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We vividly remember that when we were young(er), we were told that time would go faster as we got older. With the impetuousness of youth, we dismissed this as nonsense, but – like many things told when young – it has proven to be true. We say this because the five years during which we have been editors has really flown. Yet, in this short period, the dynamics of trade have fundamentally changed in a disturbing manner. By means of illustration, we look at three trade-shattering events, starting with a regional one and moving on to two more fundamental problems.

First, as also noted last year, the spectre of Brexit is looming ever closer. With the EU stepping up its preparations to confront a ‘hard’ Brexit, the United Kingdom appears to refuse to face that possibility and continues to sleepwalk into the abyss, at least that is, respectfully, our modest continental view.

Second, the dynamics of the interwoven jumbo economy of ‘Chimerica’ continue to be rewritten and deteriorate as we speak, with trade policies being abused as instruments to meet political goals. And even if a ‘good, fair and “largest ever” deal’ were clinched, the painful repercussions of all unnecessary rhetoric and bellicose escalations may take years to normalise.

Third, and arguably even more fundamental, the asphyxiation of the Appellate Body slowly continues, despite multiple attempts by over 20 members to rewrite the Appellate Review process and find creative solutions. Unfortunately, the deadline of 10 December 2019 is, at the time of going to press, only three months away. After that day, members can no longer claim their ‘ticket’ for a proper traditional Appellate Review, thereby putting the continued existence of one of the best international dispute settlement systems in doubt. As Professor Van den Bossche rightly pointed out: ‘[H]istory will not judge kindly those responsible for the collapse of the WTO dispute settlement system.’

In this regard we underline the desire that some have rightfully expressed: if only we could press a reset button so that 1995 could start again! The trade world at the time was full of desire to move from its power-oriented regime into a rules-based system. Hence, the leap from the GATT to the WTO was made, along with, most notably, the creation of the

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1 As one example, we recall record duties being unilaterally imposed, with no plausible prima facie legal justification – also setting a bad example to other members.

2 Farewell speech by Professor Peter Van den Bossche, former Presiding Member of the Appellate Body. See www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm.
Appellate Body. Now, with that priceless institution on the brink, we continue to hope for a last-minute solution.³

In short and simplistic terms, trade law, born and grown after the Second World War, appears to be aging. While some might say that this is part of adolescence, others would argue that we are in the midst of a full-blown mid-life crisis. Whichever it is, we find ourselves in an undefined status, with increased decision-making, increased pressures and a search for a new self.

Returning to the specifics of this fifth edition, we wish to warmly thank our ever-faithful contributors. Once again, they have very nicely described, summarised and analysed all the main events in their respective key jurisdictions. Notably we wish to thank two new guest contributors, Michael-James Clifton and Pekka Pohjankoski, both from the bench, for opening up whole new perspectives and dynamics for The International Trade Law Review. And, on a closing note, as before, we wish to thank our publishers and, especially, our ever-growing and active audience who have supported us throughout this first lustrum.

Having said all that, we remain deeply committed to this publication in these challenging times and we wish you all happy reading.

Folkert Graafsma and Joris Cornelis
VVGB Advocaten
Brussels
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³ The irony being that the people who are currently shutting down the system have an open nostalgia as well, except that they wish to time-travel back further, to the pre-1995 power-based system, convert the WTO into the GATT, and eliminate the Appellate Body.
Chapter 1

WORLD TRADE ORGANIZATION

Philippe De Baere

I  INTRODUCTION

The World Trade Organization (WTO) provides a comprehensive set of rules that reflects a balance of rights and obligations carefully negotiated by the WTO members. While WTO members must honour their multilateral trade commitments, WTO rules recognise the right of each WTO member to pursue public policy objectives and adopt measures that may restrict trade, subject to a number of conditions laid down in the WTO agreements. In the area of trade in goods, this balance is primarily reflected in the general and security exceptions laid down respectively in Articles XX and XXI of the General Agreement on Tariffs and Trade 1994 (GATT 1994).

The WTO agreements also contain a comprehensive set of rules related to the use of trade remedies, which allow WTO members to counter unfair trade practices adopted by other members or to impose temporary import restrictions to shield a domestic industry from a sudden surge in imports. Apart from the general provisions contained in the GATT 1994 (Articles VI, XVI and XIX), three specific agreements, namely the Anti-Dumping Agreement, the Agreement on Subsidies and Countervailing Measures and the Agreement on Safeguards, addressing respectively the imposition of anti-dumping, anti-subsidy and safeguards measures, were adopted during the Uruguay Round. WTO members wishing to apply trade defence instruments must ensure that their domestic legislation is as such consistent with the relevant WTO rules. They must equally make sure that each instance of application of such legislation complies with the applicable WTO provisions.

The rules contained in the WTO agreements have been clarified over the years by WTO panels and the Appellate Body. While WTO members have invoked general exceptions in many cases and disputes relating to trade remedies constitute over half of all disputes initiated since the establishment of the WTO in 1995, until now, members have generally refrained from invoking the security exceptions in WTO disputes.

Section II of this chapter will discuss some of the key developments of WTO jurisprudence over the past year. Those developments include a landmark panel ruling on the justiciability of security exceptions and the standard of review under Article XXI of the GATT

1 Philippe De Baere is a managing partner at Van Bael & Bellis. This chapter was written with the help of Marcus Gustafsson, Tetyana Payosova and Joanna Redelbach.
2 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the AD Agreement).
3 Agreement on Subsidies and Countervailing Measures (the SCM Agreement).
4 According to data provided on the WTO website, 293 out of 573 disputes initiated between 1995 and 2018 involved claims under the AD Agreement, the SCM Agreement or the Agreement on Safeguards.
1994, the Appellate Body’s approach to excess remissions arising from the duty drawback schemes for the purpose of imposing countervailing duties, as well as the panel’s finding on permissibility of zeroing in targeted dumping investigations. Finally, Section III will then address recent proposals to deal with the WTO Appellate Body deadlock and introduce the EU proposal for an interim appeal arbitration. This chapter concludes with a discussion of the international reaction to the additional import duties imposed by the United States on steel and aluminium products under Section 232 of the Trade Expansion Act of 1962.

II SIGNIFICANT LEGAL DEVELOPMENTS

i Russia – Traffic in Transit

Introduction

On 26 April 2019, the WTO Dispute Settlement Body (DSB) adopted the Panel Report in Russia – Traffic in Transit, a landmark case dealing with the security exceptions under Article XXI of the GATT 1994. This is the first dispute in which the Panel has been asked to interpret Article XXI(b)(iii) of the GATT 1994 and, more importantly, to establish whether Article XXI is a completely ‘self-judging’ provision or whether there is room for an objective determination by WTO adjudicating bodies as to whether a WTO member has properly invoked the security exceptions.

In this dispute, Ukraine challenged a number of transit restrictions and bans, imposed by the Russian Federation since 2014, in connection with the transit of goods from Ukraine through the Russian territory to the territory of third countries, including Kazakhstan and the Kyrgyz Republic. Ukraine claimed that these measures were inconsistent, among others, with the obligations of the Russian Federation under Article V of the GATT 1994 and related commitments in Russia’s Accession Protocol. Instead of addressing Ukraine’s substantive claims, the Russian Federation invoked Article XXI(b)(iii) of the GATT 1994 and argued that its measures were necessary for the protection of its essential security interests. The Russian Federation further argued that Article XXI of the GATT 1994 is totally ‘self-judging’ and, consequently, the Panel lacked jurisdiction to address any of the substantive issues in that case.5

Justiciability of security exceptions

Article XXI of the GATT 1994 provides as follows:

Nothing in this Agreement shall be construed
(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
   (i) relating to fissionable materials or the materials from which they are derived;
   (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
   (iii) taken in time of war or other emergency in international relations; or

5 Panel Report, Russia – Traffic in Transit, paras. 7.1-7.4, 7.23.
Based on the language of Article XXI of the GATT 1994, the Russian Federation argued that ‘the explicit wording of Article XXI confers sole discretion on the member invoking this Article to determine the form, design and structure of the measures taken pursuant to Article XXI.’\(^6\) Consequently, according to the Russian Federation ‘both the determination of a member’s essential security interests and the determination of whether any action is necessary for the protection of a member’s essential security interests are at the sole discretion of the member invoking the provision.’\(^7\)

Ukraine argued that Article XXI of the GATT 1994 is ‘an affirmative defence for measures that would otherwise be inconsistent with GATT obligations’ and does not provide for an exception to the rules on jurisdiction. Ukraine also cautioned that if Article XXI of the GATT 1994 were to be considered non-justiciable and hence excluded from the jurisdiction of WTO panels and the Appellate Body, it would suffice for a WTO member to invoke the security exceptions and this would automatically decide the outcome of the dispute.\(^8\) Hence, according to Ukraine, a Panel is called upon to make an objective assessment as to whether the actions were taken in time of war or other emergency in international relations under Article XXI(b)(iii) of the GATT 1994 and whether a member invoked Article XXI in good faith.\(^9\)

All third parties, save the United States, supported the justiciability of Article XXI’s invocation.\(^10\) Notably, the United States, while recognising that the Panel has jurisdiction within the meaning of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), argued that the dispute as such was ‘non-justiciable’. The United States based its position in particular on the language of Article XXI(b) of the GATT 1994, which refers to actions by a WTO member ‘which it considers necessary for the protection of its essential security interests’.\(^11\)

The Panel agreed with Ukraine and found that Article XXI(b) is not ‘totally self-judging’ as asserted by the Russian Federation.\(^12\) Based on textual and contextual interpretation, the Panel first found that Article XXI(b) of the GATT 1994 contains three alternative, rather than cumulative, clauses that limit the scope of paragraph (b). Namely, national security actions under this provision must relate to fissionable materials, or relate to traffic in arms or be taken in time of war or other emergency in international relations. As regards the subparagraph (iii) of Article XXI(b), the Panel further found that the temporal element of the action taken to protect essential security interests (i.e., ‘in time of war or other emergency in security relations’), as well as the factual circumstances that amount to a war or emergency in international relations are ‘amenable to objective determination’.\(^13\) The Panel noted that ‘as the existence of an emergency in international relations is an objective state of affairs, the determination of whether the action was “taken in time of” an “emergency in international

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\(^6\) Panel Report, Russia – Traffic in Transit, para. 7.28.
\(^7\) Panel Report, Russia – Traffic in Transit, para. 7.27.
\(^8\) Panel Report, Russia – Traffic in Transit, para. 7.31.
\(^9\) Panel Report, Russia – Traffic in Transit, paras. 7.32-7.33.
\(^10\) Panel Report, Russia – Traffic in Transit, paras. 7.35-7.52.
\(^12\) Panel Report, Russia – Traffic in Transit, para. 7.102.
relations” under subparagraph (iii) of Article XXI(b) is that of an objective fact, subject to objective determination.\textsuperscript{14} The Panel found further support for this interpretation in the object and purpose of the GATT 1994 and the WTO Agreement and the negotiating history of the GATT 1947.\textsuperscript{15} The Panel additionally concluded that no subsequent practice by WTO members establishing an agreement between them regarding the interpretation of Article XXI, and in particular its interpretation as a ‘self-judging’ provision, has been developed.\textsuperscript{16}

Importantly, the Panel defined ‘emergency in international relations’ as ‘a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state’, which gives rise to particular types of interests for the member invoking this defence, ‘i.e. defence or military interests, or maintenance of law and public order interests.’\textsuperscript{17} This definition means that actions taken by WTO members for the protection of economic welfare of domestic industries, where no such ‘emergency of international relations’ exists, cannot benefit from the exception clause under Article XXI(b) (iii) of the GATT 1994.

Ultimately, the Panel concluded that because Article XXI(b) of the GATT 1994 is not totally self-judging, the Panel had jurisdiction to review the Russian Federation’s invocation of this provision. It also rejected the United States’ argument that the invocation of Article XXI(b)(iii) was ‘non-justiciable’.\textsuperscript{18}

**Standard of review under the chapeau of Article XXI(b): deference subject to a good faith obligation**

Having established that Article XXI(b) is justiciable and that the requirements listed in subparagraphs (i) to (iii) are subject to an objective determination, the Panel turned to the analysis of the introductory clause of Article XXI(b) of the GATT 1994. In this regard, the Russian Federation argued that the clause ‘which it considers necessary’ refers to both the determination of the invoking member’s essential security interests, where WTO members enjoy wide discretion, and the necessity of the measure for the protection of those interests.\textsuperscript{19}

The Panel determined that ‘essential security interests’ is a narrower concept as compared to ‘security interests’ and ‘may be generally understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally’.\textsuperscript{20} While the Panel agreed that ‘it is left, in general, to every WTO member to define what it considers to be its essential security interests’, it also noted that WTO members are not free to elevate any concern to that of an ‘essential security interest’ and that this discretion is limited by a member’s obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith.\textsuperscript{21} In particular, ‘[t]he obligation of good faith requires that members not use the exceptions in Article XXI as means to circumvent their obligations under the GATT 1994’

\textsuperscript{14} Panel Report, *Russia – Traffic in Transit*, para. 7.77.
\textsuperscript{17} Panel Report, *Russia – Traffic in Transit*, para. 7.76.
\textsuperscript{18} Panel Report, *Russia – Traffic in Transit*, paras. 7.102-7.103.
\textsuperscript{19} Panel Report, *Russia – Traffic in Transit*, para. 7.128.
\textsuperscript{20} Panel Report, *Russia – Traffic in Transit*, para. 7.129.
and, for instance, a WTO member would not be allowed to re-label ‘trade interests that it had agreed to protect and promote within the system, as “essential security interests” falling outside the reach of that system’.  

Hence, in the language of the Panel, a member invoking Article XXI(b) of the GATT 1994 is required ‘to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity’.  

As regards the second element of the chapeau of Article XXI(b) of the GATT 1994 (i.e., the necessity of the measure), the Panel found that the connection between the measure taken and the particular situation of emergency in international relations is also subject to an obligation of good faith. Hence, Article XXI(b) requires ‘plausibility in relation to the proffered essential security interests, i.e. that [the member’s actions] are not implausible as measures protective of these interests’.

**Implications**

The Panel Report in *Russia – Traffic in Transit* is the first dispute in which the WTO adjudicators have addressed the question of the justiciability of Article XXI(b)(iii) of the GATT 1994 and interpreted that provision. The findings of the Panel have an important systemic role and are of particular importance for several pending cases, including the dispute between Qatar and Saudi Arabia on the alleged failure of Saudi Arabia to provide adequate protection to intellectual property rights held by or applied for entities based in Qatar (DS567) and several cases initiated against the United States as regards its Section 232 measures on steel and aluminium (see Section III(ii) below). Importantly, the Panel’s interpretation, if followed by future panels and the Appellate Body, should prevent potential abuse of security exceptions by WTO members to justify protectionist measures under the guise of essential security interests.

**ii EU – PET (Pakistan)**

**Introduction**

On 28 May 2018, the WTO DSB adopted the Panel and Appellate Body Reports in *EU – PET (Pakistan)* (DS486), a dispute concerning the imposition of countervailing duties targeting an import duty exemption on raw materials, a so-called ‘duty drawback scheme’, used by exporting producers of polyethylene terephthalate (PET) from Pakistan. Given the prevalence of these types of schemes among WTO members, the Appellate Body’s confirmation of the Panel Report provides important guidance on the procedures in Annexes II and III of the SCM Agreement on how investigating authorities should calculate the potential excess remission arising from such schemes. In addition, the Appellate Body agreed with the Panel that even though the measure at issue had expired, the Panel was entitled to make findings regarding its conformity with the covered agreements.

Adjudication of measures that have expired

After the Panel had been established but before it began its work, the EU notified the Panel that the countervailing measures at issue in the dispute had expired and requested that the Panel cease its work. The Panel denied the EU’s request on three grounds: (1) the measure expired only after the establishment of the Panel; (2) the complainant continued to request that findings be made; and (3) there was a ‘reasonable possibility’ that the EU would impose measures ‘that may give rise to certain of the same, or materially similar, WTO inconsistencies that are alleged in this dispute.’25

On appeal, the European Union argued that by deciding to make findings after the measure at issue had expired, the Panel failed to comply with its function under Article 11 of the DSU. The latter provision requires a panel to make an objective assessment of the matter before it ‘including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements’. The Appellate Body recalled that a panel has a margin of discretion in the exercise of its inherent adjudicative powers under Article 11 of the DSU and that within this margin of discretion, it is for a panel to decide how it takes into account subsequent modifications to, or expiry or repeal of, the measure at issue.26 The Appellate Body stressed that the expiry of the measure ‘while relevant, does not dispense with the “matter” that a panel is tasked with examining.’27

The Appellate Body then proceeded to analyse the Panel’s use of its discretion under Article 11 and the three grounds that the Panel had put forward.28 The Appellate Body concluded that ‘the Panel in this dispute made an objective assessment that “the matter” before it still required to be examined because the parties continued to be in disagreement as to the “applicability of and conformity with the relevant covered agreements” with respect to the [investigating authority’s] findings underpinning the expired measure at issue.’29 However, one of the Appellate Body members issued a separate opinion disagreeing with the majority on this point.30

Obligations to only countervail the ‘excess remission’ of duty drawback schemes

As part of its investigation, the EU found that the manufacturing bond scheme (MBS) constituted a countervailable subsidy. As explained by the Appellate Body, ‘[s]ystems like the MBS are commonly referred to as duty drawback schemes’, which ‘permits the import of duty-free material on condition that it is used as an input in the manufacture of goods that are subsequently exported’.31

Under Article 1.1(a)(1)(ii) ‘government revenue that is otherwise due is foregone or not collected’ is recognised as a type of financial contribution by a government and can therefore be countervailed. However, the Agreement specifies in footnote 1 to Article 1.1(a)(1)(ii) that in accordance with ‘the provisions of Annexes I through III of this Agreement, the exemption

26 Appellate Body Report, EU – PET (Pakistan), para. 5.19.
27 Appellate Body Report, EU – PET (Pakistan), para. 5.28.
28 Appellate Body Report, EU – PET (Pakistan), paras. 5.38-5.50.
29 Appellate Body Report, EU – PET (Pakistan), para. 5.51.
30 Appellate Body Report, EU – PET (Pakistan), paras. 5.54-5.61.
31 Appellate Body Report, EU – PET (Pakistan), para. 5.68.
of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy’. Annexes II and III contain detailed rules on how the investigating authority shall proceed to determine whether an excess remission has occurred, and therefore whether the duty drawback can be countervailed.

Under the MBS, the importer had to deposit with the Pakistan Customs Department the amount of the customs duty and sales tax that would normally be due on the imported inputs. At the time of exportation of the finished product, if it was found that the inputs had been used to manufacture the finished product, the deposit was released. However, the EU had found ‘serious discrepancies and malfunctions’ in how the system operated in practice, and therefore considered that the system did not adhere to the rules in Annexes II and III. On that basis, the EU considered that the entire amount of the duty drawback granted to the exporting producers could be countervailed. The Panel disagreed, finding that even where the exporting country’s system to assess the amount of the duty drawback did not adhere to Annexes II and III, the investigating authority could still only countervail the ‘excess amount’ of the duty drawback, in accordance with footnote 1 to Article 1.1(a)(1)(ii).

On appeal, the EU challenged the Panel’s interpretation of footnote 1 to Article 1.1(a)(1)(ii) and Annexes I to III. Annex II contains guidelines on the consumption of inputs in the production process and Annex III contains guidelines on the determination of substitution drawback schemes, and the two annexes share the same structure. What the Appellate Body qualified as the ‘heart’ of the EU’s argument concerned the procedure outlined in Annex II(II) and the consequences if this procedure is not adhered to.

Annex II(II)(1) states that where it is alleged that a drawback scheme conveys a subsidy by reason of excess drawback of import charges on inputs, ‘the investigating authorities should first determine whether the exporting member has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts’. Where such a system is found to exist, the investigating authorities should then examine the system to see whether ‘it is reasonable, effective for the purposes intended, and based on generally accepted commercial practices in the country of export’. If the system is found not to live up to these standards, or if there is no such system at all, Annex II(II)2 specifies that ‘a further examination by the exporting member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred’.

The Appellate Body first noted that ‘[s]hould an investigating authority determine that a “further examination” by the exporting member needs to be carried out . . . , it follows that the investigating authority has the responsibility of informing the exporting member of this need . . . in sufficient detail and in a timely manner’. Doing so ‘allows the exporting member, and indeed the investigated company, the opportunity to defend effectively their interests in the remaining stages of the countervailing duty investigation’.

32 Appellate Body Report, EU – PET (Pakistan), para. 5.72.
33 Panel Report, EU – PET (Pakistan), paras. 7.31-7.60.
34 Appellate Body Report, EU – PET (Pakistan), para. 5.111.
35 Appellate Body Report, EU – PET (Pakistan), para. 5.120.
36 Appellate Body Report, EU – PET (Pakistan), para. 5.122.
37 Appellate Body Report, EU – PET (Pakistan), para. 5.122.
Yet Annex II(II)(2) and the similarly worded Annex III(III)(2) do ‘not provide for specific procedural steps on what is to happen if no “further examination” by the exporting member is carried out, or if an investigating authority is still unsatisfied with the results of a “further examination”’. The EU referred to ‘this absence of prescription as a “silence”, the consequence of which is that the remission of import duties no longer qualifies as a duty drawback scheme and the entire amount of duties refunded or not collected upon exportation can be countervailed by the investigating authority’.39

However, the Appellate Body noted that ‘this perceived “silence”’ did not pertain to the definition of the subsidy, and in particular, ‘to what constitutes the financial contribution element of the subsidy’. Annex II(I)(2) is unambiguous in stating that ‘drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs’ and that this ‘echoes the limitation of the financial contribution to the excess amount of the remission, articulated in footnote 1 and Annex I(i)’. Moreover, the Appellate Body did not consider the perceived ‘silence’ as ‘without cure in the SCM Agreement’. If the ‘further examination’ required to be undertaken by the exporting member is not undertaken, or is unsatisfactory, the investigating authority may use ‘facts available’ pursuant to Article 12.7 of the SCM Agreement.

Finally, it should be noted that the Appellate Body observed that the designation of Annexes II and III as ‘Guidelines’ and the extensive use of the term ‘should’ suggest that ‘the content of Annexes II and III, while crucial to the understanding of duty drawback schemes and substitution drawback schemes, ought not to be interpreted as “rigid rules that purport to contemplate every conceivable factual circumstance” with respect to the assessment of such schemes.’

**Implications**

*EU – PET (Pakistan)* is the first dispute to interpret footnote 1 of the SCM Agreement and the extensive guidelines set out in Annexes II and III for assessing the amount of potential subsidies arising from tax exemption and duty drawback schemes. These types of schemes are in widespread use among WTO members and the EU’s narrow interpretation threatened to undermine the explicit exemption granted to such schemes. More importantly, the case confirms that the expiry of the measure at issue, in itself, does not mean that a panel is precluded from ruling on that measure.

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38 Appellate Body Report, *EU – PET (Pakistan)*, paras. 5.123, 5.120.
39 Appellate Body Report, *EU – PET (Pakistan)*, paras. 5.120, 5.124.
40 Appellate Body Report, *EU – PET (Pakistan)*, para. 5.127.
41 ibid. See also para. 5.131.
42 Appellate Body Report, *EU – PET (Pakistan)*, para. 5.127. See also para. 5.128.
iii US – Differential Pricing Methodology

On 9 April 2019, the Panel circulated its report to the members of the WTO DSB in US – Differential Pricing Methodology (DS473), concerning anti-dumping duties applied to softwood lumber imports from Canada. The Panel Report is notable for ruling that the use of ‘zeroing’ is permitted in targeted dumping investigations, contrary to existing Appellate Body case law. The Panel Report was appealed by Canada on 4 June 2019.44

Zeroing permitted in targeted dumping investigations

Article 2.4 of the AD Agreement governs the procedure for calculating the dumping margin by comparing the normal value with the export price of the exporting producers. Specifically, Article 2.4.2 states, in its first sentence, that the normal methodology is to calculate the dumping margin by comparing the weighted average export price with the weighted average normal value (the W-W methodology), or by comparing normal value and export prices on a transaction-to-transaction basis (the T-T methodology). However, the second sentence of Article 2.4.2 states that if two conditions are met, the investigating authorities may compare the weighted average normal value with individual export transactions (the W-T methodology) to address ‘targeted dumping’. These conditions are that (1) there is ‘a pattern of export prices which differ significantly among different purchasers, regions or time periods’ (the ‘pattern clause’), and (2) an explanation is provided as to why such differences cannot be taken into account using the W-W or T-T methodologies (the ‘explanation clause’).

In the case at hand, when the US Department of Commerce (USDOC) had found that both of these conditions were met, and the W-T methodology would therefore be applicable, the USDOC applied zeroing when calculating the dumping margin. That is, the United States aggregated the positive dumping amounts from those transactions whose export price was below the average weighted normal value, but treated as ‘zero’ the negative dumping amounts resulting from those transactions whose export price exceeded the weighted normal value. Consequently, the negative dumping amounts were not allowed to offset the positive dumping amounts.

In concluding that this approach was permissible under Article 2.4.2, the Panel’s analysis proceeded in several distinct steps. First, the Panel examined whether the USDOC had correctly identified ‘a pattern of export prices which differ significantly among different purchasers, regions or time periods’, in accordance with the pattern clause.45 The USDOC had aggregated the findings found among different purchasers, regions and time periods when assessing whether such a pattern existed. The Panel disagreed with this approach and followed the reasoning of the Appellate Body in US – Washing Machines, holding that the text of Article 2.4.2 requires that a pattern must be identified when looking at the three categories separately. Moreover, when establishing a pattern, the USDOC had taken into account export transactions whose prices were both significantly higher and significantly lower relative to other transactions to other purchasers, regions or time periods. Here the

44 Notification of an appeal by Canada under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review, WT/DS534/5, dated 4 June 2019.
Panel agreed with the United States’ approach and disagreed with previous findings of the Appellate Body in *US – Washing Machines*, observing that nothing in the text of the pattern clause ‘further qualif[ies] the export prices which “differ significantly”’. Second, the Panel looked at the negotiating history of Article 2.4.2 and found, consistent with previous panels and the Appellate Body, and contrary to the approach of the US, that the W-T methodology could only be applied to the identified pattern transactions, and not to all transactions.

Third, the Panel turned to the actual dumping margin calculation. The question that arose was whether a so-called ‘mixed methodology’ applied by the USDOC when calculating the dumping margin was permissible. That is, whether the standard W-W or T-T methodology could be applied only to non-pattern transactions, while the W-T methodology was applied only to the pattern transactions. The findings from both these methodologies and sets of transactions were aggregated by the USDOC and divided by the weighted average normal value to calculate the dumping margin.

The Appellate Body had previously found a mixed methodology approach to be prohibited. According to the language of Article 2.4.2, the standard W-W and T-T methodologies had to be applied to ‘all comparable export transactions’, and not only to non-pattern transactions. Moreover, the Appellate Body had previously considered that including the results from the W-W or T-T methodologies applied to the non-pattern transactions when calculating the dumping margin risked ‘re-masking’ the targeted dumping uncovered by applying the W-T methodology to only the pattern transactions. On this basis, the Appellate Body held that only the dumping found by applying the W-T methodology to the pattern transactions should be included in the dumping margin calculation. The Panel in *US – Differential Pricing Methodology* disagreed with the Appellate Body’s textual interpretation and, moreover, considered that ‘the purpose of the second sentence of Article 2.4.2 is to unmask targeted dumping through the application of the W-T methodology, and not by simply disregarding non-pattern transactions’.

Fourth, having found that an investigating authority is permitted to apply the W-T methodology to the pattern transactions, but must apply the W-W or T-T to non-pattern transactions, and that the result of both comparisons should be aggregated, the Panel noted that the outcome of this analysis would always be ‘mathematically equivalent to the dumping margin based on the application of the W-W methodology to all export transactions, provided the weighted average normal values used under the W-W and W-T methodologies are the same’. On this basis, the Panel reasoned that considering that the ‘raison d’être of the W-T methodology is to unmask targeted dumping, the inability of this methodology to do so will render this methodology inutile’. Furthermore, the Panel found that the reference in the second sentence of Article 2.4.2 to a comparison between the average weighted

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50 Appellate Body Reports, *US – Washing Machines*, paras. 5.118-5.124, and *US – Anti-Dumping Methodologies (China)*, paras. 5.102-5.108.
52 Panel Report, *US – Differential Pricing Methodology*, para. 7.100. The Panel adopted the arguments made by the United States. See paras. 7.72, 7.74-7.75.
normal value and ‘individual’ export transactions suggested that ‘an investigating authority may distinguish those individual export transactions that mask other export transactions from those individual export transactions that are being masked’. The Panel therefore concluded that ‘an investigating authority is permitted to use zeroing while applying the W-T methodology to the pattern transactions.’

Implications

US – Differential Pricing Methodologies is the second time that a panel has decided to explicitly depart from the case law of the Appellate Body, and may mark a greater willingness to do so in the future. The Appellate Body has held that a panel may only depart from previous rulings if it has ‘cogent reasons’ to do so. The Panel in US – Differential Pricing Methodologies invoked this test, but did not extend its reasoning beyond a single paragraph nor engage with Canada’s arguments that no such cogent reasons existed in the present case. In its appeal, Canada has asked the Appellate Body to ‘find that the Panel acted inconsistently with the function of panels under Article 11 of the DSU’.

The findings of the Panel will likely encourage the US to continue to use zeroing in anti-dumping proceedings concerning targeted dumping. Indeed, it appears that the US in any event had already decided to continue to use zeroing in targeted dumping investigations and not to implement the findings of the two previous Appellate Body Reports, US – Washing Machines and US – Anti-Dumping Methodologies (China), which prohibited it. However, the Panel did not appear to question the prohibition on zeroing in standard dumping investigations that do not concern targeted dumping.

III OUTLOOK

i The European Union’s proposal for an interim appeal arbitration at the WTO

The WTO dispute settlement system is going through a major crisis because of the United States’ continuing resistance to the appointment of WTO Appellate Body members. Pursuant to Article 17 of the DSU, the Appellate Body shall be composed of seven members, who are appointed by the WTO DSB. Three is the minimum number of members required to serve on any appeal. At the time of writing, the Appellate Body is left with only three members –
Ujal Singh Bhatia and Thomas R Graham will complete their terms on 10 December 2019, while Hong Zhao’s term expires on 30 November 2020. Hence, if the deadlock persists, the Appellate Body will become inoperative on 11 December 2019.

The stakes are high not only because the system may lose an appellate stage of review, but also because a dysfunctional Appellate Body may paralyse the dispute settlement mechanism as a whole. This is because Panel reports cannot be adopted by the DSB and become binding on the parties if any of the parties notifies its decision to appeal pursuant to Article 16.4 of the DSU. If no appeal is possible, a party to a dispute could easily block the adoption of an unfavourable decision by the panel.

The United States has voiced several concerns of a technical and systemic nature related to the functioning of the Appellate Body and has pledged to continue to block the appointment process of WTO Appellate Body members unless these concerns are duly addressed. Since DSB decisions are taken by consensus, the formal objection by any WTO member, in this case by the United States, is sufficient to effectively prevent the appointment or reappointment of an Appellate Body member.

**Official proposals by WTO members to address the WTO Appellate Body deadlock**

In an attempt to address the United States’ concerns, WTO members – individually and jointly – submitted a number of proposals to the WTO General Council. Some of these proposals are more far-reaching and call for an amendment of the DSU, whereas other proposals suggest the adoption of soft law instruments instead of a formal revision of the WTO rulebook.

In particular, the European Union, along with a group of like-minded WTO members, has submitted two proposals. The first EU proposal – submitted jointly with China, Canada, India, Norway, New Zealand, Switzerland, Australia, Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro – aims to address most of the issues raised by the United States, including a transitional rule for the outgoing Appellate Body members, the rules on extension of the 90-day time frame allocated for an appeal, clarification on the review of municipal laws on appeal, and rules to avoid *obiter dicta*. This proposal also suggests that an annual meeting of WTO members with the Appellate Body should ensure a regular channel of communication on systemic issues or general trends in WTO jurisprudence.

Furthermore, several WTO members have called for identifying options for binding or non-binding guidance to be provided to adjudicative bodies on specific issues, including through the adoption of ‘authoritative interpretations’. Honduras prepared three

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62 The concerns raised by the United States were addressed in Chapter XX of the *International Trade Law Review 2018*.

63 Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro to the General Council, Revision, WT/GC/W/752/Rev.2, 11 December 2018.

64 Communication from the European Union, China, India and Montenegro to the General Council, Revision, WT/GC/W/753/Rev.1, 11 December 2018.

65 Communication from Australia, Singapore, Costa Rica, Canada and Switzerland to the General Council, Adjudicative bodies: Adding to or diminishing rights or obligations under the WTO Agreement, WT/GC/W/754/Rev. 2, 11 December 2019.
communications to foster a discussion on the functioning of the Appellate Body, addressing the issue of timelines, alleged judicial activism and precedent. Brazil proposed that the General Council should adopt ‘Guidelines for the Work of Panels and the Appellate Body’ and, along the same lines, Thailand proposed a General Council decision on the dispute settlement system of the WTO. Finally, Japan, Australia and Chile proposed a DSB decision affirming and clarifying the existing provisions of the DSU as the most practical, feasible and expeditious solution.

Unfortunately, so far the United States has not expressed its views on any of the proposals put forward by other WTO members. The United States has also refrained from proposing any solutions of its own and limited its statements at the DSB meetings to reiteration of its concerns and conclusion that these systemic concerns remain unaddressed.

Since none of the proposals seems to please the United States and the pressure is accumulating, WTO members are now looking for alternative solutions to maintain the dispute resolution function in the likely event that no Appellate Body members are appointed by 10 December 2019.

**The interim appeal arbitration under Article 25 of the DSU**

In view of the above-mentioned circumstances, in May 2019, the European Union submitted a proposal for an interim appeal arbitration pursuant to Article 25 of the DSU. In essence, the proposed interim appeal arbitration shall replicate, to the extent possible, the rules and procedures as set out in the DSU and the Appellate Body Working Procedures governing the appellate review. To implement this solution, the European Union would seek to reach an agreement with other like-minded WTO members that would introduce a framework for submitting future cases to an interim appeal arbitration. This framework agreement would also provide that parties will not pursue appeals under Articles 16.4 and 17 of the DSU. As the name of the mechanism suggests and as should be reflected in the mutually agreed solution, the interim appeal arbitration will apply only if and when the Appellate Body will not be able to hear appeals from panel cases due to an insufficient number of its members.

When a dispute arises and enters the stage of panel review, the European Union and the other party would need to indicate their intention to conclude an arbitration agreement.

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66 Communication from Honduras, Fostering a discussion on the functioning of the Appellate Body, WT/GC/W/758, 21 January 2019; Communication from Honduras, Fostering a discussion on the functioning of the Appellate Body: Addressing the issue of alleged judicial activism by the Appellate Body, WT/GC/W/760, 29 January 2019; Communication from Honduras, Fostering a discussion on the functioning of the Appellate Body: Addressing the issue of precedent, WT/GC/W/761, 4 February 2019.

67 Communication from Brazil, Guidelines for the work of panels and the Appellate Body, 28 March 2019, WT/GC/W/767.


69 Communication from Japan, Australia and Chile, Informal process on matters related to the functioning of the Appellate Body, Revision, WT/GC/W/768/Rev.1, 26 April 2019.


in that particular case and notify this agreement pursuant to Article 25.2 of the DSU to the DSB, normally within 60 days after the date of the establishment of the panel. The proposed agreed procedures for arbitration under Article 25 of the DSU provide that as soon as the panel report is issued to the parties and 10 days preceding the anticipated date of circulation of the panel report, any party may request the panel to suspend the panel proceedings with a view to initiating the arbitration under these agreed procedures. That request would be considered to constitute a joint request by the parties for suspension of the panel proceedings for 12 months under Article 12.12 of the DSU. The party would then file a Notice of Appeal with the WTO Secretariat, as soon as the suspension of the panel proceedings takes effect. The appeals would be heard by three former Appellate Body members, selected by the WTO Director General and serving pursuant to Article 25 of the DSU, with an appropriate legal and administrative support from the Appellate Body Secretariat. As noted above, the interim arbitration appeal will largely follow the existing appellate procedure, with only a few deviations that would be necessary because of the special nature of the interim mechanism.

The arbitration award would be binding on the parties by virtue of the arbitration agreement. After the conclusion of the appeal arbitration proceedings, the arbitration award including the panel report, as may be modified by the award, would be notified to the DSB and the relevant Council or Committees pursuant to Article 25.3 of the DSU. Articles 21 and 22 of the DSU will apply mutatis mutandis to arbitration awards pursuant to Article 25.4 of the DSU and the arbitration agreement.

One clear advantage of this solution is that the proposed appeal arbitration is based on the existing rule in the DSU, namely Article 25. Some elements of the proposed mechanism, however, may need to be further revised and improved to ensure that the mechanism is fully operational by December 2019. For instance, it remains unclear whether the WTO Appellate Body Secretariat would be available to assist the arbitrators and whether a solution with former Appellate Body members serving as arbitrators would suffice.

**Alternatives to the interim appeal arbitration: agreements 'not to appeal'**

While the EU proposal for an interim appeal arbitration may be a viable option for some WTO members, others might follow a different approach that is based on an agreement to waive the right to appeal. The first precedent was set by Indonesia and Vietnam within the framework of a compliance review in Indonesia – Safeguard on Certain Iron or Steel Products (DS496). In particular, as part of their bilateral understanding on the sequencing of proceedings, Vietnam and Indonesia agreed that ‘if, on the date of the circulation of the panel report under Article 21.5 of the DSU, the Appellate Body is composed of fewer than three members available to serve on a division in an appeal in [that] proceedings, they will not appeal that report under Articles 16.4 and 17 of the DSU’.

**Practical consequences for pending and future appeals**

As explained above, if at least two vacancies of WTO Appellate Body members are not filled by 10 December 2019, the Appellate Body will become inoperative and will stop accepting new appeals. As far as the pending appeals are concerned, Rule 15 of the WTO Appellate

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72 Understanding between Indonesia and Vietnam regarding procedures under Articles 21 and 22 of the DSU, Indonesia – Safeguard on Certain Iron and Steel Products, WT/DS496/14, 27 March 2019, para. 7.
Body Working Procedure should allow, upon a notification to the DSB, that two outgoing Appellate Body members complete the disposition of all appeals to which they will have been assigned as of 10 December 2019.

The coming months will be decisive for WTO members in attempting to find solutions to keep a functioning WTO dispute settlement mechanism, be it through an interim appeal arbitration, an agreement ‘not to appeal’ or any other viable solutions. The long-term systemic implications of either of these interim solutions for the WTO dispute settlement mechanism, and in particular its appeal function, are, however, difficult to predict.

ii International reactions to Section 232 measures on steel and aluminium

Introduction

In March 2018, President Trump imposed additional duties of 25 per cent and 15 per cent respectively on imports of steel and aluminium products into the United States. The duties were imposed following investigations of the USDOC conducted under Section 232 of the Trade Expansion Act of 1962 (Section 232). The latter allows the US authorities to impose import restrictions based on the finding of a threat of impairment to the national security of the United States.

The imposition of additional import duties on steel and aluminium triggered severe reactions from other WTO members. Nine WTO members – including the European Union, China and India – initiated WTO proceedings against the United States.73 As a response to the US measures, the European Union, China, Turkey and Russia have also adopted rebalancing measures pursuant to Article 8 of the Agreement on Safeguards in the form of additional duties on imports originating in the United States. These rebalancing measures were in turn challenged before a WTO panel by the United States.74 In addition, to protect its domestic market from a potential trade diversion caused by the US measures, the European Union imposed its own protective duties on imports of steel products.75

Overview of the offensive and defensive cases

The complainants in the offensive cases brought against the US measures argue that the additional import duties on steel and aluminium constitute safeguard measures inconsistent with Article XIX of the GATT 1994 and the Agreement on Safeguards. The complainants also make several claims under the GATT 1994.

The defensive cases initiated by the United States against the European Union, China, Turkey and Russia relate to the additional duties imposed by those countries on imports from the United States under Article 8 of the Agreement on Safeguards. The latter provision allows WTO members affected by the safeguard measures to suspend the application of

73 China (DS544), India (DS547), the European Union (DS548), Canada (DS550), Mexico (DS551), Norway (DS552), Russia (DS554), Switzerland (DS556) and Turkey (DS564). Following a mutually agreed solution with the United States, Canada and Mexico have withdrawn their cases against the United States.
74 China (DS558), the European Union (DS559), Turkey (DS561) and Russia (DS566).
75 In February 2019, the European Union imposed definitive safeguard measures on imports of certain steel products. See Regulation (EU) 2019/159 of 31 January 2019 imposing definitive safeguard measures against imports of certain steel products, 2019 O.J. (L 31) 27.
substantially equivalent concessions or other obligations under the GATT 1994 with regard to the member imposing those safeguard measures. The United States argues that those measures are inconsistent with Articles I and II of the GATT 1994.

Both the offensive and the defensive cases raise several interesting questions with implications going far beyond those specific disputes. First, are the additional duties imposed by the United States on imports of steel and aluminium products safeguard measures? Second, can those measures – whether considered as safeguards or not – be justified under the security exceptions of Article XXI of the GATT 1994?

Are Section 232 measures disguised safeguard measures?
The additional duties on imports of steel and aluminium products have been imposed pursuant to Section 232 and not pursuant to the US safeguard legislation. The complainants argue, however, that those duties de facto constitute safeguard measures inconsistent with Article XIX of the GATT 1994 and several provisions of the Agreement on Safeguards. Such qualification of the US measures is particularly crucial for those WTO members that adopted rebalancing measures pursuant to Article 8 of the Agreement on Safeguards, as otherwise their rebalancing measures will necessarily be WTO-inconsistent.

The Agreement on Safeguards does not provide a definition of a safeguard measure. The question of what constitutes a safeguard measure was, however, recently addressed by the Panel and the Appellate Body in Indonesia – Iron or Steel Products. According to the Appellate Body, to qualify as a safeguard measure, a measure must present two constituent features. First, it must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the member’s domestic industry caused or threatened by increased imports of the subject product. Important, whether a certain measure constitutes a safeguard measure is an objective question that must be assessed by the Panel as part of its objective assessment of the matter pursuant to Article 11 of the DSU. To make such an assessment, the Panel must examine the design, structure and expected operation of the measure as a whole. The Panel must identify all the aspects of the measure that may have a bearing on its legal characterisation and recognise which of those aspects are the most central to that measure. The Appellate Body also explained that as part of its determination, a Panel should evaluate and give due consideration to all relevant factors, including the manner in which the measure is characterised under the domestic law of the member concerned, the domestic procedures that led to its adoption and any relevant notifications to the WTO Committee on Safeguards. None of these factors, however, is in and of itself dispositive of the question of whether the measure constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.

The additional duties on imports of steel and aluminium products are not labelled by the United States as safeguard measures. However, looking at the features of the US measures and applying the test developed in Indonesia – Iron or Steel Products, those measures appear to fall within the category of safeguard measures. Indeed, by going beyond the bound rates provided for in the US Schedule of Concessions, the measures suspend at least one GATT obligation or withdraw or modify at least one GATT concession. It could also be argued

76 Appellate Body, Indonesia – Iron or Steel Products, para. 5.60.
77 ibid.
that although officially those measures aim to prevent a threat of impairment to the national security of the United States, in practice, the purpose of those measures is to protect the domestic steel and aluminium industries from injury caused by competition with imports.

**Can Section 232 measures be justified under Article XXI of the GATT 1994?**

Section 232 allows the US President to take action to adjust imports when it is determined that such imports threaten to impair the national security of the United States. Section 232 provides for a number of factors that should be taken into account in making such a determination. The current US administration adopted an extremely broad interpretation of national security, covering not only national defence, but also the overall commercial welfare of individual domestic industries. This broad interpretation of national security allows the US President to adopt measures that shield declining domestic industries from foreign competition.

The United States argues that the additional import duties on steel and aluminium products imposed pursuant to Section 232 are a matter of national security and cannot be reviewed by a WTO panel. The United States relies in that regard on the security exceptions in Article XXI of the GATT 1994, which allow WTO members to take otherwise GATT-inconsistent measures considered necessary for the protection of their essential security interests.

Historically, WTO members refrained from relying on Article XXI as a justification. Recently, however, the security exception has been invoked by several countries to justify politically motivated trade restrictions. Notably, Article XXI was invoked by the Russian Federation to justify certain transit restrictions imposed with respect to imports coming from Ukraine (see Section II.i above). In a report adopted on 26 April 2019, the Panel found that it had jurisdiction to determine whether the requirements of Article XXI(b)(iii) – raised by the Russian Federation – were satisfied and explicitly rejected the United States’ argument that the invocation of Article XXI(b)(iii) is ‘non-justiciable’. In addition, the Panel made a number of observations that appear to be relevant for the ongoing disputes against the US Section 232 measures.

As explained in Section II.i above, the Panel made it clear that protectionist measures aiming to safeguard economic interests of a WTO member would not fall within the scope of security exceptions under Article XXI of the GATT 1994. Among other reasons, the Panel stressed that the obligation of good faith requires that members not use the Article XXI security exceptions as a means to circumvent their obligations under the GATT 1994 by relabelling trade interests as ‘essential security interests’. The Panel also found that political or economic differences between members are not sufficient, of themselves, to constitute an emergency in international relations for the purpose of Article XXI(b)(iii). This kind of situation will only amount to ‘emergency in international relations’ if it gives rise to defence and military interests, or maintenance of law and public order interests.

Should the Panel in the ongoing cases follow the approach of the Panel in DS512 and find that the invocation of Article XXI by the United States is subject to its review, the Panel will be faced with the difficult task of assessing the limits of ‘essential security interests’ and,

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81 ibid.
particularly, whether those cover ‘economic security’. The findings of the Panel in DS512 appear not to support such a broad interpretation. The Presidential Proclamations imposing the additional import duties and the statements made by various US officials leave no doubt that the sole objective of those measures is to support and revive the US steel and aluminium industries.

What’s next?

The findings in the ongoing cases relating to the US Section 232 measures on steel and aluminium products will have important implications for other measures currently considered by President Trump with respect to imports of autos and auto parts, uranium, and titanium sponge. They will also provide further clarifications with respect to the security exceptions under Article XXI of the GATT 1994. Last but not least, the findings in those cases may reaffirm the safeguard measure test recently developed in the context of other disputes.

IV CONCLUSIONS

The recent developments in the case law confirm that the WTO dispute settlement mechanism not only helps to clarify the existing provisions of the WTO agreements, but also assists WTO members in maintaining the proper balance between their WTO rights and obligations, thereby enhancing the security and predictability of the multilateral trading system.

The clarifications brought about by the panels and the Appellate Body in the disputes discussed in Section II are likely to have significant systemic implications. This is particularly true for the Panel’s finding in Russia – Traffic in Transit on the justiciability of security exceptions under Article XXI of the GATT 1994. The Panel’s ruling is particularly timely given the recent surge of protectionist measures that WTO members may attempt to justify under the disguise of national security concerns. Furthermore, the Appellate Body’s findings in EU – PET (Pakistan) addressed another important systemic issue in concluding that the expiry of the measures at issue is not dispositive as to whether a panel may consider the measures’ conformity with the covered agreements, therefore ensuring the effectiveness of the dispute settlement mechanism. Moreover, given the prevalence of duty drawback schemes among WTO members, the clarifications offered regarding such schemes will likely bring significant relief to exporting producers in future anti-subsidy investigations. Finally, the Panel’s findings on the admissibility of zeroing in targeted dumping investigations in US – Differential Pricing Methodology marks a significant departure from the Appellate Body’s established approach.

The continuing deadlock of the WTO Appellate Body remains at the top of the WTO agenda. Despite multiple efforts by WTO members and the WTO Secretariat, the Appellate Body is likely to become dysfunctional as of 11 December 2019, unless the United States changes its current position. Given the reluctance of the United States to engage in fruitful discussions with a view to unblocking the appointment of the Appellate Body members, WTO members will likely focus on finding alternative solutions so as to maintain a functioning WTO dispute settlement mechanism, with or without an appellate review. The EU proposal on an interim appeal arbitration offers a solution for those members that want to retain the possibility of appellate review. Apart from short-term practical implications,
this WTO Appellate Body crisis may have serious consequences for the future architecture of WTO dispute settlement, which constitutes the only effective means of resolving trade grievances for many WTO members.

Finally, several pending cases, including disputes relating to the WTO legality of the US Section 232 measures on steel and aluminium products, will provide additional clarifications on the interpretation and scope of the security exceptions under Article XXI, which will be of particular importance in view of rising trade protectionism.
Chapter 2

ARGENTINA

Alfredo A Bisero Paratz

I OVERVIEW OF TRADE REMEDIES

Argentina has actively used trade defence instruments in support of various economic policies over the past decade. Initially, the broad goal of Argentina’s international commercial policy was the promotion of national industry. Between 2011 and 2015, however, Argentina used trade restrictions to maintain a positive trade balance in the interest of preserving foreign currency reserves. Following a change in government in December 2015, Argentina abolished many of these restrictions to ease towards a return of previous trade policies aimed at promoting domestic production. During 2016 and 2017, Argentina continued its rollback of restrictions on foreign trade, which has made evident the inability of most Argentine exporters to produce goods at competitive prices. Policies to maintain the value of the peso relative to the US dollar also harmed competitiveness and generated a trade deficit in 2017. A currency crisis in May 2018 ended in an abrupt slide (about 100 per cent relative to the US dollar) of the peso and prompted the government’s return to export duties on goods and services in September 2018. These measures somewhat eased the commercial deficit that had reached US$3.88 billion in 2018.

The government of Argentina has initiated several anti-dumping and safeguard investigations intended to mitigate the economic impact of imported industrial and textile products. Most investigations in train (there are 19 ongoing processes according to the National Commission of Foreign Trade) involve products originating from China, Chile, Brazil and Italy. As a sign of Argentina’s willingness to await results before taking action on these processes, the government has not implemented countervailing measures (such as anti-subsidy duties) during the pendency of the proceedings, with the exception of four proceedings involving China, Italy, Brazil and Mexico.

II LEGAL FRAMEWORK

Argentina is a member of the GATT and WTO Agreements. In 1995, the Argentine Congress passed Law No. 24,425 ratifying the agreements creating the World Trade Organization signed at Marrakech in April 1994, known as the Final Act of the 1986–1994 Uruguay Round of trade negotiations. This ratifying legislation also incorporated trade remedies into Argentina’s internal regulations based on the following: the Agreement on Implementation of

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Article VI of the General Agreement on Tariffs and Trade 1994; the Agreement on Subsidies and Countervailing Measures; and the Agreement on Safeguards. Concurrently, the Argentine Congress supplemented these remedies with distinct domestic procedures.

i Anti-dumping procedures

The Argentina Executive branch issued Decree No. 1,393/08 (replacing Decrees No. 1,326/98 and 1,088/01) to regulate and supplement the government’s procedures in connection with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and the Agreement on Subsidies and Countervailing Measures.

The Ministry of Production and Labour Matters is responsible for carrying out the investigative process and determining whether to apply countervailing measures provisionally, during the course of the investigation, and, definitively, upon its conclusion. Investigations into dumping or subsidies are carried out by the following agencies: the Secretary of Foreign Commerce (the Secretary), the Undersecretariat of Foreign Commerce (the Undersecretariat) and the National Commission of Foreign Trade (the Commission). Investigations may commence with a complaint filed by an importer or producer or with *ex officio* investigations initiated by the Secretary. The Commission and the Undersecretariat may assist complainants in obtaining product information for investigation from foreign domestic markets and in satisfying the formal requirements of a claim.

All claims must satisfy the formal and substantive requirements set forth in Article 5 of the Anti-Dumping Agreement. These requirements include statements on: (1) the complainant’s identity and the industry on behalf of which the complaint is made; (2) background information concerning the allegedly offending goods; and (3) how these products are alleged to adversely affect domestic commerce. The complaint must also furnish the Undersecretariat with specific evidence substantiating dumping (as defined by the Anti-Dumping Agreement), specific economic harm to the complainant and causation. Section 4 of the Decree authorises complainants to furnish a wide range of evidence (e.g., expert reports or general documentary evidence regarding pricing and costs, etc., in the country of origin) tending to prove these requirements.

Upon the filing of a complaint by an importer or producer, the Undersecretariat and Commission review the formal aspects of the filing and, if any formal errors are found, request amendments to the filing within five days. Within 10 days of filing or as soon as all formal requirements are satisfied, the Commission is to inform the Undersecretariat that the claim may proceed. The Commission’s report also identifies similar products manufactured in Argentina and opines on the complainant’s representativeness of the relevant industry sector.

Within two days of receiving the file from the Commission, the Undersecretariat shall notify the complainant of the acceptance or denial of its claim. Within 10 days of accepting a claim, the Undersecretariat makes an assessment regarding whether the evidence offered is sufficient to justify commencement of a dumping investigation. If the assessment is affirmative, the Undersecretariat then requests the Commission to complement its report with data regarding the extent of harm inflicted on the relevant domestic industry and the causal link between the alleged dumping and injury.

Upon receiving a complete report recommending commencement of an investigation from the Undersecretariat, the Secretary must affirm or deny the recommendation within five days. If the recommendation is denied, the Secretary must notify the complainant of the grounds for the denial.
If the recommendation is affirmative and the desired investigation relates to subsidies in the exporter’s country, the Undersecretariat must furnish the relevant national government with notice of the decision. This notice must include a request that the foreign government respond with information clarifying the situation and an invitation to reach an agreement on the same in accordance with Section 13.1 of the Agreement on Subsidies and Countervailing Measures.

If the Secretary decides to commence an investigation, it must issue a resolution for publication in the Official Gazette to effectuate its determination. As the resolution must contain substantive and procedural information pertinent to the investigation (e.g., the relevant time frames), issuance of the resolution is more than a perfunctory administrative act. The resolution must contain the following data:

- the product and the country of origin;
- the period to which the investigation applies;
- a description of the dumping practices or existing subsidies;
- a summary of the injury and the causal link to the dumping activity;
- the name of the third country qualified as a market economy, for comparative purposes, when the investigation involves a non-market economy (as qualified by Argentina consistent with Decree No. 1,219/06); and
- the start date of the investigation and the agency charged with carrying out the process.

Next, the Undersecretariat notifies all interested parties and countries involved in the alleged dumping practice of the resolution and commencement of the investigative process.

As to the import transactions subject to investigation to prove dumping, the Undersecretariat will investigate alleged dumping practices or subsidies existing up to 12 months prior to commencement of the investigation. With respect to the existence of economic harm, however, the investigation may extend to operations performed up to three years prior to commencement of the investigation.

Within 10 days of the investigation’s initiation, the Undersecretariat and the Commission send questionnaires to interested parties (including producers, exporters and importers), to which they are to respond within 30 days, pursuant to certain requirements set out in Decree No. 1,393/08.

The subsequent steps involve the Secretary’s preliminary determination as to the facts under investigation. To start this process, the Undersecretariat has 100 calendar days from the investigation commencement date to issue a preliminary assessment on the evidence related to dumping or subsidies. Next, within 110 calendar days of commencement, the Commission is required to issue a report as to its preliminary assessment on the economic harm and causal link with the relevant dumping activity or subsidy. The Undersecretariat’s report may include a recommendation that the Secretary adopt countervailing measures to mitigate the harm caused by the dumping or subsidy. If the Secretary decides to implement countervailing measures during this preliminary phase, it must issue a resolution confirming its decision. The resolution must contain the following information: product descriptions and the name of the exporter; details of the dumping activity, the injury and the causal link; the justification for instituting countervailing measures; a description of the measures taken (generally an increase of import duties) and their duration; and instructions to the customs authorities. At any time, the Secretary may suspend or conclude countervailing measures if the relevant exporters or foreign governments offers to engage voluntarily in procedures.
to reduce anti-dumping pursuant to Section 8.4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and Section 18.1 of the Agreement on Subsidies and Countervailing Measures.

After completing their preliminary assessments, the Undersecretariat and the Commission serve notice of their reports on the interested parties. Once they receive service, these parties have 10 days to propose evidence to be offered in support of their positions, which the Undersecretariat and the Commission must then admit or deny, on a relevance basis only, within 10 days. The interested parties then have up to 80 days before the respective final determinations of the Undersecretariat (as to the evidence on dumping or subsidies) and the Commission (as to injury and the causal link between the dumping or subsidy and the injury) to produce the proposed evidence admitted. Both the Undersecretariat and the Commission may investigate the facts in the country of origin after notifying the interested parties of their intention to do so.

On conclusion of the evidentiary stage, all interested parties have 10 days to file their final arguments on the evidence. Conclusion of this period ends the investigatory process.

To issue their final determinations on the evidence of dumping or subsidies and causation, the Undersecretariat and the Commission may take up to 220 and 250 calendar days respectively (from initiation of the investigation). The decisions shall be published in the Official Gazette and served on the interested parties. If either assessment concludes that the claimant has not proved its allegations, the Secretary will close the investigation.

If both assessments conclude that the allegations are proved, the Undersecretariat will send the Secretary a report recommending the application of anti-dumping or compensatory duties. The Secretary then makes its own recommendation to the Ministry of Production, which makes a final determination to be published in the Official Gazette and served on the interested parties.

The Secretary may apply definitive anti-dumping or compensatory duties retroactively to import operations performed up to 90 days before the Ministry of Production’s approval. The maximum term for the prospective application of anti-dumping or compensatory duties is five years.

The anti-dumping or compensatory duties assessed should equal the economic harm inflicted by the dumping or subsidy to neutralise its effect. Exporters that have not sold products into Argentina during the relevant term may file a request for a reduction of any anti-dumping duties with the Undersecretariat. The Undersecretariat must evaluate the request within 120 days and send a report on the same for the Secretary’s review. Within 10 days of receiving the report, the Secretary must issue a recommendation for a final decision of the Ministry of Production, which shall confirm its decision within 20 days.

Decree No. 1,393/08 also authorises measures and procedures to neutralise exporters’ manoeuvres to elude anti-dumping or compensatory duties (e.g., through the export of products similar to those investigated). Definitive anti-dumping or compensatory duties may be reviewed two years after their application or once the established term has elapsed.

Administrative resolutions issued during the process as to the suspension, denial or conclusion of the investigation and any provisional or definitive anti-dumping or compensatory duties are subject to administrative appeals. At the conclusion of the administrative stage, final administrative decisions are subject to appeals before the Federal Courts.
ii Safeguard regulations

Decree No. 1,059/96 regulates and supplements the Argentine government’s implementation of domestic safeguards under the Agreement on Safeguards.

The investigative procedure to determine whether an increase in imports of a given product is causing or threatens to cause serious injury to an industry is carried out by the Secretary, the Commission and the WTO Committee on Safeguards.

The complainant can be an industrial chamber, an individual company or a group of companies representing at least 30 per cent of the national production of the given product to be protected by this procedure. Along with the claim, complainants must file an adjustment plan containing proposed actions to make the relevant industry more competitive and productive.

After receiving the complaint, the Secretary requests technical reports for delivery within 50 days of the Commission analysing whether an increase in imports of a product is causing or threatening to cause serious harm to the industry. The Commission’s report must contain the following information:

a a description of the facts giving rise to the complaint, an analysis of the import increase harming or threatening to harm national production, and the current or potential effects on national production;

b an assessment of the change in the trade balance for the product in the relevant period;

c a comparison of the imported product’s share of the market relative to national production;

d the existence of any commercial agreements with the country of origin;

e an evaluation of the industrial sector with respect to investments, personnel and gross income; and

f an evaluation of the expected results of the safeguards.

Within 20 days of receiving said reports, the Secretary shall decide whether to open an investigation. The Secretary’s decision to commence the investigation shall be published in the Official Gazette and notice of publication shall be sent to the WTO Committee on Safeguards. The resolution must contain the following: the name of the complainant; a description of the imported product subject to investigation; the name of the country of origin; the causal connection between the import increase and the injury or threat of injury; the date of the hearing prior to the close of the investigation period in which interested parties may give their opinion on the necessity and impact of the safeguard measures proposed to protect the public interest; and details of any provisional measures to be taken.

As a provisional safeguard measure, within 15 days of receiving the Secretary’s opinion, the Ministry of Production and Labour Matters may apply increased import duties for a term not to exceed 200 calendar days. If any provisional safeguard measures are revoked, the Customs Administration will reimburse the additional import duties charged.

The time limit for an investigation is nine months; however, this term may be extended for two additional months. During the above-mentioned term, the Commission are charged with gathering evidence from importers, businessmen, producers and consumer associations on which to base their final report. The final report may revise or ratify the initial reports or broaden the arguments contained therein. During the regular or extended term, the Secretary may close the investigation by publishing its decision to do so in the Official Gazette.

Once the Secretary receives the final reports of the Commission, it has 10 days to invite governments of the countries whose exports are involved in the investigation to participate
in a consultation process lasting 60 days. After conclusion of this period, the Secretary issues a report to the Ministry of Production and Labour Matters recommending approval or denial of the requested safeguard measures and addressing the adjustment plan proposed by representatives of the relevant domestic industry sector.

The Ministry of Production and Labour Matters must make a final decision on the proposed safeguard measures within 15 days of receiving the Secretary’s report. The decision shall be published in the Official Gazette and all interested parties along with the WTO’s Safeguards Committee shall receive notice. The Ministry of Production and Labour Matters may implement the following safeguard measures:

a. increased import duties;

b. total or partial import restriction on the relevant products; and

c. any other measures.

Safeguards measures may apply to a product for a period of no more than four years; however, this term may be extended for an additional term up to a maximum of four years. Along with any safeguards to last for a period of more than one year, the Ministry of Production and Labour Matters must concurrently issue a progressive liberalisation programme, the development of which the Secretary is responsible for overseeing. Decisions adopting safeguard measures are not subject to administrative or judicial appeals.

III TREATY FRAMEWORK

Since 1991 Argentina has focused its international trade efforts on the Mercado Común del Sur (Mercosur), a treaty between Brazil, Paraguay and Uruguay and, more recently, Venezuela, the aim of which is to form a customs union. The Mercosur parties agreed the Common External Tariff (CET) on 1 January 1995. Generally, the CET ranges from zero to 20 per cent depending on the product (with an average of 16 per cent). Mercosur will gradually eliminate non-tariff restrictions and other limitations on trade among member countries. With some notable exceptions, Mercosur countries apply no duties to imports from other member nations for approximately 85 per cent of traded goods. Within the context of Mercosur, Argentina is negotiating regional agreements with other Latin American countries, the European Union and other countries.

Argentina, as a Mercosur member, abides by a general system of preferences on goods produced and traded within the Mercosur area. Additionally, Argentina has executed free trade agreements with several Latin American countries, including Bolivia (Acuerdo de Complementación Económica (ACE) No. 36 in 1996), Chile (ACE No. 35 in 1996), Peru (ACE No. 58 in 2005) and Israel in 2007. Mercosur has also executed agreements with India (2004), Egypt (2010) and the Southern African Custom Union (2008). To date, only the Mercosur–India agreement is in force, and none of the other non-Mercosur agreements are yet in force.

Additionally, Argentina has executed preferential trade agreements with Mexico (ACE No. 6 of 2006), Uruguay (ACE No. 57 of 2003), Paraguay (ACE No. 13 of 1992), Chile (ACE No. 16 of 1991) and Brazil (ACE No. 14 of 1990). Argentina has further agreements within the context of Mercosur: Colombia, Ecuador, Venezuela – Mercosur (ACE No. 59 of 2004); Mercosur – India (2004); and Mercosur – Mexico (ACE No. 55 of 2002, related to the automotive industry).
For goods not covered by the above-mentioned agreements, Argentina also provides certain duty exemptions or reductions to members of the Latin American Integration Association. General and special tariff rates are published in the Official Gazette, each publication providing notice of the relevant country, products and tariffs.

On 22 January 2018, Argentina ratified the Trade Facilitation Agreement (TFA) drafted within the framework of the WTO, which had taken effect on 22 February 2017. The TFA is a multilateral agreement aimed at expediting the movement, release and clearance of goods, including goods in transit. On 19 January 2017, Mercosur and the EFTA (European Free Trade Association) executed a joint statement announcing the finalisation of the exploratory dialogue leading to the execution of a free trade agreement (FTA). The eighth round of negotiations took place in Buenos Aires in May 2019.

After more than 20 years of negotiations, on 28 June 2019, the European Union and Mercosur reached a trade agreement, which includes tariffs and customs duties reductions on international trade between the two blocs. The agreed tariff reduction is likely to impact on EU and Mercosur industrial and agribusiness sectors. The agreement includes provisions to facilitate trade between small companies operating in countries of both regions. Governments and parliaments for both regions (and their member countries) will now undertake the legal review and ratification of the agreement.

Argentina and Chile executed an FTA on 2 November 2017. On 11 January 2019, the Chilean Congress ratified the FTA, which entered in force in April 2019. The FTA refers to government purchases of goods and services, improved efficiency in bilateral trade operations, harmonisation of customs regulations, services, investments, e-commerce and bilateral cooperation.

IV RECENT CHANGES TO THE REGIME

On 10 December 2015, the election of a conservative government brought several changes to foreign exchange laws and administrative regulations, including tax and customs rules, which have had a significant impact on foreign trade. These changes included the repeal of nearly all capital controls, the devaluation of the Argentine peso to unify it with several official and black market dollar-peso exchange rates prices, the abolition of most restrictions on foreign currency purchases by Argentine residents, and the adjustment of Argentine customs regulations to the new international trade policy.

Nevertheless, a sustained and deepening economic crisis prompted the government to reinstate export duties (which it had eliminated in 2016) and halt the reduction of duties on soybean exports at 18 per cent plus the export duties described in Section V.

V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

Other than the trade defence instruments applied by Argentina within the framework of the WTO treaties, the Argentine government has implemented the rules and regulations discussed below, many of which will have effects on international trade by Argentina.

i Authorised economic operator

On 1 April 2019, Customs issued General Resolution 4,451 to regulate the authorised economic operator (AEO) system consistent with the World Customs Organization (WCO) Framework of Standards. According to the WCO, AEOs are importers, exporters and related
parties (e.g., brokers, carriers, intermediaries, warehouses) that comply with supply chain
security standards approved by the customs authorities. This new system adapts the original
customs systems of reliable operators, launched in 2017, to meet WCO standards to secure
and facilitate global trade.

ii Export duties on goods and services, and increase of statistics tax
On 4 September 2018, the Executive Branch issued Decree No. 793/2018 to establish a
12 per cent export duty to be levied on exports for consumption of all goods listed in the
Mercosur Common Classification (i.e., all exports from Argentina). The duty was made
effective immediately but is scheduled to sunset automatically on 31 December 2020.

The Decree capped the duty at 4 pesos for every US dollar of the taxable base or the
official FOB price and at 3 pesos for every US dollar of the taxable base or the official FOB
price for goods exported are those included in Annex I of the Decree. The goods listed in
Annex I include (agricultural livestock and its raw material, chemical and organic products,
manufactured and industrial products, and artwork. The Decree removed the 2016 reduction
(0.5 per cent) of the customs duty for soybean products, applying new rates on soybean and
related-product exports of 11 per cent to 18 per cent, with certain exceptions.

The Decree’s validity was challenged on constitutional grounds based on the
non-delegability of legislative powers to the President (Article 76 of the Argentina
Constitution). In filing their challenge, the plaintiffs relied on the 2014 Supreme Court case
Camaronera Patagónica v. Ministerio de Economía y otros s/ amparo. Final ruling on the case
remains pending.

In the meantime, the government resolved the constitutional issue by enacting, on
4 December 2018, the Budget Law (Law No. 27,467). As of 2 January 2019, duties on
exported goods and – for the first time in history – services entered into effect. The duties
apply to all persons providing services and to those assigned the contractual rights for payment
of those services. The Budget Law tracks the earlier Decree to tax the amount of the invoice
(or similar document) at a rate not exceeding 12 per cent. Decree 1,201/18 published on
2 January 2019 likewise capped the export duty to 4 pesos for every US dollar of the taxable
base for services, again calling for the end of the duty on 31 December 2020.

Finally, on 6 May 2019, the Executive Branch issued Decree 332/19 increasing the
statistics tax (an ad valorem tax to finance Customs’ services) from 0.5 per cent to 2.5 per
cent and increase the US$500 cap for this tax to US$125,000. This increase will be in force
until 31 December 2019.

VI TRADE DISPUTES
According to WTO reports,2 Argentina has currently initiated 21 cases as complainant,
mostly against the European Union, Chile and the United States in connection with various
import barriers faced by Argentine agricultural products and biodiesel at those countries’
ports. On the other side of the coin, Argentina was involved in 22 disputes as respondent. For
the most part, these disputes were initiated by the European Union and the United States.

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2 See www.wto.org.
Argentina

They relate principally to measures taken by Argentina to protect the shoe industry, peaches and other agricultural products. Finally, Argentina is currently participating in 62 disputes as a third party.

There have been no new dispute settlements in the past year involving Argentina as correspondent, which reveals the new trade policies adopted by the country are characterised by compliance with WTO regulations.

The most relevant dispute settlements in 2018 and 2019 follow.

i  **DS572: Argentina v. Peru – Anti-dumping measures on import of biodiesel**

On 29 November 2018, Argentina requested consultations with Peru concerning certain anti-dumping and countervailing measures imposed by Peru on biodiesel from Argentina. Argentina’s claim remains in the consultation stage.

ii  **DS537: Canada – Measures governing the sale of wine**

On 12 January 2018, Australia requested consultations with Canada concerning measures maintained by the Canadian government and the Canadian provinces of British Columbia, Ontario, Quebec and Nova Scotia governing the sale of wine. This request for consultations follows earlier requests for consultations submitted by the United States (DS520 and DS531) pertaining to measures maintained by the Canadian province of British Columbia governing the sale of wine in grocery stores.

On 17 January 2018, New Zealand requested to join the consultations, followed by the United States on 19 January 2018, Argentina and the European Union on 25 January 2018, and Chile on 26 January 2018. Subsequently, Canada informed the dispute settlement board (DSB) that it had accepted the requests of Argentina, Chile, the European Union, New Zealand and the United States to join the consultations.

On 13 August 2018, Australia requested the establishment of a panel. At its meeting on 27 August 2018, the DSB deferred the establishment of a panel.

At its meeting on 26 September 2018, the DSB established a panel. Argentina, Chile, China, the European Union, India, Israel, Korea, Mexico, New Zealand, Russia, South Africa, Taiwan, Ukraine, the United States and Uruguay reserved their third-party rights.

On 25 February 2019, Australia requested the Director General to compose the panel. On 7 March 2019, the Director General composed the panel.

On 24 April 2019, the chair of the panel requested the DSB in separate communications to circulate to members the panel’s working procedures, as well as a partial timetable.

**VII OUTLOOK**

The December 2015 elections harboured a major shift in Argentina’s trade policies. Nevertheless, in this final year of the government that was elected in 2015, Argentina is enduring a prolonged economic crisis, worsened by the currency crisis in May 2018 that forced the government to borrow money from the International Monetary Fund and agree to major adjustments to its economic plan. The three bugbears of Argentina’s past – inflation, recession and devaluation – have forced the government to abandon the path of ‘gradualism’ toward budget reform comprising the increase of revenue and reduction of spending.

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www.wto.org/english/tratop_e/dispu_e/cases_e/ds572r_e.htm.
to close the government’s increasing budgetary gap, the president announced the need to sustain export duties on soy and other commodities and to levy similar duties on all other exports, reversing government policy. This eventually led to the 2018 decision to tax not only exports of goods but also, for the first time in Argentina’s history, services.

Continuous devaluation of the peso responded partially to international competition. Even though in 2018 the trade deficit was reduced compared with 2017 (from US$8.47 billion to US$3.88 billion), this has not changed Argentina’s continuing thirst for hard currency such as the US dollar.

This volatile context has been further exacerbated by the looming 2019 national elections in which the incumbent conservative coalition is faced with serious challenge from the same populist party that governed between 2003 and 2015. The uncertainty about the outcome has the international trade community in jitters, many convinced that a change in the government will quickly return Argentina to the foreign trade policies of the first 15 years of this century.
Chapter 3

BRAZIL

Fernando Benjamin Bueno and Milena da Fonseca Azevedo

I OVERVIEW OF TRADE REMEDIES

Brazil is the ninth-largest economy in the world. The country coped well with the first years of the global economic crisis in comparison to other players, mainly owing to continuing domestic and foreign demand (especially Chinese demand for commodities). More recently, Brazil has had significant exports gains with agricultural products as a result of trade wars, especially the one related to the United States and China. Nonetheless, in the past couple of years, Brazil has been severely affected by an economic crisis and instability. In 2018, the country’s trade balance reached a surplus of US$58,298 billion, 13 per cent lower than the trade balance of the past year. The World Bank’s 2018 data and projections indicate that Brazil is expected to expand 2.2 per cent in 2019 ‘assuming fiscal reforms are quickly put in place, and that a recovery of consumption and investment will outweigh cutbacks to government spending’.

The new President of Brazil is guiding the country to an economic liberal administration (2019–2022). The government expects to align trade and economic policies. To do that, the government has conducted a ministerial reform. The former Ministry of Treasure, the Ministry of Labour, the Ministry of Planning, and the Ministry of Industry, International Trade and Services form the new Ministry of Economy. That is, the Ministry of Economy has the ‘control’ of all factors of production.

Brazil has been a WTO member since its creation in 1995 and has adopted trade remedies provided in the WTO Agreements to take corrective action against imports that, in general, are causing material injury to a domestic industry.

Trade remedies are broadly divided into anti-dumping, countervailing and safeguard measures. The most commonly used in Brazil are anti-dumping measures, imposed in more than 382 cases from 1988 to 2018. In the same period, countervailing measures were imposed in 12 cases and safeguard measures in six.

In 2014, Brazil ranked as the top imposer of anti-dumping duties according to the WTO, when the country initiated 45 anti-dumping investigations and imposed more than 40 anti-dumping measures. However, Brazil is experiencing a slowing down in trade remedy

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cases initiations, as the number of cases in 2015 decreased to 38 and in the following year to 24. As at June 2019, only 22 cases have been initiated, four new investigations and 18 sunset reviews.

On the international front, Brazil was a target of 21 new trade remedies in 2018, which resulted in the application of 44 trade defence measures against the country’s exports in the same year. The steel industry is still one of the most affected sectors with 24 measures applied against Brazilian exports. Brazilian poultry and sugar products have been targeted by China recently. The recent ‘trade war’ may affect other Brazilian exporter sectors.

Additionally, mechanisms designed to guarantee the effectiveness of trade remedies, such as anti-circumvention measures and investigations of origin, are being used more frequently.

According to the WTO report on G20 trade measures, from October 2018 to May 2019 there was a significant increase on import restrictive measures taken by G20 countries considering the value of trade. Nonetheless, Brazil is enforcing trade facilitation measures. Brazil is fulfilling its WTO commitments and implementing the Trade Facilitation Agreement to increase transparency and efficiency of customs and other procedures related to trade.

Brazil launched the Single Window web portal in 2017, which gathers online information that exporters and importers might need. It has significantly reduced time and paperwork necessary to complete customs procedures as it allows users to run simulations to get to know the administrative treatment, measures and tariffs applied to the product. The portal has been implemented in steps. In 2018, the portal was expanded to attend exports under the scope of drawback suspension. The country is also successfully implementing the authorised economic operator programme, which accredits operators that meet safety criteria and comply with customs requirements. Consequently, it triggers faster procedures and reduces the time necessary for port operations. The programme has been improved and is passing through some simplifications to expedite the certification process under the standard of international organisations.

II LEGAL FRAMEWORK

i Anti-dumping measures

In Brazil, the imposition of anti-dumping measures is set out by Decree 8,058 of 2013, which abides by the rules set forth by Article VI of the GATT 1947 and the WTO Anti-Dumping Agreement.

The agency responsible for conducting anti-dumping investigations is the Subsecretariat of Trade Defence and Public Interest (SDCOM), part of the Secretariat of Foreign Trade (SECEX), both of which are subordinate to the Ministry of Economy. The SDCOM is the authority responsible for both dumping and injury examinations.

7 https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DF.aspx?language=E&CatalogueIdList=119452 &CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.
An anti-dumping investigation in Brazil starts when local producers or business associations file a written petition with the SDCOM setting out evidences of dumping, injury to the domestic industry, and the causal link between the dumped imports and the alleged injury.

The dumping period shall be of 12 months, ending in March, June, September or December. Regarding the period for injury analysis, it shall comprise 60 months, divided in five periods of 12 months, given that the most recent period must be the same as the dumping period. Exceptionally, it can be of up to 36 months but no less than that.

Once accepted, the merits of the petition are reviewed and the investigation is initiated. Investigations must be concluded within 10 months of the initiation date, subject to an additional eight-month extension under special circumstances.

During the investigation, known interested parties are notified and have sufficient opportunity to present in writing any related evidence. Upon prior authorisation, the SDCOM may conduct on-the-spot investigations at the facilities of all parties (domestic industry, importers, foreign producers and exporters) to verify the information submitted.

Parties may also request confidential treatment of special information, provided they present sufficient arguments and a non-confidential summary that allows a reasonable understanding of the information. The SDCOM stores all confidential documents in special files.

However, if a party fails to provide information in a timely manner denies its access or creates obstacles to the investigation, the preliminary and final determination shall be made based on the best information available.

Additionally, within five months of the initiation of the investigation interested parties may request hearings pointing out the specific themes to be discussed. Nevertheless, attendance of the hearing is not mandatory.

According to the decree, within 120 days of the initiation of the investigation, the SDCOM provides a preliminary determination about dumping, injury and causal link. The Subsecretariat may recommend to the Special Secretariat of International Trade and Foreign Affairs (SECINT), which is under the Ministry of Economy, the imposition a provisional measure on imports of the product under investigation, providing that: (1) all interested parties have had opportunity to express their opinions about the investigation; (2) dumping, injury and causal link to the domestic industry are affirmatively determined on a preliminary basis; and (3) authorities understand that such measures are necessary to prevent any injury during the course of the investigation.

In case the provisional duty is applied and certain criteria are met, such as the rapid increase of imports after the investigation, a retroactive collection of the anti-dumping duty of up to 90 days may be imposed on the imports.

During the investigation, exporters may undertake satisfactory obligations to adjust prices or to cease exporting at dumping prices. The SECEX should accept and SECEX must accept this price undertaking. In this case, the dumping proceeding may be terminated or suspended with no imposition of duties.

At the end of the investigation, the SDCOM issues a final determination regarding the existence of dumping, injury and the causal link between them, recommending or not to SECINT the imposition of a definitive duty. Such anti-dumping duties are not imposed under the following circumstances: (1) insufficient evidence of dumping or injury caused by the dumping; (2) the dumping margin is de minimis (less than 2 per cent); and (3) the
volume of imports subject of actual or potential dumping, or injury is insignificant. In case of a positive recommendation from the SDCOM, SECINT can decide on the imposition of the duty.

According to the decree, companies that fully cooperated in the original investigation are entitled to a lesser duty that is, the anti-dumping duties imposed shall be less than the margin of dumping where such amount is sufficient to remove the injury to the domestic industry caused by the dumped imports.

Anti-dumping duties and price undertakings remain in force as long as needed to mitigate dumping and the resulting injury. However, these duties cease five years following imposition, subject to extension, through a sunset review procedure if there is evidence that its extinction could result in dumping and injury to domestic industry.

In addition to the sunset review, the regulation also provides for a change in circumstances review (interim review). Regarding the scope and collection of the duty, procedures for new shippers’, anti-circumvention and reimbursement reviews are set forth in the decree. In addition, the legal text provides for product scope and redetermination review, in case the effectiveness of an anti-dumping measure is compromised.

**ii Subsidies and countervailing measures**

The application of countervailing measures in Brazil is governed by Decree 1,751 of 1995, which is based on the WTO Agreement on Subsidies and Countervailing Measures.

An investigation starts when local producers or business associations file a written petition with the SDCOM setting out evidences of subsidies, injury to the domestic industry, and the causal link between the subsidised imports and the alleged injury.

During the investigation, known interested parties are notified and have sufficient opportunity to present in writing any related evidence. Investigations must be completed within a year of the initiation date, subject to an additional six-month extension under special circumstances.

Prior to completion of the procedure, but never less than 60 days from initiation, the authorities may issue a preliminary determination and impose provisional measures on imports under investigation, provided that: (1) all parties have expressed their opinions about the petition; (2) actionable subsidies and injury to the domestic industry are affirmatively determined on a preliminary basis; and (3) authorities understand the measures are necessary to prevent any damage during the course of the investigation. Measures may be imposed by paying an additional amount to the import tax or granting a guarantee. Unlike the anti-dumping regulation, a preliminary determination is not mandatory.

Additionally, before the final report, which provides grounds for the final determination, there is a final hearing, whereby parties are informed of the essential facts under judgment. Afterwards, parties may submit their final arguments within 15 days.

During the investigation, the export country may, of its own decision, undertake satisfactory obligations to eliminate or reduce the subsidy, adopt an alternative measure to offset the effects and have exporters agree to a review of prices. Should the SECEX accept and approve such undertaking, the investigation may be terminated or suspended with no imposition of countervailing duties.

Countervailing duties are imposed when the SDCOM finds that an actionable subsidy, injury and causal link occurred; and the SECINT accepts the SDCOM’s recommendation.
on the imposition. The amount of duty stipulated should never exceed the amount calculated of the actionable subsidy. Unlike the anti-dumping regulation, there is no provision on the obligation to apply the lesser duty rule.

On the other hand, definitive duties are not imposed under the following circumstances: (1) insufficient evidence of the occurrence of actionable subsidy or injury resulting therefrom; (2) the amount of actionable subsidy is de minimis; or (3) the volume of imports subject to actual or potential dumping, or injury is insignificant.

Countervailing duties remain in force as long as needed to mitigate or to prevent material injury. However, duties cease five years following imposition, subject to extension if there is evidence that the extinction of such could result in injury to national industry.

iii Safeguard measures

The imposition of safeguard measures in Brazil is governed by Decree 1,488 of 1995, which abides by the rules set forth by Article XIX of the GATT 1947 and the WTO Agreement on Safeguards.

A safeguard investigation submission shall be filed in writing with the SDCOM. The petitioner has to present sufficient elements of evidence regarding increases in imports, serious injury or threat of serious injury and causal link of both.

During a safeguard investigation, the interested parties have the opportunity to submit any evidence that might be relevant. Parties may request confidential treatment of special information, if they present sufficient arguments and a non-confidential summary that allows a reasonable understanding of the information. The SDCOM keeps confidential documents in special files. Moreover, hearings may be scheduled, but are not mandatory.

In critical circumstances, where a delay would cause damage that might be difficult to repair, it is possible to impose a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury.

Consultations with countries involved must be initiated immediately after the provisional measures. It shall be applicable for 200 days at most and may be suspended once authorities decide before the 200-day period. In the case of definitive safeguard measures, the period applicable in the provisional measure shall be accounted for the first one.

Similarly to the proceeding for anti-dumping and subsidies investigations, the SDCOM issues a final determination recommending a safeguard or not. Then, if the SECINT accepts it, a safeguard is imposed.

Safeguard measures remain in force only to the extent necessary to prevent or remedy serious injury and facilitate adjustment of the domestic industry. It may take the form of an additional tariff, ad valorem or ad rem (specific), to the MERCOSUR External Tariff (TEC) or quantitative restriction. However, such measures cease four years following imposition.

Measures may be extended if there is evidence that: (1) they are still necessary to prevent or remedy serious injury; and (2) the domestic industry is not adjusting in accordance with the agreements settled with the government. Nevertheless, the entire duration of the measure will never exceed 10 years. Measures extended shall not be more restrictive than the ones that were in effect initially, and shall continue being liberalised.
Circumvention and non-preferential rules of origin

In order to guarantee the effectiveness of the trade measures in force, Brazil issued anti-circumvention rules: CAMEX Resolution 63 of 2010, SECEX Order 21 of 2010, SECEX Order 14 of 2011 and SECEX Order 42 of 2013. The anti-dumping decree and SECEX Order 42 of 2013 provide rules for anti-circumvention in anti-dumping cases. The anti-circumvention investigations are initiated at the request of any interested party of the original investigation, such as the domestic industry, producers, the government of the exporting country, Brazilian importers, companies responsible for the manufacturing operation or other parties as decided by the SDCOM or by the SECEX. Once accepted, the merits of the petition are reviewed and the investigation is initiated. The investigations must be concluded by the SDCOM within six months of the start date, subject to an additional three-month extension under special circumstances.

Brazil has established legislation for non-preferential rules of origin of trade policy, regulated by Law 12,546 of 2011, CAMEX Resolution 80 of 2010, SECEX Order 38 of 2015 and RFB Normative Instruction 1169 of 2011. The procedure certifies the origin of imported goods and intends to curb avoidance of anti-dumping measures through minor product modifications in third countries. As a general rule, Brazil applies the wholly obtained and tariff jump criteria, which aim to prevent fraud in the declaration of origin. Therefore, according to the legal text, the country of origin is the one in which the last substantial transformation was carried out. It also establishes a substantial transformation test as a change in tariff classification (four digits level) but excludes mere assembling, packaging, fractioning in lots, selecting, marking or diluting from being considered a substantial transformation even if they change the tariff classification. Since then, numerous investigations to examine the origin of products have been initiated.

III TREATY FRAMEWORK

Brazil is a member of the Latin American Integration Association (ALADI), which was instituted in 1980 through the Montevideo Treaty to promote economic and social development, harmony and balance throughout the region.  

As an ALADI member, all Brazilian exports to other members are granted with a minimum tariff preference called the regional tariff preference. ALADI members are Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela. Additionally, Brazil has entered into free trade agreements and economic mutual assistance agreements (ACE) with several ALADI members, in which higher tariff preferences were negotiated.

Brazil also executed the Mercosur Treaty on 26 March 1991, in Asuncion, Paraguay, which intended to constitute a common market between the founders Brazil, Argentina, Paraguay and Uruguay. In August 2012, Venezuela became a full member, and in July 2015 Bolivia also joined Mercosur and is currently in the accession process. In December 2017, the Brazilian Representation in the Mercosur Parliament approved the accession. However, the analysis of the Brazilian Congress, which will finalise the process, is pending. The trade
bloc associate members are Chile (since 1996), Peru (2003), Colombia and Ecuador (2004), and Guyana and Suriname (2013). Through ACEs, the goal is to establish a free trade zone throughout Mercosur and with all associate members.10

Since 1 January 1995, there have not been tariff barriers between Mercosur member countries. Therefore, products originating in one member country and sold in other countries are not subject to customs duties. Furthermore, a customs union was established to take effect on the same date. Mercosur members have adopted the common external tariff (TEC), based on the Mercosur common nomenclature (MCN) to unify the import duties levied on each MCN code and, consequently, prevent cash-flow deviations in trade. The TEC acts as the bedrock for the Mercosur integration process. This tariff covers the majority of products imported from non-member countries.

Mercosur and India signed a fixed tariff preference agreement in 2004, enacted by Brazil in June 2009. This agreement is currently being expanded, and the Brazilian government initiated a public consultation in 2013 to map the private sector's interests at stake. In 2009, Mercosur signed a trade preference agreement with the South African Customs Union, which entered into force in 2016.

Brazil, as a Mercosur member, enacted its first free trade agreement with a non-member, Israel, in 2007, which entered into force in 2010. It also signed an FTA with Egypt in 2010, and in the following year an agreement with Palestine. The agreement with Palestine is still under the internalisation process and Brazil already internalised the FTA with Egypt in 2015.11

New free trade agreements have become a priority in recent years, especially since the new presidency took office. Brazil now intends to gain greater access to markets through trade arrangements. On 28 June 2019, after 20 years of negotiations, Mercosur and the European Union reached an agreement for an FTA.

In 2015, Brazil opened public consultations to map out the industry's interest in new agreements to be negotiated with Mexico, Cuba, Canada, Lebanon, Tunisia and the EFTA (Iceland, Liechtenstein, Norway and Switzerland). In 2017, new consultations were opened for agreements to be negotiated between Mercosur and South Korea and Mercosur and Japan, focusing specifically on tariff reduction. Brazil and Mexico are negotiating the expansion of the agreement (ACE-53), focusing on market access, services, trade facilitation, rules of origin, sanitary and phytosanitary measures, technical barriers and dispute settlement. An expansion agreement with India is also being negotiated.

In March 2018, Brazil officially launched negotiations with Canada, and the first negotiation round occurred later that month. The CAMEX approved negotiations with Singapore in July 2018. In October 2018, Brazil and Chile concluded a free trade agreement negotiation under ACE-35. The agreement includes tariff reduction and other non-tariff subjects, such as services, digital trade, telecom, sanitary and phytosanitary measures; technical measures trade facilitation, intellectual property and small and medium enterprises. It is the first agreement in which Brazil assumes obligations on digital trade, good regulatory practices, corruption, global value chains, gender, environment and labour subjects.

IV RECENT CHANGES TO THE REGIME

Brazil is going through relevant structural and legal changes. New elected president Jair Bolsonaro shrunk the government structure, deeply affecting the international trade policy structure. In the new structure, the Ministry of Economy will play a major role in Brazil’s foreign trade policy.

The Ministry of Economy will be responsible for, among others, the supervision, control, regulation and execution of programmes and activities related to foreign trade; the application of trade remedies mechanisms; participation in international negotiations on foreign trade and in economic and financial negotiations with governments and multilateral bodies; and the development of industrial, trade and services policy. These functions are largely concentrated in the new SECINT. The Special Secretariat encompasses the Executive Secretariat of the Foreign Trade Chamber, SECEX and the Secretariat of International Economic Affairs.

The SECINT is now responsible for imposing trade remedies. The SDCOM will be responsible for conducting trade remedies and public interest investigations. In the previous structure, the trade remedies investigations were conducted by the Ministry of Industry, Foreign Trade and Services, while public interest investigations were conducted by the Ministry of Treasury.

The SECINT is also responsible for determining import duty rates. The Subsecretariat of Trade Strategy will be responsible for the elaboration of a National Tariff Structure Review Proposal, including tariffs modifications.

V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

Decree 9,107 of 26 July 2017 establishes the deadline and requirements applicable to fragmented industries in trade remedies proceedings (dumping, subsidies and safeguards). A fragmented industry is composed of an exceptionally large number of domestic producers and usually comprises a significant number of small and medium-sized enterprises, which are granted preferential and differential treatment by the Brazilian constitution. For its turn, Ordinance SECEX No. 41 of 31 July 2018 regulates the qualification of a domestic industry of a particular product as a fragmented industry in the proceedings. Fragmented industries have softer criteria to prove standing to file a trade remedies case, and with this new regulation, it will have more time to file a case (at most, 10 months after the end of the period of investigation), while in a regular case, the petitioner has four months at most to file a case after the period of investigation.

A major change in subsidies investigations is also expected. The decree in effect was the subject of a public consultation at the beginning of 2014. The authority received several suggestions from industry associations, as well as from a lawyers’ association and a consulting firm. However, no changes have yet been made. The same change is expected in the safeguards decree. In December 2017, the Brazilian government made a public consultation of a decree draft on safeguards. The main associations that use trade remedies presented their views. As part of the trade remedies’ modernisation, the subsidies and safeguard proceedings were made electronic in June 2018.

On 17 April 2019, Ordinance No. 8 of 15 April 2019 was published, and it is already in force, providing the administrative procedures for the assessment of public interest in cases involving trade remedies. The Ordinance is under public consultation and the authority received contributions up to 31 May 2019. Jurisdiction for such assessments has shifted to
organs included in SECINT, responsible for the decision on the existence of public interest, as well as the SECEX and SDCOM, responsible for technical analysis of the public interest. The establishment of the new Ordinance aims for the convergence of procedural deadlines for public interest and trade remedy assessments. As a result, the assessment of public interest will occur during investigations of anti-dumping, countervailing or reviews in progress. In other cases, if there is evidence that the circumstances justifying the application of the trade remedy have changed, an administrative review can be requested under the respective legislation in force. Preliminary public interest assessment is now mandatory in original dumping or subsidy investigations, but optional in the case of sunset reviews, at SDCOM’s discretion, or based on a public interest questionnaire submitted by interested parties. A final version of the ordinance incorporating the contributions of the public consultation should be published in the second semester of 2019.

Additionally, the Superior Justice Court, by the Federal Jurisdiction Council, formally recommended that federal courts should have specialist competition and international trade law judges.\(^\text{12}\) Trade remedies measures may be challenged at a judicial level; however, they are usually challenged at an administrative level.

VI TRADE DISPUTES

Brazil is an active participant of the Dispute Settlement Body. In addition to being a complainant and respondent in several cases, the country participates as a third party in many cases.

Certain Brazilian measures concerning taxation and charges in the automotive, electronics and technology industries in Geneva, and other measures that potentially affect Brazilian exporters was challenged under the WTO. A first case against these measures was filed by the European Union in 2013 (DS472), and a second case was filed by Japan in July 2015 (DS497). The Appellate Body issued the final report on December 2018 to bring into conformity the measures related to electronics and automotive incentives. On the other side, the Appellate Body reversed the findings of subsidy related to programmes related to exporters (PEC and RECAP) and concluded that these programmes comply with WTO agreements.

In 2017, Brazil requested consultations with Canada regarding trade in commercial aircraft (DS522). As per the request, Canada granted substantial subsidies to aircraft producers in the form of loans and other financial contributions, which are prohibited and actionable subsidies. The consultations received requests to join by China, the United States, the European Union, Singapore, Russia and Japan. The panel was composed on 6 February 2018.

Most recently, Brazil requested consultations against China concerning the safeguard measure imposed by China on imported sugar, China’s administration of its tariff-rate quota for sugar and China’s import licensing system for out-of-quota sugar (DS568). The European Union, Thailand and Guatemala requested to join consultations.

Finally, Brazil requested consultations on 27 February 2019 against subsidies to producers of sugar cane and sugar in India (DS579). In March, Guatemala, Costa Rica, the European Union, Australia and Thailand requested to join consultations.

\(^{12}\) [www.in.gov.br/materia/-/asset_publisher/Kujrw0TZC2Mb/content/id/19111746/do1-2017-06-12-resolucao-n-445-de-7-de-junho-de-2017-19111694](www.in.gov.br/materia/-/asset_publisher/Kujrw0TZC2Mb/content/id/19111746/do1-2017-06-12-resolucao-n-445-de-7-de-junho-de-2017-19111694).
VII OUTLOOK

The European Union, the United States, China and Argentina remain Brazil’s main partners in bilateral trade flow imports. Brazil is expected to remain a major player in the global trade of certain agricultural commodities, and it is expected that there will be an end to manufacturing sector’s decline in its share of the GDP.

The manufacturing industrial sector expects to continue to face hard times in terms of competitiveness. Nonetheless, recent measures adopted by the companies to face crisis challenges, recently sanctioned amendments to the labour law, and possible other reforms under discussion on social security and tax may ensure the industry better conditions to compete in local and foreign markets. Government actions to facilitate trade and grant market access may also drive companies’ strategies in the international trade area.

As a part of Brazil’s new economic and trade policies, it seeks to accede to the Organisation for Economic Co-operation and Development. The new trade policy focuses on reducing some import duties, improving Brazilian exports competitiveness, facilitating trade, and negotiating free trade agreements. Trade remedies appears to have not been given the same priority as in past governments; however, it would possibly continue to play a relevant role, depending on the evolution of trade flows, especially the ones related to unfair trade. On the export front, Brazil has actively supported Brazilian exporters facing trade remedies investigations.

China’s market economy status is still a major issue in the trade remedies area in Brazil. As other countries, Brazil currently does not recognise China as a market economy. After the expiration of the provision set forth in China’s Protocol of Accession to the WTO on 11 December 2016, Brazil has placed itself in a position to wait for other countries’ positions and is closely following challenges brought by China against the European Union under the WTO’s Dispute Settlement Body. As at June 2019, it had initiated 16 sunset review and two new original cases against China. SDCOM is analysing China’s market economy status on a case-by-case basis, considering evidence regarding whether the investigated product or sector is under a market economy environment or not.
Chapter 4

CHILE

Ignacio García and Andrés Sotomayor

I  OVERVIEW OF TRADE REMEDIES

Chile has been widely recognised as one of the global leaders in economic freedom, constantly fostering international trade. Chile is a party to the Marrakesh Agreement and was one of the founding members of the WTO and has since become an active promoter of free trade.

Therefore, trade defences are exceptional mechanisms that have only been activated after thorough investigations and in consideration of technical arguments.

Except for a few cases, all imports are subject to a most-favoured-nation duty of 6 per cent *ad valorem*, and used goods shall pay an extra 50 per cent of that duty. In addition, a value added tax of 19 per cent is charged over *ad valorem* value of products. Preferences are granted only in consideration of country of origin and tariff classification of certain product. Exports, on the other hand, do not pay any tax or duty.

Importers are not subject to any licensing. However, if FOB value of the importation is more than US$1,000, customs clearance shall be made through a customs agent, which is an auxiliary of the public service, in particular the National Customs Service, licensed to represent third parties in the clearance of the imported goods.

Restrictions on certain goods are applicable only based on health, international obligations (such as the Montreal Protocol) or national security reasons.

As a consequence of the above, and other measures implemented by the Chilean authorities, the system effectively promotes worldwide international trade.

However, in order to prevent actual or imminent severe damage to domestic industry and production, safeguards, anti-dumping and countervailing duties are applicable as trade remedies after a regulated proceeding.

Those mechanisms are included in free trade agreements, following WTO Agreement principles, with minor adjustments on a case-by-case basis.

For example, the National Commission in Charge of Investigating the Existence of Price Distortions on Imported Goods (the Commission) has recently finished an investigation on dumping of imports of steel grinding bars with a diameter of less than four inches from China, and the authority decided to apply anti-dumping duties of 5.6 per cent (excluding one specific exporter). The measure will expire on 23 May 2019.

There are no measures currently effective concerning safeguard or countervailing duties.

The procedure to adopt safeguards, anti-dumping or countervailing duties is properly regulated and in accordance with WTO principles.

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The procedure can be initiated by complaint by those affected by dumping or subsidies, or by request by those affected by safeguards.

A complaint for dumping or subsidies shall be submitted by the industry of domestic production, whose collective production represents more than 50 per cent of the total production of the similar product. For safeguards, the request shall be submitted by the industry of domestic production affected by serious injury or threat thereof, namely all producers of similar or competitive products, or those whose collective production of similar or directly competitive products constitutes a major proportion of the total domestic production.

In exceptional cases, an investigation may be initiated ex officio by the Commission, when there are grounds to initiate it.

Complaints and requests must be addressed to the President of the Commission and submitted to the Technical Secretariat of the Commission, providing evidence to support that there is:

a) distortion on prices causing significant actual or imminent damage to the domestic industry, in case of dumping and subsidies; or

b) an increase of imports and how it causes or threatens to cause damage to the similar or directly competitive domestic production, in case of safeguards.

Upon receipt of the claims, the Commission reviews the evidence and determines whether there is sufficient merit to initiate an investigation, publishing an abstract of it in the Official Gazette if declared admissible. Otherwise, the inadmissible decision is notified to the complainant.

Once the Commission has decided to initiate an investigation, it should be notified to the government of the country involved and to the accused companies in case of dumping; to the government of the country involved in case of subsidies; and to the Safeguards Committee of the WTO and to the countries with which Chile has signed trade agreements in case of safeguards.

Investigations of dumping and subsidies must be concluded within one year, and in any event within 18 months, except in exceptional circumstances. On the other hand, the Commission must conclude safeguards investigations within 90 days.

During the investigation, the Commission can recommend to the President of the Republic, through the Minister of Finance, the application of provisional measures. These measures are implemented through the enactment of a presidential decree. Likewise, anti-dumping and countervailing duties may be implemented after 60 days from the date of initiation of the investigation, and cannot exceed four months, or six months in qualified cases. Safeguard measures may be implemented within 30 days of the start of the investigation and cannot exceed 200 days.

During the course of the investigation, the Commission sends a questionnaire to the interested parties with details of the information required and how answers should be structured. Moreover, the Commission may require additional information from the complainant or petitioner, and other interested parties, which may submit additional information for a better resolution of the case.

The Commission shall protect confidential information provided during the process, if there are grounds to grant that status. To disclose such information, the Commission shall request express permission of the party that has provided it.
Public hearings may be organised whenever the parties request to present arguments, expose opinions and discuss the information provided by other parties. However, any information given orally must be submitted in writing and made available to other interested parties.

In dumping or subsidies investigations, and in accordance with Annex 1 of the Article VI GATT Agreement and Annex VI of the Subsidies and Countervailing Measures Agreement, the Commission may carry out investigations in a foreign territory to verify information provided or to obtain further details, if the foreign country authorises it.

Based on the information collected during the investigation, the Secretariat prepares a technical report, which is confidential, that provides the necessary elements for the Commission decision regarding the existence of price distortions or increased imports and how they affect domestic production. In addition, specialised studies may be requested if necessary.

To allow participation and for transparency purposes, the Commission will publish every preliminary decision, but without affecting confidential treatment of the relevant information.

To conclude the investigation, the Commission may recommend not to apply a measure because there is no distortion or excess of imports. In this scenario, the Commission issues a resolution ending the investigation, which is published in the Official Gazette. On the other hand, if the Commission recommends the application of a definitive measure, it should submit its recommendation and its background to the President of the Republic, through the Minister of Finance, for a decision. The President, if in agreement with the recommendation, shall enact a presidential decree instructing the implementation of the recommended measure, publishing it in the Official Gazette.

Regarding the duration of measures, it depends. Anti-dumping and countervailing duties cannot exceed one year from the publication of the presidential decree in the Official Gazette. Moreover, the recommended measure cannot exceed the margin of distortion. On the other hand, safeguard measures cannot exceed two years from the publication of the presidential decree in the Official Gazette, and are renewable for a maximum of two years. If provisional measures were applied during the investigation, the period of two years is counted from the date of publication of the decree that ordered such measures.

There is no specific appeal procedure against trade remedy decisions. However, general administrative regulation applies, according to which the affected party has several available actions to dispute the measure.

First, there are administrative actions to be submitted before the Commission or its superior, the Minister of Economy. Both actions (reconsideration and hierarchical appeal, respectively) may consider legal or policy issues and must be submitted within five days of the publication of the measure. Another administrative action would be a presentation made by anyone before the General Comptroller (an independent entity) to discuss the legality of a resolution. It is a short procedure where the controller agency requests information from the affected agencies and renders a decision.

It is also possible to exercise jurisdictional actions. The action for annulment is an action before a civil judge (Ordinary Courts of Justice). The trial will follow the rules of the general procedure, and is therefore a long discussion that could take years. However, the plaintiffs may ask for precautionary measures to avoid the effects of the contended act.
The argument for the claim in this case would be an administrative act against the law or the Constitution, therefore it is just a legal claim and not a policy issue. Even though theoretically there is no statute of limitation for this action, the courts have said that the general rules should be applicable, hence the statute of limitation is five years.

A constitutional claim is a claim before a Court of Appeals for a breach of some of the constitutional rights established in Article 19 of the Chilean Constitution. The claim must be filed within 30 days of the publication of the administrative act. This a simple and short procedure where the Court decides after receiving the report of the affected agency.

Finally, it is possible to file an economic constitutional claim within six months of an act’s publication before a Court of Appeals, claiming an infringement of the constitutional right to develop legitimate economic activities established in Article 19 No. 21 of the Constitution.

All of the above-mentioned actions (except for the one before the General Comptroller) require an affected right or a legitimate interest of the plaintiff.

II LEGAL FRAMEWORK

Customs procedure and rules can be found mainly in the Customs Ordinance, the Chilean Customs Rules Compendium and the Chilean Tariff Code, which is based on the Harmonised Commodity Description and Coding System.

On the other hand, the legal framework on trade defence is based on the WTO Agreements. Moreover, Supreme Decree No. 16 enacted in 1995 incorporated into Chilean legislation the Anti-dumping Agreement, the Safeguards Agreement, the Agreement on Subsidies and Countervailing Measures, and GATT Articles VI and XIX.


Moreover, Decree No. 1,314 of 2012, of the Ministry of Finance, regulates the procedure to claim and request safeguards, anti-dumping and countervailing measures.

Finally, Chile is part of 28 trade agreements where trade remedies are included, and those agreements, once approved by the Congress, will be incorporated in the Chilean legal system.

III TREATY FRAMEWORK

Considering the necessity of having clear rules and principles of international trade, Chile is a founding member of the WTO and the Marrakesh Agreement was adopted through Decree No. 16. In addition, Chile is member of other WTO Agreements such as the Trade Facilitation Agreement and the Agreement on Government Procurement.

On the other hand, Chile has subscribed to four categories of commercial agreements, which differ in coverage and in the degree of commitment. The first kind of agreement would be the partial scope agreement, which refers to a limited group of goods with preferential tariff treatment, which is the case for the agreement with India. The second group is the economic complementation agreement, which liberalises trade in goods and has deeper obligations, such as the case of the agreements with Bolivia, Ecuador and MERCOSUR, among others. The third kind of agreement is the free trade agreement, which aims at establishing a free trade zone between countries, which is the case for the agreements with the United States,
Chile has subscribed commercial agreements with the following countries: Australia, Bolivia, Canada, China, Colombia, Cuba, Ecuador, Hong Kong, India, Japan, South Korea, Malaysia, Mexico, Panama, Peru, Thailand, Turkey, the United Kingdom, the United States, Venezuela and Vietnam. Moreover, Chile has concluded negotiations for another partial scope trade agreement with India, and is currently conducting negotiations for a strategic association agreement with Indonesia.

Furthermore, Chile is member of the following regional agreements:

- **Centro América** (Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua);
- **EFTA** (Iceland, Liechtenstein, Norway and Switzerland);
- **MERCOSUR** (Argentina, Brazil, Paraguay, Uruguay and Venezuela);
- **P4** (Brunei Darussalam, New Zealand and Singapore);
- **European Union** (Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden); and
- **Pacific Alliance** (Colombia, Mexico and Peru).

### IV RECENT CHANGES TO THE REGIME

Law No. 18,525, enacted in 2011, which refers to trade remedies, has recently been amended, as well as the new regulation for trade remedies proceedings, established in Decree No. 1,314, which replaced Decree No. 575 of 1993 for anti-dumping and countervailing duties, and replaced Decree No. 909 of 1999 for safeguard measures.

The amendment to Law No. 18,525 increased the period of time in which a safeguard may be implemented. The WTO Agreement establishes a maximum period of eight years, considering extensions. Formerly, Law No. 18,525 allowed only for one year with an extension for the same period (i.e., two years maximum). Currently, safeguards may be implemented for two years, renewable for two more years.

Regarding the regulation, the new Decree No. 1,314 systematised the rules for trade remedies, giving more certainty to interested parties; and improved the proceedings for adopting measures and the faculties of the Commission.

### V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

As of 2010, specialised courts were implemented in Chile for tax and customs disputes. The new Tax and Customs Courts seek to benefit private investors through the possibility of disputing Tax or Customs Authority resolutions, in an independent and expert court.

Proceedings are regulated to be transparent, efficient and modern, in order to provide justice effectively.

Another significant legal development relates to the transfer pricing approach by Chilean authorities. Transfer pricing is gaining increasing relevance in Chile, especially after 2012’s tax reform, which strengthened the existing rules on methods to calculate values in

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related-party transactions, in accordance with OECD rules and principles. The Tax Authority is consistently investigating and requiring information in order to apply transfer pricing adjustments, which includes import valuation investigations too.

One of the improvements of the tax reform was the inclusion of the advance pricing agreement mechanism, which consists of an agreement with the Tax Authority or with the Customs Authority in case of imported goods, on the determination of price, value or regular market profit in said operations with related parties. This agreement lasts for three years and may be renewed.

The transfer pricing regulation will certainly bring more control and audits by the authority, but the system of specialised and independent courts improves the chances of a fair defence of taxpayers, importers and exporters.

VI TRADE DISPUTES

Chile has been involved in several WTO disputes. In particular, it has been involved in 10 disputes as a complainant, 13 as a respondent and 43 as a third party.

In these disputes, a regular counterparty is Argentina and the products involved are those related to agriculture such as milk, wheat, wheat flour and edible vegetable oils. Often, Argentine industries participate in the Commission of Distortions investigation proceedings, expressing their disconformity with the eventual measures to be proposed and declared by the government.

One of the most prominent cases between Chile and Argentina related to a price band system maintained by Chile. According to such scheme, the tariff rate for wheat, wheat flour, sugar and edible vegetable oils from Argentina could be adjusted if the price fell below a lower price band or rose beyond an upper price band.

This scheme was challenged by Argentina before the WTO and before the Panel and the Appellate Body.2

The Appellate Body reversed two Panel findings. The first one was referred to a matter brought by Argentina that was not raised in its panel request, depriving Chile of its due process rights under the Dispute Settlement Understanding, Article 11. The second reversed finding was related to the Panel’s understanding of Chile’s price band system as an ordinary custom duty, assessed on the basis of exogenous price factors.

Notwithstanding the above, the Appellate Body concluded that Chile’s price band system was inconsistent with Article 4.2 of the Agreement on Agriculture and upheld the Panel’s finding that it was a border measure that is similar to variable import levies and minimum import prices.

Chile amended its price band system, and the total amount of duties imposed on imports of wheat, wheat flour and sugar would vary in two ways: through the imposition of additional specific duties or through the concession of rebates on the amounts payable. When the reference price determined by the Chilean authorities fell below the lower threshold of a price band, a specific duty was added to the ad valorem tariff. On the contrary, when the reference price was above the upper threshold of the price band, imports would benefit from a duty rebate.

Argentina referred to the original Panel to claim for the insufficient measures adopted by Chile. The Panel concluded that Chile had failed to implement the recommendations and

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rulings of the Dispute Settlement Body in the original dispute, and that the system, even with the amendment, continued to be a border measure similar to a variable import levy and a minimum import price, inconsistent with Article 4.2 of Agreement on Agriculture. For judicial economy, the Panel considered that an additional finding based on GATT Article II:1(b) and WTO Agreement Article WVI:4 was not necessary. The Appellate Body upheld the finding of the Panel.

VII OUTLOOK

Chile subscribed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) with Australia, Brunei Darussalam, Canada, Japan, Malaysia, New Zealand, Peru, Singapore and Vietnam. The CPTPP is the consequence of the United States’ decision to withdraw from the Trans-Pacific Partnership Agreement (TPP), and includes all the countries that negotiated the TPP except for the United States, and includes all the terms of the TPP except for 20 sections that were suspended and that mostly referred to intellectual property. The CPTPP has not entered into effect yet, because it must be approved by the Congress (it was already approved by the House of Representatives and is now being discussed by the Senate), but it is expected that the agreement will bring opportunities to Chile and those investing in Chile.

Moreover, the legal reform enacted in 2017, regarding the authorised economic operator (AEO), in accordance with the WCO’s SAFE Framework of Standards, was fully implemented through Resolution No. 246 in January 2018. This programme, in which companies or customs brokers will be certified as AEO by the Customs Service, will allow them to make improvements in efficiency of processes, including time and cost reductions.
I  OVERVIEW OF TRADE REMEDIES

China first introduced anti-dumping measures in the Foreign Trade Law in May 1994. In 1997, China promulgated the Anti-dumping and Anti-subsidy Regulations and initiated its first trade remedy case – the anti-dumping investigation against newsprint from Korea, Canada and the United States. Nowadays China has become one of the major users of trade remedy measures.

As of June 2019, China has initiated 112 anti-dumping investigations, 12 anti-subsidy investigations and two safeguards investigations.

II  LEGAL FRAMEWORK

There are three basic trade remedy regulations of China: the Anti-dumping Regulations, the Anti-subsidy Regulations and the Safeguards Regulations, all of which were enacted in 2002 and amended in 2004.

The Ministry of Commerce (MOFCOM) is the competent authority in charge of all trade remedy cases. MOFCOM has also promulgated a number of implementing rules concerning various issues, such as initiation, questionnaire response, hearing, verification, etc., throughout the investigations.

After China’s accession to the WTO, the People’s Supreme Court promulgated three rules concerning judicial review of trade remedy measures in 2002 – Rules on Certain Issues Concerning Hearing of International Trade Administrative Cases, Rules on Certain Issues Related to Application of Law in Hearing of Anti-dumping Administrative Cases and Rules on Certain Issues Related to Application of Law in Hearing of Anti-subsidy Administrative Cases. There have been no cases brought to judicial review to date.

III  RECENT CHANGES TO THE REGIME

Before April 2014, the dumping and subsidy investigation and the injury investigation were conducted separately by two bureaus under MOFCOM, specifically, the Fair Trade Bureau determining dumping and subsidy and the Industry Investigation Bureau deciding on injury.

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After April 2014, the two bureaus were combined into a single investigating agency – the Trade Remedy and Investigation Bureau (TRIB). Since then, the same team from TRIB assigned to a case conducts both the dumping/subsidy and the injury investigations.

IV SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

i Interim reviews – more cases based on domestic industry’s requests as compared to exporters’ requests

It is not easy for interested parties to persuade MOFCOM to initiate interim reviews seeking to update its anti-dumping duty rates, particularly for foreign producers/exporters. From 2012 to the first half of 2019, MOFCOM initiated 11 interim reviews in total: three in 2012, none in 2013–2014, two in 2015, three in 2016, two in 2017 and one in the first half of 2018. Notably, among the 11 interim reviews, only three were based on foreign producers/exporters’ requests, while nine were based on domestic industries’ requests. Those interim reviews as requested by Chinese domestic industries always result in raising anti-dumping duty rates.

ii The second safeguard investigation after 14 years

MOFCOM initiated a safeguard investigation on sugar in September 2016, which is the second safeguard investigation by China. The first one was in 2002 on certain iron and steel products.

The 2002 steel investigation was initiated under special circumstances related to the US investigation. On 20 March 2002, the US government imposed safeguard measures by imposing special duties and a tariff rate quota. These US safeguard measures severely impacted the international trading for steel industries, and, as a result, major trade partners, including China, the EU and Canada, imposed their own safeguard measures as counter-measures and also brought the investigation to the WTO Dispute Settlement Body.

To some extent, the sugar investigation is the first safeguard investigation China initiated based on its own concerns. The sugar investigation was completed in May 2017 with a result of safeguard measures of special duties of 45 per cent, 40 per cent and 35 per cent for the first year, the second year and the third year respectively. Over the past decade, the government of China has not resorted to safeguard measures to protect its domestic industries. In light of the greater uncertainty in international trade policies taken by the world major trading partners, particularly the US trade policies under the Trump administration, it is yet to be seen whether the government of China might change its position after the sugar investigation.

iii DDGS, sorghum and barley investigations – MOFCOM’s sampling practice

More than 80 US companies registered with MOFCOM to participate in the anti-dumping anti-subsidy investigations against distiller’s dried grains with or without solubles (DDGS) from the United States in 2016. MOFCOM decided to select respondents for individual examination through a sampling procedure.

In previous investigations, MOFCOM had always based its sampling decisions on the simple sales information reported in the registration forms. In the DDGS case,
China

however, MOFCOM issued sampling questionnaires for the first time to the registered US respondents. The sampling questionnaires are quite complicated. For example, MOFCOM requested all registered companies to ‘provide the name, address, and contact number of all the suppliers from whom your company purchased corn or other grains used for the production of the Product Under Investigation during the POI’. In addition, MOFCOM also requested information that was not normally required for sampling purposes, such as information regarding shareholders, subsidiaries, production and sales costs, domestic sales and exports to third-country markets, as well as information that relates to a material injury investigation such as Chinese like products, sales and production capacity.

Completing such complex sampling questionnaires in 15 days was not an easy task. Many respondents failed to provide complete information requested and were eventually determined as uncooperative by MOFCOM.

In this regard, the anti-dumping anti-subsidy investigations against grain sorghum from the United States in 2018 are even more extreme examples. In sorghum investigations, MOFCOM deviated from its long-time practice and did not conduct sampling before issuing its anti-dumping and anti-subsidy questionnaires. MOFCOM required all interested parties, including over 20,000 US sorghum farmers, to respond to its anti-dumping and anti-subsidy questionnaires. All US producers or exporters who failed to provide complete information requested were determined as uncooperative by MOFCOM. MOFCOM repeated this practice in the anti-dumping anti-subsidy investigations against barley from Australia later the same year, during which MOFCOM did not conduct sampling before issuing its anti-dumping and anti-subsidy questionnaires and instead required all interested parties to respond to the questionnaires.

iv DDGS, sorghum and barley investigations – traders v. producers

It is MOFCOM’s long-established practice that MOFCOM assigns individual dumping/subsidy duties only to foreign producers, not to traders. For exports through foreign trading companies, anti-dumping/anti-subsidy duties assigned to foreign producers will be applied.

This producers only practice was faced with challenges in the DDGS case. Unlike vertically integrated industries, the US DDGS industry consists of a large number of producers, marketing companies, traders and exporters. Most of them are not affiliated with one another in any manner. The US DDGS are produced at over 100 ethanol plants, and sold to the Chinese market through many different channels, such as via: (1) sales on the spot market to unaffiliated traders, who then resell to China and other countries; (2) sales under contract to unaffiliated traders, who then resell to China and other countries; (3) indirect purchase from a producer by an unaffiliated trader (usually through another trader); (4) purchase by one or multiple unaffiliated traders through marketing companies that sell for one or multiple producers who then export the DDGS to China and other countries; and (5) direct sale to importers or customers in China by a producer or its affiliated reseller. Only a small number of US producers are themselves responsible for sale or export of their products to China through their own company or its affiliates. On the other hand, the vast majority of DDGS exports to China were not made directly by US producers themselves, but through intermediaries, and, thus, US producers do not know, nor do they control, the destination of their DDGS after they are sold to traders or any intermediary parties.
Despite this unique and complex trading pattern in the industry, MOFCOM declined to deviate from its normal practice and continued to select respondents only from the producers and excluded traders (unless they were producers at the same time) from the sampling pool.

MOFCOM’s sampling methodology was a bit different. The sampling was based on the total sales volume, rather than the export volume to China as usual, of the self-produced DDGS (including domestic sales and exports), excluding purchased products, by the US DDGS producers. MOFCOM selected three US producers (including their affiliated companies) for individual examinations: POET LLC, Big River Resources LLC, Marquis Energy LLC and its affiliate Marquis Energy-Wisconsin LLC.

Owing to the unique trading pattern in the industry, the sampled producers most of the time do not have the knowledge of the destinations of their products being sold through intermediaries. MOFCOM, therefore, found they failed to provide complete and accurate information regarding both their exports to China and their domestic sales.

In its final determination, MOFCOM stated that it could not verify the completeness, accuracy and authenticity of domestic sales data reported by the respondent Marquis. It, therefore, found the domestic sales data reported unsuitable as the basis for determining the normal value, and opted to use the constructed value (i.e., production cost plus reasonable expenses and profit) to determine the normal value. For the export price, MOFCOM accepted the sale price of Marquis Energy to Chinese unaffiliated importers or US unaffiliated traders, but used the ‘reasonably presumed export price’ for Marquis Energy-Wisconsin because it was found that it had failed to provide complete and accurate information regarding its exports to China. The ‘reasonably presumed export price’ for Marquis Energy-Wisconsin was in fact the export price determined for Marquis Energy.

For the other two respondents POET and Big River, MOFCOM calculated their normal values based on the constructed cost (i.e., production costs plus reasonable expenses and profits), and determined their export prices based on ‘reasonably presumed export price’, which is also the export price to unaffiliated customers determined for another respondent Marquis Energy.

For other cooperative companies, MOFCOM calculated a weighted average dumping margin using total sales volume of DDGS sold during the POI as the weighing factor.

Although MOFCOM adopted the cooperative sampled companies’ own data to determine their normal values, the export prices for all respondents were based exclusively on one: the export data of one respondent (Marquis Energy), and only the sales where Marquis Energy knew its DDGS would be exported to China at the time of the sale.

As one can see, MOFCOM also acknowledged that owing to the unique and complex trading patterns in the industry, the majority of DDGS exports to China were not made directly by producers themselves, but through intermediaries; and, thus, the producers did not know, nor did they control the destination of their products in the cases of sales to traders or any intermediaries. Thus, the methodologies used by MOFCOM in the DDGS case to sample, to determine export price and to calculate dumping margin for cooperative companies would not encompass the majority of exports of US DDGS to China. It is doubtful that the dumping margins of 42.2 per cent to 50 per cent determined by MOFCOM can be representative for the US DDGS industry.

In this regard, the anti-dumping anti-subsidy investigations against sorghum from the United States in 2018 are even more extreme examples. The US grain sorghum industry consists of a large number of SMEs, farmer producers, marketing companies and traders/
exporters, almost all of whom are not affiliated with one another in any manner. The over-20,000 farmers who grow grain sorghum in the United States do not themselves export sorghum to China. They sell it locally to traders/exporters and others, who are then responsible for any sales to China and setting the price for exports to China. The farmers play no direct role in exports to China.

In the anti-dumping preliminary determination, MOFCOM assigned the dumping margin of 178.6 per cent for all US companies completely based on the best information available, because it determined that no US respondent provided sufficient information requested. However, it is still interesting to observe the different treatments of MOFCOM for producers and exporters in this case. On the one hand, MOFCOM calculated the individual dumping margin for 18 US sorghum producers of which CHS Inc claimed to MOFCOM to be a sorghum producer and exporter but only provided MOFCOM with sales data as a trader. On the other hand, MOFCOM determined to apply the ‘all others’ rate to the five US responding traders because they did not provide sufficient information for MOFCOM to calculate individual dumping margins for them. We wonder whether the US sorghum responding traders would be entitled to individual anti-dumping duty under the Chinese anti-dumping rules if they had provided all of the information that was requested.

As at June 2019, the anti-dumping and anti-subsidy determinations have not been published in the investigations against barley from Australia.

v Surrogate value

The investigating authorities of the United States, the EU and certain other jurisdictions do not accept the actual domestic prices and costs of the Chinese companies when they conduct anti-dumping or countervailing investigations against imports from China. They instead use the surrogate value, based on price or cost data from other countries, to determine the normal value of the products originated in China, which often results in a very high dumping or subsidy margin.

Big vertically integrated multinational companies are often the targets of Chinese trade remedy cases. These multinational companies utilise self-produced material inputs to produce the subject merchandise of the Chinese anti-dumping investigations. MOFCOM is replacing the internal prices of such self-produced material inputs of multinational companies with surrogate ‘market prices’ in the anti-dumping investigations more and more frequently. In the anti-dumping preliminary determination of phenol from the United States, the EU, Korea, Japan and Thailand, which was published in May 2019, MOFCOM scrutinised the cost tables submitted by foreign respondents in a very strict way and adjusted the internal price of the self-produced material inputs, and therefore the costs of production reported by all seven mandatory respondents from the United States, the EU, Korea, Japan and Thailand.

Considering the treatment of Chinese companies in the anti-dumping and countervailing investigations of the US and the EU, it may be expected that we will find more examples in which MOFCOM resorts to surrogate value to determine the cost of production of the subject merchandise when US or EU companies are involved.
vi Sunset review

According to the WTO Anti-Dumping Agreement, any definitive anti-dumping duty shall be terminated on a date no later than five years from its imposition, unless the authorities determine in a review that the expiry of the duty would likely lead to continuation or recurrence of dumping and injury.3

The WTO Anti-Dumping Agreement does not specify whether a second sunset review can be initiated before the expiration of an anti-dumping duty extended by a previous sunset review; as a result, different WTO members adopt different approaches in practice. In China, MOFCOM did not initiate a second sunset review on anti-dumping duties extended by a previous sunset review until 28 September 2014. Before that, the anti-dumping duties were always lifted after one or two five-year terms of anti-dumping measures being in place. In the newsprint and polyester film investigations, domestic industries requested the initiation of a second sunset review, but later withdrew their requests. This is seen to be related to the position of China in the WTO Doha negotiations on anti-dumping rules; China had argued vigorously for the automatic termination of all anti-dumping duties within 10 years of the imposition of the definitive anti-dumping duty.

In the Doha round of WTO negotiations, delegations had widely differing views regarding various aspects of the sunset review issue, especially on whether there should be any automatic termination of anti-dumping duties after a given period of time and, if so, how long. On the two extremes of this issue were those delegations that favoured automatic termination after five years without any possibility of extension and those that reject the principle of automatic termination (anti-dumping duties can be extended through sunset review) altogether. China argued on this issue that, ‘In no event, shall such a review be initiated more than one time and any definitive anti-dumping duty be applied for a period longer than ten years from the date of its imposition.’4

This position reflects China’s understanding of the spirit and intent of Article 11.3 of the WTO Anti-Dumping Agreement (provisions concerning the sunset review issue). China, along with other friends of anti-dumping (FANs), pointed out that Article 11.3 adopts the structure of ‘shall be terminated . . . , unless . . . ‘ and ‘this suggests that most, if not all, AD measures will be terminated after 5 years,’ and that sunset review is just a ‘unless’ case. However, ‘the current situation is that undue emphasis has been put on the “unless” clause and anti-dumping duties are being extended repeatedly through sunset reviews.’ This contradicts the spirit of the WTO Anti-Dumping Agreement and the entire sunset review system. Therefore, the FANs argued that anti-dumping duties should be terminated after a period of imposition (periods are different according to proposals by different members, for example, five years, eight years or 10 years). The FANs further explained that:

> the essence of the proposal is to prevent the case of extending AD measures through a forward-looking analysis (i.e., likelihood test). After the lapse of the five years, exporters must be given clearance and a further restriction should only be made possible through an analysis on the current (or immediate past) situation (‘he is (has been) dumping’) and not by the prediction of the future (‘he is likely to dump’). An anti-dumping measure must not be taken in a pre-emptive manner.5

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3 See Article 11.3 of the Agreement on Implementation of Article VI of the GATT 1994.
4 See TN/RL/GEN/149, dated 29 June 2007.
China was always an active supporter of this proposal. China’s position on the sunset issue appears to be changing. On 28 September 2014, MOFCOM initiated the second sunset review of the anti-dumping measures on imported PVC originated from the United States, Korea, Japan, Russia and Taiwan. As a result of the review, the anti-dumping measures on the imports from the US, Korea and Japan were extended for another three years. During 2016 and 2018, MOFCOM initiated another four and five second sunset reviews respectively. On 28 September 2018, MOFCOM even initiated the third sunset review of the anti-dumping measures on the imported PVC originated from the US, Korea, Japan and Taiwan. It has been 15 years since the anti-dumping duty was first imposed on the imported PVC.

It is believed that China has abandoned its previous position that the measures should not be applied for a period longer than 10 years.

vii MOFCOM amended its anti-dumping and anti-subsidy rules
In April 2018, MOFCOM published three revised anti-dumping and anti-subsidy implementing rules. These are related to (1) the Rules on Interim Review of Dumping and Dumping Margins, (2) the Rules on Hearing for Anti-Dumping and Anti-Subsidy Investigations and (3) the Rules on Anti-Dumping Investigation Questionnaires. The amendments, particularly the one for interim review, reflect some significant changes to their 2002 versions.

The amendments to the Rules on Anti-Dumping Investigation questionnaires incorporate some existing practices and requirements of MOFCOM regarding the investigation questionnaires. For example, it makes clear that the investigating authority may not individually examine responses from those that have not registered with the investigating authority.

The amendments to the Rules on Hearing for Anti-Dumping and Anti-Subsidy Investigations are mainly to consolidate the current three separate but essentially same rules provided in the Provisional Rules on Hearing for Anti-Dumping Investigations, Provisional Rules on Hearing for Anti-Subsidy Investigations and Rules on Hearing for Industry Injury Investigations. This consolidation reflects the combination of the two bureaus of MOFCOM – the Fair Trade Bureau and the Industry Investigation Bureau – in April 2014.

Notably, three significant changes are made in the amendments to the Rules on Interim Review of Dumping and Dumping Margins, specifically related to the standing of the petitioners, the criteria to initiate an interim review and interim review of foreign producers and exporters with zero dumping margin.

Evidence of the standing of the petitioners in the original investigation
An interesting question would be whether the petitioners in the original investigation can ask for an interim review of certain producers or exporters when the circumstances of the domestic industry have changed and the petitioners in the original investigation no longer satisfy the standing requirements needed for petitioning for an original anti-dumping investigation. The answer to this question is ‘no’ under the previous rules, because the same standing requirement as in an original investigation was clearly included in the previous Rules on Interim Review of Dumping and Dumping Margins. But the answer is ‘yes’ under the new rules because ‘where the petitioners in the original investigation applies for an interim review, it is unnecessary to prove their standing again.’ This change makes it easier for the domestic industry to apply for an interim review.
Changes to the legal standard for requesting an interim review

The basis to initiate an interim review is that the normal value or export price, or both, has changed, and it is necessary to review the margin of original anti-dumping measures. The applicant must provide evidence relating to the change in the normal value, export price and dumping margin compared with the level of original anti-dumping measure when submitting a request for an interim review.

The 2018 amendments added one more requirement for foreign applicants: evidence that the change will continue in the future. This amendment requires the foreign applicant not only needs to prove that the dumping margin has changed significantly in the 12 months before the filing date, but also needs to explain the reasons for such a change. Moreover, based on those reasons, it would also need to prove the changes did not just happen in the previous 12 months, but will also continue in the future.

This amendment may inevitably make it more difficult for foreign producers or exporters to seek an interim review. The foreign applicant would need to prepare more evidence. The interim review may not be initiated even if the normal value, export price and dumping margin do change significantly, if the foreign applicant cannot explain the reasons for such changes well, and, more critically, prove the change will continue in the future.

Interim review of exporting producers with zero anti-dumping duty

Domestic industry and foreign competitors definitely wish to push MOFCOM to review foreign exporting producers that have a zero dumping duty rate after the original investigation and that continue their sales in the Chinese market.

According to the previous rules, where domestic industry files an application for interim review, the exporters and producers whose dumping margins were determined as zero or de minimis in the original anti-dumping investigation shall also be subject to the review investigation.

Interestingly, under the new rules, reviewing zero margin exporters or producers has to be done through a new anti-dumping investigation – which covers both dumping margin examination and injury evaluation – rather than an interim review.

In the meantime, the new rules also provide that if the investigating authority determines in an interim review that the anti-dumping margin for a foreign export producer is zero, then this zero margin may be reviewed in the future interim reviews.

V TRADE DISPUTES

The three rules concerning judicial review of trade remedy measures promulgated by the People's Supreme Court in 2002 establish the legal ground for interested parties to challenge MOFCOM’s trade remedy actions. However, there is no public information to show that such a case has ever been brought.

In contrast, other WTO members, including the EU, the United States, Japan, Canada and Brazil, have brought nine cases concerning Chinese trade remedy measures before the Dispute Settlement Body (DSB) as at June 2019:

a. China – Provisional Anti-Dumping Duties on Certain Iron and Steel Fasteners from the European Union (DS407);

b. China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States (DS414);
In several reports of the panels and the Appellate Body, the DSB announced that certain aspects of MOFCOM’s trade remedy actions were inconsistent with WTO rules. Transparency is one of the outstanding issues identified by the panels and the Appellate Body. For example, in the case of DS414, the complainants sought and obtained from MOFCOM confidential treatment in relation to a number of categories of information. The Panel upheld the US’s claim that MOFCOM acted inconsistently with Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement by failing to require the complainant to submit adequate non-confidential summaries of the information. The Panel concluded that the purported summaries did not provide a reasonable understanding of the substance of the information submitted in confidence. The panels also concluded that China acted inconsistently with Articles 6.9 and 12.2.2 of the Anti-Dumping Agreement and Articles 12.8 and 22.5 of the SCM Agreement, on the basis that China failed to disclose the essential facts supporting its causation analysis and did not provide an adequate explanation for its causation findings.

In July 2013, MOFCOM promulgated Provisional Rules for Implementing the World Trade Organization Rulings on Trade Remedy Disputes, a set of simple rules containing eight articles. In practice, when DSB delivers a ruling that China’s trade remedy measures are inconsistent with WTO rules, MOFCOM will reinvestigate the relevant case and issue new determinations.

Decisions of the WTO Panels and the Appellate Body have made positive impacts on MOFCOM’s practice in trade remedy cases. In recent years, we have noticed obvious laudable improvements in transparency throughout the proceedings at MOFCOM. It is not too long since a foreign producer or exporter may have found that MOFCOM’s simple and short disclosures made it quite difficult to understand MOFCOM’s calculation of a specific dumping margin. In recent investigations, however, MOFCOM has provided detailed information to foreign producers and exporters about the calculation of the dumping margins. It is now conducting more thorough price impacts and causation analysis in its investigations.

VI OUTLOOK

During 2017, China initiated a record number of trade remedy investigations: 10 new anti-dumping investigations and one new anti-subsidy investigation. During 2018, the
number of trade remedy investigations newly initiated by China was still very high: seven new anti-dumping investigations and three new anti-subsidy investigations. To some extent, the tide receded a little in the first half of 2019. MOFCOM initiated three new anti-dumping investigations and no new anti-subsidy investigation in the first six months of 2019.

After 11 December 2016, the provisions of subparagraph (a)(ii) of Article 15 of the Protocol on the Accession of China (i.e., the non-market economy clause) expired 15 years after China’s accession to the WTO. On 12 December 2016, China immediately brought the United States and EU to the DSB, requesting consultations with the United States and the EU concerning certain provisions of US laws and EU regulations pertaining to the determination of normal value for ‘non-market economy’ countries in anti-dumping proceedings involving products from China.6 In May 2019, it was reported that the WTO ruling in the EU case may not be in China’s favour. On 7 May 2019, China requested that the DSB panel suspend its proceedings. On 14 June 2019, the panel informed the DSB of its decision to grant China’s request and suspend its work. It is unknown whether China will continue to pursue the ‘market economy’ cases or not. If China has to accept the surrogate value method used by the United States and the EU in their anti-dumping and countervailing investigations against Chinese companies, MOFCOM may more frequently resort to the surrogate value to determine the cost of production of the subject merchandise in its anti-dumping investigations when the US and the EU companies are involved.

China has initiated 12 anti-subsidy investigations as at June 2019. The first anti-subsidy investigation was in 2009 concerning grain-oriented flat-rolled electrical steel from the United States. The first eight anti-subsidy investigations were all targeted against the United States (five cases) and the EU (three cases). In February 2017, MOFCOM initiated its first anti-subsidy investigation against imports from India, concerning the product ortho chloro para nitro aniline. In 2018, MOFCOM initiated three anti-subsidy investigations against US sorghum, Indian 7-phenylacetamido-3-chloromethyl-3-cephem-4-carboxylic acidpmethoxybenzyl ester and Australian barley. With the unsound global economy and the great uncertainty of trade policies adopted in leading countries, it is expected that there may be more anti-subsidy cases initiated by MOFCOM.

The intensification of trade frictions between China and the United States in 2018 and 2019 has and will continue to dramatically impact Chinese trade remedy investigations against the US products. One example is the sorghum anti-dumping and anti-subsidy investigations – in February 2018, MOFCOM self-initiated for the first time anti-dumping and anti-subsidy investigations against US sorghum, and imposed 178.6 per cent provisional anti-dumping duty in April. However, the sorghum investigations were terminated because of alleged ‘public interests’ just ahead of a widely anticipated round of negotiation between China and the United States. When the negotiation at last collapsed and the United States imposed additional tariffs on Chinese products, the sorghum was added to the Chinese retaliation list in June 2018. After another round of Sino-US trade negotiation collapsed in May 2019, MOFCOM quickly determined more than 100 per cent dumping margins for US companies in one preliminary determination and one interim review, and initiated two new anti-dumping investigations against US products in about one month.

OVERVIEW OF TRADE REMEDIES

As outlined in the fourth edition of The International Trade Law Review, The Eurasian Economic Union (EAEU) remains an active user of trade defence instruments. Between July 2018 and July 2019, the following developments took place with regard to the application of trade remedy instruments by the EAEU:

a. An anti-dumping investigation (AD-24) initiated on 2 March 2018 against imports of cast aluminium wheels originating from China into the EAEU territory. The investigation was finished in March 2019 by the imposition of anti-dumping duty of 33.69 per cent for a five-year period.

b. An anti-dumping investigation (AD-25) initiated on 26 March 2018 against imports of optical fibre for optical communication cables originating from the United States and Japan into the EAEU territory. The interested parties emphasised that the introduction of such a duty could lead to isolation of the market from innovative products, a shortage of goods on the market and an increase in the cost of secondary products. Therefore, on 8 July 2019, the Department published a draft report containing the conclusion that there is no substantial injury for the relevant industry of the EAEU and suggesting to finish the investigation without the imposition of anti-dumping measures.

c. An anti-dumping investigation (AD-26) initiated on 29 June 2018 against imports of galvanised steel originating from China and Ukraine into the EAEU territory. The investigation was prolonged till 28 October 2019. No interim results were available as at July 2019.

d. A safeguard investigation (SG-10) initiated on 7 August 2018 against imports of certain types of metal into the EAEU territory. On 10 June 2019, a draft report on the results of the investigation was published. It proposed to apply a safeguard measure in the form of a special quota for one year, for the purpose of preventing serious injury to the industry of the EAEU.

e. An anti-dumping investigation (AD-27) initiated on 4 September 2018 against imports of hot-rolled seamless pipes made of corrosion-resistant steel originating from China into the EAEU territory. Pending as at July 2019.
An interim anti-dumping investigation (AD-7-R1) initiated on 26 February 2019 against imports of mill rolls originating from Ukraine. On 24 May 2019, a decision was made to extend the anti-dumping measure by the amount of 26 per cent until 25 February 2020.

A safeguard investigation (SG-11) initiated on 1 March 2019 against imports of microwave ovens into the EAEU territory. On 18 April 2019, the decision was made to suspend the investigation because of the withdrawal of the application by the company that initiated the investigation.

A safeguard investigation (SG-12) initiated on 4 March 2019 against imports of welded pipes made of stainless steel into the EAEU territory. Pending as at July 2019.

An anti-dumping investigation (AD-28) initiated on 7 May 2019 against imports of aluminium tape originating from Azerbaijan and China into the EAEU territory. Pending as at July 2019.

An interim anti-dumping investigation (AD-19-R2) initiated on 13 June 2019 against imports of steel railway wheels originating from Ukraine. On 17 June 2019, a draft report of the investigating authority was published. It proposed to suspend application of the anti-dumping duties until the end of the interim anti-dumping investigation. This happened upon the request of the EAEU consumers of the wheel products, which indicated the industry’s inability to supply the market with the required quantity of relevant products and unusually drastic price increases.2

EAEU countries were also extensively targeted by trade remedy measures on foreign markets. On 27 April 2018, Turkey launched a safeguard measure investigation concerning the import of certain iron and steel products. In October 2018, Turkey implemented the provisional safeguard measure on five imported steel products and placed a 25 per cent tariff on imports exceeding the average imported volume between 2015 and 2017. However, on 8 May 2019, the Ministry of Trade, Industry and Energy of Turkey lifted its provisional safeguard measure without imposing further restrictions.3

On 13 August 2018, the European Union announced an anti-dumping investigation relating to imports of mixtures of urea and ammonium nitrate in aqueous or ammonia solution, originating in Russia, the United States, and Trinidad and Tobago. As mentioned in the Notice of initiation of an anti-dumping proceeding concerning imports of mixtures of urea and ammonium nitrate originating in Russia, Trinidad and Tobago and the United States of America, dated 13.8.2018:

The allegation of dumping from Russia is based on both a comparison of the domestic price with the export price (at ex-works level) of the product under investigation when sold for export to the Union and a comparison of a constructed normal value (manufacturing costs, selling, SG&A and profit, for which the costs for gas, SG&A and profit were adjusted) with the export price (at ex-works level) of the product under investigation when sold for export to the Union. Both comparisons show dumping.4

On 2 October 2018, the European Union approved and adjusted anti-dumping duties on steel pipes originating in Russia and Ukraine. The duties have been set in the range of 24.1 per cent to 35.8 per cent for various producers in Russia, and from 12.3 per cent to 25.7 per cent for Ukraine. The decision came into force on 3 October 2018.\(^5\) Anti-dumping duties on pipes produced in Russia and Ukraine have been in effect since 1997. Depending on market environment and court judgements, they are regularly adjusted or temporarily cancelled.

On 15 April 2019, Egypt imposed provisional safeguards of up to 15 per cent on semi-finished steel and 25 per cent on rebar imports. The country launched a safeguard probe at the end of March 2019. The tariffs on billet and slab imports are up to 15 per cent, with their rate being determined by the cost, insurance and freight (CIF) value of the material. Semi-finished steel imports priced above $550 per metric ton CIF are not subject to a duty, while any material below $450 per metric ton. CIF is taxed at the maximum rate of 15 per cent, according to market participants. The rebar duties are 25 per cent of the import’s CIF value. The measure will apply for 180 days and is designed to remedy the increase in imports arising from trade measures elsewhere – most notably in the US and EU.\(^6\)

On 3 June 2019, the US International Trade Commission (the Commission) announced the start of the third review to determine whether revocation of the anti-dumping duty order on silicon metal from Russia would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Initially, on 26 March 2003, the US Department of Commerce (Commerce) issued an anti-dumping duty order on imports of silicon metal from Russia. Following the first five-year reviews by Commerce and the Commission, effective 16 July 2008, Commerce issued a continuation of the anti-dumping duty order on imports of this product from Russia. And following the second five-year reviews by Commerce and the Commission, effective 2 July 2014, Commerce issued a continuation of the anti-dumping duty order on imports of silicon metal from Russia.\(^7\)

In addition, Ukraine introduced a number of restrictive measures against goods from EAEU countries:

\(a\) in July 2018, safeguard measures in the form of quantitative quotas were imposed on imports of acid sulphur and oleum for a period of three years;

\(b\) in October 2018, anti-dumping measures against imports of asbestos-cement slate from Belarus were suspended without extension owing to the exhaustion of the terms of application;

\(c\) as a result of the anti-dumping investigation initiated in July 2018 against imports of cement products from Belarus, Moldova and Russia, in May 2019 imports from Russia received an extremely high duty of 114.95 per cent, and products from Belarus were taxed at 57.03 per cent;

\(d\) in March 2019, an anti-dumping investigation against imports of electric bulbs from Belarus finished with adoption of 17.73 per cent anti-dumping duty without accepting price undertakings from Belarusian exporters;


e in March 2019, an anti-dumping investigation against imports of salt from Belarus finished with the imposition of 11.85 per cent anti-dumping duty for all exporters and individual duty of 10.28 per cent for the main Belarusian exporter and accepting price undertakings from him;

f at the end of June 2019, an anti-dumping investigation against imports of hire with a corrosion-resistant coating originated in Russia and China finished with the imposition of 47.57 per cent anti-dumping duty for product from Russia, which is two times higher than the duty imposed for China;

g in December 2018, an anti-dumping investigation against imports of roller bearings originated from Kazakhstan was launched;

h in April 2019, an anti-dumping investigation against imports of aerated concrete blocks from Belarus was launched. According to the complainant it was initiated because of the sharp increase in imports from 2017 and 2018 from 41 per cent to 98 per cent respectively;

i in April 2019, an anti-dumping investigation against imports of cables and ropes from Russian Federation was launched;

j in April 2019, a review of anti-dumping duties on ammonium nitrate from the Russian Federation was initiated because of the expiration of the measure in force. The action of the duty was extended for the period of the review. At the same time, ammonium nitrate was included into the sanctions list of banned goods from the Russian Federation published by the Cabinet of Ministers of Ukraine at the end of June 2019;

k in April 2019, the anti-dumping measures against imports of glass containers originating from the Russian Federation were extended for another five years; and

l in April 2019, the application of safeguard measures on imports into Ukraine of flexible porous plates, blocks and sheets of polyurethane foams was extended for another three years in the form of safeguard duties.8

II LEGAL FRAMEWORK

As indicated in the fourth edition of *The International Trade Law Review*, changes to the current EAEU trade defence regime have been actively discussed over recent years, including during the period since July 2018. However, no significant amendments and alterations to the Protocol have happened in the past year.

III RECENT CHANGES TO THE REGIME

The EAEU member states and governing bodies are very actively negotiating free trade regimes with third parties. Currently, the EAEU is in negotiations on the conditions and future terms of FTAs with countries including Egypt, Israel, Serbia, India, Thailand, Indonesia and Mongolia. The negotiations with Egypt and Serbia are nearly complete, while the EAEU plans to sign the FTA with India in 2020. Moreover, the EAEU concluded a declaration on cooperation with the Pacific Alliance. On 20 June 2019, Russia launched

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negotiations with South Korea on investment and trade in services agreement. The EAEU signed the memoranda on cooperation with Bangladesh, where the intention to sign the FTA was expressed.

The FTA signed on 29 May 2015 with Vietnam has come to fruition. The EAEU and Vietnam bilateral trade has increased considerably by 18.9 per cent in comparison with the previous year. The economic and trade cooperation between the EAEU and China is gaining momentum and experienced growth by a margin of 8 per cent. Furthermore, the EAEU moved forward with China’s One Belt, One Road initiative and joined the project during the G20 summit.

IV SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

As indicated in the fourth edition of The International Trade Law Review, some changes in the enforcement practice of the EAEC Department have taken place in recent years, and it should be noted that the standard of proving injury to the domestic industry has generally increased. However, during the past year, two controversial enforcement decisions have been taken by the EAEU Commission.

The first, rather unusual, approach was employed by the EAEU according to the results of an interim anti-dumping investigation in relation to certain types of steel pipes originating from Ukraine to revise the individual sizes of anti-dumping duties as a result of changed circumstances.

Initially, duties on the Ukrainian Interpipe pipes were introduced in June 2011. Later, their action was extended until 2021. In October 2016, the Ukrainian manufacturer initiated a revision of anti-dumping duties because the company put into operation its own electric steel-smelting complex. This, in turn, provided the company’s enterprises with their own pipe billet, which resulted in a change in the structure and level of production costs.

According to the results of the revision, on 4 October 2017, the Department for the Protection of the Domestic Market of the EAEC suggested reducing the anti-dumping duties on certain types of steel pipes, produced in Ukraine. In particular, the duty for casing pipes should be reduced from 18.9 per cent to 9.98 per cent, for tubing from 19.9 per cent to 12.23 per cent, and for general purpose pipes from 19.4 per cent to 12.11 per cent. For more than a year, the report was left without consideration by the EAEC Board.

On 30 October 2018, at the meeting of the Board of the Eurasian Economic Commission, the proposals and the draft decision of the Department to reduce anti-dumping duties were not supported. There was no explanation of any reasons or justifications for such a decision.9

The second interesting enforcement decision was taken in June 2019. It relates to the anti-dumping duty against the import of Ukrainian steel railway wheels produced again by Ukrainian company Interpipe on the EAEC market. For the first time, the measure in force was revised because of requests from consumers from Belarus and Kazakhstan. On 22 December 2015, the EAEC applied an anti-dumping duty against the Ukrainian railway wheels, which was the only alternative to the same product produced in the EAEC at the rate of 34.22 per cent. However, following a statement by the consumers of the wheel products of the EAEU, which indicated the inability of its industry to provide the market with the

required quantity of relevant products and unusually drastic price increases, the investigating authority was forced, on 13 June 2019, to open the review of the existing measures and suspend them until the end of the interim anti-dumping investigation.  

V EAEU–UKRAINE TRADE SANCTIONS ESCALATION

During the past year, the EAEU and Ukraine exchanged restrictive measures within the framework of sanctions lists for a quite considerable group of goods.

On 15 May 2019, the Cabinet of Ministers of Ukraine adopted two resolutions that continued the economic sanctions war between Ukraine and Russia. One of these resolutions substantially supplemented the list of products prohibited from import from Russia. The second introduces safeguard duties from 1 August 2019 on almost all products of Russian origin except for products of sensitive import such as coal, gasoline and pharmaceuticals. As at mid July, this resolution has not yet been published.

The second resolution – No. 535 ‘On Amendments to the list of goods prohibited from being imported into the customs territory of Ukraine originating from the Russian Federation’ – appeared on the website of the Cabinet of Ministers at the end of June 2019. It substantially complements the list of Russian goods prohibited from import, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1147 of 30 December 2015.

This was done in response to the April 2019 decision of the Russian government on sanctions against Ukraine, which, in turn, was made after a similar decision by the Ukrainian Cabinet of Ministers.

Based on the data of the State Fiscal Service of Ukraine, in terms of value, according to the results of 2018, the import of prohibited goods from Russia to Ukraine amounted to US$511.9 million.

This amount mainly includes deliveries of:

- fertilisers – US$323 million, or 63.1 per cent;
- tractors and cars – US$52.8 million, or 10.3 per cent;
- hardware (wires, pipes, cables, screws, bolts, etc.) – US$48.9 million, or 9.6 per cent;
- used freight wagons and trams – US$42.9 million, or 8.4 per cent;
- plywood – US$19.7 million, or 3.8 per cent; and
- cement – US$16.8 million, or 3.3 per cent.

The share of imports of other sanctioned goods from Russia to Ukraine amounted to 1.5 per cent at US$7.8 million.

The total amount of goods that fell under the sanctions turned out to be three times more than that for which Russia banned the import of goods.

This decision of the Ukrainian government will not remain without a response from Russia. Most likely, the response will affect the Ukrainian engineering products that are not yet banned from importing into Russia, which is the most painful option for Ukraine. The only question is the scale of the answer.

At the same time, in June 2019, Russia allowed the automobile and railway transit of sanctioned Ukrainian goods through its territory if there were special seals on vehicles and

11 www.minprom.ua/digest/254579.html.
goods using the GLONASS technology (similar to GPS). The relevant amendments have been made to the presidential decree on the use of special economic measures, signed in October 2018.

There was a noticeable trend in the past year for the growth of restrictive and sanction measures from both parties. Only five years ago they had a much more substantial amount of mutual trade flows than today.

VI TRADE DISPUTES

i WTO dispute settlement

Among the five current member countries of the Eurasian Economic Union, Russia remains the most active user of the WTO dispute settlement system. It acts as a complainant to three active cases – two against the United States and one against Ukraine.

On 20 July 2018, the final panel report was circulated to members on the case Russia–Ukraine – Anti-dumping measures on the import of ammonium nitrate (DS493). According to this report, Ukraine made mistakes in the procedure for establishing a dumping margin for Russian producers of ammonium nitrate, and subsequently, the current protective duties should be abolished. At the same time, the Ukrainian side noted that it could use gas adjustments in the future when conducting investigations against gas-intensive industries. For example, Russian producers have access to gas at a price three to five times (depending on the period) lower than the same gas sold for export and used by competing manufacturers in third countries. In addition, at different periods the price of gas for Russian producers was even lower than the cost of Gazprom and, accordingly, was unprofitable for it. It is clear that with such pricing in the industry, where gas is the main raw material they immediately become uncompetitive with Russian producers in both the domestic and export markets.

With regard to gas adjustments, the panel confirmed that during the conduct of anti-dumping investigations, the investigating authority has the right to apply adjustments to the cost of the main raw materials and materials of a foreign manufacturer if there is evidence to prove that their price is unjustified. In this dispute, the panel more clearly placed emphasis on this issue than in the Argentina–Biodiesel dispute (DS473), the results of which made the application of cost adjustments look quite controversial. Ukraine has actually restored a certain balance in the application of adjustments.

Despite this, on 23 August 2018, Ukraine notified the DSB of its decision to appeal to the Appellate Body certain issues of law and legal interpretations in the panel report.

On 22 October 2018, the Appellate Body indicated that Division members could currently spend only very little time preparing for this appeal and that it would not be possible for the Division to focus on the consideration of this appeal and be fully staffed for some time. The Appellate Body informed the DSB that it would communicate appropriately with participants and DSB members as soon as it knew more precisely when the Division could schedule the hearing in this appeal.12 The situation remains unchanged as at mid July 2019.

The case United States – Certain Measures on Steel and Aluminium Products (DS554) initiated by Russia on 29 June 2018 is moving very slowly. On 18 October 2018, the Russian Federation requested the establishment of a panel. At its meeting on 29 October 2018, the DSB deferred the establishment of a panel. At its meeting on 21 November 2018, the DSB

12 www.wto.org/english/tratop_e/dispu_e/cases_e/ds493_e.htm.
established a panel. Bahrain, Brazil, Canada, China, Colombia, Egypt, the European Union, Guatemala, Hong Kong, Iceland, India, Indonesia, Japan, Kazakhstan, Malaysia, Mexico, New Zealand, Norway, Qatar, Saudi Arabia, Singapore, South Africa, Switzerland, Taiwan, Thailand, Turkey, Ukraine and Venezuela reserved their third-party rights.

On 7 January 2019, the Russian Federation requested the Director General to compose the panel. On 25 January 2019, the Director General composed the panel. As at mid July 2019, the case is ongoing.

On 5 July 2019, Russia requested consultations with the United States regarding anti-dumping measures imposed by the United States on hot-rolled flat-rolled carbon-quality steel products from Russia (DS586).

The key claims are:

a the United States imposed anti-dumping duties at the level of the ‘all others’ rate, which exceeds the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement;

b the United States failed to determine an individual dumping margin for each known exporter or producer concerned of the product under investigation and instead relied on an ‘all others’ rate; and

c the United States failed to establish normal values based on the method enshrined in Article 2.1 of the Anti-Dumping Agreement or on any of the alternatives enshrined in Article 2.2 of the Anti-Dumping Agreement.

EAEU countries more often act as respondents. There are eight active WTO cases: six of them brought by Ukraine, including three cases for Russia and one each for Kazakhstan, Armenia and Kyrgyz Republic, one case against the European Union and one against the USA.

In Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union (DS475), following lengthy compliance proceedings, which took up a large part of 2017–2018, on 18 October 2018, the European Union requested the establishment of a compliance panel. At its meeting on 29 October 2018, the DSB deferred the establishment of a compliance panel. At its meeting on 21 November 2018, the DSB agreed to refer to the original panel, if possible, the matter raised by the European Union. Australia, Brazil, Canada, China, India, Japan, Kazakhstan, Taiwan, Ukraine and the United States reserved their third-party rights.

The compliance panel was composed of the original panellists. On 25 March 2019, the chair of the compliance panel informed the DSB that the panel expected to issue its final report, based on the timetable adopted after consultation with the parties, in the first quarter of 2020.

In Russia – Measures affecting the importation of railway equipment and parts thereof (DS499), initiated by Ukraine in October 2015, the panel report was circulated to members on 30 July 2018.

On 27 August 2018, Ukraine notified the DSB of its decision to appeal to the Appellate Body certain issues of law and legal interpretations in the panel report. On 3 September 2018, the Russian Federation notified the DSB of its decision to cross-appeal.

13 www.wto.org/english/tratop_e/dispu_e/cases_e/ds554_e.htm.
14 www.wto.org/english/tratop_e/dispu_e/cases_e/ds586_e.htm.
15 www.wto.org/english/tratop_e/dispu_e/cases_e/ds475_e.htm.
On 24 October 2018, the Appellate Body indicated that Division members could only spend very little time preparing for this appeal and that it would not be possible for the Division to focus on the consideration of the appeal and be fully staffed for some time. The Appellate Body informed the DSB that it would communicate appropriately with participants and DSB Members as soon as it knows more precisely when the Division can schedule the hearing in this appeal.\textsuperscript{16} As at mid July 2019, there is no further move on the case.

Ukraine lost the dispute Russia – Transit Transportation Measures (DS512). The decision was made public on the WTO website on 5 April 2019 and adopted by the DSB on 26 April 2019. The arbitrators did not reveal violations by Russia of its obligations both under the GATT agreement of 1994 and under the agreement on accession to the WTO. In 2016, the Russian Federation banned railway and automobile transit for Ukrainian products that are sent to Kazakhstan and Kyrgyzstan. Later the ban was extended to other central Asian countries and Mongolia. In the same year, Ukraine appealed against Russia’s actions to the WTO. Ukraine claimed a violation by Russia of Article V of the GATT that prohibited discrimination in transit of goods from other member states of the organisation. In turn, the Russian Federation motivated its actions by another norm (Article XXI of the GATT), which allows for the introduction of protective measures in the event of a threat to national security. This decision may indirectly influence the DS532 case, where Ukraine is trying to challenge the ban on imports of Ukrainian juices, confectionery and wallpaper.\textsuperscript{17}

Kazakhstan – Anti-dumping measures on steel pipes (DS530) has made almost no significant progress since July 2018. The only move was made on 7 September 2018 when Ukraine supplemented its consultations request of 19 September 2017. Ukraine referred to Kazakhstan’s failure to implement the findings of the investigating authority in the interim review of the anti-dumping duties on steel pipes, initiated in October 2017, concluding that such duties should be decreased.\textsuperscript{18}

DS530 was supported by similar cases initiated by Ukraine. Namely, Armenia – Anti-Dumping Measures on Steel Pipes (DS569) and Kyrgyz Republic – Anti-Dumping Measures on Steel Pipes (DS570). Both cases were initiated on 17 October 2018. Ukraine requested consultations with both countries concerning anti-dumping measures applied in Armenia and Kyrgyz Republic on the importation of certain types of steel pipes. The challenged measures were allegedly adopted as a result of the sunset review of the anti-dumping measures on imports of certain types of steel pipes originating in Ukraine and imported into the customs territory of the EAEU. Ukraine claimed that these measures appear to be inconsistent with Articles 9.1, 9.3, 11.1, 11.2, 11.4 and 12.2.2 of the Anti-Dumping Agreement; and Article VI of the GATT 1994. As at the time of writing, both cases are at the consultations stage.\textsuperscript{19,20}

The third case Russia is respondent in is Russian Federation – Additional Duties on Certain Products from the United States (DS 566). On 27 August 2018, the United States requested consultations with the Russian Federation concerning the imposition by the Russian Federation of additional duties with respect to certain products originating in the United States.

\textsuperscript{16} www.wto.org/english/tratop_e/dispu_e/cases_e/ds499_e.htm.
\textsuperscript{17} www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm.
\textsuperscript{18} www.wto.org/english/tratop_e/dispu_e/cases_e/ds530_e.htm.
\textsuperscript{19} www.wto.org/english/tratop_e/dispu_e/cases_e/ds530_e.htm.
\textsuperscript{20} www.wto.org/english/tratop_e/dispu_e/cases_e/ds570_e.htm.
The United States claimed that the measures appear to be inconsistent with Articles I:1, II:1(a) and II:1(b) of the GATT 1994.

At its meeting on 18 December 2018, the DSB established a panel. Brazil, Canada, China, the European Union, Egypt, India, Indonesia, Japan, Kazakhstan, Malaysia, Mexico, New Zealand, Norway, Qatar, Saudi Arabia, Singapore, Switzerland, Taiwan, Thailand, Turkey, Ukraine and Venezuela reserved their third-party rights.

On 8 January 2019, the United States requested the Director General to compose the panel. On 25 January 2019, the Director General composed the panel.21 The case is ongoing.

21 www.wto.org/english/tratop_e/dispu_e/cases_e/ds566_e.htm.
Chapter 7

EUROPEAN UNION

Nicolaj Kuplewatzky and Nia Bagaturiya

I INTRODUCTION

Last year’s EU trade landscape proved to be a most unruly horse to ride. Exacerbated by the tide of uncertainty spilling over the Atlantic, economic operators not only were faced with the odd trade defence investigation, but also had to worry about more systemic dangers to international supply chains. In fact, a 2019 McKinsey study lists ‘uncertainty over trade policy’ as the greatest globalisation-related concern to companies operating in international value chains. What had two years earlier still been referred to as ‘geopolitical complexities’ has now crystallised into a more tangible problem: unpredictable trade policy as a whole. As will be set out in this chapter, 2018 was an interesting year for trade lawyers in the EU. For only the second time in the history of the Common Commercial Policy, the EU imposed erga omnes safeguard measures, this time arising from a threat of serious injury mainly linked to the existence of trade diversion from the United States’ Section 232 measures on certain steel products. On top of that, the general systemic uncertainty surrounding Brexit certainly did no favours for trading and investment conditions in the EU. At the same time, trade defence measures decreased in number from the previous year and important free trade agreements entered into force. The below is a review of those 2018 and early 2019 developments that have most occupied trade lawyers in the EU.

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II LEGAL FRAMEWORK

The European Union’s anti-dumping and anti-subsidy legal framework was amended and codified in 2016. It currently comprises basic Anti-Dumping Regulation\(^4\) and basic Anti-Subsidy Regulation.\(^5\) It is important to note that these legislative instruments were overhauled substantially by the adoption of Regulations (EU) 2017/2321\(^6\) and 2018/825.\(^7\) The former introduced a new methodology with regard to normal value calculations, regardless of origin, where domestic prices and costs are established to be significantly distorted because of a state intervention, while the latter modernised the EU’s trade defence instruments (TDI) for the first time since 1996. These legislative changes were covered in detail in previous editions of this book.

Erga omnes safeguard measures in the EU are governed by Regulation (EC) 2015/478,\(^8\) which concerns the rules on imports from World Trade Organization (WTO) members, and Regulation (EU) 2015/755,\(^9\) which applies to imports from non-WTO members. No changes to these regulations resulted from the above legislative developments.

III OVERVIEW OF TRADE DEFENCE INSTRUMENTS

The past year’s statistics report 93 definitive anti-dumping measures and 12 countervailing measures in force.\(^10\) This is a slight decrease measured against the previous year that saw 97 definitive anti-dumping measures and 13 countervailing measures in force at the end of 2017.

A substantial part of the work of the European Commission (the Commission) continued to be review investigations, with 24 initiated in 2018. These reviews consisted of 17 expiry reviews, three interim reviews, one anti-absorption investigation and three reopenings.\(^11\)

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\(^11\) Commission Staff Working Document accompanying the document the 37th Annual Report from the Commission to the Council and the European Parliament on the EU’s Anti-Dumping, Anti-Subsidy...
China remains the main country affected by the measures in 2018, accounting for 50 per cent of the total measures imposed as at 31 May 2019. It has been subject to 66 definitive measures, with five anti-dumping investigations and one countervailing investigation pending. China, Russia and the United States are the main countries subject to measures.

Several noteworthy investigations initiated between 1 August 2018 and 31 May 2019 deserve a mention.

First, it is important to note that for several years now, the Commission has committed itself to supporting the European steel industry in line with its strategy adopted in 2016, which is aimed at tackling the challenges of global steel overcapacity. To this end, 52 EU anti-dumping and anti-subsidy measures are presently in place with respect to steel products.

In addition to those measures, on 26 March 2018, the Commission initiated a safeguard investigation into certain steel products. This represents the second such investigation commenced on steel products pursuant to the rules set out in Article XIX of the GATT 1994 and the WTO Agreement on Safeguards, as implemented by Regulations (EU) 2015/478 and (EU) 2015/755. Following the imposition of provisional safeguard measures, definitive measures were adopted on 31 January 2019. These measures concerned 26 product categories and took the form of an erga omnes tariff-rate quota, so that imports of the product categories concerned above a particular quantitative threshold are subject to a 25 per cent duty (TRQ). In line with its obligations under WTO law, the measures were imposed for three years against imports from all countries except for the European Economic Area states (Norway, Iceland and Lichtenstein), as well as Botswana, Cameroon, Fiji, Ghana, Ivory Coast, Lesotho, Mozambique, Namibia, South Africa and Eswatini. On 17 May 2019, the Commission commenced its first review of those measures, which at the time of drafting is ongoing, and is predicted to be finalised by the end of September 2019. As announced in its Notice of Initiation, in the review, the Commission seeks to assess whether, on the basis of the Union interest, it may have to adjust the level or allocation of the quantitative element of the TRQ in case of changed circumstances during the period of imposition of the measures.

Among others, the Commission intends to investigate:

and Safeguard activities and the Use of trade defence instruments by Third Countries targeting the EU in 2018, p. 8.

See the WTO’s Integrated Trade Intelligence Portal (I-TIP Goods) and limit the direct query search accordingly: http://i-tip.wto.org/goods/Forms/TableView.aspx (last accessed 14 June 2019).


Until 30 June 2021.

See Article 5 of Regulation (EU) 2019/159, n 8.

Notice of initiation concerning the review of the safeguard measures applicable to imports of certain steel products, OJ C 169, 17 May 2019, p. 9.

id.
the level and allocation of tariff-rate quota for a number of specific product categories;\textsuperscript{21}  
crowding out of traditional trade flows;\textsuperscript{22}  
potential detrimental effects in achieving the integration objectives pursued with preferential trading partners;\textsuperscript{23}  
update the list of developing WTO member countries excluded from the scope of the measures based on their most recent level of imports;\textsuperscript{24}  and  
any other changes in circumstance that may require an adjustment of the level or allocation of the tariff-rate quota.\textsuperscript{25}

Separately, the Commission also announced that it is assessing whether the combination of anti-dumping or anti-subsidy measures and safeguard measures on the same product could have an effect greater than that intended in terms of the Union’s trade defence policy and objectives.\textsuperscript{26} As at the time of writing, no final conclusion has been reached.

Against this background, it is worth noting that, during the past year, several countries terminated their investigations into steel products.\textsuperscript{27} Whether the EU will follow their lead remains to be seen, particularly against the background of ArcelorMittal’s recent announcement that it plans to expand steel production cuts in Europe because of ‘an unprecedented rise in imports from outside the EU’.\textsuperscript{28}

Second, biodiesel makes a return in the form of anti-subsidy investigations into imports from Argentina and Indonesia. Back in 2012, the Commission first commenced anti-subsidy and anti-dumping investigations against imports of Indonesian biodiesel, made of palm oil, and Argentinian biodiesel, made of soybeans.\textsuperscript{29} However, the anti-subsidy investigations at the time were terminated,\textsuperscript{30} whereas anti-dumping duties were imposed.\textsuperscript{31} The latter

\textsuperscript{21} ibid, section 3.A.  
\textsuperscript{22} ibid, section 3.B.  
\textsuperscript{23} ibid, Section 3.C.  
\textsuperscript{24} ibid, Section 3.D.  
\textsuperscript{25} ibid, Section 3.E.  
\textsuperscript{26} Notice concerning the potential combined effects of anti-dumping or anti-subsidy measures with the safeguard measures on certain steel products, OJ C 146, 26 April 2019, p. 5.  
\textsuperscript{27} Costa Rica (Steel Concrete Rebar safeguard investigation terminated), Thailand (pre-existing safeguard measures concerning Hot-Rolled Steel Flat Products expired without renewal), Philippines (pre-existing safeguard measures in place against Steel Angle Bars expired without renewal), Indonesia (pre-existing safeguard measures on Flat-Rolled Product of Iron or Non-Alloy Steel terminated), Turkey (safeguard investigation into Iron and Steel terminated with no measures imposed) and Canada (provisional safeguard measures terminated for every kind of steel except two products). See also Gulf Cooperation Council (anti-dumping investigation into Chinese seamless pipes and tubes terminated).  
\textsuperscript{29} See Notice of initiation of an anti-subsidy proceeding concerning imports of biodiesel originating in Argentina and Indonesia, OJ C 342, 10 November 2012, p.12 and Notice of initiation of an anti-dumping proceeding concerning imports of biodiesel originating in Argentina and Indonesia, OJ C 260, 29 August 2012, p. 8.  
\textsuperscript{31} Council Implementing Regulation No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia, OJ L 315, 26 November 2013, p. 2.
measures then led to a number of disputes in Geneva (at the World Trade Organization Dispute Settlement Body (WTO DSB)) and Luxembourg (at the EU courts). The present anti-subsidy investigations into imports of biodiesel originating in Argentina resulted in definitive measures on 12 February 2019, coupled with an undertaking subject to a quantitative limit for eight Argentinian producers and the Argentinian Chamber of Biofuels. The anti-subsidy investigation into imports of biodiesel from Indonesia remains pending.

Another recently initiated case that is worth mentioning is the anti-subsidy investigation into imports of certain woven or stitched glass fibre fabrics (GFF) from China and Egypt. Initiated on 16 May 2019, this investigation follows the earlier initiation of an anti-dumping investigation against the same product. The novelty of this case, however, relates to the claim that ‘some of the subsidies are directly granted by the Government of Egypt, and some indirectly by the Government of China, but via the Government of Egypt.’ That is, the evidence presented to the Commission is reported to have shown that the only Egyptian exporting producer situated in the special economic zone at issue (the China-Egypt Economic and Trade Cooperation Zone) is Chinese-owned and benefits from preferential access to loans from Chinese state-owned or state-controlled entities to Egyptian state-owned banks. Against the backdrop of similar cooperation programmes under the Belt and Road Initiative, economic operators and governments alike are going to observe this investigation with great interest. Definitive measures, if any, are due on or before 13 June 2020.

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35 Notice of initiation of an anti-subsidy proceeding concerning imports of biodiesel originating in Indonesia, OJ C 439, 6 December 2018, p. 16.


38 id.

39 id.
Finally, it is worth reporting on first uses of the new anti-dumping methodology targeting significant market distortions. On 2 May 2019, in an expiry review into duties on organic coated steel, the Commission for the first time applied measures based on the new anti-dumping methodology. In so doing, it determined that the product under review was subject to a number of distortions: first, the Commission established the existence of significant economic distortions affecting domestic prices in China in the general economic context, highlighting the effects arising from the ‘socialist market economy’ system; second, it assessed the effect of state intervention and dominance of state ownership in the steel sector; third, it considered to what extent the Chinese state would be in a position to interfere with prices and costs through state presence in firms; fourth, it analysed to what extent the system of state planning, through government five-year plans and other circulars, would affect the prices on the domestic market; fifth, it considered that Chinese property and bankruptcy laws would result in the maintenance of insolvent firms; and, sixth, that wage costs and access to capital amounted to non-market-conforming distortions of the prices and costs of input materials. Considering all these elements, the Commission concluded that ‘prices or costs, including the costs of raw materials, energy and labour, are not the result of free market forces because they are affected by substantial government intervention’, which allowed the Commission to proceed to calculate normal value on the basis of Mexico as the representative country. The review ultimately extended the measures concerned.\footnote{Commission Implementing Regulation 2019/688 of 2 May 2019 imposing a definitive countervailing duty on imports of certain organic coated steel products originating in the People’s Republic of China following an expiry review pursuant to Article 18 of the Regulation (EU) 2016/1037 of the European Parliament and of the Council, OJ L 116, 3 May 2019, p. 39 and Commission Implementing Regulation 2019/687 of 2 May 2019 imposing a definitive anti-dumping duty on imports of certain organic coated steel products originating in the People’s Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council, OJ L 116, 3 May 2019, p. 5.}

Another expiry review worth reporting on concerns the investigation into imports of mixtures of urea and ammonium nitrate originating in Russia, Trinidad and Tobago and the United States of America.\footnote{Notice of initiation of an anti-dumping proceeding concerning imports of mixtures of urea and ammonium nitrate originating in Russia, Trinidad and Tobago and the United States of America, OJ C 284, 13 August 2018, p. 9.} While definitive findings are still pending, in imposing provisional duties against Russia, the Commission – for the first time – applied a modulation of the lesser-duty rule (by which duties are set against the lower of dumping or injury margin) because of the provisionally determined distortions in raw material (gas) prices in Russia.\footnote{Commission Implementing Regulation 2019/576 of 10 April 2019 imposing a provisional anti-dumping duty on imports of mixtures of urea and ammonium nitrate originating in Russia, Trinidad and Tobago and the United States of America, OJ L 100, 11 April 2019, p. 7.}

The only Article 5 investigation fully applying the new methodology (regarding steel sheet piles from China) was terminated on 5 July 2019.\footnote{Notice of initiation of an anti-dumping proceeding concerning imports of hot-rolled steel sheet piles originating in the People’s Republic of China, OJ C 177, 24 May 2018, p. 6, as terminated by Commission Implementing Decision (EU) 2019/1146 of 4 July 2019 terminating the anti-dumping proceeding concerning imports of hot-rolled steel sheet piles originating in the People’s Republic of China, OJ L 181, 5 July 2019, p. 89.}
IV LEGAL AND PRACTICAL DEVELOPMENTS

In the area of TDI, no substantial legislative changes occurred in 2018. That is of little surprise: the EU’s TDI framework only recently underwent a major overhaul with changes to the basic anti-dumping and anti-subsidy Regulations that were introduced through Regulations (EU) 2017/2321 and (EU) 2018/825. The aim of these changes was to streamline investigations, increase transparency, help SMEs, and establish the possibility to impose appropriate duty levels in investigations where top-down market distortions in the country under investigation sought to impact on the normal value of the product under investigation.

In 2018, and in line with its Communication on Steel of 2016, the Commission continued to focus on investigations in respect of steel products. In fact, in the past year, TDI investigations into unfair trading of steel products comprised 44 per cent of the Commission’s case work, giving new life to the old joke that ‘real trade lawyers know at least 10 types of steel’. Definitive safeguard measures were imposed on certain steel products on 31 January 2019. At the same time, anti-dumping and anti-subsidy measures remain in place for some categories covered by the safeguard measure. To tackle this issue and avoid double-counting, the Commission established a mechanism by way of which the relevant anti-dumping and anti-subsidy measures should be amended in accordance with Notice 2019/C 146/06 to avoid (1) an undesirably onerous burden on certain exporting producers, and (2) greater than necessary effect in terms of the Union’s trade defence policy and objectives.

As mentioned above, the majority of the TDI investigations in 2018 (as in previous years) were against China. The Commission has published a report on China’s significant market distortions in support of its new methodology. It is also working on such a report on Russia.

In a separate drawer of the Common Commercial Policy, Regulation (EU) 2019/67 imposed certain safeguard measures with regard to imports of indica rice originating in Cambodia and Myanmar, temporarily withdrawing the preferential access granted to these countries under the Everything But Arms arrangement of the EU’s GSP Framework, and

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47 Notice concerning the potential combined effects of anti-dumping or anti-subsidy measures with the safeguard measures on certain steel products, OJ C146, 26 April 2019, p. 5.


re-introducing the ordinary Common Customs Tariff duties on imports of those products from the countries concerned. This type of measure is not employed often, but has been made use of in the past, in particular to investigate whether a beneficiary country had been sufficiently complying with the GSP’s human rights conditions. The temporary withdrawal arising from Regulation (EU) 2019/67 will remain in place for a period of three years, unless extended in duly justified circumstances.52

Not specifically a TDI measure, but nonetheless of note to the international trade practitioner, is the entry into force of Regulation (EU) 2019/712 on safeguarding competition in air transport.53 This regulation effectively repeals and replaces its never-used 2004 predecessor (Regulation (EC) 868/200454) and tasks the Commission to address unfair practices by third countries in the air transport sector. In a nutshell, mirroring many typical TDI provisions, the Commission is granted the implementing powers to adopt measures (financial duties or the suspension of some services) when air carriers benefit from discriminatory practices or subsidies granted by third countries that result in injury to EU air carriers. It remains to be seen whether the 2019 regulation will be applied.

**i EU’s trade and economic partnerships**

After years of negotiation, and during times of great uncertainty in international trade, on 28 June 2019, the EU and Mercosur, a bloc comprising Argentina, Brazil, Paraguay and Uruguay, reached a political agreement on trade that will cover a population of 780 million and bring the two trade partners politically and economically closer together. This is most needed for the EU export industry, which, following stalemates in negotiation, particularly on agriculture, lost for a short while its long-standing rank as the largest trading partner for Mercosur (excluding Venezuela) to China.55 While the EU–Mercosur Association Agreement will still require approval by the Council and the European Parliament before its entry into force, before the summer recess, the Irish parliament, the Dáil, voted in favour of a largely symbolic motion to reject the trade deal. This may have no implications for its approval process, however, the vote should at least caution those who believe that the die has already been cast on this deal.

Separately, two important free-trade agreements entered into force in the first half of 2019. First, on 1 February 2019, the EU and Japan’s Economic Partnership Agreement (EU–Japan EPA) entered into force. Covering one-third of global GDP, the EU–Japan EPA represents not only the biggest bilateral trade partnership ever concluded by the EU, but also the first EU trade agreement locking in the Paris climate deal commitments alongside provisions on minimum standards for workers’ rights and consumer protection. Therefore,

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52 id, recital 79 et seq.
the agreement creates a Euro-Pacific market space without tariffs and common technical standards in key sectors (e.g., motor vehicles, life science, food products, clothing and ICT), facilitates trade in services, and encourages increased activities across a number of service sectors that account for 90 per cent of Europe’s job market.56

Following the same steps, the trade and investment agreements between the EU and Singapore received the approval of the European Parliament on 13 February 2019, with the green light given to the Partnership and Cooperation Agreement.57 Singapore is the EU’s largest trading partner in the southeast Asia region, with total bilateral trade in goods and services estimated at €53 billion and €51 billion respectively. Therefore, the significance of these agreements, which will ensure a certain minimum level of investment protection and remove all remaining tariffs on EU products and obstacles to trade besides tariffs in major sectors, should not be underestimated. Further steps to effect entry into force require the finalisation of Singapore’s internal administrative procedures and the conclusion of the final formalities by the EU and Singapore. In contrast, the investment protection agreement, which falls under the shared competence of the EU and its Member States after Opinion 2/15 of the Court of Justice58 also needs to be ratified by the EU Member States, following their national procedures.59

Finally, the mechanism for the settlement of disputes in the EU–Canada Comprehensive Economic and Trade Agreement (CETA), which entered into force in 2017, was given its blessing by the Court of Justice in Opinion 2/17 on 30 April 2019. The Court’s opinion had been sought by Belgium in 2017, expressing doubts as to the effects of that mechanism on the exclusive jurisdiction of the Court over the definitive interpretation of EU law, and therefore the autonomy of the EU legal order, and certain other matters. With its positive opinion, and subject only to minor prior requirements, the Court clears the way for entry into force of the type of dispute settlement mechanism envisaged by CETA (and, by extension, also of the Multilateral Investment Court – a global dispute settlement body for investment disputes).

ii Brexit

The core legislation comprising the UK’s TDI framework is the Trade Bill60 and the Taxation (Cross-border Trade) Act 2018 (TCBTA).61 The Trade Bill was introduced into the House of Commons on 7 November 2017 and is currently progressing through Parliament.62 The aim of the Trade Bill is to ensure continuity of the effects of existing EU free trade agreements and other preferential trading arrangements upon Brexit. While the Trade Bill does not create an

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57 The EU and Singapore signed the trade and investment agreements on 19 October 2018.
60 See the draft Trade Bill: https://publications.parliament.uk/pa/bills/2017-19/trade/documents.html (last accessed 14 June 2019).
62 https://services.parliament.uk/Bills/2017-19/trade/documents.html.
underlying trade remedies framework, it sets up the basis for an establishment of the Trade Remedies Authority (TRA). More details on the TRA’s function are contained in TCBTA,\(^{63}\) the general provisions of which came into force on 13 September 2018.

The TRA is a public body that, much like the Commission, will be carrying out investigations in the area of anti-dumping, anti-subsidy and safeguards. It will recommend appropriate measures to the Secretary of State, who in turn will either reject or accept these recommendations. That said, the Secretary of State can only reject a recommendation on public interest grounds. To ensure transparency, when the Secretary of State decides not to apply measures on public interest grounds, the reasons for that will have to be explained to the House of Commons.\(^{64}\)

In the meantime, before the Trade Bill enters into force and the TRA is fully functional, the Trade Remedies Investigation Directorate (TRID)\(^{65}\) is carrying out an examination of which active EU measures the UK may decide to keep after Brexit. The TRID was set up on 6 March 2019\(^{66}\) within the Department for International Trade to ensure that such measures meet the needs of the UK economy and are WTO-compliant. Until the full examination and potential reviews of the EU measures are complete, the UK will keep the EU duty levels set by the existing measures.\(^{67}\)

Given that there are more than 100\(^{68}\) measures in place at EU level, considerable work needs to be undertaken by the relevant UK authorities to provide certainty and continuity to UK businesses.

V TRADE DISPUTES BEFORE THE EUROPEAN COURTS

In 2018, the Court of Justice (ECJ) and the General Court (GC) together handed down a total of 26 judgments.\(^{69}\) While this slowly reduces the backlog of pending cases (around 35), the EU continued to face regular court challenges concerning its trade policies and trade defence practice.

Below, we discuss some of the most interesting practical developments in the field of trade defence.

i Access to documents and information not accounted for in the basic Regulations

In the area of trade defence, access to confidential documents and information is subject to strict differentiation as to whether a document or certain information is open for disclosure because it forms part of the ‘non-confidential’ file, or whether that document is subject to a

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63 The Act seeks to replace the current EU Union Customs Code.
64 See Section 13 and Schedules 4 and 5 of the TCBTA.
65 The contingency provisions are envisaged by Section 56 of the TCBTA.
68 At the time of writing there are 133 measures in force by the EU. See the WTO’s Integrated Trade Intelligence Portal (I-TIP Goods) and limit the direct query search accordingly: http://i-tip.wto.org/goods/Forms/TableView.aspx (last accessed 14 June 2019).
non-disclosure obligation because that document is confidential by nature, is internal, or has had confidential treatment requested for it (and does not lend itself to indexing or summary). However, the delicate contours of this interplay between the various access to documents provisions of the basic Regulations and the observance of the rights of defence of interested parties had long been unclear.

The recent judgment in *Jindal* tackles this system for the first time and clarifies what must be provided to interested parties for rights of defence purposes.\(^\text{70}\) In doing so, the judgment recalls that the basic Regulations provide for a complete system of procedural guarantees seeking, on the one hand, to allow interested parties effectively to defend their interests and, on the other hand, to preserve, when it is necessary, the confidentiality of the information used in the course of that investigation.\(^\text{71}\) According to the GC, the various provisions on confidentiality and disclosure allow those two requirements to be reconciled.\(^\text{72}\) That is to say that, for the effective defence of their rights, interested parties need to be given access to the ‘non-confidential’ file of the investigation during the investigation and receive a complete disclosure of their information used in the investigation. The analogous safeguards on confidentiality circumscribe these access rights.\(^\text{73}\)

However, according to *Jindal*, those provisions do not cater for ‘documents the disclosure of which the applicants could not claim pursuant to the basic regulation’.\(^\text{74}\) That is because access to any other information ‘would be contrary to the respect for the confidentiality of such data’.\(^\text{75}\) That reasoning is akin to the *Technische Glaswerke Ilmenau* case law, which, while concerning access to documents under Regulation (EC) 1049/2001,\(^\text{76}\) seeks to ensure that the dialogue and balancing exercise sought by the EU legislator in investigation procedures not be disturbed.\(^\text{77}\) In practice, this means that interested parties can no longer rely on a rights of defence claim during the investigation to get access to more detailed information than that which would have been available to them on the ‘non-confidential file’ or in their individual disclosure. To the Commission, this reasoning may provide some breathing space particularly with regard to vexatious and long lists of claims and ‘clarification’ questions during the course of the investigation. At the same time, *Jindal* may shift the Court’s attention to greater observance of the disclosure provisions in the basic Regulations, including verification of the up-to-date nature of the ‘non-confidential file’ and more detailed disclosure documents and verification reports (the latter of which was greatly relied on as evidence in the recent judgment in *Changmao*).\(^\text{78}\)


\(^{71}\) ibid, paragraph 45.

\(^{72}\) ibid, paragraph 49.

\(^{73}\) ibid, paragraph 51.

\(^{74}\) ibid, paragraph 49.

\(^{75}\) ibid, paragraph 51.


\(^{77}\) See, to that effect, the dialogue procedure established in Article 108 TFEU between the Commission and the Member States, as discussed in Case C-139/07 *P Commission v. Technische Glaswerke Ilmenau* EU:C:2010:376, paragraphs 57 to 59.

Cooperation between national courts and EU institutions

Picture the following scenario: you do not have standing for a direct challenge before the GC but still wish to challenge the validity of a trade defence regulation. Under the Foto-Frost case law, a national court can merely confirm the validity of a regulation, but cannot, by itself, invalidate such a regulation. If it has been sufficiently persuaded to have doubts about the validity of the regulation, it must refer the case to the ECJ.79

What to do, however, where raising those doubts requires reliance on confidential information? From Jindal, we know that in trade defence investigations, such information is not easy to come by. In Eurobolt, although the applicant before the Dutch national courts had raised doubts as to compliance with certain essential procedural rules, it could not prove that was the case because to do so it would have had to rely on confidential information not in its possession. That is what prompted the Dutch Supreme Court to refer the case to the ECJ: would the principle of sincere cooperation, coupled with the preliminary reference procedure, entitle national courts to approach the EU institutions that had taken part in drawing up a piece of secondary EU legislation to provide them with certain documents or information to confirm the legislation’s validity, and rid themselves of the reasonable doubts raised by the parties before them, without making a reference to the ECJ?

The answer from Luxembourg was a resounding yes. According to the ECJ:

"A national court or tribunal is entitled to approach an EU institution, prior to the bringing of proceedings before the Court of Justice, in order to obtain specific information and evidence from that institution which that court or tribunal considers essential in order to dispel all doubts which it may have as regards the validity of the EU act concerned and, thus, avoid making a reference to the Court of Justice for a preliminary ruling for the purpose of assessing validity."80

According to the ECJ, the EU institutions would be under a duty of sincere cooperation with the judicial authorities of the Member States, because those authorities are responsible for ensuring that EU law is correctly applied. That transforms the role of the EU institutions into a quasi-standing amicus curiae, which has to assist the national court with evidence and information in finding the correct determination of the question before it, theoretically establishing a similar role to that which the Commission already plays at ECJ level for preliminary references. Only under the conditions laid down in the long-standing Zwartveld case law could those institutions deny the transmission of the evidence or information concerned, thus setting a high barrier to deny such cooperation. This development will greatly assist national litigants in the enforcement of their rights, be that in the field of trade defence or beyond, because not only does the Eurobolt approach bridge the (at times) high psychological hurdle of establishing genuine doubts about the validity of a piece of EU secondary legislation, but it also has the potential of shortening national procedures significantly. At least for the applicant in Eurobolt, a request for the underlying information at first instance could have saved taking the case to the Dutch Supreme Court.

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iii Developments of the Rusal Arメンal case law

On 16 July 2015, the Grand Chamber of the ECJ handed down its judgment in Case C-21/14 P Rusal Arメンal. It laid down that the recitals to the basic anti-dumping Regulation do not reveal sufficient intention on the part of the legislator to implement into EU law the obligations assumed under Article 2 of the WTO Anti-Dumping Agreement.82 Furthermore, according to the ECJ, the WTO Anti-Dumping Agreement ‘has no specific rules relating to’83 the determination of market economy status, so that there would effectively be a certain policy space unassumed by public international law, which may be filled by an EU law-specific solution. In that area, the ECJ recognises the EU legislator had wished to express an intention to ‘adopt in that sphere an approach specific to the EU legal order’.84

But does Rusal establish a space of ‘European exceptionalism’ in trade defence law?

Last year proved that fear to be unfounded. First, in November 2018, in its judgment in Baby Dan, the ECJ held that because the basic anti-dumping Regulation defines, by way of cross-reference to a different article, the meaning of ‘major proportion’85 of the Union industry – a reference that is notably absent in the equivalent provision in the WTO Anti-Dumping Agreement – ‘[t]hat reference constitutes an additional factor in relation to the definition in Article 4.1 of the Anti-Dumping Agreement.’86 In light of this, ‘it must be held that the Anti-Dumping Agreement, as interpreted by the DSB, cannot be relied upon to challenge the legality of the contested regulation.’87 Read in isolation, that conclusion might be worrying to some. However, the ECJ also makes clear reference to the judgment in Philips Lighting, in which the Grand Chamber of the ECJ opined that the additional factor in Article 5(4) of the basic anti-dumping Regulation would not be an obstacle to read that provision in line with Article 4.1 of the WTO Anti-Dumping Agreement.88 And since the industry at issue in Baby Dan was, in addition, highly fragmented, the judgment is also in line with the directions given by the Appellate Body in EC – Fasteners.89

Along similar lines, in March 2019, the GC in Foshan Lihua Ceramic noted that an additional subparagraph to an article in the basic anti-dumping Regulation on new exporter reviews that differed from that contained in the WTO Anti-Dumping Agreement ‘is an expression of the EU legislator’s intention to adopt an approach in this field that is specific to the EU legal order’.90 And, on that basis ‘it cannot be established that it was the EU legislature’s intention, by the adoption of Article 11(4) of the Basic Regulation, to implement the particular obligations created by Article 9.5 of the Anti-Dumping Agreement.’91 That is correct: there is no equivalent paragraph addressing sampling in the WTO Anti-Dumping Agreement with regard to new exporter reviews, nor does WTO jurisprudence exist on that issue. So, Foshan Lihua Ceramic concerns a Rusal-ised situation where the EU legislator has filled an existing policy space. That is, however, only until an interpretation on the

83 ibid, paragraph 50.
84 ibid, paragraph 48.
85 Basic Anti-dumping Regulation, Article 4(1) with reference to Article 5(4).
86 Judgment of 15 November 2018, Case C-592/17 Baby Dan, EU:C:2018:913, paragraph 74.
87 ibid, paragraph 75.
91 ibid.
cross-application of the sampling possibility in Article 6.10 of the WTO Anti-Dumping Agreement is resolved or a narrow meaning is given to Article 9.5 of the WTO Anti-Dumping Agreement, which is when Article 11(4) of the basic anti-dumping Regulation will have to again be interpreted to conform with WTO law.

VI TRADE DISPUTES BEFORE THE WTO DSB

In the past year, there were two major developments before the WTO DSB that concerned the EU.

First, on 7 May 2019, China requested the suspension of the Panel’s work in EU – Price Comparison Methodologies. On 14 June 2019, the Panel informed the DSB that it wished to grant China’s request and suspend its work. According to Article 12.12 of the WTO’s Dispute Settlement Understanding, the Panel may suspend its work at any time at the request of the complaining party for a period not exceeding 12 months. That provision also indicates that if the work of the Panel has been suspended for more than 12 months, the authority for establishment of the Panel lapses. China’s request comes in the wake of news reports that ‘China didn’t automatically qualify for market-economy status in 2016.’ Such reports remain unconfirmed by the EU and the United States.

Second, on 10 August 2018, the Panel released its report in EU – Energy Package. In this proceeding, Russia challenged the EU’s Third Energy Package (which consists of two EU directives and two regulations) over the regulation of the natural gas sector in Croatia, Hungary and Lithuania, and the development of certain natural gas infrastructure in those countries. The challenged measures fall into seven different categories, ranging from unbundling (that is, the separation of transmission and distribution of gas providers on the domestic market), to certain public body measures (which, according to Russia, seek to ‘exempt’ pipeline transport service suppliers owned and controlled by EU Member States from the requirement of unbundling), to certain infrastructure exemption measures (which, allegedly, led to the Commission and Member State authorities interpreting certain requirements for eligibility for infrastructure exemption differently with regard to EU and Russia-imported natural gas and pipeline transport service suppliers). While the detail of the Panel’s conclusions escapes a short summary, it generally concluded that Russia did not demonstrate the inconsistency of most measures. With regard to the measures referred to above, the Panel noted that there was insufficient evidence provided by Russia that: first, the unbundling measure is inconsistent with the GATS (Article II.1 dealing with non-discrimination, XVI:2(a) dealing with market access commitments) or GATT (Articles I:1 and III:4 also dealing with non-discrimination); second, the public body measure would be inconsistent with GATS Article XVII (dealing with national treatment); and third, the infrastructure exemption measures would be inconsistent with GATT Article X:3(a) (which concerns the uniform application of rules). Only with regard to one measure, the TEN-E measure, concerning benefits under the TEN-E

Regulation\(^5\) for certain ‘projects of common interest’, did the Panel find a violation of GATT Articles 1:1 and III:4. These findings were appealed by the EU on 21 September 2018, with the Appellate Body report outstanding.

**VII OUTLOOK**

For trade lawyers at least, Brexit is the gift that keeps on giving. With Brexit preparations continuing, EU trade law is likely to gain renewed interest on both sides of the Channel. Next year’s edition of this book will either feature a separate chapter on the United Kingdom or continue in its current format. Uncertainty arising from Brexit remains possibly the biggest threat to trade in the region, with English bookmaker Paddy Power putting the odds at 2/1 that Brexit will not occur before 2020 and at 7/1 that a second Brexit referendum will be held before the end of 2019.

In the area of TDI, the coming year is expected to be equally interesting, albeit slightly more predictable: the outcome of the steel safeguard review will be eagerly awaited by many economic operators in the EU, with the outcome most likely also having an impact on steel safeguard investigations in other jurisdictions. Of further interest will be the definitive determination reached in the anti-subsidy investigation on GFF imports from China and Egypt (part of this investigation includes novel claims concerning alleged subsidies made by Chinese state-owned banks in a free trade zone in Egypt pursuant to an arrangement between the two governments). The entry into force of the Regulation (EU) 2019/1131\(^6\) (known as the EEZ regulation) and the likely initiation of a number of Article 5 investigations fully clothed in the new MTDI model should provide for an equally interesting change. To ensure that SMEs are not left behind throughout this process, the Commission’s latest annual report notes that it seeks to assist SMEs’ participation in TDI investigations (within the EU and in third countries), and that part of that process is to raise awareness of the trade investigation process among such companies in general.\(^7\)

On the legislative front, things are expected to remain quiet – after all, last year’s major overhaul of the legislative landscape in TDI requires trial and implementation before any further rule changes are set to see the light of day. That said, commentators are already setting their sights on Germany’s turn for the Council’s rotating presidency in July 2020 to give fresh impetus to an aging catalogue of trade policy measures. That is so particularly in light of Peter Altmaier’s policy paper on Germany’s National Industrial Strategy 2030, which advocates an aggressive industrial policy approach towards non-EU Member States,

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\(^7\) See p. 43 of Commission Staff Working Document accompanying 37th Annual Report, n 3.
particularly in the area of intellectual property and public procurement, and would open the
door to possible ‘EU instruments that penalize forced technology transfers and state aid by
non-EU governments’. In what form these instruments would be presented remains open.

98 Peterson Institute for International Economics, Policy Brief 19-4, Jeroem Zettelmeyer, ‘The Return of
Chapter 8

ADMINISTERING EUROPEAN JUSTICE: LEGAL SECRETARIES (RÉFÉRENDAIRES)

Michael-James Clifton and Pekka Pohjankoski

This chapter examines the origins of legal secretaries in the Court of Justice of the European Union (CJEU) and the EFTA Court and the role they have within these ‘European Courts’. To this end, it explores similar positions found in the courts of select civil law and common law jurisdictions, comparing and analysing them. On the basis of this comparative review, we argue that the position of legal secretary in the European Courts owes more to the tradition of independent judicial secretaries in civil law jurisdictions, although it also shares some features with the law clerks of the common law world. In addition, the article endeavours to describe the current role of legal secretaries, assessing their respective functions in the two judicial bodies and evaluating the relative importance of the position. On this point, the article finds that the legal secretaries are tasked with considerable responsibilities in the management of the judicial enterprise of the European Courts. At the same time, they have no independent role since their work is performed exclusively in the name of the judge or advocate general for whom they work and under their direct supervision.

I INTRODUCTION

At the CJEU2 and the EFTA Court, legal secretaries assist the courts’ members in their work. The two ‘sister’ courts, referred to in this chapter as ‘the European Courts’, have comparable roles in the administration of justice within the legal orders of the EU and European Free Trade Association (EFTA) pillars of the European Economic Area (EEA).3 The European Courts provide authoritative interpretation on EU law and EEA law, resolve disputes of international character between Member States and the supranational surveillance bodies, and act as the final arbiters on issues arising from the daily administration of these regional integration systems.4 The role occupied by both courts, as well as their judges, has long been

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2 Pursuant to Article 19 of the Treaty on European Union (TEU), the Court of Justice of the European Union (CJEU) includes the Court of Justice, the General Court and specialised courts. At the time of writing, no specialised courts exist.
3 The EEA Agreement brings together the 28 EU Member States and the three EFTA States (Norway, Iceland, Liechtenstein) who have signed the EEA Agreement. Switzerland, an EFTA State, is not party to the EEA Agreement.
4 On the relationship of the two courts, see, e.g., C Baudenbacher ‘The EFTA Court and Court of Justice of the European Union: Coming in Parts but Winning Together’, in A Rosas, E Levits and Y Bot (eds), The
the subject of in-depth academic studies. However, much less attention has been paid to the internal organisation of these judicial bodies and the legal work carried out by the personal advisers of their members – that is, the legal secretaries of the judges and advocates general, frequently referred to by their French title, référendaire.

This chapter examines the origins of legal secretaries in the CJEU and the EFTA Court and their role in the administration of justice in these judicial bodies overseeing the application of the laws governing the EU and the largest ‘enhanced free trade area’ in the world: the EEA. It strives to remedy the relative dearth of literature on the ‘closest personal legal advisers and assistants’ to the members of the European Courts. Not only is this gap in the literature regrettable in view of the lack of information on the legal secretaries, but it also contributes to misunderstandings about their role. In particular, the office of référendaires is sometimes conflated – in our view wrongly – with that of the law clerks of the United States Supreme Court. At other times, they are portrayed – according to us, equally misguidedly – as unaccountable power-hungry operators in the shadows of the European Courts. As its title suggests, this article aspires to shed light on the origins of the legal secretaries’ position and illuminate the readership about their role. This chapter considers not only the current normative framework that governs their work, but also the historical development of the role of legal secretaries, including comparative materials from national jurisdictions.

This chapter has a two-part structure. The first part considers positions similar to those of the legal secretaries in the European Courts found in the judiciaries of select civil law and common law countries. On this basis, the chapter argues that the position of legal secretary in the European Courts derives primarily from the more independent and long-serving judicial secretaries found in the courts of civil law jurisdictions, although it also shares some features

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6 See, e.g., M Bobek, ‘The Court of Justice of the European Union’ in A Arnell & D Chalmers (eds.), The Oxford Handbook of European Union Law (Oxford University Press, 2014), p. 168 (where the author describes it as ‘regrettable’ that legal secretaries have been subject to little sustained research). See also A Cohen, “Dix personnages majestueux en longue robe amarante.” La formation de la Cour de justice des Communautés européennes’ (2010) 60 (2) Revue française de science politique 227, at 231 (‘Mais la plupart des travaux sur le processus de constitutionnalisation restent muets . . . sur les . . . référendaires . . . , leur carrière professionnelle avant et après leur passage par la Cour, leur formation et leur spécialisation, sans parler de leurs origines sociales, de leurs opinions politiques ou de leurs convictions idéologiques . . . ’).

7 At the CJEU, where French is the working language, the title référendaire is commonly used, while ‘legal secretary’ is prevalent at the English-speaking EFTA Court; for the purposes of this article, these two terms are used interchangeably.

8 See J Bast, ‘European Economic Area (EEA)’ in Max Planck Encyclopedia of Public International Law 632 (Oxford University Press, 2010). See also Case E-9/97, Sveinbjörnsdóttir [1998] EFTA Ct. Rep. 95, paragraph 59. The CJEU has jurisdiction over EU law and the EEA Agreement insofar as the latter is applied in the EU Member States; the EFTA Court has jurisdiction over the EEA Agreement as regards the EFTA States which are parties to the EEA Agreement.

with the law clerks of the common law world.\textsuperscript{10} The second part describes and evaluates the function of legal secretaries in the European Courts, providing first an overview of the position at the CJEU, followed by a presentation of the role at the EFTA Court. This part evaluates the relative importance of the position, finding that the legal secretaries are tasked with considerable responsibilities in the management of the judicial enterprise of both European Courts. At the same time, it is highlighted that they have no independent role since their work is exclusively performed in the name of the judge or advocate general for whom they work.\textsuperscript{11}

II THE ORIGINS: ASSISTING JUDGES IN CIVIL LAW AND COMMON LAW JURISDICTIONS

i Assisting judges in civil law jurisdictions – history and current practice

The notion of having court lawyers aid judges in their work appears to have its origins in the Romano-Germanic legal tradition. The administrative-judicial office of ‘referendarius’ has existed in continental Europe under various guises over time. Without suggesting a direct line of pedigree for the present-day legal secretaries at the European Courts, some early functions of certain officials may be recounted anecdotally. Referendarius was both an ecclesiastical rank in the Orthodox Church and a civilian office of the Byzantine imperial administration.\textsuperscript{12}

At the Byzantine Court of the Eastern Roman Empire, referendarii were ‘officials who reported to the Emperor on the memorials of petitioners, and conveyed to the judges the orders of the emperor in connexion with such memorials’.\textsuperscript{13} During the Middle Ages in


\textsuperscript{11} The members’ work in the European Courts is organised around their chambers or cabinet, to which the judge or advocate general personally selects his or her référendaires at complete liberty. The word cabinet may bring to mind images of political affiliation, but the selection and role of legal secretaries is, in principle, apolitical.


the West, the high official later known as chancellor (‘cancellarius’) was called referendarius during the Merovingian period of the Frankish Empire (5th–8th century). The origins of the office may also be traced in the canon law institutions of the Catholic Church. In the 1438 work De curiae commodis (‘On the Benefits of the Curia’) by Lapo Da Castiglionchio, a Florentine humanist and an official in the Papal Curia during the reign of Pope Eugenius IV (1383–1447), it is explained that the referendarii, who worked in the judicial branch of the administrative apparatus of the Holy See, were in charge of handling the requests for grace presented to the Pope. According to a definition of a référendaire in the Dictionary of Canon Law and Papal Practice from 1761, these officials of the Papal Curia had to be qualified as ‘doctors of civil and canon law’. Finally, during the ancien régime of pre-revolutionary France, référendaires worked under the Chancellor (‘chancelier’) in the Paris parlement, a provincial appellate court.

Whatever the exact nature of referendarii may have been, it appears that, at the time of the creation of the European Coal and Steel Community in 1951, the office of legal secretary was not unknown to the judicial systems of the original EU Member States, all of which, broadly speaking, hailed from the civil law tradition. In Germany, ‘legal support workers’ had assisted judges at the Prussian Supreme Administrative Law Court, established in 1875.
today, the judges at German federal supreme courts are assisted by academic collaborators.¹⁹ At the Federal Constitutional Court, founded in 1951, all academic collaborators are, in principle, legally qualified to serve as judges.²⁰ The duties of the collaborators are, however, limited to assisting the judges; they do not vote on the decisions.²¹ Similarly, at the French Court of Cassation, temporarily assigned judges with reporting and documentation duties work as conseillers référendaires as part of their careers.²² They participate in the court’s work and deliberations but may only vote in some cases, notably when they act as rapporteurs.²³ Before assuming their functions at the Court of Cassation, the conseillers référendaires must have served for a few years on the bench in lower-level courts. They must be younger than 47 at the time of their nomination for a 10-year mandate, after which they generally return to lower courts.²⁴ As judges, they enjoy the same guarantees of non-removability from office as the members of the Court of Cassation.²⁵ Further, the judges of the Italian Constitutional Court are also assisted by judicial assistants.²⁶ These judicial assistants are ordinary or administrative judges, university professors and researchers, or civil servants, who perform research and case-handling functions.²⁷ They are chosen directly by individual judges for a maximum period of nine years, which coincides with the length of the term of the judges themselves.²⁸

Beyond the original Member States, legal secretaries are a feature of the judicial organisation of other Romano-Germanic legal systems, such as that of Denmark (joined the EEC in 1973) and Finland (joined first the EEA in 1994, then the EU in 1995). At the Supreme Court of Denmark, such lawyers have existed since King Frederik III’s Order of 14 February 1661 founded the Court’s administration. It was originally provided that two legal secretaries, one from nobility and the other from the merchant classes, should keep records of the proceedings and draft documents, which laid the foundation for the

²¹ ibid., p. 77. The clerks of the Federal Constitutional Court, which has two chambers (Senat), have nonetheless been nicknamed the ‘third chamber’ on account of their alleged influence in the drafting of judgments. See, e.g/ S Jehle, ‘Der heimliche dritte Senat in Karlsruhe’ Stuttgarter-Zeitung.de, 3 January 2015, available at www.stuttgarter-zeitung.de/inhalt.bundesverfassungsgericht-der-heimliche-dritte-senat-in-karlsruhe.68baaf04-08db-49c2-a843-395b4747985.html, accessed 30 December 2017. Their influence should however not be overstated. Cf C Körner, ‘Der “Dritte Senat”’, Legal Tribune Online (30 October 2012), available at www.lto.de/recht/job-karriere//jobprofil-wissenschaftliche-r-mitarbeiter-am-bundesverfassungsgericht/, accessed 30 December 2017 (according to which the academic assistants ‘pedal’ the Court forward, but ‘do not sit on the handlebars’).
²² On the creation of the position of conseillers référendaires, see P Hébraud, ‘Magistrats. Choix du poste de réaffectation’ (1967) 65 (spec. no. 7) Revue trimestrielle de droit civil 442.
²³ See Article L. 431-3 of the code de l’organisation judiciaire.
²⁵ ibid.
²⁷ ibid., 94–96, 100.
²⁸ ibid.
present-day office of the judicial clerks. They record the minutes of the judges’ voting in deliberations and participate in the handling and preparation of cases, assisting the reporting judge. Most of them have five to 10 years of professional experience upon recruitment and stay at the Supreme Court for two to three years. The Finnish Supreme Court Act of 1918 established the office of rapporteurs (esittelijä). The persons appointed to this office had to be ‘learned citizens from the legal profession with experience and skill in judging’. The office of esittelijä continues to fulfil an essential role in the judicial work of both the Supreme Court and the Supreme Administrative Court, as these court lawyers prepare the draft judgment for the judges. Under Section 118(2) of the Constitution of Finland, the esittelijä may file a dissenting opinion to the judgment, which relieves him or her of any official responsibility for the decision. They may only be discharged from office under the same exceptional conditions as judges.

Finally, in Switzerland, an EFTA State, legal secretaries (Gerichtsschreiber) are employed at both the federal and cantonal courts. Originally, as an aspect of the Swiss democratic tradition, courts were formed of lay judges only, with a Gerichtsschreiber – literally a ‘court writer’ – to provide the judges with advice on the law. The first two Gerichtsschreiber were employed by the Swiss Federal Supreme Court in 1875. There, their primary task was, until the 1980s and 1990s, the ‘draft[ing] of the written judgments after the decisions had been

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30 Depending on the function performed, they are known by titles such as protokolsekretær (protocol officer) or referendar (legal secretary). B Dahl, ‘Højesteret og dommerfuldmægtigene’, in R Plesner Skovby, N Palea Bonde and D Pagh Asanovski (eds), Jubileumskrift til Dommerfuldmægtigeforeningen (Djøf Forlag, 2014), pp. 42–48.
31 ibid., p. 42.
32 Different positions in the administrative hierarchy exist within the function of esittelijä, including that of oikeussihteeri, which may be translated as ‘legal secretary’. Another position is that of referendarieråd (in Swedish, the second national language of Finland), which clearly shares its etymology with référendaire.
33 See Finnish Supreme Court Act (Laki Korkeimmasta oikeudesta) 74A/1918, at §8 (translation by authors).
34 See, Constitution of Finland (Suomen perustuslaki) 731/1999, 103§, 118§, paragraph 2, Supreme Court Act (Laki korkeimmasta oikeudesta) 665/2005, 13§. Heikki Kanninen, the Finnish nominated Judge at the General Court of the European Union as well as a former référendaire at the Court of Justice, has observed that the permanency of the office of esittelijä is a characteristic that particularly distinguishes it from that of référendaires at the CJEU, who are fully dependent on the judge or advocate general for whom they work. H Kanninen, ‘KHO:n esittelijä ja EY:n tuomioistuinten lakimiesavustajana – sama työ, eri asema’, in Korkein hallinto-oikeus 90 vuotta (Otavan Kirjapaino, 2008), p. 591.
35 The Swiss Federal Supreme Court’s own English publications translate ‘Gerichtsschreiber’ as ‘Court Clerk’. For the purposes of this chapter, to avoid confusion the German word will be used to refer to such positions in Switzerland. See, inter alia, ‘The Swiss Federal Supreme Court: The Third Power within the Federal State 2017’, available at www.bger.ch/files/live/sites/bger/files/pdf/Publikationen/bg_broschuere_a4_e.pdf, accessed 30 December 2017, p. 4. They are known in the French and Italian speaking linguistic communities of Switzerland as greffier or cancelliere, respectively. In the past, Gerichtsschreiber were also called ‘Juristischer Sekretär’ – translating roughly to ‘legal secretary’ (see § 25 of the former Criminal Procedure Code of the Canton of Zurich).
36 On cantonal courts, see, e.g., § 133 of the Gesetz über die Gerichts- und Behördenorganisation im Zivil- und Strafprozess (GOG), 211.1, 10.5.2010.
38 Interview with Dr. iur. R Pedretti, LLM, Gerichtsschreiber at the Federal Supreme Court on 12 April 2016.
rendered in court'. With the court’s increasing caseload, the Gerichtsschreiber are now also tasked with preparing the draft ruling in many cases, as well as the final text of rulings based on the remarks made by the members of the division. Gerichtsschreiber sign the judgment and may dissent from the court's judgment in certain circumstances. A candidate for the position must either be a licensed lawyer or hold a doctorate in law. While some work for the Federal Supreme Court for 20 to 30 years, more often they serve for around 10 years.

ii Assisting judges in common law jurisdictions – history and current practice

The United States was the first common law jurisdiction to provide for assistants to higher court judges. The position of law clerk has evolved over time. In 1905, US Supreme Court Justice David Brewer considered that his ‘stenographer’ was ‘simply a typewriter, a fountain pen, used by the judge to facilitate his work’. Until the 1930s, some law clerks were still in the process of completing their legal education by attending night law school while clerking at the US Supreme Court. Although in earlier days the law clerks at the US Supreme Court could stay with the Justices for several years, nowadays the clerkships last one year. However, the law clerks of today are chosen from among the nation’s top graduates and charged with tasks commensurate with their legal qualifications. The law clerks’ work is particularly

40 In 2016, there were 132 court clerks at the Federal Supreme Court. ibid.
41 ibid.
42 Interview with Dr. iur. R Pedretti, LLM, Gerichtsschreiber at the Federal Supreme Court on 12 April 2016.
46 For example, Justice Charles Evan Hughes retained Justice William Howard Taft’s law clerk, whereas Justice Owen J Roberts kept one clerk for 15 years, and Justice Pierce Butler employed one clerk for 16 years. See M Swann, ‘Clerks of the justices’ in K Hall (ed), The Oxford Companion to the Supreme Court of the United States (Oxford University Press, 1992), p. 160.
47 D Lat, ‘“Of Courtiers and Kings”: An interview with Todd Peppers about Supreme Court Clerkships’, Above the Law (9 December 2015), available at http://aboutelaw.com/2015/12/of-courtiers-and-kings-an-interview-with-todd-peppers-about-supreme-court-clerkships/, accessed 30 December 2017. (‘Now a candidate has to attend a top-ten law school, be editor-in-chief of the law review, be at the top of his or her class, have a previous judicial clerkship with a federal “feeder court” judge, and, increasingly, have experience in a corporate firm or as a government attorney to be considered.’)
essential in aiding the Justices with reviewing the approximately 7,000 to 8,000 petitions for certiorari – that is, applications for leave to appeal – that are filed yearly and identifying the 80 or so cases that will end up on the Court’s plenary review docket.48 The composition of the body of law clerks, including their backgrounds and political views, is a matter of considerable public interest and their selection is closely followed by specialised media in an effort to ‘read the tea leaves’ for possible trends in the Court’s future jurisprudence.49 The fact that the Justices appear to rely on a relatively small number of federal appellate court ‘feeder’ judges from whom most of the law clerks are drawn further refines the selection process.50 Justice Clarence Thomas has openly admitted that he hires only law clerks who have previously clerked for a federal judge appointed by a Republican President and who share his worldview. He has reportedly said: ‘I won’t hire clerks who have profound disagreements with me . . . It’s like trying to train a pig. It wastes your time, and it aggravates the pig.’51 There is a vast library of material – both first-hand accounts by former clerks and empirical studies by political scientists – written on the relative influence, or otherwise, of these law clerks.52

In the United Kingdom, judicial assistants are a far more recent creation with the first judicial assistants (then called legal assistants) appointed to the House of Lords in 2000.

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52 Recent examples include: A Ward and D L Weiden, Sorcerers’ Apprentices: 100 Years of Law Clerks at the United States Supreme Court (New York University Press, 2006) and T C Peppers, Courtiers of the
This was considered to symbolise part of the modernisation of the House of Lords. At present, the Justices of the UK Supreme Court, who also sit in the Judicial Committee of the Privy Council, are supported by seven judicial assistants in total who carry out research in connection with appeals and summarise applications for permission to appeal. It is a temporary fixed-term position lasting from September to the following July. Additionally, the court employs one judicial assistant on a permanent basis. An applicant must be ‘a solicitor, barrister or advocate qualified in one of the UK jurisdictions, having completed a training contract or pupillage by the start of the appointment.’ At the Court of Appeal of England and Wales, the ‘Judicial Assistant Scheme’, founded in 1997, is different. Unlike the Supreme Court, the Court of Appeal hires trainee solicitors and pupil barristers for a period running from October to July of the following year. In 2019, the High Court of England and Wales introduced a Judicial Assistant scheme, following pilot schemes in 2017 and 2018 and modelled on the Judicial Assistant position in the Court of Appeal. A rather more ‘European’ position may be found at the United Kingdom Competition Appeal Tribunal (the CAT), a specialised tribunal dedicated to competition matters. At the CAT, there are four positions specifically titled ‘Referendaire’. These lawyers work directly for the president, chairmen and registrar. According to the CAT itself, the post ‘corresponds to that of a Référendaire at the European [Union’s] General Court but also encompasses a case handling role central to the work of the Tribunal’. Referendaires typically serve at the CAT for three to five years.

Law clerks exist throughout the common law world. The Courts Service of Ireland employs six ‘judicial research assistants’ upon two-year non-renewable contracts. They are a conscious mix of solicitors, barristers, and legal academics and work for judges of the High, Circuit and District Courts. Genevieve Coonan, herself a former Senior Judicial Researcher,
notes that ‘in general the majority of Research Assistants are recent honour graduates of Irish universities’. 61 Research Assistants are not assigned individually to each judge, but rather work in a pool. 62 The Justices of the High Court of Australia have been assisted by ‘Associates’ since the Court’s inception in 1903. 63 These Associateships are for 12 months. The successful candidate ‘will have graduated with first class honours and will preferably have research experience (and often experience working for a law firm or university or another court)’. 64 As Michael Kirby, formerly a Justice of the High Court of Australia, has said, ‘[m]any of them are young law graduates for whom a year working for a judge is a great opportunity to see the court from the inside’. 65 Associates are appointed by their justice two to three years in advance of their terms. The great majority have not clerked previously, in contrast to those at the US Supreme Court. 66 Other Australian courts also employ law clerks, whose roles may vary. 67 Law clerks are also found inter alia at the Supreme Court of Canada, where 27 law clerks, comprising both English and French speakers, work for one year for the Chief Justice and Puisne judges, 68 and the Supreme Court of New Zealand where they are titled ‘judges’ clerks’. 69 The Constitutional Court of South Africa employs two South African law clerks for each Justice who, rather innovatively, may also employ one ‘foreign law clerk’ each. 70

62 ibid.
67 e.g., At the Supreme Court of New South Wales, ‘[t]ipstaves are employed as part of the personal chambers staff of a particular judge. . . . [T]hey conduct often complex legal research on behalf of judges [involving] a detailed analysis of case law and an examination of legal developments in areas where precedents may not be well defined.’ By contrast, the ‘associates’, whose positions are renewable, provide ‘broadly based executive support to enable the judge to meet obligations both within the court and to external stakeholders, including legal practitioners, litigants in person and members of the public.’ See, Supreme Court of New South Wales, Careers, www.supremecourt.justice.nsw.gov.au/Pages/sco2_aboutus/sco2_careers.aspx#associate_roles, accessed 30 December 2017.
69 For an insight into the New Zealand practice, see M Harris, ‘The Role of a Judge’s Clerk at the Supreme Court of New Zealand: A “Worm’s-Eye View”’, available at https://cdn.auckland.ac.nz/assets/facultyconferences/faculty-of-law/Supreme%20Court%20Conference/M%20Harris.pdf, accessed 7 April 2016, at p 1 (‘[C]lerks generally play a junior role in New Zealand courts, [and] are employed for short periods of time’).
iii  Comparison between the common law and civil law roles

While the position of law clerks in common law jurisdictions and their civil law counterparts may initially seem rather similar, the foregoing section has shown that the profiles required of such legal assistants or court lawyers and their length of service vary greatly. In civil law jurisdictions, the lawyers assisting judges are relatively more senior and stay in their role for several years. Some legal systems charge these lawyers with the task of presenting the case to the bench in their own name. As rapporteurs, not only are they perhaps themselves able to sign the final decision, but they may also file a dissenting opinion whenever their proposed text is not followed, as is the case in Finland and Switzerland. These positions often require a number of years of relevant experience, including judicial training or other qualifications required to serve as a judge. They may furthermore constitute a long-term career, with autonomous guarantees of independence. By contrast, in common law jurisdictions, law clerks are invariably starting out on their legal careers and assist a particular judge for approximately one year, conducting research and drafting memoranda. The exception to the typical common law position is the employment of référendaires at the CAT. But given the CAT’s set-up – in many ways a halfway house between an English court and a European court by design – this is perfectly logical.

From this comparative overview, we can establish that the civil law and common law roles of court lawyers and legal assistants are quite different. While in essence the idea is the same – that the judges are assisted by someone junior to them – there are substantial, almost existential differences between these positions. In legal systems following the civil law tradition, the role of such lawyers is rather characterised by the independent reporting duties reminiscent of the administrative-judicial office of referendarius, whereas, by contrast, the shorter ‘clerking’ experience of their common law counterparts highlights their more junior status. While the legal secretaries of civil law countries also serve for several years in their position and have the legal qualification to act as judge, the law clerks of common law jurisdictions tend to be more junior, serve for a shorter term and with less independence as to their functions.\(^\text{71}\)

\(^{71}\) Owing to how clerkships are traditionally perceived in common law jurisdictions, the work undertaken by legal secretaries at the European Courts is not always well understood: a former référendaire at the CJEU, Marie Demetriou QC, has written that ‘the fact that référendaires are directly involved in drafting judgments often comes as a surprise to members of the British judiciary’. M Demetriou, ‘The Role of Référendaires at the European Court’ (2007) 7 (1.1) \textit{EC Tax Journal} 3. It does not help that the role of ‘legal secretary’ exists in the UK where it is understood as a very different position: a lawyer’s administrative or secretarial assistant. See, e.g., the information provided by the National Careers Service at https://nationalcareersservice.direct.gov.uk/advice/planning/jobprofiles/Pages/legalsecretary.aspx, accessed 6 April 2016 (‘Legal secretaries provide a high level of administrative support for lawyers and legal executives. They help with the day-to-day tasks involved in running a legal services or law firm.’) Similarly, in the US, the term ‘legal secretary’ connotes the performance of purely secretarial tasks in a law firm, as opposed to those undertaken by ‘paralegals’ or ‘legal assistants’. For paralegals/administrative assistants, see ABA Model Guidelines for the Utilization of Paralegal Services, adopted by the Standing Committee of the American Bar Association in 2012. At best, many imagine that the position of a legal secretary is directly comparable to judicial assistants in the UK or law clerks in the US. Indeed, when seeking applications for a new ‘Legal Secretary (Référendaire)’, Judge Christopher Vajda, the British member of the Court of Justice, had to make explicit in the advertisement that the position ‘is not equivalent to the post of a Judicial Assistant in the UK’. See the advertisement placed, inter alia, on the website of The Bar Association for Commerce, Finance & Industry at www.bacfi.org/files/LegalSecretaryECJ.pdf, accessed 30 December 2017.
Seen against this background, the office of legal secretary at the European Courts appears to derive predominantly from the civil law tradition of ‘court lawyers’, rather than from the model of common law ‘law clerks’. Analysing the origins of the legal secretaries in the European Courts is helpful to understand the tasks and responsibilities attributed to the position as it exists today. That said, there are also significant differences between the référendaires and their national counterparts in civil law jurisdictions, whose roles are, moreover, far from uniform. Most significantly, as will be shown below, legal secretaries at the European Courts do not author decisions independently as rapporteurs in their own name, but work under the direct supervision of the judges and advocates general. With this in mind, we turn next to exploring the role of the legal secretaries at the CJEU and the EFTA Court.

III THE ROLE OF LEGAL SECRETARIES AT THE EUROPEAN COURTS

i CJEU

Référendaires have been a feature of the CJEU since the creation of the Court of Justice of the European Coal and Steel Community in 1952. Originally, they were known as attachés who were required to have ‘adequate legal training’ and to take an oath before the Court before entering upon their duties. During the CJEU’s first two decades, the seven members of the Court each had one legal secretary who was a permanent employee. Each new member would inherit his or her predecessor’s référendaire. As the CJEU expanded – on account of the increase in the number of Member States, as well as the size of the Court’s docket – the number of référendaires increased in tandem. At the time of writing, there are 28 judges and 11 advocates general at the Court of Justice, each normally with three to four legal secretaries in their cabinet. For the time being, the judges at the General Court each have three legal secretaries. Presently, the General Court comprises 46 judges, with their number set to increase to 56 in October 2019. The presidents and vice presidents of the courts have additional référendaires for specific management, organisational and revision tasks at their disposal.

The basic role of legal secretaries at the CJEU has remained the same over the years: they are the personal legal advisers to the judges or advocates general. The etymology of

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74 The seven judges consisted of one from each of the original six Member States and one representing the coal and steel workers’ associations. See, A Boerger-De Smedt, ‘La Cour de Justice dans les négociations du traité de Paris instituant la CECA’, (2008) 14 (2) Journal of European Integration History 20.
the title **référendaire** derives from the Latin verb *referre* (to inform, report)\(^{76}\) and, as such, according to one definition, a **référendaire** is ‘the one who must report what needs to be reported’.\(^{77}\) This description of the role is fitting. At the Court of Justice, a judge charged with the task of rapporteur and an advocate general are designated in every case, even when the latter issues no published opinion, and one **référendaire** from each member’s cabinet is allocated the responsibility for managing the case. The most essential tasks of the **référendaires** working for the Judge-Rapporteur include the drafting of judgments and other documents, notably the preliminary report (*rapport préalable*) of the case, which presents the facts of the case, the arguments of the parties, a first analysis of the legal questions raised by the case, as well as its suggested procedural treatment,\(^{78}\) and assisting him or her in the preparation of notes and memoranda during deliberations in cases where other judges act as rapporteurs.\(^{79}\)

To the outside world, the **référendaires** are visible at oral hearings, where they – one from the judge-rapporteur’s cabinet and one from the advocate general’s (in cases where the latter’s opinion is requested) – sit at a separate desk on one side of the courtroom. However, **référendaires** do not have the right to put questions directly to the parties in the proceedings and their role is therefore limited to following the hearing, taking notes and, if necessary, communicating with their judge or advocate general electronically or by the intermediary of the court’s usher. **Référendaires** also assist the judges during the written phase of the courts’ deliberations. They discuss the case with the judge and, where necessary, help draft memoranda outlining the judge’s position. However, they do not attend the oral **délibéré**, a meeting at which the judges agree on the final text of the judgment. It is worth underlining that frequently many important questions are only resolved at this stage, in the exclusive presence of judges. Hence, the **référendaires’** views, if not shared by the judges themselves, cannot become included in the final judgment.\(^{80}\) In fact, although sometimes referred to as ‘ghost-writers’\(^{81}\) or ‘men and women in the shadows’,\(^{82}\) the legal secretaries are civil servants who perform their work under the direct supervision of the members of the European Courts. Aside from the case management work, **référendaires** may from time to time assist the judges or advocates general in their other tasks, including the work of the Court’s internal committees, such as the Administrative or the Rules of Procedure Committees, researching a particular issue of law more generally, or making preparations for the members’ representative

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\(^{78}\) See Article 59 of the Rules of Procedure of the Court of Justice and Article 87 of the Rules of Procedure of the General Court.

\(^{79}\) The **référendaires** working for advocates general draft the Advocate General’s Opinion and provide help in assessing the importance of cases presented to the advocate general by the Judge-Rapporteur at an early stage of the procedure.

\(^{80}\) cf. the view expressed by Hubert Legal, former judge at the General Court, in H Legal, ‘Editorial: Le contentieux communautaire de la concurrence entre contrôle restreint et pleine juridiction’ (2005) 2 *Concurrences* 2, who claims legal secretaries at General Court wield considerable power during deliberations while describing them as ‘judicially inexperienced . . . ayatollahs of free enterprise’.


duties. The cabinets may host trainees (stagiaires) and visiting members from national judiciaries (magistrats nationaux) and référendaires take part in their training. While the language revision and translation of official court documents is carried out by the CJEU’s specialised linguistic services, the référendaires are often invited to proofread certain language versions before their publication, particularly in cases where their judge acts as judge-rapporteur, to ensure substantive accuracy. Similarly, they verify the summaries of judgments prepared by the administrators of the CJEU’s Research and Documentation service in the cases for the management of which they have responsibility in the judge-rapporteur’s cabinet.

Despite these myriad tasks, the texts that govern the procedure before the EU courts make no mention of référendaires whatsoever. It follows that, while legal secretaries may undertake administrative tasks in their capacity as officials and agents of the EU, they can only perform judicial work when they act in the name of their direct superior, the judge or advocate general for whom they work. As Stéphane Gervasoni, judge at the General Court and formerly a référendaire himself, describes it: ‘[l]e référendaire sans son juge n’a pas d’existence autonome’ – the legal secretary does not have any independent judicial status. It follows that référendaires do not author any judicial documents in their own name, except through agency (per procurationem). The judges or advocates general sign off all the work and the documents always bear their name.

As officials or agents of the EU, référendaires are covered by the EU Staff Regulations. In particular, the rules governing the rights and obligations of EU officials and agents, such as impartiality, conflicts of interest, and good behaviour, apply to them. Moreover, acknowledging the particular nature of the work and the special relationship of trust between référendaires and their judge or advocate general, the Court adopted in 2009 the Code of Conduct for référendaires, setting out more detailed obligations as regards, in particular, conflicts of interest in the handling of cases, ex parte contacts, as well as external activities of référendaires, such as academic lecturing, other speaking engagements, and publications. To the extent such other activities touch on the CJEU’s work, they are subject to a requirement of pre-notification to the president.

83 It may be noted that while the procedural texts of the ECJ are silent on référendaires, they speak of ‘Assistant Rapporteurs’. According to Articles 13 of the Statute of the Court of Justice of the European Union, Assistant Rapporteurs may be appointed to ‘participate in preparatory inquiries in cases pending before the Court and to cooperate with the Judge who acts as Rapporteur’. Similarly, Article 17 of the Rules of Procedure of the Court specifies that their function is to assist the President of the Court in interim proceedings and the judge-rapporteurs in their work. However, it is clear that these provisions do not refer to référendaires.


The référendaires are employed by the Court on the proposal of the judge or advocate general concerned. As their work is highly technical in nature, qualities such as the legal qualifications, prior judicial experience or language skills of the candidate, tend to play an important role in the hiring process. There are no formal recruitment schemes, such as in national civil services or in other EU institutions, including other directorates of the CJEU. The decision to hire a référendaire is the prerogative of each judge or advocate general and the appointment procedure is characterised by the proposal of a single candidate, who is then either accepted or rejected by the appointing authority, that is, the Court of Justice or the General Court. In practice, the proposal of the judge or advocate general concerned is submitted to the members’ plenary meeting and almost always accepted without discussion. The European Union Civil Service Tribunal described this discretionary aspect of the hiring process in the following way:

That power of proposal is not governed by any legal rules, as the member concerned chooses freely the person whom he intends to propose, by the method which he considers appropriate. The fact that there is no systematic organisation of an official recruitment procedure for that category of temporary staff within the [EU] courts results from the relationship of trust between the staff concerned and the members of those courts to which they are assigned. Legal secretaries are recruited intuitu personae, the staff concerned being selected both for their professional and personal qualities and for their ability to adapt to the methods of working specific to the member concerned and those of the whole of his Chambers. 

In fact, according to the EU courts’ case law, référendaires are recruited in the same manner as the personal staff of a Commissioner at the European Commission. The member of the court is the master of his or her cabinet and may organise its functioning independently of formal procedures. The corollary of this independence is that the member may also dismiss a référendaire at will. Thus, while EU judges and advocates general may only be removed from office by a unanimous decision of the Court of Justice, no guarantees of permanency apply in the case of référendaires.

That the selection of référendaires is not governed by any specific legal rules means that there are no gender, nationality or other quotas. According to publicly available information, approximately 66 per cent of legal secretaries at the Court of Justice are men and 34 per

87 The latter category includes, in particular, lawyer-linguists or lawyers at the ECJ’s Research and Documentation service, who are normally recruited by way of the Concours organised with the help of the European Personnel Selection Office (EPSO).
88 Judgment of 4 September 2008 in Case F-103/07, Radu Duta v. Court of Justice of the European Communities, paras. 25 and 26 (confirmed on appeal by order of the General Court of 29 July 2010 in Case T-475/08 P, Radu Duta v. Court of Justice of the European Communities, ECLI:EU:T:2010:322). As the judgment is only available in French, the citation is from the official summary of the decision in English. See also, regarding the hiring of a lecteur d’arrêt by the president of the Court of Justice, Judgment of the Court of First Instance of 17 October 2006 in Case T-406/04, André Bonnet v. Court of Justice of the European Communities, ECLI:EU:T:2006:322, para. 33.
90 Article 6 of the Statute of the Court of Justice of the European Union.
cent women, while at the General Court, the respective figures are around 70 per cent and 30 per cent.\textsuperscript{91} As regards the nationality distribution, the cabinet staff in a supranational tribunal representing 28 Member States is, almost by definition, relatively diverse.\textsuperscript{92} However, among the référendaires, some Member State nationalities clearly dominate, while others are proportionately underrepresented. For historical reasons, French remains the working language of the CJEU.\textsuperscript{93} According to a 2015 study by Zhang, this choice bears rather significantly on the composition of the judges’ cabinets, as almost half of the référendaires are of French, Belgian or Luxembourgish nationality and around 80 per cent of them were educated in the law schools of these three countries.\textsuperscript{94} While the exact numbers may lend themselves to discussion, the trend identified by Zhang is certainly correct.

Référendaires typically serve at the CJEU for several years. A good number work until the end of their judge’s or advocate general’s renewable six-year mandate,\textsuperscript{95} while a few dedicate their careers to the role, working in different cabinets over time and eventually retire from the position in their mid-sixties. According to Sally Kenney, the two longest-serving référendaires at the CJEU served 34 years each.\textsuperscript{96} The varying seniority corresponds to diverse previous professional experience. While some référendaires may have initially been offered the position in their late twenties on the sole basis of their academic record or performance

\textsuperscript{91} Data collected from Whoiswho, the EU’s official directory, accessible through the ECJ’s website http://curia.europa.eu, accessed 30 Dec 2017. On the relevance of gender in the appointment of judges to the ECJ, see S J Kenney, ‘Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice’, (2002) 10 Feminist Legal Studies 257.

\textsuperscript{92} A list of the names of référendaires is publicly available on Whoiswho, the EU’s official directory, available at http://curia.europa.eu.

\textsuperscript{93} In 1952, it was agreed that the original Court of Justice could decide for itself which language to use in its internal drafting and deliberations, as long as its judgments would be published in all official languages. Since then, the CJEU has used French as its working language. See, La traduction à la Commission: 1958-2010 (Études sur la traduction et le multilinguisme 2/2009, European Commission, Directorate-General for Translation), p 8–9, 13. It is open to question whether French would be chosen as the principal internal working language today. According to Eurostat’s 2016 figures, some 94.1 per cent of all EU-28 students at upper secondary level were studying English as a foreign language in 2014, compared to only 23.0 per cent, studying French. ‘Foreign language learning statistics’, available at http://ec.europa.eu/eurostat/statistics-explained/index.php/Foreign_language_learning_statistics, accessed 30 December 2017.

\textsuperscript{94} A H Zhang, ‘The Faceless Court’ (206) 38 (1) University of Pennsylvania Journal of International Law 71, at 108.

\textsuperscript{95} Under the basic texts that govern the European Courts (i.e., the EU Treaties and the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice), the members of both courts are nominated for a renewable term of six years by their Member State. There is no limit to the number of times a member may have his or her mandate renewed and there is no compulsory retirement age. See also, on their nomination, Decision of the EFTA Court of 14 February 2017 in Case E-21/16, Nobile, unreported, and the Order of the President of 20 February 2017, [2017] EFTA Ct. Rep. 554, in the same proceedings (concerning the decision of appointment, which was subsequently annulled and replaced, of the Norwegian member for a term of less than six years). See further, Judgment of the General Court of 23 January 2018 in Case T-639/16 P, FV v. Council, ECLI:EU:T:2018:22 (finding composition of EU Civil Service Tribunal irregular), and the Decision of the Court of Justice of 18 March 2018 in Case C-141/18 RX, FV v. Council, ECLI:EU:C:2018:218 (declining to review the latter judgment).

during their CJEU internship, the more senior legal secretaries may have previously served as civil servants, law professors, practising lawyers, diplomats or even judges. It may be noted that a rather significant number of current members of the CJEU have previously served as référendaires.97

### EFTA Court

Legal secretaries have worked at the EFTA Court since its foundation in 1994. As the EFTA Court was set up to mirror the CJEU in the EFTA pillar of the EEA Agreement, there is much common organisational DNA shared between the two judicial bodies. The EFTA Court not only employs legal secretaries, but, like the CJEU, it also operates a cabinet system, with the cabinet being the judge’s ‘empire’.98 However, that shared DNA only goes so far as, for example, there are no advocates general at the EFTA Court and the Court’s working language is English.99

From the EFTA Court’s inception until 2011, each judge, including the president, had one legal secretary. As a direct result of the increasing size of the EFTA Court’s docket, particularly from 2011 onwards, the number of legal secretaries employed in each cabinet has increased correspondingly. From 2012, the president engaged a second legal secretary with the other judges hiring another legal secretary to work in both cabinets. In 2015, the practice evolved so that all judges had two legal secretaries each. Finally, since 2016, the president of the EFTA Court has engaged three legal secretaries with the other judges each employing two legal secretaries in their respective chambers. This practice may be changing as currently there are six legal secretaries at the EFTA Court with two in each cabinet. Were the EFTA Court’s jurisdiction to expand in the future, whether through the potential accession to the EFTA pillar of the EEA by either Switzerland or the United Kingdom, or both (post-Brexit), or potentially more likely as a result of those countries ‘docking’ to the EFTA pillar’s institutions as part of more structured trading relationships with the European Union,100 it may be anticipated that additional legal secretaries would be engaged.

The role of a legal secretary at the EFTA Court is broadly similar to that of a référendaire at the CJEU: they are the personal legal advisers to the judges. The casework of the legal

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97 At the time of writing, three judges and three advocates general at the Court of Justice, 16 judges at the General Court, as well as the registrars of both Courts, had previously served as legal secretaries at the CJEU. As regards previous members, see also A Cohen, ‘Sous la robe du juge. Le recrutement social de la Cour’ in P Mbongo and A Vauchez, *Dans la fabrique du droit européen: Scènes, acteurs et publics de la Cour de justice des Communautés européennes* (Bruylant, 2009), p. 28.


99 For a detailed understanding of the EFTA Court, its role, functioning and relationship with the CJEU, see generally, C Baudenbacher (ed) *The Handbook of EEA Law* (Springer International Publishing, 2016), chapters ‘The EFTA Court: Structure and Tasks’ and ‘The Relationship between the EFTA Court and the Court of Justice of the European Union’ both by President Baudenbacher. See also M-J Clifton, ‘The Other Side of the Street: the EFTA Court’s Role in the EEA’, (2014) 7–8 *European Law Reporter* 216.

secretsaries begins when the president of the Court allocates a case to a judge-rapporteur. Unlike at the CJEU, at the EFTA Court the president regularly chooses to be the judge-rapporteur him or herself, and therefore his or her legal secretaries also provide support for this role. In addition, legal secretaries in the president’s cabinet prepare the first draft of all procedural orders – including for instance applications for leave to intervene – as these are the responsibility of the president. Once allocated, the assigned judge-rapporteur will give that case to one of his or her own legal secretaries who will be responsible for the active case-management of the proceedings and who will advise the judge on any procedural deadlines that may need setting. The legal secretary prepares procedural documents, such as the Preliminary Report followed by the Report for the Hearing and the draft judgment for the judge-rapporteur. The Preliminary Report tends to be a significantly less detailed procedural document when compared to the rapport préalable at the CJEU. Nevertheless, at the EFTA Court it is an important ‘punctuation mark’ within the proceeding: the decision of the Court on the basis of the judge-rapporteur’s recommendation in that document marks the formal change from the written to the oral procedure.

Hearings are held in all but the most straightforward of cases at the EFTA Court – in such circumstances the parties will have given their express consent that the case be dealt with without a hearing. During the hearing, one legal secretary from each cabinet sits on the legal secretaries’ desk at one side of the courtroom. As with their counterparts at the CJEU, legal secretaries follow the proceedings taking notes and cannot address the parties or the Court, although they may occasionally pass a note, either electronically or via the Court’s usher, to their judge. Once the judge-rapporteur has presented his or her draft judgment, the legal secretaries in the other cabinets will prepare comments and propose amendments to their judge during the deliberations, which are conducted predominantly in writing. They will also prepare notes and draft memoranda if required. The legal secretaries do not attend the judges’ reading, a meeting at which the judges agree on the final text of the judgment. However, a practice newly instigated in 2018 has seen the development of a legal secretary’s reading of certain judgments subject to final control by the judges.

Moreover, legal secretaries will prepare the press release on a case, as well as translate it into German, Icelandic and Norwegian, once the Court’s judgment is ready to be handed down. While originally the EFTA Court did employ lawyer linguists, this is no longer the case: all other necessary translations are outsourced before being revised within the Court. Legal secretaries will also draft the summaries of the judgments for the Court’s Annual Reports for those cases in which their judge was rapporteur.

Apart from case-management work, legal secretaries assist in the broader judicial work of their judges. This may include drafting speeches and papers, or conducting specific pieces of legal research, organising and speaking at conferences, or assisting on the revision of the Rules of Procedure. Legal secretaries often engage in academic lecturing, other speaking engagements and write in legal publications. Unlike at the CJEU, there is no requirement that these be pre-notified to the president, but the judge for whom they work will invariably

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102 Assuming that there will be a hearing in the particular case, this document presents the reporting judge’s summary of the facts of the case, the relevant legislation, and the parties’ submissions.
103 See Article 40 Rules of Procedure of the EFTA Court.
104 See Article 41(2) Rules of Procedure of the EFTA Court.
be notified, not least as a courtesy. The legal secretaries will typically be responsible for the instruction of any trainees hired, or visiting ‘legal secretaries’ hosted from national judiciaries while they are a part of the cabinet.

As the legal secretaries are the judges’ personal legal advisers, their hiring is undertaken directly. The judges frequently offer these positions to lawyers they have come across earlier in their careers and whom they consider to have the requisite skills for the position, or alternatively an open application process may be conducted. Invariably, the judges require candidates to be specialised in or have experience of working with EEA or EU law, and be fluent in English, although proficiency in a number of languages remains desirable. Where a public application process has been conducted, typically with advertisements placed in the national press, a series of interviews takes place. Usually, several years of relevant experience are required, as well as postgraduate or doctorate studies in the field. It is not essential that the legal secretary hold a particular nationality, but often a judge will hire a candidate from his or her own country or who shares his or her mother tongue. Applicants will frequently have worked previously at the CJEU or the EFTA Court often having begun as a trainee or stagiaire. Nevertheless, at the EFTA Court the majority of legal secretaries will already be known to a particular judge from their home country – sometimes as a result of the legal secretary’s own legal education.105

Once hired, the EFTA Court Staff Regulations and Staff Rules govern the status of legal secretaries. Interestingly, staff disputes are dealt with by the EFTA Court Advisory Board and appeals from the Advisory Board lie to the Administrative Tribunal of the International Labour Organization.106 Typically, the youngest legal secretaries are around 27, with the oldest being around 40. However, the role of a legal secretary is an impermanent one – linked as it is to the personal mandate of the hiring judge. Frequently though, at least for a transitional period, legal secretaries will be ‘inherited’ by an incoming judge. Legal secretaries at the EFTA Court tend to serve for periods between one and seven years.

IV CONCLUSION

This chapter has demonstrated that the origins of the position of legal secretary at the European Courts derives predominantly from that of lawyers assisting judges in legal systems following the civil law tradition. As such, it is characterised by their advisory and reporting tasks and the relative seniority and longer service compared with the generally more junior position that law clerks in common law jurisdictions occupy. However, although the legal secretaries’ position resembles that of their civil law counterparts, some writers consider the cabinet system, where the court lawyers are directly attached to a particular judge, a reflection of the common law tradition.107 To a certain degree, therefore, the broader setting of the legal secretaries’ work at the European Courts may reflect both traditions.

105 With the exception of the Liechtenstein cabinet, which has historically been highly international in make-up, which is in part a reflection of the composition of the domestic judiciary. No Liechtensteiner has worked in the cabinet to date.

106 See Rules 45–47, Part X, EFTA Court Staff Regulations and Staff Rules.

Nevertheless, the common law influence should not be overstated and direct analogies between the role of legal secretaries at the European Courts and that of the law clerks of the US Supreme Court, for example, are misplaced. At the same time, unlike some of their counterparts in civil law jurisdictions, legal secretaries at the European Courts do not perform judicial acts in their own name. It is worth emphasising that each national or European example has its own particular characteristics, be it a common law or a civil law jurisdiction. Although the European Courts do not specifically follow either legal tradition, one of the hallmarks of EU and EEA law is the cross-fertilisation of legal concepts and institutions – and the role of legal secretaries is no exception in this regard.

This article has also shown that the role of legal secretaries is largely identical at both the CJEU and the EFTA Court. As the members’ personal legal advisers, they play an important, yet ancillary, part in the judicial enterprise of the European Courts. Although the legal secretaries are tasked with considerable responsibilities in the management of the cases brought before these judicial bodies, they have, at the same time, no independent role in the decision-making process.108 As has been stated in this article and elsewhere, their role is to act as judges’ ‘right-hands’ or ‘sparring partner[s]’.109 They assist the judges in their role in judging cases by ensuring that legal problems are considered and tackled, and arguments are refined and sharpened, from a number of legal perspectives and, potentially, legal traditions. Longer-standing legal secretaries also provide an element of internal institutional memory. A significant common feature common to both European Courts is the cabinet system, which allows the courts’ members to exercise direct control over their legal secretaries’ work. Any potential excesses, which the responsibilities and relatively longer service of legal secretaries could in theory provoke, are thus maintained in check. That being said, legal secretaries, as they enable the decision-making activity of the judges, contribute significantly – in the spirit of the reporting duties incumbent on the office of referendarius – to the day-to-day administration of European justice.

108 The EFTA Court had occasion to address the role of legal secretaries in Case E-1/06 EFTA Surveillance Authority v. Norway [2007] EFTA Ct. Rep. 8. In that case, a challenge was made against a legal secretary’s involvement for having previously published an academic article on the subject three years before. The registrar wrote to the party that had raised the matter stating that, ‘As legal secretaries are not decision-makers, the Court will only in special circumstances decide that a legal secretary must refrain from assisting a judge in a certain case.’ Another legal secretary recused himself in the same case having worked on the specific case prior to starting at the EFTA Court.

OVERVIEW OF TRADE REMEDIES

The modern trade system emerged from the ruins of the Second World War and was principally the creation of the United Kingdom and the United States. The Bretton Woods Conference (July 1944) created the International Monetary Fund and the World Bank, the Dumbarton Oaks Conference (August to October 1944) formulated the United Nations organisation and the Havana Conference (November 1947 to March 1948) fashioned the Havana Charter for an International Trade Organization (ITO).

In 1947, the General Agreement on Tariffs and Trade (the GATT 1947) was negotiated as a stopgap measure. Though the GATT 1947 was drafted, the ITO was never created because of inaction on the part of the United States Congress. Since inception, the primary objective of GATT 1947 has been to reduce tariffs, enhance international trade and transparency. As tariff rates were lowered over time following the GATT 1947 agreement, member countries realised the need to reform the existing framework. From 1947 to 1994, the GATT contracting parties engaged in eight rounds of negotiations, the last of which was the Uruguay Round (1986–1994). The Uruguay Round agreements were signed in Marrakesh, Morocco on 15 April 1994 and on the same date the World Trade Organization (WTO) was born when the agreement establishing the WTO (the WTO Agreement) was signed.

The WTO Agreement, inter alia, included the GATT 1994 as an integral part, which is binding on all members. The GATT 1994, in turn, encompassed the provisions of the GATT 1947, as well as the provisions of the legal instruments in force under the GATT 1947.

One of the cardinal principles of the GATT 1994 and the WTO is the most-favoured-nation (MFN) treatment. MFN means that each member nation is required to apply tariffs...
equally to all trading partners. Where, on one hand, the GATT and WTO regimes mandate equal treatment and non-discrimination, on the other, the WTO Agreement provides exceptions by allowing use of trade remedy instruments, among others, namely:

- **a** anti-dumping measures targeted against unfair-priced imports;
- **b** subsidy or countervailing measures targeted to offset subsidy given by exporting governments; and
- **c** emergency safeguard measures adopted to combat unforeseen surges in imports.

Pursuant to the GATT 1994, detailed guidelines have been prescribed under the specific agreements that have also been incorporated in the national legislation of the member countries of the WTO. Indian laws were amended with effect from 1 January 1995 by introducing a procedural framework for initiation and conduct of trade remedial investigation, the imposition of measure and judicial review. From 1995 to 2017, India initiated 888 anti-dumping investigations, the highest number among the member states. In 2017 alone, India initiated 49 anti-dumping investigations and imposed measures in 47 investigations. As at March 2019, anti-dumping measures on 139 products from multiple countries and countervailing duty measures on two products were in force. To enhance the accessibility of trade remedial measures to the domestic industry, the Indian government merged investigating agencies conducting anti-dumping, countervailing duties and safeguard investigation under one umbrella institution, the Directorate General of Trade Remedies.

II LEGAL FRAMEWORK

i Anti-dumping measures

Under international law, anti-dumping measures are regulated by Article VI of the GATT and the Agreement on Implementation of Article VI of the GATT 1994 (the Anti-Dumping Agreement). Anti-dumping laws allow a country to impose temporary duties on goods exported by a foreign producer when the export price of such goods is less than the normal value of ‘like articles’ sold in the exporter’s domestic market and is causing injury to the domestic producers.

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9 Agreement on Implementation of Article VI of the GATT 1994, Agreement on Subsidies and Countervailing Measures and Agreement on Safeguards provides framework of trade remedial measures permissible under the WTO.


13 Earlier, anti-dumping and anti-subsidy investigations were conducted by the Designated Authority, Directorate General of Anti-dumping, Ministry of Commerce and Industry. Safeguard investigations were earlier conducted by Directorate General (Safeguards). Pursuant to the merger of investigating agencies, all trade remedial investigations are being conducted by the Designated Authority, the Directorate General of Trade Remedies (DGTR). Press release by the government of India dated 9 May 2018 is available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=179195.
In India, anti-dumping actions are governed by Sections 9A, 9AA, 9B and 9C of the Customs Tariff Act, 1975 (the Act) and Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (the Anti-dumping Rules) as amended from time to time.

The government agency entrusted with the determination of dumping and injury is the Designated Authority (DA), Directorate General of Trade Remedies, Ministry of Commerce and Industry. However, the DA only conducts trade remedial investigations and recommends anti-dumping duties. The actual responsibility for imposition and collection of duties lies with the Ministry of Finance.

India’s domestic law envisages that where any article is exported from any country or territory to India at less than its normal value, then, upon the importation of such an article into India, the Indian government, through the Ministry of Finance, may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such an article.

Since dumping per se is not actionable, there is a further requirement to establish that there exists a causal link between dumped imports and injury caused to the domestic industry. The injury margin is arrived at by calculating the difference between the non-injurious price and the landed cost of the imported product. India follows the WTO’s lesser duty rule; that is, the Indian government imposes anti-dumping duty equal to the margin of dumping or margin of injury, whichever is lower.

Anti-dumping duty ceases to have effect on the expiry of five years from the date of its imposition unless revoked earlier. However, if the DA, in a review, is of the opinion that the cessation of such a duty is likely to lead to continuation or recurrence of dumping and injury,

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14 Rule 3 of the Anti-dumping Rules.
15 Rule 17 of the Anti-dumping Rules.
16 Rule 18 of CVD Rules.
17 The Act defines export price as the price of an article exported from the exporting country to India. In certain circumstances, when such price is considered unreliable, export price of the article may be determined on other reasonable basis. Refer, Explanation (b) to Section 9A(1) of the Act.
18 The normal value is the comparable price at which the goods under investigation are sold, in the ordinary course of trade, in the domestic market of the exporting country. Refer, Explanation (c) to Section 9A(1) of the Act.
19 ‘Margin of dumping’ is defined in Explanation (a) to Section 9A(1) of the Act: ‘margin of dumping’, in relation to an article, means the difference between its export price and its normal value.
20 Section 9A of the Act. The principles for the determination of normal value and export price and margin of dumping are enshrined in terms of Annexure I of the Anti-dumping Rules.
21 Also known as the fair selling notional price.
22 Annexure II of the Anti-dumping Rules set out the principles for the determination of injury and Annexure III for determination of non-injurious price.
23 Article 9.1 of the Anti-Dumping Agreement.
24 Rule 4(d)(i) of the Anti-dumping Rules.
it may from time to time extend the period of such an imposition for a further period of five years (known as a ‘sunset review’). During the five-year period, the DA may carry out a ‘changed circumstances’ review, which is called a ‘midterm review’. India also allows ‘new shipper’ reviews. In such a review, any exporter who has not exported the product to India during the period of investigation may request a determination of individual dumping duty. However, a new shipper review is only permissible if the applying exporter is not related to an exporter or producer in the exporting country who is subject to the anti-dumping duties.

The recommendation and imposition of anti-dumping duty is appealable to a specialised tribunal, the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), constituted under Section 129 of the Customs Act 1962.

ii Subsidies and countervailing measures

Article XVI of the GATT 1994 and the Agreement on Subsidies and Countervailing Measures (ASCM) deal with the regulation of subsidies and the use of countervailing measures to offset the injury caused by subsidised imports. Pursuant to the ASCM, a subsidy is deemed to exist if there is a financial contribution by a government or any public body within the territory of a member or there is a form of price support and a benefit is thereby conferred.

In India, countervailing actions are governed by Sections 9, 9B and 9C of the Act. In 1995, the Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidised Articles and for Determination of Injury) Rules, 1995 (the Countervailing Rules) were enacted to determine the manner in which the subsidised articles liable for countervailing duty are to be identified, the manner in which subsidy provided is to be determined and the manner in which the duty is to be collected and assessed under the Act.

As with anti-dumping, the DA conducts countervailing investigations and recommends duties pursuant to the provisions given under the Act and the Countervailing Rules. The responsibility for the imposition and collection of duties as recommended by the DA lies with the Ministry of Finance.

Indian law on countervailing measures is similar to the ASCM and provides that where any country or territory pays, bestows – directly or indirectly – any subsidy upon the manufacture or production therein or the exportation therefrom of any article, including any subsidy on transportation of such an article, then, upon the importation of any such

26 Trade remedial investigations are often based on market conditions during a defined timeline, which are subject to change over time. To align such measures with the evolving market, Rule 23 of the Anti-dumping Rules allows the Designated Authority to modify the existing duty owing to a change in the market situation. Such changes may arise on account of variation in normal value, export price of goods and landed value of imports in India, etc.
28 Rule 22 of the Anti-dumping Rules.
29 Section 9C of the Act.
30 Article 1.1 of the ASCM.
31 Rule 4 of the Countervailing Rules.
32 Refer to Explanation to Section 9 of the Act.
article into India, whether the same is imported directly from the country of manufacture, production or otherwise, and whether it is imported in the same condition as when exported from the country of manufacture or production or has been changed in condition by manufacture, production or otherwise, the central government may, by notification in the Official Gazette, impose a countervailing duty not exceeding the amount of such a subsidy.33

The DA in determining the subsidy shall ascertain whether it:34

\[ \text{a} \] relates to export performance;
\[ \text{b} \] relates to the use of domestic goods over imported goods in the export article; or
\[ \text{c} \] has been conferred on a limited number of persons engaged in manufacturing, producing or exporting the article unless such a subsidy is for:
- research activities conducted by or on behalf of persons engaged in the manufacture, production or export;
- assistance to disadvantaged regions within the territory of the exporting country; or
- assistance to promote adaptation of existing facilities to new environmental requirements.

As with anti-dumping practices, the DA is required to assess and accord a finding that the import of a subsidised article into India causes or threatens to cause material injury to the domestic industry. The principles for the determination of injury are set out in Rule 13 read with Annexure I of the Countervailing Rules. Rule 12 read with Annexure IV of the Countervailing Rules provides for the calculation of the amount of countervailable subsidies. However, in a scenario where an article subject to countervailing duty already attracts an anti-dumping duty, a countervailing duty for the amount equivalent to the difference between the quantum of countervailing duty and the anti-dumping duty payable may be imposed by the government.

The countervailing duty ceases to have effect on the expiry of five years from the date of its imposition, unless revoked earlier. However, if the central government, in a review, is of the opinion that the cessation of such a duty is likely to lead to continuation or recurrence of subsidisation and injury, it may, from time to time, extend the period of such an imposition for a further period of five years.35 An appeal against the order of determination or DA review regarding the existence, degree and effect of subsidy in relation to the import of any article is made to CESTAT.36

### iii Safeguard measures

Article XIX of the GATT 1994 read with the Agreement on Safeguards (AOS) provides the ground rules for safeguard actions. According to the AOS, a member may apply safeguard measures to a product if the member has determined that it is being imported into its territory in such increased quantities, absolute or relative to domestic production, as to

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33 Section 9 of the Act.
34 Rule 11 of Countervailing Rules.
35 Section 9(6) of the Act read with Rule 4 of the Countervailing Rules.
36 Section 9C of the Act.
cause serious injury to the domestic industry that produces identical or similar, or directly competitive products. Article 9 of the AOS provides for a special and differential treatment for developing countries.

The national legislation to implement the provisions of AOS has been enacted under Section 8B of the Act. The Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 (the Safeguard Rules) govern the procedural aspects. Further, Section 8C of the Act and the Customs Tariff (Transitional Products Specific Safeguard Duty) Rules, 2002 have been specifically enacted for imposing safeguard duty on any article imported into India from China in such increased quantities and under such conditions as to cause market disruption to the domestic industry.

The safeguard duty investigations were earlier conducted by the Directorate General of Safeguards (DGS) of the Department of Revenue, Ministry of Finance. Post-2018, the safeguard investigations are conducted under the aegis of the DA, the Directorate General of Trade Remedies (DGTR).

Similar to the provisions of the AOS, Indian law provides that if the central government, after conducting an enquiry, is satisfied that any article is imported into India in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic industry, then it may, by notification in the Official Gazette, impose a safeguard duty on that article. It may be noted that any safeguard duty imposed under the Safeguard Rules shall be on a non-discriminatory basis and applicable to all imports of such an article irrespective of its source.

The safeguard duty ceases to have effect on the expiry of four years from the date of its imposition unless revoked earlier. The DA also conducts a review of the need for continuance of safeguard duty. In no case shall the safeguard duty continue to be imposed beyond a period of 10 years from the date on which it was first imposed. If the duty so recommended is for more than a year, the DA is to recommend progressive liberalisation adequate to facilitate positive adjustment.

III TREATY FRAMEWORK

Free trade agreements (FTAs) are arrangements between two or more countries or trading blocs that primarily agree to reduce or eliminate customs tariff and non-tariff barriers on substantial trade between them. Formation of FTAs is one of the permitted exceptions to the MFN principle. Like other countries, India too has entered into FTAs and preferential trade agreements (PTAs). India is also involved in other formats of bilateral and

37 Article 2, AOS.
38 Section 8B of the Act.
39 Rule 13 of the Safeguard Rules.
40 Section 8B(4) of the Act.
41 Rule 18 of the Safeguard Rules.
42 Section 8B(4) of the Act read with Rule 16 of the Safeguard Rules.
43 Rule 4 read with Rule 17 of the Safeguard Rules.
45 In a PTA, two or more partners agree to reductions on an agreed number of tariff lines. The difference between a PTA and a FTA is that in the former there is a positive list of products, on which duty is to be reduced, while in the latter there is a negative list, on which duty
pluralistic partnerships such as comprehensive economic cooperation agreements (CECAs), comprehensive economic partnership agreements (CEPAs) and regional trade agreements (RTAs).

India views RTAs and PTAs as ‘building blocks’ towards achieving the overall objective of trade liberalisation. India’s initial foray into RTAs was through the Bangkok Agreement (1975), the Global System of Trade Preferences (GSTP, 1988) and the SAARC PTA (SAPTA, 1993). India has built on these initiatives to engage with countries and regional blocs around the globe.

It is known that FTAs and RTAs through their preferential tariffs accelerate trade among nations. However, to combat a surge of such imports (including low-prices imports) most bilateral treaties preserve the right of members to invoke trade remedy measures. Noted examples are (1) the ASEAN Agreement on Trade in Goods, which permits a member’s use of safeguards under the AOS, and (2) the CECA between India and Singapore, which permits the use of subsidy and anti-dumping measures. Some of the bilateral agreements entered by India also call for strict compliance with the WTO Agreement and incorporate WTO-plus obligations. One such MOU was signed between India and Iran in 2018, mandating mutual cooperation in trade remedial measures and sharing of data before initiation of the investigation.

India is also actively involved in negotiating a number of new agreements, such as:

- Regional Comprehensive Economic Partnership (RCEP);
- Framework Agreement with Mercosur;
- India–EU Bilateral Trade and Investment Agreement;
- Australia–New Zealand CEPA;
- India–Canada CEPA;
- India–Israel FTA;
- Eurasian Economic Union (including Russia);
- Expended PTA with Chile; and
- India–Peru FTA.

India has also initiated a review of (1) India–ASEAN Agreements and (2) India–Sri Lanka FTA to negotiate the India–Sri Lanka Economic and Technology Cooperation Agreement. At the time of writing, India is actively negotiating an e-commerce chapter in the RCEP agreement.

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46 The CECA and the CEPA are agreements that consist of integrated packages on goods, services and investment, along with other areas including intellectual property rights and competition.


IV  RECENT CHANGES TO THE REGIME

Recently, the DGTR has taken multiple steps to enhance transparency, uniformity and fairness in the investigation process. The government has introduced a Manual of Operating Practice for Trade Remedy Investigation and Handbook of Operating Procedures of Trade Defence Wing. The Manual of Operating Practice for Trade Remedy Investigation enlists step-by-step instructions to be implemented while conducting trade remedial investigations. The Handbook of Operating Procedures of Trade Defence Wing on the other hand encapsulates the role of the government by providing institutional support to Indian exporters in investigations conducted by other WTO members against India.

The most significant and recent change in the anti-dumping investigations in India was the introduction of a new set of questionnaires to be filed by the supporting Indian producers participating in the investigation (supporter’s questionnaire). The main objective of the supporter’s questionnaire is to undertake meaningful examination of injury and to avoid skewed injury analysis based on selective data furnished by a few domestic producers. The supporter’s questionnaire overcomes this hurdle and accounts for the information furnished by supporting producers at the time of final determination.49

The Indian government is also aiming to reform the legal framework of trade remedial investigation. As a first step, the DA has published a ‘stakeholders’ consultation’, which invites input from the industry with an aim to amend Anti-Dumping, Anti-Subsidy and Safeguard Duty Rules by 2019–2020.50

V  SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

As stated above, DA determination orders and Ministry of Finance imposition orders are statutorily appealable to the CESTAT on merits. However, the determination or imposition orders are also amenable to judicial review by the Tribunals, High Courts and the Supreme Court of India (India’s highest court).

The Supreme Court of India in a 2005 case, Reliance Industries Limited v. Designated Authority and others,51 came to the conclusion that the nature of proceedings before the DA is quasi-judicial, and that it is well settled that a quasi-judicial decision must be in accordance with the principles of natural justice and hence reasons have to be disclosed by the DA in its decision. In 2011, in the case of Automotive Tyre Manufacturers Association v. Designated Authority and others,52 the Supreme Court of India declared that the DA is obliged to adhere to the principles of natural justice in the exercise of power conferred on it under the rules. The Supreme Court of India further declared that when an investigation and public hearing is carried out by one DA and the final findings or order is issued by a successor DA (the new DA), such final findings offend the basic principles of natural justice. Pursuant to this judgment, the departmental practice that has now emerged is that, when a particular DA is transferred or vacates office, all cases are required to be reheard in such a manner that the DA who hears the case is the one who renders the final findings.

49 Trade Notice No. 13/2018 dated 27 September 2018, issued by the DA.
52 (2011) 2 SCC 258.
In 2016, the Supreme Court in the case of *Commissioner of Customs, Bangalore v. M/s GM Exports and Others*\(^{53}\) reiterated that India, as a signatory to the WTO, must adhere to its international obligations and held that the domestic legislation must be interpreted in line with the Anti-Dumping Agreement. In 2018, the Delhi High Court in the case of *Forech India Ltd and Others v. Designated Authority and Others*\(^{54}\) held that in the case of an expiry review, the anti-dumping duty can only be extended without break (i.e., before the expiry of existing duty levied in the earlier investigation). The said decision of the High Court has been challenged before the Supreme Court and the final conclusive judgment on the issue is awaited.

Recently, the High Court of Madras in the case of *Saint Gobain India Private Limited v. Union of India and Others*\(^{55}\) detailed the importance of statutory timelines and set aside the investigation concluded by the DA after an 18-month timeline. The Court in this judgment emphasised the Anti-Dumping Agreement and clarified that the new shipper review should be conducted by the DA on an expedited basis.

**VI TRADE DISPUTES**

Settling international trade disputes between the member states is the responsibility of the WTO’s Dispute Settlement Body (DSB). This body consists of all the WTO members. The DSB has the sole authority to establish ‘panels’ of experts to consider cases and accept or reject the panel’s findings or the results of an appeal. Either side can appeal a panel’s ruling. Sometimes both sides do so. Appeals have to be based on points of law such as legal interpretation – they cannot re-examine existing evidence or examine new issues.\(^{56}\)

India has been an active participant before the DSB and has to date raised 25 disputes as a complainant. India has also faced the brunt of 30 cases that other member nations have filed against India. In 159 disputes, India acted as a third party.\(^{57}\) Out of the 25 WTO disputes filed by India, three disputes are at an advanced stage.

**i Trade remedy disputes filed by India**

In the WTO case known as *US-Carbon Steel (India)*\(^{58}\), the DSB adopted the Appellate Body Report circulated in 2014. Since the dispute was adjudicated in favour of India, the United States claimed to have implemented the ruling of the dispute by issuing revised final determination. In 2017, India requested the DSB to evaluate the claim of compliance by the US and issuance of compliance report. In 2018, Chair of the Compliance Panel informed the DSB to issue the report in 2019, which is awaited.\(^{59}\)

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\(^{53}\) 2015 (324) ELT 209 (SC).

\(^{54}\) (2018) 361 ELT 671.


\(^{56}\) www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

\(^{57}\) www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm.

\(^{58}\) WTO Dispute titled *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* (DS-436).

\(^{59}\) Communication from the Panel dated 3 September 2018 in DS-436.
On 9 September 2016, in a dispute titled *US-Renewable Energy*, India requested consultations with the United States regarding domestic content requirements and other subsidies instituted by the governments of the states of Washington, California, Montana, Massachusetts, Connecticut, Michigan, Delaware and Minnesota, in the energy sector. India claimed that the measures resulted in violation of:

- Articles III:4, XVI:1 and XVI:4 of the GATT 1994;
- Article 2.1 of the TRIMS Agreement; and
- Articles 3.1(b), 3.2, 5(a), 5(c), 6.3(a), 6.3(c) and 25 of the ASCM.

The Report of the Panel was issued on 27 June 2019, which found that the measures in dispute were inconsistent with the United States’ obligations under Article III:4 of the GATT, as they provided an advantage for the use of domestic products, which amounted to a less favourable treatment for similar or identical imported products.

Most recently, the US imposed 25 per cent and 10 per cent of additional import duty on certain steel products and aluminium products from all countries except Canada, Mexico, Australia, Argentina, South Korea, Brazil and those in the European Union. Against the imposition of additional import duty, India filed a dispute titled *US – Steel and Aluminium Products* and requested the WTO for the establishment of a panel. Since the selective levy of additional duty distorts international trade, eight other WTO members, namely Canada, China, the EU, Mexico, Norway, Russia, Switzerland and Turkey, have also filed disputes against the United States. On January 2019, the Director General constituted a panel to adjudicate the dispute.

### Trade remedy disputes against India

The WTO trade remedy case known as *India – Export Related Measures* is likely to have a significant impact on the overall export potential. In this dispute, the United States challenged the numerous programmes applicable to an array of products. The dispute is currently at Panel stage and the US has alleged that the following programmes are in contravention of the ASCM:

- Export Oriented Units Scheme and sector-specific schemes, including Electronics Hardware Technology Parks Scheme;
- Merchandise Exports from India Scheme;
- Export Promotion Capital Goods Scheme;
- Special Economic Zones; and
- Duty-Free Imports for Exporters Programme.

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61 [www.wto.org/english/tratop_e/dispu_e/cases_e/ds510_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds510_e.htm).
62 Only imports of steel, and not those of aluminium, from South Korea have been exempted from the measures at issue by the United States.
64 WTO Dispute titled *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* (DS-436).
Brazil, Canada, China, Egypt, the EU, Japan, Kazakhstan, Korea, Russia, Sri Lanka, Taiwan and Thailand reserved their rights as third parties. This dispute is of substantial importance as the alleged programmes are prominently used by a large number of exporters. In the wake of this dispute, the government of India has already taken various steps for replacement or streamlining alleged subsidy programme.

In 2019, Brazil (DS-579), Australia (DS-580) and Guatemala (DS-581) filed disputes before the WTO against domestic support subsidies and export subsidy granted by India to sugar and sugarcane industry. In these disputes, WTO members claimed various measures to be in violation of the Agreement on Agriculture and ASCM. Broadly classified, alleged measure covers:

a. domestic support by the government of India in the form of a mandatory minimum set price;

b. mandatory minimum set price by nine state governments; and

c. financial assistance by government of India and various state governments contingent upon export performance.

Although the dispute is currently at the consultation stage, various other WTO members have raised concerns over the measures. Member countries highlighted that India has substantially increased domestic support adversely impacting the competitiveness of other exporting WTO members. More specifically, Guatemala has cited the Press Release of the Cabinet Committee on Economic Affairs and claimed that India has provided export subsidy in tune of 4,000 rupees per ton (approximately 21 per cent of the world raw sugar price).

VII OUTLOOK

In the recent past, global trade has witnessed a pragmatic shift and resulted in enormous trade disputes. In 2018, the United States imposed tariffs on multiple products imported from China, the EU, India and other WTO members. In response, China imposed retaliatory tariffs. Since the escalation of tariffs resulted in an adverse impact, the United States and China are working towards arriving at a trade deal. In 2019, India withdrew Pakistan’s MFN status and imposed higher tariffs, aiming to counter terrorism. Most recently, the US withdrew duty-free benefits to India under the Generalized System of Preferences, resulting in enhancement of tariffs on goods exported from India. One week later, India imposed retaliatory tariffs on numerous products imported from the United States.

Keeping into consideration the number of trade disputes, India is likely to revamp the Foreign Trade Policy and renegotiate with the United States for reinstatement of benefits under the Generalized System of Preferences. Continued imbalance in global trade will also act as a decisive factor for India in the ongoing negotiation of various trade agreements including the RCEP. Looking forward, on account of slowdown in global trade, key industry sectors in India, including the iron and steel industry, are also likely to witness a surge in imports, resulting in multiple trade remedial investigations.

66 www.wto.org/english/tratop_e/dispu_e/cases_e/ds541_e.htm.
68 Page 19 of Guatemala request for a consultation with India dated 25 March filed before the WTO’s dispute settlement body.
I OVERVIEW OF TRADE REMEDIES

‘Trade remedies’ generally refers to the three remedy tools approved under the WTO Agreements regarding unfair trading, etc., and they are, namely, anti-dumping duty measures, countervailing duty measures and safeguard measures. The aim of these measures is to protect domestic industries and to provide them with remedies against unfair imports from a foreign country or for other special reasons, and they involve designating, inter alia, the product, supplier and supplying country and imposing additional custom duties or restricting the quantity of imports allowed.

In particular, anti-dumping duty measures and countervailing duty measures are established for the purpose of eliminating injury to domestic industry caused by unfair import from a foreign country. To utilise these measures, the domestic producer (companies and organisations, etc.) must file a petition to the Japanese government requesting the imposition of a duty. The government will conduct an inspection based on this petition and if the statutory requirements are satisfied, a custom duty will be imposed pursuant to laws and regulations.

The following sections will describe these three trade remedies as they are applicable to Japan, as well as recent changes to the system.

II LEGAL FRAMEWORK

i Anti-dumping duty measures

Anti-dumping duty measures are special customs duty measures imposed on a certain product when the export price of the product is lower than the price at which it is sold in the exporting country (dumping), and such dumping is causing injury to the domestic industry in the importing country. In order to counter this, a dumping margin is added to the domestic selling price in order to render the dumped price a ‘fair’ price. The amount of anti-dumping duty cannot exceed the difference between the export price and the domestic selling price of the product.

The anti-dumping duty is a trade relief remedy sanctioned under the WTO Agreements (the General Agreement on Tariffs and Trade (GATT) Anti-Dumping Agreement). In Japan, this remedy is set forth in the Customs Tariff Act and the Cabinet Order regarding Anti-Dumping Duty (the AD Order), among others, and is also subject to WTO Agreements (the GATT Anti-Dumping Agreement) as well as these domestic laws and regulations.
addition, there are the Guidelines for Anti-dumping Duty Proceedings (the AD Proceedings Guidelines) and an ‘Anti-dumping Duty Petition Handbook’ that exist to supplement domestic laws and regulations.

The measures

Requirements

Anti-dumping duty measures can be invoked when the following requirements apply pursuant to Article 8 of the Customs Tariff Act:

a. It must be determined that dumping has occurred (i.e., the product must be imported at a price lower than the normal price in the exporting country).

   In principle, the ‘normal price’ is calculated based on the price at which the product is sold to consumers in the exporting country (‘exporting country domestic selling price’) (Article 2, paragraph 1 of the AD Order). The exporting country domestic selling price used must be the price used in transactions with individual purchasers.

   However, if there exists no exporting country domestic selling price or if it is deemed inappropriate to apply the exporting country domestic selling price, one of the following prices is used (Article 2, paragraphs 1 and 2 of the AD Order):

   • the selling price for export of ‘like’ products that are exported from the supplying country of the relevant product to an appropriate third country (‘third country export price’); or

   • the production cost of the relevant product plus management fee, sales expenses, general expenses and regular profit for products similar to the relevant product produced in the country of origin (the ‘constructed normal price’).

In addition, Japan has appointed China (excluding Hong Kong and Macao) and Vietnam as non-market economy nations. If a producer of a product imported from either nation cannot clearly demonstrate that the market economy conditions prevail (in its market), then the normal price may be calculated by using the exporting country domestic selling price, third country export price or the constructed normal price of a same type of product exported from a country that is at a similar stage of economic development comparable to the country of origin of the relevant product (Article 2, paragraph 3 of the AD Order).

b. The dumping must be causing or potentially cause material injury to the Japanese industry, or there must exist a fact that the establishment of Japanese industry is materially hindered by the dumping.

   ‘Japanese industry’ means Japanese producers that produce at least 50 per cent of Japan’s total production of the same type of product deemed as having been dumped (excluding certain producers such as those who have a direct or indirect controlling relationship with the suppliers or producers of the relevant imported product).

c. Third, there must be a causal relationship between the dumping and injury caused to the Japanese industry. If the injury to the Japanese industry is caused by factors other than the dumping, such as an increase of imports of a non-dumped product or a decrease in demand, etc., then anti-dumping duty measures cannot be invoked.

d. Lastly, the measures must be necessary to protect the Japanese industry. For example, if the exporter makes a promise to revise the export price or the applicant withdraws its petition or other changes in circumstances occur, rendering it unnecessary to protect
the Japanese industry after a petition for anti-dumping duty measures has been filed or investigation by an authority is initiated, then anti-dumping duty measures cannot be invoked.

Method of imposing anti-dumping duty measures
A cabinet order is enacted to invoke anti-dumping duty measures in each individual case (Article 8, paragraph 2 of the Customs Tariff Act). The relevant cabinet order designates the product in question, the supplier and supplying country subject to the anti-dumping duty measures and the period for which the duty is imposed.

The anti-dumping duty is imposed on the relevant product, supplier and supplying country designated by the cabinet order for the designated period of time in addition to the tariff rate normally imposed on the relevant product, to the extent that the sum does not exceed the difference between the normal price and the export price to Japan (dumping margin).

Implementation period
Anti-dumping duty measures are implemented for a maximum of five years; however, this period may be extended if reviewed as appropriate during said period (Article 8, paragraphs 1 and 27 of the Customs Tariff Act).

Initiation of investigation, case example of invocation
Compared with other countries, there have not been many anti-dumping investigations in Japan.2

In the past five years, three cases were subject to anti-dumping investigation. Those were: (1) an investigation on carbon steel butt welding fittings originating in Korea and China (invocation date: 31 March 2018); (2) an investigation on polyethylene terephthalate with a high degree of polymerisation originating in China (invocation date: 28 December 2017); and (3) an investigation on potassium hydroxide originating in Korea and China (invocation date: 9 August 2016).

ii Countervailing duty measures
Countervailing duty measures are special duty measures imposed for the purpose of countervailing the effect of subsidy from the exporting country's government where the export of the subsidised product is causing injury to the domestic industry of the importing country.

The countervailing duty system is one of the trade remedies approved under the WTO Agreements (the GATT Agreement on Subsidies and Countervailing Measures). In Japan, investigation proceedings are governed by the Customs Tariff Act (Article 7) and the Cabinet Order on Countervailing Duty (the CVD Order). In addition, the Guidelines for Countervailing Duty Proceedings (the CVD Proceedings Guidelines) exist to supplement the WTO Agreements, domestic laws and regulations and to support the smooth operation of the system.

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The measures

Requirements

Countervailing duty measures can be invoked when the following requirements apply pursuant to Article 7 of the Customs Tariff Act:

First, it must be determined that import of the subsidised product has, in fact, occurred. Subsidies that are subject to the countervailing duties refer to any subsidy that bestows benefits, such as gifts and forgiveness of debts, and has specificity. 3

It must be determined that the import of a product that was directly or indirectly subsidised for the production or export thereof in a foreign country caused or could potentially cause material injury to the Japanese industry (limited to the Japanese industry producing the same kind of product as the imported product so subsidised), or the establishment of Japanese industry 4 must be materially hindered by such import.

A causal relationship between the import of the subsidised product and the injury to domestic industry must be demonstrated. If the injury is caused by other factors, such as increased import of a non-subsidised product or a decrease in demand as a whole, such factors will be naturally taken into account when accessing the causal relationship between the subsidised import and the material injury to domestic industry.

Lastly, invocation of duty measures must be necessary to protect the Japanese industry.

Method of countervailing duty measures

A cabinet order must be enacted in order to invoke countervailing duty measures in each individual case (Article 8, paragraph 1 of the Customs Tariff Act). The relevant cabinet order designates the product in question, the exporter, producer, exporting country or country of origin of the product and the period for which the duty will be imposed.

The countervailing duty is imposed in addition to any normally imposed tariffs (agreed tariff rate, basic tariff rate, temporary tariff rate or preferential tariff rate) in an amount no more than the amount of the relevant subsidy.

The amount of subsidy is calculated according to the following method: 5

The Guidelines for Countervailing Duty Proceedings set out the basic thinking behind the calculation of typical subsidy amounts. Subsidies are calculated from the receiver’s point of view, but the calculation method for each subsidy amount is determined appropriately through individual investigation based on the nature and terms and conditions thereof.

Implementation period

Countervailing duty measures are implemented for a maximum of five years; however, this period may be extended if reviewed as appropriate during said period (Article 7, paragraphs 1 and 27 of the Customs Tariff Act).

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3 A “subsidy that has specificity” means (1) any subsidy where the subject of the subsidy is explicitly limited to specific corporations; and (2) in addition to (1), any subsidy where sufficient grounds exist for believing it is possible to have specificity.

4 ‘Japanese industry’ means Japanese producers that produce at least 50 per cent of Japan’s total production of the same type of product as the imported product (excluding certain producers such as those who have control over the suppliers or importers of the relevant imported product) (Article 2, paragraph 1 of the CVD Order).

5 Pages 6–9 of the CVD Proceedings Guidelines.
Initiation of investigation, case example of invocation

In Japan, there has only been one countervailing duty case to date: this was the Hynix DRAM (Korea) case (imposition of countervailing duties was determined on 27 January 2016 at a rate of 27.2 per cent for the period from 27 January 2006 to 31 August 2008, and 9.1 per cent from 1 September 2008 to 23 April 2009, and withdrawn on 23 April 2009).

iii Safeguard measures

‘Safeguard measures’ generally refers to the imposition of customs duties or restrictions on quantity of imports allowed in order to avoid injury to the importing country’s domestic industry caused by a sharp increase in imports of a particular product where such measures are recognised as urgently necessary for the national economy.

Safeguard measures are trade remedies approved under the WTO Agreements (the GATT Agreement on Safeguards). In Japan, quantity restriction measures are regulated under the Foreign Exchange and Foreign Trade Act, the Import Trade Control Order, and the Regulations to Govern Emergency Measures to be taken in Response to an Increase in the Importation of Goods, while customs duty measures are provided for in the Customs Tariff Act (Article 9) and the Cabinet Order Relating to Emergency Duties. These domestic laws and regulations are also supplemented by the ‘Establishment of the Guidelines for Procedures relating to Emergency Measures to be taken in response to an Increase in the Importation of Goods’ and the ‘Guidelines for Procedures relating to Emergency Duty, etc.’.

The measures

Requirements for invocation

Emergency duty measures (or safeguard measures) can be invoked when the following conditions apply pursuant to Article 9 of the Customs Tariff Act.

Increase in imports

As the most fundamental requirement for imposition of emergency duty, there must be an increase in the imports of a particular kind of product due to a price decrease in a foreign country or some other unforeseen development of circumstances (Article 9, paragraph 1 of the Customs Tariff Act).

‘Unforeseen development of circumstances’ is the domestic legislative equivalent of the wording ‘a result of unforeseen developments’ as used in Article 19 of the GATT 1994, under which it is agreed that ‘unforeseen developments’ means the development of circumstances arising after negotiation of related tariff concessions which it ‘would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated’.6

The increase in imports may be due to either natural or artificial causes, and may include cases where the absolute import quantity decreases or remains the same but the percentage of imported product increases. However, if, for example, there is a price decrease in a foreign country and the domestic industry takes countermeasures against such low-priced imported product by marking down its own domestic product price, then emergency duty measures cannot be imposed if there is no increase in the absolute quantity or shares of import, as there exists no increase in imports in any sense.

6 Page 729 of the ‘Special Tariff Kommentaru’.
Serious injury to domestic industry or threat thereof

Even if there is an increase in the imports of a particular product, emergency duty measures cannot be imposed if there is no serious injury to Japanese industry.

Similarly to anti-dumping duty and countervailing duty, ‘Japanese industry’ here means producers that produce a substantial proportion of the total domestic production (roughly at least 50 per cent), as a proportion of either all domestic producers of like products and directly competing products, or those producers of the relevant product itself. The purpose of this requirement is to ensure that emergency duty measures are imposed only when a substantial portion of the relevant industry is injured rather than to protect individual entities that failed to compete with foreign import products.

However, unlike anti-dumping duties and countervailing duties, the scope of ‘Japanese industry’ is not limited to producers of ‘like goods’ but extends to ‘Japanese industry involved in the production of products which compete directly with such imported product in their uses’, and is therefore more broadly defined. This is based on the idea that in the event of unfair conduct such as dumping or subsidy, the scope of ‘Japanese industry’ must be limited in order to strictly assess the facts regarding unfair conduct; however, in the case of emergency duty measures, which are triggered by injury resulting from fair trade, the requirements regarding the scope of injury needs to be stricter, but once those requirements are met the remedies are more broadly available to domestic industry, including competing industries.

‘Serious injury’ means a greater level of injury than the ‘material injury’ required in the case of anti-dumping duty or countervailing measures, and in practice, it is determined on a case-by-case basis. Also, serious injury does not actually need to have been realised; the threat of serious injury can be sufficient if it is clearly imminent.7

Causal relationship between the increase in imports and serious injury to domestic industry

Even if there is an increase in imports of a specific product and serious injury to the domestic industry has been established, emergency duty measures will not be imposed unless a link can be shown between the injury and the increase in imports.

Urgent necessity for the national economy

Another requirement that must be met before emergency duty measures can be invoked is that there must be an urgent necessity for the national economy.

Emergency duty measures, which are taken against fair trade, offer protection to domestic industry, but at the same time they are disadvantageous to domestic consumers of the product. Therefore, before these measures are invoked, it must be carefully assessed from the viewpoint of the national economy whether the protection of the relevant industry is truly necessary based on Japan’s industry policies, and whether the invocation of such measures is necessary at that point in time.8

Method of emergency duty measures

A cabinet order must be enacted to invoke emergency duty measures in each individual case. The relevant cabinet order designates the product in question and the period for which the duty will be imposed.

7 Pages 729–730 of the ‘Special Tariff Kommentaru’.
8 Page 731 of the ‘Special Tariff Kommentaru’.
Emergency duty measures are implemented by way of imposition of customs duty or restriction on import volume to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Emergency duty measures are applied to the entire world indiscriminately. When imposing volume restrictions, the cap must be at least the average import volume for the past three years, in principle.

Emergency duty measures may be imposed on all specified products imported during the specified period of time or on the part of the specified products exceeding a certain quantity or value, in addition to normal customs duty, in an amount equal to or less than the amount corresponding to the difference between the customs value of the products and the appropriate wholesale price in Japan of like products or similar products, minus the amount of normal customs duty. If the specified products are subject to tariff concessions under the WTO Agreements, emergency duty may, by withdrawing such concessions or modifying such concessions within a certain tariff rate, be imposed at a certain tariff rate or the rate so modified with respect to all of the specified products imported during the specified period of time or the part of such specified products exceeding a certain quantity or value.

**Implementation period**

Emergency duty measures are implemented for a maximum of four years; however, if it is deemed that Japanese industry will continue to suffer serious injury owing to increased imports of the specified product even after the end of such period and it is deemed that the Japanese industry is in the process of structural adjustment, then the implementation period may be extended up to a total of eight years (inclusive of the aforementioned four years) (Article 9, paragraphs 1 and 10 of the Customs Tariff Act).

**Initiation of investigation, case example of invocation**

In Japan, there has only been one emergency duty measures case to date (a safeguard investigation regarding Welsh onions, shiitake mushrooms and tatami mats).

In the above-mentioned case, an investigation was initiated in December 2000 upon request by the Minister of Agriculture, Forestry and Fisheries. In April 2001, Japan invoked temporary safeguard measures for a period of 200 days setting a tariff quota and imposing additional tariffs on imports of Welsh onions, shiitake mushrooms and tatami mats that exceeded the quota. However, these temporary measures did not lead to the invocation of definite measures, and instead were terminated in November 2001.

**III  TREATY FRAMEWORK**

**i  Brexit**

According to the comments by the Customs and Tariff Bureau of the Ministry Finance, which was released dated as of 1 February 2019, if the Draft Agreement on the withdrawal of the United Kingdom from the EU becomes effective, a transition period will be established after Brexit, and the Agreement between the EU and Japan for an Economic Partnership will apply to the UK until 31 December 2020. Conversely, if the transition period cannot be established in the Draft Agreement, the Agreement between the EU and Japan for an Economic Partnership will not apply to the UK after Brexit, therefore the most-favoured tax rate will apply to transactions between Japan and the United Kingdom. Further, both the Japanese and British prime ministers have indicated that they will conclude a bilateral agreement based on the EPA between Japan and the EU after Brexit.
Withdrawing of the US from TPP

After the US left the TPP Agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP11), with the remaining 11 member countries, became effective on 30 December 2018. TPP11 is a large-scale agreement for 12 per cent of the world GDP if added to the TPP11 member countries even after the withdrawal by the US, it has a level of liberalisation of goods (rate of tariff elimination) in market access for goods higher than those of conventional FTAs and EPAs, and it handles a wide range of content, including the environment, labour, intellectual property, competition and e-commerce.

Japan has now started negotiations with the US for a Trade Agreement on Goods (TAG), and it was confirmed that the US will not invoke additional tariff measures on Japanese automobiles and parts during the negotiations. The US has moved to introduce a restraining provision against the conclusion of any FTA with non-market economies in TAG, and this provision may be a major obstacle to Japan’s promotion of mega-FTAs (RCEP, Japan–China–Korea Free Trade Agreement).

The Transatlantic Trade and Investment Partnership and the RCEP

The Transatlantic Trade and Investment Partnership (TTIP) was supposed to be the de facto global standard of 21st century trade, however, while the TTIP negotiations have been delayed, Japan made an EPA with the EU in addition to the TPP, despite the US leaving, and the rules set forth in these agreements are considered to have some impact on the TTIP negotiations. The RCEP has been under negotiations since November 2012, and it has been pointed out that progress in negotiations has been delayed, though the Joint Leaders’ Statement in 2018 announced that it is in the final stage of negotiations and that they are determined that it will be concluded in 2019. The purpose of the RCEP is to develop trade remedies for participating countries, support the purpose of trade liberalisation of the RCEP, while maintaining the principles under the WTO Agreement.

Negotiations of FTAs (such as the EU–Japan Free Trade Agreement)

The EU–Japan EPA came into effect on 1 February 2019. The EU is an important trading partner for Japan, accounting for approximately 11 per cent of exports and 12 per cent of imports. Further, in terms of investment, the EU is the second-largest investment destination after the US and the largest source of investment, and Japan and the EU have a close relationship on trade and investment. TPP11 and the Agreement between the EU and Japan for an Economic Partnership will create a better business environment for companies in countries party to the agreements, and by actively utilising these agreements, it is expected that business opportunities will expand for Japanese companies.

In addition to matters relating to tariffs on industrial products and agriculture, forestry and fishery products, and matters relating to trade in services, investment and e-commerce, the EU–Japan EPA covers state-owned enterprises and subsidies, intellectual property (geographical indication), and matters concerning regulatory cooperation. No agreement was reached on the investment rules concerning investment protection and investment dispute resolution procedures between investors and investment-recipient countries.
IV RECENT CHANGES TO THE REGIME

There have been no major legislative changes recently except for the amendment of the relevant laws discussed in Section V.

V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

i Relaxation of requirements for petitions for anti-dumping duties, etc.

As described below, the requirements for petitions for anti-dumping duties and countervailing duties have been relaxed, and it has become easier to use the system.

The petitioner was previously required to submit a damage assessment of a significant part of the domestic industry (approximately 50 per cent of the total output) at the time of petition. However, by virtue of an amendment to the AD Order and the CVD Order, a petitioner has only to submit a damage assessment to the extent reasonably available.

The petitioner was previously required to confirm at the time of petition that the support for the petition for imposition of duties exceeded the opposition (the requirement at the investigation initiation). However, by virtue of an amendment to the AD Order and the CVD Order, in the case where the same cannot be confirmed at the time of petition, it is now possible for the competent ministry for the relevant industry to confirm with Japanese producers its support for the petition for imposition of duties after the petition.

The determination was previously made at the time of confirmation of the requirements for petition or investigation initiation, including importer-producers (those engaged in both domestic production and import of the goods subject to investigation). However, by virtue of an amendment to the AD Order and the CVD Order, the determination is now made excluding such importer-producers. This amendment entered into force on 1 April 2017.

ii Relaxation of requirements for group petition for anti-dumping duties, etc.

For group petitions for anti-dumping duties and countervailing duties, the petition was previously required to be filed by a group the majority of which were Japanese producers of the product related to the petition. However, by virtue of an amendment to the AD Order and the CVD Order, group petitions for imposition of duties are now possible if at least two members of the petitioning group are Japanese producers of the relevant product. (The amendments were to Articles 5 and 10 of the AD Order and Articles 3 and 7 of the CVD Order.) The amendments came into effect on 1 May 2016.

iii Amendment of the AD Proceedings Guidelines and CVD Proceedings Guidelines

Japanese ministries including the Ministry of Economy, Trade and Industry and the Ministry of Finance reviewed the then current requirements for investigation initiation under the anti-dumping duty system and countervailing duty system, which were stricter than those under international rules, and amended the related guidelines as a result.

Specifically, with regard to the investigation initiation requirement under the anti-dumping duty systems, etc. (status of support), it was required that ‘the production of the Japanese producer(s) who support the petition’ exceed the total production of ‘opposers’, ‘position unknown’ and ‘import producers’. However, due to the amendment, which brings

Japanese rules into line with international rules, ‘position unknown’ is now excluded from the calculation of the status of support. (The amendments were to Section 5(3) of the AD Proceedings Guidelines and Section 4(3) of the CVD Proceedings Guidelines.) The amendments came into effect on 1 April 2011.

VI TRADE DISPUTES

i Anti-dumping measures by Korea on Japanese pneumatic transmission valves

On 15 March 2016, the Japanese government made a request to the World Trade Organization to hold consultations with Korea under the WTO Agreements on grounds that Korea’s anti-dumping duty measures on valves for pneumatic transmissions from Japan, imposed by Korea from 19 August 2015, were in breach of the Anti-Dumping Agreement because of flaws in Korea’s determination of injury and causal relationship, as well as flaws in its investigation procedures. Despite consultations held on 28 April 2016, Japan and Korea failed to bridge the gap between them. Japan requested WTO adjudication by a panel, and on 4 July a panel was established. On 12 April 2018, following WTO dispute resolution procedures, a panel report was issued finding that the anti-dumping duty measures by Korea were inconsistent with the WTO Agreements and recommending that the measures be modified. After the issuance of the report, Japan has requested prompt modification in good faith from Korea.

ii Safeguard measures against steel products in India

Further, on 29 March 2016, based on the final decision that the domestic industry in India had suffered or was likely to suffer significant damage owing to an increase of steel imports, India commenced definitive safeguard measures following the government’s provisional safeguard measures, which had been in place since 14 September 2015. The additional tax rate is 20 per cent for the first year and gradually decreases to 18 per cent, 15 per cent and 10 per cent at six-month intervals afterwards.

In December 2016, Japan made a request to India to hold consultations from the position that such safeguard measures were suspected of breaching the WTO Agreement. However, despite bilateral consultations held in February 2017, the two countries did not reach a resolution based on the WTO Agreement, and in March 2017, Japan requested WTO adjudication by a panel, with a panel established in the following April. On 6 November 2018, following WTO dispute resolution procedures, a panel report was issued finding that the safeguard measures by India were inconsistent with the WTO Agreements and recommending that, although they had already expired, the measures be modified as long as their effects remain. Japan has requested that India accepts in good faith the panel report and refrains from acting in breach of this acknowledgment in the future.

iii Anti-dumping measures by Korea on Japanese stainless steel bars

On 18 June 2018, the Japanese government requested the WTO for consultations with Korea under the WTO Agreements, since it was highly likely that the tax treatment of

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the anti-dumping duties that Korea has imposed on Japanese stainless steel bars since July 2004 were in violation of the Anti-Dumping Agreement. Bilateral consultations were held on 13 August 2018, but the dispute was not settled, and on 13 September 2018, the Japanese government requested the WTO establish a panel. The WTO established the panel (small committee) on 29 October 2018, in accordance with the WTO dispute resolution procedures. Japan will seek a resolution of the above issue in accordance with the WTO rules.

VII OUTLOOK

Japan, originally acknowledging itself as a trading nation, has been hesitant in utilising anti-dumping and other trade remedy measures; however, with the rise of other Asian nations and the WTO dispute resolution rules becoming well established, the number of investigations and disputes handled has increased. The above three cases are examples of the recent trend.

Chapter 11

KOREA

Dong-Won Jung and Sungbum Lee¹

I OVERVIEW OF TRADE REMEDIES

Korea’s Customs Act contains provisions on the anti-dumping measure, countervailing duty measure and safeguard measure. These measures were introduced into the Korean legal system in compliance with relevant provisions of the World Trade Organization (WTO) Agreement. In addition, Korea conducts unfair trade practice investigations and issues corrective measures, such as import bans and destruction orders, and imposes administrative fines if exported or imported products infringe the intellectual property rights of others or violate other domestic laws, including the origin marking regulations.

The most commonly triggered trade remedy measure in Korea is the anti-dumping measure. The Korea Trade Commission (KTC), which is responsible for anti-dumping investigations, received 152 applications for anti-dumping investigations and has imposed anti-dumping duties on 106 products since its establishment in 1987. By country, the most frequently targeted country in anti-dumping investigations was China, followed by Japan, the United States and European Union Member States. By product, the most frequently targeted item was chemical products, followed by steel products, paper/wood products, textiles products, machinery products and electrical equipment products. As to unfair trade practices, the KTC has received 349 applications for investigation in total, and took disciplinary measures in 110 cases. Recently, more and more applications are filed for investigations regarding infringement on intellectual property rights.

In contrast, Korea has never performed a countervailing duty investigation, and has conducted safeguard investigations into four items (soybean oil, dairy products, bicycle parts and garlic), with safeguard measures being imposed on two of these (dairy products and garlic) since the establishment of the WTO in 1995. The KTC has not conducted any safeguard investigations since 2003.

II LEGAL FRAMEWORK

The procedure for anti-dumping investigations is provided in Article 23 of the Act on the Investigation of Unfair International Trade Practices and Remedy against Injury to Industry and Articles 51 to 56 of the Customs Act. The procedure for countervailing duty investigations is prescribed in Article 24 of the Act on the Investigation of Unfair International Trade

¹ Dong-Won Jung and Sungbum Lee are partners at Yoon & Yang.
Practices and Remedy against Injury to Industry and Articles 57 to 64 of the Customs Act. Their subordinate rules and regulations provide very detailed information on the investigation procedures.

Korea has two government bodies that are responsible for the anti-dumping and countervailing duty measures. The KTC is in charge of conducting anti-dumping and countervailing duty investigations, while the Ministry of Strategy and Finance (MOSF) is responsible for making final decisions on whether to issue an anti-dumping or countervailing duty order after examining the result of the KTC’s investigations.

The procedure for safeguard investigations is provided in Articles 16 to 20-2 of the Act on the Investigation of Unfair International Trade Practices and Remedy against Injury to Industry. The KTC performs safeguard investigations and recommends safeguard measures to the head of the competent government agency.

As to unfair trade practices, including import or sale of IP-infringing products and products in violation of the origin marking, the KTC conducts investigation and issues corrective measures, such as import bans, and imposes administrative fines. Unlike other countries, Korea may issue corrective measures and impose administrative fines not only in relation to products imported but also in relation to exported products that are in violation of IP infringement or manufacturing of such products in Korea. In other words, what is unique in Korea’s legal system is that a foreign IP holder may request the KTC to conduct investigations on the manufacturing of products in Korea that infringe its IP rights or exportation of such products from Korea to foreign countries.

In *Shanghai ASA Ceramic Co Ltd v. Ministry of Strategy and Finance* (Korean Supreme Court Decision 2008Du17936 delivered on 30 January 2009), the court denied the application of a WTO Agreement directly in the court proceedings, explaining that it is generally the governments who have the rights and obligations under the WTO Agreement rather than individuals. In *Shanghai ASA*, the plaintiff claimed that the Korean government’s imposition of an anti-dumping duty on its products was inconsistent with the WTO Antidumping Agreement (ADA). However, the court clearly indicated that individuals have no standing to argue whether the Korean government’s measure in question is in compliance with the WTO Agreement at Korean courts. Therefore, it is clear that individuals cannot directly invoke the WTO Agreement at Korean courts. The reason for the court’s decision in *Shanghai ASA* was based on the WTO Agreement being designed to deal with legal relationships between the WTO Member States.

There is a commentary to the above Supreme Court decision, which can be summarised as follows. From the perspective of comparative law or reciprocity, there is nothing to be surprised at in the court’s decision. Indeed, Korea’s main trading partners, such as the United States, the European Union, China and Japan also do not recognise the direct effect of the WTO Agreement. As, however, Korean lower courts have allowed a direct application of the WTO Agreement, the meaning of the *Shanghai ASA* case cannot be underestimated. Although the Korean Constitution reflects monism with regard to the relation between treaty and domestic law, the *Shanghai ASA* case is legitimated under the principle of reciprocity in international economic relations.

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Korea

III TREATY FRAMEWORK

Korea has been actively pursuing free trade agreements (FTAs) to secure stable overseas markets and enhance competitiveness of the Korean economy in response to the worldwide spread of FTAs. As a result, starting with the Korea–Chile FTA, Korea effectuated FTAs with 52 countries, including EFTA, ASEAN, Australia, Canada, China, Colombia, the EU, India, New Zealand, Peru, Turkey, the United States and Vietnam and is conducting FTA negotiations with the Regional Comprehensive Economic Partnership (RCEP), etc., at the moment.3

<table>
<thead>
<tr>
<th>Status Opposite party</th>
<th>Status</th>
<th>Significance</th>
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<tbody>
<tr>
<td>In force (15) Chile</td>
<td>Became effective in April 2004</td>
<td>First FTA foothold to enter the Latin American market</td>
</tr>
<tr>
<td>Singapore</td>
<td>Became effective in March 2006</td>
<td>Foothold to enter the ASEAN market</td>
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<tr>
<td>EFTA</td>
<td>Became effective in September 2006 (EFTA: four countries - Switzerland, Norway, Iceland and Liechtenstein)</td>
<td>Foothold to enter the European market</td>
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<tr>
<td>ASEAN</td>
<td>Became effective in September 2006 (ASEAN: 10 countries – Malaysia, Singapore, Vietnam, Myanmar, Indonesia, Philippines, Brunei, Laos, Cambodia and Thailand)</td>
<td>First FTA entered into with the large economic bloc</td>
</tr>
<tr>
<td>India</td>
<td>Became effective in 2010</td>
<td>BRICs country Large market</td>
</tr>
<tr>
<td>EU</td>
<td>Became provisionally effective on 1 July 2011 Became fully effective on 13 December 2015</td>
<td>Largest economic bloc in the world (based on GDP)</td>
</tr>
<tr>
<td>Peru</td>
<td>Became effective on 1 August 2011</td>
<td>Rich with resources Foothold to make inroads to Latin America</td>
</tr>
<tr>
<td>US</td>
<td>Became effective on 15 March 2012</td>
<td>Large advanced economic bloc</td>
</tr>
<tr>
<td>Turkey (basic agreement, agreement on trade in goods)</td>
<td>Became effective on 1 May 2013</td>
<td>Foothold to make inroads into the Europe and Central Asia</td>
</tr>
<tr>
<td>Australia</td>
<td>Became effective on 12 December 2014</td>
<td>Rich with recourses Major market in Oceania</td>
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<tr>
<td>Canada</td>
<td>Became effective on 1 January 2015</td>
<td>Advanced market in North America</td>
</tr>
<tr>
<td>China</td>
<td>Became effective on 20 December 2015</td>
<td>No. 1 trade partner of Korea</td>
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<tr>
<td>New Zealand</td>
<td>Became effective on 20 December 2015</td>
<td>Major market in Oceania</td>
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<tr>
<td>Vietnam</td>
<td>Became effective on 20 December 2015</td>
<td>No. 3 investee country of Korea</td>
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<tr>
<td>Colombia</td>
<td>Became effective on 15 July 2016</td>
<td>Rich with recourses Emerging market in Latin America</td>
</tr>
<tr>
<td>Adoption of the text (1) Latin America</td>
<td>Initiating on 10 March 2017 (Latin America: six countries – Panama, Costa Rica, Guatemala, Honduras, El Salvador and Nicaragua)</td>
<td>Created new markets in Latin America</td>
</tr>
<tr>
<td>Under negotiation (4) Korea–China–Japan</td>
<td>The fifth negotiation was held in April 2016</td>
<td>Lay groundwork for economic integration of Northeast Asia</td>
</tr>
<tr>
<td>RCEP</td>
<td>The 19th negotiation was held on 19 July 2017 (RCEP: Korea, China, Japan, India, Australia, New Zealand and 10 ASEAN countries)</td>
<td>Contribute to the economic integration of East Asia</td>
</tr>
<tr>
<td>Ecuador SECA</td>
<td>The fifth negotiation was held in November 2016</td>
<td>Rich with resources Foothold to enter the Latin American market</td>
</tr>
<tr>
<td>Israel</td>
<td>The fourth negotiation was held in May 2017</td>
<td>Model country of the creative economy</td>
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IV  RECENT CHANGES TO THE REGIME

The amendment to the Enforcement Decree of the Customs Act on 26 March 2010 provided a legal ground for the lesser duty rule, which had been implemented in practice without legal grounds, under which anti-dumping duties are imposed based on the lesser of the dumping margin and the injury margin.4 Furthermore, the enforcement rule of the Customs Act was amended on 30 March 2010 to expressly stipulate the prohibition of zeroing, by prescribing that if individual export prices are higher than the normal value, the weighted average of such export prices shall be the dumping price in the calculation of the average dumping margin.5 Also, while the KTC independently determined the products under investigation previously, the 14 February 2013 amendment to the Enforcement Decree of the Customs Act allowed the KTC to consult with the Commissioner of the Korea Customs Service to determine the merchandise subject to investigation.

In addition, the 27 March 2017 amendment to the Enforcement Decree of the Customs Act clearly provided two measures that can be taken if an exporter fails to keep its price undertaking. The amendment prescribes that a provisional measure shall apply for no longer than four months, and even after a price undertaking has been accepted, anti-dumping duties shall be imposed if the investigation had been continued and details of anti-dumping duties to be imposed, such as anti-dumping duty rates, have been determined.6 In the past, if a material injury caused by imported products subject to a provisional measure has been acknowledged owing to an exporter’s breach of its price undertaking, all products imported after the acceptance of the price undertaking were to be subject to anti-dumping duties. However, the amendment limited the imports subject to anti-dumping duties only to those products that breached the price undertaking.7 This amendment was triggered by the following background: in the anti-dumping investigation of the Chinese H-shape steel beam, a Chinese exporter was offered and accepted a price undertaking and then breached the price undertaking. In the course of reviewing measures to be taken against the breach of the price undertaking, many issues arose with respect to the period of provisional measures and the scope of products subject to anti-dumping duties, etc., and the above amendment was enacted to promote legal stability.

V  SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

i  Verification method on domestic price of exporting country as the normal value

Described below are the factors that the KTC uses to recognise the normal value in calculating dumping margins.

Cost of production below test

After reasonably computing the cost of production (COP) and the domestic sales price, if the volume of sales below COP is less than 20 per cent of the domestic sales volume, the entire trade of the relevant product is deemed to have been conducted in the ordinary course

4 Article 65(1) of the Enforcement Decree of the Customs Act.
5 Article 10(8) of the Enforcement Rule of the Customs Act.
6 Article 68(5) of the Enforcement Decree of the Customs Act.
7 Article 69(1)3 of the Enforcement Decree of the Customs Act.
of trade. According to the KTC’s practice, if the volume of sales below COP is 20 per cent or more and less than 80 per cent, only sales of the relevant product at or above COP are regarded as having been conducted in the ordinary course of trade. If the volume of sales below COP is 80 per cent or more, no trade of the relevant product is considered as having been conducted in the ordinary course of trade.

**Domestic sales volume viability test**

If the sales volume of the product under investigation in the exporting country is less than 5 per cent of the import volume from the exporting country, the domestic price in the exporting country is deemed to be inappropriate to use as the basis for determining the normal value. However, even if the sales volume is less than 5 per cent, this test does not apply if it has been established that the domestic price is comparable to the normal value. The entire sales volume of like products in the domestic market of the exporting country and the entire export volume to Korea are compared, but verification is made by individual model taking into account the characteristic of the product.

**Arm’s-length test**

Article 10(1)2 of the Enforcement Rule of the Customs Act prescribes that the sales price between interested persons, which has been influenced by their special relationship, may not be used as a basis for determining the normal value. However, this clause does not provide the standards to apply in determining whether or not a sales price had been influenced by such special relationship.

Hence, the KTC, in practice, excludes sales between interested persons from the calculation of dumping margins if domestic sales of an exporter have been made for self-consumption or the weighted average sales price with an interested person is less than 98 per cent or more than 102 per cent of the weighted average sales price with independent third parties. In addition, if domestic sales of an exporter have been made to independent trading parties through an affiliated company for the purpose of a resale, the normal value is determined based on the first resale price of the affiliated company to a non-affiliated third party. The scope of interested persons is listed in Article 23(1) of the Enforcement Decree of the Customs Act.

8 Article 10(1) of the Enforcement Rule of the Customs Act.
9 Article 10(2) of the Enforcement Rule of the Customs Act.
10 Article 23 (Scope of Special Relationship, etc.):
‘Special relationship prescribed by Presidential Decree’ in Article 30 (3) 4 of the Act means any of the following cases:
1. Where the buyer and the seller are an executive officer or manager of their business.
2. Where the buyer and the seller are legally in the same line of business.
3. Where the buyer and the seller are in the employment relationship.
4. Where any specified person holds or controls, directly or indirectly, at least five per cent of the voting stocks of the buyer and the seller.
5. Where either the buyer or the seller is in a position to direct or control the other legally or practically or one party controls directly or indirectly the other party.
6. Where the buyer and the seller are controlled directly or indirectly by the same third person.
7. Where the buyer and the seller jointly control directly or indirectly the same third person.
ii Method of calculating profits in determining the constructed export price
Article 2.3 of the WTO ADA and Article 58(4) of the Customs Act stipulate that in cases where there is no export price or where it appears that the export price is unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the reasonable basis. Article 10(7) of the Enforcement Rule of the Customs Act prescribes that reasonable profits should be considered under circumstances described above, but it does not provide any specific method.

In practice, the KTC adjusts profits between the supplier and the affiliated company in Korea by distributing the profits realised by the Korean affiliated company’s resale of the merchandise subject to the investigation (i.e., the aggregate of the profits of the supplier and the affiliated company) in proportion to the costs incurred by both parties.11

iii Application of a single dumping margin to affiliated companies
Although the Customs Act and its subordinate regulations do not expressly have provisions, if a company under investigation is likely to manipulate prices because of their special relationship, etc., the KTC calculates a single dumping margin assuming that such suppliers are a single economic entity because two or more affiliated entities are highly likely to distort transactions, including prices, COPs, etc., through inside trading, and could incapacitate anti-dumping duties by committing a circumvention through affiliated companies.

As indicated in Korea – Antidumping Duties on Imports of Certain Paper from Indonesia (DS312) below, the WTO panel ruled that calculation of a single dumping margin does not violate the WTO ADA if certain conditions are met.

iv Method of calculating dumping margins in the review
If it is found in a sunset review that dumping is likely to continue or recur, dumping margins computed in the original investigation or the recent sunset review shall apply. On the contrary, if it is found in a sunset review that dumping is likely to discontinue or stop recurring, dumping margins newly calculated in the sunset review shall apply. If there is an enterprise under investigation that submitted responses in the original investigation but failed to submit responses in the sunset review, a dumping margin should, in principle, be calculated based on available facts.

If the import volume has substantially reduced or import ceased completely, it is regarded that dumping is likely to continue or recur. If the import volume remained unchanged or increased, it is deemed that dumping is not likely to continue or recur. Other factors can also be considered in determining whether dumping is likely to continue, such as exporters’ conditions, idle production facilities and plans to extend production facilities, status of export to third countries, prospect of demands for like products in the exporting country, anti-dumping measures taken in third countries, likelihood of switch of export from third countries to Korea when anti-dumping measures expire and increase or decrease trends of exporters’ production volume, etc.

8. Where the buyer and the seller are in a relationship by blood falling under any of the subparagraphs of Article 1-2(1) of the Enforcement Decree of the Framework Act on National Taxes.
(Amended by Presidential Decree No. 19478, 22 May 2006; Presidential Decree No. 22816, Apr. 1, 2011; Presidential Decree No. 24373, 15 February 2013.)

11 This applied to the original anti-dumping investigation of the Taiwanese and Chinese POY (November 2008) and to the changed circumstances review of the Chinese tiles (October 2008), etc.
v Service of anti-dumping questionnaires in Korean
In the past, the KTC’s questionnaire was in English. However, it began to distribute questionnaires in Korean from 2007. Although the questionnaire is in Korean, companies may submit their responses either in English or in Korean.

vi Period for determining whether imports are negligible
According to Articles 3.3 and 5.8 of the WTO ADA and Article 12(2) of the Enforcement Rule of the Customs Act, if imports from a certain country are less than 3 per cent of total imports, they are deemed as negligible and the authorities should terminate the investigation regarding that country. However, there have been lots of controversies because the WTO ADA and the Customs Act do not provide the period for determining negligible imports.

In Korea, facts that took place within the three years immediately prior to the application until the initiation of investigation can be reviewed in investigating the existence of injury to the domestic industry. However, the information after the initiation of investigation until the determination on the existence of injury to the domestic industry may be considered, if necessary. In general, the KTC reviews six months or one year additionally when conducting the investigation on the injury to the domestic industry.

Meanwhile, in 2002, the WTO Committee on Anti-Dumping Practices proposed three recommendations regarding the fixation of the period in order to determine whether the imported volume of the subject merchandise to the investigation is de minimis, which are: (1) the period of investigation on dumping margins; (2) one year prior to the initiation date of the investigation; and (3) one year prior to the application date of the investigation. Nowadays, Korea applies recommendation (1), above. However, in the past, the KTC thought it was best to evaluate the very recent period and reviewed the one-year period before whatever determination that it made. For instance, if the preliminary determination were made in June of 2016, it would review the volume of imports from June 2015 to May 2016 in order to determine whether the import volume was less than de minimis. In the same investigation, if the final determination were made in February of 2017, it would have reviewed the volume of imports from February 2016 to January 2017 in order to determine whether the import volume was less than de minimis. The reason for such an approach was to see the import trend right before making the determination. However, such an approach caused unreasonable results. That is, under such an approach, according to the timing of making the preliminary and final determination, the determination on whether the import volume satisfies de minimis constantly changes. Also, companies subject to investigation can manipulate their import volume in order to escape from the investigation on the basis of de minimis level of import volume. This substantially undermined the effectiveness of anti-dumping measures, and the KTC changed its policy to consider the import volume during the period of investigation in determining whether there was a sufficient amount of products to impose anti-dumping duties in the investigation.

vii Determination of the scope of products subject to anti-dumping duties
There are two systems to determine whether a certain item to be imported after imposition of anti-dumping duties is subject to anti-dumping duties.

First, an importer or a customer may request the KTC to: (1) exclude a certain product from anti-dumping duties on the ground that the product falls outside the definition or
scope of the product subject to anti-dumping duties; or (2) exclude a certain product from anti-dumping duties on the ground that the product is not produced by domestic producers or that it is difficult to produce the product.

Second, a domestic producer may request the KTC to include a certain product in the scope of products subject to anti-dumping duties on the ground that, although the product was excluded in the original investigation because the producer did not produce the item at that time, the producer is now producing the product and its products are competing with the products excluded in the original investigation.

Although the first system has been primarily used in most cases, there were recently cases in which the second system was used. These systems concern determination of whether a certain product that was imported after the imposition of anti-dumping duties should be subject to such duties, and are not relevant to the determination on whether certain imports falls within or outside the product scope under the investigation. These two systems are examined below.

First, an importer or a customer may request the KTC to exclude a certain product from anti-dumping duties. If the applicant requests the exclusion on the ground that a certain product does not fall within the product scope subject to anti-dumping duties, the KTC would determine whether to exclude this product from the scope considering its physical characteristics and intended use. If the applicant requests the exclusion of a certain product claiming that the product is not produced by the domestic industry, this would cause sharp conflicts between domestic producers and importers or customers. In many cases, the KTC excludes certain products from anti-dumping duties imposed if domestic producers are not producing the requested products. However, even if domestic producers are not currently producing certain products, domestic producers can produce and sell the product at any time if they have produced such product in the past or currently have production facilities for such items. Therefore, whether to exclude such products from anti-dumping duties imposed should be carefully considered. Up to the present, the KTC accepted the application to review for the exclusion of a certain product from the scope at any time. However, from 2017, the KTC adopted a new system, and only allows importers or customers to request the exclusion of a certain product from anti-dumping duties imposed after at least one year has elapsed from the imposition of the anti-dumping measure.

Next, there are cases where a domestic producer requests the KTC to include a certain product, which was excluded in the original investigation, in the products in scope subject to anti-dumping duties because, although the producer could not produce a like product at the time of the original investigation, the producer came to obtain the ability to produce and sell a like product while conducting the investigation. For example, in the anti-dumping investigation on kraft paper, the KTC excluded a certain product from anti-dumping duties in the original investigation because the domestic industry could not produce like products of the products imported. However, the domestic industry prepared production facilities and began to produce and sell the product while the KTC conducted the original investigation. In the review process, domestic producers requested the KTC to include certain types of products in the product scope subject to anti-dumping duties. However, the KTC dismissed the domestic producers’ request, ruling that:

\[\text{With respect to a review, as Article 11.2 of the WTO ADA stipulates that the authorities shall review the need for the continued imposition of a duty and Article 11.3 prescribes that a duty may not be terminated if the authorities determine that the expiry of the duty would be likely to lead to}\]
More specifically, if a certain product was excluded from the product scope subject to the anti-dumping duties in the original investigation, there is no order of imposition of anti-dumping duties on such products, and, therefore, there is nothing to be reviewed in relation to such products that were not subject to the anti-dumping duty in the first place. Considering the purposes of the sunset review system, the KTC negated to allow an interested person to apply to expand the product scope subject to the anti-dumping duties through the sunset review procedure. Consequently, the KTC rejects applications for the expansion of the product scope subject to anti-dumping duties to include certain products that were not within the scope at the time of the original investigation into the product scope subject to the imposition of anti-dumping measure.

This also relates to the circumvention issue. For example, in the anti-dumping investigation of Chinese plywood, although the domestic industry included all plywood, whether made of broadleaf trees or needle leaf trees, in the application, the domestic industry provided only the Harmonized Commodity Description and Coding System of Korea (HSK) code on broadleaf tree plywood (needle leaf tree plywood was not imported from China into Korea at that time). The KTC’s final investigation report included plywood made of both broadleaf trees and needle leaf trees in the definition of the products subject to anti-dumping duties, but stated the HSK code of broadleaf tree plywood only, and subsequently, anti-dumping duties were only imposed on broadleaf tree plywood (the final investigation report states that the HSK codes are for reference rather than being conclusive and may be added or revised in light of the definition, physical characteristics and intended use of the products under investigation).

However, after anti-dumping duties were imposed on broadleaf tree plywood, Chinese plywood exporters increased export of needle leaf tree plywood instead of broadleaf tree plywood in order to avoid the anti-dumping measure, and the domestic industry requested imposition of anti-dumping duties on the circumventing needle leaf tree plywood. However, the MOSF took a stance that even if the KTC’s final determination and the MOSF Enforcement Decree stated the Chinese plywood as products subject to anti-dumping duties, if the HSK code only refers to broadleaf tree plywood, it is reasonable to impose anti-dumping duties only to the narrower extent (i.e., only on broadleaf tree plywood). It is thought that the MOSF took such stance based on the principles of clear taxation requirements and strict interpretation on taxations, which are derived from the principle of no taxation without law.

Since Korea does not have a legal basis to investigate circumventive behaviours of companies, domestic producers could not request an anti-circumvention investigation regarding needle leaf tree plywood. In the end, domestic producers submitted a separate application for anti-dumping investigation of needle leaf tree plywood (original investigation) and anti-dumping duties were imposed on the needle leaf tree plywood as well. Although there are discussions on whether Korea should adopt provisions on the anti-circumventions, it seems that it will take some time before Korea could adopt such measures in the future.

viii Lesser duty rule

Provisions on the lesser duty rule were adopted into the Customs Act in 2010. Under the lesser duty rule, the injury margin shall be imposed as the anti-dumping duties if the margin
of injury to the domestic industry is lesser than the dumping margin. The basis of this rule is Article 9.1 of the WTO ADA. This WTO rule is not mandatory but rather optional. Some WTO Members have adopted this rule while some countries did not.

The injury margin is a concept that means the difference between the price that does not cause injury to the domestic industry, non-injurious import price (NIP), and the sales price of the dumped products. In order to calculate a proper injury margin, the KTC compares prices of dumped products and domestic like products after making some adjustments with regard to different aspects between the two products other than prices. The KTC provides four basic methods of calculating the injury margin. These are regarded as being identical to the formula that the Friends of Anti-dumping, including Korea, proposed in the WTO DDA rule negotiation.

\[
\text{Injury margin 1} = \frac{\text{actual sales price of domestic products} - \text{sales price of imported products}}{\text{CIF import price}} \times 100
\]

Method 1 is the price undercutting method. This is suitable when the domestic products price is not influenced by dumped imports, and calculation can be easily made based on objective statistics. The injury margin can be calculated using the weighted average sales prices on all products or by selected representative models in case there are various models. However, method 1 has the limitation that it cannot be applied if the sales price of dumped imports is higher than the sales price of domestic products.

\[
\text{Injury margin 2} = \frac{\text{target sales price of domestic products} - \text{sales price of imported products}}{\text{CIF import price}} \times 100
\]

Method 2 is the price underselling method. This method is suitable when the sales price of domestic products is influenced by dumped imports, and can be used even when the sales price of dumped imports is higher than the sales price of domestic products. The target sales price is calculated by adding selling, general and administrative expenses and a reasonable amount of profits to the manufacturing cost of domestic products. Reasonable profits are, in principle, calculated by using the operating profit rate of the relevant industry in the Business Management Analysis issued by the Bank of Korea. However, if necessary, the average profit rate of a foreign country or other reasonable references may be used.

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12 Article 9.1 of the ADA provides: ‘The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.’

13 KTC, Understanding Trade Remedy System (2009), pp. 68 to 70.
Injury margin 3 = \[
\frac{\text{target sales price of domestic products} - \text{actual sales price of domestic products}}{\text{CIF import price}} \times 100
\]

Method 3 is a method necessary to impose anti-dumping duties when the domestic sales price of dumped imports is higher than the target sales price of domestic products.

Injury margin 4 = \[
\frac{\text{CIF price of non-dumped products} - \text{CIF price of dumped products}}{\text{CIF import price}} \times 100
\]

Method 4 is applied when non-dumped imports have a high market share and have material influence on the domestic market price.

Korea has calculated injury margins using the above formulae taking specific circumstances into consideration. Injury margins can be calculated for all countries, for individual country, or for individual exporter. In the past, Korea calculated injury margins for each exporting country except in few cases when the calculation was done on individual exporters. However, the KTC has used a single injury margin for all exporting countries and individuals since the case on the Indonesian and Chinese wood-free paper in September 2003.14

VI OUTLOOK

In Korea, an application for countervailing duty investigation on stainless steel bar from India was officially filed but was withdrawn before its initiation in 2003. Since then, Korea has not conducted any countervailing duty investigation up to the present. Also, as explained above, Korea has not done any safeguard investigation since its negative determination in the sunset review on Chinese garlic in 2002. In other words, all trade remedy measures imposed by the KTC after 2003 are anti-dumping measures. The KTC recently conducted a study on WTO disputes, subsidy investigation methods, etc., in relation to countervailing duty investigation. Although this may not be considered as the KTC’s intention to immediately conduct countervailing duty investigations, this implies, at the very least, that the KTC recognises the difficulty of curing the injury to the domestic industry owing to subsidised products with anti-dumping measures alone.

In addition, Korea has never conducted investigations on circumvention because Korea does not have provisions to conduct anti-circumvention investigations. However, more and more domestic companies are actively requesting the KTC to perform circumvention investigations, like in the United States or the EU, on the actions taken by foreign exporters circumventing anti-dumping duties. To conduct circumvention investigation, it is necessary to amend the Customs Act, and add new provisions that allow the KTC to conduct circumvention investigations. Recently, Korea has taken aggressive action on this issue –

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14 Cases where a single injury margin was calculated for multiple exporting countries are as follows: alkali manganese batteries from China, Japan and Singapore (October 2003); stainless steel bars from Japan, India and Spain (June 2004); and lithium batteries from Japan and the US (June 2004).
the Korean government is holding public discussions in order to gather information from domestic industries on the necessity of anti-circumvention investigations. The government is also considering adopting legislative measures that would make it possible to conduct anti-circumvention investigations. Anti-circumvention measures may be adopted to the Customs Act in 2019.

As discussed above in detail, if a person, after the imposition of anti-dumping duties, intends to apply for an exclusion of a product from the scope subject to anti-dumping duties, such person should apply for a circumstantial change review from 2017.

In addition, Korea recently showed deep interest in the investigation on IP infringement by imported/exported products and is trying to find a way to enhance the effectiveness of provisional measures as a prior step before making the final determination. As noted above, even a foreign person may apply to the KTC for the investigation if products manufactured in, and exported from, Korea infringe the applicant’s intellectual property rights. As the result of the investigation, the KTC has the authority to issue corrective orders, such as export bans for Korean products, or imposing administrative fines on the entity that committed unfair trade practices if it finds any IP infringements in relevant investigations.

Korea has recently amended the Anti-dumping Operating Regulations to further facilitate its practice on anti-dumping investigations. The amended Anti-dumping Operating Regulations, which became effective on 12 July 2018, complement the existing regulation and introduce new procedures. Some of the key aspects of the amendments are as follows:

- the KTC is required to notify the result of the on-site verification to the overseas supplier under investigation;
- the overseas suppliers must submit written responses in the Korean language; and
- overseas suppliers must provide sufficient good cause to the KTC when they request that information regarding the business be submitted in a confidential manner.
OVERVIEW OF TRADE REMEDIES

Trade remedies have historically been a relatively underutilised and underdeveloped area of trade law in Malaysia.

Malaysia achieved its independence on 31 August 1957, and by 24 October 1957 Malaysia was already a signatory to the General Agreement on Tariffs and Trade (GATT).

In response to Article VI of GATT, by virtue of the Customs (Dumping and Subsidies) Ordinance 1959 – which was largely modelled after the Customs Duties (Dumping and Subsidies) Act 1957 from the United Kingdom – a law to prevent dumping was introduced in Malaysia for the first time.

As history would show, this ordinance was never implemented as there were issues with its enforceability. First, this was attributed to the fact that there was no specific provision on the causal link between dumping and injury brought upon the domestic industry. This was contrary to Article VI of GATT in which causality was a condition. Secondly, the Ministry of Finance was the relevant authority to determine and collect anti-dumping duties under the ordinance. Due to the complex procedures, the ministry was not well equipped to administer the law on anti-dumping.

Simultaneously, the Kennedy Round (1964–1967) followed by the Tokyo Round (1973–1979) and subsequently the Uruguay Round (1986–1994) brought significant changes to laws on anti-dumping under GATT. These changes, along with the fact that Malaysia created its anti-dumping law very early on, left regulators in the lurch as the ordinance was rapidly losing its relevance and was not up to the standards of the time.

The government instead preferred the approach of imposing import duties across the board. However, this was an inefficient technique – one that led to some unintended consequences. First, it went against the policy of the government at the time, which was to reduce protectionist measures in order to create a competitive domestic industry. Second, this led to inflation.

Therefore, in light of Malaysia’s commitment under GATT as well as its new-found commitment as a member of the Association of South East Asian Nations (ASEAN) under
the ASEAN Free Trade Area, the Countervailing and Anti-Dumping Duties Act 1993 (CADDA) was enacted to address the pitfalls of the previous ordinance. One of the primary changes under CADDA was that a specialised division under the Ministry of International Trade and Industry (MITI) was tasked to administer Malaysia’s anti-dumping law.

Again, however, as CADDA was implemented before the conclusion of the Uruguay Round, substantial changes had to be made in order for the law to be in compliance with the Agreement on Implementation of Article VI. Thus, by virtue of the Countervailing and Anti-Dumping Duties (Amendment) Act 1998, CADDA underwent some substantial changes primarily with regard to definitions, basic principles and investigative procedures to reach its current form.

With regard to safeguards measures, Malaysia enacted the Safeguards Act 2006 (SA) to fulfil its obligations as a World Trade Organization (WTO) member. The SA is in direct conformity with the WTO Agreement on Safeguards.

As detailed above, Malaysia underwent several setbacks in its journey to implement its laws on trade remedies. This was the reason trade remedies were an underutilised and underdeveloped area of trade law in Malaysia. This was certainly propounded by the fact that most industries in Malaysia were undergoing their developmental phases – as is the case with most developing nations, and as such did not have sufficient initiative to seek such remedies.

Be that as it may, the tide has rapidly turned as the rapid economic development has brought upon with it an appetite to seek trade remedies by local industries in Malaysia, as evidenced by the increase in number of initiated investigations in recent years.

As it stands, CADDA and the SA are the relevant legislation that provide for trade remedies in Malaysia – both of which are administered by MITI. They are both also in line with WTO standards and obligations.

II LEGAL FRAMEWORK

i Anti-dumping measures

CADDA is the primary law that provides for trade remedies in Malaysia. It is also the most widely used. Approximately 70 anti-dumping investigations have been initiated by Malaysia over the past 20 years. Although this is a small number in comparison with other jurisdictions, there has been an increase in investigations in recent years, with over 30 initiations alone from 2011 to 2018.

CADDA provides for the investigation, the determination of dumping and the imposition of anti-dumping duties. Dumping is defined as the importation of merchandise into Malaysia at less than its normal value as sold in the domestic market of the exporting country.9

Under CADDA, normal value means the comparable price actually paid or payable in the ordinary course of trade for the like product sold for consumption in the domestic market of the exporting country.10 CADDA defines exporting country to mean the country of export of the subject merchandise. In instances where the subject merchandise is not exported

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8 Anti-dumping Initiations: By Reporting Member 01/01/1995 – 31/12/2014 provided by the WTO.
9 Section 2(1) of CADDA.
10 Section 16(1) of CADDA.
directly to Malaysia but transhipped through an intermediate country, the intermediate country would be considered to be the exporting country if the subject merchandise is substantially transformed in that country.11

In the event there are no sales in the domestic market of the exporting country or when sales do not permit a proper comparison, the normal value can be determined by two methods. The first is by comparing the comparable price of the like product when exported to an appropriate third country.12 In the event there are reasonable grounds for believing or suspecting that a sale of the like product is at a price below unit production costs in the exporting country, the sale may be treated as not having been made in the ordinary course of trade by reason of price and may be disregarded in determining normal value.13

The second method of determining normal value is by constructing the value of the subject merchandise by adding the cost of production plus a reasonable amount of selling, administrative and other general expenses and for profits.14 The amount of selling, administrative and other general expenses and profits shall be based on actual information pertaining to production and sales in the ordinary course of trade.15

In relation to export price, CADDA defines it to mean the price actually paid or payable for the subject merchandise.16 In instances where there is no export price, or if the exporter and importer or a third party are related, or there is a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the subject merchandise is first resold to an independent buyer or if it is not resold – on any reasonable basis.17

With regard to comparison of normal value and export price, CADDA provides for a fair comparison to be made. The comparison shall be made at the same level of trade and in respect of sales made – as close as possible to at the same time. Other differences that affect price comparability shall be given due account.18 In cases where the subject merchandise is not imported directly from the country of origin but is exported from an intermediate country, the price at which the subject merchandise is sold from the exporting country to Malaysia shall be compared.19

CADDA defines injury to mean material injury or threat of material injury to the domestic industry or material retardation of the establishment of such an industry.20 A determination of injury for the purpose of an anti-dumping duty investigation shall involve an objective examination of both the volume of imports of the subject merchandise and the effect of the subject merchandise on prices in the domestic market for like products and the consequential impact of the imports on the domestic producers.21

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11 Section 2(1) of CADDA.
12 Section 16(2)(a) of CADDA.
13 Section 16(3) of CADDA.
14 Section 16(2)(b) of CADDA.
15 Section 16(5) of CADDA.
16 Section 17(1) of CADDA.
17 Section 17(2) of CADDA.
18 Section 18(2) of CADDA.
19 Section 18(5) of CADDA.
20 Section 2(1) of CADDA.
21 Section 22a(1) of CADDA.
Lastly, it must be demonstrated that the subject merchandise, through the effects of dumping, is causing injury to the domestic industry.\(^{22}\) In doing so, an examination must take place based on all relevant evidence available together with any other known factors that show the subject merchandise may be causing injury to the domestic industry.\(^{23}\) With regard to procedure, an anti-dumping investigation can be initiated through the filing of a petition, containing sufficient evidence of dumping and injury along with a causal link between the imports of the subject merchandise and injury, made to the government by or on behalf of the domestic industry.\(^{24}\) In addition, the government can, in special circumstances, initiate an anti-dumping investigation on its own volition.\(^{25}\)

Upon receiving the petition, the government of the exporting country targeted in the petition\(^{26}\) will be notified. Then, an investigation will be conducted to ascertain whether there is sufficient evidence to justify an investigation, whether there is a sufficient degree of support or if the investigation is in the interest of the public.\(^{27}\) Upon doing so, the government can reject the petition. If the petition is rejected, the petitioner will be notified.\(^{28}\)

In the event the government decides to initiate an investigation, the appropriate interested parties\(^{29}\) will be notified and a notice of initiation will be published.\(^{30}\) Parties can then choose to make their views known and relevant parties can respond to the government’s questionnaire, which is a means of gathering information to make a decision as set out in the Countervailing and Anti-Dumping Duties Regulation 1994 (CADDR).\(^{31}\)

Thereafter, within 120 days of the date of publication of the notice of initiation of investigation, which may be extended by an additional 30 days, the government will make a preliminary determination.\(^{32}\) The preliminary determination can either be in the form of a negative preliminary determination or an affirmative preliminary determination. If a negative preliminary determination is made and it is satisfied that all necessary elements for the imposition of anti-dumping duties are not found, then the investigation will cease.\(^{33}\)

In the event of an affirmative preliminary determination, provisional safeguard measures may be imposed. A final determination shall then be made within 120 days of the date of the publication of the notice of the affirmative preliminary determination.\(^{34}\) The final

\(^{22}\) Section 22a(2) of CADDA.
\(^{23}\) Section 22a(3) and 22a(4) of CADDA.
\(^{24}\) Section 20(1) and 20(2) of CADDA.
\(^{25}\) Section 20(7) of CADDA.
\(^{26}\) Section 20(3) of CADDA.
\(^{27}\) Section 20(4) of CADDA.
\(^{28}\) Section 20(6) of CADDA.
\(^{29}\) Section 2(1) of CADDA defines an interested party to mean a producer, exporter or importer of the subject merchandise; a trade or business association a majority of whose members are producers, exporters or importers of the subject merchandise; the government of a country in which the subject merchandise is produced or from which it is exported; a producer of the like product in Malaysia; a trade or business association a majority of whose members produce a like product in Malaysia; or any other party considered appropriate by the government.
\(^{30}\) Section 20(8) of CADDA.
\(^{31}\) Regulations 8 and 9 of CADDR.
\(^{32}\) Regulation 9 of CADDR.
\(^{33}\) Regulation 11 of CADDR.
\(^{34}\) Regulation 15(1) of CADDR.
determination will be required to state, inter alia, the names of the exporters and producers of
the subject merchandise, a description of the subject merchandise, factors that led to injury
and any other reasons.\textsuperscript{35}

Finally, it is important to note that CADDA provides for a judicial review mechanism
for any party who is not satisfied or who is aggrieved by the decision of the government’s final
determination.\textsuperscript{36}

Out of the approximately 70 anti-dumping investigations initiated in Malaysia from
1995 to the end of 2014, 38 have resulted in the imposition of anti-dumping measures.\textsuperscript{37}

\textbf{ii Subsidies and countervailing measures}

Like anti-dumping measures, countervailing measures are provided for in CADDA. However,
in contrast with anti-dumping, there has been very minimal activity in this area. To date there
have been no countervailing investigations initiated by Malaysia reported to the WTO.\textsuperscript{38}

An actionable subsidy that causes adverse effects to the domestic interest such as causing
injury to the domestic industry shall be subject to countervailing measures.\textsuperscript{39}

Much like an anti-dumping investigation, an initiation of investigation of
countervailing duties can be made on behalf of the domestic industry\textsuperscript{40} or by the government
in special circumstances.\textsuperscript{41} One of the distinguishing factors in the procedure under CADDA
between the investigation for countervailing measures and anti-dumping measures is that,
for countervailing measures, there is a requirement to have a consultation with the interested
foreign governments with the prospect of arriving at a mutually agreed solution.\textsuperscript{42}

In the event a mutually agreed solution is not reached, injury and causal link would have
to be established before an affirmative decision can be made. The procedural requirements for
countervailing measures resemble those for anti-dumping as both these trade remedies are
regulated under the same statutory regime under CADDA and CADDR.

\textbf{iii Safeguard measures}

The SA came into force on 22 November 2007. Despite receiving a lukewarm response
in the beginning, with the first petition submitted to the government four years later, on
1 April 2011, since then Malaysia has seen two other safeguard investigations with an
addition of two other petitions in 2016, bringing the total to five.

From a legislative perspective, the SA is a reflection of the WTO’s Agreement on Safeguards. A petition can be initiated either by the domestic industry or by the government

\textsuperscript{35} Regulation 15(2) of CADDR.
\textsuperscript{36} Section 34a(1) of CADDA.
\textsuperscript{37} Anti-dumping Measure: By Reporting Member 01/01/1995 – 31/12/2014 provided by the WTO.
\textsuperscript{38} Countervailing Initiations: By Reporting Member 01/01/1995 – 31/12/2014 provided by the WTO.
\textsuperscript{39} Section 2c of CADDA.
\textsuperscript{40} Section 4(1) of CADDA.
\textsuperscript{41} Section 4(6) of CADDA.
\textsuperscript{42} Section 5(1) of CADDA.
on its own initiative.\textsuperscript{43} To fulfil the requirements for a safeguard measure, a surge in imports must be established. Then, it must be shown that the imports caused serious injury\textsuperscript{44} or carry the threat of serious injury to the domestic industry.\textsuperscript{45}

In the event factors other than increased imports of the product under investigation are at the same time causing or threatening to cause injury to the domestic industry, such injury shall not be attributed to the increased imports.\textsuperscript{46}

When the government has determined that there is sufficient evidence of serious injury or threat of serious injury, an investigation will be initiated.\textsuperscript{47} This is effected by the publication of the notice of initiation.\textsuperscript{48} Interested parties such as foreign exporters and producers of the product under investigation, importers of the product under investigation, governments of exporting countries, domestic producers and relevant trade and business associations within Malaysia may participate in the investigation.\textsuperscript{49}

All interested parties will have the opportunity to present their views and evidence at a public hearing. In addition, interested parties will also be given the opportunity to respond to all written and oral presentations of other interested parties, and to comment on whether or not the safeguard measure would be in the interest of the public.\textsuperscript{50}

Thereafter, the government will make a preliminary determination on whether the product under investigation is being imported into Malaysia in such increased quantities and whether the conditions for a safeguard measure have been met.\textsuperscript{51}

In the event a negative preliminary determination is made, the investigation can either be terminated or further investigated.\textsuperscript{52} Either way, a preliminary determination would need to be given within 90 days, with an additional 30 days granted upon extension.\textsuperscript{53} In the event an affirmative preliminary determination is made, a provisional safeguard measure will be applicable.\textsuperscript{54} A provisional safeguard measure imposed shall not exceed 200 days.\textsuperscript{55} This timeline of 200 days coincides with the requirement under the Safeguards Regulations 2007 (SR) for a final determination to be issued under 200 days as well.

The government can impose a negative final determination or an affirmative final determination. An affirmative final determination shall include, inter alia, a complete description of the product under investigation, the factors that led to serious injury, the duration of the safeguard measure, the timeline for progressive liberalisation and a list of developing countries exempted.

\textsuperscript{43} Section 10 of the SA.
\textsuperscript{44} Section 8(1) of the SA.
\textsuperscript{45} Section 9(1) of the SA.
\textsuperscript{46} Section 8(3) of the SA.
\textsuperscript{47} Section 14(1) of the SA.
\textsuperscript{48} Section 16 of the SA.
\textsuperscript{49} Section 2(1) of the SA.
\textsuperscript{50} Section 18(1) of the SA.
\textsuperscript{51} Section 20(1) of the SA.
\textsuperscript{52} Section 20(2) of the SA.
\textsuperscript{53} Regulation 9 of the SR.
\textsuperscript{54} Section 20(3) of the SA.
\textsuperscript{55} Section 22(3) of the SA.
Although not expressly provided for under the SA, a preliminary determination or final determination can be open to judicial review in the Malaysian High Court on the grounds that the investigative authority made a decision tainted with illegality, irrationality or procedural impropriety.

To date, there have been three safeguard measures imposed upon a final determination. The said measures are currently in force.

### III TREATY FRAMEWORK

Malaysia has been active in its involvement in international trade and has become one of the major trading nations in the world. International trade is a key contributor to Malaysia’s economic growth and development. Malaysia’s main exports include electrical and electronics products, chemicals, machinery, appliances and manufactured metals.\(^{56}\) In terms of natural resources, Malaysia exports crude oil, liquefied natural gas, palm oil and natural rubber. In return, the country imports mainly electronics, machinery, petroleum products, plastics, vehicles, iron and steel products and chemicals. Malaysia’s top export and import partners are Singapore, China, the United States and Japan.\(^{57}\)

As a trading nation, Malaysia has shown a high commitment towards building regional and bilateral trade ties through arrangements with individual regional groupings and countries. Malaysia’s trade policy has been to pursue efforts in creating a more liberalised and fair global trading environment while according a high priority to the WTO system.

Malaysia currently has bilateral free trade agreements (FTAs) with Japan, Pakistan, New Zealand, India, Chile, Australia and Turkey, while negotiations are still under way with the European Union.

Virtually all the bilateral FTAs have specific chapters on trade remedies – most of which reflect the regime under WTO, namely the Agreement on Implementation of Article VI on Anti-Dumping, the Agreement on Safeguards and the Agreement on Subsidies and Countervailing Measures.

In relation to safeguard measures, the bilateral FTA between Malaysia and New Zealand contains an interesting *de minimis* provision, which states that the originating product from a party may be excluded if it does not cause serious injury or a threat of serious injury.\(^{58}\)

This departs from the wording under the WTO Agreement on Safeguards and the SA in which its *de minimis* provisions are restricted to apply only to imports from developing country members with less than 3 per cent of total imports while other developing country members with less than 3 per cent total imports amount to less than 9 per cent total imports.\(^{59}\)

The difference mainly lies in the fact that New Zealand may not be considered a developing country member under the WTO – although there is no definitive list in this

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57 ibid.

58 Article 5.3 of the New Zealand–Malaysia Free Trade Agreement.

59 Article 9.1 of the WTO Agreement on Safeguards.

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regard, and the term ‘not a cause of serious injury of threat thereof’ could plausibly apply to instances in which one of the parties have more than a 3 per cent share of total imports. Essentially, this widens the scope of the *de minimis* provision for imports.

At the regional level, Malaysia is part of the ASEAN Free Trade Area (AFTA) together with other ASEAN Member States such as Brunei, Cambodia, Indonesia, Laos, Myanmar, the Philippines, Singapore, Thailand and Vietnam, which creates a complete free trade area among them. ASEAN presently has AFTA FTAs with China, Japan, South Korea, India, Australia and New Zealand. Through AFTA, Malaysia has also entered into the ASEAN Trade in Goods Agreement and, together with Brunei, Singapore and Thailand, has embarked on a self-certification pilot project since 1 November 2010 that is aimed at facilitating an enhanced environment for trade.

Malaysia has also developed significant relations economically and politically with the Gulf Cooperation Council (GCC) and is keen to have strong bilateral trade ties with the GCC through future FTAs. As a member of the Organisation of the Islamic Conference (OIC), Malaysia has actively supported and promoted intra-OIC trade and has ratified the Framework Agreement on Trade Preferential System among the OIC countries.

Malaysia signed the Trans-Pacific Partnership (TPP) Agreement, an FTA initiative with Australia, Brunei, Canada, Chile, Japan, Mexico, New Zealand, Peru, Singapore, Vietnam and the United States. Although the United States subsequently withdrew from the TPP under the Trump administration, the other members of the TPP have agreed to pursue the trade deal without the United States. In November 2017, the TPP was renamed as the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP) and was signed by the remaining 11 member countries on 9 March 2018 after eight rounds of negotiations. Malaysia is currently considering whether it will proceed to ratify the CPTPP. An analysis is being conducted by the government, which came to power in a landslide victory in May 2018, to ascertain if the CPTPP agenda would fit with the new policies that have been put in place.

Another interesting development in relation to Malaysia’s treaty framework is its involvement in the Regional Comprehensive Economic Partnership (RCEP). RCEP is a proposed FTA between the 10 Member States of ASEAN and the six existing states that ASEAN currently has FTAs with. RCEP is viewed by many as the alternative to the presently suspended Trans-Pacific Partnership Agreement, with China as a key partner. RCEP would potentially include up to three billion people, constituting almost half of the world’s population. RCEP is currently being negotiated, with the most recent round held in Melbourne, Australia in July 2019.

In the past Malaysia has favoured the trend of entering into multilateral FTAs. This is evidenced by its keen involvement in the multilateral FTAs such as RCEP, illustrating its desire to parlay on its central geographic location to drive its developing export-orientated economy.

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60 See footnote 58.
61 Section 40A of the SA provides that a safeguard measure can be applied in accordance with the terms and conditions agreed upon in a trade agreement.
IV  RECENT CHANGES TO THE REGIME

On a general level there have not been many developments to the laws regulating trade remedies in Malaysia. The significant changes from a Malaysian perspective occurred in 1998 with the amendment to CADDA and thereafter the introduction of the SA, which came into force in 2007.

That being said, there have been some interesting minor changes to the legislative regime. The Safeguards (Amendment) Act 2012 came into force on 1 September 2013. The amendment allows Malaysia to conduct a safeguard investigation and impose safeguard measures on specific countries in accordance with the terms and conditions agreed upon in a trade agreement entered into by the government. Prior to the amendment, all investigations and safeguard duties would have to be imposed on a global basis irrespective of the source.

V  SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

In relation to the anti-dumping investigations initiated from 1995 to 2003, 13 out of 22 were connected with subject merchandise based on pulp of wood or other fibrous cellulosic material, paper newsprint and paperboard-based materials and recovered paper materials, targeting nations such as Thailand, Indonesia and South Korea.

There were no anti-dumping investigations initiated from 2007 to 2011. However, since 2011, over 30 anti-dumping investigations have been initiated – a sharp increase from the years before. Interestingly, with the exception of one investigation on polyethylene terephthalate, all investigations have been targeting steel or steel-related subject merchandise such as steel wire rods, steel reinforcing concrete bars, hot rolled coils and cold rolled stainless steel in coils from nations such as China, Vietnam, South Korea and Japan.

The current trend in Malaysia is that most, if not all, initiations of investigations for trade remedy measures are intrinsically intertwined with the steel industry; therefore, any discussion on trade remedies in Malaysia must involve a discussion on the steel industry.

Until 2002, the steel industry suffered from low prices and surpluses of capacity. From 2003 onwards, during the ‘long boom’ that occurred in the regional steel industry, China’s rapid growth and expansion resulted in an escalation in the demand for steel.

By 2008, China consumed 35 per cent of the world’s steel as compared to 13 per cent in 1995. During the ‘long boom’ most steel companies, Malaysian steel producers included, underwent massive expansion. However, in August 2008, steel prices tumbled on the back of the global financial crisis. By the middle of 2009, however, as a response to stimulus packages in various countries, the demand for building materials began to increase and by 2012 consumption of steel had surpassed the 2008 levels. Malaysia’s construction industry at that time underwent massive growth and expansion on the back of the government’s economic transformation programme.

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62 Section 40A of the SA.
63 Provided by the WTO.
64 Anti-dumping Initiations: By Reporting Member 01/01/1995 – 31/12/2014 provided by the WTO.
66 ibid.
67 ibid.
During this period China continued to increase its steelmaking capacity and produced at a high level, resulting in high quantities of steel being available for low prices.\(^{68}\) In addition, China benefited from stimulus measures implemented by its government in 2013, which took the form of tax cuts for small and medium-sized enterprises and streamlined customs regulations to facilitate exports and reforms in value added tax.\(^{69}\)

This resulted in the suppression of steel prices in the domestic market. As such, a number of investigations have been initiated against exporters.

While steel products still constitute a large number of investigations conducted, there has also been a shift to other types of products such as chemicals in recent years.

From a legal perspective, we observed the beginning of judicial reviews under Section 34a of CADDA against decisions made by MITI.\(^{70}\) In a reported case, an applicant was successful in reviewing and quashing the decision of the government of Malaysia made under CADDA.\(^{71}\)

On the safeguard front, there has been an increase in cases under the SA. To date, all the investigations under the SA have been in relation to steel-related products.

In July 2015, upon a final determination, the government of Malaysia imposed the first ever safeguard measure by imposing safeguard duties starting at 17.4 per cent on imports of the hot rolled steel plates. The duties would apply for three years and would gradually reduce to 10.4 per cent in the final year. Exemptions were given for products whose grade and quality the domestic producers could not manufacture.

In April 2016, the first-ever judicial review of a preliminary determination under the SA was brought before the Malaysian High Court. Judicial review is a remedy available in Malaysia against decisions made in the exercise of a public duty or function. Although the Malaysian High Court granted leave or permission to the applicant, who was the petitioner for the safeguard investigation, to review the decision, the review was ultimately dismissed on technical grounds. This confirms for the first time that decisions made under the SA are amenable to review by the courts; however, this is not expressly provided by statute.

In May 2016, the government initiated two simultaneous investigations on steel wire rods and deformed bar-in-coil, and steel concrete reinforcing bars, which is an unprecedented move based on petitions initiated by local steel mills. In April 2017 upon a final determination, the government of Malaysia imposed the second and third ever safeguard measure by respectively imposing safeguard duties starting at 13.9 per cent on imports of steel wire rods and deformed bar in coils and 13.42 per cent on imports of steel concrete reinforcing bars.

Further, in June 2017, the government initiated an anti-dumping investigation on imports of cold-rolled stainless steel originating from China, South Korea, Taiwan and Thailand. In February 2018, anti-dumping duties were imposed on imports from China, South Korea, Taiwan and Thailand. The duties will be in force until 2023.

In 2019, two anti-dumping investigations have been initiated. One on cold-rolled coils originating from China, Japan, South Korea and Vietnam; and another on steel concrete reinforcing bars originating from Turkey and Singapore. As at the time of writing, both investigations are ongoing with no preliminary determination having been issued.

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\(^{68}\) ibid. at 38.

\(^{69}\) ibid.

\(^{70}\) *PT Pabrik Kertas Tjiwi Kimia TBK v. Kerajaan Malaysia* [2007] 3 MLJ 781.

\(^{71}\) ibid.
VI TRADe DISPUTES

At the WTO level, there has been very little activity in relation to trade disputes involving Malaysia. In 1995, Malaysia was a respondent in a request for consultation made by Singapore, which was later withdrawn. In 1997, Malaysia was a complainant and requested for consultation in United States – Import Prohibition of Certain Shrimp and Shrimp Products. The decision of the panel was later reversed by the Appellate Body in 1998.

More recently Malaysia’s role in WTO disputes has been confined to that of a third party. Some of the more recent WTO disputes in which Malaysia was involved as a third party are European Union – Anti-Dumping Measures on Biodiesel from Argentina; India – Certain Measures Relating to Solar Cells and Solar Modules; and Australia – Certain Measures Concerning Trademarks, Geographic Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging.72

VII OUTLOOK

Malaysia is unique in the sense that the use of trade remedies is still in its infancy. From a trade practitioner’s perspective, these are interesting formative times.

While Malaysia’s manufacturing sector is largely open to foreign investment and international competition, there are policies in place to protect certain key industries. There are various requirements to obtain approval permits to import certain goods into the country. In addition, there are tariffs imposed on certain products and non-tariff barriers to trade. This, alongside with government policies to stimulate growth in local industries by providing various incentives, has accorded protection to the developing local industries.

As a consequence, the Malaysian government is seen to have been taking a proactive role in protecting its key local industries, which it considers are essential for the nation’s growth. This is likely to be the reason why trade remedies are still an underutilised means of recourse in Malaysia as the policy is to take pre-emptive protectionist measures to protect the local industries from harm, as opposed to reactionist measures such as anti-dumping and safeguard measures. This is one of the primary reasons why the use of trade remedies in Malaysia is not as common as in other jurisdictions.

More interestingly, on 9 May 2018, Malaysia had its 14th general election. The election was tightly contested and resulted in the victory of the opposition coalition – Pakatan Harapan. This was the first time in 60 years that the ruling Barisan Nasional coalition had lost an election. While there were initial uncertainties on the types of policies relating to international trade and foreign policy that would be taken, it appears that, at least for matters relating to international trade and foreign policy, that the current government has shown that it intends to steady the ship – to maintain a similar approach as taken by the previous government.

Also pertinent to note is that because of Malaysia’s proximity to China, the Sino-American ‘trade war’ will have an impact on the country. However, at this time, it is difficult to state whether the impact will be either positive or negative.

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72 WTO Disputes by country/territory: Malaysia: www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm#mys.
Chapter 13

TURKEY

M Fevzi Toksoy, Ertuğrul Canbolat and Hasan Güden

I OVERVIEW OF TRADE DEFENCE INSTRUMENTS

Turkey ranks among the World Trade Organization’s (WTO’s) top 10 users of anti-dumping measures. Between 1995 and 2014, Turkey was ranked 10th among WTO members in terms of the number of anti-dumping investigations initiated and seventh in terms of the number of anti-dumping measures imposed, which mostly concerned plastics and rubber, textiles, and base metals. Indeed, Turkey has to this date conducted 232 trade defence investigations (including anti-dumping, anti-subsidy, anti-circumvention and safeguard investigations).

The Directorate General for Imports (Directorate General) within the Ministry of Trade (the Ministry) is competent for the conduct of trade defence investigations.

As regards anti-dumping, anti-subsidy, review and anti-circumvention investigations, the Directorate General (Department of Dumping and Subsidy; Department for Monitoring and Assessment of Import Policies) is empowered to conduct a preliminary examination upon complaint or ex officio. If the Directorate General considers that there are reasons warranting the initiation of an investigation, it issues a recommendation to the Board of Evaluation for Unfair Competition in Imports (the Board), which then submits its decision to initiate an investigation to the Minister of Trade (the Minister) for approval. If it is approved, an initiation Communiqué is published in the Turkish Official Gazette.

The Board is empowered to make proposals in the course of an investigation, evaluate the findings made during investigations and submit for the Minister’s approval its decisions on the imposition of provisional or definitive measures. Eventually, the Board can also propose undertakings in the course of an investigation, decide whether or not to accept a proposed undertaking and take relevant measures where undertakings are violated.

As to safeguard investigations, a similar process applies, but the competent department and board are different (i.e., Department of Safeguards, Board for the Evaluation of Safeguard Measures for Imports). If the concerned board resolves that a safeguard measure is justified.

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1 M Fevzi Toksoy is a managing partner, Ertuğrul Canbolat is a senior associate and Hasan Güden is an associate at ACTECON.
3 The following breakdown may be made: 117 measures are in force; 45 measures have expired; 11 measures have been repealed as a result of expiry investigations; 30 safeguard measures expired or were terminated; 21 investigations have ended without the adoption of any measures; and eight investigations are still ongoing. Those numbers have been calculated by considering the number of initiation notices and not the number of subject countries.
and the Ministry approves this resolution, a Communiqué proposing the adoption of a measure to the President is published. If the President decides that a measure should be taken, a presidential decree announcing the measure is published in the Official Gazette.

The Directorate General may decide to conduct surveillance upon a written application or ex officio.

II LEGAL FRAMEWORK

Owing to the economic contraction and foreign exchange bottleneck of the 1970s, Turkey decided in 1980 to liberalise its economy and adopted an economic policy based on growth through exports. Indeed, from the 1960s until 1980, Turkey pursued an import-substitution industrialisation policy. To accomplish that shift, Turkey had to open its economy and gradually abandon its restricting policies (authorisation to import, foreign exchange control, etc.). The liberalisation of the Turkish economy has therefore been accompanied by the suppression of barriers aiming to substitute imports with domestically produced inputs.

While liberalising its economy, facilitating imports, Turkey felt the need to somehow protect its domestic producers. In that context, the first legislation providing for trade defence instruments was adopted in 1989. Since then, Turkey has been one of the developing countries that intensively used trade defence instruments both to protect its domestic industries and to respond to measures taken by other states affecting Turkish exports.

In terms of liberalisation, Turkey went further by forming a customs union with the EU in 1995, which meant adopting the EU’s common external tariff and compulsory alignment with the EU’s Common Trade Policy.4

Turkey is also a member of the WTO and is therefore bound by the Agreement Establishing the World Trade Organization, as well as the annexed agreements including the General Agreement on Tariffs and Trade (GATT 1994), the Agreement on Subsidies and Countervailing Measures, the Agreement on Implementation of Article VI of GATT 19945 (the Anti-Dumping Agreement) and the Agreement on Safeguards.

i Anti-dumping and anti-subsidy legislation

The main relevant legislation is:

- Law No. 3577 on the Prevention of Unfair Competition in Imports;
- Regulation No. 23861 on the Prevention of Unfair Competition in Imports;
- Decree No. 99/13482 on the Prevention of Unfair Competition in Imports;
- Communiqué No. 2008/6 on the Prevention of Unfair Competition in Imports; and

ii Safeguard legislation

The Turkish legislation on safeguards is:

- Decree No. 2004/7305 on Safeguard Measures in Imports; and
- Regulation No. 25486 on Safeguard Measures in Imports (the Safeguard Regulation).

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4 The Customs Union Agreement came into force on 31 December 1995.
iii  Anti-circumvention

Anti-circumvention is regulated by the following provisions:

a  Article 11 of Decree No. 99/13482 on the Prevention of Unfair Competition in Imports; and

b  Articles 4(4)(j) and 38 of Regulation No. 23861 on the Prevention of Unfair Competition in Imports.

iv  Surveillance

The main principles for the surveillance carried out by the Ministry are established in the following legislation:

a  Decree No. 25476 on Safeguard Measures for Imports; and

b  Regulation No. 25486 on Safeguard Measures for Imports.

Surveillance is an instrument by which import trends, import conditions and the imports’ effect on the domestic industry may be observed. If the Ministry decides to implement a surveillance, every country will be subject to such a measure. This measure allows the Ministry to monitor and have a better outlook on future imports from the subject countries. In other words, surveillance provides advance warning on the type of product and the number of products that a company plans to export to Turkey from those countries. The companies that do not have the ‘surveillance documents’ are obliged to pay the value added tax for the difference between their actual product price and the reference price.

III  TREATY FRAMEWORK

The conclusion of free trade agreements (FTAs) is part of Turkey’s willingness to conduct a growth policy based on exports in order to conquer new markets and diversify the products it exports. Turkey’s FTAs are generally characterised by the elimination of tariff and non-tariff barriers between the concerned countries, by the prevention mechanisms that could be used to offset the adverse effects of duty reductions, by the establishment of a joint committee responsible for the proper implementation of the FTA, and by regulations on issues such as origin rules or cooperation between administrations. Moreover, the conclusion of FTAs and the establishment of customs unions is often considered to be a potential solution to the foreign trade deficit, which constitutes one of Turkey’s long-standing problems. As regards trade defence instruments specifically, those FTAs generally contain a provision stating that parties may resort to trade measures in accordance with the WTO agreements and sometimes provide rules not included in the WTO agreements or domestic law. The FTA concluded with Korea differs from the others because it provides for substantive rules: the prohibition of zeroing; the application of the lesser duty rule; the obligation of the investigating authority to request the exporter or producer in the territory of the other party for missing information or clarification concerning the answers to the questionnaire, if necessary; and the obligation to terminate a review investigation if the dumping margin calculated is less than the de minimis threshold set out in Article 5.8 of the Anti-Dumping Agreement.

In light of these, Turkey first entered into an FTA with the European Free Trade Association countries in 1991, and then formed a customs union with the EU. Indeed,
on 22 December 1995, the EC–Turkey Association Council, adopted Decision No. 1/95 on implementing the final phase of the customs union, which entered into force on 1 January 1996. Decision No. 1/95 abolishes the imposition of customs duties and charges having equivalent effect on imports of industrial goods between the EU and Turkey. Decision No. 1/95 further provides that Turkey must conclude FTAs only with countries with which the EU has concluded preferential trade agreements and must align its policies with the EU’s Common Trade Policy. The latter requirement means that Turkey must, among other things, implement trade measures substantially similar to those contained in the EU’s legislation on trade defence to countries other than EU Member States. Moreover, although Decision No. 1/95 does not prevent the imposition of trade defence measures between the EU and Turkey, it provides that the EU and Turkey shall endeavour, through exchange of information and consultation, to seek possibilities for coordinating their action in that regard.

FTAs entered into by Turkey recall parties’ interest in reinforcing the implementation of the multilateral trading system established by the WTO, and in that respect, provide that the WTO’s instruments constitute a basis for parties’ trade policies. In that sense, although FTAs’ main objective is to facilitate trade between signatory parties, the need to address distortions in trade flows through trade law instruments is also recognised. The FTAs concluded by Turkey therefore do not contain any different provisions with regard to the substantial or procedural rules already applicable to trade defence cases.

The Commission underlined in its 2019 Country Report for Turkey that although Turkey is generally aligned with the terms of the EU with regard to free trade agreements it has entered with third countries, it has continued to implement its free trade agreement with Malaysia even though the EU has not yet concluded a similar agreement with this country.

IV  RECENT CHANGES TO THE REGIME

The Turkish regime has not undergone any salient amendment recently. Nevertheless, some changes in the Ministry’s practice may be mentioned (see details in Section V, below).

The 7th Chamber of the Council of State, with two decisions taken on 28 December 2017, repealed the definitive anti-dumping duties imposed against imports of unbleached kraft liner paper originating in the United States on the grounds that neither the occurrence of the injury nor the causal link between the dumped imports and the injury was concretely established and that adverse effects were attributed to the dumped imports without carrying out a proper examination of other reasons that could have had a bearing on the injury. The Ministry then appealed those decisions before the Plenary Session of the Tax Law Chambers, which overturned those decisions on 3 October 2018.

It should also be noted that the Regulation published on 21 February 2017, repealed the Regulation on Safeguards Measures Concerning the Imports of Goods Originating in China, thereby making the general rules applicable to imports from China. Accordingly, the Decree of the Council of Ministers on the same subject was also repealed on 18 March 2017.

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V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

i Market economy status

The expiration of the 15-year period prescribed for the application of the ‘surrogate country approach’ to China, which was set out in China’s Accession Protocol to the WTO, has been brought to attention by the Chinese government and Chinese associations to confirm that an automatic switch to market economy status has occurred. However, Chinese exporters, which are seeking to have their cost and price data taken into consideration by the Ministry, claim that they satisfy the conditions for market economy treatment (MET) laid down by Turkish legislation.

In the Solar panels anti-dumping case, despite the request by the Chinese Ministry of Trade that the MET be applied, the Ministry implicitly rejected the ‘automatic switch’ argument regarding the expiry of the Accession Protocol by only referring to the proper implementation of the WTO and Turkish legislation. Additionally, one of the cooperating exporters requested that the Ministry consider that the company’s activities are conducted under market economy conditions. Although the Ministry acknowledged the improvements made by China concerning the compulsory household registration (hukou system), it has been outlined that the system still restricts free movement of workers and prevents wage formation under market conditions. Furthermore, owing to the collective ownership of land and the prohibition of private ownership, Chinese companies are granted the right to use land by the government; however, the conditions under which prices and depreciations are calculated are not transparent.

In the Porcelain anti-dumping case, the China Ceramics Industrial Association put forward the argument that the normal value must be calculated on the basis of actual costs and sales data of each exporter. The Ministry, however, indicated that the exporters included in the sampling applied for the non-market economy (NME) treatment and provided their data accordingly (i.e., without any costs and domestic sales information). The following questions arose in this case:

a Does the acknowledgment of the alleged ‘automatic switch’ of China to market economy status make the choice for cooperating companies between MET and NME treatment irrelevant, and if so, should the Ministry have requested the cooperating companies that asked for NME treatment to provide their costs and domestic sales data?

b Should the Ministry make an individual determination for a cooperating company that was not included in the sampling but submitted complete information on costs and domestic prices along with the documents supporting MET?

Eventually, the Ministry stipulated that no provision in Turkish law recognises China as a market economy. Nevertheless, Additional Article 1 of the Regulation No. 23861 on the Prevention of Unfair Competition in Imports provides that exporters and producers located in non-market economies can request that the provision applicable as regards market economies be applied to the determination of the normal value in their case; to this end,


they have to demonstrate that they produce and sell under market economy conditions. The Ministry indicates in initiation notices that those claiming market economy treatment must comply with requirements mentioned in the legislation.

ii Implications of the withdrawal of the complaint

According to Turkish law, the Ministry may well decide to terminate an investigation upon the withdrawal of the complaint. Indeed, the Ministry developed a consistent practice of closing investigations upon withdrawal of the complaint and pursued this practice in a considerable number of cases. The Ministry, however, reversed this practice in its recent Porcelain case, in which it decided not to close the investigation and also to use the data submitted by the complainant company, which withdrew its complaint.

This practice raises the questions of whether the representativeness test should be re-conducted concerning the other (remaining) complainant company or companies, and whether the data of the withdrawing company may still be used by the Ministry for the injury determinations following the withdrawal. These questions are of importance with regard to the Porcelain case, in which the Ministry considered that the complainant company other than the withdrawing company does not satisfy the representativeness criterion.

On the other hand, the anti-dumping investigation carried out concerning imports of terephthalic acid originating in Korea, Spain and Belgium, and the anti-dumping and anti-subsidy investigations conducted into imports of acrylic and modacrylic products originating in China, South Korea, Thailand and Germany, were all terminated following the withdrawal of the complaints.

iii Non-cooperation versus cooperation

Turkish law provides that the investigation’s outcome may be less favourable to the non-cooperating companies. Accordingly, the Ministry generally determines more favourable duties for the companies duly cooperating. In this regard, the following cases are relevant:

- in the Porcelain case, the Ministry applied the same duty rate for all the companies regardless of the fact that some of them cooperated and had been selected for the sampling;
- in the final disclosure regarding the Terephthalic acid case, a company that duly submitted its responses was considered non-cooperating on the grounds that it attempted to obstruct the investigation to affect its outcome;
- in the Articulated link chain and parts anti-circumvention case, the Ministry exempted most of the cooperating companies;\(^14\)
- in the Woven fabrics of synthetic and artificial stable fibres expiry review case, the applicable anti-dumping measure has been reduced from 87 per cent of the CIF price to 44 per cent;\(^15\) and

in the Wall clocks expiry review case,16 where no exporting or producing company cooperated, the Ministry calculated a dumping margin likely to recur in case of the expiry on the basis of the prices offered on global shopping platforms; and imposed a measure at an amended rate of 23 per cent of the CIF price, which cannot be applied in a way exceeding the absolute dumping margin determined in the original investigation.17

These recent cases reveal that proper cooperation can bring about important advantages (i.e., lower duties or exemption from duties), and exporting companies may be placed in a better position, so that cooperating companies may stand out in the competition thanks to their new position in the market.

iv Absence of on-the-spot verification

The Ministry may conduct verification visits at the premises of the domestic producers and exporters. Such verification visits enable the Ministry to examine the records, to verify the information provided, and to comprehensively analyse the interested parties’ accurate economic indicators. It is undisputed that on-spot verifications are critical in trade defence investigations and are necessary for the Ministry to base its determinations on positive evidence and to conduct an objective examination of the facts. Those visits are particularly crucial in the context of expiry reviews, as the Ministry may confine its assessment only to the injury analysis (i.e., based on domestic industry data).

In this regard, although the Ministry usually carries out verification visits, the domestic producers involved in the Polyester synthetic staple fiber expiry review case18 had not been subject to such visits.

The Hinges anti-circumvention case raises a discussion point regarding verification.19 While the Ministry considered the data provided by the exporters and producers located in Germany and indicated that the conduct of verification visits at the premises of those companies is not necessary, it carried out verification visits at the premises of the cooperating companies located in the other countries. Even though the conduct of verification visits is not compulsory, the question could be asked whether conducting verification visits in a subject country but not in others during the same investigation would be consistent with the investigating authorities’ obligation to carry out an objective examination.

v Injury analysis

The Ministry evaluates, in the context of the injury determination, whether the prices at which products enter Turkey have been decreasing and then analyses the effect of the import prices on the domestic industry’s prices. Price undercutting demonstrates to what extent

17 See Communiqué No. 2001/5 on the Prevention of Unfair Competition in Imports, published on 7 November 2001. In this decision, while the Ministry established an absolute dumping margin of 4.84 US$/piece and a dumping margin of 180 per cent (in relative terms), it imposed an anti-dumping measure of 2.10 US$/piece.
import prices are below the domestic selling price of the domestic industry, whereas price depression gives the percentage at which the import prices are lower than the target price of the domestic industry.

**Country-specific data versus company-specific data**

The Ministry’s assessments are mostly based on country-specific rather than company-specific data, especially in cases where the majority of the exports to Turkey are made by a single company or where there is a large number of cooperating exporters or producers in the subject country.

Accordingly, in the Dioctyl phthalate anti-dumping case where the cooperating exporter claimed that its own data be used, the Ministry underlined that an important part of the imports of the concerned product from South Korea has been made by the cooperating company and that the concerned claim has not had any effect on the final evaluations of price undercutting and depression. A similar approach has been adopted in the Sodium percarbonates anti-dumping case where the Ministry found that the exports of the cooperating company located in Germany made up a significant part of the exports from Germany to Turkey, and therefore considered the Turkish Statistical Institute’s country-specific data.

The following cases are worth mentioning in this respect:

*a* In the Kraft liner anti-dumping case, the Ministry conducted its analysis regarding the effect of subject imports on the domestic industry’s prices considering both the cooperating exporters’ and country-specific data.

*b* In the Wall clocks expiry review case, it seems that the Ministry found that the subject imports were only composed of high-segment products because of the effect of the measure imposed on a piece-rate basis, and therefore that the actual prices used revealed a lack of price undercutting and depression. Additionally, the Ministry based its calculations of potential price effects in case of the concerned measure’s expiry on the prices offered on global shopping platforms.

**The implementation of the lesser duty rule**

The importance attached by the Ministry to the outcome of the above-mentioned assessments is dependent on the characteristics of each case. In some cases in which price undercutting or depression were absent, the Ministry did not impose any measure by way of implementing the lesser duty rule. Nevertheless, in recent cases, the Ministry has decided to impose measures even in the absence of price undercutting or depression.

In the Polyester synthetic staple fibre expiry review case, in which neither price undercutting nor price suppression was established for the imports from Korea, the Ministry still extended the period of application of the existing measures and evaluated that the prices of imports from Indonesia in 2015 and 2016 were far from being representative because of their very low quantity. The Ministry also took into consideration the effect of the currency fluctuation during the same period.

The Sodium percarbonates case is also worth mentioning, as the Ministry linked the absence of price undercutting to the domestic producer’s waiver from its turnover and profit

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by not raising its prices to be able to compete with the imports. Besides, one of cooperating parties’ claim regarding the currency used in the determination of price undercutting and depression has been accepted by the Ministry and the calculations have been made accordingly. Eventually, the concerned company also requested from the Ministry that the differences in the production processes (i.e., energy efficiencies) be taken into account in the calculation of price undercutting and price depression. However, the Ministry rejected this request on the basis of its like product analysis.

**Transparency issues in the reasonable profit margin calculations**

The setting of a reasonable profit margin is of utmost importance in the establishment of the price effect.

In the *Tubes and pipes of refined copper* case,\(^\text{22}\) unlike its common practice, the Ministry set, as regards the price depression calculation, a lower reasonable profit margin in its decision as compared to the margin established in the final disclosure. This change from 10 per cent to 8 per cent may be explained by the comments submitted by the cooperating exporter and importers against the findings contained in the final disclosure.

On the contrary, in the *Porcelain* case, the Ministry maintained the reasonable profit margin (10 per cent) set in the final disclosure, although the China Ceramics Industrial Association claimed that the profit rate used in the price depression calculation is very high and that a profit rate of between 3 per cent and 5 per cent would be more accurate as regards the producers operating in the concerned industry. In that respect, the Ministry emphasised that the resellers’ average profit rate is 22 per cent based on the importers’ actual data.

Regarding the value on which a reasonable profit margin should be implemented, it was claimed in the *Tubes and pipes of refined copper* case that the purchase value of copper, which is determined on the London Metal Exchange (and is therefore publicly available to all parties), constitutes the main cost item as well as the price of the subject product, and that any genuine negotiation would be made on the remainder of the price. The Ministry nevertheless rejected this argument.

It should also be noted that the Ministry refrained from disclosing the non-confidential version of its injury calculations; even in cases with a single domestic producer, the Ministry has been reluctant to reveal the exact injury margin. On the one hand, such an approach may contribute to protecting the confidentiality of the domestic industry. On the other hand, this protective approach must not lead to the restriction of the rights of the defence.

**vi Currency fluctuation**

In the *Tubes and pipes of refined copper* case, in which the operations of the exporting company and the domestic industry were conducted in euros and US dollars respectively, the claim was made that the injury to the domestic industry resulted from the appreciation of the US dollar against the euro during the investigation period. The Ministry controversially dismissed this argument on the grounds that the copper stock exchange prices constitute the main portion of both production costs and prices of copper tubes and pipes, and that the currency of the concerned prices is the same for both exporting companies and the domestic industry.

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vii Single economic entity

Under Turkish law, the Ministry is obliged to ensure a fair comparison between the export price and the normal value that shall be made at the same level of trade. For this purpose, due account should be taken of differences that can affect price comparability, including paid commissions. In that respect, it is of significance whether the exporter and the company to which commissions have been paid operate as a single economic entity and, consequently, whether such commissions will be deducted from the export sales. In other jurisdictions, the single economic entity doctrine is consistently recognised and the costs incurred by the company to which the commissions have been paid are deemed part of the export price.

In the *Tubes and pipes of refined copper* case, the Ministry rejected a request to be considered within a single economic entity because of the lack of supporting documents. Accordingly, this case shows that the Ministry may well accept such requests in the future, provided that sufficient supporting documents are submitted. It is not clear at this stage what kind of documents would be deemed supporting, considering the fact that to be recognised as cooperating, respondent companies must already provide the Ministry with, among other things, documents on the capital structure of both the company paying and the company receiving commissions, and on the nature and scope of the involvement of the company receiving commissions.

viii Substantial transformation in anti-circumvention cases

Anti-circumvention investigations revolve around whether or not the imported goods originate in the subject (exporting) country. In practice, the Ministry seeks to determine whether the subject product underwent substantial transformation in the subject country, thereby acquiring the origin of the exporting country.

In the *Polyester partially oriented yarn* case, the Ministry found that the processing of the subject product, partially oriented yarn, into partially texturised yarn through operations such as twisting and putting through texturing machines does not constitute a substantial transformation.\(^2\) In the *Woven fabrics of synthetic and artificial stable fibers* case, the Ministry held that the purchased raw fabric made up a significant portion of the final product’s costs and that the value added created through the workings of the subject company did not exceed 15 per cent.\(^2\)

VI TRADE DISPUTES

Although the relevant parties may appeal to request the annulment or the suspension of the execution of the Ministry’s decisions, these are seldom challenged in court. In the rare cases where the Ministry’s decision is called into question, the competent court regularly acknowledges that the Ministry may exercise considerable discretion in its assessments. The length of the appeal process is another reason for interested parties not to lodge an action against the Ministry. Therefore, case law in that area has not been developed yet.


As regards Turkey’s situation at the WTO, it has been involved in five cases as complainant, 12 cases as respondent and 94 cases as third country. However, only three cases in which Turkey was complainant led to the establishment of a panel.

In United States – Countervailing Measures on Certain Pipe and Tube Products (DS523), Turkey complained about the method used by the US authorities to determine which entities are public bodies, which sales were made for less than adequate remuneration, and which aid is specific to certain enterprises. The use of facts available and the application of adverse inferences had also been contested. The Panel in this case ruled in Turkey’s favour in most regards and determined that the Department of Commerce failed, inter alia, to:

- apply the correct legal standard and provide a reasoned and adequate explanation for its public body determinations;
- engage in a process of reasoning and evaluation in selecting facts available for missing price information and in selecting the subsidy rate as a ‘reasonable replacement’ for the missing necessary information or for the use of certain subsidies; and
- distinguish the effects of subsidised imports with those of dumped, non-subsidised imports for purposes of its injury determination.

The US appealed against the Panel’s report before the Appellate Body.

In Morocco – Hot-Rolled Steel (DS513), Turkey had contested the Moroccan authorities’ exceeding the investigation duration, their use of facts available (and their failure to disclose essential facts in that regard), their failure to issue import licences following the imposition of provisional measures, which are alleged to have amounted to import restrictions, and their failure to provide a reasoned and adequate explanation of their finding of injury and causation. In this case the Panel also upheld most of Turkey’s claims. Accordingly, Moroccan authorities failed to:

- conclude the investigation within the 18-month maximum time limit;
- reject the reported information and establish the dumping margins for the two investigated Turkish producers on the basis of facts available;
- inform all interested parties of essential facts; and
- improperly conduct the injury analysis.

Also, the United States filed a complaint challenging retaliatory duties brought by Turkey in response to the US duties on steel and aluminium. Indeed, the Decree on the Implementation of Additional Duty for the Imports of Certain Products Originating in the United States was announced on 25 June 2018 (valid retroactively as from 21 June 2018).

A Panel was also established (DS573) on 11 April 2019 on Thailand’s request against Turkey’s additional duties of 9.27 per cent on imports of Thai air conditioners imposed in response to Thailand’s earlier decision to extend safeguard duties on imports of non-alloy hot rolled steel flat products for an additional three years.

On 2 April 2019, the EU requested consultations concerning certain of Turkey’s requirements on the production, import and approval for reimbursement, pricing and licensing of pharmaceutical products.
VII  OUTLOOK

Current events related to trade have been marked by an increasing protectionism triggered by the tension that exists between the United States and China. Accordingly, Turkey has frequently had to implement trade defence measures in the past few years to support its domestic industries. In this context, the trade flows diverted from the United States to the EU and Turkey owing to additional duties are likely to cause an increase in the number of trade defence investigations.

Turkey’s safeguard investigation into imports of certain iron and steel products (initiated as a response to the ongoing worldwide protectionist approach in the international trade regime as regards steel imports, more particularly, right after the US 232 Section tariffs and the EU’s initiation of a safeguard investigation concerning imports of certain iron and steel products) was concluded on 7 May 2019 without imposition of a measure. This case is of significance particularly because (1) Turkey implied at the beginning of the investigation that the EU could be exempted from potential measures but was subjected to provisional measures (in the form of a system of tariff rate quotas in excess of which an additional duty of 25 per cent); and (2) Turkey’s attachment to its commitments under WTO rules and its determination not to undermine trade liberalisation.

On the other hand, the Ministry’s evaluations and findings in recent cases suggest that Turkey will closely monitor the stance of the US and of the EU as well as other countries’ trade defence policies.

As regards the status of China, although the Ministry in no case applied the market economy status to Chinese producers after the expiry of Article 15 of China’s WTO Accession Protocol (i.e., since December 2016), the developments in the EU and in the United States may be taken into consideration by the Turkish authorities. In any case, the MET may be granted to Chinese exporters provided that requests to that effect are accompanied by documents or evidence supporting the conditions set out by the Turkish legislation on the MET status of China, such as the non-interference of the state in the decision-making process of the company or the existence of an accounting system in line with international accounting standards. In this context, China’s recent suspension of its dispute before the Panel with regard to its market economy treatment claim appears to constitute an important development for the Ministry’s approach.
Chapter 14

UKRAINE

Anzhela Makhinova

I OVERVIEW OF TRADE REMEDIES

Trade defence instruments (anti-dumping, countervailing and special (safeguard) measures) have been applied in Ukraine since 1999 when the Law of Ukraine on Protection of Domestic Producer against Dumped Imports (the Anti-Dumping Law), the Law of Ukraine on Protection of Domestic Producer against Subsidised Imports (the Anti-Subsidy Law) and the Law of Ukraine on Application of Special Measures to Imports into Ukraine (the Safeguard Law) first entered into force.

Thereafter, trade defence instruments have been applied by domestic industries quite often. As of 3 June 2019, the following anti-dumping investigations and reviews are underway in Ukraine related to imports that originate in:

a Russia – related to imports of galvanised sheets, wire ropes and ammonium nitrate;

b Belarus – related to imports of rebars and gas concrete blocks;

c China – related to imports of incandescent electric lamps, galvanised sheets and steel hot-worked seamless pipes;

d Moldova – related to imports of rebars; and

e Kazakhstan – related to imports of railway bearings.

Moreover, a review of safeguard measures applied to foam blocks and sheets, notwithstanding country of origin and export, is in process.

At the same time, the following trade defence remedies are in place on imports of the following products originating in:

a Russia: – 11 anti-dumping duties in respect of:

• crossing points;
• fibreboards;
• ammonium nitrate;
• glass containers for medical purposes of up to 0.15 litres;
• abrasives;

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1 Anzhela Makhinova is a partner at Sayenko Kharenko. The author expresses her gratitude to Ivan Baranenko, associate at Sayenko Kharenko, for assistance in drafting Section III of this chapter.

2 Instead of internationally recognised terms ‘safeguards, safeguard investigations’, Ukrainian law operates with the terms ‘special measures, special investigations’. To avoid any misunderstandings, we use the terms ‘safeguards, safeguard investigations’ for the purposes of this chapter.

• certain nitrogen fertilisers;
• certain types of chocolate products and other cacao-containing products;
• caustic soda;
• certain urea-formaldehyde products;
• rebars and wire rods;
• cement; and
• one countervailing duty in respect of passenger cars;

b China – four anti-dumping duties in respect of incandescent lamps; articles made from ferrous metal; rubber stoppers for medical use and seamless pipes;

c Belarus – four anti-dumping duties in respect of fibreboards, salt, incandescent electric lamps and cement;

d Kyrgyzstan – one anti-dumping duty in respect of incandescent lamps;

e Poland – one anti-dumping duty in respect of rubber stoppers for medical use;

f Moldova – one anti-dumping duty in respect of cement; and

g two safeguard measures in respect of foam blocks and sheets, sulphuric acid and oleum, notwithstanding the country of origin and export.

Under Ukrainian law, the following state authorities are involved in trade defence proceedings:

a the Interdepartmental Commission on International Trade (the Commission) is responsible for the adoption of key decisions in the course of proceedings. This includes initiation of investigations; positive/negative conclusions on the existence of dumping, specific subsidies or surge in imports and their amounts; positive conclusions on existence of injury; termination of proceedings with or without trade defence remedies;

b the Ministry of Economic Development and Trade of Ukraine (MEDT) is responsible for procedural issues including registering interested parties; collecting answers to questionnaires; holding hearings and consultations; and drafting preliminary and definitive reports following preliminary or final results of investigations with the relevant recommendations to the Commission on the decisions to be adopted; and

c the Ministry of Finance of Ukraine and the State Fiscal Service of Ukraine is responsible for providing the MEDT with all relevant statistics related to proceedings.

Irrespective of the type of investigation, the proceedings are very similar for all of types and include the following stages:

a submission by a domestic industry of an application for initiation of the relevant investigation;4

b initiation by the MEDT of an anti-dumping/anti-subsidy procedure to verify sufficiency of evidence of dumping/non-legitimate subsidy, injury and causal link in the application. Based on the results of the anti-dumping/anti-subsidy procedure, the MEDT drafts a report with the relevant recommendations for the Commission either to initiate investigation or not;

4 Although Ukrainian law allows initiation of trade defence proceedings ex officio, there is only one relevant example in Ukraine's history: a safeguard investigation related to imports into Ukraine of certain oil products initiated on the basis of the materials submitted by the Ministry of Energy and Coal Industry of Ukraine.
adoption by the Commission of a decision on investigation initiation or on refusal to initiate. Usually, the above decision shall be adopted within 30 days of submission of an application to the MEDT’s registry;

d publication of an official notification on investigation initiation in Uryadovyy Kurjer, the governmental newspaper – Ukrainian law is silent on the exact deadlines. In practice, the relevant term differs from case to case. The date of the notification publication is considered as the date of official investigation initiation;

e conducting an investigation by the MEDT, including:

• registration of interested parties in the investigation – usually the relevant requests shall be submitted within 10 to 30 days of the investigation initiation;

• submission by the interested parties of their commentaries on an investigation’s initiation, including on application of the domestic industry – usually 20 to 60 days after the investigation initiation;

• submission by the interested parties of their answers to the questionnaires. There are no special deadlines for the MEDT to send questionnaires to the interested parties. In practice, terms differ considerably from case to case and may vary from two to five months after the investigation initiation. Initially, the MEDT grants 37 days to answer questionnaires. However, this term may be extended for a period of not more than four weeks based on duly substantiated requests;

• on-the-spot verifications to be conducted by the MEDT;

• hearings are usually conducted at the final stage of the investigation. Under Ukrainian law, hearings are only conducted if they are duly requested within terms set forth by the MEDT in the notification on investigation initiation (usually within 10 to 30 days of the investigation initiation). At present, the MEDT requests interested parties submit pre-hearings submissions and, following the results of the hearings, post-hearings submissions in writing within five to 10 days of the hearings. Otherwise, their oral statements will be not taken into account;

• comments by the interested parties on the individual dumping margin calculation that since 2018 are disclosed by the MEDT to the relevant interested parties; and

• comments by the interested parties on the draft definitive report of the MEDT with conclusions on the results of the investigation. Under Ukrainian law, any draft report shall be sent, as a rule, one month prior to adoption by the Commission of a definitive decision. However, in practice, such terms differ considerably from case to case and may be from two days to one month;

f adoption by the Commission of a definitive decision based on the definitive report of the MEDT either on application of trade defence remedies or termination of investigation without application thereof. The relevant decision shall be published in Uryadovyy Kurjer. If trade defence remedies are applied, they will be imposed only within a certain period after the relevant notification publication. Previously, measures were applied 30 days after publication of any decision on the application of measures. However, there are now more and more cases with longer periods of 45 to 60 days;

g challenging the Commission’s decision before the court not later than one month after imposition of the relevant remedies;
reviews. The Anti-Dumping Law stipulates reviews, including sunset, interim, newcomer and accelerated reviews. The Anti-Subsidy Law stipulates the following types of reviews: sunset, interim and newcomer reviews. The Safeguard Law sets forth a review for interim liberalisation of safeguard measures applied and for the extension of safeguard measures;

an anti-circumvention investigation is conducted in cases of unfair trade practices involving foreign producers and exporters aimed at avoiding the application of anti-dumping and countervailing measures; and

renewal of investigation under Anti-Dumping Law in cases when the application of anti-dumping duties has not changed import prices or changed them insignificantly.

Under Ukrainian law, all documents submitted in the course of an investigation shall be in Ukrainian or accompanied by Ukrainian translation. In case of violation of the above requirement, the relevant information and documents shall not be taken into account by the MEDT. In practice, this obligation may be very burdensome for the interested parties, especially in case of submission of answers to questionnaires, because usually the MEDT requires lots of supporting documents to be submitted together with the answers to the questionnaire, all of which shall be duly translated into Ukrainian. Moreover, some of the supporting documents shall be notarised or certified by the seals of the interested parties.

In the absence of an electronic database of all investigation-related documents, in order to ensure transparency, Ukrainian law obliges all interested parties to send all their submissions to other interested parties to the investigation for commentaries by post. No unsent documents and information shall be taken into consideration by the MEDT. This is also burdensome for the interested parties.

Pursuant to Ukrainian law, any documents shall only be regarded as submitted in time if they are provided by the end of the working hours of the MEDT and duly registered by the MEDT’s registry with the relevant date. In practice, to respect the relevant deadlines, it is highly advisable to submit documents to the MEDT’s registry at least one working day prior to the deadline, otherwise, there is a risk that the documents will not be registered in time. In such cases, the delayed documents will not be taken into account by the MEDT.

II LEGAL FRAMEWORK

In Ukraine, trade defence instruments are regulated by:

international treaties duly ratified by the Parliament of Ukraine and constituting the national legislation of Ukraine under the Law of Ukraine on International Treaties of Ukraine, specifically:

- GATT 1994;
- Agreement on Application of Article VI of the GATT 1994;
- Agreement on Safeguards; and
- Agreement on Subsidies and Countervailing Measures; and

special national legislation consisting of:

- Anti-Dumping Law;
- Anti-Subsidy Law;
- Safeguard Law; and
- Law of Ukraine on Foreign Economic Activity (Article 31 establishing deadlines for challenging the Commission’s decisions before the court).
Even though the above Laws were adopted during Ukraine’s accession to the WTO and were declared as fully compliant/based on the relevant WTO agreements, there are some discrepancies. For instance, the Safeguards Law does not stipulate a requirement to establish unforeseen developments in the course of safeguard investigations. The Anti-Subsidy Law still divides subsidies into legitimate subsidies (for such subsidies the application of countervailing measures is not allowed) and illegitimate subsidies (which may be subject to countervailing measures), contrary to the Agreement on Subsidies and Countervailing Measures, which since 2000 has not addressed non-actionable subsidies.

III TREATY FRAMEWORK

i Free trade areas

Since its accession to the WTO in 2008, Ukraine has made persistent efforts to strengthen economic ties with its trade partners and to create new business opportunities by establishing free trade areas (FTAs). To date, Ukraine has FTA Agreements with the European Union, European Free Trade Association (EFTA), the Commonwealth of Independent States (CIS), and agreements with a number of other states. For the purposes of this review, we will focus only on the provisions of the FTAs in respect of trade defence instruments.

ii EU–Ukraine FTA (DCFTA)⁵

Safeguards

The DCFTA provides for separate rules for safeguards in general and safeguards on passenger cars. In the part containing general rules on safeguards, the respective WTO obligations are reaffirmed and additional provisions on transparency and due process are added, as well as a clause that the parties shall endeavour to impose safeguards in a way that least affects bilateral trade. Additionally, Ukraine may apply a safeguard measure in the form of a higher import duty on passenger cars originating in the EU if certain conditions are met. Notably, safeguards and safeguards on passenger cars shall not be applied simultaneously.

Anti-dumping and countervailing measures

The parties reaffirmed their respective WTO obligations and envisaged provisions on:

a transparency. For example, disclosure of all essential facts and considerations concerning application of measures immediately after provisional measures and before final determination. Interested parties shall be given 10 days to comment on the final disclosure;

b due process. For example, provisional anti-dumping or countervailing measures may be applied by the parties only if a preliminary determination has shown the existence of dumping or subsidy causing injury to a domestic industry;

c consideration of the public interests prior to imposition of the measures; and

d lesser duty rule.

DCFTA provisions on dispute settlement are not generally applied to the trade remedies chapter, subject to some exceptions.

⁵ Provisional application of DCFTA started on 1 January 2016, entered into force on 1 September 2017.
iii CIS (Armenia, Belarus, Kazakhstan, Kyrgyz Republic, Moldova, Russia, Uzbekistan)—Ukraine FTA

Safeguards
The parties agreed to impose safeguards in line with WTO provisions. The parties agreed as well to exclude other parties from application of safeguards if import of the product concerned from such parties does not cause injury to domestic industry, that is, if the following conditions are simultaneously met:

- the other party to the FTA is not among the top five exporters of the product concerned to the country imposing the measures for the past three years;
- for the past three years, the volumes of import from the other party decreased or increased by lower volumes (in absolute and comparative figures) than from other states; and
- the level of prices for imported products from the other party is equal to or less than the level of prices of the domestic producer of like or directly competitive products.

The party intending to impose safeguard measures shall inform the parties to the FTA of its intention. The parties hold consultations to find a mutually acceptable solution.

Anti-dumping and countervailing measures
The parties reaffirmed their respective WTO obligations and agreed to disclose essential facts and conclusions not later than 30 days after the end of the investigation. The parties to the CIS FTA shall have adequate possibility to hold consultations before the end of the investigation.

iv EFTA–Ukraine FTA

Safeguards
The EFTA–Ukraine FTA sets out separate provisions for global safeguard measures and bilateral safeguard measures.

As to the former, the parties reaffirmed their respective WTO obligations and added that a party taking a safeguard measure under WTO provisions shall, to the extent consistent with obligations under the WTO, exclude imports of an originating good from another party if such imports are not a substantial cause of serious injury or threat thereof.

Bilateral safeguard measures could be taken if, owing to reduction or elimination of customs duty under the EFTA–Ukraine FTA, a product originating in a party to the agreement is being imported into the territory of another party in such increased quantities

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6 Entered into force on 20 September 2012. Political and economic discrepancies between Ukraine and Russia as well as participation of Ukraine in the DCFTA with the EU led to the unilateral suspension by Russia of the CIS FTA Agreement with regard to Ukraine and imposition of regular customs duties to Ukrainian goods: http://kremlin.ru/acts/bank/40358, http://kremlin.ru/acts/bank/40310. Ukraine, in turn, imposed retaliatory measures of the same nature against Russian goods and agricultural products: http://zakon3.rada.gov.ua/laws/show/1146-2015-%D0%BF. These decisions, however, did not impact the trade regime between Ukraine and other CIS FTA members.

7 Entered into force on 1 June 2012.

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that it constitutes substantial cause of serious injury or threat thereof to domestic industry. Bilateral safeguard measures may only be taken in case there is sufficient evidence of the above facts, and only to the extent necessary to eliminate the injury.

**Anti-dumping measures**

The parties agreed to non-application of anti-dumping measures, as provided in the respective WTO Agreements in relation to products originating in another party. It is also mentioned that this non-application provision could be reviewed in a five-year period.

**Countervailing measures**

The parties reaffirmed their respective WTO obligations. However, they also added a clause requiring parties to seek a mutually acceptable solution before initiation of the investigation. It provides that the party considering initiating an investigation shall notify in writing the party whose goods are subject to investigation and allow for a 60-day period with a view to finding a mutually acceptable solution. Consultations shall take place in the Joint Committee if any party so requests within 30 days of the receipt of notification.

**Canada–Ukraine FTA (CUFTA)**

**Emergency actions**

The parties reaffirmed their obligations under the respective WTO provisions and added a clause allowing a party under certain conditions to take emergency actions (e.g., suspend the further reduction of a rate of duty or increase a rate of duty).

Emergency actions may only be taken during the transition period and only if reduction or elimination of duties pursuant to the CUFTA resulted in a significant increase in imports of a certain product that causes or threatens to cause serious injury to the domestic industry.

A party shall maintain an emergency action only to the extent necessary to prevent or remedy serious injury, for a period not exceeding three years or within the transition period.

CUFTA also includes a non-cumulation clause in relation to safeguards and emergency actions. A party shall not adopt or maintain, with respect to the same goods and at the same time, an emergency action under the terms of CUFTA and a safeguard measure under WTO provisions.

**Anti-dumping and countervailing measures**

The parties reaffirmed their obligations on anti-dumping and countervailing measures under the respective WTO provisions.

Dispute settlement mechanisms under CUFTA shall not be applied in relation to anti-dumping and countervailing measures.

**FTA with Montenegro**

**Safeguards**

The Montenegro–Ukraine FTA provides for separate provisions for global safeguard measures and bilateral safeguard measures.

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8 Entered into force on 1 August 2017.
As to the former, the parties reaffirmed their respective WTO obligations. Additionally, they added a provision on transparency: any party intending to impose safeguard measures at the request of another substantially interested party shall immediately provide ad hoc written notification of all pertinent information on the initiation of the safeguard investigation, the provisional findings, and the final findings of the investigation.

Bilateral safeguard measures can be imposed if reduction or elimination of customs duty under the Montenegro–Ukraine FTA results in increased quantities of imports of such goods, causing serious injury or threat thereof to the domestic industry.

A party shall take bilateral safeguard measures upon clear evidence and to the minimum extent necessary to remedy or prevent injury.

Anti-dumping and countervailing measures
The parties reaffirmed their respective WTO obligations. They also added additional clauses on application of a lesser duty rule and certain rules concerning transparency: full disclosure of all facts after the provisional measures and before the final measures, provision of a 10-day period to comment on the final disclosure, etc.

FTA with Macedonia
Safeguards
Under the Macedonia–Ukraine FTA, initiation of safeguard procedures shall be preceded by notification of the opposite party to the FTA and consultations between the parties with a view to finding a mutually acceptable solution. Safeguards may be adopted if the Joint Committee fails to find a solution within 30 days.

Anti-dumping and countervailing measures
The parties reaffirmed their respective WTO obligations without introduction of new legislative provisions.

vi Other FTAs
Ukraine also has FTA Agreements with Azerbaijan, Georgia, Tajikistan, Turkmenistan and Uzbekistan, which provide for preferential trade conditions and trade cooperation, but do not cover trade defence issues.

IV RECENT CHANGES TO THE REGIME
In the past year, Ukrainian legislation in the field of trade defence instruments was unchanged. However, we consider it necessary to point out the following recent practices introduced in 2018 and the first quarter of 2019.

i Domestic industry status
Initially an anti-dumping investigation on certain urea-formaldehyde products from Russia was initiated against two products – urea-formaldehyde resin and urea-formaldehyde
concentrate. Following the results of the investigation, the Ministry decided to exclude urea-formaldehyde concentrate from the scope of measures for the following reasons:

\( a \) Urea-formaldehyde resin and urea-formaldehyde concentrate are different products (in terms of their physical, technical and chemical characteristics, as well as their spheres of application), and they are not interchangeable.

\( b \) The domestic producer has not made sufficient sales on the internal market of Ukraine. Notably, the relevant decision of the MEDT and the Commission is silent on what should be considered sufficient and insufficient (in terms of exact volumes). Moreover, it is unclear how insufficient sales on the internal market could lead to termination of an investigation into a certain product, if both the Agreement on Application of Article VI of the GATT 1994 and the Anti-Dumping Law stipulate such form of material injury as material retardation of the establishment of such an industry. This means that there may even be situations when there are no sales, but injury is caused.

\( c \) The domestic industry has imported urea-formaldehyde concentrate in large volumes. It is worth emphasising that both the MEDT and the Commission have not commented on the exact volumes of imports that deprive the domestic industry of its status and the fact that the domestic industry has not imported the product during the period of investigation (but only during the first year of three consecutive years of injury analysis).

The MEDT concluded that in such circumstances it was precluded from due investigation of the national producer status, its economic conditions and, therefore, material injury.

**ii Tolling schemes**

In the safeguard investigation on sulphuric acid, the MEDT faced an issue with injury analysis for the domestic industry employing tolling schemes. Even though the MEDT has not provided detailed explanations on the matter, it is clear that in such cases participation of both contractors and tollers is crucial.

**iii Termination of investigation in the absence of necessity to apply countervailing measures**

On 4 December 2018, Ukraine terminated without measures an anti-subsidy investigation on cars from Uzbekistan, which was initiated two months earlier, on 3 October 2018. Right after initiation of the investigation, the Uzbekistan authorities announced that they intend to impose import restrictions on several groups of Ukrainian products. Although the official notification said the investigation was terminated because the measures on cars ‘are not necessary’, some experts caution the Ukrainian authorities against the practice of termination of investigations beyond the official procedure as the result of negotiations.

**iv Termination of investigations, reviews without application and extension of anti-dumping measures**

It is worth emphasising that in Ukraine, it is very rare to see termination of investigations and reviews without the application or extension of anti-dumping measures. Meanwhile, in the period in question there were several such examples. First, in April 2019, the Commission terminated an anti-dumping investigation against imports into Ukraine of syringes from China, Turkey and India because there were no sufficient grounds for application of definitive anti-dumping duties. Meanwhile, in November 2018, the Commission terminated a sunset
review of anti-dumping measures applied to imports into Ukraine of asbestos sheets from Belarus with reference to an absence of evidence that termination of measures would be likely to lead to continuation or recurrence of dumping and injury.

v End use of the products subject to anti-dumping duties

Sometimes anti-dumping measures are applied to products classified under customs codes that cover not only the products in question, but also other products. In practice, it is quite difficult for the customs authorities to apply measures in such cases. In one of the most recent cases, where anti-dumping duties were applied to imports from China and Poland of rubber caps destined for medical purposes, it was stipulated in the decision that if the rubber caps were cleared for another purpose and it was subsequently revealed that in practice they were used for medical purposes, definitive anti-dumping duties would be paid.

V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

One of the urgent issues related to trade defence instruments in Ukraine is the outdated legislation that was adopted in 1998, which does not implement recent developments as set forth in WTO jurisprudence. The Commission and the MEDT are not able to improve their practice or fill in the gaps by applying the relevant new developments because under Article 19 of the Constitution of Ukraine, both the Commission and the MEDT shall act only as directly set forth by law.

Ukrainian law does not precisely define all stages of investigation with specific time limits, or address documents to be issued by the MEDT, which in practice results in non-transparency and can even be detrimental to securing the rights of interested parties. For instance, Ukrainian law does not directly allow for conducting any consultations between the MEDT and interested parties, even to clarify certain important issues (e.g., controversial PCN coding, problems with dumping margin calculations).

According to the business community, the investigation procedure as currently set forth by the law is not transparent as it does not provide that the MEDT discloses its position on all important issues, except for sending its final determination to the interested parties at the close of an investigation. Therefore, even though interested parties usually submit many different documents to the MEDT and address all its requests, they are not able to identify the approach taken by the MEDT and understand the its relevant position in due course, leaving this until the end of the investigation when it is usually too late to clarify or improve submissions. It is worth emphasising that recently this practice has changed in relation to answers to questionnaires. Specifically, the MEDT now first sends questionnaires. If they are answered incorrectly, usually one or even several clarification requests are followed. If the necessary information is not collected, the MEDT notifies the relevant interested parties in detail of inconsistencies or other loopholes and asks for comments. In the absence of the relevant comments, questionnaires will not be taken into account.

Another problem arises from the stipulation in Ukrainian legislation in the field of trade defence instruments of certain inoperative provisions. For example:

a The law sets as a mandatory precondition for the initiation of an anti-circumvention investigation, newcomer review, and accelerated review, the placement of a deposit for the customs authorities and introduction of a procedure for contract registration.
However, Ukrainian law does not establish the procedures for deposit placement and contract registration, which is a stumbling block for initiation of the above procedures in Ukraine.

b The Safeguard Law stipulates the possibility to reconsider a decision on application of safeguard measures upon the request of the State Fiscal Service of Ukraine, the domestic industry, or other state authorities within 30 days of publication of the relevant decision. Following the results of this reconsideration, the said decision may either be terminated, amended or left as it is. However, in the absence of the relevant detailed rules, it is questionable whether this option could be applied in practice.

c The anti-circumvention mechanism may be engaged in very limited cases – only in case of an increase in imports of the products subject to anti-dumping or countervailing duties from third countries or in case of assembling of the products in issue in Ukraine from imported parts. At the same time, the most frequently used types of anti-dumping and countervailing duties circumvention, such as minor changes to the products and their further importation under different customs code, cannot be addressed by an anti-circumvention investigation.

Another problem is connected with the enforcement by the Commission and the MEDT of the relevant court decisions. In case of full invalidation of the Commission’s decision on application of trade defence instruments, the situation is clear because such decisions are invalidated automatically. However, the situation is absolutely unclear when the Commission’s decision is invalidated partially in respect of a certain foreign producer or exporter subject to individual anti-dumping or countervailing measures. In practice, in the absence of specific instructions from the court to the Commission and the MEDT, the latter is not in a position to reopen the proceedings (e.g., recalculate dumping margin or reinvestigate injury).

In Ukraine, there is also an issue with implementation of reports of panels and the Appellate Body adopted in the course of the WTO dispute settlement procedure; Ukrainian law does not specifically address this issue. Ukraine has only one example of practical implementation of such reports, namely the panel report in Ukraine – Passenger Cars. In this case, the panel established that Ukraine had not duly established all relevant circumstances allowing application of safeguard duties as well as seriously infringed procedural rules. As a result, and in light of the nature of the violations, the Commission adopted a decision to invalidate the relevant safeguard duties with reference to national interests. However, it is unclear how Ukraine will be able to implement reports that are not so straightforward when, for instance, reopening of the procedure will be required.

VI TRADE DISPUTES

Ukraine has been involved in seven disputes as a complainant, four as a respondent and 19 as a third party. A brief description follows:

a Ukraine v. Armenia – Measures Affecting the Importation and Internal Sale of Cigarettes and Alcoholic Beverages (DS411)9 – On 25 October 2010, the dispute settlement body (DSB) deferred the establishment of a panel.

9 www.wto.org/english/tratop_e/dispu_e/cases_e/ds411_e.htm.
Ukraine v. Moldova – Measures Affecting the Importation and Internal Sale of Goods (Environmental Charge) (DS421)\textsuperscript{10} – On 17 June 2011, the DSB established a panel; however, a panel has not yet been composed.

Moldova v. Ukraine – Taxes on Distilled spirits (DS423)\textsuperscript{11} – On 20 July 2011, the DSB established a panel; however, a panel has not yet been composed.

Ukraine v. Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging\textsuperscript{12} – On 28 May 2015, Ukraine requested the panel to suspend its proceedings in accordance with Article 12.12 of the Dispute Settlement Understanding ‘with a view to finding a mutually agreed solution’. On 30 May 2016, the panel’s jurisdiction lapsed because it had not been requested to resume its work within 12 months of the suspension of the panel proceedings.

Japan v. Ukraine – Definitive Safeguard Measures on Certain Passenger Cars (DS468)\textsuperscript{13} – On 30 October 2013, Japan requested consultations with Ukraine regarding the definitive safeguard measures imposed by Ukraine on imports of certain passenger cars. On 20 June 2014, the Panel was composed by the Director General. On 26 June 2015, the panel report was circulated to members. The Panel found that Ukraine acted inconsistently with Article XIX:1(a) of the GATT 1994, and Articles 2.1, 4.2(a), 4.2(b), 8.1, 4.2(c), 12.1, 12.2 and 12.3 of the Agreement on Safeguards. On 20 July 2015, the DSB adopted the panel report. On 6 October 2015, Ukraine informed the DSB that it had revoked the safeguard measures on the import of passenger cars.

Russia v. Ukraine – Anti-Dumping Measures on Ammonium Nitrate from Russia (DS493)\textsuperscript{14} – On 7 May 2015, Russia requested consultations with Ukraine regarding anti-dumping measures imposed by Ukraine on imports of ammonium nitrate. Russia claimed that the measures were inconsistent with:

* Article 1; Articles 2.1, 2.2, 2.2.1, 2.2.1.1 and 2.4; Article 5.8; Articles 6.1, 6.2, 6.4, 6.5.1, 6.6, 6.8 and 6.9; Articles 9.2 and 9.3; Articles 11.1, 11.2 and 11.3; Article 18.1; and Annex II of the Anti-Dumping Agreement; and
* Article VI of the GATT 1994.

On 29 February 2016, Russia requested the establishment of a panel, which was composed on 2 February 2017 by the Director General. On 20 July, the WTO circulated the panel report. As of June 2019, the case is being considered by the Appellate Body.

Ukraine v. Russia – Measures affecting the importation of railway equipment and parts thereof (DS499)\textsuperscript{15} – The panel was composed on 2 March 2017. On 30 July, the WTO circulated the panel report. As at June 2019, the case is being considered by the Appellate Body.

Ukraine v. Russia – Measures Concerning Traffic in Transit (DS512)\textsuperscript{16} – On 5 April 2019, the panel issued a report following consideration of the case. Ukraine has managed to prove that Russia’s transit restrictions were not in compliance with Article V of

\textsuperscript{10} www.wto.org/english/tratop_e/dispu_e/cases_e/ds421_e.htm.
\textsuperscript{11} www.wto.org/english/tratop_e/dispu_e/cases_e/ds423_e.htm.
\textsuperscript{12} www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm.
\textsuperscript{13} www.wto.org/english/tratop_e/dispu_e/cases_e/ds468_e.htm.
\textsuperscript{14} www.wto.org/english/tratop_e/dispu_e/cases_e/ds493_e.htm.
\textsuperscript{15} www.wto.org/english/tratop_e/dispu_e/cases_e/ds499_e.htm.
\textsuperscript{16} www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm.
GATT, but Russia has invoked Article XXI (b) (iii) of GATT (i.e., the national security exception) and the panel ultimately ruled that Russia applied this correctly. Ukraine has not challenged the case before the Appellate Body.

Russia v. Ukraine – Measures relating to Trade in Goods and Services (DS525)\(^{17}\) – On 19 May 2017, Russia requested consultations with Ukraine with respect to alleged restrictions, prohibitions, requirements and procedures adopted and maintained by Ukraine in respect of trade in goods and services as well as transit.

Ukraine v. Kazakhstan – Anti-dumping Measures on Steel Pipes (DS530)\(^{18}\) – Ukraine has requested consultations with Kazakhstan in respect of anti-dumping duties applied by the Eurasian Economic Union to certain types of pipes with origin in Ukraine. The dispute is at the consultation stage.

Ukraine v. Russia – Measures Concerning the Importation and Transit of Certain Ukrainian Products (DS532)\(^{19}\) – On 13 October 2017, the parties have conducted consultations.

Ukraine v. Armenia – Anti-Dumping Measures on Steel Pipes (DS569)\(^{20}\) – Ukraine has requested consultations with Armenia in respect of anti-dumping duties applied by the Eurasian Economic Union to certain types of pipes with origin in Ukraine. The dispute is at the consultation stage.

Ukraine v. Kyrgyz Republic – Anti-Dumping Measures on Steel Pipes (DS570)\(^{21}\) – Ukraine has requested consultations with the Kyrgyz Republic in respect of anti-dumping duties applied by the Eurasian Economic Union to certain types of pipes with origin in Ukraine. The dispute is at the consultation stage.

VII OUTLOOK

It goes without saying that Ukrainian legislation in the field of trade defence instruments shall be completely revised to fully implement well-established WTO jurisprudence. During 2016–2017, the MEDT, together with the legal and business communities, elaborated the relevant draft laws aimed at improvement of the current regulations. Eventually, on 17 July 2017,\(^{22}\) the MEDT presented five draft laws considerably changing the legal environment in the field of trade defence instruments and eliminating many problems currently faced by the Commission, the MEDT and the interested parties of investigations. At the time of writing, the draft laws are being considered by the Parliament of Ukraine.

\(^{17}\) www.wto.org/english/tratop_e/dispu_e/cases_e/ds525_e.htm.
\(^{18}\) www.wto.org/english/tratop_e/dispu_e/cases_e/ds530_e.htm.
\(^{19}\) www.wto.org/english/tratop_e/dispu_e/cases_e/ds532_e.htm.
\(^{20}\) www.wto.org/english/tratop_e/dispu_e/cases_e/ds569_e.htm.
\(^{21}\) www.wto.org/english/tratop_e/dispu_e/cases_e/ds570_e.htm.
\(^{22}\) http://me.gov.ua/Documents/List?lang=uk-UA&tag=docs_project.
I  OVERVIEW OF TRADE REMEDIES

The following is a brief introduction to the various areas of US trade remedies law, including the anti-dumping (AD) and countervailing duty (CVD) laws as well as other statutes designed to address different types of trade violations.

Anti-dumping/countervailing duty

The AD and CVD laws are the best-known and most frequently used trade remedies laws in the United States. The AD laws are designed to provide a remedy (in the form of an import duty) for domestic industries that have been injured or threatened with injury by imports of unfairly priced (dumped) merchandise, whereas the CVD laws are designed to provide a remedy (also in the form of an import duty) for domestic industries that have been injured or threatened with injury by imports of merchandise produced or exported by companies benefiting from impermissible subsidies. Thus, each type of case features two components: an injury evaluation, conducted by the US International Trade Commission (ITC), and an analysis of the alleged wrongdoing – namely dumping (in AD cases) or subsidisation (in CVD cases) – conducted by the US Department of Commerce (the Department, or Commerce). Only if the agencies find both injury and dumping does an AD order issue, and likewise only if the agencies find both injury and unlawful subsidisation does a CVD order issue.

Dumping and subsidisation

Under US AD law, ‘dumping’ means selling a class or kind of merchandise at ‘less than fair value.’ To evaluate whether an exporter to the United States is dumping, Commerce first calculates the fair or ‘normal’ value – typically, the price at which the producer sells the same merchandise in the home market. It then compares that value to the US price (as adjusted for differences in freight, selling expenses, etc.). If the export sale is to an unrelated party, then

1 Alexander H Schaefer is a partner at Crowell & Moring LLP. The information in this chapter was accurate as at August 2018.

2 Technically, in addition to material injury and the threat of material injury, ITC may also evaluate whether the establishment of an industry in the US has been ‘materially retarded’. In practice, however, this allegation is rarely made, and affirmative findings of material retardation of a US industry are exceedingly unusual.

3 19 USC §§1673(a) and 1677(34).

4 If the quantum of home market sales are too small relative to US sales, Commerce may consider other bases for ‘normal value’, including sales to third countries or, failing that, cost of production plus a reasonable profit.
the export price serves as the US price; if the export sale is to a related party, then the US price is based on the first sale in the US to an unrelated party. Thus, where a foreign exporter sells to its US affiliate, the US price is based on that affiliate’s sale to its unrelated customers. Note, however, that because the US AD law treats China and Vietnam as ‘non-market economies’, it presumes that pricing in those markets is distorted and cannot serve as a reasonable basis for comparison to US prices. So, in cases involving those countries, Commerce uses a complex and somewhat unpredictable ‘surrogate value’ methodology, whereby it takes the various inputs and cost elements required to produce the merchandise and then values them based on their market prices in a ‘surrogate country’.\footnote{19 USC §1677b(c).} A surrogate country must be a producer of the merchandise at issue and must also be at a level of economic development similar to that of Vietnam or China, depending on the case.\footnote{There are several surrogate countries that Commerce typically identifies; of late the most frequently used are Thailand and Indonesia.} The extent to which the ‘normal value’ exceeds the US price is known as the ‘margin of dumping’,\footnote{19 USC §§1677(35) and 1677b.} and ultimately translates into the AD duty that must be deposited at the time of entry.

Subsidisation, as noted above, does not involve unfair pricing but rather the provision of unlawful subsidies. Such subsidies can take a variety of forms (e.g., tax holidays, export credits, debt forgiveness) provided that they confer a financial benefit on the recipients and that they are ‘specific’, meaning that they are provided to particular companies or industries either as a matter of law or as a matter of fact.\footnote{19 USC §§1677(5) and 1677(5A).} The ‘margin’ of subsidisation is calculated by spreading some portion of the subsidy benefit amount over the exporter’s production or export sales value.\footnote{This ‘spreading’ process is dependent on the nature of the subsidy; for example, if the subsidy comes in the form of an export credit paid only on export sales, then the subsidy value will be spread across only those sales. But if the subsidy is, say, a tax benefit that is not tethered to export sales, then it will be spread over all sales of that merchandise.}

If Commerce calculates a margin of dumping or subsidisation above the \textit{de minimis} level (typically 2 per cent in AD investigations and 1 per cent in CVD determinations), then it issues an affirmative determination.\footnote{19 USC §§1671d(a) and 1673d(a).}

\textbf{Injury}

ITC’s injury analysis focuses on a three-year snapshot of the performance of the domestic (US) industry and includes a variety of factors such as profitability, capacity utilisation, capital investment and R&D.\footnote{19 USC §1677(7).} It also evaluates pricing trends for the domestically produced and imported merchandise over time to examine the relationship between imports and the domestic industry’s performance.\footnote{id.} If ITC finds a causal connection between imports and material injury (or threat of injury) to the domestic industry, it issues an affirmative determination.\footnote{19 USC §§1671d(b) and 1673d(b).}
Investigation and review procedures

AD and CVD investigations typically are commenced by the filing of a petition by the domestic industry. Following that filing, Commerce must confirm that the petitioners and supporters represent a sufficiently large proportion of the industry to have standing; if so, then the case moves to ITC for a preliminary determination as to whether there is a ‘reasonable indication’ of injury or threat. If ITC makes a negative determination at this juncture then the case is dismissed, but in practice the ‘reasonable indication’ standard is a low one and it is quite rare for an AD and/or CVD case to conclude at this stage.

If ITC makes an affirmative determination that there is a reasonable likelihood of injury (or threat thereof), then the case moves to Commerce, which analyses whether and to what extent there is dumping or subsidisation, or both. Commerce issues comprehensive questionnaires to the largest two or three exporters of the subject merchandise seeking sales and production data, and it typically conducts an on-site audit of those data known as a ‘verification’. If respondents provide incomplete or inaccurate data, or otherwise fail to cooperate, they may be subject to adverse findings that can result in extremely high margins and duties; recent cases have seen combined AD and CVD margins in excess of 500 per cent. Commerce makes a preliminary determination (typically about seven months after the investigation begins) as to whether there has been dumping or subsidisation; at that point, importers must begin paying duties at the rates that Commerce has provisionally calculated. After that, both Commerce and ITC begin their final investigatory phases, in which interested parties may submit briefs and provide testimony. To the extent that Commerce makes a final affirmative determination that there is dumping and ITC makes a final affirmative determination of injury or threat, Commerce issues an AD or CVD order, or both, and importers must continue making duty deposits at the final rates Commerce calculates. If either agency issues a negative determination, then the case ends and the US Customs and Border Protection (CBP) refunds any duties remitted between Commerce’s preliminary and final determinations.

The initial rate at which importers deposit duties thus is based on past sales data. As such, AD and CVD deposit rates are subject to change via annual ‘administrative reviews’ that may be requested by any US producer, foreign producer or exporter, or US importer of the subject merchandise. If a producer’s margin of dumping for a particular annual period is lower than the deposit rate, then the US importers of that producer’s merchandise receive a refund of the difference (plus interest). If the margin is higher than the deposit rate, then the importers are invoiced for the difference (again plus interest). In addition, the rates calculated in these administrative reviews become the new deposit rates for importers

14 19 USC §§1671a(b) and 1673a(b).
15 19 USC §§1671a(c)(4) and 1673a(c)(4).
16 19 USC §§1671b(a)(1) and 1673b(a)(1).
17 19 USC §§1671b and 1673b.
18 19 USC §§1671b(d) and 1673b(d).
19 19 USC §§1671d(c)(2)–(c)(4) and 1673d(c)(2)–(c)(4).
20 19 USC §§1671d(c)(1)(B)(ii) and 1673d(c)(1)(B)(ii).
21 19 USC §1675(a)(1).
22 19 USC §1677g.
23 id.
going forward. But given that the reviews themselves frequently take in excess of a year to be completed, it may be several years after an import entry is made before the final assessment rate for that entry is established.

In addition to annual administrative reviews at Commerce, AD and CVD orders are subject to five-year ‘sunset reviews’. Conceptually, AD and CVD orders are designed to be temporary measures; as such, the sunset review procedures are designed to verify that the industry still needs the orders. As a result, every five years ITC conducts a review to evaluate whether revocation of the orders would lead to the recurrence of injury, and Commerce conducts a review to consider whether revocation of the orders would lead to the recurrence of dumping or subsidisation, or both. If either agency concludes that an order is no longer necessary, then the order is ‘sunset’ (revoked). Revocations in the first five-year sunset review are rare, with results becoming more mixed in subsequent reviews.

**Appeals**

Interested parties that participated in the agency proceedings may appeal AD and CVD determinations in reviews and investigations (including determinations as to the ‘scope’ of AD/CVD orders and what products do and do not fall within it) go to the US Court of International Trade (CIT), an Article III court that sits in Manhattan. The CIT has exclusive jurisdiction over AD/CVD matters as well as certain types of customs issues. The CIT acts in many respects like an appellate court – its judges may not re-weigh the evidence or substitute their own judgment for that of the agencies; instead, the role of the judge assigned to a case is limited to evaluating whether the agency decisions at issue were supported by ‘substantial evidence on the record’. If so, then the judge must affirm those decisions (whether or not he or she would have reached the same ultimate conclusion); if not, the judge must remand the matter to the agency for further consideration. Appeals from CIT decisions go to the US Court of Appeals for the Federal Circuit (CAFC) in Washington, DC. Interestingly, that court has interpreted the AD/CVD statute as allowing the CAFC to conduct de novo reviews, which has been the cause of some consternation in the US trade bar since the CIT is a specialised trade court whereas the CAFC hears primarily patent matters, appeals of Veterans Administration determinations and other non-trade issues. Interested parties aggrieved by CAFC decisions may file a petition for certiorari with the US Supreme Court, but such petitions are rarely granted, and grants typically must involve a constitutional question.

In cases involving Mexico or Canada, interested parties may opt to invoke NAFTA’s dispute resolution provisions and conduct their appeal before a binational panel in lieu of filing in the CIT. The panel will include five panellists from a roster that the importing and exporting countries maintain, but it will apply the law of the importing country; so, in appeals of US AD/CVD determinations involving Canada or Mexico, the panel will apply US law.

24 19 USC §§1675(c) and 1675a.
25 19 USC §1675(d).
26 See NSK Corp. v. US Int’l Trade Comm’n, 542 F. App’x 950 (CAFC 2013).
27 In the past decade, only one trade case has reached the Supreme Court. See United States v. Eurodif S.A., et al., 555 U.S. 305 (2009).
Other trade remedies

There are several other types of US trade remedies proceedings that merit mention. They can roughly be divided into those involving purely executive branch action and those requiring some level of administrative, congressional, or quasi-judicial action.

Beginning with actions most similar to AD/CVD cases, ‘safeguard’ actions, commonly known as ‘Section 201’ actions in reference to their statutory underpinning at Section 201 of the Trade Act of 1974, are designed to address a situation where imports of a particular class or kind of merchandise are increasing to the point of being a ‘substantial’ cause of ‘serious injury’ to the US industry. These cases differ from AD/CVD proceedings in several important ways: first, the domestic industry need not allege any wrongdoing by the exporting countries. Second, the standard for making the ‘serious injury’ showing is substantially higher than the standard for ‘material injury’ applied in AD/CVD cases (which is the primary reason why 201 proceedings are comparatively rare). Third, even if petitioners successfully satisfy that standard, the president has the discretion to grant or deny relief. If relief is granted, it can take the form of duties or quotas, and it may not last longer than four years (though it can be extended for up to an additional four years). Though 201 was last successfully used by the steel industry in 2001, two new 201 proceedings are ongoing on solar cells, modules and panels and large residential washers.

The United States also provides a remedy for US holders of IP rights that are alleged to be infringed by imports. These proceedings, known as ‘337’ cases because of their statutory underpinning in Section 337 of the Trade Act of 1974, are heard by administrative law judges and ultimately the ITC. Although ITC cannot award monetary damages the way that a federal district court can, it has the power to exclude merchandise from being imported – as a result, 337 cases are often brought in parallel to infringement cases in federal court to increase the complainant’s leverage and scope of relief. In addition to IP violations, Section 337 also covers imported products manufactured via the use of other unfair trade practices (e.g., child labour).

There are two additional and important authorities available to the executive branch to unilaterally restrict imports via duties, quotas or other action. Although historically the use of these authorities has been quite rare, in recent months the Trump administration has unearthed them as part of the President’s implementation of his trade policy. The first is commonly known as a ‘Section 232’ case, so-called because of the underlying statute – Section 232 of the Trade Expansion Act of 1962. Under that statute, the Commerce Department – in consultation with the Department of Defense – undertakes an investigation to determine whether imports of a particular product or category of products constitute a threat to US national security. To the extent that the conclusion is affirmative, the statute gives the President broad authority to take steps to ‘adjust’ the volume of imports in order to ameliorate the threat. The second is known as a ‘Section 301’ case (derived from Section 301 of the Trade Act of 1974), which gives the President broad authority to respond to unfair trade practices by US trading partners in a variety of ways, including the assessment of tariffs.

28 See 19 USC §2252 et seq.
29 id.
31 See Crystalline Silicon Photovoltaic Cells, Whether Or Not Partially or Fully Assembled Into Other Products, Inv. TA-201-75; Large Residential Washers, Inv. TA-201-76.
32 See 19 USC §1337.
33 See 19 USC §1862.
or implementation of quotas. Within the Section 301 process, if the challenged act, policy or practice is not covered by a free trade agreement (FTA) or the World Trade Organization (WTO) rules, retaliation can be immediate. However, if the challenged act is covered by an FTA or WTO rules, the USTR cannot retaliate until the applicable dispute settlement process is complete, which can take years.

Finally there are several additional executive authorities summarised in the table below; these too are historically rarely used, though given the events of recent months we may see one or more of these provisions invoked as well in the months to come.

<table>
<thead>
<tr>
<th>Action and authority</th>
<th>Triggering event</th>
<th>Standard</th>
<th>Timing and duration</th>
<th>Relief</th>
</tr>
</thead>
<tbody>
<tr>
<td>Import surcharge under Section 122 of the Trade Act of 1974 (19 USC §2132)</td>
<td>Presidential Proclamation</td>
<td>To address serious US trade deficit, significant dollar depreciation, or correct international balance of payments disequilibrium</td>
<td>Effective: immediately Duration: 150 days, can be extended by Congress</td>
<td>Up to 15 per cent import duties</td>
</tr>
<tr>
<td>Action under Trading with the Enemy Act of 1917 (50 USC §4305)</td>
<td>Presidential proclamation</td>
<td>Restrict trade with countries hostile to the US</td>
<td>Immediate and unlimited</td>
<td>Unlimited</td>
</tr>
<tr>
<td>Action under Int'l. Emergency Economic Powers Act of 1977 (50 USC §1701 et seq.)</td>
<td>Presidential declaration</td>
<td>Declaration of national emergency with respect to a foreign threat</td>
<td>Immediate and unlimited</td>
<td>Unlimited</td>
</tr>
</tbody>
</table>

II LEGAL FRAMEWORK

US AD and CVD proceedings are subject to both US law and agency regulation: the law is set out in 19 USC §§1671 and 1673 (for AD and CVD investigations, respectively), and the regulations appear in 19 CFR §§351 et seq. and 19 CFR §§207 et seq. (for Commerce’s and ITC’s regulations, respectively). Importantly, both agencies’ regulations provide for the creation of ‘administrative protective orders’ or ‘APOs’, which ensure that the sensitive data that parties are obliged to provide in AD/CVD proceedings remain confidential to foreclose any possibility of the cases being used opportunistically to troll for competitive information.

World Trade Organization (WTO) member states that conclude that a Commerce or ITC determination violates the US’s obligations under the WTO may invoke the WTO’s dispute resolution provisions. However, as a matter of US law the WTO’s decisions are not legally binding on the US34 – following an adverse decision, the US may either opt to bring its practices into conformity on a prospective basis (in general no retroactive correction is required), or it may ignore the WTO’s findings altogether (subject to the right of the aggrieved WTO member to retaliate within the bounds of what the WTO Agreements allow).

III TREATY FRAMEWORK

Although the WTO generally favours free trade, the WTO nevertheless allows member states to maintain trade remedies laws and regulations, subject to the WTO’s parameters on methodology, transparency and fairness. This ‘carve-out’ for trade remedies provisions reflects the desire of the United States and its colleague member states to be able to maintain trade remedies regimes notwithstanding the general movement towards free trade. That being

34 See 19 USC §3512(a)(1).
so, the free trade agreements (FTAs) into which the United States has entered tend not to address AD/CVD and safeguard actions other than to reaffirm the legitimacy of such actions. As noted in Section I, NAFTA allows aggrieved party member states in trade remedies proceedings brought by another member state to appeal to a binational panel rather than to the CIT, but NAFTA is unique in this regard. On occasion, as a part of the FTA negotiatory process, the US will insist on certain trade remedies provisions; for example, during the negotiation of the Korea–US FTA, the parties agreed upon a provision creating a special ‘safeguard’ mechanism for shipments of automobiles.35 But aside from these sorts of sectorally targeted initiatives, the US’s treaty arrangements have little impact on US trade remedies law other than to legitimise its continued application to imports from FTA partners.

IV SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

i Reinvigoration of Section 232: steel, aluminium and automotive products

Prior to the Trump administration, Section 232 had not been deployed since President Ford levied 232 tariffs on oil import more than 40 years ago. But in April 2017, the Commerce Secretary H Wilbur Ross – at President Trump’s direction – initiated Section 232 investigations to determine whether imports of steel and aluminium products represent a threat to US national security. Following a lengthy and politically charged investigatory process that included Department of Defense consultations, public hearings, and the submission of written comments, in January 2018 Secretary Ross transmitted his reports on the results of those investigations – in both cases, he concluded that the imports do indeed threaten US national security. In light of that finding, he recommended several alternative measures that in his view would mitigate that threat – those measures included quotas, tariffs and combinations of the two. Ultimately, President Trump announced (in early March) that he intended to apply tariffs of 25 per cent and 10 per cent respectively to steel and aluminium imports. The announcement was followed within a few weeks by formal presidential proclamations to that effect indicating that the tariffs would take effect in 15 days but exempting Canada and Mexico in order to facilitate ongoing discussions with those countries.36 Implementation of the tariffs subsequently was delayed to 1 June 2018, to allow for discussions and negotiations with trading partners.

Initially, those discussions were somewhat fruitful – on 28 March 2018, South Korea achieved a permanent exemption from the steel tariff by agreeing to an annual quota (which also included quarterly caps), and in early May Argentina, Australia and Brazil were granted similar exemptions – for Argentina and Brazil, the exemptions were conditioned on quotas similar to those negotiated with South Korea, whereas Australia’s exemption was a function of certain security considerations and accommodations that have not been publicly specified. But negotiations with the European Union eventually came to an impasse, and on 1 June 2018 the tariffs went into effect as to the EU and all the other countries that had declined to negotiate quota arrangements. In the interim, a number of trading partners including Canada, the EU, India, Japan, Mexico, Russia and Turkey have filed complaints.

in the WTO or announced that they intend to impose retaliatory tariffs on imports from the US. The Trump administration’s position to this point has been that the 232 tariffs are not ‘safeguard’ tariffs but rather national security measures and as such do not fall within the scope of the WTO agreements.

The potential for steel and aluminium tariffs had triggered a firestorm of critical responses in the months leading up to the President’s proclamations – in particular, a large number of US manufacturers contended that there are numerous grades and categories of steel that US steel producers either do not produce or produce but in insufficient volumes to meet market demands. In response to that concern, the President issued follow-on proclamations directing the Secretary of Commerce to establish a procedure whereby US steel and aluminium purchasers and consumers could petition for the exclusion of products that are domestically unavailable or not available in sufficient quantities. In late March of 2018, the Commerce Department rolled out the procedures for requesting such exclusions and for objecting to such requests.37 Once the tariffs took effect in June, the Commerce Department was inundated with requests, particularly in the steel proceeding. As of this writing, interested parties have filed more than 16,000 exclusion requests for steel products and more than 3,000 requests for aluminium products; the vast majority of those requests remain pending. Requesting parties have alleged a number of procedural deficiencies in the request process – in particular, there is no opportunity to respond to domestic industry objections, and as such there is a fear among requestors that objections that are misplaced or factually incorrect nonetheless will foreclose the possibility of exclusion, and appeal avenues are as yet unclear.

On 23 May 2018, the Secretary of Commerce announced the commencement of another Section 232 investigation, this time to determine whether imports of automobiles (including cars, sport utility vehicles, vans and light trucks) and auto parts threaten US national security. A formal Federal Register notice followed, setting the schedule for the submission of comments and a public hearing on 19 and 20 July 2018.38 Some members of Congress have suggested that the President’s use of 232 generally and in the automotive space in particular is unjustified, and at the time of writing there is a Senate bill pending that would require the President to secure Congressional approval prior to applying Section 232 tariffs; House Minority leader Mitch McConnell, however, has indicated that he will not bring such legislation up for vote.39

**Section 301 and Chinese intellectual property practices**

On 14 August 2017, President Trump issued a memorandum to the Office of the US Trade Representative stating, inter alia, that:

*China has implemented laws, policies, and practices and has taken actions related to intellectual property, innovation, and technology that may encourage or require the transfer of American...*

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37 See Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum Into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum, 83 Fed. Reg. 12,106 (19 March 2018).
technology and intellectual property to enterprises in China or that may otherwise negatively affect American economic interests. These laws, policies, practices, and actions may inhibit United States exports, deprive United States citizens of fair remuneration for their innovations, divert American jobs to workers in China, contribute to our trade deficit with China, and otherwise undermine American manufacturing, services, and innovation.40

The USTR commenced its investigation shortly thereafter, eventually concluding that ‘the acts, policies, and practices of the Government of China related to technology transfer, intellectual property, and innovation covered in the investigation are unreasonable or discriminatory and burden or restrict US commerce’, and recommending that a tariff of 25 per cent be applied to approximately US$50 billion of Chinese exports to the US.41 Following a comment process, in late June the administration announced that it had modified the initial list of products that would be subject to the tariffs, cutting out roughly US$16 billion worth of imports, and was publishing a new list to bring the total back up to US$50 billion.42 The administration further announced that the US$34 billion worth of items remaining from the initial list would be subject to tariffs effective 6 July.43 Finally, the announcement indicated that USTR would set up an exclusion process – not unlike that deployed in the Section 232 cases – to allow for the exclusion from the tariffs of domestically unavailable products.

Despite extensive negotiations between the United States and China, the two countries were unable to reach an accord and the 301 tariffs went into effect as scheduled. In response, China announced that effective immediately it would assess retaliatory tariffs on an equivalent volume of US exports, targeting agricultural and automotive products, and China also has expressed its intention to bring a WTO action in response to the 301 action, which it argues is unlawful and disproportionate.

iii  Third-country processing in AD/CVD proceedings: the Bell Supply case

The Bell Supply case has a somewhat torturous procedural history, but at its core it addresses the role of third-country processing and its impact on the status of merchandise otherwise subject to an AD/CVD order. The case involved the AD order on oil country tubular goods (OCTG) from Korea – that order covered both finished Korean OCTG and unfinished (non-heat-treated) Korean OCTG, commonly known as ‘green tubes’.44 The Bell Supply company was sending Korean green tubes to a third country for finishing; in response to a scope ruling request filed by the US industry, the company argued that the third-country finishing removed the products from the scope of the AD/CVD order. The Commerce Department disagreed, finding that the finishing did not ‘substantially transform’ the tubes, which therefore remained products of China and were thus subject to the AD order.45

43 id.
44 See Bell Supply Company LLC v. United States, 179 F.Supp.3d 1082 (CIT 2016).
45 id. at 1088.
On appeal, the Court of International Trade disagreed, arguing that Commerce’s use of the ‘substantial transformation’ analysis was inappropriate. In essence, the Court’s position was that the language of the scope of the order controls; as a result, if the language does expressly include merchandise processed in a third country, then such merchandise is necessarily outside the scope. Moreover, the court held that insofar as imports of such merchandise thwart the AD order, the domestic industry has a remedy; namely, to invoke the anti-circumvention provisions of the AD/CVD statute.

That decision was greeted with howls of protest from the US petitioner community, which argued that it created a massive loophole and would result in producers subjecting their goods to minor third-country processing to evade AD/CVD orders. Moreover, petitioners pointed out that anti-circumvention determinations are prospective only, in that duties can apply to circumventing products only once the Commerce Department has initiated an anti-circumvention inquiry – this, they argued, would be further incentive to engage in the aforementioned minor third-country processing.

In an April 2018 decision, the US Court of Appeals for the Federal Circuit reversed that decision, holding that the lower court had misconstrued the statute. The court held that Commerce was indeed entitled to make a threshold ‘substantial transformation’ inquiry to determine an imported product’s country of origin prior to conducting any anti-circumvention analysis because the two analyses have different elements and are conducted for different purposes. Having held that the use of the substantial transformation test was permissible, the court remanded the case to the CIT to determine whether Commerce’s application of that test on the merits passed muster. Notably, Commerce’s original conclusion that the third-country processing did not substantially transform the green tubes squarely contradicted a US Customs and Border Protection administrative ruling on the same issue, so the question of whether these particular goods are subject to AD/CVD remains open.

Anti-circumvention: hot-rolling and galvanising as ‘minor alterations’

Historically, US AD/CVD cases in the steel sector featured strong categorical distinctions between product segments – for example, hot-rolled sheet, cold-rolled sheet (which is produced by running hot-rolled sheet through a cold-rolling mill) and corrosion-resistant sheet (which is produced by running cold-rolled sheet through a galvanising or galvannealing line) were understood to be meaningfully different products with different physical characteristics and end uses. As a result, AD/CVD cases to date have never sought to consolidate these products as a single category. Recent developments, however, suggest that the dividing lines between these products may be blurring, which could have a significant impact on the way steel cases are brought and litigated down the road.

Both cold-rolled sheet and corrosion-resistant sheet (CORE) from China are subject to US AD orders. In the wake of those orders, a number of Chinese steel producers established a presence in Vietnam, where they set up cold-rolling mills and galvanising lines. Given the long-standing precedent that both cold-rolling and the combination of cold-rolling and galvanising represent ‘substantial transformations’ that result in the products’ origin being the country where those operations take place, the resulting products were exported to the US as products of Vietnam and therefore not subject to the Chinese AD orders. Confronted with this import volume, in September 2016 the domestic industry requested that the Department

46  id. at 1092.
47  id. at 1093–1094.
of Commerce initiate anti-circumvention inquiries – that is, the domestic industry argued that the conversion of Chinese hot-rolled sheet into cold-rolled sheet and CORE in Vietnam was a relatively minor operation, and as such the products should remain subject to the AD/CVD orders on Chinese cold-rolled sheet and CORE. After an extensive back-and-forth, in November 2016 the Commerce Department initiated those inquiries.\textsuperscript{48}

Importers and non-US steel producers argued vigorously against the domestic industry’s position, noting that an affirmative finding would blur the lines between product categories, thereby making the administration of existing and future cases profoundly difficult. Nonetheless, after a nearly 18-month investigation into the matter, in May 2018 the Commerce Department published determinations finding that the shipments of Vietnamese cold-rolled and CORE produced using Chinese hot-rolled sheet are circumventing the orders on Chinese cold-rolled and CORE.\textsuperscript{49} Some practitioners suspected that the determinations might be limited to their facts; more specifically, they might be limited to instances in which Chinese hot-rolled sheet was the input into the further-processed items. But in mid-June 2018, the domestic industry filed follow-on requests, asking that the Commerce Department investigate whether sheet that is being cold-rolled in Vietnam using hot-rolled sheet from Korea is circumventing the AD order on Korean cold-rolled sheet. To the extent that these sorts of inquiries proceed, they raise significant questions about future steel proceedings and what the scope of their coverage is likely to sweep in over time.

\section{TRADE DISPUTES}

As noted in Sections IV.i and ii, above, the Trump administration’s application of Section 232 tariffs to steel and aluminium imports and 301 tariffs to a variety of Chinese imports have triggered a series of WTO actions; to this point, however, those actions remain in their infancy, and as such we will focus on actions completed during the past year.

In \textit{United States – Conditional Tax Incentives for Large Civil Aircraft},\textsuperscript{50} the latest chapter in the long-running dispute between Boeing and Airbus about alleged subsidies, the EU argued that certain conditional tax incentives established by the State of Washington in relation to the development, manufacture, and sale of large civil aircraft were prohibited by the WTO Agreement on Subsidies and Countervailing Measures (the SCM Agreement). In late-2016, the WTO panel tasked with evaluating those incentives concluded that they were indeed prohibited.\textsuperscript{51} Both the United States and the EU appealed elements of that result to the WTO appellate body, and in September 2017 the appellate body reversed the


\textsuperscript{50} \textit{United States – Conditional Tax Incentives for Large Civil Aircraft}, DS487.

The US aviation industry argued that this was a major vindication, with Boeing's general counsel stating that 'The WTO has rejected yet another of the baseless claims the EU has made as it attempts to divert attention from the US$22 billion of subsidies European governments have provided to Airbus and that the WTO has found to be illegal.'

In United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea, Korea contended that the Department of Commerce's 'viability' test in AD cases is deficient. In AD investigations and reviews involving market economies, the Commerce Department typically calculates the margin of dumping based on a comparison of US prices with home market prices, both sets of prices being adjusted to yield a 'factory door to factory door' comparison. However, to the extent that home market sales volumes are small relative to US sales volumes, the Commerce Department has the discretion to conclude that home market pricing is not a 'viable' basis for comparison and therefore use other benchmarks. Typically, the first of these is sales to third countries; if they too are relatively small, then the agency will rely on a constructed value based on a build-up of costs plus a reasonable profit. In the OCTG case, the Commerce Department concluded that neither home market sales nor third country sales were viable benchmarks, and accordingly the agency derived and relied on a constructed value. Korea contested that finding, but the WTO panel largely upheld the Commerce Department's methodology. Although the panel took issue with certain of the Commerce Department's findings, including the profit rate that the agency used in deriving its constructed value, in general it supported the discretion of agencies to determine whether and when to toggle between third-country sales and constructed value.

VI  OUTLOOK

Trade remedies proceedings in the US are active – AD/CVD petitions continue to appear on a regular basis, and the Trump administration's deployment of rarely used authority, including Sections 232 and 301, has had and will continue to have a seismic impact on US importers, manufacturers, and consumers. The administration continues to express the view that tariffs are the best, if not the only, way to force a global rationalisation of steel and aluminium production capacity, and to pressure China to make meaningful changes to its IP practices in a way that will allow for a more balanced trade relationship. Supporters of these positions argue that these measures are long overdue and will have a salutary effect on the US economy, including via the repatriation of jobs and reduction of the US trade deficit. Critics contend that the measures will ignite a trade war that needlessly alienates our closest trading partners and drives up consumer prices with no concomitant benefit to US industry. The President has tweeted that 'trade wars are good, and easy to win' – that proposition is likely to be tested in the months to come.

54  United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea, DS488.
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Philippe De Baere regularly lectures on EU Trade Law at the College of Europe, at the Carlos III University of Madrid (UC3M) and the University of Leuven (KUL).

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David has been advising multinational clients on general corporate and customs since 2000. He assists clients from the very beginning when they first invest in China, to their daily operations and regulatory compliance matters. Clients always find his advice precise, clear and helpful.

David’s practice also covers the full spectrum of customs matters, including classification, valuation, free trade zones and bonded warehouses, import licensing, export control, audits and investigations, as well as US export control.

David has developed unique investigative and auditing expertise from his trade litigation practice, and assists clients in navigating Chinese anti-bribery laws and the US Foreign Corrupt Practices Act, and frequently assists clients in internal investigations, audits and preventative training.
Since 2012, *Chambers Global* and *Chambers Asia-Pacific* have recognised David as a leading lawyer in international trade each year.

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After 1997, when the Turkish Competition Authority became active, he focused on EU and Turkish competition law and advised clients in the majority of the investigations conducted by that authority. He also prepared many successful merger notifications, negative clearance and exemption applications in a variety of industries.

Dr Toksoy has broad experience in customs union-related issues such as parallel trade, customs duties and anti-dumping. He has contributed in a variety of anti-dumping investigations conducted in different industries by various investigating authorities. He has combined his competition law knowledge with his broad experience of economic aspects of antitrust matters across a wide range of industries, particularly in M&A transactions, restrictive practices, distribution systems and abuse of dominance.

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