

High Court Backs Safeguard Duties for Steel Sector¹

by S Saravana Kumar and Jason Tan Jia Xin

The significance of the domestic steel industry for Malaysia's prosperity and welfare cannot be overemphasised. The domestic steel industry is a RM40 billion industry employing around 150,000 people.

The High Court recently ruled in favour of maintaining safeguard duties that will help protect the domestic sector, but the judgment could harm foreign manufacturers that have been exporting cheap and large volumes of steel into the country.

Background

Until recently, Malaysia was at the forefront of the regional steel industry in Southeast Asia in terms of crude steel production. Malaysians took immense pride in having developed indigenous technologies that won accolades from industry players.

However, its pole position was overtaken by neighbouring countries, as all countries seem to have taken the path of protecting their respective steel industries through tariff and non-tariff measures.

This, of course, extends beyond SE Asia, where trading giants such as the US and the European Union have all placed emphasis on protecting their steel industries. Such protectionism has not escaped the World Trade Organization (WTO) either, which has introduced a safeguard measure to protect trade and counteract the sudden and sharp increase of imports of a product that causes serious harm to a domestic market.

Although this safeguard duty can be imposed if such circumstances arise, national interest must be taken into account when deciding to introduce such a tariff.

In only the second time in Malaysia's history, the government imposed definitive and final safeguard duties on imported steel wired rods and deformed bar in coils (steel wire rods), starting from 14 April 2017, at 13.9%, reducing it to 12.9% and 11.9% in the subsequent two years.

This duty was introduced following a petition filed by the Malaysia Steel Association (MSA) on behalf of the domestic industry to the Ministry of International Trade and Industry (MITI). In the petition, the MSA stressed that the domestic industry has suffered tremendously as a result of the continuous dumping of steel products into Malaysia and the increase in imports over the past few years.

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The petition further stated that the serious harm suffered by the whole steel industry because of an increase in imports was evidenced by recent plant closures, under-utilisation of production capacities and a massive retrenchment of workers. Thus, the damage suffered has had profound, far-reaching and adverse effects on the socio-economic wellbeing of the nation.

Safeguard duties challenged

The government's imposition of safeguard duties was met with strong resistance by the importers based in Malaysia, who collectively claimed, through the Steel Wire Association of Malaysia (SWAM), that the safeguard duties were wrongly imposed.

On 15 June 2017, SWAM filed an application for judicial review, seeking to quash MITI's decision to introduce the safeguards. SWAM argued that:

- MITI did not notify the WTO committee on safeguards prior to imposing the safeguard duties, which is allegedly a requirement under the WTO Agreement on Safeguards;
- MITI failed to provide any opportunity to member states of the WTO for consultation on the safeguard duties; and
- Licensed manufacturing warehouses (LMWs) were not excluded from the safeguard duties. SWAM's contention was that LMWs are exempted from all customs duties and, therefore, MITI's decision of not excluding them was illegal.

High Court's decision

Lee Hishammuddin Allen & Gledhill (LHAG) acted for MSA in the proceedings, and argued on a preliminary basis that s 29 of the Safeguards Act 2006 clearly states that MITI merely makes a recommendation to the Minister of Finance on the imposition of safeguard duties, who is the one authorised to impose definitive safeguard duties. As such, the decision maker is the finance minister, and not MITI. Thus, by merely naming MITI, SWAM had named the wrong party in the proceedings.

This point was swiftly acknowledged and agreed by the High Court, which stated that MITI is not the final decision maker and, as such, SWAM had sued the wrong party.

Further, the High Court also agreed with LHAG's contention that SWAM's allegation on the need to notify the WTO committee on safeguards did not concern SWAM. In other words, SWAM did not have any standing to contest this issue, as notification to the WTO committee only affects member states (countries) of the WTO Agreement. SWAM is merely an association representing importers of steel based in Malaysia. In any event, under Art 19 of the General Agreement on Tariffs and Trade (GATT), member states have some leeway in terms of timing of notification in certain circumstances.

On the issue of LMWs raised by SWAM, the High Court also ruled convincingly that it is the Customs Department and the Ministry of Finance that are empowered under the law to give an exemption of safeguard duties. Nothing in the Safeguards Act 2006 allows MITI to exempt LMWs from safeguard duties. In fact, the law is clear that MITI cannot step into the shoes of either the Customs Department or the Ministry of Finance.

Premised on the above grounds, the High Court dismissed SWAM's challenge on 27 June 2018 and confirmed that the safeguard duties will be maintained.

This landmark decision by the High Court will certainly benefit local steel manufacturers and rejuvenate the steel industry. It is seen as a temporary relief for the manufacturers from the effects of cheap and large volumes of steel coming into Malaysia. In fact, any duties with rates above 10%, such as this one, will be a major deterrent to manufacturers in other countries to dump their products into Malaysia.

To put it simply, despite living in an era where globalisation has thrived, there is a limit to free trade. Several other countries, not only Malaysia, have also gone to great lengths to protect their respective steel industries.

New Prime Minister Tun Dr Mahathir Mohamad summed it up nicely on 25 June when he remarked:

"I don't believe in free trade, absolute free trade, because when the competition is between the weak and the strong, you need to have some protection for the weak." **LH-AG**

About the authors



S Saravana Kumar (sks@lh-ag.com) is a partner with the Tax, SST & Customs Practice. He is described by clients as "extremely innovative in his interpretation of laws" and is "committed, sound in knowledge, amiable and always well prepared". He regularly represents taxpayers on various direct and indirect tax disputes before the Malaysian courts.



Jason Tan Jia Xin (tjx@lh-ag.com) is a senior associate with the Tax, SST & Customs Practice, and is part of a team headed by S Saravana Kumar. His main area of practice consists of trade remedies and customs law, particularly anti-dumping and safeguard duties. He has represented local manufacturers, importers and foreign exporters in various landmark trade remedy actions as well as litigation in Malaysia.