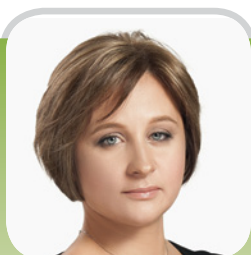


Trade Defense Remedies in 2017: Interesting Times Ahead!



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In 2017 Mrs. Makhinova was recognized by Who's Who: Trade & Customs as "extremely knowledgeable about legal aspects of handling anti-dumping cases and WTO rules" and as "one of the most experienced people dealing with international trade issues in Ukraine." She is a country expert on franchising for the International Distribution Institute, recognized by Who's Who: Trade and Customs, and Who's Who: Franchising, Clients Choice in International Trade

The past year was full of new challenges for international trade law practitioners. Suffice to mention:

(a) Considerable revision by Donald Trump of the trade policy of the USA that has already resulted in a crisis within the WTO by blocking the appointment of new members of the Appellate Body.

(b) Unwillingness of WTO members such as the USA and the EU to grant market economy status to China in trade defense proceedings culminating in adoption by the EU of amendments to its trade defense legislation allowing for the application of adjustments in case of considerable market distortions. Immediately after adoption of the above amendments, the EU published a report (at 466 pages) describing in details all "market distortions" existing in China and detailed recommendations for domestic industry on how to draft new applications on investigation initiation.

(c) As surely as night follows day, China initiated two WTO disputes against the EU (DS516) and the US (DS515) to challenge the continued application of non-market economy status to China in trade defense proceedings.

(d) Constantly growing protectionism provoking the increased application of trade defense remedies in the world as directly confirmed by the *Annual report by the Director-General "Overview of Developments in the International Trading Environment" (Mid-October 2016 to mid-October 2017)*.

It is unquestionable that the above trends have influenced Ukraine. This article focuses on the benchmark trends.

STATISTICS

2017 was a very active year for trade defense proceedings in Ukraine.

In particular, the following measures were applied: in April, anti-dumping duties against imports of abrasives; in May, anti-dumping duties against imports of certain cacao containing products; in December, anti-dumping duties against imports of bars. In March, anti-dumping duties against imports of asbestos slates rose from 21.8% to 37.4% based on the results of an interim review. It is worth noting that all of the above duties were against products originating in Russia.

Ukraine initiated the following new reviews and investigations in 2017: in February, an anti-dumping investigation related to imports of bars with origin in Russia. In April, an interim review of anti-dumping duties applied to imports of nitrate ammonium and an anti-dumping investigation against imports of certain urea-formaldehyde products both with origin in Russia. In August, a safeguard investigation against imports of sulphuric acid notwithstanding the country of origin and export. In November, a sunset review of anti-dumping duties applied to imports of asbestos slates with origin in Belarus, an anti-dumping investigation against imports of salt originating in Belarus, and an anti-dumping investigation against imports of syringes from India, Turkey, and China. In December, an anti-dumping investigation against imports of incandescent lamps from Belarus.

BENCHMARK DEVELOPMENTS

Consumers vs. Domestic Industry

In 2016, for the first time in the history of Ukraine, end customers of products

subject to anti-dumping investigation on imports of certain fertilizers with origin in Russia (i.e. agricultural producers) strongly and actively opposed application of anti-dumping measures. Thus, the Interdepartmental Commission on International Trade (the Commission) and the Ministry of Economic Development and Trade of Ukraine (the Ministry) sought to strike a balance between their interests and those of the domestic producers initiating the investigation. The Commission and the Ministry took into account arguments from agricultural producers, even though they had not been duly registered as interested parties of the anti-dumping investigation, a mandatory precondition for participation in the investigation under the *Law of Ukraine On Protection of Domestic Producers from Dumped Imports*.

In 2017, many customers participated in all investigations, something that was not typical for the previous years. In order to avoid situations when customers do not actively participate in the investigation but later request that the Ministry and the Commission refrain from applying measures, even when there are grounds for this, the Ministry has established a new practice to send questionnaires to all participants of the investigation. This includes customers and even associations of customers, in order to collect the most reliable information on the actual influence of the potential measures on customers. If the questionnaires are not submitted at all or are submitted incorrectly, the Ministry will be deprived of the opportunity to analyze the above influence and thus, it is safe to assume that the Ministry will not be able to take into account the position of the customers.

Ukraine vs. Russia

2017 was the year when Russia lost its leading position in terms of the quantity of new trade defense proceedings initiated by Ukraine against Russian products. This is an expected result in view of the application of many trade bans and restrictions by both countries against each other, triggering a considerable decrease in bilateral trade.



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Sayenko Kharenko has unrivalled expertise in Ukraine when it comes to advising our clients on all aspects of international trade law, including WTO rules and trade defence proceedings. Based on its more than ten-year experience in this field, the firm's team is ready to come up with sophisticated commercial solutions for our clients to help them to expand their business globally.

Sayenko Kharenko's stellar international trade team has the following competitive advantages:

- Experience both in Ukraine and abroad
- Representing clients not only in the course of basic trade defence investigations, but also in sunset and interim reviews as well as anti-circumvention investigations
- Strong legal expertise combined with sophisticated economic substantiation, including dumping margin calculation employing advance methodologies
- Representing both domestic producers protecting the Ukrainian market and foreign producers trying to gain an individual approach in the course of proceedings

— Appearing before Ukrainian courts and, in the course of WTO dispute settlement procedure, both defending and challenging the results of trade defence proceedings

— Sayenko Kharenko's lawyers have been actively engaged in drafting new Ukrainian legislation in the field of trade defence remedies to be brought in full compliance with advanced WTO approaches

A combination of expertise that is unique on the Ukrainian market with in-depth industry knowledge enables Sayenko Kharenko to offer its clients a full range of services in the following fields:

- Trade remedies (anti-dumping, countervailing and safeguards);
- WTO;
- Trade compliance;
- International transactions and contractual structuring;
- Agency, distribution and franchising;
- Free trade agreements.

Judicial Review

The new "fashion trend" of 2017 in Ukraine is challenging trade defense measures before Ukrainian courts. It is worth pointing out the following benchmark decisions of the court in the course of consideration of the above disputes in 2017:

— In one case, a court ruled that special measures applied in Ukraine under the *Law of Ukraine On Application of Special Measures against Imports to Ukraine* are different from safeguard measures applied under the *Agreement on Safeguards* and the *GATT*. Thus, the latter shall not apply to special investigations in Ukraine. This is nonsense because Ukraine has notified the *Law of Ukraine On Application of Special Measures against Imports to Ukraine* as a legal instrument implementing the *Agreement on Safeguards*. Moreover, Ukraine has duly notified the WTO on initiation of the relevant special investigation and on application of special measures to the WTO under the *Agreement on Safeguards*. In view of the fact that European companies are key suppliers of the products in question, this court decision may have far-reaching negative consequences for Ukraine.

— In another case, a court has appointed a court expert examination to double check calculation of the dumping margin made by the Ministry. This is the first case in the history of the application of trade defense remedies in Ukraine when a court has appointed a court expert examination for such matters. In our view, this is quite a dangerous precedent for the following reasons:

Firstly, under Ukrainian law, the Ministry has the exclusive power to calculate

dumping margins based on all information, documents and evidence collected in the course of the investigation, while the Commission, by its decision, confirms the correctness of the dumping margin calculation methodology employed by the Ministry. If a court or experts re-calculate the dumping margin, in our view, there is a high risk of interference in the discretionary powers of the said state authorities by the court.

Secondly, in this case, the court has requested the expert to answer not only questions requiring special knowledge (i.e. to double-check mathematical calculations), but also issues of a legal nature — specifically whether cost adjustment for the market price of Russian gas is allowed in principle. According to well-established international practice, some WTO members use such cost adjustment to counteract so-called dual-pricing practices when the same product (natural gas in this case) is sold by the state to its domestic industry at considerably lower prices than for export and usually the domestic price is regulated by the state. Hence, adoption of a decision to apply cost adjustment is possible only after detailed analysis of the legal framework in the respective country and its practical implementation. Therefore, such questions are of a legal nature and thus, are inadmissible for court expert examinations.

Thirdly, it is not clear how the expert will calculate the dumping margin as it does not have all the relevant materials that were available to the Ministry and the Commission in the course of the investigation. Therefore, the expert does not have the possibility to conduct an objective examination.

— In one more case, the court has requested the Ministry to disclose all confidential information and documents submitted by the interested parties in the course of the investigation, while in another case the request relates to the full confidential version of the final determination. In both cases, the court has requested to disclose huge volumes of confidential information and commercial secrets (to name but a few: on cost of production, sales prices in Ukraine and the domestic market, customers in Ukraine and the domestic market etc.) to direct rivals. This is potentially harmful for the companies participating in trade defense proceedings in Ukraine. Ukrainian trade defense regulations stipulate specific procedures to protect confidential information in the course of an investigation. However, Ukrainian procedural legislation is silent on the matter. As a result, general rules are applied, according to which all case materials are available for all participants. In view of the above, there is a strong argument for addressing the relevant gap in the legislation as soon as possible.

NEXT STEPS

On 17 July 2017, the Ministry presented five draft laws considerably changing the legal framework in the field of trade defense instruments and eliminating many problems currently faced by the Commission, the Ministry, and the interested parties of investigations. The above draft laws are due for adoption by Ukrainian Parliament in 2018.