

# On the Cusp of a New Era of Trade Defence Instruments in Ukraine



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It goes without saying that 2016 was crucial for trade defence instruments both in Ukraine and around the world. Suffice to mention (a) expiry of Section 15(a)(ii) of China's Accession Protocol to the WTO in December 2016 allowing WTO Members to treat China as a non-market economy for the purposes of calculating a dumping margin and thus, to apply higher anti-dumping duties to products which originate in China; (b) the Appellate Body report in Argentina – Biodiesel case implying the end of cost adjustment methodologies; (c) the fierce opposition by such WTO Members as the USA and the EU against granting market economy status to China, which has already resulted in the introduction of considerable amendments to the EU Basic Anti-Dumping Regulation<sup>1</sup> stipulating the possibility for the European Commission to construct normal value on the basis of costs of production and sale reflecting undistorted prices or benchmarks; (d) gradual constant

growth of trade defence measures used to protect domestic producers...

Recent trends of trade defence proceedings in Ukraine clearly demonstrate that similarly to other WTO Members, Ukraine should reinforce its approaches and regulations to address the above challenges in the most efficient way. This aim of this article is to summarize benchmark trends of trade defence proceedings in Ukraine in 2016.

## STATISTICS

In February 2016 the Interdepartmental Commission on International Trade (i.e. the state agency responsible for adoption of key decisions in trade defence proceedings) (the "Commission") extended anti-dumping duties applied to imports of wood fiberboards originating in Russia; in May applied anti-dumping duties to imports of caustic soda originating in Russia and safeguard duties to imports of blocks and sheets from polyurethane notwithstanding the country of origin

and export; in December applied anti-dumping measures to imports of certain nitrogen fertilizers originating in Russia. At the same time, in 2016 the Commission initiated only two new proceedings: in May – anti-dumping investigation related to imports of chocolate and other finished products from cacao originating in Russia and in December – review of safeguard measures applied to imports of porcelain tableware.

## RECENT TRENDS

### *Ukraine vs. Russia*

Based on recent statistics, it is safe to assume that the "trade war" between Ukraine and Russia has evidently influenced trade defence proceedings.

Notably, in 2016 all investigations in Ukraine were conducted against imports of products originating in Russia<sup>1</sup>, while 9 out of 16 anti-dumping measures are applied against products from Russia. The first countervailing duties for Ukraine are applied against Russia as well.

Like night follows day, 2 out of 3 investigations currently being conducted in the Eurasian Economic Union (Belarus, Russia, Kazakhstan, Armenia, Kyrgyzstan) are against products originating from Ukraine, while 7 of 19 anti-dumping duties are applied against Ukraine.

### *Safeguard Investigations – New-Old Approaches*

In the past domestic producers preferred safeguard investigations rather than anti-dumping or anti-subsidy probes, despite the fact that under the WTO rules safeguard measures should be applied only in extraordinary circumstances. The way in which Ukrainian producers acted could be easily explained, since the matter of proof in safeguard investigations is much simpler than in anti-dumping and anti-subsidy ones: it is enough to simply provide customs statistics indicating an increase in imports and to compare it with the alleged injury caused to domestic producers. Moreover, contrary to anti-dumping or coun-

<sup>1</sup> Under WTO rules and Ukrainian legislation, safeguard investigations are conducted and measures and applied notwithstanding the country of origin and export. Therefore, in this article we concentrate only on country-specific measures.

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**S**ayenko Kharenko is a leading Ukrainian law firm with an internationally oriented full-service practice. We are currently one of the largest law firms in Kyiv. Most recently, Sayenko Kharenko collected three of the most prestigious professional excellence country awards, more specifically, Law Firm of the Year by each of *IFLR European Awards 2017*, *Who's Who Legal Awards 2017* and *Legal Awards 2017*. In early 2017, the firm was also shortlisted in Law Firm of the Year category by *The Lawyer European Awards 2017* and *Chambers Europe Awards 2017*.

### About its International Trade Practice

Sayenko Kharenko's international trade practice group offers a wealth of experience across the full spectrum of cross-border trade regulation and policy to help its clients manage the risks and maximize the opportunities associated with the increasing regulation of international trade in goods and services around the world.

Sayenko Kharenko's stellar team of lawyers is the most expert in Ukraine in the field of international trade and routinely handles cross-border trade and regulatory issues, which require thorough legal knowledge, solid commercial background, and deep trade policy insight. The firm's team blends all of the above and acts for a diverse roster of foreign and domestic industries.

Sayenko Kharenko's lawyers practice before all the relevant bodies in Ukraine and globally, covering all major international trade law matters, including: international transactions and contractual structuring; agency, distribution and franchising; free trade agreements; trade remedies (anti-dumping, countervailing and safeguards); regulation of foreign trade activity; WTO counselling, WTO dispute settlement, and other matters.

Sayenko Kharenko trade lawyers have a great reputation among colleagues and professional community, and come recommended by leading legal directories for trade, customs and franchising in Ukraine. They also serve as Ukraine's national experts on agency/distribution and franchising at the International Distribution Institute.

tervailing measures, safeguard measures allow to "kill all birds with one stone", simultaneously blocking all channels of imports.

However, the age of safeguard measures passed when the Panel in the *Japan – Passenger Cars* case ruled that Ukraine violated almost all WTO requirements, while imposing safeguard duties on imports of passenger cars. As a result, Ukraine terminated safeguard duties even without submission of an appeal.

After that the Commission and the Ministry refrained from initiating safeguard investigations in Ukraine until 2015, when a safeguard investigation related to imports of blocks and sheets from polyurethane was initiated and even safeguard duties were applied in 2016.

In our opinion, the case materials make it safe to assume that the Ministry and the Commission kept making the same mistakes as in the safeguard investigation related to passenger cars and thus, quite expectedly, the relevant decision has been challenged before the court.

### Extension of Safeguard Measures – New Benchmark?

On a separate note, on the last day of December 2016, the Commission initiated a review of the safeguard measures against imports of kitchen tableware produced from porcelain. Since Ukrainian safeguard legislation lacks clarity on the procedure of the review and related aspects, the results of this review will become a benchmark on how the Ministry and the Commission deals in practice with such cases.

In particular, Ukrainian safeguard legislation provides that safeguard measures may be extended provided it is determined that the

safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting. However, it is silent with respect to what procedure to follow. In this connection, only Article 7 of the WTO Safeguard Agreement explicitly states that such a review should be in line with the procedures set out in Articles 2, 3, 4 and 5 of this Agreement, which means the Ministry should conduct a fully-fledged safeguard investigation. Since in such a review the Ministry will need to confirm only that the safeguard measure continues to be necessary to prevent or remedy serious injury, and that there is evidence that the industry is adjusting, the Ministry can, based on its powers, shorten the period of review and determine specific information to be provided by interested parties. However, major procedural stages of the investigation should be carried out.

Additionally, a safeguard measure that is extended shall not be more restrictive than it was at the end of the last period, and should continue to be liberalized.

### Interests of Customers vs. Interests of Domestic Producers

The importance of an anti-dumping investigation related to imports into Ukraine of nitrogen fertilizers originating in Russia is more than merely symbolic: it has created lots of landmark precedents, to name but a few:

– it is the first proceedings when the end customers of the products subject to investigation (i.e. agricultural producers) strongly and actively opposed application of anti-dumping measures and thus, the Commission and the Ministry were forced to strike a balance between their interests and the domestic

producers initiating the investigation. To overcome the opposition of the agricultural producers, the Commission applied anti-dumping duties in December 2016 on condition of their suspension, which was already carried out in February 2017, even prior to the coming into force of anti-dumping duties.

– even prior to official publication of the decision, the Commission and the Ministry posted on the web-site<sup>2</sup> information about the adopted decision, on the intention to further suspend the anti-dumping duties and to even initiate a specific law to abolish import duties on the importation of fertilizers. The said announcement deviates from the previous experience of the Commission.

– the Commission and the Ministry took into account arguments from agricultural producers, even though they had not been duly registered as the interested parties of the anti-dumping investigation. The compatibility of such approach with the Law of Ukraine *On Protection of Domestic Producers from Dumped Imports* is highly questionable.

The moral of the above tale is that domestic producers should be aware of the stated new approach of the Commission and the Ministry, and should be ready to counteract such position held by customers from the very beginning. End customers should consider it as a very clear message that their active participation in an investigation can have a strong influence on the final decision adopted by the Commission.

<sup>2</sup> <http://www.me.gov.ua/News/Detail?lang=uk-UA&id=e25cd6de-d945-4cfc-83d6-f919b4852c83&title=ZaiavaMizhvidomchoiKomisiiZMizhnrarodnoiTorgivli>