Forewarned is Forearmed, or Recent Case Law on Trade Defense Remedies

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On its path to the WTO, in 1998 Ukraine adopted legislation specifically addressing trade defense proceedings and remedies, namely: the *On Protection of National Producer against Dumped Imports Act of Ukraine*, *On Protection of National Producer against Subsidized Import Act of Ukraine* and *On Application of Special Measures against Imports into Ukraine Act of Ukraine*[1].

Since then and until June 2013, Ukraine initiated 33 anti-dumping and 36 safeguard investigations. No anti-subsidy investigations have yet been conducted in Ukraine.

Under the mentioned Acts, trade defense proceedings in Ukraine are conducted by the Ministry of Economic Development and Trade of Ukraine (the Ministry). Major decisions within the proceedings, including preliminary and final determinations, are made by a special interdepartmental agency i.e. the Interdepartmental Committee on International Trade (the Committee) chaired by the Minister of Economic Development and Trade of Ukraine. The applicable legislation provides for a judicial review of the Committee's decision.

It is worth noting that a significant amount of the said decisions have been challenged in Ukrainian courts. Nevertheless, the Ukrainian courts have not yet established a firm practice of ruling and interpreting issues related to trade defense remedies and proceedings. Even though Ukraine is a civil law country, we believe that it is worth analysing trade defense remedies case law recently rendered by the Ukrainian courts in order to fully understand major legal concerns and the approach of courts thereto.

Our intention in this article is to canvass the "weald" of case law on trade defense remedies related matters and sum up its landmark trends. In this article we do not aim to establish the legality and substantiation of the said judgements.

Sufficient evidence for trade defense proceedings initiation

It is worth noting that the Committee was until recently, as a rule, in the national industry's corner and sometimes even initiated investigations based on unfounded and unproved claims. However, this trend has changed and, nowadays, the Committee and the Ministry scrutinize the respective claims and request the national industries to improve their submissions on multiple occasions.

Probably, this development was due to recent case law[2]. Particularly, in one of the most recent cases the court found that, as the claim made by the national industry did not include any information on its total profit, the export value of products and export prices, the Committee and the Ministry were not in a position to fully analyze the injury issue i.e. the national producer's economic factors and indices, especially in the view of the fact that the majority of its products are exported to different countries.

Additionally, the court noted that according to the information available to the Committee and the Ministry, average export prices of the national industry were considerably lower than prices on the internal market as well as average cost of production. Based on the said findings, the court confirmed the legality and reasonableness of the Committee's refusal to initiate the investigation.

Quorum for action

Under Ukrainian legislation, the Committee is a state agency acting on a temporary basis, the composition of which is approved by the resolutions of the Cabinet of Ministers of Ukraine (the CMU) adopted from time to time. As of today the composition of the Committee is approved by *Resolution of the CMU of 18 April 2012, No.310* and consists of 12 members representing different state bodies, e.g. the Administration of the President of Ukraine; the Ministry of Incomes and Fees of Ukraine; the Ministry of Foreign Affairs of Ukraine; the Ministry of Agrarian Policy and Food of Ukraine; the Antimonopoly Committee of Ukraine, etc. The Committee's meetings shall be regarded as meeting the criteria of a quorum

[1] Instead of internationally recognized term "safeguards", Ukrainian law operates with the term "special measures".

[2] E.g. the decision of the Higher Administrative Court of Ukraine of 28 August 2012 No. K/9991/42461/12.

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The TRADE DEFENSE REMEDIES legislation DOES NOT STIPULATE any criteria for DEFINING the LIKE PRODUCTS

if not less than a half of the Committee's members are present. The Committee's decisions shall be adopted by a simple or special majority (depending on the issue being considered).

Notably, even though some members of the Committee may be dismissed from their position in the relevant state bodies, the respective resolutions are quite often not amended in a timely fashion. Hence, there is a question of eligibility of decisions adopted by the Committee. The courts' approach to this issue is rather controversial.

In some cases[3] the courts ruled that the majority of the Committee's members shall be defined not on the basis of the membership approved by the relevant resolution of the CMU, but on the actual membership as of the date of the decision adoption (excluding all members listed in the respective resolution but dismissed as of the date of the decision adoption). This issue was raised by the courts during the challenging proceedings regarding the Committee's decision on initiation of the safeguard investigation related to imports of motor vehicles into Ukraine. As of the date of the above decision, the Committee's *de jure* (under the Resolution) membership was 22 members, but *de facto* (i.e. due to the administrative reform 6 members of the Committee were dismissed, but the respective amendments were not introduced to the CMU's Resolution) there were only 16 Committee's members. The court calculated a simple majority from 16 members, but not from 22 members. In other cases[4] the courts calculated the majority of the Committee's members based on the membership listed in the respective CMU's resolution.

[3] E.g. the decision of the District Administrative Court of Kiev No.2a-11825/11/2670 of 29 February 2012.

[4] E.g. the decision of the Kiev Appellate Administrative Court of 18 January 2011 No.2a-6413/10/2670.

To be or not to be

According to Ukrainian legislation, only the interested parties are allowed to fully protect their interests within the trade defense proceeding, to name but a few: submit their commentaries; access case file; participate in hearings or consultations, etc.

Under the law the interested party is defined as any person that notified the Ministry of its interest in participating in a particular investigation and actively participates in the investigation by submitting written evidence or other information sufficient for investigation purposes. The following persons may be regarded as interested parties: an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are foreign producers, exporters or importers of such product; the competent authorities of the exporting country; a national producer or wholesaler of the like product in Ukraine or a trade and business association, the majority of members of which produce or sell via wholesale trade a like product on the territory of Ukraine; trade union of producers or wholesalers of the like product; the relevant Ukrainian authorities.

In a number of decisions[5] the courts confirmed that by failing to register as the interested parties of the investigation and to participate in the investigation proceedings, the companies (i.e. foreign producers, exporters, importers and consumers of the products subject to trade defense remedies) waive their right to submit the relevant information and contribute to the adoption of the relevant decision. Hence, the above companies shall not be allowed to challenge the Committee's decision based on the grounds that certain information was not fully investigated.

[5] E.g. the decision of the Kiev Appellate Administrative Court of 7 August 2012 No.2a-420/11/2670; the decision of the Commercial Court of City of Kiev of 26 March 2007 No.23/324A-45/25A; the decision of the District Administrative Court of the City of Kiev of 15 September 2010 No.2a-3851/10/2670; the decision of the Higher Administrative Court of Ukraine of 16 March 2011, No.K-40593/10; the decision of the Higher Administrative Court Ukraine of 16 March 2011 No. K-40593/10.

Like or unlike

The trade defense remedies legislation does not stipulate any criteria for defining the like products. Hence, the Ministry defines the respective criteria on a case-by-case basis. The Committee's decisions also vary greatly. In some anti-dumping proceedings the Committee's decisions contain quite detailed technical characteristics of the products subject to anti-dumping duties. For instance, the list of all types of switches subject to anti-dumping measures (with indication of each type name, mark, railway line, weight) was attached as an annex to the Decision of the Committee *On Application of Definitive Anti-Dumping Measures to Imports into Ukraine of Switches Originating in the Russian Federation No.АД-43/2002/52-63 of 5 July 2002*. The Ukrainian importer imported into Ukraine switches with the same characteristics as those set out in the above mentioned Committee's decision as well as additional characteristics that made the imported switches different from the ones subject to anti-dumping measures. Therefore, the importer did not pay the anti-dumping duty. Later, the tax service conducted the post-audit of the Ukrainian importer and concluded that the latter should have paid the anti-dumping duty. The Ukrainian importer challenged the tax service's decision in court. The court ruled that only switches directly set out in the relevant

[6] E.g. the decision of the Commercial Court of Dnepropetrovsk Region of 20 March 2008, No.A18/750-07(A16/52(A8/402).

Committee's decision shall be subject to anti-dumping measures. All switches with additional or different characteristics shall be excluded from application of anti-dumping measures[6].

In another case according to the Committee's decision[7] the anti-dumping measures apply only to wood fiberboards produced by using wet technology. The company imported into Ukraine wood fiberboards produced by using dry technology that was confirmed by certificates of origin, conclusion of expert examination, certificates of quality. However, the customs service applied anti-dumping duties to the said importer. The latter challenged the relevant customs service's decision in court. The court ruled[8] that the anti-dumping measures shall apply only to the products directly indicated in the relevant Committee's decision. Additionally, the court considered certificates of origin, a conclusion of an expert examination, certificates of quality confirming that wood fiberboards were produced by using dry technology as sufficient evidence that the products imported shall not be subject to anti-dumping duty.

Status of the WTO committees' recommendations in Ukraine

Referring to the *Recommendations Concerning the Periods of Data Collection for Anti-Dumping Investigations* adopted by the Committee on Anti-Dumping Practices[9], the courts[10] ruled that Ukraine is obliged to follow the recommendations of the above Committee, while conducting anti-dumping investigations and adopting decisions on anti-dumping measures.

Dumping margin calculation

Usually, the Ministry calculates individual dumping margins for interested parties, which actively cooperate with the Ministry within the investigation proceedings (e.g. which submit all requested information and documents, participate in the hearings, etc.) and a general dumping margin for all other foreign producers/exporters. These calculations are provided in the relevant Ministry's reports, based on which the Committee adopts its final determination.

In one of the cases, a foreign producer challenged the Committee's decision regarding the rate of the individual anti-dumping duty applied to this producer. The foreign producer alleged that the Ministry miscalculated the individual dumping margin for this producer and the Committee, while adopting its final determinations, followed the Ministry's approach. In order to prove the above, the foreign producer submitted to the court the calculation of an individual dumping margin performed by the relevant scientific research institute. The court agreed with the foreign producer's approach and reversed the Committee's decision in the part related to this foreign producer[11].

Terms for challenging the Committee's decision

According to Ukrainian legislation, the Committee's decisions shall be challenged in administrative courts under the proceedings set forth by the *Code of the Administrative Proceedings of Ukraine*. The Code stipulates that an administrative claim may be submitted for the consideration of the administrative court within a 6-month period (or a 1-year period)[12] starting from the date when a person has become or should have become aware of the violation of rights.

At the same time, pursuant to the *On Foreign Economic Activity Act of Ukraine*, the decision on application of anti-dumping, countervailing or safeguard measures shall be challenged in court within 1 month starting from the date of application of the relevant measures.

There is no uniform approach by the courts to this issue. In some cases,[13] the courts ruled that since the above law does not directly refer to the administrative court, the interested parties are entitled to challenge the respective Committee's decision within a 1-year period starting from the date when their rights were violated. At the same time, in some cases,[14] the courts referred to the *On Foreign Economic Activity Act of Ukraine* and applied a 1-month period provided therein.

Suspension of decisions on application of trade defense remedies

In most cases, if the Committee's decision is challenged in court, the plaintiffs request the court to secure the claim by suspending the Committee's decision pending the completion of court proceedings. Under Ukrainian law, the respective court ruling enters into force immediately. Therefore, the courts believe that

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[7] The Decision of the Committee of 14 July 2006, No.АД-135/2006/143-35 *On Application of Definitive Anti-Dumping Measures to Imports into Ukraine of Wood Fiberboards produced by Dry Technology Originating from Russian Federation.*

[8] E.g. the decision of the Commercial Court of Lvov Region of 6 May 2008 No.30/27A.

[9] G/ADP/6 of 16 May 2000.

[10] E.g. the decision of the Kiev Appellate Administrative Court of 7 August 2012 No.2a-420/11/2670.

[11] E.g. the decision of the District Administrative Court of the City of Kiev of 6 February 2009 No.5/411.

[12] Until 7 July 2010 the *Code of the Administrative Proceedings* of Ukraine stipulated 1-year period for submitting administrative claims.

[13] E.g. the decision of the District Administrative Court of the City of Kiev of 6 February 2009 No.5/411.

[14] E.g. the decision of the District Administrative Court of the City of Kiev of 19 February 2010 No.5/229.

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the Committee's decisions shall be suspended immediately as well (without any notifications in official newspapers, including those in which the Ministry is obliged to publish all investigation related notifications).

In practice this does not work smoothly. In one of the cases, the safeguard duties to matches first were applied in the form of safeguard duties[15]. After the review of the applied safeguard measures, the Committee decided to apply quotas, instead of safeguard duties[16]. The national producer challenged the respective Committee's decision on quota application before the court and requested the court to suspend it. The court satisfied the above domestic producer's claim and suspended the Committee's decision. However, no notifications on the above suspension were published in official government newspapers.

In the absence of any notifications on the Committee's decision on application of quota suspension, the Ukrainian importer imported the matches within the applied quotas rate, but without the payment of safeguard duties previously applied. Following the post-audit, the customs authorities revealed the above and requested the importer to pay anti-dumping duties as well as applicable penalties. The Ukrainian importer refused to pay the above duties and penalties and challenged the respective customs authorities' decision in court. The court ruled[17] that since the Committee's decision on quotas application was suspended during the importation, the safeguard duties shall apply and should have been paid by the importer.

Justified suspension of anti-dumping measures application or not?

The *On Protection of National Producer Against Dumped Imports Act of Ukraine* (the *Anti-Dumping Act*) allows for a temporary suspension of anti-dumping measures if: (1) economic conditions on the Ukrainian market changed so that the suspension of anti-dumping measures would probably not result in renewal of causing injury to the national producer; (2) the national industry commented on such suspension; (3) the Committee considered such comments.

Usually if the measures are suspended, the national industry tries to reverse the respective Committee's decisions.

In one of the cases[18], the court ruled that the suspension of anti-dumping measures applied to imports of ammonium nitrate into Ukraine from Russia is justified and is in line with the *Anti-Dumping Act* as suspension is seeking to support Ukrainian agricultural producers using ammonium nitrate as fertilizers in their activities by maintaining lower prices for imported ammonium nitrate.

However, in some cases, the Committee's decisions are reversed by a court as the investigating authorities quite often do not strictly follow the requirements and meet the conditions provided by the *Anti-Dumping Act*. In one case[19] the court reversed the Committee's decision on suspension as the court considered it unjustified. While considering this case the court found that on 22 October 2010 the Ministry sent a notification by fax to the national producer that on 25 October 2012 the Committee's meeting for consideration of the effective anti-dumping measures status would take place and requested the national producer to confirm its presence by 22 October 2010. The national producer was present at the meeting. At the meeting, the Committee considered the issue on suspension of the effective anti-dumping measures and adopted the respective suspension decision. The Ministry's report on suspension presented to the Committee did not contain any evidence that the economic conditions on the Ukrainian market changed so that the suspension of anti-dumping measures would probably not result in renewal of causing injury to the national producer. Moreover, the court ruled that the Ministry's letter of 22 October 2010 shall not be regarded as a due request for the national producer's commentaries regarding potential suspension of the anti-dumping measures since it has not referred to such suspension at all. Thus, the court ruled that the Committee's decision on the relevant suspension fails to meet the conditions provided by the *Anti-Dumping Act* and reversed the Committee's decision.

Moral of the tale

Unfortunately, Ukrainian courts have not yet established a firm practice of ruling and interpretation of issues related to trade defense remedies and proceedings. However, it is safe to say that interested parties should not fail to register and participate in trade defense proceedings in Ukraine, at least in order to be able to seek further protection of its interests in court.

END

[15] The decision of the Committee of 29 September 2009 No. СП-215/2009/4402-25 On Application of Safeguard Measures related to Imports into Ukraine of Matches Notwithstanding the Country of Origin and Export

[16] The decision of the Committee of 25 October 2010 On Review of Safeguard Measures related to Imports into Ukraine of Matches Notwithstanding the Country of Origin and Export Applied according to the Decision of the Committee of 29 September 2009 No. СП-215/2009/4402-25

[17] E.g. the decision of the Kiev Appelate Administrative Court of 15 March 2012 No. 2a-7123/11/2670

[18] E.g. the decision of the Kiev Appellate Administrative Court of 18 January 2011 No. 2a-6413/10/2670

[19] E.g. the decision of the District Administrative Court of the City of Kiev of 25 February 2011 No.2a-19104/10/2670