Articles

FTAS AND FRAGMENTATION OF TRADE REMEDY RULES — LESSONS DRAWN FROM EXPERIENCES OF VIETNAM

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ABSTRACT

Free trade agreements (hereinafter "FTA") are vital to foster trade liberalization and investment facilitation across the territories of the contracting parties. Meanwhile, trade remedies become more critical as a legitimate means for the contracting parties to employ so as to protect their domestic industries. The problem, however, is that FTAs are different when it comes to trade remedy rules and procedures. As a result, having participated in FTAs, many countries now have fragmented rules and procedures for their trading partners depending on the contents of the FTAs, and accordingly, their domestic legal instruments on trade remedies are also fragmented. Frequently, FTA-specific rules and procedures are incorporated into the domestic legal system through guidance or regulation issued by administrative agencies rather than statutes by the legislature. This phenomenon of the fragmentation of trade remedy rules and procedures because of multiple FTA provisions and sprouting non-statute legal instruments is causing new challenges for many countries, particularly for developing countries

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with fewer human and financial resources. Vietnam has experienced the same situation. The challenges that Vietnam has encountered and the approaches Vietnam has taken to overcome them will provide important lessons for other countries.

KEYWORDS: *trade remedy. FTAs, fragmentation of rules, WTO agreements, developing members, Vietnam*

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I. INTRODUCTION

It is widely acknowledged that each country has strong legislative protections against detriment to its own industry in order to preserve a fair trade liberalization environment between nations. In order to do this, trade remedy measures were developed and are categorized into three primary groups, namely anti-dumping, countervailing and safeguard measures.[1] In essence, anti-dumping and countervailing measures are applied to deal with unfair trade practices of imported goods such as dumping or subsidies. Besides, safeguard measures are used to shield the domestic manufacturing sector from adverse effects and potential harm caused by a sudden surge in imported goods.[2] These measures are detailed in Articles VI, XVI and XIX of the *General Agreement on Tariffs and Trade* (hereinafter "GATT") *1994* along with the *Agreement on Implementation of Article VI of the GATT 1994* (hereinafter "Anti-Dumping Agreement"), the *Agreement on Subsidies and Countervailing Measures* (hereinafter "SCM Agreement") and the *Agreement on Safeguards* (hereinafter "SG Agreement") of the World Trade Organization (hereinafter "WTO").

Basically, trade remedies are regulated globally in the WTO Agreements. However, along with the process of international economic integration, the proliferation of free trade agreements (hereinafter "FTA") has become increasingly popular among nations seeking to enhance their economic ties. FTAs allow countries to go further WTO regulations or adapt them more flexibly to suit bilateral or regional interests. This can lead to conflicts if FTAs impose higher requirements, for example on transparency in safeguards or anti-dumping duties. Furthermore, although WTO obligations require domestic implementation, some countries may not fully fulfill their WTO obligations in domestic law, creating a gap between international commitments and domestic enforcement.[3] On the other hand, FTAs often demand faster amendments to domestic laws compared to WTO, posing challenges in harmonizing regulations. The relationship between the WTO, FTAs, and domestic law is complex, both complementary and potentially conflicting. [4] Thus, countries need to fully implement international commitments into domestic law, and promote harmonization between legal frameworks to maintain stability and efficiency in international trade.

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[1] Robert Teh et al., *Trade Remedy Provisions in Regional Trade Agreements* 3 (WTO, Staff Working Paper ERSD-2007-03, 2007).
[2] *Id.*
[3] Junji Nakagawa, *General Discussion on the Challenges and Direction of WTO Reform* 3 (ITI, ITI Rsch. Series No. 104, 2020).
[4] Mitsuo Matsushita, Proliferation of Free Trade Agreements and Development Perspectives 27 (Oct. 2020) (unpublished manuscript) (on file with Law and Development Institute Inaugural Conference, Sydney, Australia).

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Most importantly, the emergence of FTAs featuring trade remedy regulations that go beyond the multilateral norm underscores the increasing complexity within the legal framework, exemplifying one of the manifestations of fragmentation. Indeed, the fragmentation of international law, resulting from increasing specialization, is not a recent development but a defining feature.[5] Unlike a hierarchical system, international law expands horizontally, focusing on solving specific issues rather than establishing uniform regulations. This reflects sociological "functional differentiation", where society becomes more specialized, leading to the autonomization of distinct areas.[6] Fragmentation poses risks of conflicting rules and practices but also signifies international law's expansion into new areas, adapting to a pluralistic world.[7] The phenomenon is particularly pronounced in the context of trade remedies where countries may adopt varying standards and procedures, complicating compliance and enforcement.

This phenomenon mentioned has also been observed in FTAs involving Asian countries, such as Japan, South Korea, China, and Singapore. Among them, Singapore appears to be the most proactive WTO member in experimenting with a variety of trade remedy rules.[8] Target countries of WTO members' trade remedy measures, such as South Korea and China, have made significant efforts to explore anti-dumping provisions and other trade remedy mechanisms to minimize their misuse.[9] In Japan, trade remedies, often known as "special tariffs", are governed by the Customs Tariff Act and related guidelines. However, their implementation remains limited due to administrative barriers, weak legal frameworks, fragmented regulatory agencies, and insufficient cooperation among these institutions.[10] Meanwhile, the issue of trade remedies in Africa is exacerbated by the fact that many African countries generally lack the legal and institutional capacity to invoke and implement trade remedy measures under the WTO Agreements.[11] Additionally, each regional FTA such as Common Market for

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[5] Panagiotis Delimatsis, *The Fragmentation of International Trade Law*, 45(1) J. WORLD TRADE 87, 87 (2011).

[6] Int'l L. Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, at 11, U.N. Doc A/CN4/L682 (Apr. 13, 2006).

[7] *Id.* at 14.

[8] Dukgeun Ahn, *Legal Development of WTO Trade Remedy Practices in East Asia*, *in* INTERNATIONAL ECONOMIC LAW AND GOVERNANCE: ESSAYS IN HONOUR OF MITSUO MATSUSHITA 515, 530 (Julien Chaisse & Tsai-yu Lin eds., 2016).

[9] Kiyoun Sohn, *Assessment of Korea's FTAs: Focusing on Trade Remedies Rules*, 24(7) J. KOR. TRADE 107, 107 (2020); Kiyoun Sohn, *Assessment of China's FTAs: Focusing on Trade Remedies, SPS and TBT Provisions*, 19(3) INT'L ECON L. RSCH. 45, 66 (2021).

[10] Zoia Podoba & Victor Gorshkov, *Trade Remedies: Global Trends and the Case of Japan*, *in* GLOBALIZATION AND ITS SOCIO-ECONOMIC CONSEQUENCES, PROCEEDINGS OF 17TH INTERNATIONAL SCIENTIFIC CONFERENCE 2018, 2021-23 (2017).

[11] Francis Mangeni, *The Case for Customized Trade Remedies in the COMESA-EAC-SADC Tripartite Free Trade Area*, *in* KEY ISSUES IN REGIONAL INTEGRATION VOLUME III 166, 172 (Ann Mugunga ed., 2014).

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Eastern and Southern Africa (COMESA), the East African Community (EAC), and Southern African Development Community (SADC) as well as the Tripartite Free Trade Area (TFTA) and the African Continental Free Trade Area (AfCFTA), operates under distinct trade remedy regulations.[12] This diversity complicates the enforcement and consistent application of such measures across the region.

As a developing country in the Asia-Pacific region, Vietnam is actively engaged in many FTAs. However, its domestic legal framework remains incomplete, necessitating enhancements and amendments to effectively participate in these agreements. The varying content of FTAs often diverges from the general principles of domestic law as well, requiring the issuance of implementation guidance post-accession. This process contributes to the fragmentation of Vietnam's domestic regulations, especially regarding trade remedies. The purpose of this article is to explore Vietnam's strategy for addressing a major concern in international trade law, namely the fragmentation of trade remedy rules. In recent years, Vietnam has become the target of numerous trade remedy investigations, while simultaneously making active use of these tools to protect its domestic economy. This underscores Vietnam's significant focus on developing and implementing trade remedy policies, particularly as its economy has rapidly emerged over the past decade. Vietnam's approach to trade remedies, as a newly emerging economy, offers valuable lessons and insights for other countries as they shape their own trade policies to balance domestic protection with compliance to international commitments.

This article will focus on trade remedy measures in some significant FTAs of which Vietnam is a member, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (hereinafter "CPTPP"), the European Union–Vietnam Free Trade Agreement (hereinafter "EVFTA"), the Regional Comprehensive Economic Partnership Agreement (hereinafter "RCEP"), and the Vietnam–Korea Free Trade Agreement (hereinafter "VKFTA"). Notably, the CPTPP is a pioneering new generation FTA, being the third-largest economic bloc at the time of its signing, representing about 13% of global GDP (around 10.6 trillion USD).[13] Similarly, RCEP is a regional trade agreement among fifteen East Asian countries, including ASEAN members and partners like Australia, Japan, and China, which accounts for 30% of global GDP, and over a quarter of world exports, offering substantial opportunities for businesses in the

[12] Willemien Denner, *Trade Remedies and Safeguards in Southern and Eastern Africa*, *in* MONITORING REGIONAL INTEGRATION IN SOUTHERN AFRICA 43, 60-63 (Anton Bösl et al. eds., 2009).

[13] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership Overview*, N.Z. FOREIGN AFF. & TRADE, https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/cpt pp-overview.

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region.[14] The EVFTA represents a modern FTA between Vietnam and the EU's twenty-seven member countries. This agreement strengthens Vietnam's relationship with one of its largest foreign investors, fostering cooperation across multiple sectors.[15] Meanwhile, VKFTA—the first bilateral trade agreement between Vietnam and its economic partner, which went into effect since 2015, offers greater benefits than the ASEAN–Korea FTA, reinforcing Korea's position as Vietnam's primary investment partner.[16] Examining these four FTAs provides crucial insights into trade remedy obligations, allowing businesses and state agencies to optimize the opportunities while minimizing the risk of trade remedy investigations. In doing so, the article contributes to both practice and academic discourse by analyzing the fragmentation of trade remedy regulations in the Vietnamese context, providing new policy perspectives for diplomats and practitioners while promoting academic discussion on the structural limitations of current FTAs and their impact on international economic law

In Section II, a broad view of trade remedies in Vietnam's FTAs will be provided. The article devotes Section III to analyzing and evaluating key provisions on trade remedies of FTAs, followed by an assessment of their impact on Vietnam. Section IV evaluates and comments on Vietnam's current legal framework on trade remedies in the context of its participation in many FTAs. The practical implementation of trade remedies in Vietnam is discussed in Section V. Thereafter, Section VI examines lessons for other countries from Vietnam's approach. Finally, Section VII provides general concluding thoughts.

II. OVERVIEW OF TRADE REMEDY MEASURES IN VIETNAM'S FTAS

Alongside the opportunities brought by the FTAs in economic, trade, and investment sectors, there is a forecasted increase in the demand for trade remedy instruments. Most FTAs include provisions on trade remedy measures, which are suitably adjusted and often demand higher standards than WTO commitments. Many countries, including Vietnam, are also strengthening their national legal framework on this issue. This section will provide an overall picture of the necessity of commitments on trade remedies

[14] *Regional Comprehensive Economic Partnership (RCEP)*, ASEAN, https://asean.org/regional-comprehensive-economic-partnership-rcep/.
[15] Thi Thu Trang Nguyen, *EU-Vietnam Free Trade Agreement - Challenges of the "New-Generation" European Union–Vietnam Free Trade Agreement (EVFTA)*, FRIEDRICH NAUMANN FOUND. FOR FREEDOM (2023), https://shop.freiheit.org/download/P2@1442/696884/ PP_EVFTA_EN_final.pdf.
[16] *Seven Years on: 4 Ways the Vietnam-Korea FTA is Changing Vietnam,* WTOCENTER VCCI TRUNGTAMWTO (Oct. 26, 2022), https://wtocenter.vn/chuyen-de/20625-seven-years-on-4-ways-the-vietnam-korea-fta-is-changing-vietnam.

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in Vietnam's FTAs, the system of trade remedy regulations in Vietnam, and the achievements and challenges that the country still encounters.

Trade remedies are one of the significant negotiation elements of trade agreements. Most FTAs have included provisions on trade remedies due to concerns about the harmful impact of these agreements on the domestic manufacturing industry. On the other hand, Article XXIV of the GATT 1994, paragraph 8(b) mandates countries to abolish "duties and other restrictive regulations of commerce" while formulating agreements on trade preferences.[17] As a result, trade restrictions, especially trade remedies, must be eliminated so as to fulfill the objective of free trade.[18] However, the elimination of tariff barriers in FTAs may necessitate the implementation of trade remedy measures, since import-competing industries would continue to seek protection.[19] When participating in an FTA, import-competing industries must be certain that they have the instruments to protect themselves against the unforeseen consequences of implementing their commitments. Maintaining trade remedy measures in FTAs can help in the process of obtaining domestic enterprises support for trade agreements' negotiation and implementation. Trade remedy commitments will be similar to other subjects, such as extending the transition period, regulations on rules of origin, regulations on sensitive industries, and so forth,[20] which aim to support and protect domestic competitive industries sensitive to imported goods. Recently, Vietnam has significantly enhanced its trade remedy efforts, expanding its scope, scale, and effectiveness. This has resulted in favorable outcomes that improve the efficiency of its economic integration, particularly through participation in contemporary FTAs. Key FTAs such as the CPTPP, RCEP, EVFTA, and VKFTA which feature substantial tariff reductions, are expected to intensify competitive pressures on Vietnamese and foreign enterprises in specific sectors. This will indeed increase the demand for the implementation of trade remedy mechanisms.

It is noticeable that trade remedies are either merely provisions in trade in goods or are regulated in separate chapters depending on the particular agreement. Specifically, Chapter 6 of the CPTPP, Chapter 7 of the RCEP, Chapter 3 of the EVFTA and Chapter 7 of the VKFTA provide regulations

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[17] Article XXIV Paragraph 8(b) of the GATT 1994 provides:

> A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

[18] Dukgeun Ahn & Wonkyu Shin, *Analysis of Anti-Dumping Use in Free Trade Agreements*, 45(2) J. WORLD TRADE 431, 431 (2010).
[19] WALTER GOODE, NEGOTIATING FREE-TRADE AGREEMENTS: A GUIDE 5 (2005).
[20] *Id.* at 4.

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on these measures that each country member of the agreements must comply with. As far as the trade remedies committed in the FTA are concerned, most of the regulations frequently refer to relevant WTO Agreements and incorporate a number of provisions on investigation procedures and the imposition of measures. New-generation FTAs also have additional provisions on investigation and application of trade remedy measures with intra-bloc member countries.[21]

The participation in commitments within the CPTPP, RCEP EVFTA, and VKFTA agreements has enabled Vietnam to improve its legal enforcement system regarding trade remedies. Specifically, the Trade Remedies Authority of Vietnam (hereinafter "TRAV") has been established in 2017, and currently empowered by Decision No. 2639/QD-BCT issued by the Ministry of Industry and Trade (hereinafter "MOIT") on December 2, 2022.[22] The TRAV plays a pivotal role in negotiating and enforcing trade remedy issues within WTO frameworks as well as bilateral and multilateral FTAs. It actively monitors and engages in dispute settlements at the WTO, addressing market economy concerns in trade remedy investigations. Such agency has recently completed legal assessments related to trade remedies in numerous agreements including the CPTPP, EVFTA, and RCEP.

It should be noted that Vietnam's current legal documents on trade remedy measures are quite comprehensive. These provisions serve as the basis for Vietnam to investigate and apply appropriate measures when increasing imports due to the openness of FTAs cause or threaten to cause harm to domestic industries. Currently, Vietnam's trade remedy regulations are stipulated in the Law on Foreign Trade Management (Law No. 05/2017/QH14), passed by the National Assembly on June 12, 2017, and effective from January 1, 2018.[23] In particular, Chapter IV includes 33 articles (from Article 67 to Article 99) regulating the main contents related to the investigation, application and handling of trade remedies. Subsequently, Government Decree No. 10/2018/ND-CP dated January 15, 2018 on guidelines for the Law on Foreign Trade Management regarding trade remedies has been issued.[24]

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[21] *See* Teh et al., *supra* note 1, at 6.

[22] *Decision No. 2639/QD-BCT Regulating "the Functions, Tasks, Powers, and Organizational Structure of the Trade Remedies Authority"*, THƯ VIỆN PHÁP LUẬT [L. LIBR.] (2022), https://thuvienphapluat.vn/van-ban/Thuong-mai/Quyet-dinh-2639-QD-BCT-2022-chuc-nang-nhiem-vu-Cuc-Phong-ve-thuong-mai-544989.aspx (Viet.). The former Decision No. 3752/QD-BCT dated October 2, 2017 was replaced by the effective date of Decision No. 2639/QD-BCT.

[23] *Law on Foreign Trade Management (No. 05/2017/QH14)*, THƯ VIỆN PHÁP LUẬT [L. LIBR.] (2017), https://thuvienphapluat.vn/van-ban/Thuong-mai/Law-05-2017-QH14-foreign-trade-management-360690.aspx (Viet.) [hereinafter Law on Foreign Trade Management 2017].

[24] *Decree No. 10/2018/ND-CP on Guidelines for the Law on Foreign Trade Management on Trade Remedies*, THƯ VIỆN PHÁP LUẬT [L. LIBR.] (2018), https://thuvienphapluat.vn/van-ban/EN/Thuong-mai/Decree-10-2018-ND-CP-on-guidelines-for-the-law-on-foreign-trade-management-on-trade-remedies/376485/tieng-anh.aspx (Viet.) [hereinafter Decree No. 10/2018/ND-CP]

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Concerning the guidance for implementing the trade remedy commitments under the previously stated FTAs, the following official legal documents have been released by the relevant administrative agency:

- Circular No. 19/2019/TT-BCT dated September 30, 2019, issued by the MOIT, guiding the application of special safeguard measures to enforce the CPTPP.[25]
- Circular No. 07/2022/TT-BCT dated March 23, 2022, issued by the MOIT, guiding the implementation of trade remedy measures in the RCEP.[26]
- Circular No. 30/2020/TT-BCT dated November 26, 2020, issued by the MOIT, guiding the implementation of the EVFTA regarding trade remedy measures.[27]

Furthermore, a variety of legal documents address the planning, organization, and implementation of trade remedy measures, encompassing initiatives and national action plans, most notably Decision No. 316/QD-TTg dated March 1, 2020 of Prime Minister approving "Project on Building and Effectively Operating the Early Warning System for trade remedies".[28] The regulations listed above will be analyzed in more detail in the following sections.

It is evident that these policies were promulgated shortly after the new-generation FTAs took effect in Vietnam, demonstrating the great influence of the agreements on Vietnam's trade in general and trade remedies in particular. As Vietnam engages in a growing number of FTAs with distinct commitments on trade remedies, administrative agencies are tasked with issuing corresponding implementation regulation or guidance. This results in a fragmented regulatory framework, creating challenges for state authorities as well as domestic and foreign enterprises. These stakeholders must navigate not only the overarching legal framework but also the specific provisions of each individual FTA, adding complexity to compliance and

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[25] *Circular No. 19/2019/TT-BCT Dated September 30th, 2019 of the Ministry of Industry and Trade on Imposition of Special Safeguard Measures to Implement the CPTPP*, WTOCENTER VCCI TRUNGTAMWTO (Oct. 21, 2019), https://wtocenter.vn/chuyen-de/15144-circular-no-192019tt-bct-dated-september-30th-2019-of-the-ministry-of-industry-and-trade-on-imposition-of-special-safeguard-measures-to-impleme [hereinafter Circular No. 19/2019/TT-BCT].

[26] *Circular No. 07/2022/TT-BCT Guiding the Implementation of Trade Remedy Measures in the RCEP*, WTOCENTER VCCI TRUNGTAMWTO (Mar. 23, 2022), https://antidumping.vn/circular-no-072022tt-bct-guiding-the-implementation-of-trade-remedy-measures-in-the-rcep-n25810.html [hereinafter Circular No. 07/2022/TT-BCT].

[27] *Circular No. 30/2020/TT-BCT Guides the Implementation of EVFTA Regarding Trade Remedies*, WTOCENTER VCCI TRUNGTAMWTO (Mar. 12, 2020), https://wtocenter.vn/chuyen-de/16524-ministry-of-industry-and-trade-issues-a-circular-guiding-the-implementation-of-the-evfta-regarding-trade-remedies [hereinafter Circular No. 30/2020/TT-BCT]. Some provisions of Circular No. 30/2020/TT-BCT are amended and supplemented by Circular 28/2025/TT-BCT dated May 15, 2025, which takes effect on July 1, 2025.

[28] Prime Minister Viet., *Decision No. 316/QD-TTg*, CHINHPHU.VN, https://vanban.chinhphu.vn/default.aspx?page id=27160&docid=199250.

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enforcement efforts. Undoubtedly, Vietnam's legal framework governing management activities in trade remedies of administrative agencies has been reinforced and improved throughout the year. Through the application of appropriate and internationally compliant trade remedies, domestic industries are protected from unfair competition, thereby facilitating their growth, promoting employment, and enhancing economic value. Presently, trade remedy measures applied to imports are protecting domestic industries that represent about 9.5% of Vietnam's GDP (based on 2022 estimates).[29] The implemented measures have also boosted state budget revenue, contributing millions of USD in tax revenues to the national budget.[30] Nevertheless, the growing need to implement trade remedies faces limitations in initiating and conducting numerous investigations concurrently, as well as in responding to investigations targeting Vietnam's exports. These constraints stem from ongoing challenges in the domestic legal system, human resources, infrastructure, businesses awareness of trade remedies, and coordination among relevant stakeholders. Above all, the root cause of all these problems is the increasing number of FTAs signed within a short period. Each has different provisions, making it challenging to follow up on these regulations domestically.[31]

III. FUNDAMENTAL PROVISIONS OF TRADE REMEDIES IN VIETNAM'S FTAS

This section discusses key provisions of trade remedies from the recent FTAs of Vietnam. Although all these FTAs are beneficial and relevant, they contain varying contents. It is essential to highlight the differences and discrepancies among the provisions of several key FTAs, which serve as a basis for showing that, if incorporated into the domestic legal system, they will exacerbate the fragmentation of trade remedies rules and procedures in Vietnam.

[29] Minh Anh, *Sớm Hoàn Thiện Hệ Thống Pháp Luật Củng Cố Thể Chế về Công Tác Phòng Vệ Thương Mại* [*Early Completion of the Legal System, Institutional Strengthening of Trade Defense Work*], TẠP CHÍ ĐIỆN TỬ THƯƠNG HIỆU VÀ CÔNG LUẬN [ELEC. J. TRADEMARKS & PUB. OP. CENT. VATAP ASS'N] (Jan. 18, 2024, 12:07), https://thuonghieucongluan.com.vn/som-hoan-thien-he-thong-phap-luat-cung-co-the-che-ve-cong-tac-phong-ve-thuong-mai-a210047.html (Viet.).

[30] Thanh Thanh, *Strengthen Trade Remedies to Protect Domestic Production: Vietnam's Trade Defense Authority*, HANOITIMES (Feb. 6, 2024, 10:39 AM), https://hanoitimes.vn/strengthen-trade-remedies-to-protect-domestic-production-vietnams-trade-defense-authority-326030.html.

[31] Munim Kumar Barai et al., *Vietnam: Achievements and Challenges for Emerging as a FTA Hub*, 9(2) TRANSNAT'L CORP. REV. 51, 59-60 (2017).

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A. Provisions on Anti-Dumping and Countervailing Measures

The CPTPP, RCEP, EVFTA and VKFTA all strictly comply with WTO regulations on anti-dumping and countervailing duty, especially the WTO Anti-Dumping Agreement and SCM Agreement. In CPTPP, the rights and duties of member countries do not exceed WTO regulations, ensuring consistency and compliance with existing rules.[32] As for the RCEP, the anti-dumping and countervailing duties are governed by the second section of Chapter 7, emphasizing WTO responsibilities and setting them in transparent and fair context.[33] Likely, EVFTA and VKFTA require that anti-dumping and countervaling measures shall be employed in accordance with WTO stipulations, avoiding misuse to hinder trade. If one party is considering implementing these measures, it is important to consider the interests of the other party.[34] This part continues with the examination of the specific and distinct rules of the above FTAs, focusing on important provisions such as transparency and fairness, lesser duty rule application and prohibition of zeroing.

1. Provision on Ensuring Transparency and Fairness — In addition to Article 6.8, CPTPP stipulates "Practices related to anti-dumping and countervailing duty procedures" in Annex 6-A of the Agreement. These CPTPP's regulations and Chapter 7 of the RCEP are intended to promote the goals of transparency and due process in anti-dumping and countervailing duty investigations. These include the verification process,[35] maintaining a non-confidential file, [36] providing written notification and requiring consultation,[37] and the handling of confidential information.[38] All four FTAs require the parties to completely and meaningfully disclose all relevant facts and factors that have influenced their decision to adopt the measures. This information must be disclosed in writing and sufficient time shall be granted for interested parties to comment.[39] One prominent aspect of the EVFTA is its emphasis on fairness. Apart from adhering to the WTO's established

[32] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 6.8, Mar. 8, 2018, 3346 U.N.T.S. [hereinafter CPTPP].
[33] Regional Comprehensive Economic Partnership, art. 7.11(1), Nov. 15, 2020, https://www.dfat.gov.au/trade/agreements/in-force/rcep/rcep-text [hereinafter RCEP].
[34] Free Trade Agreement between the European Union and the Socialist Republic of Vietnam art. 3.1, EU–Viet., June 30, 2019, https://eur-lex.europa.eu/eli/agree_internation/2020/753/oj/eng [hereinafter EVFTA]; Free Trade Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Korea, art. 7.6(1), (2), Kor.–Viet., May 5, 2015, https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wpcontent/uploads/2016/09/Korea-Vietnam-FTA.pdf [hereinafter VKFTA].
[35] *See* RCEP, *supra* note 33, art. 7.11(2).
[36] *See id.* art. 7.11(3).
[37] *See id.* art. 7.12; CPTPP, *supra* note 32, Annex 6-A (a).
[38] *See* RCEP, *supra* note 33, art. 7.15; CPTPP, *supra* note 32, Annex 6-A (c).
[39] *See* EVFTA, *supra* note 34, art. 3.2; RCEP, *supra* note 33, art. 7.14; CPTPP, *supra* note 32, Annex 6-A (e).

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criteria for commencing investigations and implementing anti-dumping or countervailing duty measures, the EVFTA mandates the consideration of public interest. This involves evaluating the situations of the domestic industry, importers, associations, businesses and undertakings.[40]

The VKFTA has many regulations that are more detailed or have higher requirements than WTO regulations with the goal of making investigation processes and procedures transparent and minimizing the abuse of trade remedy measures. Specifically, according to the agreement, the consultation period begins when a party's competent authority receives a request for the application of legitimate anti-dumping or countervailing duty related to goods imported from the other party. Additionally, before starting an investigation, the investigating party must notify the other party in writing that the complaint has been received and arrange a meeting with the other party to discuss the complaint with the party's investigating authority.[41] Furthermore, regulations for investigations by qualified authorities following the repeal of measures as a consequence of a review are included in the agreement.[42]

In short, these FTA provisions generally comply with the WTO's Anti-Dumping Agreement and the SCM Agreement to guarantee full transparency when initiating anti-dumping and countervailing duty investigations on a specific product from FTA members. However, the agreements introduce some extra obligations not covered by the WTO Agreements, making them a WTO-plus type of regional trade agreement. Market access for imported products, regardless of whether they come from FTAs' member or non-member countries, is not materially altered by the anti-dumping and countervailing duty mechanisms included in such agreements. The RCEP, as well as CPTPP, EVFTA and VKFTA do not contain any explicit clauses that bar their members from becoming the subject of anti-dumping and countervailing duty investigations or impositions, in contrast to several bilateral or regional trade agreements that restrict or even forbid the use of these trade remedy measures among their trading partners.[43]

2. Provision on the Application of Lesser Duty Rule — Some FTAs have included provisions on the principle of implementing lesser duty, whereas the WTO does not require its members to use this rule. The EVFTA stipulates explicitly that a party may not apply anti-dumping or countervailing duties in excess of the dumping margin or subsidy margin. The party shall endeavor to guarantee that such duty is less than the margin

[40] *See* EVFTA, *supra* note 34, art. 3.3.
[41] *See* VKFTA, *supra* note 34, art. 7.7.
[42] *See id.* art. 7.9.
[43] Joseph Wira Koesnaidi & Yu Yessi Lesmana, *Trade Remedies Chapter*, *in* DYNAMISM OF EAST ASIA AND RCEP: THE FRAMEWORK FOR REGIONAL INTEGRATION 249, 264 (Fukunari Kimura et al. eds., 2022).

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of dumping or subsidy that is sufficient to eliminate the damage to the domestic industry.[44] The word "shall" indicates that the party is obliged to perform the lesser duty rule, without any exception. A similar provision is included in the VKFTA under Article 7.6.3(b), which helps limit the parties from making decisions that impose unnecessarily high duty rates. Meanwhile, the two multilateral FTAs—CPTPP and RCEP have not covered this issue, leaving it within the scope of bilateral trade partnerships. It is argued that in a multilateral context, the parties should also consider applying the principle of lower tariff rates. This would encourage greater openness and connections in the trade relationships between partners.

3. Provision on the Prohibition of Zeroing — Zeroing is among the most contentious issues within the WTO framework. The major concern in the *US — Softwood Lumber V (Article 21.5-Canada),*[45] for example, was the transaction-to-transaction manner of zeroing. The Appellate Body, in this instance, concluded that Article 2.4.2 prohibits an interpretation that would permit the use of zeroing in the transaction-to-transaction comparison technique during compliance procedures. Besides, the primary complaint in *EC — Bed Linen,*[46] involving India, pertained to the weighted average-to-weighted average comparison method's model zeroing procedure, which included negative dumping margins. The issue of zeroing continues to be addressed in the *US — Zeroing (Japan)*. Zeroing is inconsistent with the requirements of Article 2.4.2 because it leads to an increased dumping margin for the entire product.[47]

Acknowledging the issues caused by zeroing practices and the necessity of banning them, numerous countries have actively worked to eliminate zeroing at the bilateral, regional, and multilateral levels. To be specific, the VKFTA explicitly includes a provision that bans the zeroing approach. Certain regulations, including "the prohibition on zeroing" have been added to the RCEP members' duties and are not covered by the Anti-Dumping Agreement. Thus, each member must incorporate all individual dumping margins, whether positive or negative, into weighted average-to-weighted average or transaction-to-transaction comparisons when they are established, assessed, or reviewed under Article 2, Article 9(3) and (5), and Article 11 of the Anti-Dumping Agreement.[48] Particularly, Article 2.4.2 of

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[44] *See* EVFTA, *supra* note 34, art. 3.4.

[45] Appellate Body Report, *United States — Final Dumping Determination on Softwood Lumber from Canada*, ¶ 91, WTO Doc. WT/DS264/AB/RW (adopted Sep. 1, 2006) [hereinafter *US — Softwood Lumber V*].

[46] Appellate Body Report, *European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, ¶¶ 8, 10, WTO Doc. WT/DS141/AB/R (adopted Mar. 12, 2001) [hereinafter *EC—Bed Linen*].

[47] Appellate Body Reports, *United States — Measures Relating to Zeroing and Sunset Reviews*, ¶ 128, WTO Doc. WT/DS322/AB/R (adopted Jan. 23, 2007) [hereinafter *US — Zeroing (Japan)*].

[48] *See* RCEP, *supra* note 33, art. 7.13; VKFTA, *supra* note 34, art. 7.6.3(a).

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the Anti-Dumping Agreement addresses the practice of zeroing in general as it specifies what is a reasonable approach for normal value and export price when comparing weighted averages to weighted averages or transactions to transactions. However, Vietnam's other two FTAs—CPTPP and EVFTA remain silent on this matter. Perhaps future negotiated FTAs should include provisions restricting the use of zeroing, given the obstacles it has brought over the years.

Vietnam has been affected by the practice of zeroing in several trade disputes. For instance, in the *US — Shrimp (Vietnam)*, the US imposed anti-dumping duties on shrimp imports from Vietnam. Vietnam challenged the use of "zeroing methodology" by the U.S. Department of Commerce (hereinafter "USDOC") in calculating the dumping margins.[49] The WTO panel determined that the USDOC's "zeroing methodology" in the context of administrative reviews constitutes "a general and prospective application". The Panel further found that this measure could be challenged "as such" and that it is inconsistent with WTO law.[50] As a target of foreign anti-dumping investigations and duties, Vietnam faces obstacles when investigating countries use the zeroing methodology to calculate the dumping margins of Vietnam's imports. The consensus among RCEP member countries for the prohibition of the zeroing brings significant benefits to Vietnam's products when exported to the markets of the FTA member countries, and vice versa.

B. Provisions on Safeguard Measures

Safeguard measures are employed to shield domestic industries during emergencies, such as a sudden increase in imports that causes significant harm, and can be implemented even in the absence of unfair competition. Despite appearing to counter trade liberalization, safeguard measures are recognized by the WTO, provided they meet stringent criteria to avoid exploitation. They serve as a safety valve, enabling importing countries to temporarily curb imports to protect domestic industries from severe damage in challenging situations. Governments can use these measures to support domestic production in the short term, particularly when adhering to market access commitments. Most FTAs identify two types of safeguard measures that member countries can apply, namely global safeguard measures and the FTAs special safeguard measures.

Global safeguard measures are understood as safeguards taken by FTA members under the provisions of Article XIX of the GATT 1994, the SG Agreement and Article 5 of the Agreement on Agriculture within the WTO

[49] Panel Report, *United States — Anti-Dumping Measures on Certain Shrimp from Viet Nam*, ¶ 2.4, WTO Doc. WT/DS404/R (adopted Sep. 2, 2011) [hereinafter *US — Shrimp (Vietnam)*].
[50] *Id.* ¶¶ 7.122, 7.142.

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framework.[51] Global safeguard measures are mandated to be implemented in all WTO members without exception. However, a CPTPP country can exclude the application of safeguard measures to goods imported from another member country if that member's goods simultaneously satisfy the following two conditions: (i) the goods are imported under tariff quotas or are on the tax reduction list; (ii) the imported goods do not cause injury or threaten injury to the domestic industry of that country.[52] There is a similar provision in Article 7.5(1) of the VKFTA, where the other two FTAs do not allow exclusion from the application of global safeguard measures.

Moreover, the heightened negotiation and signing of FTAs by various nations have led to competitiveness concerns among the participating countries. As a result, many FTAs have implemented specific safeguard measures to address these issues. These measures are known as "transitional safeguards", "bilateral safeguards", or "special safeguards". During the transition period, when many tariff lines of FTA members are completely eliminated, it will easily lead to a sudden increase in imports from other members. Therefore, most FTAs establish a safeguard mechanism during the transition period.[53] These FTAs prohibit members from using transitional or bilateral safeguard measures by stipulating tariff quotas or quantitative restrictions. Instead, the parties can use the following transitional or bilateral safeguard tools: suspend the continued tariff reduction as committed for that item; increase the tax rate on such goods not to exceed the MFN tax rate in effect at the time of application of this measure or the MFN tax rate in effect on the day immediately preceding the effective date of this FTA, whichever is lower.[54]

This part analyzes some important provisions on safeguard measures in FTAs from a comparative perspective, demonstrating the diversity of international trade cooperation.

1. Provision on Non-Concurrent Application of Safeguard Measures in FTAs — It is worth noting that, most FTAs provide that when a product is subject to a global safeguard measure, the party applying that global safeguard measure cannot apply FTAs special safeguard measures to the same product and vice versa, unless the current applicable measure is terminated. For example, Article 7.9 of the RCEP also stipulates that two types of safeguard measures cannot be applied simultaneously to the same

[51] *See* CPTPP, *supra* note 32, art. 6.2(1); VKFTA, *supra* note 34, art. 7.5(1); RCEP, *supra* note 33, art. 7.9(1); EVFTA, *supra* note 34, art. 3.6(1).
[52] *See* CPTPP, *supra* note 32, art. 6.2(4).
[53] Under CPTPP art. 6.3.1(a), it can be a relative increase or an absolute increase compared to the domestic industry; *see also* RCEP, *supra* note 33, art. 7.2(1); EVFTA, *supra* note 34, art. 3.10(1); VKFTA, *supra* note 34, art. 7.1.
[54] *See* CPTPP, *supra* note 32, art. 6.3(2); RCEP, *supra* note 33, art. 7.2(2); EVFTA, *supra* note 34, art. 3.10(2); VKFTA, *supra* note 34, art. 7.1.

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product, including safeguards under Article XIX of GATT 1994[55] and the SG Agreement and interim or transitional RCEP safeguard measures.[56] Its purpose is to prevent the implementation of both global and FTA-specific safeguards simultaneously for the same imported goods of a party, so ensuring compliance with international obligations, mitigating excessive protectionism, and preserving fair competition. This content is also similarly regulated under Article 3.6(2) of the EVFTA, and Article 7.5(3) of the VKFTA. However, the CPTPP includes additional measures that cannot be implemented concurrently, including safeguard measures specified in Appendix B of Schedule Annex 2-D pertaining to Tariff Commitments (such as safeguard measures on agricultural goods or forest goods); and an emergency action under Chapter 4 of the CPTPP on textiles, apparel and accessories.[57]

2. Provision on Transparency and Notification Obligations — The notification obligations when applying global safeguards in trade agreements such as RCEP, CPTPP, VKFTA, and EVFTA represent an evolution in the approach to transparency and cooperation among parties. Particularly, compared to the WTO, where the SG Agreement only requires notification to the WTO Committee on Safeguards, the provision in Article 7.9(3) of RCEP and Article 6.2(3) of CPTPP sets a higher requirement, allowing parties to proactively receive comprehensive and timely information upon request. This not only enhances transparency but also facilitates countries to respond more quickly to safeguards. The CPTPP also requires electronic copies of notifications,[58] emphasizing the modernity and efficiency of the process. Meanwhile, VKFTA and EVFTA, although less detailed, still set out written notification obligations,[59] representing a minimum commitment to information disclosure. This difference shows that more comprehensive agreements such as RCEP and CPTPP aim to build a deeper trade cooperation mechanism, while bilateral agreements such as VKFTA and EVFTA keep a simpler level, suitable for a narrower scope of the partnership.

With respect to the investigation procedures for the application of transitional or bilateral safeguard measures, RCEP, VKFTA, CPTPP, and EVFTA stipulate compliance with the provisions of the SG Agreement (Article 3 and paragraph 2 of Article 4) when conducting safeguard investigations.[60] To ensure expeditiousness, RCEP, EVFTA, and VKFTA require the investigation to be completed within one year from the date of

[55] *See* RCEP, *supra* note 33, art. 7.9(4)(b).
[56] *See id.* art. 7.9(4)(a).
[57] *See* CPTPP, *supra* note 32, art. 6.2(5).
[58] *See id.* art. 6.2(3).
[59] *See* VKFTA, *supra* note 34, art. 7.5(2); EVFTA, *supra* note 34, art. 3.7(1).
[60] *See* RCEP, *supra* note 33, art. 7.4; VKFTA, *supra* note 34, art. 7.2; CPTPP, *supra* note 32, art. 6.5; EVFTA, *supra* note 34, art. 3.11.

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initiation. Meanwhile, CPTPP does not specify a specific time limit, creating the possibility of prolonging the investigation period, causing disadvantages for exporting countries. In addition, these agreements require the investigating country to notify in writing relevant parties[61] and provide public reports to ensure transparency, as stipulated in Article 6.6 of CPTPP. These provisions aim to balance the interests of the parties and enhance transparency in the investigation process.

3. Provision on the Period of Safeguard Measures Application — There is a slight difference in the provision on the period of safeguard measures application. The application of CPTPP and VKFTA safeguard measures must not exceed two years. In case of necessity, the application period can be extended for a maximum of one year.[62] With a maximum period of three years, the CPTPP and VKFTA put domestic industries under pressure to restructure quickly. This may protect common trade interests but also poses challenges for developing industries. The duration of application is provided in Article 7.5(1) of the RCEP, which stipulates that parties may apply RCEP safeguard measures for three years, with the possibility of extending for an additional year, making the total maximum duration four years. If the party applying the safeguard measure is a less developed country, the extension can be up to one more year, making the total maximum duration five years. The extension of the safeguard measure can only occur if the importing country demonstrates that the extension is necessary to prevent or remedy serious injury and that the relevant domestic industry is making adjustments. The longer period in RCEP provides space for less developed countries to adjust their domestic industries to meet the specific requirements of developing economies. However, this can also be abused, prolonging the protection period. On the other hand, Article 3.11(6)(b) of the EVFTA specifies that a party is prohibited from implementing a bilateral safeguard measure for more than two years; however, this period can be extended by an additional two years. As such, EVFTA combines protectionism and adequate time for domestic industries to adapt while yet establishing boundaries to prevent abuse of the extended period.

4. Provision on Prioritizing Support for Least Developed or Developing Countries — It bears mentioning that the RCEP includes special provisions for least developed countries such as Cambodia, Myanmar, and the Lao PDR.[63] These countries are exempt from provisional or transitional RCEP safeguard measures and can extend such measures by an additional year

[61] *See* RCEP, *supra* note 33, art. 7.3; VKFTA, *supra* note 34, art. 7.2(1); CPTPP, *supra* note 32, art. 6.6; EVFTA, *supra* note 34, art. 3.11(2).

[62] CPTPP art. 6.4(2) reads: "[T]he competent authority of the Party that applies the measure determines, in conformity with the procedures set out in Article 6.5 (Investigation Procedures and Transparency Requirements), that the transitional safeguard measure continues to be necessary to prevent or remedy serious injury and to facilitate adjustment."

[63] *See* RCEP, *supra* note 33, art. 7.6.

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without compensating affected members.[64] This provision, unique to the RCEP and not found in the WTO Agreements, aims to support the economic integration of the least-developed ASEAN members. Besides, there are some differences between the method described in Article 9.1 of the SG Agreement and the calculation of *de minimis* imports for a RCEP safeguard measure. When import volumes are negligible, Article 7.6 of the RCEP also stipulates that an investigation and the use of transitional safeguard measures should not be conducted for an exporting country whose market share of the relevant product is less than three percent of the total imports of similar goods into the importing country. However, this provision will not apply if the total import volume from all exporting countries with a market share of less than three percent exceeds nine percent of the total import volume of similar goods into the importing country.[65] Thus, not only the least developed and developing countries, but any member including developed countries can avoid investigation and the application of safeguard measures if they meet the criteria related to negligible imports.

5. Provision on Special Safeguard Measures for Sensitive Industries — Besides the general trade remedy provisions in Chapter 6, the CPTPP includes specific safeguards for textiles and apparel in Chapter 4. The implementation of special safeguards is essential for the textile sector due to its inherent vulnerability to changes in global trade. This sector often experiences severe price volatility and import surges, which can jeopardize the competitiveness and livelihoods of domestic enterprises. The rules governing the application of emergency measures for textiles and apparel closely resemble transitional measures. These safeguards are implemented for a limited period to address or rectify the adverse impacts of imported goods on the domestic industry of the importing country.[66] Additionally, emergency measures for textiles and apparel differ from transitional safeguard measures in several ways. Firstly, emergency measures specifically target textiles and apparel, whereas transitional safeguards apply across all sectors, including textiles. Secondly, the transitional period for emergency measures is notably longer than that for transitional safeguards. It begins from the effective date of the agreement among the involved parties and extends up to five years after the importing party eliminates tariffs on goods from the exporting party under the agreement. By providing an additional layer of protection, the safeguard measures help to stabilize local markets, ensure food security, and support the economic sustainability of traditional industries. Furthermore, they contribute to a more balanced trade environment, allowing trading partners to manage the impacts of

[64] ASIAN DEV. BANK, THE REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP AGREEMENT A NEW PARADIGM IN ASIAN REGIONAL COOPERATION? 63 (2022).
[65] *See* RCEP, *supra* note 33, art. 7.6(1).
[66] *See* CPTPP, *supra* note 32, art. 4.3.

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liberalization while still satisfying their FTA commitments, thereby promoting equitable growth and development in this important sector.

By and large, the fragmentation of trade remedy rules stems from the proliferation of FTAs, which has a great impact on Vietnam's trade policy. *Firstly*, as previously analyzed, certain new generation FTAs often introduce their own regulations and procedures for trade remedies. These FTAs reflect the economic and political preferences of the parties involved, which can lead to more relaxed or stringent trade remedy rules compared to WTO regulations, including principles of lower duty rates, public interest, transparent and fair procedures, prohibition of zeroing and so on. These additional requirements necessitate Vietnam's compliance. Consequently, in addition to maintaining a legal framework that is compatible and consistent with global standards, the Vietnamese investigating authority must also fulfill the mandatory obligations outlined in FTAs with major trading partners. *Secondly*, specific FTA trade remedy provisions influence Vietnam's trade policy by shaping the legal framework for addressing unfair trade, aligning national practices with international standards, protecting domestic industries, and encouraging regulatory reforms. The special safeguard measures, in particular, are explicitly defined, with the transitional period for their implementation varying for each FTA and type of goods. Subsequently, specific procedures for investigating and implementing transitional safeguard measures have been developed and issued separately for the CPTPP, RCEP, and EVFTA by administrative agencies. Nevertheless, Vietnam does not have a specific domestic legal instrument to govern the application of these measures under the earlier negotiated Korea –Vietnam FTA. When parties are participating in various FTAs with different rules, trade remedy disputes may get more complicated. This creates a situation in which a country's trade remedy practices may differ based on the individual FTA framework in question.

IV. CURRENT STATUS OF TRADE REMEDY LEGAL FRAMEWORK IN VIETNAM IN THE CONTEXT OF FTAS IMPLEMENTATION

Vietnam has implemented many legislations as a result of its accession to the WTO in 2007 and its early days of FTA exploration. But at some point it stopped to amend or introduce new legislation because FTAs are so common and so frequent that legislative processes cannot take place all the time. Many of the key tasks have been delegated to the administrative agencies of Vietnam for respective implementation. The agency or agencies have thus adopted guidance of many types, directly leading to the fragmentation of trade remedy regulations. This section aims to evaluate the compatibility of existing legislation in Vietnam with the FTAs commitments on trade remedies to demonstrate its incomprehensiveness. Along with that,

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comments and evaluations on domestic guidance for implementing trade remedies within FTAs will be made.

A. Evaluating Trade Remedy Provisions in Vietnam's Law on Foreign Trade Management and Its Guidelines

Vietnam's legislations, specifically the Law on Foreign Trade Management of 2017 and Decree 10/2018/ND-CP, have been developed in compliance with the provisions of the WTO Agreements regulating trade remedies.[67] Meanwhile, most members of the CPTPP, RCEP, EVFTA, and VKFTA are also WTO members.[68] Thus, the development of provisions on safeguards largely refers to relevant agreements within the framework of the WTO. It is not surprising to see that Vietnamese law includes many provisions that are compatible with these FTAs. However, there still exist some regulations within Vietnam's legal system that are not fully compatible with the commitments in FTAs or still lack specific provisions.

Firstly, regarding safeguard measures stipulated in the FTAs, the CPTPP, RCEP, EVFTA and VKFTA all specify a prohibition on the simultaneous use of different safeguard measures for the same product, including those under Article XIX of the GATT 1994, the SG Agreement, and FTAs safeguards. However, the Law on Foreign Trade Management 2017 does not cover this provision. This gap was later addressed by the implementation guidances of these FTAs.

Concerning bilateral or transitional safeguard measures in the FTAs, Article 99 of the Law on Foreign Trade Management 2017 includes provisions on Special Safeguard Measures as follows:

1. Special safeguard is a safeguard measure which the Minister of Industry and Trade decides to apply in case there is an excessive increase in imports into Vietnam as a result of tax reduction according to a roadmap under the relevant treaty to which the Socialist Republic of Vietnam is a contracting party.

2. Special safeguard measures may only be applied to goods originating from specified countries in conformity with treaties to which the Socialist Republic of Vietnam is a contracting party.

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[67] Giang Le, *Spotlight: International Trade Law in Vietnam*, LEXOLOGY (Sep. 6, 2023), https://www.lexology.com/library/detail.aspx?g=01521c79-c141-48f0-b80d-e3eb935ecd61.

[68] As of 2024, CPTPP includes 11 members: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam and the United Kingdom (newly acceded); RCEP has 15 members including 10 Asean member states, China, Japan, South Korea, Australia, and New Zealand.

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3. Investigation for application of special safeguard measures must comply with treaties to which the Socialist Republic of Vietnam is a contracting party.

It can be seen that Article 99 implicitly addresses safeguard measures within FTAs, covering both bilateral and transitional safeguards.[69] However, Article 99 merely foresees and offers the most general requirements on FTAs special safeguards, in light of Vietnam's increased negotiation and signing of bilateral and multilateral trade agreements. After ratifying the CPTPP, EVFTA and RCEP, Vietnam also developed specific legal documents to regulate the implementation of trade remedies committed in these FTAs. These implementation guidances explicitly specify that bilateral or transitional safeguard measures are covered under the FTAs and Article 99 of the Law.[70] These guidances will be explained further below.

Secondly, compared to the provisions on the anti-dumping and countervailing measures of the EVFTA, VKFTA and RCEP, the Law on Foreign Trade Management 2017 and its guidelines still contain some provisions that are not entirely compatible. As far as the transparency is concerned, the Law requires the investigating authority to announce final determination and the main grounds thereof after the investigation comes to a conclusion.[71] However, the Law does not stipulate how such facts must be disclosed, while Article 7.6(2) of VKFTA, Article 3.2(1) of EVFTA and Article 7.14 of RCEP require that the disclosure of the grounds must be "full and meaningful" and immediately prior to the final determination. This enhances transparency in the procedure for implementing measures, as well as giving the parties sufficient time to submit comments. The time of disclosure under the Law is not as reasonable as that prescribed by the WTO Agreements[72] in general and FTAs in particular, leading to a limitation of the parties' right to protect their interests.

According to Article 7.7 of the VKFTA, consultations should occur after receiving a complaint and before initiating an investigation, not during the

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[69] Thanh Hang Pham, *Thực Thi Các Quy Định về Tự Vệ Thương Mại Theo Hiệp Định RCEP—Một Số Đề Xuất Với Việt Nam* [*Enforcement of Trade Safeguard Provisions under the RCEP Agreement—Some Recommendations to Vietnam*], 131(192) TẠP CHÍ GIÁO DỤC VÀ XÃ HỘI [J. EDUC. & SOC'Y] 124, 129 (2022).

[70] Circular No. 19/2019/TT-BCT, *supra* note 25, art. 3(6); Circular No. 07/2022/TT-BCT, *supra* note 26, art. 3(3); Circular No. 30/2020/TT-BCT, *supra* note 27, art. 3(2).

[71] Law on Foreign Trade Management of 2017 art. 81(3) and art. 89(3) stipulate: "after the investigation concludes, the investigating agency shall publish the final conclusions on the investigated contents as regulated in Article 80 of this Law. The final conclusions of the investigating agency and the main grounds for issuing the final conclusions must be notified by appropriate means to the relevant parties in the investigation."

[72] Anti-Dumping Agreement art. 6.9 and SCM Agreement art. 12.8 read that: "The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests."

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investigation. In contrast, Article 70(4) of the Law on Foreign Trade Management 2017 and Article 13 of Decree 10/2018/ND-CP only specify that consultations should happen "in the investigation process", which does not align with the VKFTA's requirement.[73] This means the Vietnamese regulations do not fully encompass the VKFTA's timing requirement for consultations. Moreover, the Law does not cover investigations following the revocation of measures due to a review cycle, as specified in Article 7.9 of VKFTA, even though this provision is intended to bolster the enforcement role of the investigating authority. In particular, this article requires parties to carefully assess any request to initiate an anti-dumping investigation on goods from the other party with terminated measures in the past 12 months. As mentioned, no guidance on trade remedy measures under the VKFTA has been issued by the state administrative agencies. Therefore, applying trade remedy measures specifically for the VKFTA will be challenging, as stakeholders will need to refer to both domestic laws and the agreement, despite the fact that these documents may be inconsistent leading to difficulties in interpretation.

B. Evaluating the Guidance for Implementing Trade Remedies in Vietnam's FTAs

This section will explain certain provisions in the guidances on the implementation of trade remedies in FTAs, specifically Circular No. 19/2019/TT-BCT guiding the application of special safeguard measures to enforce the CPTPP; Circular No. 07/2022/TT-BCT guiding the implementation of trade remedy measures in the RCEP; Circular No. 30/2020/TT-BCT guiding the implementation of the EVFTA regarding trade remedy measures.

1. Structure of Guidance — Regarding the structure of guidance, both Circular No. 07/2022/TT-BCT and Circular No. 30/2020/TT-BCT have a scope that includes guidance on the application of special safeguard measures (bilateral and transitional safeguards), anti-dumping, and countervailing measures. Accordingly, the structure of the guidance is organized sequentially into general provisions on scope, regulated entities and explanation of terminologies; provisions on anti-dumping and countervailing measures; and provisions on bilateral or transitional safeguard measures. On the other hand, Circular No. 19/2019/TT-BCT only provides guidance on the application of CPTPP special safeguard measures

[73] Thi Hong Son Pham, *Các Biện Pháp Phòng Vệ Thương Mại Trong Các Hiệp Định Thương Mại Tự Do Thế Hệ Mới Và Tác Động Đối Với Việt Nam* [*Trade Remedy Measures in New Generation Free Trade Agreements and Their Impact on Vietnam*], TẠP CHÍ TRI THỨC XANH [GREEN KNOWLEDGE MAG.] (July 1, 2021), https://trithucxanh.vn/post/cac-bien-phap-phong-ve-thuong-mai-trong-cac-hiep-din h-thuong-mai-tu-do-the-he-moi-va-tac-dong-doi-voi-viet-nam.

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and does not provide guidance on the implementation of anti-dumping and countervailing measures. Therefore, when implementing these measures, the investigating authority will refer to the regulations on anti-dumping and countervailing measures in the Law on Foreign Trade Management and its guiding decrees.

2. Specific Provisions of Guidance — In terms of anti-dumping and countervailing measures, only Circular No. 07/2022/TT-BCT, which provides guidance on trade remedies in RCEP, stipulates the disclosure of essential facts, even though the transparency of investigating procedures is also addressed by both VKFTA and EVFTA. The Circular specifically guides that the procedures for related parties to present their opinions and comments will follow Article 9(1) of Decree No. 10/2018/ND-CP. Specifically, the related parties have the right to submit opinions on the draft final conclusions of measures within seven days from the date the investigating authority sends the draft for comments. Subsequently, the investigating authority will consider and respond to the opinions of the related parties in the final investigation conclusions of the case.[74] This guidance also offers a clearer definition of essential facts to ensure the legal compliance of the investigating authority and the right of parties to access information. Accordingly, essential facts are those under examination that serve as the foundation for the decision to apply measures in compliance with current confidential information requirements.[75] The Circular guiding trade remedies in RCEP also specifies the prohibition of using the zeroing method to calculate the dumping margin.[76] Thus, the Vietnamese investigating authority has a legal basis for applying this in the calculation and application of anti-dumping duties on foreign imports.

Regarding safeguard measures, the guidelines all include the principle of not applying two safeguard measures simultaneously on the same type of goods. Transitional or bilateral safeguard measures are not applied beyond the transition period.[77] The transition period of each FTA is different and is clearly specified in the guidelines. Additionally, the guidances detail the preparation of dossiers for requesting the application of special safeguard

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[74] *See* Circular No. 07/2022/TT-BCT, *supra* note 26, art. 6(1).
[75] *Id.* art. 6(2).
[76] *Id.* art. 5 provides:

> When margins of dumping are calculated under Point a and Point b Clause 2 Article 20 of the Decree No. 10/2018/ND-CP, all individual margins, whether positive or negative, shall be counted for the margin of each foreign producer or exporter. Nothing in this Article shall prejudice or affect the investigating authority's rights to calculate the dumping margins under Point c Clause 2 Article 20 of the Decree No. 10/2018/ND-CP.

[77] *Id.*, art. 8; Circular No. 30/2020/TT-BCT, *supra* note 27, art. 6; Circular No. 19/2019/TT-BCT, *supra* note 25, art. 5.

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measures, the obligations of the investigating authority to notify and consult the requested party, the investigation timeframe, the application of special safeguard measures, and compensation.[78]

However, despite some provisions being guided by these Circulars, implementation in practice remains challenging. Specifically, the provisions on applying trade remedy measures to less developed and developing countries and territories are guided by Article 12(8) of Circular No. 07/2022/TT-BCT. This provision refers to Decree No. 10/2018/ND-CP regarding the determination of the list of less developed member countries. Meanwhile, Article 15(2) of Decree No. 10/2018/ND-CP merely outlines a general provision, stating that the list of less developed and developing countries is determined by the national investigating authority based on reliable data sources. Thus, compiling the list of these countries will fall under the responsibility of the investigating authority.

Regarding the application of transitional or bilateral safeguard measures, the guidances stipulate the authority responsible for making the decision to apply these measures. Accordingly, the MOIT will decide on the application of transitional or bilateral safeguard measures when the findings of the investigating authority show an absolute or relative increase in the imports of goods benefiting from special preferential import tax rates under the CPTPP, RCEP, and EVFTA, in terms of volume or quantity, compared to similar or directly competing goods produced domestically; that the domestic industry is experiencing or is at risk of serious injury; and that the increase in imports, as described, is causing or threatening to cause serious harm to the domestic industry.[79] There are no detailed guidelines on determining the elements that form the basis for applying transitional or bilateral safeguard measures as above. At this time, the investigating authority must also base on the Law and Decree No. 10/2018/ND-CP to determine.[80] However, Decree No. 10/2028/ND-CP currently does not have provisions on determining the causal relationship between excessive imports into Vietnam and serious damage to the domestic manufacturing industry. Meanwhile, this is one of the important contents for the investigating authority to have sufficient grounds to decide to apply safeguard measures.

Regarding trade compensation, only Circular No. 07/2022/TT-BCT provides instructions on compensation procedures as follows:

> Article 14. Compensation

[78] *See* Circular No. 07/2022/TT-BCT, *supra* note 26, ch. III; Circular No. 30/2020/TT-BCT, *supra* note 27, ch. III; Circular No. 19/2019/TT-BCT, *supra* note 25, ch. II.
[79] Circular No. 07/2022/TT-BCT, *supra* note 26, art. 11(3); Circular No. 30/2020/TT-BCT, *supra* note 27, art. 9(2); Circular No. 19/2019/TT-BCT, *supra* note 25, art. 8(1).
[80] Law on Foreign Trade Management 2017, *supra* note 23, art. 94; Decree No. 10/2018/ND-CP, *supra* note 24, art. 51.

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> 1. Compensation procedures in case Vietnam initiates investigation, applies or extends the transitional RCEP safeguard measure shall be followed in accordance with Article 7.7 of the RCEP Agreement.
> 2. Authority to make compensation shall comply with Clause 3 Article 98 of the Law on Foreign Trade Management.

This article obviously does not explain the requirements of RCEP and simply specifies the compensation procedure in the event that Vietnam is the party implementing transitional safeguard measures. When a partner country launches an investigation into Vietnamese imports and imposes a safeguard measure, the administrative agency and related parties have to base on the Law and Decree No. 10/2028/ND-CP. This RCEP compensation procedures guidance is actually making it more difficult for related parties since they must refer to a variety of statute and non-statute legal instruments, including the original agreement text.

C. Assessing the Current Status of the Legal Framework for Trade Remedies in Vietnam

The implementation of FTAs in Vietnam has a considerable impact on the country's trade policy, particularly in terms of trade remedies. As Vietnam continues to integrate into the global economy, the necessity for effective trade remedy measures to protect domestic industries from unfair trade practices has become gradually important. This includes aligning national regulations with various international standards and commitments under FTAs. Thus, fragmentation of trade remedy rules is an inevitable phenomenon due to Vietnam's incomplete legal system. The current state of trade remedies in Vietnam reflects ongoing efforts to strengthen the legislative framework and enforcement mechanisms, as well as to address challenges and capitalize on opportunities afforded by the country's expanding network of FTAs.

Following the legislative discussion, it is evident that many trade remedy issues are left to guidance and investigations are heavily reliant on guidance. So, foreign exporters who are defending their cases in Vietnam do not have full legislative information from the legislation and they have to refer to guidance as well. However, the guidance system on trade remedies within FTAs raises several critical issues, including a lack of clarity, incompleteness, frequent changes, and a high degree of discretion by investigating authorities or administering agencies.

The primary issue with the trade remedy guidance system is its lack of clarity. Ambiguous guidelines can result in inconsistent interpretations and applications, creating uncertainty among stakeholders. For instance, if the

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criteria for implementing safeguard measures are not clearly defined, businesses may struggle to understand the conditions under which such measures may be imposed. This lack of transparency can prevent them from making informed decisions, ultimately affecting their ability to operate effectively within the FTA framework. The provision in Article 12(8) of Circular No. 07/2022/TT-BCT on excluding the application of RCEP safeguard measures for goods originating from less developed member countries is an illustrative example. The lack of specificity in the method of determining less developed countries and only referring to Decree No. 10/2018/ND-CP has not addressed the issues in practical implementation. To resolve this difficulty, the TRAV has proposed to amend and supplement the regulation as follows: "On a quarterly basis, the Ministry of Industry and Trade may review and amend the list of less developed and developing countries . . . based on import data of investigated goods provided by the customs authorities."[81]

In addition, the fact that the guidances do not cover all the new provisions in the agreement is also a noteworthy issue. For example, the EVFTA has added provisions to ensure fairness and transparency, creating a more stable and favorable business environment for exporters. Investigating authority must ensure the disclosure of information and provide relevant parties the opportunity to express their views during the investigation process. Circular No. 30/2020/TT-BCT, which guides trade remedies in the EVFTA, did not include this new point of the agreement, even though it is a requirement exceeding WTO standards. In addition, the guidances of CPTPP and EVFTA on trade remedies do not provide regulations on trade liberalizing compensation for the party affected by the application of safeguard measures. These are major shortcomings of the guidances, which lead to incomplete understanding and application of international commitments.

Another major concern is the frequent alterations to the guidance. Regular updates or modifications to trade remedy regulations can result in a volatile legal environment. Businesses and stakeholders may struggle to keep up with the most recent rules, which could lead to non-compliance and violations. Furthermore, continual changes can interfere with long-term business planning and investments, as businesses favor a stable and predictable regulatory framework for making strategic decisions.

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[81] According to BỘ CÔNG THƯƠNG [MINISTRY OF INDUS. & TRADE], DỰ THẢO BÁO CÁO TỔNG KẾT TÌNH HÌNH THỰC HIỆN NGHỊ ĐỊNH SỐ 10/2018/NĐ-CP NGÀY 15 THÁNG 01 NĂM 2018 CỦA CHÍNH PHỦ QUY ĐỊNH CHI TIẾT MỘT SỐ ĐIỀU CỦA LUẬT QUẢN LÝ NGOẠI THƯƠNG VỀ CÁC BIỆN PHÁP PHÒNG VỆ THƯƠNG MẠI [DRAFT REPORT SUMMARIZING THE IMPLEMENTATION OF DECREE NO. 10/2018/ND-CP DATED JANUARY 15, 2018 OF THE GOVERNMENT DETAILING A NUMBER OF ARTICLES OF THE LAW ON FOREIGN TRADE MANAGEMENT ON TRADE REMEDY MEASURES] 29 (2024) (Viet.).

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The fourth significant issue is the extensive discretion given to investigating authorities or administering agencies. Such discretion can result in arbitrary or biased decision-making, compromising the fairness and impartiality of the trade remedy process. When authorities possess wide-ranging interpretive powers, their decisions are more likely to be influenced by political or economic pressures rather than by objective criteria. This can lead to protectionist measures that favor domestic industries over fair competition, potentially causing trade disputes and tensions among FTA member countries. As previously mentioned, due to many regulations being guided unclearly, such as those determining less developed countries, the interpretation and application in practice will be at the discretion of the investigating authorities. In investigative practice, there have been instances where this factor was exploited to circumvent trade remedy measures, as exemptions are given according to the list of less developed or developing countries. This occurred in Vietnam's investigations applying safeguard measures on steel billets and long steel products (SG04) and fertilizer products (SG06). The MOIT had issued decisions to amend this list in both cases. In the SG04 case, Malaysia and Kazakhstan were removed from the list of developing countries exempt from safeguard measures.[82] In the SG06 case, Jordan and Morocco were removed from the initial list.[83]

In brief, the trade remedy guidance system within FTAs faces issues such as a lack of clarity, incompleteness, frequent changes, and excessive discretion by authorities. These problems create an unpredictable and potentially unfair environment for businesses under these agreements. To overcome these challenges, it is crucial to implement clearer and more stable guidances while restricting the discretionary powers of investigating authorities, thereby ensuring a fair and transparent trade remedy system within FTAs.

V. CURRENT IMPLEMENTATION OF TRADE REMEDIES IN VIETNAM

Previously, most businesses perceived trade remedy measures as barriers to Vietnamese exports to foreign markets instead of mechanisms against foreign imports into Vietnam. However, trade remedies are now widely recognized and used by businesses to protect domestic industries from unfair trade practices. The current situation regarding the use of trade remedy measures in Vietnam will be addressed in the following section.

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[82] *Vietnam – Safeguard Measures on Steel Billet and Long steel (SG04)*, WTOCENTER VCCI TRUNGTAMWTO (Dec. 25, 2015, 12:00), https://antidumping.vn/vietnam--safeguard-measures-on-steel-billet-and-long-steel-sg04-n15389.html.

[83] *Vietnam – Safeguard Measures on Fertilizers (SG06)*, WTOCENTER VCCI TRUNGTAMWTO (May 12, 2017, 12:00), https://antidumping.vn/vietnam--safeguard-measures-on-fertilizerssg06-n21347.html.

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A. Protecting Domestic Industry from Foreign Unfair Trade Through Trade Remedy Measures Within FTAs

Faced with the challenges and injuries to the domestic manufacturing sector due to imported goods being dumped or increasing in quantity abruptly, by the end of 2023, Vietnam has conducted twenty-five consecutive trade remedy investigations to protect the legitimate interests of domestic manufacturers, including sixteen anti-dumping cases, one countervailing case, six safeguard cases, and two investigations on anti-circumvention of trade remedies. Among sixteen anti-dumping cases, except for Taiwan and India (which has declared its withdrawal from the RCEP), the countries subject to the investigations and measures all have FTAs with Vietnam, including South Korea, China, Indonesia, Malaysia, and Thailand.[84] The anti-dumping cases involved goods such as steel, wood products, plastic products, monosodium glutamate products, cane sugar, sorbitol products, wind towers, and so on.[85]

Meanwhile, Vietnam has initiated only one countervailing duty investigation concerning cane sugar originating from Thailand in 2020 (AD13.AS01).[86] The MOIT issued Decision No. 2466/QD-BCT to initiate an anti-dumping and countervailing duty investigation on cane sugar from Thailand based on the request file from representatives of the domestic cane sugar industry.[87] According to Article 70, paragraph 5(c) of the Law on Foreign Trade Management, Article 5.5 of the WTO Anti-Dumping Agreement, and Article 13.1 of the SCM Agreement, on August 26, 2020, the TRAV sent a letter to the Royal Thai Embassy in Vietnam notifying them of receiving a complete and valid request file and inviting consultations. The investigating authority then sent questionnaires to foreign manufacturers and exporters and the Royal Thai Government, requesting full cooperation throughout the investigation process. On February 9, 2021, the MOIT issued a decision to apply provisional anti-dumping and countervailing duties on

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[84] *Statistics on Anti-Dumping Case Against Imports Conducted by Vietnam up to 31 Dec 2023*, WTOCENTER VCCI TRUNGTAMWTO (Mar. 27, 2024, 04:56), https://antidumping.vn/statistics-on-anti-dumping-case-against-imports-conducted-by-vietnam-up-to-31-dec-2023-n27018.html; *Statistics on Anti-Subsidy Case Against Imports Conducted by Vietnam up to 31 Dec 2023*, WTOCENTER VCCI TRUNGTAMWTO (Mar. 27, 2024, 04:58), https://antidumping.vn/statistics-on-anti-subsidy-case-against-imports-conducted-by-vietnam-up-to-31-dec-2023-n27020.html; *Statistics on Safeguard Case Against Imports Conducted by Vietnam up to 31 Dec 2023*, WTOCENTER VCCI TRUNGTAMWTO (Mar. 27, 2024, 05:00), https://antidumping.vn/statistics-on-safeguard-case-against-imports-conducted-by-vietnam-up-to-31-dec-2023-n27021.html.

[85] *Statistics on Anti-Dumping Case Against Imports Conducted by Vietnam up to 31 Dec 2023*, *supra* note 84.

[86] *Vietnam – Anti-Dumping And Anti-Subsidy Measures on Sugarcane Products (AD13-AS01)*, WTOCENTER VCCI TRUNGTAMWTO (Oct. 5, 2020, 12:00), https://antidumping.vn/vietnam--anti-dumping-and-anti-subsidy-measures-on-sugarcane-products-ad13-as01-n21594.html.

[87] *Id.*

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certain cane sugar products from Thailand.[88] Subsequently, on June 15, 2021, Decision No. 1578/QD-BCT was issued, stipulating the final measures to be applied for five years from June 16, 2021. The final investigation conclusions of the investigating authority determined that there existed: (i) dumping and subsidization of the investigated imported goods; (ii) material injury to the domestic industry; and (iii) a causal relationship between the dumped and subsidized imports and the significant damage to the domestic industry. The official countervailing duty applied was 4.65%, which is an additional import duty applied to cane sugar imports from Thailand (including imports under the tariff quota).[89] This process demonstrates that the investigation and imposition of countervailing measures adhered to domestic legal provisions. The anti-dumping and countervailing investigation on cane sugar from Thailand was subsequently expanded into an investigation on anti-circumvention of trade remedies through five ASEAN countries, namely Cambodia, Indonesia, Laos, Malaysia, and Myanmar.[90]

On the topic of global safeguard measures, similar to anti-dumping and countervailing cases, the investigating authority in Vietnam must meet the substantive and procedural conditions under the SG Agreement while strictly complying with the requirements in FTAs that Vietnam is a member of, primarily related to procedural requirements such as notification and consultation obligations. The imported products that Vietnam investigated and applied safeguard measures to are quite diverse, including float glass, steel, pre-painted galvanized iron, fertilizers, vegetable oil, and monosodium glutamate.[91]

B. Responding to Trade Remedy Measures of FTA Partners

In terms of implementing trade remedies in FTAs, it is critical to examine not only initiating actions but also defending against them, for example, when Vietnam is subjected to trade remedy investigations by FTA partners. This is particularly likely given that Vietnam's FTA partners are among the most frequent users of trade remedy instruments globally. As of

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[88] *See generally* BỘ CÔNG THƯƠNG [MINISTRY OF INDUSTRY AND TRADE], QUYẾT ĐỊNH ÁP DỤNG THUẾ CHỐNG BÁN PHÁ GIÁ VÀ THUẾ CHỐNG TRỢ CẤP TẠM THỜI ĐỐI VỚI MỘT SỐ SẢN PHẨM ĐƯỜNG MÍA CÓ XUẤT XỨ TỪ VƯƠNG QUỐC THÁI LAN [DECISION ON THE IMPOSITION OF PROVISIONAL ANTI-DUMPING DUTIES AND COUNTERVAILING DUTIES ON CERTAIN SUGAR PRODUCTS ORIGINATING FROM THE KINGDOM OF THAILAND] (2021) (Viet.).

[89] *Id.*

[90] *Vietnam – Anti-Circumvention Measures on Cane Sugar (AC02.AD13-AS01)*, WTOCENTER VCCI TRUNGTAMWTO (Sep. 22, 2021, 05:06), https://antidumping.vn/vietnam--anti-circumvention-m easures-on-cane-sugar-ac02ad13-as01-n23989.html.

[91] *Statistics on Safeguard Case Against Imports Conducted by Vietnam up to 31 Dec 2023*, *supra* note 84.

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now, FTA partners have conducted fifty-one anti-dumping investigations, eleven countervailing duty investigations, and twenty-eight global safeguard investigations against Vietnam or affecting Vietnam. Thus, the aggregate number of investigations initiated and measures implemented by FTA partners totals around ninety cases, representing 43% of all trade remedy investigations and measures enforced against Vietnamese exporters.[92]

Notably, Canada, Mexico, Australia, and Vietnam are all members of the CPTPP. Canada has investigated eighteen trade remedy cases against Vietnamese exports and is currently applying tariffs on seven Vietnamese products, including carbon welded steel pipes, cold-rolled steel, rebar, copper pipe fittings, corrosion-resistant steel sheets, oil country tubular goods, and upholstered seating. In 2024, Canada introduced a new anti-dumping investigation on wire rod from Vietnam, and reviewed products already subject to trade remedy measures.[93] Additionally, Australia has initiated seventeen trade remedy investigations related to Vietnamese exports. Mexico, a potential market for Vietnam due to preferential tariff commitments under the CPTPP, has investigated three anti-dumping cases against Vietnam, involving galvanized steel, cold-rolled steel coils, and welding wire.[94]

Among ASEAN member countries, Malaysia, Indonesia, the Philippines, and Thailand—all RCEP members—have used trade remedy measures against Vietnam. Malaysia has initiated ten trade remedy investigations related to Vietnamese exports and is currently applying measures on seven Vietnamese products, mainly steel products. Indonesia and the Philippines each have conducted fourteen trade remedy investigations; and Thailand has conducted eight investigations related to Vietnamese exports.[95] In the EU

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[92] *Statistics on Anti-Dumping Cases Against Vietnam's Exports in the Other Foreign Market up to 31 Dec 2023*, WTOCENTER VCCI TRUNGTAMWTO (Mar. 27, 2024, 04:46), https://antidumping.vn/statistics-on-anti-dumping-cases-against-vietnams-exports-in-the-other-foreign-market-up-to-31-dec-2-n27014.html; *Statistics on Anti-Subsidy Cases Against Vietnam's Exports in the Other Foreign Market up to 31 Dec 2023*, WTOCENTER VCCI TRUNGTAMWTO (Mar. 27, 2024, 04:50), https://antidumping.vn/statistics-on-anti-subsidy-cases-against-vietnams-exports-in-the-other-foreign-market-up-to-31-dec-2-n27016.html; *Statistics on Safeguards Case Against Vietnam's Exports in the other Foreign Market up to 31 Dec 2023*, WTOCENTER VCCI TRUNGTAMWTO (Mar. 27, 2024, 04:53), https://antidumping.vn/statistics-on-safeguards-case-against-vietnams-exports-in-the-other-foreign-market-up-to-31-dec-2023-n27017.html.

[93] *Wire Rod – Canada Investigates Anti-dumping Measures*, WTOCENTER VCCI TRUNGTAMTO (Mar. 8, 2024, 11:59), https://antidumping.vn/wire-rod--canada-investigates-anti-dumping-measures-n26945.html.

[94] *Micro Welding Wire – Mexico Investigates Anti-Dumping Measure*, WTOCENTER VCCI TRUNGTAMWTO (Oct. 10, 2023, 04:12), https://antidumping.vn/micro-welding-wire--mexico-investigates-anti-dumping-measure-n26537.html; *Cold Rolled Steel - Mexico Investigates Anti-Dumping Measure*, WTOCENTER VCCI TRUNGTAMWTO (July 28, 2022, 02:45), https://antidumping.vn/cold-rolled-steel-mexico-investigates-anti-dumping-measure-n24792.html; *Coated Steel – Mexico Investigates Anti-Dumping*, WTOCENTER VCCI TRUNGTAMWTO (Aug. 30, 2021, 04:59), https://antidumping.vn/coated-steel--mexico-investigates-anti-dumping-n26265.html.

[95] See statistics cited *supra* note 92.

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market, the EU has previously initiated a countervailing investigation on Vietnamese polyester yarn[96] and is currently reviewing safeguard measures imposed on certain steel products.[97] In the Northeast Asian market, South Korea has investigated and applied four anti-dumping cases on Vietnamese exports, including plywood and seamless copper pipes and tubes.[98] It is evident that the number of trade remedy investigations is expected to continue increasing in the future. Therefore, domestic businesses need to prepare resources and strategies to respond to future cases.

As regards the response of Vietnam over trade remedy measures imposed by FTA partners, since joining the WTO, Vietnam has undertaken several legal actions within the WTO framework. Among these, Vietnam has been involved in trade remedy disputes as a complainant in four disputes[99] (out of a total of five disputes) and as a third party in twenty-four disputes (out of a total of forty-two disputes).[100] It can be seen that, trade remedy disputes are a primary area of dispute for Vietnam at this organization. Specifically, the DS496 dispute, involving safeguards, was particularly notable as it was among the few safeguard-related disputes in which Vietnam had participated. Prior to this, Vietnam had only been involved in one other safeguard dispute (DS399).[101] This DS496 case can be summarized as follows:

On July 7, 2014, the Indonesian Ministry of Finance decided to implement safeguard measures on imported flat-rolled iron or steel products without consulting the Vietnamese government.[102] In response, on June 1, 2015, the Vietnamese government filed an official complaint with the WTO Dispute Settlement Body (hereinafter "DSB") to resolve the issue according to Dispute Settlement Understanding (hereinafter "DSU") procedures. Vietnam's request for consultations, submitted on the same day, identified the challenged measures as including: The special duty imposed as a

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[96] *Polyester Staple Fibres (PSF) – EU Investigates Anti-Subsidy Measures*, WTOCENTER VCCI TRUNGTAMWTO (Dec. 23, 2013, 12:00), https://antidumping.vn/polyester-staple-fibres-psf--eu-investigates-antisubsidy-measures-n21770.html.

[97] *EU – Safeguard Measures on Certain Steel Products*, WTOCENTER VCCI TRUNGTAMWTO (Mar. 10, 2021, 12:00), https://antidumping.vn/eu--safeguard-measures-on-certain-steel-products-n22520.html.

[98] *Statistics on Anti-Dumping Cases Against Vietnam's Exports in the other Foreign Market up to 31 Dec 2023*, *supra* note 92.

[99] There are three anti-dumping disputes: United States — Anti-Dumping Measures on Certain Shrimp from Vietnam (DS404, DS429), United States — Anti-Dumping Measures on Fish Fillets from Vietnam (DS536), one safeguard dispute: Indonesia — Safeguard on Certain Iron or Steel Products (DS496), and no disputes related to subsidies and countervailing measures.

[100] *Dispute by Member*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

[101] *See generally* Panel Report, *United States — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WTO Doc. WT/DS399/R (adopted Oct. 5, 2011).

[102] Request for Consultations by Vietnam, *Indonesia — Safeguard on Certain Iron or Steel Products*, ¶ 1, WTO Doc. WT/DS496/1, G/L/1118, G/SG/D48/1 (June 3, 2015).

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safeguard measure on the importation of steel products under HS code 7210.61.11.00;[103] The notification regarding the existence of a threat of serious injury from increased imports as well as the notification of the proposal to apply the safeguard measure;[104] Indonesia's failure to conduct consultations regarding the application of the safeguard measure, including the date of imposition and the information of the measure before it was actually applied.[105] Vietnam contended that these measures breached Article I.1 and Article XIX.1 of the GATT 1994, along with various provisions of the SG Agreement.[106] Following unsuccessful consultations, Vietnam requested the formation of a panel. On October 28, 2015, the DSB agreed to establish this panel. However, due to an earlier agreement on September 28, 2015, to form a panel for a similar case brought by Taiwan, a single panel was assigned to address both disputes simultaneously under Article 9.1 of the DSU. This case, which drew significant attention from WTO members, saw participation from nine members as third parties.[107]

Vietnam's experience with safeguard disputes was relatively limited, which contributed to its unsuccessful challenge against Indonesia. Both the panel and the Appellate Body concluded that Indonesia's contested measure was not classified as a safeguard. The specific duty imposed by Indonesia was intended to prevent and remedy serious injury to its own industry but did not involve suspending, withdrawing, or modifying any GATT 1994 obligations.[108] As a result, Indonesia was permitted to maintain or even increase the special duty on steel products imported from Vietnam. Moreover, Vietnam was unable to compel Indonesia to provide compensation under Article 8 of the SG Agreement.[109]

It should be noted that Vietnam has gained valuable insights into WTO regulations concerning safeguard measures through this dispute. This

[103] *Id.* ¶ 5.a.
[104] *Id.* ¶ 5.b.
[105] *Id.* ¶ 5.c.
[106] *Id.* ¶ 6.
[107] Panel Report, *Indonesia — Safeguard on Certain Iron or Steel Products*, ¶ 1.4, WTO Doc. WT/DS490/R, WT/DS496/R (adopted Aug. 27, 2018).
[108] Appellate Body Report, *Indonesia — Safeguard on Certain Iron or Steel Products*, ¶¶ 6.6-6.8, WTO Doc. WT/DS490/AB/R, WT/DS496/AB/R (adopted Aug. 27, 2018).
[109] Agreement on Safeguards art. 8, Aug. 27, 2002, 1869 U.N.T.S. 154, https://www.wto.org/english/docs_e/legal_e /sg_e.htm provides:

> A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavor to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.

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experience will better inform Vietnam's approach to future safeguard disputes within the WTO framework. Moving forward, Vietnam is advised to reassess its legal foundation for implementing safeguard measures and refine its practices related to the investigation and imposition of such measures. This reflective process is crucial for Vietnam to enhance its effectiveness in handling safeguard-related issues in international trade disputes. Generally, in light of the swift rise in trade remedy investigations amid the current execution of FTAs, not only Vietnam but also other developing countries must promtly complete more synchronous and consistent legal systems to minimize fragmentation and serve as a solid legal basis for stakeholders.

VI. LESSONS DRAWN FROM VIETNAM'S EXPERIENCES

The situation in Vietnam is representative of a broader challenge faced by many countries due to the proliferation of FTAs. Nations such as China, Korea, Japan, the US, and the EU encounter similar complexities as they navigate multiple FTAs simultaneously. Although national circumstances may differ, all countries must contend with the fragmentation of trade remedy regulations. In the era of the WTO, a single set of trade remedy laws governed international trade under the WTO Agreements. However, the increasing number of FTAs has introduced a myriad of new provisions, contributing to a complex and fragmented regulatory environment. While many trade remedy rules are still anchored in the WTO Agreements, FTAs are progressively incorporating additional provisions. This has led to a complicated landscape for trade remedy regulations, posing significant compliance challenges. The case of Vietnam exemplifies the difficulties arising from this fragmentation, particularly for developing countries with limited manpower and resources, making adherence to legal obligations in trade remedy matters increasingly burdensome. To solve this problem in Vietnam, state authorities have researched and evaluated the practical implementation of trade remedy laws to come up with appropriate solutions.

A. Fulfillment of the Amendment of Key Domestic Legislation

As analyzed above, the current Vietnamese domestic legislation on trade remedies does not fully specify or align with the commitments and regulations set forth in the FTAs. This lack of clarity can lead to uncertainties for foreign enterprises and hinder their ability to fully benefit from the provisions of these trade agreements. To address these issues, it is proposed to amend and supplement the Law on Foreign Trade Management 2017 and Decree 10/2018/ND-CP to ensure synchronization and consistency with

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international commitments and compliance with FTAs.[110] The amended and supplemented law and decree will clarify the legal nature of each trade remedy measure, as well as cover and anticipate emerging situations. These legal texts will serve as the basis for issuing guidelines on trade remedies in future FTAs. It would harmonize trade remedy measures by aligning anti-dumping, countervailing duties, and safeguard measures with international standards and the commitments outlined in these FTAs.

In the short term, along with amending the entire trade remedy chapter in the Law on Foreign Trade Management 2017 and its guidelines, it is argued that Vietnam could issue a separate legal document specifically addressing trade remedy rules not yet aligned with the FTAs. This document would apply exclusively to entities and transactions within the scope of the FTAs, ensuring compliance with FTA commitments by detailing the necessary adjustments. By creating this separate legal framework, the general trade remedy legislation would remain unchanged, simplifying the legal environment for businesses not covered by the FTAs. The benefits of either amending the law or issuing a separate document include providing clear and predictable guidances for foreign enterprises, and demonstrating Vietnam's commitment to upholding international trade standards and obligations.

B. Promotion of the Effective Implementation of Trade Remedies in FTAs

The implementation of trade remedy provisions is essential for protecting domestic industries from unfair trade practices by FTA partners. To achieve this, the Vietnamese government must develop a specific and clear action plan that involves monitoring, coordination, and rapid response to emerging issues. Rapid response to trade remedies is crucial when potential trade problems are identified, so authorities must be prepared to address and compile these issues promptly, providing domestic businesses with timely support and guidance. Additionally, creating dedicated rapid response teams within the TRAV and other relevant bodies would help swiftly resolve trade disputes and issues, minimizing disruption to domestic businesses. As of today, following the issue of Decision No. 316/QD-TTg on approving "Project on Building and Effectively Operating the Early

[110] *Lấy ý kiến Hồ sơ Dự thảo Nghị định thay thế Nghị định số 10/2018/NĐ-CP quy định chi tiết một số điều của Luật Quản lý ngoại thương về các biện pháp phòng vệ thương mại* [*Commenting on the Draft Decree to Change the Decree No. 10 /2018 /ND-CP Specifies a Number of Articles of the Foreign Trade Management Law on Trade Remedy Measures*], BỘ CÔNG THƯƠNG VIỆT NAM [MINISTRY OF INDUS. & TRADE REPUBLIC VIET.] (June 6, 2024, 14:52), https://moit.gov.vn/tin-tuc/thong-bao/lay-y-kien-du-thao-nghi-dinh-thay-the-nghi-dinh-10-2018-nd-cp-quy-dinh-chi-tiet-mot-so-dieu-cua-lu at-quan-ly-ngoai-thuon.html.

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Warning System on Trade Remedies", the TRAV has updated the monitoring of over 170 products, including an early warning list for eighteen products deemed at risk of being investigated under trade remedy procedures.[111] This Decision represents a strategic move towards a more systematic and preemptive approach in handling trade remedy issues.

C. Enhancement of the Dissemination and Awareness of Trade Remedies in FTAs

Education and awareness campaigns are essential to inform domestic enterprises about trade remedies and FTA commitments, which enable them to understand the importance of compliance and the repercussions of noncompliance. The organization of regular workshops and seminars allows them to learn about trade remedies and FTA commitments, offering valuable guidance for navigating international trade regulations. Additionally, training programs for government officials will enhance their understanding of trade remedies in FTAs, aiding in compliance with international trade norms and preventing disputes. In 2020, the Vietnam Chamber of Commerce and Industry (hereinafter "VCCI"), in collaboration with the TRAV, hosted a conference titled "Trade Remedies: A Tool to Protect the Interests of the Domestic Manufacturing Industry in the Context of Integration." In December 2022, the United States Agency for International Development[112] Trade Facilitation Program and VCCI Danang also organized a training workshop on "Effectively Taking Advantage of Preferential Tariffs from New Generation FTAs." On August 6, 2024, as part of the WTO Chairs Programme at Foreign Trade University in Vietnam, the university successfully conducted the workshop titled "Proactively Applying and Responding to Trade Remedies in International Trade."[113] Moreover, on August 13, 2024, the MOIT disseminated Official Dispatch No. 5971/BCT-DB to localities, associations, enterprises, and institutes across sixty-three provinces and cities, announcing the establishment of training courses for new generation FTA experts in 2024, encompassing both basic and advanced training programs.[114] These programs aimed to enhance the knowledge of

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[111] Minh, *supra* note 29 .

[112] The United States Agency for International Development [hereinafter USAID] is the world's leading international development institution, working to advance development goals. Since 1989, USAID has worked with the Vietnamese government, the commercial sector, universities and research institutions, national and international organizations, and others to achieve shared objectives.

[113] More information about the conference can be found at WTO CHAIRS PROGRAMME - FOREIGN TRADE UNIVERSITY, https://wcp.ftu.edu.vn/en/ (last visited Sep. 20, 2025).

[114] *Thông báo về việc tổ chức các khóa đào tạo để trở thành chuyên gia FTA thế hệ mới* [*Notice of Organizing Training Courses to Become a New Generation FTA Expert*], BỘ CÔNG THƯƠNG VIỆT NAM [MINISTRY OF INDUS. & TRADE REPUBLIC VIET.] (Aug. 8, 2024, 11:37), https://moit.g

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local authorities and businesses on new generation FTAs, including trade remedy commitments.

VII. CONCLUDING THOUGHTS

In principle, trade remedy measures are legitimate tools to maintain fair trade between members in the case of the WTO, and between contracting parties in the case of the FTAs. The trade remedy provisions in the CPTPP, RCEP, EVFTA, and VKFTA are understood as WTO-plus commitments because they impose higher and additional requirements compared to the WTO Agreements as regards procedural requirements, obligations of investigating authorities, rights of interested parties, and so on. As a contracting party of an FTA has to amend or enact laws and regulations on trade remedy matters upon entry into force of the FTA, the existence of multiple FTAs means that these domestic laws and regulations are also all different for respective contracting parties. It leads to the fragmentation of trade remedy norms. This is a phenomenon that has not been observed in the WTO Agreements where simply one set of trade remedy norms is applied. As more and more FTAs are being concluded, the extent of fragmentation will go deeper and wider. Fragmented rules will make it more difficult for both investigating authorities and interested parties to abide by the rules. Complexities will arise when an investigating authority conducts a trade remedy investigation against a product from multiple countries, for instance an anti-dumping investigation of passenger vehicles from Country A, Country B and Country C. Practically speaking, as far as the investigating authority is concerned, this investigation would be considered to be a single investigation. When there are FTAs in place with Countries A, B and C respectively, now applicable rules all become different because there are three different FTAs with different rules on trade remedies. Thus, even if the anti-dumping investigation petition is submitted the same day, and initiation of the anti-dumping investigation is decided the same day, the same investigating authority will now have to follow different procedural steps depending on the contents of the three FTAs. It would place a significant burden on the investigating authority. The burden is likely to become more significant when it comes to developing countries as their investigating authorities usually experience a chronic shortage of human resources and trade remedy expertise.

In addition to enhancing academic understanding of the systemic legal challenges posed by the proliferation of FTAs in international trade governance, the article offers practical guidance for policymakers and

ov.vn/tin-tuc/thong-bao/thong-bao-ve-viec-to-chuc-cac-khoa-dao-tao-de-tro-thanh-chuyen-gia-fta-the-he-moi.html.

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negotiators navigating fragmented trade remedy rules. Vietnam's experience provides a useful example in this regard. The issuance of trade remedy guidances for each FTA, while the laws and regulations basically remain intact, has led to significant challenges not only for administrative agencies and the investigative authority but also for domestic and foreign enterprises. On the surface, trade remedy laws look uniform and consistent. In reality, however, they apply different rules and follow different paths. The difference is only stipulated in an instrument whose legal status is either low, weak and precarious—the guidances. In order to address the fragmentation phenomenon, Vietnam would have chosen the easiest solution—different rules are reflected through an instrument which can be easily adopted and amended by a government agency or an investigating authority. Moreover, it would be essential to improve the national legal framework for trade remedy issues. This involves stipulating clear and unambiguous provisions in trade remedy laws and regulations. It also demands creating and administering a unified legal scheme in which legal instruments are adopted and structured properly. Key issues of trade remedy investigations and measures should be stipulated in laws and regulations; they should not be delegated to guidances, guidelines or internal directives which are by nature susceptible to agency discretion. Predictability and stability of trade remedy investigations and ensuing measures would not be easily threatened under this formula. The approaches that Vietnam has taken as a result of the conclusion of multiple FTAs with key trading partners offer important lessons for other countries, particularly developing countries. Vietnam's achievements and shortcomings with respect to the trade remedy matters would arguably merit careful attention at this juncture.

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