



# **Seminar on Trade Defense Instruments**

*co-funded by the European Union and  
Thai Department of Foreign Trade of the Ministry of  
Commerce*

**Parallel Application of AD/AS & SG Measures  
EU & WTO Cases Concerning TDI**

Bangkok - 25 April 2012

Edwin Vermulst



# Contents



- Parallel application of AD/AS and SG measures: The EU's approach
- Judicial review in the EU: Trade defence cases
- WTO dispute settlement proceedings: Trade defence cases



# Parallel Application Of AD/AS & SG Measures: The EU's Approach



# Regulation 452/2003: Background (1)



- **Regulation 452/2003** on measures that the EU may take in relation to the combined effect of anti-dumping ["AD"] or anti-subsidy ["AS"] measures with safeguard measures ["SG"] was adopted in the context of trade defence cases concerning steel products.
- **AD measures on steel products:**
  - In **February 2002**, measures imposed on imports of **hot-rolled coils** of iron or non-alloy steel from **Bulgaria, India, South Africa, Chinese Taipei, Serbia and Montenegro**.
  - In **April 1996**, measures imposed on imports of **tube and pipe fittings** of iron or steel from **China, Croatia** (expired subsequently) and **Thailand** (measures against China were extended to **Chinese Taipei**); **August 2002** measures imposed on imports from **Czech Republic, Malaysia, Russia, Korea and Slovakia**.
- **SG measures on steel products:**
  - **28 March 2002**, investigation initiated covering 21 steel products and provisional measures imposed on 15 products including **hot-rolled coils, and tube and pipe fittings**.
  - **27 September 2002: Definitive measures imposed on 7 products** including the two above-mentioned products.
  - No SG measures on hot-rolled coils from India and Chinese Taipei, and tube and pipe fittings from China (exception: developing countries with share of imports being less than 3%).



# Regulation 452/2003: Background (2)



## ➤ SG measures on steel products (*cont.*):

- SG measures were in the form of tariff quota applicable for specific periods and imports in excess of the quotas were subject to *ad valorem* duties calculated on the basis of underselling margins for the products.
- Combined effect of AD and SG measures on the two products: Where the tariff quota would be exceeded, SG duty would apply along with the AD duty. In case of undertakings, the SG duty would become payable in addition to the obligation to observe the price undertaking.
- Regulation imposing provisional SG measures (March 2002) mentioned that combined effect of AD and SG measures on certain products could lead to the “*establishment of a level of protection higher than that which is necessary*” and in August 2002, the Commission issued a notice stating that it may be necessary to amend the level of AD/AS duties on the products in case definitive SG measures were imposed. Interested parties were given 40 days to comment.
- Definitive SG Regulation (September 2002): Commission again mentioned the same point and in December 2002 issued a notice stating that it is considering whether it is necessary to amend the level of duties. Interested parties were given 40 days to comment.
- In March 2003, **Regulation 452/2003** was issued granting the Commission and Council the possibility to take appropriate measures in case of parallel application of AD/AS and SG measures.



# Regulation 452/2003: Substance



## ➤ Rationale as mentioned in the preamble to the Regulation:

- Though AD and AS measures are to remedy market distortions created by unfair trading practices, and SG measures are to grant relief against greatly increased imports, a combination of AD/AS measures with SG measures on one and the same product could have an effect greater than that intended or desirable in terms of the EU's trade defence policy and objectives.
- Such a combination of measures could place an undesirably onerous burden on certain exporting producers seeking to export to the EU which may have the effect of denying them access to the EU market.
- Sufficient predictability and legal certainty for all operators concerned is necessary.

## ➤ Substantive elements:

- Measures can be adopted to (a) amend, suspend or repeal existing AD and/or AS measures; (b) exempt imports in whole or in part from AD/AS duties otherwise payable; (c) any other special measures considered appropriate in the circumstances.
- Any amendment, suspension or exemption would apply only when the relevant SG measures are in force.
- Measure/s adopted shall not serve as basis for the reimbursement of duties collected prior to that date unless otherwise specifically provided.



# Regulation 452/2003: Application In Steel Cases (1)



- In May 2003, EU Regulation was issued providing a special duty application system for hot-rolled coils and tube and pipe fittings:
  - Where both the AD duty and SG duty would normally be payable, the AD duty was set as the ceiling, *i.e.* :
    - If the AD duty was less than or equal to the SG duty, no AD duty was payable.
    - If AD duty payable was greater than the SG duty, the difference between the two was payable.
  - In case of price undertakings: The Commission and the concerned companies agreed to equivalent reductions in the price undertakings or that the minimum price obligation would not apply when the SG duty was payable.
  - Application of AD and SG measures against imports of tube and pipe fittings from Thailand:
    - ✓ Country-wide AD duty imposed since 1996: 58.9%.
    - ✓ SG duty applicable to imports in excess of the quota: 23.7% for the period from 29.9.2002 to 28.3.2003 (based on the undercutting margin).
    - ✓ Net applicable AD duty rate: 35.2% for the period from 29.9.2002 to 28.3.2003.



# Regulation 452/2003: Application In Steel Cases (2)



## ➤ Arguments of interested parties:

- The Commission rejected the argument that when AD measures apply, SG measures should not be applied to the same products for the reasons that:

**“...it must be remembered that anti-dumping measures apply only to imports of hot-rolled coils and tube and pipe fittings originating in certain countries. Therefore, if safeguard measures were not applied to imports of hot-rolled coils and tube and pipe fittings subject to anti-dumping measures, they would only apply to some imports of those products originating in some countries but not in others. It is considered that this would be contrary to the [EU's] international obligations, which require that safeguard measures shall be applied to a product being imported irrespective of its source.”** OJ (2003) L114/1

- As regards the argument that for those imports to which SG measures apply, AD measures should not be applied, the Commission noted that:

**“it is only when there is a combination of anti-dumping measures with the safeguard duty that an effect greater than that intended or desirable could arise. Indeed, it is only in that circumstance that certain exporting producers are subject to the burden of both anti-dumping measures and safeguard duty on the same import. Therefore, it is considered that it would only be appropriate to take action where safeguard duties become payable.”**





# Other Cases



## ➤ **Salmon cases (2004-2005):**

- SG investigation initiated on 6 March 2004 and definitive measures imposed on 4 February 2005.
- AD investigation on salmon from Norway initiated on 23 October 2004 and provisional measures imposed from 27 April 2005.
- From the same date, *i.e.* 27 April 2005, SG duty revoked for the reasons that:
  - Norwegian Salmon imports in the year ending 30 September 2004 represented around 60% of the EU market and around 75% of all EU imports.
  - Provisional AD measures on salmon from Norway would eliminate the unfair price element in the imports and can also be expected to slow down the quantitative import increase originating in Norway.
  - In the particular circumstances of the case, AD measures were sufficient to address the injury suffered by the EU industry and it was not necessary to maintain the SG measures.

## ➤ **Wireless Wide Area Networking (“WWAN”) Modems cases (2010-2011):**

- SG and AD investigations initiated on 30 June 2010, **and**
- AS investigation initiated on 16 September 2010.
- ✓ Investigations terminated due to withdrawal of complaint.



# Judicial Review In The EU: Trade Defence Cases



# Introduction (1)



- Article 13 of the WTO Anti-Dumping Agreement [“ADA”] and Article 23 of the WTO Agreement on Subsidies and Countervailing Measures [“ASCM”] require WTO members having AD and AS legislation to:
  - maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations.
- ❖ Note: No such requirement is contained in the WTO Agreement on Safeguards [“ASG”].
- In the EU, there are no special provisions in the AD, AS or SG Regulations concerning judicial review. The general provisions of the Lisbon Treaty apply.
  - EU level: Direct challenges of determinations can be brought before the General Court of the EU [“General Court”] which can be appealed once on points of law to the Court of Justice of the European Union [“CJEU”].
  - Member State level: Challenges can be made before the national tribunals/courts of first instance which can be appealed before appeal courts, and in most Member States, a further appeal, limited to questions of law, is possible before national supreme courts. Such national courts may (or in highest instance must) refer questions of EU law to the CJEU through the preliminary ruling procedure [“PR”].



# Introduction (2)



## ➤ Types of appeals in the EU:

- **Most common type:** Application for annulment before the General Court under Article 263(4) of the Treaty on the Functioning of the EU [“TFEU”].
  - **Indirect possibility** to challenge determinations is given by Article 268 of the TFEU in combination with Article 340 of the TFEU allowing a claim for damages against the EU Institutions. This avenue is very rarely used in trade remedies determinations and, more importantly, is very rarely successful.
  - At the Member State level the possibility exists to plead the illegality of a trade remedy determination by contesting the customs administration’s assessment of the duties. The Member State’s Court will then have the possibility of referring the matter of the validity of the trade remedy determination at issue to the CJEU through the PR procedure by virtue of Article 267 of the TFEU.
- The EU level Courts do not have specialized chambers to deal with trade remedy cases. The average duration of a procedure before the General Court is usually more than three years and in case of an appeal the average duration of the two-step procedure is slightly over five years.



# EU Court Cases



## ➤ Trade defence determinations are very often the subject of judicial reviews in the EU:

- Between the years 2000-2010, judgments were issued in 49 cases at the EU level involving trade defence determinations, majority of which pertained to AD determinations.

Cases concerning AD determinations/issues	Cases concerning AS determinations/issues	Cases concerning AD and AS issues
47	2	2

- ✓ To the author's knowledge there have been no EU court cases concerning SG measures during this period.
- Resort to the PR procedures by Member States' Courts is relatively limited and it appears that the vast majority of the cases are not referred to the CJEU. During the 2000-2010 period, judgements were rendered by the CJEU in the context of 8 requests for preliminary rulings:
  - ✓ 7 out of these pertained to AD measures, and 1 pertained to AS measures.
  - ✓ To the author's knowledge there have been no PR cases concerning SG measures.



# WTO Dispute Settlement Proceedings: Trade Defence Cases



# WTO Dispute Settlement Proceedings (1)



- Between 1995-15 April 2012, 436 complaints/disputes have been filed by WTO Members (Note: This figure includes all cases in which requests for consultations were filed irrespective of whether or not a DSB report was issued).
- While the violation of GATT 1994 has been most frequently invoked in WTO disputes, *i.e.* in 346 cases (as GATT provisions are most often invoked in conjunction with violations of other agreements), **among the other WTO agreements, violations of the ADA and ASCM have been most frequently alleged.**

Agreement	Number of disputes between 1995-2012 (Source: WTO website)
Anti-Dumping Agreement	90
Agreement on subsidies and Countervailing Measures	90
Agreement on Agriculture	67
WTO Agreement	44
Agreement on Technical Barriers to Trade	43
Agreement on Safeguards	39
Agreement on Sanitary and Phytosanitary Measures	38
Agreement on Import Licensing Procedures	34
TRIPs	31
TRIMs	28
GATS	22
Agreement on Textiles and Clothing	16
Agreement on Customs Valuation	15
DSU	15
Agreement on Rules of Origin	7
Government Procurement Agreement	4



# WTO Dispute Settlement Proceedings (2)



- On the whole, violations of the ADA, ASCM and ASG have been alleged in 204\* disputes:

WTO disputes (Source: WTO website)			
Concerning ADA	Concerning ASCM	Concerning ASG**	Both ADA and ASCM
90	90	39	15

**Notes:**

- \* Cases in which both ADA and ASCM were invoked have been counted only once for the purpose of this figure.  
\*\* The number excludes the disputes pertaining to China-specific SG measures.

- The table in the following slide provides an overview of the yearly frequency of disputes pertaining to trade defence agreements:
- WTO disputes pertaining to the violation of ADA, ASCM and ASG comprise overall 47% of the disputes brought before the dispute settlement body between 1 January 1995 and 15 April 2012.
  - For the purpose of this calculation disputes in which violations of both the ADA and ASCM were raised have been counted only once.





# WTO Dispute Settlement Proceedings (3)



WTO disputes between 1 January 1995 - 15 April 2012						
Year	Total Disputes	ADA	ASCM	ASG	% of yearly disputes pertaining to trade defence agreements (with double counting)	% of yearly disputes pertaining to trade defence agreements (without double counting, i.e. cases in which both ADA and ASCM violations were invoked have been counted only once)
2012	9	1	1	1	33%	33%
2011	8	5	2	0	88%	75%
2010	17	5	3	4	71%	65%
2009	14	3	1	0	29%	29%
2008	19	5	5	0	53%	42%
2007	13	1	5	0	46%	38%
2006	20	8	9	2	95%	85%
2005	12	4	2	2	67%	67%
2004	19	8	6	0	74%	68%
2003	26	6	6	1	50%	46%
2002	37	7	7	11	68%	62%
2001	23	6	4	7	74%	65%
2000	34	10	7	3	59%	53%
1999	30	8	3	4	50%	50%
1998	41	6	11	2	46%	46%
1997	50	3	10	2	30%	30%
1996	39	3	8	0	28%	28%
1995	25	1	0	0	4%	4%
Total	436	90	90	39	-	47%



# Thank You

