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SUMMARY REPORT
APEC WORKSHOP ON PROVISIONS OF RTAs/FTAs IN THE ASIA-PACIFIC REGION
CONCERNING SAFEGUARDS, INCLUDING TRANSITIONAL SAFEGUARDS

10-11 June, 2014
Surabaya, Indonesia

The APEC workshop on Provisions of RTAs/FTAs in the Asia-Pacific Region concerning Safeguards, Including Transitional Safeguards was held at the Java Paragon Hotel, Surabaya, Indonesia on 10-11 June 2014.

The workshop was attended by 81 participants representing 11 APEC Economies (Chile, China, Chinese Taipei, Indonesia, Hong Kong China, Malaysia, Mexico, Papua New Guinea, The Philippines, Thailand, and Vietnam). The speakers and delegates vary, from government officials to representatives from business sectors (business associations) and experts from research institutions and universities, which reflect diverse perspectives on provisions of RTAs/FTAs in the Asia-Pacific Region concerning safeguards.

Opening session

In his opening remarks as well as during presentation of workshop overview, Mr. Iman Pambagyo, Director General of International Trade Cooperation, Ministry of Trade of the Republic of Indonesia, emphasized the workshop as an important undertaking in the context of APEC Capacity Building Needs Initiatives, aiming to help APEC economies gain more insight, knowledge and capacity in negotiating RTAs/FTAs. He further highlighted the need to enhance understanding on safeguard and transitional safeguard provisions being negotiated or completed under various RTAs/FTAs. He hoped that this workshop will increase economies' capacity in negotiating such provisions in the future, operationalizing such provisions effectively, and at the same time contributing to the establishment of more or less standardized provisions of safeguards and transitional safeguards in the Asia-Pacific region. He emphasized that the Workshop aims were:

- To increase knowledge and capacity of negotiators and policy makers, with practical relevance, to participate in negotiations on provisions of RTAs/FTAs;

- To share best practices and experiences in preparing for RTAs/FTAs negotiations in the APEC regions' provisions of RTAs/FTAs concerning safeguards, including transitional safeguards; and
- To provide inputs to negotiators and policy makers, primarily from developing economies, in formulating safeguards, including transitional safeguards provisions, in their proposed or current RTAs/FTAs negotiations.

Understanding Fundamental Issues and Procedures under the WTO Safeguards Mechanism and RTAs/FTAs Safeguards Provisions in the APEC Region

The session is designed to help participants get a better understanding of the WTO safeguards mechanism and RTA/FTA safeguards provisions in the APEC region, given the fact that in the GATT era safeguards were infrequently used as governments utilized “grey area” measures such as the voluntary export restraint. However, upon signing onto the numerous WTO agreements, Members gave up these “grey area” measures and adopted instead the WTO Agreement on Safeguards (SGA). Under the WTO system, a member is given the right to apply a safeguard measure, such as restricting imports of a product temporarily, to respond to an increase in imports that causes, or threatens to cause, serious injury to domestic industry. This can be done so long as the requirements are met and the procedures are followed through.

The SGA provides clear guidelines and strict procedural obligations which must be adhered to. Although there are some systematic differences between the global and regional safeguards, similar provisions to those found under WTO law are included in the regional trade agreements. Many regional trade agreements include identical provisions to those found in the SGA, while several others make direct reference to the procedures and obligations contained in WTO rules. Members are sometimes treated differently in RTAs when an RTA party excludes partner countries from a global safeguard action. This issue has arisen in certain WTO Panel and Appellate Body cases, e.g. Argentina - Footwear, and US-Wheat Gluten. However, the question of whether or not GATT Article XXIV can justify a derogation from the SGA has never been tested for WTO compatibility, although this is a crucial deviation from one of the guiding principles of the SGA, namely that of non-discriminatory application irrespective of sources.

In this session, Ms. Jo-Ann Crawford from the World Trade Organization (WTO) started with outlining the very dynamic and complex RTAs trends. She then focused her analysis on safeguard provisions in 44 intra-APEC RTAs/FTAs, in which she conveyed the categories of safeguard provisions present in such RTAs. She also gave detailed accounts of intra-APEC bilateral and transitional Safeguards trigger mechanisms, the conditions for investigation and application of the measure, various types and length of safeguard measures in intra-APEC RTAs/FTAs, the retaliation and compensation provisions and provided a comparison with WTO rules. She concluded her presentation by noting that so far there have been no significant movements to clarify the WTO rules on safeguard measures in RTAs/FTAs. The organization's secretariat however has prepared a number of papers concerning the cross-cutting issues on RTAs/FTAs.

Prof. Lepi T Tarmidi from University of Indonesia reviewed the definition, characteristics, and main issues concerning safeguards in general. He underlined that trade defence measures and especially safeguards are an integral part of any free trade agreement. Nevertheless, through the explanation and practice of safeguards based on WTO articles, he inferred that it is not easy to undertake trade defence measures such as safeguards. He also described the variants of safeguards, such as emergency safeguards, transitional safeguards, the Special Safeguard Provision (SSG), and the Special Safeguard Mechanism (SSM). He then shortly explained safeguard measures' relations with and dumping, subsidies, and countervailing measures. He concluded that safeguard measures, in reality, are not effective, even if the case is brought to the Dispute Settlement Body (DSB) of the WTO.

The first session was marked by a vibrant discussion between the participants. The discussion ranged from information regarding safeguard measures in ASEAN, advantages and disadvantages of bilateral, regional and global safeguard measures, how to encourage countries to notify their safeguard measures to the WTO, the increasingly broader and more prescriptive RTAs/FTAs provisions, criteria for a finding of 'serious injury' in a safeguard investigation, and details on compensation actions. The diverse questions raised during this session showed the participants' interests in many aspects of safeguard issues. Some interesting points were also made during the discussion. Prof Lepi proposed the need to include consumers' interests in the provision of safeguard measures. Ms. Jo-Ann Crawford reminded the participants to check WTO's data and papers that are available online in the organization's website.

Implementation of Safeguards and Transitional Safeguards for Developing and Developed Economies in APEC Region

In general, this session focused on the implementation of safeguards and transitional safeguards from the experiences of developing and developed economies in the APEC region. It discussed the observed impacts of implemented safeguards and how the implementation could be improved so that APEC economies could gain greater benefits both for the producers and consumers. It also urged further investigation into what the challenges are and how to anticipate them in investigating, imposing, and monitoring safeguards and transnational safeguards.

The first speaker, Mr. Jeremy AG Kumajas of Indonesia's Ministry of Trade, concisely delivered the country's safeguards measure, which is based on both domestic and international laws. According to Indonesia's laws, a safeguards measure is only applied to the extent necessary to prevent or remedy serious injury suffered by and to facilitate adjustment made by the domestic industry, with classification of serious injury or threat of serious injury determined through the investigation. In general, the provisions of a safeguards measure as well as the practices and imposition of a safeguards measure in Indonesia are the same with those governed by WTO and international practices. Provisions of a safeguards measure in RTAs/FTAs also complement the general provision of a safeguards measure in Indonesia.

Mr. Victor Mroczka from USTR explained the role of U.S. International Trade Commission (ITC) in serious injury determinations within safeguard investigations. Before he delved into the details, he noted that most of the FTAs the US is participating in are bilateral as compared to regional or plurilateral. He then gave details on the ITC's process in making determinations of whether there has been serious injury or threat of serious injury to the domestic industry, in order to assist the President in making a final decision on whether to put in place a safeguard, including the form, amount, and duration. He emphasized the importance of the inter agency process in advising the President on the probable economic effect of the reduction, modification, or termination of action. He also shared some

experiences of the ITC in managing safeguard measures such as the use of the electronic filing system and transparency of the investigation process.

Luis M. Catibayan from the Department of Trade and Industry of the Philippines shared the Philippines's experience in bilateral safeguards negotiations in the Japan-Philippines Economic Partnership Agreement. He started by presenting the different Most Favoured Nation (MFN) rates between the two economies. Afterward, he showed how negotiations between two economies take place by examining the advantage of applying safeguards regulations. He also stressed the need to see the level of imports, prospective investors, local industries' competitiveness, and impact of the measure to downstream industries, consumers, and the economy as a whole.

Ms. Mia Mikic from United Nations Economic and Social Commission of Asia and the Pacific (ESCAP) discussed the implementation of safeguards and transitional safeguards in developing and developed APEC economies and more generally in Asia, by focusing on a selected set of issues. She started with outlining the positive and negative impacts of safeguard measures, stressing their importance as an insurance instrument in a wider liberalization initiative but also the possible impact of reducing predictability for investors and trading partners. She proceeded by providing some numbers on initiation and final measures based on WTO data of notified global measures and noted that while the number of safeguards in general is much smaller than for Anti-Dumping (AD) measures, there is still no clear downward trend for APEC economies. She presented more details for three selected economies (two from APEC, Indonesia and Thailand, and for India) on the reactions of imports value after the imposition of safeguards. Those figures do not necessarily provide evidence that safeguards were effective, leading towards the need to also look at some other factors when investigating the reasons for and impact of safeguards, such as general economic growth trends, FDI inflows, effects of sectoral industrial policies, etc., which could contribute to changes in imports in addition to or more than simple liberalization measures.

The second session was also marked by a rich discussion amongst the participants. The government officials were frequently asked regarding their respective economy's policies on several issues such as dumping and safeguard targets, tariff rate, and special safeguard mechanism. The issue of how to determine 'serious injury' also persisted in this session and

Mr. Luis Catibayan noted that the WTO Agreement on Safeguards actually provides details on the injury factors. Another issue regarding the need to take consumers' interests in safeguard measures was also re-discussed in this session. Ms. Mia Mikic and Mr. Victor Mroczka respectively mentioned the case of intermediate producers and consumers' voices in New Zealand and the United States concerning safeguard measures.

Experiences in Implementation of Safeguards and Transitional Safeguards from Business Perspectives

Mr. Erry Bundjamin, The first speaker, from Trade Legal Expert for Indonesia Textile Association (API) shared the difficulties of safeguard measures in practice. Such a standard is indeed needed as safeguard measures carry extraordinary nature and applied as emergency action. Sometimes the import statistics covered products broader than the safeguard measures' investigated scope.

The second and last speaker, Mr. Yose Rizal of the PECC, discussed some issues related to implementation, and some consequences safeguard measures bring to the industry and the economy in general. Among others, the speaker pointed to the effectiveness of safeguard measures. Studies showed that safeguards may improve the situation of the related industry, but need to be taken carefully and under strict conditions. He also explained some "grey areas" of safeguard implementations, e.g. determination of additional tariff rate under safeguard action and causality between "serious injury" and the increase of imports. He also provided examples of discriminatory effects of safeguards that tend to benefit established suppliers but hurt less established suppliers. On bilateral safeguards, studies show that reducing imports is ineffective as it only shifted imports to other trading partners.

In the following discussion, questions regarding quota arose from several participants. Mr. Erry Bundjamin stated that quotas are very subjective while Mr. Yose Rizal gave an example from the case of wheat imports from Turkey to Indonesia. Ms. Jo-Ann Crawford, Ms. Mia Mikic and Prof. Lepi T. Tarmidi also joined the discussion on quotas. All of them agreed that quotas should be changed to tariffs. Mr. Luis Catibayan also gave insight about how quota administration is considered too difficult by the Philippines.

Recommendations on Enhancing APEC Roles in Implementation of Safeguards and Transitional Safeguards in APEC Region and next steps

In this last session of the workshop, all of participants worked together to make policy recommendations for APEC and APEC Process through group discussions and deliver a presentation for gaining inputs from other groups.

Lessons learnt

The first session:

- (i) The session improved the participant's understanding of the different approaches to safeguards measures employed by the APEC economies in their RTAs;
- (ii) Its also helped participants in understanding the differences between bilateral and global safeguard measures as well as other safeguard provisions, provided better understanding of the differences between various trade remedies and their economic effects, and outlined the importance of statistics and information about RTAs in general.
- (iii) All participants were illuminated as to the differences between WTO members on safeguard measures in RTAs/FTAs; there is no significant move for clarifying the GATT Article XXIV and SGA rules.

The second session:

- (i) The session brought a better understanding of the safeguard measures of other economies (more/less restrictive) and a better understanding of the different ways of implementing provisions, difficulties in quantifying serious injury, and the limited capacity that restricts the ability of economies to conduct safeguard investigations.
- (ii) This session was able to provide a better understanding of the linkage between further liberalization and the safeguard instrument, better understanding of the types of measures that can be put in place and why they are necessary, and the necessity for better communication between negotiators and implementers.

The third session:

- (i) There are sets of varieties in term of rules and procedures for the application of safeguard measures within an APEC economy, which all national legislation, and

regional and bilateral FTAs resorted to in order to adopt them in accordance with the SGA as a reference or parameter for the application of a safeguard measure.

- (ii) It is also remarked that most of business or industry is of the general view that the application of safeguards measures is simpler and easier as compared to ADD (Anti-Dumping Duty) and CVD (Countervailing Duties) which may not be true in practice.
- (iii) The application of a safeguard measure was found to be not effective in some areas as it requires strict conditions; while at the same time may not bring many benefits to the development of the concerned industries and economy in general.
- (iv) There are some economies within APEC that still do not have national legislation on the implementation of safeguard measure. In general, economies within APEC prefer to use global safeguards instead of regional and bilateral safeguards measures for a number of reasons, mostly because of the lower MFN tariff rate.
- (v) The issue of the effectiveness of safeguards also persisted as bilateral or RTA's may not be effective in reducing imports as they simply divert imports to other trading partners.
- (vi) Bilateral Safeguards may also not be easy to implement.
- (vii) It is not clear whether the exemption of bilateral and regional FTAs members can be excluded from global safeguards measures.

Recommendations

In the wrap-up session, Mr. Bambang Purnomo, Deputy Director for Trade and Investment Facilitation, Ministry of Trade of Indonesia acting as Director of APEC and Other International Organization Cooperation, Ministry of Trade of Indonesia, commended the speakers and participants on a very successful and productive Workshop. He expressed his hope that APEC would continue to follow up on capacity building on such issues further. The recommendations drawn from the group discussion at the Workshop are as follows:

(i) Strategies on Enhancing APEC Roles in Implementation of Safeguards in APEC Region

It is recommended that APEC member economies should take actions on both individual economy and regional (or a group of economies) scales. Within an Economy, APEC economies need to provide a comprehensive study on the different APEC Economies' approaches on safeguards in bilateral, regional and multilateral provisions in order to give a better guidance on

the use of safeguards in the APEC region so that they are consistent with the WTO principles and rules as well as improve transparency for the implementation of safeguard measures, especially in rules and procedures, safeguard mechanism in bilateral and regional FTAs, the disclosure of investigation findings, and the notification to the WTO. Furthermore, APEC Economies should increase the fairness and objectiveness of the application of safeguards measures that are consistent with SGA and provide a better examination on the impact of safeguards from the perspective of the business that suffered serious injury as well as downstream industry and the consumers.

On a regional scale, the APEC Secretariat may need to create a data base of safeguards provisions and its investigation of bilateral, regional, and plurilateral safeguards in APEC economies. Moreover, APEC Economies may propose the establishment of a Sectoral Body concerning Trade Remedies under APEC CTI and develop a working group on analyzing the parameter for the implementation of safeguard measures. Economists, legal experts, and the private sector should be involved in this process.

(ii) APEC's roles in enhancing capacity building for APEC member economies and next steps

The group break-out session concluded that APEC can create the platform to promote information exchange through further sharing of knowledge in order to find best practices between APEC members and come up with solutions. To support this action, participants acknowledge that APEC needs to: (i) establish further discussion to find a common understanding of “serious injury” before the implementation of safeguards measures; (ii) plan a follow up seminar/workshop with a focus on experiences from Economies, especially on conducting safeguards investigations and a seminar on understanding of why safeguard measures are chosen over other trade remedies (AD/CVD); and (iii) arrange a symposium aimed at producing a Guideline/Manual of “Lessons Learned from the design and application of Safeguards Measures in APEC Economies”. In addition, as some APEC members are facing financial issues in this context, APEC should consider exploring ways to assist.

Conclusion:

The APEC Workshop on Provisions of RTAs/FTAs in the Asia-Pacific Region concerning Safeguards, Including Transitional Safeguards created the platform for government officials, public and private sector, academicians, and representatives from APEC member economies to share their points of views, concerns and experiences on this topic of discussion. From the Workshop's discussion, it is recommended that APEC should take further efforts through exchanging and discussing next steps in the framework of Capacity Building Needs Initiatives (CBNI). These follow up activities might focus on continuing experience, best practices and case studies sharing in specific obstacles in the implementation of the various safeguards provisions in the agreements of APEC member economies. Indonesia will be willing to work with other economies to continue work in this area based on the practical needs of APEC members.

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