²⁰ the Committee decided to cancel and refund the security payment that had been collected since August 2020 as part of the preventive measures while the investigation is being conducted.²¹ The global situation in relation to steel prices and the impact of the covid-19 pandemic are cited as reasons for the decision.

In view of the above developments, future trade remedy investigations that are related to steel and metal products are likely to be subject to the same treatment until the situation regarding prices and the covid-19 pandemic normalise.

ii Cumulative assessment

In situations where AD or CVD investigations involve more than one exporting country, Thai law grants a discretionary power to the DFT to cumulatively assess the injurious impacts caused by such imports, providing that the following criteria are fulfilled:

- a* the dumping margin from each individual country is more than *de minimis*;
- b* the volume of imports from each individual country is not negligible; and
- c* the cumulative assessment is appropriate in the light of the conditions of competition (1) between the imported products and (2) between the imported products and the like domestic product.²²

Notwithstanding the above, in Thai AD practice, cumulative assessment is generally used as the default mode of injury assessment,²³ while the analysis of the above criteria, especially the appropriateness of the conditions of competition, is largely ignored.

18 Notification regarding Final Determination of AD Investigation on Painted Hot Dip Plated or Coated with Aluminium-Zinc Alloys of Cold-Rolled Steel originating in the People's Republic of China and the Republic of Korea, published in the Royal Gazette on 30 April 2021.

19 Notification of the Committee on Dumping and Subsidy regarding Sunset Review Determination of Hot Rolled Steel in Coils and not in Coils Originating from 14 countries, published in the Royal Gazette on 8 June 2021.

20 AD Investigation on Imports of Hot Dip Galvanised of Cold Rolled Steel in Coils Originating from the People's Republic of China.

21 Notification of the Committee on Dumping and Subsidy regarding the Cancellation and Refund of Security of Payment on Imports of Hot Dip Galvanised of Cold Rolled Steel in Coils Originating from the People's Republic of China, published on the Royal Gazette on 8 June 2021.

22 Article 20, The Anti-Dumping and Countervailing Act BE 2542 (1999).

23 See also Panel Report, European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, WT/DS219/R, Para. 7.239.

For example, in the PPGL investigation (see Section V.i), the import volume from China nearly doubled, while the overall import volume from Korea showed a declining trend. The DFT applied the cumulative assessment method for assessing injury information from Korea and China and concluded that there was a volume effect without providing an analysis of the conditions proving the cumulative assessment. This lack of analysis was raised by one of the Korean exporters during the public hearing, which prompted the DFT to issue a subsequent analysis of the cumulative criteria to justify its decision.²⁴

The argument raised by the Korean exporter may influence the DFT to consider the appropriateness and validity of cumulative assessment before directly applying such an injury determination method in future investigations.

iii Strict application of custom classification in trade remedy investigation in Thailand

In many jurisdictions, the tariff classification system is not a dispositive factor in determining the scope of the subject merchandise and the like product.²⁵ However, in Thai practice, custom classification has been heavily relied on by the DFT in determining product scope, collecting information for determining the existence of dumping and imposing measures. For example, when determining whether the petitioner was the producer of a like product, the DFT would primarily assess whether the petitioner can produce and sell any product at the commercial quantity that falls under the tariff classification codes subject to the investigation, while other factors such as product characteristics, applications and end uses, although taken into consideration, would appear to be less of a decisive factor than tariff classification.

Nevertheless, in recent investigations, there are signals that the DFT may have shifted its practice toward the use of other factors beyond the mere tariff classification to determine the product scope. For example, in an AD investigation initiated in 2021, the petitioner faced the situation that its domestically produced products were identical to imported products in terms of physical characteristics, application and end uses. However, it also appeared that the major proportion of those imported products were misclassified into different tariff classification codes from those tariff classification codes that could be produced by the petitioner. After considering the facts at issue, the DFT decided to initiate an investigation covering the large proportion of imported products, notwithstanding different custom classifications.

VI TRADE DISPUTES

The number of trade disputes in Thailand has fallen during the past 10 years. In terms of WTO dispute settlements, Thailand has submitted a total of 14 complaints to the WTO Dispute Settlement Body, of which 13 were between 1995 and 2008. During 2009 and 2017, Thailand did not submit any complaints to the WTO Dispute Settlement Body.

24 The Notification of the Department of Foreign Trade regarding Disclosure of Essential Facts and Law Used as a Basis for the Determination of Anti-Dumping Investigation on Painted Hot Dip Plated or Coated with Aluminum – Zinc Alloys of Cold – Rolled Steel Products Originating from People’s Republic of China and Republic of Korea BE 2564.

25 For example, in the United States, the European Union, India, Australia and Malaysia, the initiation notification explicitly provides that HS codes in these respective countries are not regarded as having the force of law in examining product scope.

The most recent complaint, submitted in 2018, involved the additional duty imposed by Turkey on imports of air conditioning machines from Thailand, as part of the suspension of concession for safeguard duty. However, on 19 November 2020, the chair of the panel decided to suspend the dispute for 12 months based on a request from Thailand.

In terms of domestic trade disputes, Thai law permits interested parties that are not satisfied with the final determination of the AD and CVD investigation to appeal the decision to the Central Intellectual Property and International Trade Court (the IPIT Court).²⁶ The decision of the IPIT Court is subject to the scrutiny of the Court of Appeal for Specialised Cases (the Court of Appeal) and the Supreme Court of Thailand. The final determination in a safeguard investigation can be appealed to the Administrative Court of First Instance and is subject to the review of the Supreme Administrative Court.

Notwithstanding the above, the number of judicial reviews related to trade remedy investigations in Thailand is limited. To date, there have only been two appeals made to the Supreme Court of Thailand, both of which were related to the same AD investigation on glass blocks from Indonesia. The Supreme Court decision in 2007 focused on court procedural issues,²⁷ while the decision in 2015 touched on the substantive aspects of the Original Act.²⁸ One of the central issues in the 2015 Supreme Court decision was whether the Committee erred by imposing AD measures on all glass blocks that fell into the tariff classification code indicated in the notice of the initiation – in particular, when submitting the petition, the petitioner only applied for the specific size of glass block that it can produce, and did not apply for the other types and sizes of glass block that fall into the same tariff classification code. The Supreme Court held that the Committee and the DFT have the authority to initiate an investigation and impose AD measures on a product scope that is different from the product scope initially proposed by the petitioner. In addition, the Supreme Court held that the DFT and the Committee could use the tariff classification code as the basis for determining the scope for imposing AD measures in this particular investigation, as the remaining glass block types and sizes that fell into the tariff line were regarded as like products.²⁹ This Supreme Court decision may have inadvertently influenced and provided justification for the DFT to use customs classification as the primary factor to assess like products, as discussed above.³⁰

Furthermore, the Court of Appeal issued a decision in May 2021 providing guidance on the interaction between AD investigations and anticompetitive practices. Regarding AD measures on Galvalume from Vietnam,³¹ the downstream association appealed the Committee's final determination. One of the arguments submitted to the IPIT Court was that the Committee failed to consider the issue of public interest when imposing the AD measures. In particular, the petitioner of the AD investigation was the sole producer of Galvalume products in Thailand, and the imposition of the AD measures would only have strengthened the dominant position of the petitioner in the Thai market. The IPIT Court ruled in favour of the downstream association and repealed the Committee's decision by relying on the public interest obligation. However, the Court of Appeal reversed the IPIT

26 Article 61 of the Anti-Dumping and Countervailing Act BE 2542 (1999).

27 Judgment of the Supreme Court of Thailand No. 2038/2550.

28 Judgment of the Supreme Court of Thailand No. 15649-15650/2558.

29 *ibid.*, at 42.

30 See discussion in Section V.iv.

31 Anti-Dumping measures on Hot Dip Plated or Coated with Aluminium Zinc Alloys of Cold Rolled Steel Originating from Vietnam.

Court findings, arguing that the mere fact that the petitioner was the sole producer of the product in Thailand did not preclude the imposition of the AD measures on the product, as the issue of the impact resulting from the dominant position must be assessed from the perspective of sales and market share. The Court of Appeal also noted that although Section 7 of the AD/CVD Act requires the DFT and the Committee to take into account the impact on the public, the notion of the public interest cannot override the objective and purposes of the AD/CVD Act, which is to protect the domestic industry from unfair practice.³²

The above-mentioned Court of Appeal judgment may be subject to further judicial review by the Supreme Court.³³ Nevertheless, it will provide some comfort for future petitioners that submit petitions involving products that are produced by a single domestic producer. At the same time, the judgment may have diminished the importance of the public interest consideration, as the DFT may rely on the judgment when rejecting public interest arguments.

VII OUTLOOK

There have been significant developments in trade remedy investigation laws as a result of amendments to the AD/CVD Act and sub-regulations during the past two years. Looking ahead, it can be expected that DFT practices in relation to trade remedy investigations will undergo significant developments to reflect these changes to the Thai legal framework.

Furthermore, given that the major sub-regulations for AC investigations have been issued and are currently in force, it can be expected that the focus of the coming years will be on AC investigations.

32 Judgment of the Court of Appeal in case No. 249/2562.

33 At the time of writing, the association has filed a request for extension of the appeal of the judgment to the Supreme Court.

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