

# Trade Defense Remedies: Hot Topics of 2019



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Last year saw a variety of protectionist sentiments around the globe. Taking into account that trade defense remedies are protectionist measures directly allowed in the WTO, naturally enough 2019 demonstrated a growth in different investigations and applied remedies. In this article, our aim is to focus on the hottest issues in the field of trade defense remedies.

## Global View

### Statistics on Trade Defense Measures

According to official statistics provided by the WTO Committee on anti-dumping practices, in 2018, WTO members introduced 203 anti-dumping measures, which is by far the largest number of such measures during the last 15 years. In the first half of 2019, WTO members reported 82 new anti-dumping measures, the final number for the year is likely to increase.

The number of countervailing measures rose significantly in 2018 when WTO members initiated 55 new investigations and introduced 28 new measures. These are record figures for the WTO since 1995. WTO members reported 18 new countervailing measures for the first half of 2019.

In 2019, WTO members reported 13 new safeguard measures, which is the largest number since 2003. Furthermore, in 2019 WTO members reported 30 new safeguard investigations (the largest number since 2002).

These global statistics lead to the conclusion that countries more often revert to trade defense measures in order to protect domestic markets and local producers from imports. This trend is likely to continue in 2020 when most countries face serious economic challenges caused by the COVID-19 pandemic, downturn on financial markets, and price declines on raw material markets.

### Global Safeguard Measures Against Steel in 2019

On 8 March 2018, the USA imposed additional duties of 25% on steel imports and 10% on aluminum imports. Other countries responded in 2019 with safeguard measures to protect local producers.

Definitive safeguard measures were imposed by the European Union against 28 product categories. Notably, 12 out of 28 categories of Ukrainian products have been excluded from definitive measures. Canada imposed safeguard measures on imports of heavy plate and stainless-steel wire. Notably, some products were excluded from investigation, while the Canadian government announced a refund of previously paid provisional safeguard duties. The Eurasian Economic Union imposed a safeguard measure against imports of hot-rolled products. Cold-rolled products and coated products were excluded from the scope of the measure. Safeguard measures were also imposed by certain other countries.

Unlike the USA, other countries introducing safeguard measures on steel followed the procedure envisaged by the WTO Agreement on Safeguards. On the contrary, the USA claims its steel and aluminum measures to be beyond the scope of WTO regulation and does not regard them to be safeguard measures per se. This approach was largely criticized by the WTO community and entailed several disputes raised against the USA in the WTO dispute settlement system. Though the USA managed to find mutually agreeable solutions on this matter with a number of states, other disputes are at the active stage and we are likely to see their outcome in 2020.

## Ukrainian View

### Statistics on Trade Defense Measures in Ukraine

2019 was quite a productive year for trade remedies in Ukraine. During the year, Ukraine

applied 7 new anti-dumping duties, namely on rods from Belarus and Moldova, bearings from Kazakhstan, rolled steel from Russia and China, cement from Russia, Belarus and Moldova, salt from Belarus, incandescent lamps from Belarus, and medical rubber corks from Poland and China. Two other anti-dumping duties, on aerated concrete blocks from Belarus and steel ropes from Russia, were imposed in early 2020. Anti-dumping measures on medical glass bottles and incandescent lamps from China, as well as safeguard measures on polyurethane foam, were extended.

In 2019, Ukraine also initiated a number of new investigations and reviews: anti-dumping investigations on the import of steel ropes from Russia, aerated concrete blocks from Belarus, aluminum car wheels from China, matches from Belarus and Russia, steel fasteners from China, sunset reviews of anti-dumping measures on ammonium nitrate from Russia, iron non-isolated products from China, railroad switches from China, seamless steel pipes from China, special investigations on nitrogen fertilizers, complex fertilizers, syringes, review of safeguard measures on polyurethane foam.

An anti-dumping investigation into the import of syringes from India, Turkey and China ended without measures being taken.

### Legal Issues in Trade Defense Legislation

In 2019, Ukrainian courts reached several important conclusions which throw light on the way in which courts treat certain provisions of trade defense legislation:

- The limitation period for challenging decisions on application of measures before the courts. The Law of Ukraine *On Foreign Economic Activity* establishes a 1 month limitation period to challenge trade remedies. The law does not explain precisely from which date such period is calculated (i.e. adoption of a decision on imposition of a measure, official publication of the notice on the above decision, or entry of a measure into force, which in Ukraine usually takes from 30 to 60 days). But in case 826/7768/17 the Supreme Court of Ukraine clarified that the 1 month limitation period shall start from adoption of a decision on imposition of a measure by the Interdepartmental Commission on International Trade (the Commission). In our view, the above approach is quite controversial because Ukrainian law does not stipulate any mandatory deadlines for official publication of decisions on application of measures. Thus, it may well be that late publication may deprive the interested parties of the right to challenge measures before a court;
- Interested parties that are allowed to challenge applied measures before the courts. According to the general procedural provisions of Ukrainian law, a court action can

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be filed by a person or legal entity, whose rights or interests have been violated. In case 826/11968/16 the Supreme Court of Ukraine clarified that while a foreign entity does not pay safeguard duties (i.e. such duties are paid by importers), its rights and interests are not violated, therefore, it could not act as a claimant before Ukrainian courts. The same approach was taken by the court of first instance (and later upheld by the appellate court) in case 826/7872/17. This decision means, in fact, that trade remedies may only be challenged in court by domestic companies (e.g. importers, end customers) paying duties and having participated in an investigation. It shall be noted that entities which have not participated in an investigation are deprived of the right to challenge measures in court. From the practical viewpoint, the above approach may make it impossible to efficiently challenge decisions on application of anti-dumping duties before courts by foreign producers in anti-dumping investigations. This is because, due to confidentiality reasons, only foreign producers have access to all confidential information on dumping margin calculations. Therefore, only they are able to challenge the decisions based on these grounds.

- The majority of the members of the Commission empowered to apply decisions on application of trade defense measures. Notably, Ukrainian law does not precisely stipulate what size of majority of the Commission is required for adoption of a decision – of those present at the meeting or of the nominated members of the Commission. In case 826/11968/16 the Supreme Court of Ukraine clarified that trade remedies can be adopted by a majority of the Commission present at the meeting. Given that a Commission meeting is competent if no less than 50% of its members have attended the meeting, the trade remedies may

be adopted only if 25% of the Commission members have upheld them. This is quite a controversial approach in view of the fact that the Commission introduces limitations to imports from certain and even all countries (in case of safeguards).

- Discretionary power of the investigating authority to establish an investigation period. According to legislation, the period of a safeguard investigation may last from 1 to 3 years but in certain cases it can be longer. In case 826/11565/18 the Appellate Court in its decision, later upheld by the Supreme Court of Ukraine, clarified that the investigating authority is not obliged to provide any substantiation of circumstances for an extended investigation period. Therefore, definition of the investigation period is at the discretion of the investigating authority.
- Interim remedies in court actions regarding trade defense measures. When challenging trade defense measures, claimants often submit motions on interim remedies (interim suspension of the measures) to the courts. The court of first instance grants such motions in certain cases. However, the practice of the court of appeal is to reject such motions and review the decisions if interim relief had been provided by a court of first instance (see case 826/11565/18).

## Draft Laws on Trade Remedies

On 7 March 2018, the Ukrainian government submitted three new draft laws regarding trade remedies to the Ukrainian Parliament. However, in 2019 these draft laws were revoked. The effective laws on trade remedies were adopted as early as 1998 and have been only subject to a few amendments since that time. The effective legislation lacks modern instruments, practices and approaches used by foreign investigation authorities. It is reported that the Cabinet of Ministers of Ukraine is developing new draft laws on trade remedies. However, the timing of their adoption is unclear.