

Trade & Customs e-Alert

28 JUNE 2018

Power To Impose Safeguard Measures

On 27.6.2018, the Kuala Lumpur High Court dismissed an application for judicial review by the Steel Wire Association of Malaysia (**SWAM**) against the Ministry of International Trade and Industry (**MITI**)'s decision to impose definitive safeguard duties on imported steel wire rods (**SWR**) and deformed bar in coils (**DBIC**).

The petitioner was the Malaysia Steel Association (**MSA**), which represented the domestic players, i.e. Amsteel Mills, Ann Joo Steel and Southern Steel Rod (**petitioning companies**). The petitioning companies were added as parties to the application.

Prelude

On 31.3.2016, MSA filed a petition on behalf of the petitioning companies to MITI for the initiation of safeguard investigations. The grounds for the petition included a sudden and sharp increase in imports of the product, which caused serious harm to the domestic players.

The government then imposed definitive safeguard duties on the importation of SWR and DBIC, starting from 14.4.2017 at 13.9%, followed by 12.9% and 11.9% for the subsequent two years.

On 15.6.2017, SWAM filed an application for judicial review, seeking to quash the government's decision to impose the safeguard duties. Leave for judicial review was granted on 31.7.2017, while the substantive hearing took place on 1.3.2018 before YA Datuk Hajah Azizah binti Haji Nawawi.

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Parties' submissions

1. SWAM's main grounds consisted of:

(a) *Procedural impropriety*

SWAM claimed 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. SWAM also alleged that MITI failed to provide any opportunity to member states of the WTO for consultation on the safeguard duties.

(b) *Illegality*

SWAM alleged that licensed manufacturing warehouses (LMW) were not excluded from the safeguard duties, the contention being that LMWs are exempted from all Customs duties and therefore, MITI's decision to not exclude them was illegal.

(c) *Bias*

SWAM also alleged bias in MITI's decision to impose safeguard duties as the Malaysian Investment Development Authority (**MIDA**) and the Malaysia Steel Institute (**MSI**) were allegedly involved in meetings with MSA. SWAM then alleged that MIDA and MSI are linked to MITI.

2. We acted for MSA and the petitioning companies, and argued that:

(a) *Wrong party*

Section 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. It is the Minister, and not MITI, who is authorised to impose definitive safeguard duties. As such, SWAM had named the wrong party in the proceedings.

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(b) *Procedural impropriety*

Whether or not MITI notifies the WTO Committee on Safeguards does not concern SWAM — it does not have any *locus* to contest this issue, as notification to the WTO Committee only affects member states (countries) of the WTO Agreement.

However, SWAM is merely an association representing importers of steel based in Malaysia. In any event, under Article 19 of the GATT Agreement, it gives leeway to member states in terms of timing of notification in certain circumstances.

(c) *Illegality*

It is the Customs Department and the Ministry of Finance (MoF) that are empowered under the law to give an exemption on 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 Customs and MoF.

(d) *Bias*

SWAM failed to name MSI and MIDA as responding parties to the proceedings. This goes against the fundamental principle stated by our superior courts that if bias is imputed against a party, then that party must be given the opportunity to respond. In MSI and MIDA's absence, SWAM's allegation of bias clearly violated the principles of natural justice as it was tantamount to condemning a person without affording him the opportunity to be heard.

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High Court's grounds

3. The High Court, in delivering its decision on 27.6.2018, agreed with all of our arguments above. YA Datuk Hajah Azizah binti Haji Nawawi's oral grounds were as follows:

(a) *Wrong party*

Under Section 29(5) of the Safeguards Act 2006, MITI merely makes a recommendation to the Minister of Finance on whether to impose definitive safeguard duties. It is the Minister of Finance who will then impose safeguard duties. Therefore, SWAM had sued the wrong party here, as MITI was not the final decision maker. Further, SWAM had also filed its judicial review application against the wrong *Gazette* order, as it should have been filed against the one issued by the Minister of Finance.

(b) *Procedural impropriety*

Article 19 of the GATT Agreement allows MITI to delay its notification to WTO during critical circumstances. Further, SWAM does not have sufficient interest or locus over the matter as it is not affected by it.

(c) *Bias*

This allegation could not succeed as MSI and MIDA were not named as parties to the proceedings. Consequently, they could not defend the allegations thrown against them.

(d) *Illegality*

It is the Customs Department and MoF that are empowered under the law to give an exemption on safeguard duties. Therefore, this had nothing to do with MITI.

Based on the above grounds, the High Court dismissed SWAM's application with costs.

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Counsel's observations

This is the second case of its kind involving safeguard measures in Malaysia since the inception of the Safeguards Act 2006. It is a landmark decision in that the court has convincingly ruled that MITI is not strictly bound by the stringent requirements on notifications stated in the WTO Agreement. (See <http://www.theedgemarkets.com/article/court-dismisses-challenge-steel-safeguard-duty>)

Further, the court's decision confirms that MITI merely recommends the imposition of definitive safeguard measures to the Minister of Finance, who will then have the final say. MITI does not have any power in the imposition of duties and taxes, even though it conducted the safeguard investigations.

Please contact us at tax@lh-ag.com if you have queries on any Customs matter, including safeguard duties and other Customs-related concerns.

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