

THE INTERNATIONAL
TRADE LAW
REVIEW

FOURTH EDITION

Editors

Folkert Graafsma, Joris Cornelis and Drew Sundberg

THE LAWREVIEWS

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PREFACE

It has been said that ‘smooth seas don’t produce skilful sailors’.¹ And indeed, stakeholders tasked with navigating the treacherous waters of international trade have, over the past year, certainly needed to find their sea legs like at few other times in recent memory.

The escalating trade war between the United States, China and other trading partners continues apace with no end in sight. The latest in a string of US trade measures over the past year includes the announcement by the United States Trade Representative (USTR) in July 2018 that the United States intends to impose a 10 per cent additional tariff on US\$200 billion of Chinese imports, covering over 6,000 lines of products and product categories. In addition to the ever-increasing volume and scope of trade affected by United States measures – and retaliatory countermeasures by trading partners – a striking feature of several of the US tariff and quota actions has been the reliance on rarely-invoked executive authorities outside the familiar paradigm of anti-dumping, countervailing or safeguard investigations. For example, in imposing steel and aluminium tariffs in March 2018, the legal rationale relied upon by the United States was ‘national security’ pursuant to Section 232 of the Trade Expansion Act of 1962 – a provision that had not been invoked since the mid-1970s. In May 2018, the Department of Commerce launched a second investigation based on Section 232 – this time on imported autos and parts. By contrast, the United States instead relied on Section 301 of the Trade Act of 1974 to justify the imposition of a 25 per cent tariff on US\$50 billion of Chinese imports. The tariff, which went into effect in July 2018, follows an investigation by the USTR pursuant to Section 301, which concluded that certain Chinese policies relating to intellectual property and technology transfer unreasonably ‘burden or restrict US commerce’. The United States’ move to impose a 10 per cent tariff on a further US\$200 billion of Chinese goods is likewise based on Section 301.

At the same time, Brexit negotiations are proceeding in a furious race against time as the United Kingdom’s withdrawal date of 30 March 2019 looms closer. At the time of writing, there is no guarantee that a final Withdrawal Agreement will be finalised and ratified before the deadline, with the result that the EU is urging stakeholders to prepare for both a ‘deal and no-deal scenario’. Assuming that the Agreement is ratified by the Brexit date, EU law will continue to apply to and within the United Kingdom for a transition period ending on 1 January 2021. In a joint statement in June 2018, EU and UK negotiators identified key outstanding issues to include:

- a* agreeing on a ‘backstop’ to prevent a ‘hard border’ between Northern Ireland and Ireland;

1 Franklin D Roosevelt.

- b* the United Kingdom's continued protection of geographical indications;
- c* data protection;
- d* settling EU judicial and administrative procedures post-Brexit;
- e* the consistent application and interpretation of the Withdrawal Agreement; and
- f* dispute settlement.

At this critical juncture, no scenario is entirely beyond the realm of possibility, including the spectre of the United Kingdom 'crashing out' of the EU without a deal or even calling for a second Brexit referendum.

And, again in the EU, the year was also marked by a substantive overhaul of the Union's trade defence instruments with the adoption of two Regulations amending existing anti-dumping and anti-subsidy law. First, Regulation 2017/2321 introduces a new methodology for calculating normal value in dumping cases for imports from WTO members whose domestic prices and costs are significantly distorted as a result of state intervention. Normal value is usually calculated by using the costs and prices of exporters in their home market. However, where significant distortions are found to exist, the new rules require the Commission to construct normal value on the basis of non-distorted costs and prices. The Commission may use either:

- a* corresponding costs of production and sale in an appropriate representative country with a similar level of economic development;
- b* undistorted international prices, costs or benchmarks; or
- c* domestic costs to the extent that they are shown not to be distorted.

The Commission bears the burden of proof to show the existence of distortions justifying the use of the new methodology. An important feature of the Regulation is that it provides that the Commission may produce reports detailing distortions in a specific country or sector and such reports may be relied upon by complainants in anti-dumping cases. To date, the Commission has produced one country report on China (arguably the main intended target of the new rules) and a second report is underway for Russia. As further discussed in this edition's WTO chapter, it is noted that China has attempted to include the new methodology in Regulation 2017/2321 within the terms of reference of China's ongoing dispute before the WTO Panel in *EU – Price Comparison Methodologies*.²

Moreover, Regulation 2018/825, adopted in June of 2018, introduces a 'modernisation package' overhauling the way the Commission carries out anti-dumping and anti-subsidy investigations. Some of the key changes include the shortening of the investigation period wherein the Commission must now impose any provisional measures within seven to eight months as opposed to nine months previously. In addition, the Commission will provide an 'early warning' on the imposition of provisional anti-dumping measures during which time provisional duties will not be applied to allow affected parties to adjust to the new situation. The Regulation also provides that the 'lesser duty rule' will no longer be applied in anti-subsidy investigations and will be suspended in certain circumstances in anti-dumping cases. Other reforms include changes to the injury margin calculation method, the taking into account of social and environmental standards in certain investigations and the establishment

² DS516, document WT/DS516/1.

of a 'help desk' to assist small and medium-sized enterprises in understanding and making use of trade defence instruments.

These are but a sample of the dozens of trade developments and issues analysed in this fourth edition by our esteemed contributing authors from key jurisdictions around the world – including that of the WTO. We are in this context deeply grateful for the continued participation and support from the following authors: Philippe De Baere at Van Bael & Bellis for the WTO chapter, Alfredo A Bisero Paratz at Wiener-Soto-Caparrós for the Argentina chapter, Ignacio García and Andrés Sotomayor at Porzio Ríos Garcia for the Chile chapter, Yuko Nihonmatsu and Fumiko Oikawa at Atsumi & Sakai for the Japan chapter, Lim Koon Huan and Manshan Singh at Skrine for the Malaysia chapter, Fernando Benjamin Bueno and Milena da Fonseca Azevedo at Demarest Advogados for the Brazil chapter, David Tang, Yong Zhou and Jin Wang at JunHe LLP for the China chapter, Dongwon Jung and Sungbum Lee at Yoon & Yang LLC for the Korea chapter, Anzhela Makhinova at Sayenko Kharenko for the Ukraine chapter, Alexander H Schaefer at Crowell & Moring LLP for the US chapter, Nicolaj Kuplewatzky at the Legal Service of the EU Commission and Kiliane Huyghebaert at VVGB Advocaten for the European Union chapter.

We are moreover delighted and honoured to welcome on board the following new and acclaimed contributors: Sergey Lakhno at Integrites for the Eurasian Economic Union chapter, M Fevzi Toksoy, Ertuğrul Canbolat and Hasan Güden at ACTECON for the Turkey chapter, Saurabh Tiwari, Ashish Chandra and Stuti Toshi at L&L Partners for the India chapter and Prudence Smith, Eva Monard, Byron Maniatis, Matthew Whitaker, Patrick Mason Begg Clark, Bowen Fox, Jacqueline C Smith, Lachlan Green, Timothy King Atkins Jr and William Maher at Jones Day for the Australia chapter.

We are, as always, indebted to each of these outstanding practitioners, who have generously taken time from their demanding schedules to share and pass on their insights gleaned from years of practice in the field of international trade. With the pace of developments over the past year, the analyses of these contributors – taking a step back from the stream of daily events – is particularly timely and valuable.

Last but not least we wish to thank our guest editor, Drew Sundberg, for his invaluable assistance in getting this year's manuscript ready for publication. Our former colleague and skilful sailor was kind enough to spend a number of months in Brussels when the perfect trade storm was raging over the old continent. We are therefore immensely grateful for his full dedication and intellectual acumen.

Folkert Graafsma, Joris Cornelis and Drew Sundberg

August 2018

WORLD TRADE ORGANIZATION

*Philippe De Baere*¹

I INTRODUCTION

The World Trade Organization (WTO) provides a comprehensive set of rules relating to the use of trade remedies. Apart from the general provisions contained in the GATT 1994 (Articles VI, XVI and XIX), three specific agreements, namely the Anti-Dumping Agreement,² the Agreement on Subsidies and Countervailing Measures³ and the Agreement on Safeguards, addressing respectively the issues of dumping, subsidies and safeguards, 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 those agreements have been clarified over the years by WTO panels and the Appellate Body. Indeed, disputes relating to trade remedies constitute over half of all disputes initiated since the establishment of the WTO in 1995.⁴ Section II discusses some of the key developments that have occurred in WTO case law relating to trade remedies over the past year. Those developments include recent decisions on the notion of a ‘safeguard measure’, the use of cost adjustments and the need to calculate a profit cap when constructing the normal value, as well as the definition of the domestic industry in the context of anti-dumping investigations and the requirement of a fair comparison between export price and normal value. Section III will then discuss the controversies surrounding the appointment of new Appellate Body members and the developments and expectations with regard to China’s challenge to the European Union’s (EU’s) previous non-market economy methodology.

1 Philippe De Baere is a managing partner at Van Bael & Bellis. This chapter was written with the help of Sidonie Descheemaeker, Victor Crochet 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, 264 out of 551 disputes initiated to date involved claims under the AD Agreement, the SCM Agreement or the Agreement on Safeguards.

II SIGNIFICANT LEGAL DEVELOPMENTS

i Indonesia – Iron or Steel Products (DS490/DS496): the notion of a ‘safeguard measure’

Introduction

On 18 August 2017, the WTO Secretariat circulated the Panel Report in *Indonesia – Iron or Steel Products* (DS490/DS496), a dispute initiated by Viet Nam and Chinese Taipei against safeguard measures imposed by Indonesia on imports of certain flat-rolled iron or steel products. This dispute is of particular importance as it raises the issue of the scope of application and the nature of Article XIX of the General Agreement on Tariffs and Trade (GATT) 1994 and the Agreement on Safeguards. While the Panel Report is currently under appeal, the Panel’s findings concerning the definition of a safeguard measure deserve closer analysis.

The notion of a ‘safeguard measure’

The dispute concerns the specific duty applied by Indonesia on imports of galvalume following an investigation initiated and conducted under Indonesia’s domestic safeguard legislation. Indonesia has no binding tariff obligation with respect to galvalume in its Schedule of Concessions, and the specific duty was imposed in addition to the applied most favoured nation (MFN) and also exceeded the preferential duty rates under Indonesia’s regional trade agreements.

Although all parties to the dispute agreed that the challenged measure was a safeguard measure subject to the disciplines of Article XIX of the GATT 1994 and the Agreement on Safeguards, the Panel decided to examine – on its own motion – what it described as a fundamental question, namely whether the specific duty applied by Indonesia and challenged by the complainants was a ‘safeguard measure’ within the meaning of Article 1 of the Agreement on Safeguards.⁵

In ascertaining the meaning of a ‘safeguard measure’, the Panel took as a starting point the text of Article 1 of the Agreement on Safeguards, which determines the scope of application of that agreement and which refers to the text of Article XIX of the GATT 1994. Looking at the text of the latter provision, the Panel held that the ‘measures provided for’ in Article XIX of the GATT 1994, namely, safeguard measures, are measures that suspend a GATT obligation or withdraw or modify a GATT concession and that these measures must be taken for a particular purpose, namely to prevent or remedy serious injury to the domestic industry.⁶ The Panel concluded that:

one of the defining features of a safeguard measure is the suspension, withdrawal, or modification of a GATT obligation or concession that precludes a Member from imposing a measure to the extent necessary to prevent or remedy serious injury, in a situation where all of the conditions for the imposition of a safeguard measure are satisfied.⁷

5 Panel Report, *Indonesia – Iron or Steel Products*, paragraph 7.10.

6 Panel Report, *Indonesia – Iron or Steel Products*, paragraph 7.13.

7 Panel Report, *Indonesia – Iron or Steel Products*, paragraph 7.17.

The Panel found that the specific duty at issue did not qualify as a 'safeguard measure' because it did not suspend, withdraw or modify a relevant GATT obligation for the purpose of remedying or preventing serious injury.

In that regard, the Panel first held that since Indonesia has no binding tariff obligation with respect to the product at issue in its WTO Schedule of Concessions, Article II of the GATT 1994 did not preclude the application of the specific duty on imports of galvalume, meaning that the specific duty did not suspend, withdraw or modify Indonesia's obligations under Article II of the GATT 1994.⁸

Second, the Panel rejected Indonesia's argument that the GATT obligation being suspended was the exception under Article XXIV of the GATT 1994. The Panel explained that Article XXIV of the GATT 1994 is a permissive provision allowing WTO members to depart from their obligations in order to establish a customs union or a free trade area (FTA). That provision, however, does not impose a positive obligation either to enter into an FTA or to provide a certain level of market access to FTA partners. In that sense, Article XXIV of the GATT 1994 did not preclude Indonesia from raising tariffs on imports of galvalume above the preferential duty rate contained in its free trade agreements and thus, the specific duty did not 'suspend' the GATT exception under Article XXIV for the purpose of Article XIX:1(a) of the GATT 1994.⁹

Finally, the Panel found that the exclusion of developing countries by virtue of Article 9.1 of the Agreement on Safeguards did not result in the suspension of the MFN obligation under Article I:1 of the GATT 1994, for the purpose of Article XIX:1(a) of the GATT 1994. The Panel reached that conclusion on the basis of two arguments. First, according to the Panel, the discrimination that is called for by Article 9.1 is not intended to prevent or remedy serious injury.¹⁰ The Panel decided to look separately at the different components of the measure at issue, namely, the increase in the duty rate and the discriminatory application of this increase in duty. After analysing the objective of the exclusion of the developing countries from the application of the specific duty imposed by Indonesia, the Panel concluded that such exclusion was not intended to prevent or remedy serious injury and thus the specific duty could not be properly characterised as a 'safeguard measure'.¹¹ Second, the Panel considered that by virtue of the General Interpretative Note to Annex 1A of the WTO Agreement, Article 9.1 of the Agreement on Safeguards prevails over the MFN obligation imposed by Article I:1 of the GATT 1994. As a result, the question of 'suspension' does not arise when a member excludes from the scope of application of a safeguard measure imports from developing countries pursuant to Article 9.1.¹² The Panel recognised that its position departs from the decision of the panel in *Dominican Republic – Safeguard Measures*, which found that the discriminatory application of a safeguard measure in accordance with Article 9.1 of the Agreement on Safeguards resulted in the suspension of the MFN obligation under Article I:1 of the GATT 1994.¹³

In its analysis, the Panel accorded very little importance to the fact that the specific duty at issue was imposed as a result of an investigation initiated by Indonesia's authority in

8 Panel Report, *Indonesia – Iron or Steel Products*, paragraph 7.18.

9 Panel Report, *Indonesia – Iron or Steel Products*, paragraph 7.20.

10 Panel Report, *Indonesia – Iron or Steel Products*, paragraph 7.28.

11 Panel Report, *Indonesia – Iron or Steel Products*, paragraph 7.32.

12 Panel Report, *Indonesia – Iron or Steel Products*, paragraph 7.29.

13 Panel Report, *Indonesia – Iron or Steel Products*, paragraph 7.30.

charge of the imposition of safeguard measures, which was conducted pursuant to Indonesia's domestic safeguard legislation and which was notified to the WTO Committee on Safeguards. According to the Panel, the fact that the specific duty was described as a safeguard measure in the implementing regulation and imposed following an investigation conducted pursuant to Indonesia's domestic safeguards legislation, with a view to complying with the disciplines of the Agreement on Safeguards (including notification requirements), does not render the specific duty a 'safeguard measure' within the meaning of Article 1 of the Agreement on Safeguards.¹⁴

Implications

The Panel Report in *Indonesia – Iron or Steel Products* was the first occasion that a WTO adjudicator attempted to provide a comprehensive definition of a 'safeguard measure'. According to the Panel, a safeguard measure should be understood as:

a measure that suspends, withdraws, or modifies a GATT obligation or concession that precludes a Member from imposing a measure to the extent necessary to prevent or remedy serious injury, in a situation where all of the conditions for the imposition of a safeguard measure are satisfied.

The Panel's findings are currently under appeal and a report of the Appellate Body is expected later in 2018. The ultimate outcome of this dispute is of the utmost importance for all future safeguard cases, as the Appellate Body's decision to uphold the definition provided by the Panel would significantly narrow the scope of application of the Agreement on Safeguards.

ii EU – Biodiesel (Indonesia) (DS480): cost adjustments and calculation of profit margin

Introduction

On 28 February 2018, the WTO Dispute Settlement Body (DSB) adopted the Panel Report in *EU – Biodiesel (Indonesia)* (DS480). The Panel Report in that case constitutes a third decision, following the Panel and the Appellate Body Reports in *EU – Biodiesel (Argentina)* (DS473), concerning EU anti-dumping duties on imports of biodiesel. Given the similar facts in both cases, the latest Panel Report largely relies on the findings in the Argentinean case and confirms the interpretation of Article 2.2.1.1 of the Anti-dumping (AD) Agreement in relation to the EU practice of cost adjustments. The Panel Report also provides important clarifications relating to the calculation of a profit margin under 'any other reasonable method' pursuant to Article 2.2.2(iii) of the AD Agreement.

Cost adjustments

The EU's methodology to disregard the exporters' data as included in their records has raised serious concerns as to its compatibility with the AD Agreement and Article VI of the GATT 1994. In recent years, this methodology has been challenged by various WTO members. In *EU – Biodiesel (Argentina)*, the Panel and the Appellate Body made findings on the issue for the first time. The Panel's decision in *EU – Biodiesel (Indonesia)* follows the reasoning

14 Panel Report, *Indonesia – Iron or Steel Products*, paragraphs 7.34–7.40.

of the Panel and the Appellate Body in the Argentinean case and clearly confirms that an investigating authority is not allowed to ‘adjust’ the costs included in the exporters’ records simply because it considers them to be distorted by state intervention.

Article 2.2.1.1 of the AD Agreement provides that when the normal value has to be constructed on the basis of the cost of production plus a reasonable amount for administrative, selling and general (SG&A) costs and for profits:

[C]osts shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

In *EU – Biodiesel (Indonesia)*, the Panel confirmed that – in accordance with Article 2.2.1.1 – an investigating authority, as a rule, needs to use the records of the investigated producer for the determination of the cost of production and that there are only two circumstances in which an investigating authority can decide not to follow that general rule: first, when those records are inconsistent with the generally accepted accounting principles of the exporting country and, second, when those records do not reasonably reflect the costs associated with the production and sale of the product under investigation.¹⁵

With regard to the question of whether the records reasonably reflect the costs associated with the production and sale of the product under consideration, the Panel confirmed that it relates to whether the records suitably and sufficiently correspond to or reproduce the costs incurred by the investigated exporter that have a ‘genuine relationship’ with the production and sale of the specific product under consideration. It does not relate, however, to whether the records reflect some hypothetical costs that might have been incurred under a different set of conditions or circumstances.¹⁶

In the context of the anti-dumping investigation on biodiesel from Indonesia, the European Commission applied the same rationale as in the case of Argentina for deciding not to use the recorded cost of the main raw material to establish the cost of production of biodiesel, namely that the differential export tax (DET) system depressed the domestic prices of the main raw material to an artificially low level. On that basis, the European Commission held that the costs of crude palm oil (CPO) were not reasonably reflected in the records of the Indonesian producers and thus decided to replace the actual purchase price of CPO as reflected in the producers’ records with an international reference price published by the Indonesian authorities.

Like the Panel in *EU – Biodiesel (Argentina)*, the Panel in *EU – Biodiesel (Indonesia)* found that the fact that the DET system allegedly depressed the domestic prices of the main raw material was not a legally sufficient basis for concluding that the Indonesian producers’ records did not reasonably reflect the costs associated with the production and sale of biodiesel. On that basis, the Panel upheld Indonesia’s claim that the EU acted inconsistently with Article 2.2.1.1 of the AD Agreement by failing to calculate the cost of production of the producers under investigation on the basis of the records kept by the producers.¹⁷

15 Panel Report, *EU – Biodiesel (Indonesia)*, paragraph 7.20.

16 Panel Report, *EU – Biodiesel (Indonesia)*, paragraphs 7.21–7.22.

17 Panel Report, *EU – Biodiesel (Indonesia)*, paragraphs 7.26–7.27.

The Panel in *EU – Biodiesel (Indonesia)* also confirmed the Panel and the Appellate Body findings in the Argentinean case regarding the requirement under Article 2.2 of the AD Agreement to construct the normal value on the basis of ‘the cost of production in the country of origin’. The Panel held that, as was the case in the investigation on imports of biodiesel from Argentina, the European Commission selected a reference price specifically to remove the perceived distortion caused by the Indonesian DET system. Accordingly, in line with the reasoning of the Panel and the Appellate Body in *EU – Biodiesel (Argentina)*, the Panel in the Indonesian case found that the cost of CPO used by the EU authorities was not a cost ‘in the country of origin’ and thereby that the EU acted inconsistently with Article 2.2 of the AD Agreement and Article VI:1(b)(ii) of the GATT 1994.

Calculation of profit margin

In the context of the anti-dumping investigation into biodiesel from Indonesia, the Commission determined that the amount of profit could not be based on actual data from the sampled companies given that the domestic sales were not considered as being made in the ordinary course of trade. Accordingly, the amount for profit used when constructing the normal value was determined on the basis of ‘any other reasonable method’ pursuant to Article 2(6)(c) of the Basic Regulation. The Commission determined that ‘the reasonable amount of profit that a young and innovative capital intensive industry of this type under normal conditions of competition in a free and open market could achieve’ was 15 per cent based on turnover.¹⁸

Article 2(6)(c) of the Basic Regulation provides that when the amounts for SG&A and for profits to be used in the construction of the normal value cannot be determined on the basis of actual data pertaining to the production and sale, in the ordinary course of trade, of the like product by the exporter or producer under investigation, they can be determined on the basis of ‘any other reasonable method’, ‘provided that the amount for profit so established shall not exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin’. Article 2(6)(c) of the Basic Regulation essentially mirrors the language of Article 2.2.2(iii) of the WTO AD Agreement.

The Panel in *EU – Biodiesel (Indonesia)* found that the EU acted inconsistently with Article 2.2.2(iii) of the AD Agreement because in determining the amount for profits for the Indonesian producers, it failed to determine the profit cap, in other words, ‘the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin’.¹⁹ The Panel emphasised that Article 2.2.2(iii) establishes a positive obligation to calculate a profit cap and that an investigating authority may not be excused from that obligation based on the argument that data is not available.²⁰ The Panel stressed that the obligation to calculate the cap and to further provide details on the cap in the determination is fundamental as without such information interested parties would be unaware of whether the determined amount for profit exceeds the cap or not. According to the Panel, this lack of information would improperly place the burden on interested parties to then try to demonstrate that the chosen amount for profit is in excess of

18 Commission Regulation (EU) No. 490/2013 imposing a provisional anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia, recital 65.

19 Panel Report, *EU – Biodiesel (Indonesia)*, paragraph 7.73.

20 Panel Report, *EU – Biodiesel (Indonesia)*, paragraph 7.51.

the cap as well as on a WTO member representing the exporting producers. The Panel also agreed with Indonesia that in the absence of a firm obligation, the investigating authorities would be incentivised to adopt a passive approach to establishing a profit cap as a way to lessen their obligation under Article 2.2.2(iii) of the AD Agreement.²¹

Importantly, the Panel found that in determining the profit cap, the investigating authority is not allowed to disregard sales considered as not being made in the ordinary course of trade. That is because, according to the Panel, the term ‘the profit normally realised’ in Article 2.2.2(iii) refers to profits that are regularly or usually realised and does not allow the investigating authorities to enquire into the commercial conditions surrounding the sales.²² For that reason, the Panel rejected the EU’s argument that the term ‘normally’ means that an investigator may disregard the profit realised on sales that are considered not compatible with normal commercial practice.

The Panel also provided useful clarifications regarding the determination of the same general category of products for the purpose of determining ‘the profit normally realised’. The Panel first recognised that Article 2.2.2(iii) does not impose a particular requirement on an investigating authority as to how to define what products fall within ‘the same general category’. The Panel then noted that given the aim of Article 2.2.2 to approximate the price of the like product, a reasonable and objective investigating authority may define the same general category of products in a narrow manner. Referring to the panel’s findings in *Thailand – H-Beams*, the Panel observed that the use of a broader category of products when defining the same general category of products means that more products other than the like product will be included, which in turn may result in constructed normal value that is less representative of the price of the like product.²³

Although the Panel did not take issue with the manner in which the European Commission defined the same general category of products in the biodiesel investigation, it found that there were sales of products in the same general category that could have provided a basis to calculate a profit cap. The Panel ultimately concluded that since the EU authorities did not establish, or even attempt to establish the profit cap, the EU acted inconsistently with Article 2.2.2(iii) of the WTO AD Agreement.

Implications

The Panel’s findings in *EU – Biodiesel (Indonesia)* are significant for two reasons. First, they confirm the interpretation developed by the Panel and the Appellate Body in *EU – Biodiesel (Argentina)*, namely that the EU’s practice of cost adjustments is inconsistent with Article 2.2.1.1 (and Article 2.2) of the AD Agreement. The reasonable period of time for the EU to implement the DSB’s recommendations and rulings in that case expires on 28 October 2018. In that context, it should be noted that on 28 May 2018, the European Commission decided to re-open the anti-dumping investigation concerning imports of biodiesel from Indonesia (and Argentina) in order to bring its measures into compliance with the DSB’s rulings as well as the 2016 judgments of the General Court. While the European Commission is obliged to drop the cost adjustments in the case of biodiesel, it remains to be seen whether it will use

21 Panel Report, *EU – Biodiesel (Indonesia)*, paragraph 7.51.

22 Panel Report, *EU – Biodiesel (Indonesia)*, paragraphs 7.65 and 7.71.

23 Panel Report, *EU – Biodiesel (Indonesia)*, paragraph 7.62 referring to the Panel Report, *Thailand – H-Beams*, paragraph 7.115.

that methodology in other anti-dumping investigations given that the new EU anti-dumping rules, adopted in December 2017, specifically provide for a possibility to reject the domestic prices and costs in case of ‘significant distortions’.²⁴

Second, the Panel’s findings provide important clarifications with regard to the calculation of a profit margin in the context of constructed normal value. Following the Panel’s reasoning, in each case in which an investigating authority decides to determine the profit amount on the basis of any other reasonable method, it needs to calculate a profit cap, understood as ‘the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin’ and ensure that the amount of profit established in the given investigation does not exceed that cap. The Panel Report appears to suggest that there are no exceptions to that requirement and, in particular, that the investigating authority cannot be excused from the obligation to calculate the profit cap based on the argument that data is not available. The Panel’s findings should bring more legal certainty for the investigated producers in the investigations in which a profit margin is established on the basis of ‘any other reasonable method’.

iii Russia – Commercial Vehicles (DS479): Definition of the domestic industry and the major proportion method

Introduction

On 9 April 2018, the WTO DSB adopted both the Panel and Appellate Body Reports in *Russia – Commercial Vehicles* (DS479), a dispute concerning the imposition of anti-dumping duties on light commercial vehicles from Germany and Italy by Russia pursuant to Decision No. 113 of 14 May 2013 of the College of the Eurasian Economic Commission (EEC). The Panel Report, which was confirmed on appeal, provides useful clarifications concerning the definition of the domestic industry pursuant to the major proportion method set forth in Article 4.1 of the AD Agreement.

Major proportion method for defining the domestic industry

Pursuant to Article 4.1 of the AD Agreement, the term ‘domestic industry’ shall be interpreted as ‘referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products’. In this sense, an investigating authority can choose between two methods to define the ‘domestic industry’ in the course of an investigation. It can either take into account the domestic producers as a whole or the domestic producers whose collective output constitutes a major proportion of the total domestic production of those products.

In the present case, the Department for Internal Market Defence of the EEC (DIMD) determined the domestic industry by means of the second method, the ‘major proportion’ method. When doing so, the DIMD relied on data from only one domestic producer, which represented 87.9 per cent of total production of the like domestic products, because of an alleged lack of correct and verifiable information regarding the second domestic producer.

24 Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union.

The EU argued that the DIMD's method of defining the domestic industry was inconsistent with Articles 3.1 and 4.1 of the AD Agreement, because the exclusion of the second domestic producer led to a risk of materially distorting the injury analysis.²⁵

The Panel started its analysis by recalling a member's obligation under Article 4.1 of the AD Agreement. It first highlighted that Article 4.1 of the AD Agreement does not establish a hierarchy between the two different methods for defining the domestic industry.²⁶ With regard to the 'major proportion' method, the Panel recalled that a 'major proportion' is one that is 'important, serious or significant', but that may be less than 50 per cent of the total domestic production.²⁷ In addition, the Panel noted that producers may not be left out of the definition of domestic industry on the basis of considerations or selection methods that, by their nature, are likely to distort the subsequent injury determination.²⁸

The Panel then moved on to examine the particular circumstances of the case. The Panel first decided that it was not necessary to determine precisely what percentage constitutes 'a major proportion' to satisfy the quantitative element, as this must be decided on the facts of each specific case. In the present case, the Panel concluded that 87.9 per cent share of total production fell well within the quantitative element of a 'major proportion'.²⁹ However, the Panel recalled that the definition of the domestic industry has both a quantitative and a qualitative aspect. As a result, the quantitative threshold is a necessary but not sufficient condition to define a 'major proportion' of the domestic industry.³⁰ Under the qualitative element, the methodology of the investigating authority for selecting the domestic industry should not create a risk of material distortion for the injury determination.³¹

According to the Panel, the methodology used by the DIMD raised three concerns:

- a the DIMD decided to exclude the second producer after having reviewed that producer's data, which gave an appearance of selecting domestic producers to be included in the definition of the domestic industry so as to ensure a particular outcome;
- b the reasons for excluding the second producer were not set out in the investigation report; and
- c nothing in Article 4.1 of the AD Agreement suggests that a member may ignore a domestic producer in defining the domestic industry because of alleged 'gaps' in the information provided by that producer to the investigating authority.³²

For these reasons, the Panel found that Russia had acted inconsistently with Article 4.1 of the AD Agreement and, as a consequence, with Article 3.1 of the AD Agreement.

The Panel nonetheless decided to continue its analysis noting that a more comprehensive set of findings may facilitate implementation in the event its findings are adopted by the DSB. The Panel then addressed what it considered to be an alternative argument put forth by Russia that the DIMD had initially defined the domestic industry as comprising both producers, but subsequently redefined it as comprising only one producer after having

25 Panel Report, *Russia – Commercial Vehicles*, paragraphs 7.4–7.5.

26 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.9.

27 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.11.

28 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.11.

29 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.13.

30 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.15.

31 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.15.

32 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.15.

reviewed the data provided by the excluded producer.³³ In this sense, Russia argued that the ‘positive evidence’ requirement of Article 3.1 of the AD Agreement constituted another exception to the domestic industry definition set out in Article 4.1, which would allow the investigating authority to exclude a producer from the domestic industry if the data of that producer would allegedly be insufficient.³⁴ The Panel rejected this interpretation because of the fact that such exception is not expressly provided in Article 4.1 and that nothing else would suggest that Article 3.1 could create an additional exception to Article 4.1. The Panel also noted that nothing in Article 4.1 conditions the definition of the domestic industry on an assessment of the quality of the data provided and that doing so would give rise to a risk of material distortion in the injury analysis.³⁵ Although the Panel did not find it necessary to make a definitive finding in respect of the possibility or modalities of ‘redefinition’ of domestic industry under Article 4.1 of the AD Agreement, it did note that nothing in Article 4.1 justifies the use of data problems of the kind identified by Russia to redefine the domestic industry.³⁶

Russia subsequently appealed the Panel’s findings with regard to the definition of the domestic industry, arguing that an injury determination would be inconsistent with Article 3.1 of the AD Agreement if an investigating authority were to rely on deficient information. The Appellate Body decided that Article 3.1 neither permits nor obliges an investigating authority to leave out producers that provided allegedly deficient data.³⁷ Indeed, the Appellate Body noted that Article 6 of the AD Agreement provides tools for the investigating authority to seek and obtain additional information from the domestic producers that have provided allegedly deficient information.³⁸ Thus, the deficiency of information need not have a bearing on whether a domestic producer can be included in the definition of the domestic industry, or on whether the requirements of Article 3.1 have been met. Hence, the requirement in Article 3.1 that an investigating authority must conduct an ‘objective examination’ does not support the proposition that domestic producers providing allegedly deficient information may be left out of the definition of domestic industry. Instead, the Appellate Body, relying on Article 3.1, explained that an investigating authority must not act so as to give rise to a material risk of distortion in the injury analysis when defining the domestic industry.³⁹

Finally, Russia took issue with the Panel’s statement that defining the domestic industry only after having examined the information submitted by the domestic producers would result in an appearance of selecting which domestic producers form the domestic industry based on the information they provided to the investigating authority.⁴⁰ The Appellate Body decided that Articles 3.1 and 4.1 of the AD Agreement do not prevent an investigating authority from initially examining the information submitted by the domestic producers before defining the domestic industry, to the extent that the information submitted or collected is pertinent to defining the domestic industry.⁴¹ However, as the Panel’s reasoning

33 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.18.

34 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.21.

35 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.21.

36 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.26.

37 Appellate Body Report, *Russia – Commercial Vehicles*, paragraph 5.21.

38 Appellate Body Report, *Russia – Commercial Vehicles*, paragraph 5.22.

39 Appellate Body Report, *Russia – Commercial Vehicles*, paragraph 5.23.

40 Appellate Body Report, *Russia – Commercial Vehicles*, paragraph 5.30.

41 Appellate Body Report, *Russia – Commercial Vehicles*, paragraph 5.34.

was, according to the Appellate Body, more nuanced than what Russia argued, the Appellate Body did not find any error in the Panel's interpretation and application of Articles 3.1 and 4.1 of the AD Agreement.⁴²

Implications

The Panel and Appellate Body's findings in *Russia – Commercial Vehicles* further clarify the WTO disciplines concerning the definition of the 'domestic industry' and, more precisely, the 'major proportion' method set out in Article 4.1 of the AD Agreement. By upholding the Panel's finding that the domestic industry's definition was inconsistent with Article 4.1 of the AD Agreement, even though the producer included in the domestic industry represented 87.9 per cent share of total domestic production, the Appellate Body reaffirmed the importance of the qualitative aspect of the 'major proportion' requirement, showing that even if the producers included in the domestic industry represent a very large share of the total domestic production, the domestic industry's determination may still be found to be inconsistent with the requirements of the AD Agreement. It is also interesting to note that, according to the Appellate Body, the qualitative aspect of the 'major proportion' method is concerned with ensuring that the domestic producers of the like product that are included in the domestic industry are representative of the total domestic production.⁴³ In that sense, the Appellate Body appears to have gone a step further than in *EC – Fasteners*, a previous dispute dealing at length with the definition of domestic industry pursuant to Article 4.1, in which the Appellate Body held that 'a major proportion' should be properly understood as a relatively high proportion of the total domestic production that substantially reflects the total domestic production.⁴⁴

The findings in *Russia – Commercial Vehicles* are also relevant as they clarify that an investigating authority is not allowed to exclude domestic producers from the definition of the domestic industry on the ground that they have provided allegedly deficient or insufficient information. The reason for this is that such exclusions would create a material risk of distortion in the injury analysis. Indeed, the non-inclusion of this category of producers could make the domestic industry definition no longer representative of the total domestic production, thereby undermining the accuracy of the injury analysis.

iv EU — Fatty Alcohols (Indonesia) (DS442): fair comparison between the normal value and the export price

Introduction

On 16 December 2016, the WTO DSB adopted the Panel Report in *EU — Fatty Alcohols (Indonesia)* (DS442), a dispute concerning the anti-dumping measures imposed by the EU on imports of Indonesian fatty alcohols. The Panel Report, the findings of which were subsequently confirmed on appeal, contains several important findings with implications going beyond this specific dispute. In particular, the Report provides useful clarifications concerning the treatment of transactions between closely-related companies in conducting a fair comparison between the normal value and the export price under Article 2.4 of the AD Agreement.

42 Appellate Body Report, *Russia – Commercial Vehicles*, paragraph 5.36.

43 Appellate Body Report, *Russia – Commercial Vehicles*, paragraph 5.27.

44 Appellate Body Report, *EC – Fasteners (China)*, paragraphs 412 and 419.

Fair comparison between the normal value and the export price

Pursuant to Article 2.4 of the AD Agreement, an investigating authority must conduct a fair comparison between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Article 2.4 further provides that in order to make a fair comparison, the investigating authority shall make due allowances for differences affecting price comparability. The question before the Panel in *EU – Fatty Alcohols (Indonesia)* was whether a price mark-up between closely-related companies can affect price comparability and can, thus, require an adjustment.

In the present case, the EU authorities had determined that a mark-up received by a related trader based in Singapore on sales to the EU was a difference affecting prices and price comparability of the product under investigation. The EU authorities had therefore made a downward adjustment to the export price charged by the trader before comparing the export price with the normal value to establish the dumping margin.

Indonesia argued that an internal allocation of funds within a ‘single economic entity’ that does not reflect an actual expense and is not reflected in the producer’s pricing decision cannot be a difference that affects price comparability within the meaning of Article 2.4 of the AD Agreement.⁴⁵ Accordingly, for Indonesia, the mark-up received by the Singapore-based trader was not a difference affecting price comparability but merely a way of allocating profits within a single economic entity. Indonesia asserted that the dividing line between an actual expense that affects price comparability and an internal shifting of funds is whether the transaction took place within a single economic entity.⁴⁶

The Panel was not convinced that the existence of a ‘single economic entity’ could be dispositive in and of itself of whether a mark-up qualifies as a difference that affects price comparability under Article 2.4 of the AD Agreement. In that regard, the Panel noted that two entities can still transact at arm’s-length regardless of their close relationship and that, even for non-arm’s-length transactions, expenses incurred need to be recovered through pricing and can thus affect price comparability.⁴⁷

In this case, the Panel understood that the mark-up paid was intended to compensate the trader for the expenses it incurred for its involvement in the relevant sales. Hence, the Panel reached the conclusion that these transactions between these two closely-related companies did constitute an actual expense.⁴⁸

Similarly, the Panel concluded that a payment cannot be considered as not constituting a difference that affects price comparability simply because the economic benefit of the sale accrues to the single economic entity as a whole. According to the Panel, the fact that the benefit might accrue to an overall entity does not negate the possibility that a given expense that is tied only to export or domestic sales (or to both in different amounts) could be incurred within that entity, with the potential to affect price comparability.⁴⁹

Based on the text of Article 2.4 of the AD Agreement, which refers to due allowances being made in ‘each case on its merits’, the Panel concluded that the difference between:

45 Panel Report, *EU – Fatty Alcohols (Indonesia)*, paragraph 7.99.

46 Panel Report, *EU – Fatty Alcohols (Indonesia)*, paragraph 7.100.

47 Panel Report, *EU – Fatty Alcohols (Indonesia)*, paragraph 7.103.

48 Panel Report, *EU – Fatty Alcohols (Indonesia)*, paragraph 7.104.

49 Panel Report, *EU – Fatty Alcohols (Indonesia)*, paragraph 7.105.

(a) an internal allocation of funds within a single economic entity which is not reflected in the producer's pricing decision; and (b) an expense that is linked to either the export side or the domestic side or to both sides but with different amounts such that price comparability is affected, is dependent on the particular situation and evidence before an investigating authority in a given case where the proper characterization of the payment in question is at issue.⁵⁰

Thus, a reference to the concept of a 'single economic entity' as the determinative factor was not warranted.

The Panel then moved on to consider whether the EU authorities erred in their determination based on the above test. The Panel concluded that the evidence put before the EU authorities was not conclusive that the mark-up was an internal allocation of funds within a single economic entity that is not reflected in the producer's pricing decision. Therefore, it rejected Indonesia's claim that the EU authorities acted inconsistently with Article 2.4 of the AD Agreement.⁵¹

These findings were later confirmed by the Appellate Body. Before the Appellate Body, Indonesia argued that the Panel erred in its interpretation of Article 2.4 of the AD Agreement because the legal standard it articulated did not contain a reference to the concept of a 'single economic entity'.⁵² Relying on the text of Article 2.4, the Appellate Body rejected this line of argument⁵³ and confirmed that the existence of a close relationship between companies would be pertinent to the extent that it affects the relevant transactions in such a way as to affect the comparability of the export price and the normal value.⁵⁴

Implications

The Panel and Appellate Body's findings in *EU – Fatty Alcohols (Indonesia)* further clarify the WTO disciplines concerning the requirement of 'fair comparison' between the normal value and the export price and the circumstances in which an investigating authority is required to make adjustments for differences affecting price comparability. In particular it has been clarified that the existence of a 'single economic entity' does not automatically mean that price comparability between export price and normal value cannot be affected and that adjustments are therefore unwarranted. These findings, while made with regard to the specific measures imposed by the EU, are likely to also have an impact on the practice of other WTO members in anti-dumping investigations.

III OUTLOOK

i Challenges faced by the WTO Appellate Body

The WTO Appellate Body is facing the risk of no longer being able to 'promptly' settle the disputes brought before it. While the challenges facing the Appellate Body are partially linked to the increasing number and complexity of the appeals brought by the WTO members, the root cause of the current crisis is the United States' decision to block the appointment of new Appellate Body members.

50 Panel Report, *EU – Fatty Alcohols (Indonesia)*, paragraphs 7.106–7.107.

51 Panel Report, *EU – Fatty Alcohols (Indonesia)*, paragraphs 7.108–7.111.

52 Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, paragraph 5.26.

53 Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, paragraphs 5.26–5.34.

54 Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, paragraphs 5.33 and 5.44–5.45.

Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) provides that the Appellate Body shall be composed of seven members, which are appointed by the WTO DSB. Each member is appointed for a term of four years, with the possibility of an extension for one further four-year term. As DSB decisions are taken by consensus, the formal objection by any WTO member can prevent the (re-)appointment of an Appellate Body member.

The United States' refusal to support the appointment of new Appellate Body members is based on two main grounds, which, according to the United States, put into question the legitimacy of the Appellate Body.

Rule 15 of the Working Procedures for Appellate Review

First, the United States argues that departing Appellate Body members should, once their mandate expires, no longer be allowed to complete the work on pending appeals.

While the DSB nominates the seven Appellate Body members, it is the Appellate Body itself that has the discretion to extend – pursuant to Rule 15 of the Working Procedures for Appellate Review – the mandate of a person who ceases to be an Appellate Body member in order to 'complete the disposition of any appeal to which that person was assigned while a member'. When doing so, the Appellate Body merely has to notify the DSB of such an extension.

Taking into account the increasing caseload before the Appellate Body and the benefits of efficiency and continuity that arise from Rule 15, these extensions were – in the past – usually granted without comment or controversy in the DSB. Recently, however, the time needed to finalise appeals has increased considerably. As a result, the extensions granted to former Appellate Body members pursuant to Rule 15 are now longer than was usual in the past.

According to the United States, the DSB has a responsibility under the DSU to decide whether a person whose mandate has expired should continue serving on the Appellate Body, and should exercise greater control in this regard. The United States argues that the fact that Rule 15 is not comprised in the text of any of the WTO covered agreements indicates that such rule has not been agreed upon by all WTO members. While the United States considers that members need to resolve this issue before being able to move forward, several other members (including the EU) are of the opinion that the resolution of the United States' concerns should not be linked to launching the selection process for the appointment of new Appellate Body members.

Judicial activism

Second, the United States denounces the independence that the Appellate Body has gradually acquired, taking issue with the alleged 'judicial activism' of the Appellate Body.

The United States accuses the Appellate Body of going far beyond the limits of its mandate by, among other matters:

- a* creating new WTO obligations through its interpretation of the WTO covered agreements;
- b* issuing findings on matters that have not been raised by the parties to the dispute or that are not essential to the resolution of the dispute; and
- c* excessively relying on the Appellate Body Secretariat, owing to the alleged lack of legal expertise of some of the Appellate Body members.

According to the US Trade Representative, Robert Lighthizer:

[T]he WTO is losing its essential focus on negotiation and becoming a litigation-centered organisation. Too often members seem to believe they can gain concessions through lawsuits that they could never get at the negotiating table.⁵⁵

Consequences of the current deadlock

If the current deadlock continues, the security and predictability of the multilateral trading system are bound to be jeopardised. Indeed, the United States' decision to block (re-) appointments has left the Appellate Body with only four members⁵⁶ to deal with the growing number of appeals. Mr Hyun Chong Kim (Korea) resigned from the Appellate Body on 1 August 2017, while Mr Ricardo Ramírez Hernández (Mexico) and Mr Peter Van den Bossche (Belgium) completed their second terms of office on, respectively, 30 June 2017 and 11 December 2017.⁵⁷ Mr Shree Baboo Chekitan Servansing's mandate is due to end on 30 September 2018 while the terms of the remaining three Appellate Body members will expire on 10 December 2019 (Mr Bhatia and Mr Graham) and 30 November 2020 (Mrs Zhao).

At the time of writing, over 10 attempts by the DSB to fill these three vacancies have failed. Moreover, unless the United States reconsiders its resistance to new appointments by September 2018, the number of members will be further reduced to three. This lack of members logically affects the functioning of the (normally seven-membered) Appellate Body, rendering the WTO dispute settlement mechanism increasingly inoperable. Indeed, once the Appellate Body has only three members, the legal parameters within which an appeal may be treated will become highly uncertain. For example, although a division could still be assigned to hear the appeal, it will no longer be possible to organise an exchange of views, as provided for by the Working Procedures for Appellate Review, with other Appellate Body members or to ensure rotation among Appellate Body members, as required by Article 17.1 of the DSU.

Options for breaking the current deadlock

Despite informal consultations on the launch of selection processes for new Appellate Body members, which are ongoing at both the political and the technical level, there are no obvious signs of progress among the WTO members. The United States continues to block the appointment process and has not yet submitted a formal proposal on what steps, from its perspective, are needed to allow the process to move forward.

55 See the 'Opening Plenary Statement of USTR Robert Lighthizer at the WTO Ministerial Conference', available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/opening-plenary-statement-ustr>.

56 The four current Appellate Body members are: Mr Ujal Singh Bhatia (India, 2011–2019); Mr Thomas R Graham (United States, 2011–2019); Mr Shree Baboo Chekitan Servansing (Mauritius, 2014–2018); and Ms Hong Zhao (China, 2016–2020).

57 In line with Rule 15 of the Working Procedures for Appellate Review, Mr Ricardo Ramírez Hernández and Mr Peter Van den Bossche continued to complete the appeals they were assigned while they were still members of the Appellate Body once their mandate had expired.

The latest proposal, introduced by Mexico on behalf of 65 WTO members, refers to 'the urgency and importance of filling the vacancies in the Appellate Body'.⁵⁸ To enable the Appellate Body to properly carry out its functions, the WTO members propose that the DSB:

- a launches three selection processes to fill the three current vacancies;
 - b establishes a Selection Committee, composed of the Director-General and the Chairpersons of the General Council, the Goods Council, the Services Council, the TRIPS Council and the DSB, to be Chaired by the DSB Chair;
 - c sets a deadline of a 30-day period after the date of its decision, for members to submit nominations of candidates; and
 - d requests the Selection Committee to carry out its work in order to make recommendations to the DSB within 60 days of the deadline for submitting nominations of candidates.
- However, the United States does not support this proposal.

Taking into account the lack of progress, several options for breaking the current deadlock have been circulated. These have included proposals:

- a to directly appoint the new Appellate Body members using majority voting, either in the DSB or in the General Council;
- b to establish a new agreement on dispute settlement outside the WTO, negotiated by a coalition of willing states;
- c to modify the procedural rules of the Appellate Body, by denying new appeals if the terms of three or more Appellate Body members have expired or by prohibiting Appellate Body members from sitting on new appeals after the expiry of their mandate; or
- d to use the arbitration process under Article 25 of the DSU as a temporary solution to enable appeals of panel reports.

However, the likelihood of any of these options materialising in the near future appears to be slim. In addition, it remains to be seen whether the United States' decision to block new Appellate Body appointments is an isolated event, or whether the United States is laying the groundwork for a more fundamental attack on the WTO's dispute settlement system.

ii **EU – Price Comparison Methodologies (DS516): China's 'as such' challenge against the EU's previous anti-dumping legislation**

Section 15(a)(ii) of China's WTO Accession Protocol

Upon its accession to the WTO in 2001, China agreed to be bound by a number of obligations in addition to those applicable to all WTO members. Key among these obligations, which were included in China's WTO Accession Protocol, was the possibility for other WTO members to disregard domestic prices and costs in China for the determination of the normal value in the context of anti-dumping investigations for a transitional period of 15 years from the date of China's accession, namely, until 11 December 2016.

Section 15(a)(ii) of China's WTO Accession Protocol indeed provides that '[t]he importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly

58 See WTO, Dispute Settlement Body, 'Appellate Body Appointments', 16 February 2018 (WT/DSB/W/609/Rev.2).

show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product', and Section 15(d) of the Accession Protocol clarifies that '[i]n any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession'.

Pursuant to Section 15(d) of the Accession Protocol, the alternative methodologies contained in Section 15(a)(ii) automatically expired on 11 December 2016 and, thus, that the EU was under the obligation to modify its anti-dumping legislation in order to reflect the changed legal framework resulting from the expiry of part of China's WTO Accession Protocol by 11 December 2016 at the very latest.

China's 'as such' challenge on 12 December 2016

On 12 December 2016, owing to the EU's failure to modify its domestic legislation so as to reflect the change in China's market economy status in a timely manner, China launched an 'as such' challenge against the EU's Basic Anti-Dumping Regulation that was applicable at that moment in time (Regulation (EU) 2016/1036⁵⁹). In essence, China is arguing that the treatment that the EU continues to afford to Chinese imports under Article 2(7) of Regulation (EU) 2016/1036 (i.e., the continued application of alternative normal value methodologies) is inconsistent with the WTO covered agreements as of 12 December 2016.⁶⁰

More precisely, China argues that Articles 2(1) to 2(7) of Regulation (EU) 2016/1036⁶¹ are inconsistent with the principle of most-favoured nation treatment contained in Article I:1 of the GATT 1994, as these provisions provide for differential treatment of Chinese imports as compared to imports from other WTO members. In addition, China argues that Article 2(7) of Regulation (EU) 2016/1036 is – as such – inconsistent with Articles 2.1 and 2.2 of the AD Agreement. Article 2(7) expressly required the EU investigating authority to reject Chinese market prices and costs when calculating normal value in favour of third country prices and costs, unless the Chinese exporter can demonstrate that it operates under market economy conditions.

New EU anti-dumping methodology: Regulation (EU) 2017/2321

Subsequent to China's panel request, the EU published its new anti-dumping methodology (Regulation (EU) 2017/2321⁶²) in the Official Journal on 19 December 2017. The purpose of this amendment was precisely to bring the EU's Basic Anti-Dumping Regulation in line with the changes resulting from China's WTO Accession Protocol. Through the addition of a new

59 Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (codification).

60 See DS516, *EU – Price Comparison Methodologies*, document WT/DS516/1.

61 Articles 2(1) to 2(6) of Regulation (EU) 2016/1036 set forth the standard rules in EU law for calculating normal value in anti-dumping proceedings. In contrast, Article 2(7) of Regulation (EU) 2016/1036 sets out a different regime applicable to the calculation of normal value for imports from 'non-market economy' countries. Article 2(7)(b), which expressly names China, provided that the rules set forth in Articles 2(1) to 2(6) shall only apply if the concerned producer is able to substantiate that 'market economy' conditions prevail in respect of the manufacture and sale by that producer of the like product concerned. To do so, the producer must establish that it meets the criteria set out in Article 2(7)(c).

62 Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union.

Paragraph 6a to Article 2 of the Basic Anti-Dumping Regulation, the EU introduced a new methodology for establishing normal value in case of ‘significant distortions’ in the market of the exporting country, which render the use of domestic prices and costs in that country inappropriate. Formally, the new EU methodology thus provides for a country-neutral approach, abolishing the former distinction between market and non-market economies. Instead, the new methodology now applies to all countries where ‘significant distortions’ are deemed to exist.

While China, in its request for consultations and its panel request, attempted to include the new EU anti-dumping methodology within the terms of reference of the Panel,⁶³ the EU argues that the Panel cannot issue findings with respect to those new rules.

As this case is still ongoing, one can currently merely speculate about the Panel’s findings. While China appears to have strong arguments regarding the WTO inconsistency of the old EU anti-dumping methodology (Regulation (EU) 2016/1036), it appears rather unlikely that the Panel in DS516 will find that the new EU anti-dumping methodology (Regulation (EU) 2017/2321) falls within its terms of reference. If the new methodology is not properly within the Panel’s terms of reference, a victory for China would, to a large extent, be a political one. While findings of inconsistency of the old EU methodology could have an impact on other WTO members, which have not yet amended their domestic legislation so as to reflect the change in China’s market economy status⁶⁴, China would have to initiate a separate challenge against the new EU anti-dumping legislation in order to obtain findings with regard to its WTO consistency. The Panel report in DS516 is expected to be issued by the end of 2018.

IV CONCLUSIONS

As the developments in the case law confirm, overall the WTO dispute settlement mechanism continues to fulfil its role of enhancing the security and predictability of the multilateral trading system. This is particularly true in the domain of trade defence measures, which constitute by far the most litigated subject before panels and the Appellate Body.

The clarifications brought about by the panels and Appellate Body in the disputes discussed in Section II are likely to have significant implications for the practice of WTO members in trade defence investigations. In particular, the findings concerning cost adjustments, calculation of a profit margin and determination of domestic industry are likely to circumscribe the discretion that investigating authorities currently enjoy in the

63 In its request for consultations and panel request, China mentioned that its challenge ‘also concerns any modification, replacement or amendment to [EU anti-dumping legislation], and any closely connected, subsequent measures’. China explicitly notes that it was aware of the EU’s on-going legislative processes implicating potential changes to relevant provisions of the Basic Anti-Dumping Regulation and stated that its complaint ‘includes any changes made to the Basic Regulation pursuant to the legislative processes initiated by [the proposals of the European Commission]’.

64 See, for example, the United States. While China, on 12 December 2016, also filed a request for consultations targeting the US’ anti-dumping legislation, China has – to date – not yet filed a panel request in the US case. China appears to be prioritising its challenge to the EU’s anti-dumping legislation, potentially because an easier victory against the EU could set a favourable precedent for a tougher case against the United States.

context of anti-dumping investigations. Furthermore, the findings regarding the notion of 'safeguard measures', if confirmed by the Appellate Body, will significantly narrow the scope of application of the Agreement on Safeguards.

The current crisis relating to the appointment of new Appellate Body members puts at risk the future development of WTO case law and the role of the dispute settlement system once described as the jewel in the crown of the WTO. If the members do not find a solution for filling the vacancies in the coming months, the handling of current and future appeals will be seriously disturbed. This, in turn, might have serious consequences for trade relations between WTO members and the credibility of the WTO dispute settlement mechanism.

Finally, the end of 2018 may bring the much needed clarifications regarding the concrete implications of the expiry of Section 15(a)(ii) of China's Accession Protocol. Although the outcome of the dispute between China and the EU will have a mostly political significance, given that the EU has in the meanwhile amended its anti-dumping rules, the victory would help China to challenge the measures of other WTO members that continue to treat it as a non-market economy. It may also further exacerbate the already negative attitude of the US towards the WTO dispute settlement system.

ARGENTINA

*Alfredo A Bisero Paratz*¹

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 of US\$8,500 in 2017.

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 40 ongoing processes according to the National Commission of Foreign Trade) involve products originating from China, Indonesia and South Korea. Other processes involve goods exported from the United States, Brazil, Chile and Peru. 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.

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 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.

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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 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 Commerce (the Secretary), the Undersecretariat of Foreign Commercial Policies (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:

- a* the product and the country of origin;
- b* the period to which the investigation applies;
- c* a description of the dumping practices or existing subsidies;
- d* a summary of the injury and the causal link to the dumping activity;
- e* 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
- f* 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 Undersecretariat, 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 Undersecretariat and 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 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.

The Undersecretariat's report must contain the following information:

- a* an assessment of the change in the trade balance for the product in the relevant period;
- b* a comparison of the imported product's share of the market relative to national production;
- c* the existence of any commercial agreements with the country of origin;
- d* an evaluation of the industrial sector with respect to investments, personnel and gross income; and
- e* 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 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 Undersecretariat and 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 Undersecretariat and 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 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 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 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 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.

Argentina and Chile have undertaken preliminary negotiations on a free trade agreement (FTA). The FTA will refer to government purchases of goods and services, improved efficiency in bilateral trade operations, harmonisation of customs regulations, services, investments, e-commerce and bilateral cooperation. Between March and June 2017, three negotiation rounds took place, and the FTA was executed on 2 November 2017.

On 19 January 2017, MERCOSUR and the EFTA (European Free Trade Association) executed a joint statement announcing the finalisation of the exploratory dialogue to execute an FTA. The first round of negotiation took place in Buenos Aires in June 2017.

On 22 January 2018, Argentina ratified the Trade Facilitation Agreement (TFA) drafted within the framework of the WTO, which took 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.

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 and the abolition of most restrictions on foreign currency purchases by Argentine residents.

The new government also kept the policy of relaxing and eliminating rules requiring Argentine exporters to repatriate export proceeds. The elimination, in 2016, of customs duties previously imposed on agricultural and mining exports, except for soybeans (the export duty for which was lowered from 35 to 30 per cent; it has been further reduced at a rate of 0.5 per cent per month since January 2018, and will continue to be reduced until it reaches 18 per cent in December 2019), is still in force.

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 Tax and Customs reform

On 28 December 2017, Congress passed Law 27,430, which sets out a broad tax reform including internal taxes and customs procedures. Excise tax rates, levied on the import of specific goods (cars, boats, tobacco and alcoholic beverages), were increased for the import of tobacco and beer. Additionally, three items within the Customs Code were modified:

- a* import and export of goods with defects, allowing a party to cancel the transaction and seek reimbursement of any duties;
- b* facts and cases considered to be misdemeanour offences of contraband (specifically in relation to tobacco); and

- c changes in procedures to simplify notice, terms and the production of evidence in disputes with the customs authorities and in the tax and customs administrative and judicial proceedings.

ii De-bureaucratisation law

On 18 June 2018, Congress passed three laws partially ratifying Decree No. 27/18 issued in January 2018 to reduce bureaucratic obstacles and legal regulations that delay business activities reliant on government approvals. Law No. 27,445 sets forth measures to promote and speed up the transit of goods through Argentine air and sea ports (e.g., supplies for carriage may be stored at the ports under more favourable terms). Law No. 27,446 generalises the use of electronic filing and digital signatures in all government offices, affording them the same validity as physical filings, consolidating a process started by the customs authorities in 2015.

VI TRADE DISPUTES

According to WTO reports (see www.wto.org), Argentina has currently initiated 20 cases as complainant, mostly against Chile and the United States in connection with various import barriers faced by Argentine agricultural products at those countries' ports. On the other side of the coin, Argentina is involved in 22 disputes as respondent. For the most part, these disputes were initiated by the European Union and the United States. They relate principally to measures taken by Argentina to protect the shoe industry, peaches and other agricultural products. Finally, Argentina is currently participating in 60 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 in 2017 and 2018 follows.

i **Dispute Settlement: Dispute DS473: Argentina v. European Union. Anti-dumping measures on import of biodiesel²**

On 19 December 2013, Argentina requested consultations with the European Union regarding (1) temporary and permanent anti-dumping measures imposed on biodiesel originating in, *inter alia*, Argentina, as well as the investigation underlying the measures and (2) Council Regulation (EC) 1225/2009 of November 2009, which refers to the adjustment or calculation of costs associated with the manufacture and sale of products under investigation in determining dumping margins.

On 18 December 2015, the Chair of the Panel informed the Dispute Settlement Body (DSB) that, due to the complexity of the legal and factual issues of the dispute, the Panel expected to issue a final report by the end of February 2016.

On 29 March 2016, the panel circulated its report. The DSB upheld some of Argentina's claim regarding anti-dumping measures adopted by the European Union but rejected the claim for adjustment or calculation of costs associated with the manufacture and sale of products under investigation in the determination of dumping margins.

² https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds473_e.htm.

On 20 May 2016, the European Union notified the DSB of its decision to appeal certain findings of the panel report. On 25 May 2016, Argentina notified the DSB of its appeal to different findings.

On 6 October 2016, the Appellate Body report was circulated to members. At its meeting on 26 October 2016, the DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report.

At the DSB meeting on 23 November 2016, the European Union informed the DSB that, pursuant to Article 21.3 of the DSU, it intended to implement the DSB's recommendations and rulings in this dispute. On 9 December 2016, the European Union and Argentina informed the DSB that they had agreed that the reasonable period of time to implement the DSB's recommendations and rulings would be nine months and 15 days. Accordingly, the reasonable period of time is set to expire on 10 August 2017 (extended until 28 September 2017). On 23 October 2017, the European Union advised of its adoption of DSB's recommendations and Argentina expressed its satisfaction. Nevertheless, Argentina iterated its concern about the European Biodiesel Board's intention to submit a petition to the EU Commission to initiate a subsidy investigation against Argentine biodiesel imports.

VII OUTLOOK

The December 2015 elections harboured a major shift in Argentina's trade policies. The changes in law and regulation, analysed in Sections IV and V, have been accompanied by Argentina's settlement with its 'holdout' creditors and by a return to compliance with WTO commitments. These policies have enabled Argentina to return to the international credit market and, together with a well-timed tax amnesty and moratorium programme, to increase foreign currency reserves during 2016 and 2017. Nonetheless, Argentina's foreign trade continues to lag and has one of the lowest shares of GDP as compared with other countries.

Monetary policy (devaluation) applied by Argentina in December 2015 responded partially to international competition because during 2016 and part of 2017 the exchange rate remained stable, and the inflation rate was high (approximately 40 per cent in 2016 and 25 per cent in 2017). These two processes prompted debate about the increase of internal costs of exportable products and the efficiency of exporters to sell products at competitive prices. Although two of Argentina's largest trading partners (Brazil and China) ended their recession in 2017, the government-supported dollar–peso exchange rate and inflation erased the trade surplus in 2016, which became, in 2017, another record trade deficit of US\$8,471 million (the highest commercial deficit since 1995).

AUSTRALIA

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I OVERVIEW OF TRADE REMEDIES

The trade remedies available to the Australian government to take remedial action against injurious imports fall within three categories: anti-dumping measures, countervailing measures and emergency safeguards.

i Anti-dumping measures and countervailing measures

‘Dumping’ occurs where a foreign exporter sells goods to Australia at a lower price than the ‘normal value’ of the goods, which is generally the domestic price of the goods in the country of export. International World Trade Organisation (WTO) law, specifically the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement), allows remedial action to be taken by the Australian government in response to the practice. Remedial action offsets the dumping margin, which is the amount by which the normal value exceeds the export price to Australia. In some cases it offsets the injury margin, which is the amount of injury suffered by the domestic industry.

A ‘countervailing subsidy’ measure is an Australian government action taken against foreign government assistance given to foreign exporters to Australia.

If the independent Australian statutory body, the Anti-Dumping Commission (ADC), finds that one of these practices is causing material injury to domestic Australian industry, the Minister for Industry, Innovation and Science (the Minister) can impose an anti-dumping or countervailing duty to offset the dumping margin or value of the subsidy (or in both cases, the injury margin), or require price undertakings by the exporter. An anti-dumping duty can be an *ad valorem* duty, fixed duty, floor price or a combination of fixed and variable duties. A countervailing duty can be imposed as an *ad valorem* duty or a fixed amount per unit, or a combination of both.

There are currently measures in place in relation to 30 different products, and the ADC is investigating 23 different instances of dumping or subsidisation.

In certain circumstances, the Minister is empowered to exempt certain foreign exporters from the countervailing duties imposed. For example, on 9 August 2017, following a recommendation from the ADC, the Minister exempt certain types of aluminium road wheels imported from China from anti-dumping measures, on the basis that substitutable goods are not produced in Australia. The exemption was backdated 10 months.

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ii Emergency safeguards

The Australian government can also impose ‘emergency safeguards’, to be used where a ‘surge of imports causes or threatens to cause serious material injury to a domestic industry . . . Imports must be recent enough, sudden enough, sharp enough and significant enough.’² Safeguard measures may take the form of import quotas, tariffs or a combination of both.

Under Australian law, emergency safeguards can only be imposed after a full investigative review by the Productivity Commission, an independent statutory body. The Productivity Commission is an advocate of trade liberalisation, and its most recent safeguard review was in 2013 in relation to a subsidiary of Coca Cola Amatil, which resulted in the government accepting the Commission’s recommendation against imposing a safeguard.

II LEGAL FRAMEWORK

i Anti-dumping measures

Part XVB of the Customs Act 1901 (Cth) (Customs Act), the Customs Regulation 2015 (Cth), the Customs Tariff (Anti-Dumping) Act 1975 (Cth) and the Customs Tariff (Anti-Dumping) Regulation 2013 (Cth) govern Australia’s anti-dumping system. These rules are applied in accordance with the Dumping and Subsidy Manual, a legal commentary and policy document.

Parties injured by dumping may lodge an application with the Commissioner of the ADC. The applicants must account for not less than 25 per cent of total production of like goods in Australia. The Minister may also investigate of his or her own motion.³

The Commissioner may investigate or reject the application.⁴ After the investigation, the Commissioner must issue a report to the Minister recommending whether a dumping duty notice should be issued and consequent tariffs applied, and the level of any tariff.⁵ Based on that recommendation, the Minister then makes a decision.

To determine whether dumping has occurred, the Commissioner and the Minister compare the weighted average export prices over the investigation period with the weighted average ‘normal values’ over the same period.⁶ The investigation period is selected by the Commissioner, and is generally the 12 months before the initiation of the investigation.⁷ The normal value is the value of goods ordinarily paid in the country of export by the exporter or others in the exporting market.⁸ In certain circumstances, for instance if there are no arms-length domestic transactions by the exporter, the Minister will calculate the normal value based on the cost of production, the administrative, selling and general costs and ordinary profit.⁹

2 Australian Government Department of Foreign Affairs and Trade, ‘Trade Remedies’ (viewed on 8 July 2018), <http://dfat.gov.au/trade/organisations/wto/Pages/trade-remedies.aspx>.

3 Customs Act 1901 (Cth), Section 269TAG.

4 Customs Act 1901 (Cth), Section 269TC.

5 Customs Act 1901 (Cth), Section 269TEA.

6 Customs Act 1901 (Cth), Section 269TACB.

7 Anti-Dumping Commission, Dumping and Subsidy Manual (April 2017), 3.2.

8 Customs Act 1901 (Cth), Section 269TAC.

9 Customs Act 1901 (Cth), Section 269TAC.

Decisions of the Commissioner and the Minister can be reviewed on their merits by the Anti-Dumping Review Panel.¹⁰ They may also be reviewed by a court for jurisdictional error. If the Anti-Dumping Review Panel comes to a different conclusion to the Commissioner, its decision is substituted for the original decision. In the case of decisions from the Minister, the Review Panel makes a recommendation that can be either accepted or rejected.

Duty assessment decisions are made by the ADC and are subject to review by the Anti-Dumping Review Panel.¹¹

ii Departures from WTO agreements

The ADC regularly applies WTO case law, and the Dumping and Subsidy Manual also considers this. The following is of note:

- a goods originating in New Zealand are never liable for duty;¹²
- b provisional or interim duties applied while an investigation is being conducted are often implemented for longer than six months, the maximum period of time allowable under the WTO Anti-Dumping Agreement in the absence of a request by exporters representing a significant percentage of the trade involved;
- c the ADC frequently requests extensions of time to investigate dumping, and investigations often take longer than the one year allowable under the WTO Anti-Dumping Agreement in the absence of special circumstances;
- d the ADC has been criticised for its methods of constructing the normal value. For example, the ADC frequently uses benchmarks to price inputs into exported products that are higher than those inputs can be sourced in other relatively free markets, such as Japan.¹³ It is possible that some of these techniques contravene the WTO Anti-Dumping Agreement, including Article 2.2.1.1; and
- e Australia also applies the ‘lesser duty rule’, in that there is a mandatory consideration whether a lesser amount of duty than the dumping margin should be fixed where that would be sufficient to remove injury. This is a ‘WTO-plus’ commitment. In some circumstances, the mandatory consideration is not required.¹⁴

iii Countervailing duty measures

The determination of countervailing duties in Australia is performed in a similar manner to dumping under Part XVB of the Customs Act. Injured parties apply to the ADC, which investigates and makes a report. The Minister then makes a decision. If the Minister determines that the subsidies are countervailable and their effects are not negligible, an extra countervailing duty may be imposed on subsidised imports to offset the injury to domestic

10 Customs Act 1901 (Cth), Sections 269ZZA and 269ZZN.

11 Customs Act 1901 (Cth), Part XVB, Division 4.

12 Customs Act 1901 (Cth), Section 269TAAA.

13 See the analysis in Wei Zhou, ‘Australia’s Anti-Dumping and Countervailing Law and Practice: An Analysis of Current Issues Incompatible with Free Trade with China’ (2015) 49 *Journal of World Trade* 6, 975–1010, pages 985 et seq.

14 Customs Act 1901 Sections 269TG(5A) and 269TJ(3BA); Customs Tariff (Anti-Dumping) Act 1975 Sections 8(5BAA), 8(5BAAA), 9(5AAA), 10(3CA), 10(3DA) and 11(5A).

producers. A subsidy is a financial contribution, which confers a benefit.¹⁵ The subsidy is countervailable when it is 'specific', in the sense that it is limited to particular enterprises, geographical areas, export performance, or similar.¹⁶

Where the Minister decides that duties are warranted they are imposed on the importers of the goods and collected by Australian Customs and Border Protection. Duty assessments are made by the ADC.¹⁷

iv Departures from WTO agreements

The ADC regularly applies WTO case law, and the Dumping and Subsidy Manual also considers this. The key differences are similar to those in the field of anti-dumping, including:

- a* the imposition of provisional duties and the non-observation of prescribed time limits in the WTO SCM Agreement; and
- b* the application of the 'lesser duty rule' as a WTO-plus commitment.

v Safeguard measures

The Australian procedures with respect to safeguard measures are published in Commonwealth Gazette No. S297 dated 25 June 1998¹⁸ as amended by Commonwealth Gazette No. GN39 dated 5 October 2005¹⁹ (the General Procedures) and essentially codify the General Agreement on Tariffs and Trade 1994 (GATT) Article XIX and the WTO Agreement on Safeguards.

The Productivity Commission, a Commonwealth advisory body within the Treasury department, is authorised by the Productivity Commission Act 1998 (Cth) to conduct investigations on reference from the government into whether safeguard action is warranted in accordance with the General Procedures. After investigation, it produces a report to the government recommending whether safeguard measures are warranted.

When the Productivity Commission initiates an inquiry it must notify the WTO and announce it on its public website. The General Procedures require the Productivity Commission to consult with interested parties, convene public hearings and call for public submissions.

Under the General Procedures, possible safeguards are limited to quotas, tariff quotas and increased tariffs. They may only be imposed for four year periods, and only after the Productivity Commission has conducted an inquiry and concluded that safeguards are warranted. There is no formal mechanism for implementation of safeguards, which falls to the government.

In the past 20 years, the Productivity Commission has conducted safeguard inquiries into pork products (1998 and 2008), citrus products (2002), processed fruit products (2013) and processed tomato products (2013). In all but one investigation, the 1998 pork industry

15 Customs Act 1901 (Cth), Section 269T Definitions.

16 Customs Act 1901 (Cth), Section 269TAAC.

17 Customs Act 1901 (Cth), Part XVB, Division 4.

18 Commonwealth of Australia Gazette, Special Notice, 'Establishment Of General Procedures For Inquiries By The Productivity Commission Into Whether Safeguard Action Is Warranted Under The Agreement Establishing The World Trade Organization', No. S 297, Thursday, 25 June 1998.

19 Commonwealth of Australia Gazette, Government Notice, 'Amendment of general procedures for inquiries by the Productivity Commission into whether safeguard action is warranted under the Agreement establishing the World Trade Organization', No. GN 39, 5 October 2005.

investigation, the Productivity Commission concluded that no safeguard measures could be justified under the WTO Agreement on Safeguards. Australia has never implemented safeguard measures.

vi Departures from WTO agreements

There are a handful of instances in which the General Procedures depart from GATT Article XIX and the WTO Agreement on Safeguards. The main difference is that whereas Article 2.2 of the WTO Agreement on Safeguards requires that safeguard measures be applied to products irrespective of country of origin, Paragraph 5 of the General Procedures exempts products from the following countries:

- a* New Zealand (pursuant to the Australia New Zealand Closer Economic Relations Trade Agreement);
- b* Singapore (pursuant to the Singapore Australia Free Trade Agreement);
- c* the United States (pursuant to the Australia United States Free Trade Agreement), if those imports are not a substantial cause of serious injury or threat thereof; and
- d* Thailand (pursuant to the Thailand Australia Free Trade Agreement), if those imports are not a cause of serious injury or threat thereof or of serious damage or actual threat thereof.

Despite Article 2.2 of the WTO Agreement on Safeguards, there is WTO case law that suggests that under certain circumstances, measures otherwise prohibited under this section can be implemented.

III TREATY FRAMEWORK

i Overview

Australia is presently a signatory to 10 free trade agreements (FTAs) with key trade partners. Nine of the agreements currently in force are bilateral in nature (agreed with Chile, China, Japan, Korea, Malaysia, New Zealand, Singapore, Thailand and the United States) and the 10th is a multilateral agreement with the Association of Southeast Asian Nations.

Australia has also recently concluded the negotiation of three additional agreements, which have not yet come into force:

- a* the Australia–Peru FTA;
- b* the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11); and
- c* the Pacific Agreement on Closer Economic Relations.

Australia persisted with the negotiation of TPP-11 following the departure of the United States from negotiations, primarily for the benefit of Australian agricultural producers who stand to gain the most significantly from the agreement.

Australia's continued negotiation of multiple FTAs and commitment to the WTO process exhibits the significant political and private sector support for trade liberalisation. The Australian economy relies heavily on the reduction of trade barriers for continued growth, as a significant exporter of minerals, agricultural products and services. However, despite the prevailing trend towards the negotiation of agreements that promote the liberalisation of trade, Australia continues to utilise antidumping and countervailing measures with recently increased frequency, authorised under all of Australia's FTAs – except, notably, its agreement

with New Zealand. Australia has recently increased the use of anti-dumping measures against Chinese exporters, most significantly in the period directly following the signing of the China–Australia Free Trade Agreement (ChAFTA) in 2014.

Formed in 2012 following a series antidumping reforms, the ADC is an independent government agency tasked with investigating potential cases of dumping and recommending to the relevant Minister the appropriate trade remedy to be imposed. The ADC has performed 26 investigations into alleged Chinese dumping, 13 of which have resulted in the imposition of measures. In 2014 alone, notably the year ChAFTA was signed, the ADC initiated five investigations against China, including an anti-circumvention investigation.

ii Key agreements

Australia–New Zealand Closer Economic Relations Trade Agreement

Australia's FTA with New Zealand came into force on 1 January 1983 and remains one of the most comprehensive FTAs in existence. Since its inception, the agreement has prohibited all tariffs and quotas imposed on goods within the free trade area and was the first FTA in the world to extend coverage to trade in services in January 1989, subject to very limited exceptions.

ChAFTA

Finalised in 2015, the negotiation of ChAFTA represented a significant step forward in Australia's most valuable trade relationship. Forty years ago, trade between China and Australia totalled approximately A\$100 million annually, compared with over A\$100 billion today. As mentioned above, Australia's increased exercise of its anti-dumping and countervailing measures rights under the agreement, in addition to Chinese bans on certain Australian exports has challenged the relationship somewhat in recent years. That being said, Australian–Chinese trade continues to grow steadily and will be broadly assisted by the terms of ChAFTA.

Australia–US Free Trade Agreement

Coming into force on 1 January 2005 after a 10-year negotiation, the US Free Trade Agreement eliminated most tariffs on agricultural products exported by both countries, established favourable conditions in both economies in the market for financial services and mandated key changes to Australian intellectual property laws, among other reforms. The agreement retains the rights of both parties to impose trade remedies, consistent with the GATT and the General Agreement on Trade in Services.

iii The future

Australia is currently negotiating a number of bilateral and plurilateral FTAs with parties including Hong Kong, India, Indonesia, the Gulf Cooperation Council and the Pacific Alliance. Given the United Kingdom's impending withdrawal from the EU and the significance of Britain as an Australian economic partner, Australia is also expected to announce negotiations for a UK–Australia FTA. The EU and the Trade in Services Agreement (TiSA) represent two of the most significant FTAs currently under negotiation:

- a EU: on 18 June 2018 Australia and the EU announced negotiations for a FTA between the two trade partners. The EU is Australia's second largest trade partner and in 2017 was the most significant source of inbound foreign investment. A likely issue of contention

in negotiating an agreement is the EU's desire to retain protections for agricultural producers pursuant to its common agricultural policy. The EU's negotiation directives note that any agreement reached ought to recognise that subsidies paid to European farmers are not distortive and therefore should not be targeted by anti-dumping or anti-subsidy measures by Australia.

- b TiSA: Australia, the United States and the EU currently lead negotiations between 50 economies to reach an agreement on the global trade in services. Accounting for approximately 70 per cent of Australian GDP and employing four out of five Australians, lower barriers to global trade in services is critically important to Australia as its economy transitions from a producer of goods to one producing primarily services. Australia's key objectives in TiSA negotiations include improving investment conditions for Australian businesses seeking to establish offshore facilities and improving business mobility for Australian service professionals looking to cross borders for business. Australia hosted the 21st round of TiSA negotiations in December, 2016; however, there is no firm deadline set for the conclusion of negotiations.
- c On 8 March 2018, a new FTA, TPP-11, was executed between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam. TPP-11 is a separate agreement that incorporates, by reference, the majority of the provisions of the original Trans-Pacific Partnership Agreement, which has been signed but which is not yet in force. Currently, Australian trade with the TPP-11 nations totals A\$87.9 billion in exports, and A\$76.1 billion in imports, and it has been estimated that TPP-11 could potentially boost Australian exports by A\$30 billion.²⁰

IV RECENT CHANGES TO THE REGIME

The most notable recent changes to the Australian regime in the past year have been amendments to the Customs Act,²¹ particularly in relation to the anti-dumping regime and recent negotiations of several FTAs.

i Recent changes to the Customs Act

On 31 October 2017, the Customs Amendment (Anti-Dumping Measures) Act 2017²² (Amendment) was introduced to amend Section 269TAB of the Customs Act. Section 269TAB sets out the export price of any goods exported to Australia. An accurate determination of the export price is necessary to calculation of the dumping duty to be charged. Section 269TAB provides that the export price for goods exported to Australia is the price paid by the importer to the exporter (other than the transportation costs) for the goods, where the purchase of the goods was an arms-length transaction. In circumstances where the purchase by the importer was not an arms-length transaction, then the export price is the price at which the goods were sold by the importer to a person who is not an associate of the importer.

20 Australian Government, Department of Foreign Affairs and Trade, 'TPP-11 Outcomes and Background Documents' (7 March 2018), <http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/outcomes-documents/Pages/outcomes-documents.aspx>.

21 Customs Act 1901 (Cth).

22 Customs Amendment (Anti-Dumping Measures) Act 2017 (Cth).

The purpose of the Amendment is to provide methodologies for the determination of an export price in circumstances where exporters have not yet exported the goods or have only exported low volumes of the goods such that the export price is unable to be determined. This is to avoid the situation where exporters deliberately limit export of the dutiable goods for a period of time to obtain a more favourable dumping duty. Under the Amendment, review of the export price in circumstances where a good is subject to review under anti-dumping measures can be made by the Minister:

- a* where the price is being ascertained in relation to an exporter of goods; and
- b* where the Minister determines that there is insufficient or unreliable information to ascertain the price because of an absence or low volume of exports of those goods to Australia by that exporter, having regard to:
 - previous volumes of exports of those goods to Australia by that exporter;
 - patterns of trade for like goods; and
 - factors affecting patterns of trade for like goods that are not within the control of the exporter.

The Amendment also provides guidance as to how the price is to be determined by the Minister. In particular, the Minister may have regard to the following:

- a* the export price of the goods exported to Australia established in relation to a decision concerning dumping duties, countervailing duties, reviews of anti-dumping measures, anti-circumvention inquiries, acceleration review or continuation of anti-dumping measures; or
- b* the price paid for like goods sold by the exporter in arms-length transactions for exportation to an appropriate third country (a country other than Australia).

ii Anti-dumping decisions

The ADC regularly conducts dumping investigations in Australia. In April 2017, the Dumping and Subsidy Manual was updated to reflect the Commission's current practices.

The use of anti-dumping measures, including anti-dumping investigations, has been increasing over the past year. The increase has been particularly prominent in the steel sector in Australia. Several of the cases that are currently being heard by the ADC are in relation to steel and aluminium products, such as aluminium road wheels, hot rolled coil steel and hot rolled plate steel. For example, the most recent anti-dumping decision to be considered by the Federal Court of Australia was decided in November 2016 and concerned anti-dumping measures imposed on steel hollow structural sections exported from China. There is further discussion of this decision in Section V.

There has also been a significant number of anti-dumping measures taken by Australia in relation to A4 copy paper. For example, in April 2017, a dumping duty notice and a countervailing duty notice were published in respect of A4 copy paper exported to Australia from Brazil, China and Indonesia. An application was brought by Australian Paper alleging that it had suffered material injury caused by A4 copy paper being exported to Australia. The dumping margins imposed by the Minister were significant in respect of a number of exporters. For example, a 45.1 per cent dumping margin was imposed on several exporters from Indonesia. There is also a current investigation in relation to A4 copy paper exported from Austria, Finland, Korea, Russia and Slovakia. This application was also lodged by

Australian Paper, who noted in its application that sales volumes had improved during 2016 and 2017 following the investigation in relation to Brazil, China, Indonesia and Thailand. This is discussed further in Section V.

In the same light, the opposition party in Australia has stated that if it is successful in the next federal election, it intends to triple the penalties for parties who circumvent Australia's anti-dumping measures as well as increase the funding for the ADC to improve its capacity to investigate breaches.

V DISPUTES

i WTO disputes

Australia – Anti-Dumping Measures on A4 Copy Paper (DS529)

On 1 September 2017, Indonesia requested consultations with Australia regarding Australian anti-dumping measures on A4 copy paper. A panel was established, but not yet composed, on 27 April 2018. This is the first dispute brought against Australia in the field of trade defence in almost 20 years.

The dispute is especially notable as Indonesia argues that the Australian 'particular market situation' methodology is WTO-inconsistent as applied. Under this methodology, which Australia frequently applies to China, distortions in the domestic market that impact raw material costs are generally found to amount to a 'particular market situation'. Australia disregards domestic prices and costs in constructing the normal value. In constructing the normal value, Australia generally resorts to external prices for the costs it considers to be distorted.

Indonesia's claims might succeed in light of the findings of the Appellate Body in EU – Biodiesel (DS473). This could in turn result in a change to the Australian anti-dumping legislation, whereby Australia would amend or remove its 'particular market situation' methodology.

ii Anti-dumping litigation – Steelforce Trading

In 2012, the Minister published a notice that imposed a dumping duty of 13.4 per cent on the import of certain steel pipes made by Dalian, and also published a notice imposing a countervailing duty of 11.1 per cent (the countervailing duty was set aside by the Federal Court of Australia in November 2015).²³ Steelforce subsequently lodged a request for a review of the anti-dumping measures with the Commissioner of the ADC (Commissioner) in March 2015, seeking a refund of the duty it had already paid. Following the review, the Commissioner recommended that the dumping duty remain a combination of fixed and variable duties, and the fixed component of the interim dumping duty be revised to an amount equal to 17.3 per cent of the export price (the Commissioner's Report).²⁴

Steelforce Trading Pty Ltd and Dalian Steelforce Hi-Tech Co Ltd (Applicants) then sought judicial review of the Commissioner's Decision (also joining the Minister) in the Federal Court of Australia, alleging that the Commissioner had made a jurisdictional error in making his recommendation to the Minister. However, at first instance, the Court dismissed

23 *Steelforce Hi-Tech Co Ltd v Minister for Home Affairs* [2015] FCA 885.

24 *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2016] FCA 1309 at 5.

the application, and the Applicants appealed to the Full Court of the Federal Court of Australia (Full Court).²⁵ In February 2018, the Full Court upheld the Applicants' appeal and ordered that the Commissioner's Report and the recommendations contained within it be quashed, that the Parliamentary Secretary to the Minister not rely on the Commissioner's Report and recommendations, and that the matter be remitted back to the Commissioner for the 'preparation of a report according to law'.²⁶

VI OUTLOOK

The Australian political landscape in relation to trade frequently finds itself influenced by the trade policies of other jurisdictions, in particular Australia's major trading partners. The steel industry (a protected sector in both the United States and Australia) is a useful case study; the Productivity Commission's Trade and Assistance Review²⁷ estimated that the Australian sector receives over A\$1 billion in research and development, tariff, anti-dumping and direct subsidy support per year. On the whole, Australian government protectionism (measured in monetary figures) is also increasing; 2016/17 net assistance to domestic industry was valued by the Commission at A\$13.4 billion, up from A\$9.7 billion the prior year.²⁸

In April 2018, the Chairperson of the Productivity Commission heralded the positive impact trade liberalisation has on Australian GDP, but cautioned that both the Australian government and its political opposition are demonstrating an intention to increase anti-dumping and tariff assistance. The Chairperson also warned that the Opposition Government has indicated a preparedness to remove 'from the Productivity Commission the role of reviewing safeguard tariff increases, the primary mechanism under which unilateral increases in tariffs can occur and still be in compliance with our WTO commitments'.²⁹

While in some jurisdictions globalisation has been superseded by a protectionist attitude to trade, which will continue to impact the policies of successive Australian governments, the official foreign policy of the Australian government is, formally at least, pro-globalisation and anti-protectionism.³⁰ This is illustrated by Australia signing the TPP-11 agreement in March 2018.

25 *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2018] FCAFC 20.

26 *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2018] FCAFC 20.

27 Australian Government Productivity Commission, 'Trade & Assistance Review 2016–17' (2018), Annual Report Series, Canberra <https://www.pc.gov.au/research/ongoing/trade-assistance/2016-17/trade-assistance-review-2016-17.pdf>.

28 Australian Government Productivity Commission, 'Trade & Assistance Review 2016–17' (2018), Annual Report Series, Canberra, <https://www.pc.gov.au/research/ongoing/trade-assistance/2016-17/trade-assistance-review-2016-17.pdf>.

29 Harris P, 'Challenges, Threats and Opportunities for Australia International Trade', European Australian Business Council (24 April 2018), <https://www.pc.gov.au/news-media/speeches/international-trade/international-trade.pdf>.

30 Australian Government, '2017 Foreign Policy White Paper' (2017), <https://www.fpwhitepaper.gov.au/foreign-policy-white-paper>.

BRAZIL

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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). Nonetheless, in the past couple of years, Brazil has been severely affected by an economic crisis and instability. In 2016, the country's trade balance reached an unprecedented surplus of US\$47,692 billion. However, Brazil experienced a substantial decline in trade flows, as exports decreased 3.5 per cent and imports 20.1 per cent in comparison to the previous 12 months.² In 2017, exports surpassed imports by US\$67 billion. However, unlike in 2016, there was an increase in imports and exports, which indicates the return of economic growth. The World Bank's 2018 data and projections are more optimistic about the country's prospects and indicate that Brazil is slowly pulling out of recession and is expected to expand 2.4 per cent in 2018 and 2.5 per cent in 2019.³

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 365 cases from 1988 to 2017. In the same period, countervailing measures were imposed in 11 cases and safeguard measures in six.⁴

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 cases initiations, as the number of cases in 2015 decreased to 38 and in the following year to 24. As of July 2018, only nine cases have been initiated – seven new investigations and two sunset reviews.

On the international front, Brazil was a target of 39 new trade remedies in 2017, which resulted in the application of 17 trade defence measures against the country's exports in the

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2 www.mdic.gov.br/noticias/2194-balanca-bate-recorde-em-2016-com-superavit-de-us-47-7-bilhoes.

3 <http://www.worldbank.org/en/publication/global-economic-prospects>.

4 DECOM's Report, 2017: http://www.mdic.gov.br/images/REPOSITORIO/secex/decom/Relat%C3%B3rios_DECOM/Relat%C3%B3rio_2017_final.pdf.

same year. The steel industry is still one of the most affected sectors, with 12 cases 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,⁵ from 2016 to 2017 there was a significant decrease in trade facilitation measures taken by G20 countries considering the value of trade. Nonetheless, Brazil is fulfilling its WTO commitments and implementing the Trade Facilitation Agreement in order to increase transparency and efficiency of customs and other procedures related to trade.

Brazil launched the Single Window⁶ 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 include exports within the scope of suspension drawback.⁷ The country is also successfully implementing the authorised economic operators 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 simplified in order to expedite the certification process to the standard of international organisations.⁸

II LEGAL FRAMEWORK

i Anti-dumping measures

In Brazil, the imposition of anti-dumping measures is set out by Decree 8,058 of 2013,⁹ 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 Department of Trade Remedies (DECOM), part of the Secretariat of Foreign Trade (SECEX), both of which are subordinate to the Ministry of Industry, Foreign Trade and Services. The DECOM is the authority responsible for both dumping and injury examinations.

An anti-dumping investigation in Brazil starts when local producers or business associations file a written petition with the DECOM setting out evidences of dumping, injury to the domestic industry, and the causal link between the dumped imports and the alleged injury.

5 https://www.wto.org/english/news_e/news17_e/g20_wto_report_november17_e.pdf.

6 Portal Único.

7 <http://www.mdic.gov.br/index.php/noticias/3050-portal-unico-de-comercio-exterior-e-ampliado-para-novas-exportacoes-amparadas-pelo-regime-de-drawback-suspensao>.

8 <http://idg.receita.fazenda.gov.br/noticias/ascom/receita-federal-aprimora-regras-do-programa-oea>.

9 https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=119452&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

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 DECOM 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 DECOM 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 on the basis of 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 DECOM provides a preliminary determination about dumping, injury and causal link. The Department may recommend to the Brazilian Chamber of Foreign Trade (CAMEX)¹⁰, 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 CAMEX must approve 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 DECOM issues a final determination regarding the existence of dumping, injury and the causal link between them, recommending or not to CAMEX the imposition of a definitive duty. Such anti-dumping duties are not imposed

¹⁰ The Chamber is responsible for formulating and implementing foreign policies, promoting trade, investments and international competitiveness, and ultimately is responsible for imposing provisional and definitive duties in trade remedies investigations. The CAMEX is composed of a council of ministers from the following ministries: Ministry of Industry, Foreign Trade and Services, Ministry of Finance, Ministry of Planning, Ministry of Foreign Affairs, Chief of Staff Office, Ministry of Agriculture, General Secretary of the Presidency of the Republic and Ministry of Transports, Ports and Aviation. The CAMEX is under the Ministry of Industry, Foreign Trade and Services, and its president is the minister of state of the same ministry.

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 DECOM, CAMEX will hold a meeting to 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 DECOM 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 the CAMEX approve such undertaking, the investigation may be terminated or suspended with no imposition of countervailing duties.

Countervailing duties are imposed when the DECOM finds that an actionable subsidy, injury and causal link occurred; and the CAMEX accepts the DECOM'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 DECOM. 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 DECOM 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 DECOM issues a final determination recommending a safeguard or not. Then, if the CAMEX 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.

iv 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 DECOM 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 DECOM 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 most recent 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'.¹¹

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.¹² Additionally, Brazil has entered into free trade agreements, 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 Asunción, 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 undergoing the accession process. In December 2017, the Brazilian representation in the MERCOSUR Parliament approved the accession. However, the analysis of the Brazilian Congress must still take place before the process can be finalised. The trade bloc associate members are Chile (since 1996), Peru

11 Preamble of the Montevideo Treaty.

12 www.aladi.org/nsfaladi/preguntasfrecuentes.nsf/5094e65262960d6d03256ebe00601b70/5d03f704298b453e03256edf006df804?OpenDocument.

(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.¹³

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 has also signed an FTA with Egypt in 2010, and in the following year an agreement with Palestine. Both are undergoing ratification by all MERCOSUR members; Brazil ratified the first in 2015.¹⁴

New free-trade agreements were not a priority in recent years owing to the country's trade policy and lack of interest on the part of the private sector. However, since the new presidency took office, this position has changed. Brazil now intends to gain greater access to markets through trade arrangements.

Hence, concluding MERCOSUR's lengthy negotiation of an FTA with the European Union is indicated as one of the foremost objectives. The Brazilian government is looking forward to advance in this negotiation. Negotiations were paused in 2012, but were relaunched in May 2016 when both parties exchanged new offers,¹⁵ and a negotiation round was held in July 2017.¹⁶ The most recent negotiation round occurred in April 2018, and owing to difficulties in reaching an agreement on agriculture and automobiles the trade blocs have not reached a conclusion on the agreement so far. On the other hand, according to official sources, MERCOSUR and the European Union have advances on the text of customs and trade facilitation, mutual administrative assistance, financial services and capital movements and payments, goods, services and establishment, government procurement, geographical indications, trade and sustainable development and dispute settlement.¹⁷

In the same spirit, the Brazilian government recently has also been trying to reach an understanding with the United States on regulatory harmonisation. Brazilian exporters indeed face serious technical barriers to trade and phytosanitary challenges in the American

13 www.mercosur.int/innovaportal/v/7823/11/innova.front/paises-del-mercotur/.

14 www.itamaraty.gov.br/pt-BR/politica-externa/diplomacia-economica-comercial-e-financeira/695-acordos-extrarregionais-do-mercotur/.

15 <http://ec.europa.eu/trade/policy/countries-and-regions/regions/mercotur/>.

16 http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155779.pdf.

17 http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155779.pdf.

market. The first step in this direction was taken in July 2015 when the American and Brazilian trade ministers signed a memorandum of intentions on bringing their countries' respective technical norms closer.

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 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 specially 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.

In March 2018, negotiations were officially launched with Canada and the first negotiation round occurred later in the same month. In July 2018, CAMEX approved negotiations with Singapore.

IV RECENT CHANGES TO THE REGIME

Regarding trade remedy investigations, in January 2017 the DECOM publicly consulted the minutes of a decree concerning fragmented industry. The minutes established that in case of fragmented industries, deadlines to file petitions and analyse information submitted will be determined by the investigating authority on a case-by-case basis. The DECOM received suggestions from major industry associations and is currently analysing submissions to incorporate changes in the minutes. The proposition is justified, as 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. However, no changes have been made yet.

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 DECOM received several suggestions from industry associations, as well as from a lawyers' association and a consulting firm. However, all the comments and suggestions are still being studied by the DECOM and CAMEX, and no changes have been made yet.

The same change is expected in the safeguards decree. In December 2017, the Brazilian government initiated a public consultation of a decree draft on safeguards. The purpose is to improve the proceedings, similar to those recently implemented in the anti-dumping decree, with more expedite proceedings and clearer norms. The main associations that use trade remedies presented their views.

As part of the trade remedies' modernisation, the subsidies and safeguard proceedings became electronic from June 2018.

Additionally, the Superior Justice Court, by the Federal Jurisdiction Council, formally recommended that federal courts should have specialist competition and international trade law judges.¹⁸ It is allowed that trade remedies measures are challenged at judicial levels; however, these are usually challenged at an administrative level.

18 http://imprensanacional.gov.br/material/-/asset_publisher/Kujrw0TZC2Mb/content/id/19111746/do1-2017-06-12-resolucao-n-445-de-7-de-junho-de-2017-19111694.

V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

In 2016, Brazil initiated its first double remedies (anti-dumping and subsidies) investigations on Chinese exports (hot-rolled steel). The investigations are a milestone in Brazil's trade defence system.

In February 2012, through CAMEX Resolution 13 of 2012 and Resolution 29 of 2015, the Brazilian government established and regulated the Technical Group of Public Interest (GTIP) to analyse the suspension or amendment of anti-dumping and countervailing measures, as well as non-application of provisional measures, for public interest reasons. According to Brazilian trade defence regulation, public interest may be applied by CAMEX only under special circumstances.

According to these resolutions, the GTIP's role is to analyse, in an independent procedure, the public interest when imposition of a trade remedy is perceived to cause more injury than benefits. In its analysis, the GTIP assesses the impacts of the duty in the chain of production, availability of like products from other countries, market structure, competition between players and its adequacy with public policies, among other factors. However, the GTIP does not analyse dumping or actionable subsidies and injury from such practices, or any matter for which the DECOM or the SECEX are responsible.

In April 2017, CAMEX Resolution 29 made significant changes to the GTIP. The Resolution brought two major changes to the previous legislation. First, the public interest procedure does not prejudice the possibility that CAMEX decides based on public interest according to a proposal presented by one of its members. Second, the GTIP will examine each recommendation of extension of duties owing to sunset reviews to determine whether there are grounds to start a public interest procedure.

A procedure starts when a request is filed with the Secretariat of Foreign Affairs (SAIN), within the Ministry of Finance. After filing, the GTIP examines the documents and may request supplemental information, if needed. Then, the GTIP submits to the Executive Management Committee (GECEX) of CAMEX its recommendation to start or not a procedure of public interest. Once the procedure is accepted, a notification is made public.

During the procedure, the GTIP may conduct an on-the-spot investigation if it finds it necessary to verify the information submitted by the parties. In case a party does not comply with the GTIP's request for the on-the-spot investigation, the best information available may be used instead. The new resolution provides that in case of any requests or challenges during the procedure, the GTIP's secretariat is responsible for deciding on the matters.

Finally, the new resolution provides that, once the procedure is finished, the GTIP will hold a meeting with all interested parties before presenting its conclusions. Attendance at that meeting is not mandatory and will not prejudice any party. In addition, the ministries may provide arguments before the meeting. After the meeting, the GTIP will present its conclusions to CAMEX. In case the GTIP starts its procedure during an ongoing investigation, its conclusions should not be presented to CAMEX before the final determination for the imposition of anti-dumping or countervailing duties are considered by the bodies.

VI TRADE DISPUTES

Regarding WTO dispute settlement, Brazil is involved in several cases, as either complainant or respondent. The country is currently defending certain measures concerning taxation and charges in the automotive, electronics and technology industries in Geneva, and other measures that potentially affect all of its exporters. 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). As the cases discuss the same matter, the panel issued a joint final report. In September 2017, the Brazilian government appealed the panel decision.

In 2014, Brazil requested consultations with Indonesia regarding measures imposed to restrict the importation of chicken meat and its products (DS484). Brazilian chicken meat exports face a variety of barriers in Indonesia owing to restrictive rules and procedures, such as non-approval of health certificates, quarantine and the need for approval by multiple agencies, among others. One year later, Brazil requested the establishment of a panel, which was composed in 2016. The panel's final report was circulated in October 2017, with a recommendation that Indonesia bring into conformity the restrictive measures.

A similar case was started in 2016, after Brazil requested consultations with Indonesia in relation to measures that restricted importation of bovine meat (DS506). According to the request, Indonesia restricts the importation of meat through:

- a* a lack of harmonised system codes that do not include codes for bovine products;
- b* import quotas and discriminatory assignment of these;
- c* sanitary measures that are not followed internationally; and
- d* non-transparent and restrictive import licensing requirements.

The case is in consultation and the European Union, Australia, New Zealand and Chinese Taipei requested to join it.

In 2016, Brazil also requested consultations with the United States regarding the imposition of countervailing measures on imports of cold and hot-rolled steel flat products from Brazil and some aspects of the investigation conducted by American authorities (DS514). The request states that the investigation, initiated by the United States, did not have sufficient evidence and based on inaccurate data concerning the regimes, as well as refusing to terminate the investigation and accept relevant information. Investigation documents are unclear about whether the final determination was based on positive evidence or an objective examination of the facts, and duties were calculated in excess. The case is still under consultation.

That same year, Brazil requested consultations with Thailand concerning subsidies provided by the country to the sugar sector (DS507). The case questions the sugar regime that controls every aspect of the sector in Thailand, from production to storage, transport and sales operations (including import and export). The case is still under consultation, and both the European Union and Guatemala requested to join it.

Finally, 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 the United States, the European Union and Japan.

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

Recently, the CAMEX approved a study concerning the possibility of initiating a consultation with regard to newly imposed safeguard measures against sugar and the dumping of Brazilian poultry.

VII OUTLOOK

The Brazilian economy gradually recovered in 2017, with growth for both imports and exports. The European Union, the United States, China and Argentina remain Brazil's main partners in bilateral trade flows source of imports. Brazil is expected to remain a major player in the global trade of certain agricultural commodities; however, the manufacturing sector expects to stop its continuous decline in percentage of the country's GDP.

The manufacturing industrial sector expects to continue facing 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 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.

The trade flow growth accompanied by unfair trade may lead to a new increase in the initiation of remedies compared to the relatively slow trend started in the middle of 2016. In that case, four factors may help to create an environment that ensures trade remedies continue to play an important role in the Brazilian trade policy strategy. The first is the aggressive export policy adopted by third countries. The second is the increasing number of trade remedies users in Brazil. The third is the recent amendments and improvement in the regulations, specially the anti-dumping, and the upcoming changes in the subsidies/countervailing measure regulations. Finally, Brazil's experience in the field, with several trade remedies investigations being carried out by the authorities in the past five years, placed the country as a significant user of trade remedies globally.

China's market economy status is still a major uncertainty in the trade defence area in Brazil. Similar to other countries, Brazil currently does not recognise China as a market economy. After the expiration of the provision set forth in the 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. In 2018, one sunset review and two new original cases were initiated against China. However, there have been no discussions on market economy status so far.

CHILE

*Ignacio García and Andrés Sotomayor*¹

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.

Currently, for example, in Chile the National Commission in Charge of Investigating the Existence of Price Distortions on Imported Goods (the Commission) is conducting three ongoing investigations (for eventual dumping of imports of steel bars from Mexico; for eventual dumping of imports of steel grinding bars of diameter less than 4 inches, from China; and a safeguard investigation for powdered milk and Gouda cheese). On the other hand, in an investigation of the Commission over steel bars for grinding from China, the authority decided to apply anti-dumping duties ranging between 8.2 per cent and 22.9 per cent depending on the exporter. The measure will expire on 21 November 2018.

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

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

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* 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) in order 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 in order 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.

In addition, the main Chilean legislation includes Law No. 18,525 on Importation of Goods enacted in 1986, and its subsequent amendments of 1999, 2001, 2003 and 2011.

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 25 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 (which has been recently approved by Congress) 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, Canada, Thailand, China and Mexico, among others. Finally, there are strategic association agreements in which other matters are included besides trade, such as social and technological cooperation, and this is the case for the agreements with the European Union and Japan.

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 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:

- a* Centro América (Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua);
- b* EFTA (Iceland, Liechtenstein, Norway and Switzerland);
- c* MERCOSUR (Argentina, Brazil, Paraguay, Uruguay and Venezuela);
- d* P4 (Brunei Darussalam, New Zealand and Singapore);
- e* 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, Sweden and the United Kingdom); and
- f* 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 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

2 DS2017, *Price Band System and Safeguard Measures Relating to Certain Agricultural Products*.

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 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 XVI:4 was not necessary. The Appellate Body upheld the finding of the Panel.

VII OUTLOOK

Chile recently 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 from 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, 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.

CHINA

David Tang, Yong Zhou and Jin Wang¹

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 2018, China has initiated 105 anti-dumping investigations, 10 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 will conduct 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 2018, 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.² 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 and sorghum 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. 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,

2 The interim review of pyridine produced by Jubilant Life Sciences Limited in India was requested by both the Chinese domestic industry and Jubilant Life Sciences Limited.

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.

iv DDGS and sorghum 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.

v **Sunset or not?**

According to the WTO Antidumping 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 Antidumping 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 intent and spirit 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

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.

system. Therefore, 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). FANs further explained that:

[T]he 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

China was always an active supporter of this proposal.

The Doha round negotiations had come to a deadlock. China's position on the sunset issue appears to be changing too. On 28 September 2014, MOFCOM initiated the second sunset review of the anti-dumping measures on the imported PVC originated from the US, Korea, Japan and Russia. 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 two second sunset reviews respectively.

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

vi 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 the (1) Rules on Interim Review of Dumping and Dumping Margins, (2) Rules on Hearing for Anti-dumping and Anti-subsidy Investigations, and (3) 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/exporters with zero dumping margin.

⁵ See TN/RL/GEN/74, dated 17 October 2005.

Evidence of the standing for the petitioners in the original investigation is no longer required

An interesting question would be whether the petitioners in the original investigation can ask for an interim review of certain producers/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 also will continue in the future.

This amendment may inevitably make it more difficult for foreign producers/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, to review such zero margin exporters/producers, it 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, no public information shows that such case has ever been brought.

In contrast, other WTO members, including the EU, the US, Japan and Canada, have brought eight cases concerning Chinese trade remedy measures before the Dispute Settlement Body (DSB) as of June 2018: DS407: *China – Provisional Anti-Dumping Duties on Certain Iron and Steel Fasteners from the European Union*; DS414: *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States*; DS425: *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*; DS427: *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*; DS440: *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*; DS454: *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (HP-SSST) from Japan*; DS460: *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (HP-SSST) from the European Union*; and DS483: *China – Anti-Dumping Measures on Imports of Cellulose Pulp from Canada*.

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 be inconsistent with WTO rules, MOFCOM will reinvestigate the relevant case and issue new determinations.

Decisions of the WTO Panels and the Appellate Body have brought 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/exporter may have found the simple and short disclosures of MOFCOM made it quite difficult to understand MOFCOM's calculation of a specific dumping margin. In recent investigations, MOFCOM has provided detailed information to foreign producers/exporters about the calculation of the dumping margins. MOFCOM 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. To a large extent, the tide receded in the first half of 2018. MOFCOM initiated three new anti-dumping investigations and one new anti-subsidy investigation in the first six months of 2018.

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 EU concerning certain provisions of US laws and of EU regulations pertaining to the determination of normal value for 'non-market economy' countries in anti-dumping proceedings involving products from China.⁶ In the foreseeable near future, the 'non-market economy' will be the predominant issue in trade remedy cases involving China. If the DSB makes decisions favourable for China but the United States or EU fails to follow the DSB's decisions, it is reasonably anticipated that China's reaction would be strong (such as initiating more trade cases) to gain more bargaining power.

China has initiated 10 anti-subsidy investigations as of June 2018. The first anti-subsidy investigation was in 2009 concerning grain oriented flat rolled electrical steel from the US. The first eight anti-subsidy investigations were all targeted against the United States (five cases) and 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 February 2018, MOFCOM initiated the anti-subsidy investigation against the US sorghum, which is sixth to the US and tenth in total. 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 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.

⁶ DS515: *United States – Measures Related to Price Comparison Methodologies*; DS516: *European Union – Measures Related to Price Comparison Methodologies*.

EURASIAN ECONOMIC UNION

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I OVERVIEW OF TRADE REMEDIES

The Eurasian Economic Union (EAEU), being a big common market with population of about 183 million people (about 2.5 per cent of the world population), and having a share of about 3 per cent of the world gross product, is an active user of trade defence instruments (TDIs) and is often affected by the trade-restrictive measures of other countries.

As was outlined in the third edition of *The International Trade Law Review*, trade defence investigations are handled by the Department for Internal Market Defence (the Department) of the Eurasian Economic Commission (EAEC).

Currently, there are eight ongoing anti-dumping investigations. As in the past, the main country-targets of the investigations are China and Ukraine. During the past nine months, three investigation processes (*ADs-24–26*) have been started and five were launched for interim review. In the same period, five investigations were finished. All cases finished with the imposition of anti-dumping duties.

For instance, *AD-22 Steel Angles* from Ukraine was settled on 4 October 2017. The Department established that goods (steel angles) were supplied in the territory of EAEU from Ukraine at a dumped price. It was the gradual increase in imports from 2015 to 2016 that led to a significant increase of such goods' market share (7 per cent per year), with a general reduction of Ukrainian imports (10.5 per cent per year).²

Additionally, there has been a substantial decrease in production of goods on EAEU territory. It is important to stress that the comparison of average prices for a similar product between EAEU's internal market and imported goods is very different. For the period from 2013 to 2015, weighted average prices decreased as follows: the import price of the product by 38.8 per cent, and the price on the EAEU market by 34.9 per cent. The main price reduction was in 2015 against an increase in dumped imports.³

However, such a comparison of prices does not confirm their influence on the internal market. Compared with similar Case *AD-13*, the Department might erroneously conclude that there is material injury to the EAEU sector owing to dumped imports. So, the difference between the two average prices is insignificant, while there were ignored global economic factors that accompanied the EAEU's economy in 2015–2016.

Quite specific is the similar investigation process in *AD-23*, completed on 31 May 2018, where the Department suggested imposing anti-dumping duties on herbicides from the EU.

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2 http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD22_report_dated_031017.pdf.

3 Ibid.

Distinctive factors in these cases are a slight difference in the average price and insufficient studying of other factors. Thus, in its conclusions, the Department states that only goods from the EU have negative effects on the internal market. At the same time, without sufficient grounds, China's goods were deleted from this list.⁴

Among the listed active eight anti-dumping investigations conducted by EAEC, three of them are new non-interim investigations initiated in the first half of 2018.

The first investigation was initiated on 2 March 2018 against imports of cast aluminium wheels (Goods), originating in China, into the EAEU territory (*AD-24*). According to the application by the EAEU manufacturers, the dumping margin for the second half of 2016 to the first half of 2017 was 126 per cent. Justifying the existence of harm caused by dumped imports, the EAEU producers argued that the import of Goods from China hindered the growth of prices for a similar product on the market of the Union, and dumped imports led to a decrease in commodity prices in the Union market. Applications also provided data showing that during the investigation period the import prices from China were significantly lower than the prices for the Goods produced by the EAEU manufacturers – on average by 21 per cent. Because of the price policy of Chinese suppliers, the EAEU enterprises suffered losses from the sale of Goods in the market of the Union and had a negative profitability of production and sales of Goods on the market of the Union. At the same time, there were trends to increase the volumes of production and the degree of capacity utilisation. However, the EAEU producers associate this with a significant increase in exports, which, according to the applicants, was caused by the negative impact of the supply of cheap Chinese Goods to the EAEU domestic market.⁵

The second anti-dumping investigation was initiated on 26 March 2018 against imports of optical fibre for optical communication cables into the EAEU territory originating from the United States and Japan (*AD-25*). According to the application submitted by the producer of the EAEU, the dumping margin for the first nine months of 2017 was 38.87 per cent for the United States and 42.6 per cent for Japan. This case is interesting because the EAEU branch is represented by the only existing enterprise that is at the stage of creation. The enterprise's activity began with the creation of a new branch of the Union's economy, rather than a new product line in the already existing enterprise. The share of imported goods in the consumption of the EAEU before the enterprise's entrance to the market of the Union was 100 per cent (for nine months of 2017, the share of imported goods slightly decreased to 98.9 per cent owing to the start of sales of the new enterprise). Substantial investments were made in the creation of the new enterprise and there are further investment plans for the near future. The application alleges that the prices of dumping imports from the United States and Japan during the investigation period were significantly lower than the prices of commercial sales of goods by the EAEU enterprise (an underpricing of about 30 per cent for the nine months of 2017). The prices of sales by the enterprise of the EAEU for some types of goods in general reflect the prices for optical fibre existing in the markets of third countries, while the prices of goods from the United States and Japan in the market of the Union were lower than those of the markets of third countries. Despite the fact that, during the period of nine

4 http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD23_report_dated_29052018.pdf.

5 http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD24_notice_initiation.pdf.

months of 2017, the EAEU increased the volume of production and the degree of capacity utilisation, it still had negative rates of profitability and sales and was forced to make the majority of sales abroad, while initially it was oriented to the internal market of the Union.⁶

The third, most recent, anti-dumping investigation was initiated on 29 June 2018 against imports of galvanised steel into the EAEU territory originating from China and Ukraine (*AD-26*). According to the application submitted by the EAEU producers, the dumping margin for 2017 was 16.4 per cent for China and 25.6 per cent for Ukraine. As indicated in the submitted application, in a situation of a consumption volumes reduction of the goods during the analysed period, there was a significant increase in the volume of dumped imports from China and Ukraine (13.1 per cent). At the same time, sales of the EAEU enterprises slightly increased – by 2.8 per cent. In addition, the share of imports from China and Ukraine in the total volume of imports of goods into the EAEU territory increased by 9.2 per cent (to 71.3 per cent). In 2017, the price of dumped imports in rubles fell by 1.2 per cent, while the price of goods of the EAEU enterprises increased by 6.5 per cent. This increase in prices occurred against an increase in the cost of goods by 15.2 per cent. Thus, goods from China and Ukraine prevented the growth of prices for a similar product in the Union market. Such trends led to the fact that in 2017, the price of dumped imports for the first time in the analysed period was lower than the price of the product of the EAEU producers. The price reduction for this period was 6.8 per cent. Further, the complainants state that in 2017 the sales volume of the EAEU enterprises fell by 1.3 per cent, while inventories at the end of the period increased by 6.7 per cent. Taking into account all mentioned factors, the EAEU enterprises were forced to restrain prices to the detriment of their financial performance, which led to a decrease in profit and profitability.⁷

II LEGAL FRAMEWORK

As was indicated in the third edition of *The International Trade Law Review* the Protocol on the imposition of safeguards, anti-dumping and countervailing measures in respect of third countries to the Treaty on the EAEU governing the TDIs is fairly recent (starting 1 January 2015). The Protocol covers all three types of trade remedies proceedings and largely follows the provisions and the structure of the respective WTO Agreements.⁸

Therefore, there have been no changes to the current EAEU trade defence regime during the past year or earlier. However, this may change in the future as the EAEC is currently working on drafting amendments and alterations to the Protocol. Aside for procedural changes, the need for change has been triggered by changes in the European trade defence regime that took place earlier this year.

In particular, the EAEC and the business community are actively discussing the issue of changes in the anti-dumping and countervailing legislation of the EU. The essence of those changes is that, while conducting anti-dumping investigations, the European Commission will have the right to determine the existence of ‘distorting effects’ in the exporting country’s

6 http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD25_notice_initiation.pdf.

7 http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD26_notice_initiation.pdf.

8 <https://thelawreviews.co.uk/edition/the-international-trade-law-review-edition-3/1148534/eurasian-economic-union>.

market. As a result, the Commission will be able to ignore the data provided by the producers of such countries and use other sources of information, for example, to choose for dumping calculations 'surrogate countries'. As a rule, such actions would lead to a significant increase in dumping margins and anti-dumping duties.

In this regard, the representatives of the EAEC note the need to continue working on changes to the legislation of the Union regarding the application of protective measures that will similarly affect the European market, and also suggest conducting negotiations 'at all levels' of the EAEC on changes in European legislation.⁹

III RECENT CHANGES TO THE REGIME

EAEU Member States and governing bodies are actively negotiating free-trade regimes with the third parties. Currently, the EAEU conducts negotiations on the conditions and future terms of free trade agreements (FTAs) with such countries as Egypt, India, Indonesia, Israel, Mongolia, Serbia, Singapore and Thailand.

As of today, except for an FTA signed on 29 May 2015 with Vietnam, the EAEU has recently signed two new agreements – the agreement on economic and trade cooperation between the EAEU and China signed on 17 May 2018, and the interim agreement leading to formation of a free-trade area between the EAEU and Iran signed on 17 May 2018. Both agreements have chapters related to application of trade remedy instruments.

i Agreement on economic and trade cooperation between the EAEU and China

The issue of trade remedies application between the parties is regulated by Chapter 3 of the Agreement: 'Trade remedies'. The very first Article of this Chapter of the Agreement states that the parties shall apply anti-dumping, countervailing and safeguard measures in accordance with the provisions of Article VI and Article XIX of GATT 1994, the Anti-Dumping Agreement, the SCM Agreement and the Agreement on Safeguards, respectively.¹⁰ There are no other specific provisions on how TDIs should be applied.

Parties attribute an important role to information exchange as a primary form of dialogue on TDI application issues. According to Article 3.4 of the Agreement, each party may request the other party in writing to provide information on any issue covered by this Chapter. The parties shall endeavour to provide the requested information in writing within a reasonable period of time, but not exceeding 30 days, upon receipt of the request. However, the provision of the requested information shall not prevent the parties from initiating an anti-dumping, countervailing duty or safeguard investigation and shall not impede such investigation.¹¹

9 http://www.eurasiancommission.org/ru/act/trade/catr/interaction/business_dialogue/Pages/default.aspx.

10 http://www.eurasiancommission.org/ru/act/trade/dotp/sogl_torg/Documents/%D0%A1%D0%BE%D0%B3%D0%BB%D0%B0%D1%88%D0%B5%D0%BD%D0%B8%D0%B5%20%D1%81%20%D0%9A%D0%B8%D1%82%D0%B0%D0%B5%D0%BC/%D0%A2%D0%B5%D0%BA%D1%81%D1%82%20%D0%B0%D0%BD%D0%B3%D0%B8%D0%B9%D1%81%D0%BA%D0%B8%D0%B9%20%28EAEU%20alternate%29%20final.pdf.

11 Ibid.

ii Interim Agreement leading to formation of a free trade area between the EAEU and Iran

The Agreement stipulates that the parties shall conclude an FTA no later than three years from the date of entry into force of this Agreement.

Unlike the agreement with China, Chapter 3 ('Trade remedies') contains 19 pages of detailed guidelines for the parties on which TDIs to use and how to use them. There are no any provisions setting priority of the WTO rules and agreements for the parties. Conversely, the Interim Agreement provides that each party shall apply safeguard measures in accordance with its legislation.

Except for the main two instruments – anti-dumping and countervailing duties –two additional instruments are provided to the parties. These are global safeguard measures (GSM) and bilateral safeguard measures (BSM) introduced in the Articles 3.3 and 3.4 respectively. BSM is a measure imposed by a party on imports of a product originating in another party in order to prevent or remedy serious injury to a domestic industry or threat thereof caused by increased imports of that product as a result of the reduction or elimination of a customs duty under this Agreement.¹² Application of a BSM is a temporary measure for the transition period. The state intending to apply a BSM shall promptly, and in any case before applying a measure, notify the other party and the Joint Committee.¹³ The importing state may apply a bilateral safeguard measure in the form of:

- a* suspension of further reduction of any applicable rate of customs duty provided for in this Agreement for the goods concerned; and
- b* increase of the applicable rate of customs duty for the goods concerned to a necessary level not exceeding the base rate.¹⁴

The state that applies BSM shall offer a compensation measure or trade liberalisation for other goods.

Article 3.5 stipulates that for the purposes of conducting anti-dumping and countervailing investigations and subsequent proceedings Iran shall consider the EAEU Member States individually and not as the EAEU as a whole, and shall not apply anti-dumping and countervailing measures with respect to imports originating in the EAEU as a whole. If there are subsidies available at the level of the EAEU for all EAEU Member States, Iran may consider the EAEU as a whole.

IV SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

Regarding the changes in the enforcement practice of the EAEC Department for Internal Market Defense in recent years, it should be noted that the standard of proving injury to the domestic industry has generally increased. The requirements to the level of economic arguments of the parties have raised, and the requirements for the provided documents have become tougher.

It is possible to distinguish procedural and substantive factors, which significantly complicates investigations for participating parties.

12 http://www.eurasiancommission.org/ru/act/trade/dotp/sogl_torg/Documents/Interim%20Agreement%20EAEU-Iran_final.pdf.

13 Ibid.

14 Ibid.

Recently, the procedure for conducting verification visits has become longer and more difficult. In accordance with the new standard for conducting verification visits, the inspection team has increased quantitatively, inspections are conducted for at least a week and the depth of analysis of the documents of the inspected enterprises has significantly increased.

During the investigation, particular attention is paid to the potential impact of restrictive measures on competition. Bodies responsible for competition protection in the markets are now more actively participating in trade investigations. This applies both to the Department of Antimonopoly Regulation of the EAEC and to the Federal Antimonopoly Service of Russia. The latter even developed a special questionnaire for enterprises participating in the investigation, which allows for an economic analysis of the impact of potential duty on market competition, analysis of market structure, barriers to entry and market power analysis before and after applying the restrictive measure.

In particular, in the anti-dumping investigation against the import of railway steel wheels from Ukraine (*AD-19* and *AD-19-R1*) on the territory of the EAEU, special attention was paid to the issue of competition. Given that, according to Paragraph 221 of the Protocol, the situation of applicant enterprises could be recognised as dominant, the Department requested a competition impact assessment of a possible anti-dumping duty on the relevant market of the Union. The EAEC Department of Antimonopoly Regulation provided its assessment to the Department. Later, during the anti-dumping review investigation, which ended on 7 March 2018 with an increase in duties from 4.75 per cent to 34.22 per cent, the possibility of monopolising the market by reducing the number of suppliers and raising prices for final consumers of the market was examined. When doing so, the Department analysed the workload of existing and potential capacities of market participants, their investment plans to expand production and other economic factors affecting the possibility of price increases after the introduction of the measure.

In general, the application of restrictive measures and protection from their application have become more complicated for the parties involved, which requires better economic expertise.

V TRADE DISPUTES

i WTO dispute settlement

Among the current five country-members of the EAEU, Russia remains the most active user of the WTO dispute settlement system.

As of the middle of July 2018, Russia has acted as a complainant in seven WTO cases: four of them against the EU, two against Ukraine and one very recent case against the United States. Three of these disputes (two against the EU and one against Ukraine) are concerned with the cost adjustment methodology in anti-dumping cases where the costs of gas in Russia for the purpose of the calculation of the normal value were substituted with international prices (*DS474*, *DS494* and *DS493*), which would have far-reaching implications for anti-dumping investigations against countries in which the state regulates pricing in particular areas. Since then, we have some unconfirmed but highly likely information on the outcome of only one case – against Ukraine (*DS493 – Anti-dumping measures on ammonium nitrate*). On 24 January 2018, the chair of the panel informed the Dispute Settlement Body (DSB) that

the panel expected to issue its final report to the parties by June 2018, but as of middle of July there is still no public panel report available. However, according to undisclosed sources in the Ukrainian government, the panels' decision was in favour of Russia.¹⁵

The most recent WTO case Russia is involved in is *DS554 – United States – Certain Measures on Steel and Aluminium Products*.

On 2 July 2018, Russia requested WTO dispute consultations with the United States concerning the measures that the United States introduced to adjust imports of steel and aluminium into the United States, including imposing additional *ad valorem* import duties of 25 per cent on steel and 10 per cent on aluminium.¹⁶ According to the request, Russia claims that the measures at issue appear to be inconsistent with the obligations of the United States under the covered agreements; namely, a number of provisions of GATT 1994, and 11 articles of agreement on safeguards.¹⁷

On 10 July 2018, the United States accepted the request of Russia to enter into consultations while stating that this issue should not be susceptible to review or capable of resolution by WTO dispute settlement as the import tariffs were applied to adjust the imports of steel and aluminium articles that threaten to impair the national security of the United States, and therefore it is more a political matter that must not be within the mandate of the WTO.

Further on, the United States mentioned that the tariffs imposed pursuant to Section 232 are not safeguard measures but rather tariffs on imports of steel and aluminium articles that threaten to impair the national security of the United States:

*The United States did not take action pursuant Section 201 of the Trade Act of 1974, which is the law under which the United States imposes safeguard measures. Therefore, there is no basis to consult pursuant to the Agreement on Safeguards with respect to tariffs imposed under Section 232.*¹⁸

As a respondent, Russia is acting in eight WTO cases: four against the European Union, three against Ukraine and one case against Japan.

Unfortunately, since the Appellate Body (AB) report of more than one year ago, only procedural changes have happened in *DS475 Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*. However, on 8 December 2017, Russia informed the DSB that it had taken the appropriate steps to comply with the DSB's recommendations and rulings within the reasonable period.

After this notification, the EU doubted that Russia had fulfilled its obligation and requested the authorisation to suspend concessions or other obligations pursuant to Article 22.2 of the Dispute Settlement Understanding (DSU). The EU suggested that Russia had failed to conclude a sequencing agreement with the EU.¹⁰

The EU's authorities stated that Russia's measures appear to adversely affect exports to Russia of the products at issue originating in the EU and its Member States, and also appear to nullify or impair the benefits accruing to the EU and its Member States directly or

15 <https://www.eurointegration.com.ua/news/2018/05/18/7081881/>.

16 https://www.wto.org/english/news_e/news18_e/ds554rfc_02jul18_e.htm.

17 [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%20@Symbol=%20\(wt/ds554/1%20\)\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20@Symbol=%20(wt/ds554/1%20))&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#).

18 [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(@Symbol= per cent20wt/ds554/*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol= per cent20wt/ds554/*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#).

indirectly under the cited agreements. On 25 January 2018, Russia requested consultations with the EU pursuant to Article 21.5 of the DSU with respect to certain measures taken by Russia to comply with the DSB's recommendations and rulings in this dispute. In February 2018, the EU informed Russia that it agrees to enter into consultations with Russia.

On 28 March 2018, the AB settled *DS479 – Russia – Anti-dumping duties on light commercial vehicles from Germany and Italy*, where Russia appeared as a respondent. The AB established that Article 3.1 of the Anti-Dumping Agreement does not allow investigating authorities to leave domestic producers of the like product out of the definition of domestic industry because of alleged deficiencies in the information submitted by those producers. Thus, the issue about the confidentiality of some producer's information has arisen.

It should be highlighted, that knowledge of the data itself may not be sufficient to enable an interested party to properly defend itself unless that party is also informed of the source of such data and how it was used by the investigating authority. In particular, knowing the source of information may enable a party to comment on the accuracy or reliability of the relevant information and allow it to propose alternative sources of that information. This may be particularly important in the circumstances where the investigating authority uses data that was not submitted by an interested party but obtained from other sources.

Moreover, the AB stipulated, regarding Russia's appeal under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, the fact that several factors or elements could potentially influence the rate of return used to construct the target domestic price does not allow an investigating authority to disregard evidence regarding any particular factor or element that calls into question the explanatory force of dumped imports for significant price suppression under Article 3.2 of the Anti-Dumping Agreement. Article 3.5 focuses on the causal relationship between dumped imports and injury to the domestic industry. In contrast, the analysis under Article 3.2 focuses on the relationship between dumped imports and domestic prices.⁷

The AB concentrated on the correlation between Articles 3.5 and 3.2 of the Anti-Dumping Agreement, on the basis that the following conclusions can be established. When considering the effect of dumped imports on the domestic market, all factors must be taken into account. At the same time, the causal relationship between the price and volumes of the dumped imports and the negative impact on the market should be investigated and proven with particular care. Separately, the relevant authorities are entrusted with the burden of a comprehensive study of all factors that affect the state of the market. Such a decision is important, including in the light of the above-mentioned EAEU case *AD-13*. The AB found Russia's actions to be inconsistent with the Anti-Dumping Agreement and the GATT 1994, and advised the modification of such actions in accordance with above-mentioned documents.

On 20 June 2018, Russia informed the DSB that, following the expiration of the measures at issue, Russia had fully implemented the DSB's recommendations and rulings in this dispute.¹⁹

In Case *DS499 - Russia — Measures affecting the importation of railway equipment and parts thereof*, initiated by Ukraine in October 2015, the chair of the panel informed the DSB on 24 April 2018 that, owing to the complex procedural and factual nature of the dispute, and after consultations with the parties, the panel expected to issue its final report to the parties in May 2018. However, there is still no report made publicly available as of mid-July 2018.

19 https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds479_e.htm.

iDS532 – Russian measures concerning the Importation and transit of certain Ukrainian products

On 13 October 2017, Ukraine requested consultations with the Russian Federation with respect to measures concerning trade of juice products, beer, beer-based beverages and other alcoholic beverages, confectionary products, wallpaper and similar wall coverings from Ukraine claiming, among other measures, import and third-countries transit ban. This is the second request by Ukraine with Russia for consultations concerning measures that concern the transit of products. In its consultations request, Ukraine asserts that these measures apply separately and in addition to those previously challenged under *DS512, Russia – Traffic in Transit*.

Ukraine claimed that the measures appear to be inconsistent with a number of provisions of GATT 1994, Trade Facilitation Agreement, TBT Agreement, SPS Agreement and Russia's Accession Protocol commitments.²⁰ As of mid-July 2018, the panel is neither established nor composed.

At the end of 2017, Kazakhstan became the second EAEU country involved in a WTO trade dispute as a respondent for the first time after 30 November 2015, when the country became a WTO member.

DS530 – Kazakhstan – anti-dumping measures on steel pipes

On 19 September 2017, Ukraine requested consultations with Kazakhstan with respect to anti-dumping measures applied to certain types of steel pipes on the customs territory of Kazakhstan. In particular, Ukraine claimed that the measures appear to be inconsistent with a number of articles of the Anti-Dumping Agreement and Article VI of GATT 1994. Namely, Ukraine considers that the findings of the EAEC in the report, followed by Decision No. 48 of 2 June 2016, are erroneous and based on deficient rulings, procedures and provisions pertaining to the Anti-Dumping Agreement.

Ukraine's main claims refer to the argument that the Commission's determination that expiry of the measure is likely to lead to a continuation of dumping and injury was made in violation of the Anti-Dumping Agreement provisions because:

- a* the investigating authority failed to assess relevant economic factors and indices when conducting examination of likelihood of continuation or recurrence of dumping and injury;
- b* the investigating authority failed to grant to certain Ukrainian producers a full opportunity to defend their interests. For instance, the investigating authority failed to provide to exporters the reasons for non-acceptance of the undertaking from Ukrainian producers and to give Ukrainian exporters an opportunity to make comments thereon; and
- c* measures were extended, although positive evidence of such necessity was not provided.²¹

On 6 October 2017, Russia requested to join the consultations. Subsequently, Kazakhstan informed the DSB that it had accepted Russia's request to join the consultations. However,

20 https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds532_e.htm.

21 [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%40Symbol%3d+wt%2fds530%2f*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%40Symbol%3d+wt%2fds530%2f*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true).

on 19 October 2017, Ukraine informed the DSB of certain concerns regarding Russia's request to join consultations, which was submitted beyond the 10-day deadline provided in Article 4.11.²² This case still did not move to the next stage as of the middle of July 2018. The parties are in the process of consultations on further proceedings.

It is important to note that some Member States are in a state of economic and financial recession, which also affects the vulnerability of their domestic markets. Unfortunately, as already noted, some members selectively use TDI regarding imported goods and do not always study all of the factors during their investigations.

VII OUTLOOK

As can be seen from this brief description of TDIs and disputes for the period of approximately one year, the trend of international trade tensions and raise of protectionism is on the move, and past events allow for the conclusion that this trend will not change in the coming future. The trading block of the EAEU, as well as other major participants in world trade, will probably continue to actively apply different types of trade-restrictive measures, including trade remedies, particularly when the United States, EU and China are actively raising the barriers to imports from other countries (although the validity of such measures remains a big question).

EAEU exports to the neighbouring countries will possibly suffer from new trade defence measures, taking into account the EU's changes to TDI regulations enacted in May 2018 and Ukraine's new versions of the laws on TDIs currently waiting in parliament for approval.

The EU's regulation changes will allow trade remedies to be more efficiently applied on imports from all countries of the world, and not only from China, against which the lion's share of the EU trade restrictive measures is applied. In addition to the report on China, which has already been published and is the basis for taking protective measures, a similar report on Russia is being prepared, which will also serve as an occasion for protecting the European market from Russian imports.

Another threat to the global trade flows, including from the EAEU, is the efficiency or rather threatening inefficiency of the WTO dispute settlement mechanism (DSM). If the problematic situation with the appointment of Appellate body members is not resolved in the near future, this may lead to a drop in efficiency of DSM application for WTO members, therefore become a stimulus for unscrupulous parties to brake the trade rules with impunity for themselves.

This is probably one of the reasons why China and the EU jointly announced on 16 July 2018 the establishment of a working group on WTO reforms.²³ At a meeting with Chinese Premier Li Keqiang, European Council President Donald Tusk stated:

It is the common duty of Europe and China, but also America and Russia, not to destroy this order but to improve it, not to start trade wars, which turned into hot conflicts so often in our history, but to bravely and responsibly reform the rules based international order.²⁴

22 https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds530_e.htm.

23 <https://uk.reuters.com/article/uk-china-eu/eu-says-china-could-open-its-economy-if-it-wishes-idUKKBN1K515F>.

24 Ibid.

EUROPEAN UNION

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I LEGAL FRAMEWORK

The European Union's (EU's) legislation on anti-dumping and anti-subsidy instruments consists of Regulation (EU) 2016/1036² (the basic Anti-Dumping Regulation) and Regulation (EU) 2016/1037 (the basic Anti-Subsidy Regulation).³ Both Regulations were adopted in 2016 to codify a number of amendments that were made to the previous basic regulations and did not contain any new substantive elements. The codified amendments were primarily aimed at adapting the Union's trade defence legislation to the entry-into-force of the Treaty of Lisbon and its new rules on delegated and implementing acts under Articles 290 and 291 TFEU (the Comitology rules).⁴ A significant substantive overhaul of the basic Regulations has taken place with the adoption of Regulations (EU) 2017/2321⁵ and 2018/825,⁶ both the result of inter-institutional negotiations on the future of trade defence instruments in the field of anti-dumping and anti-subsidy. The changes resulting therefrom are manifold and concern both the anti-dumping and anti-subsidy instruments, and while already in part addressed in last year's edition, are discussed in detail in Section III below.

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- 1 Nicolaj Kuplewatzky is a member of the Legal Service of the European Commission and Kiliane Huyghebaert is an associate at VVGB Advocaten. The authors are grateful for the valuable assistance of Maarten Vanderhaeghe.
 - 2 Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, OJ L 176, 30.6.2016, p. 21.
 - 3 Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, OJ L 176, 30.6.2016, p. 55.
 - 4 See Regulation (EU) No. 37/2014 of the European Parliament and of the Council of 15 January 2014 of 15 January 2014 amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures, OJ L 18, 21.1.2014, p. 1. See also Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55, 28.2.2011, p. 13.
 - 5 Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, as published in OJ L 338/1 (2017).
 - 6 Regulation (EU) 2018/825 of the European Parliament and of the Council of 30 May 2018 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, as published in OJ L 143/1 (2018).

The legal framework surrounding safeguard measures is split into two regulations: Regulation (EU) 2015/478⁷ covers the rules for imports from non-WTO member countries, whereas Regulation (EC) 260/2009⁸ covers the rules for imports from WTO members. The two safeguard regulations are equally unaffected by the changes brought about by Regulations (EU) 2017/2321 and 2018/825.

II OVERVIEW OF TRADE DEFENCE INSTRUMENTS

Since the previous edition of this book, the EU has slightly intensified its trade defence activity. While last year's edition reported 94 provisional and definitive anti-dumping and 12 provisional and definitive countervailing measures in force, this year's statistics report 97 provisional and definitive anti-dumping measures and 13 provisional and definitive anti-subsidy measures in force (excluding measures extended as a result of circumvention reviews).⁹ This slight increase of new measures falls against the backdrop of a 75 per cent increase of review measures initiated.¹⁰

The main country affected remained China, which accounts for approximately 60 per cent of the total of measures imposed as of 31 May 2018.¹¹ In numbers, it is subject to 60 definitive measures, with seven anti-dumping and two countervailing duty investigations currently pending conclusion. Following suit are Russia (currently subject to nine measures) and India (currently subject to five measures) in second and third place.¹²

A couple of noteworthy investigations initiated between 1 August 2017 and 31 May 2018 deserve mention. First, the initiations into dumping and subsidy practices of electric bicycles and retreated tyres from China.¹³ These technically complex cases affect a wide array of economic interests, and so perfectly showcase the variety of products and interests that trade defence measures can target. Second, biodiesel makes a return, as an anti-subsidy measure on imports of biodiesel from Argentina was initiated on 31 January 2018.¹⁴ Third are the various measures that the EU continues to seek to address the overcapacity in the global steel market, and the resulting redirection of this excess steel production, by Chinese exporting producers in particular, to the EU market. Thus, the past year saw the conclusion of the anti-dumping investigation into hot-rolled flat products of iron, non-alloy or other

7 Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports, OJ L 83, 27.3.2015, p. 16.

8 Regulation (EU) 2015/755 of the European Parliament and of the Council of 29 April 2015 on common rules for imports from certain third countries, OJ L 123, 19.5.2015, p. 33.

9 36th Annual Report from the Commission to the Council and the European Parliament on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities (2017), p. 2.

10 *Ibid.*, p. 9.

11 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 22 July 2018).

12 Commission Staff Working Document accompanying the 36th Annual Report from the Commission to the Council and the European Parliament on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities (2017), p. 14.

13 Notice of initiation of an anti-subsidy proceeding concerning imports of electric bicycles originating in the People's Republic of China, OJ C 440, 21 December 2017, p. 22 and Notice of initiation of an anti-dumping proceeding concerning imports of electric bicycles originating in the People's Republic of China, OJ C 353, 20 October 2017, p. 19, respectively.

14 Notice of initiation of an anti-subsidy proceeding concerning imports of biodiesel originating in Argentina, OJ C 34, 31 January 2018, p. 47.

alloy steel from Ukraine, Iran, Brazil and Serbia,¹⁵ an anti-subsidy investigation into the same product from China¹⁶ and the initiation (and termination) of an anti-dumping investigation into ferro-silicon from Egypt and Ukraine.¹⁷ Of particular note is also the initiation of an anti-dumping investigation into imports of hot-rolled sheet steel piles from China, which is the first 'Article 5 investigation'¹⁸ since the entry-into-force of the revised rules for normal value calculations in face of significant, state-induced, market distortions in third countries on 20 December 2017.¹⁹ The EU also concluded an anti-dumping investigation into cast iron articles and corrosion resistant steels from China through the imposition of definitive anti-dumping duties.²⁰ On the review side, the EU initiated four expiry reviews into steel and aluminium products from China, Russia and Ukraine,²¹ and concluded the expiry reviews of the anti-dumping duties on steel robes and cables from China and the countervailing duties on stainless steel bars and rods from India by extending the measures.²²

Noteworthy points are to be reported from in particular the anti-dumping and anti-subsidy investigations into hot-rolled flat steel products. In the former, at the provisional stage, the Commission had noted that 'it is not in a position to make an affirmative conclusion that it would be in the Union interest to impose provisional measures.'²³ After final disclosure, it was then proposed that *ad valorem* duties ranging from 5.3 to 33 per cent,

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- 15 Commission Implementing Regulation (EU) 2017/1795 of 5 October 2017 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil, Iran, Russia and Ukraine and terminating the investigation on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Serbia, OJ L 258, 6 October 2017, p. 24.
- 16 Commission Implementing Regulation (EU) 2017/969 of 8 June 2017 imposing definitive countervailing duties on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China and amending Commission Implementing Regulation (EU) 2017/649 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China, OJ L 146, 9 June 2017, p. 17.
- 17 Notice of initiation of an anti-dumping proceeding concerning imports of ferro-silicon originating in Egypt and Ukraine, OJ C 251, 2 August 2017, p. 5, and Commission Implementing Decision (EU) 2018/824 of 4 June 2018 terminating the anti-dumping proceeding concerning imports of ferro-silicon originating in Egypt and Ukraine, OJ L 139, 5 June 2018, p. 25.
- 18 After Article 5 of the basic anti-dumping Regulation, currently Regulation (EU) 2016/1036 (OJ L 176, 30 June 2016, p. 21), which concerns itself with 'new' investigations, as opposed to reviews, re-openings, or circumvention investigations.
- 19 Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, OJ L 338, 19 December 2017, p. 1.
- 20 Commission Implementing Regulation (EU) 2018/140 of 29 January 2018 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain cast iron articles originating in the People's Republic of China and terminating the investigation on imports of certain cast iron articles originating in India, OJ L 25, 30 January 2018, p. 6.
- 21 Commission Staff Working Document accompanying the 36th Annual Report from the Commission to the Council and the European Parliament on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities (2017), pp. 27–28.
- 22 *Ibid.*, p. 29.
- 23 Information document of 4 April 2017, AD635, Anti-dumping proceeding concerning the imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil, Iran, Russia Serbia and Ukraine, recital 280.

capped by a minimum import price (MIP) of €472.27 per tonne net product weight, would best serve the Union interest in light of the various (and competing) interests at stake.²⁴ The EU Member States, however, rejected this proposal during the vote in the Trade Defence Instruments Committee by way of a negative opinion.²⁵ This was the first negative opinion ever received by Member States since the entry-into-force of the Comitology rules after the Treaty of Lisbon. Pursuant to the procedural rules in force for trade defence instruments, a second proposal would have to be delivered to the Appeal Committee, either in the form of the same draft, or in the form of an amended version.²⁶ At Appeal Committee stage, the Chair of Committee concluded that an amendment regarding the form of the measure, changing it from *ad valorem* duties capped by a MIP to duties to be expressed as a fixed amount per tonne, commanded the broadest possible support among EU Member States.²⁷ Still, the Appeal Committee delivered a ‘no opinion’ vote.²⁸ On that basis, and in line with the rules applicable to the Appeal Committee voting procedure, the Commission decided, on balance and having weighed up the various interests at stake, that the Union interest would still demand the putting into place of definitive duties on the product concerned.

However, in the case of the parallel anti-subsidy investigation into the same product, but originating in China, the EU treated loans as grants for the purposes of Article 3(1)(a)(i) of the basic anti-subsidy Regulation.²⁹ The Commission deemed this necessary since access to capital for corporate actors in China was deemed to be subject to various distortions, including a bias for lending to SOEs, large well-connected private firms and firms active in key industrial sectors.³⁰ Indeed, during its investigation, it referenced a study by the International Monetary Fund, which showed significant divergence between local Chinese rating grades and international rating grades (giving the example that over 90 per cent of Chinese bonds were rated AA to AAA by local rating agencies, whereas less than 2 per cent of US company bonds would command such ratings).³¹ On that basis, the Commission

24 Commission Implementing Regulation (EU) 2017/1795 of 5 October 2017 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil, Iran, Russia and Ukraine and terminating the investigation on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Serbia, OJ L 258, 6 October 2017, p. 24 at recital 553.

25 Ibid., p. 24 at recital 626.

26 Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, OJ L 55, 28 February 2011, p. 13, Article 5(3).

27 Commission Implementing Regulation (EU) 2017/1795 of 5 October 2017 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil, Iran, Russia and Ukraine and terminating the investigation on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Serbia, OJ L 258, 6 October 2017, p. 24 at recital 628.

28 Ibid., recital 671.

29 Regulation (EU) 2016/1037 of the European parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, OJ L 176, 30 June 2016, p. 55.

30 Commission Staff Working Document accompanying the 36th Annual Report from the Commission to the Council and the European Parliament on the EU’s Anti-Dumping, Anti-Subsidy and Safeguard activities (2017), p. 53.

31 Commission Implementing Regulation (EU) 2017/969 of 8 June 2017 imposing definitive countervailing duties on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in

deemed creditworthiness the Commission did not consider the creditworthiness assessments of the exporting producers concerned to be correctly assessed, and, instead, assigned those exporting producers a BB rating, the highest ‘non-investment grade’ rating.³² The premium expected on bonds issued by exporting producers with this rating was then applied to the standard lending rate of the People’s Bank of China in order to determine the market rate. For this, the Commission calculated the relative spread between the indexes of US ‘A-rated’ corporate bonds to US ‘BB-rated’ corporate bonds, adding the resulting relative spread to the benchmark interest rates published by the People’s Bank of China for that day.³³ This was done individually for each loan provided to the exporting producer concerned. *Inter alia*, on the basis of those findings, countervailing duties ranging between 4.6 per cent to 35.9 per cent were then imposed on imports of the product concerned.³⁴ This is the first time that a ‘relative spread methodology’ features in an EU anti-subsidy investigation. In fact, the authors were not able to retrieve an example of a non-EU anti-subsidy investigation employing the same type of methodology. Given its innovative and country-neutral nature, this methodology could, accordingly, serve as an example for future anti-subsidy investigations where local company bond ratings are deemed inflated.

In another significant development, also related to the global oversupply of steel, on 26 March 2018, the EU initiated *ex officio* a safeguard investigation into certain steel products.³⁵ The Commission considered that the information available, including the surveillance measures on steel products in place,³⁶ had revealed that imports from certain steel products had recently increased sharply, showing that there was sufficient evidence to initiate an investigation into possible safeguard measures.³⁷ On 18 July 2018, the Commission then imposed provisional safeguard measures, which it noted could remain in force for a maximum period of 200 days. These measures concern 23 steel product categories and will take the form of a Tariff Rate Quota (TRQ). For each of the 23 categories, tariffs of 25 per cent will only be imposed once imports exceed the average of imports over the past three years, but remains unallocated by individual exporting country (thus, a ‘global’ TRQ). The measures were imposed against all countries, with the exception of some developing countries with limited exports to the EU, and the European Economic Area (EEA) countries (Norway,

the People’s Republic of China and amending Commission Implementing Regulation (EU) 2017/649 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People’s Republic of China, recital 159 et seq.

32 Ibid., recital 166.

33 Ibid., recitals 169 et seq.

34 Ibid., recital 641.

35 Notice of initiation of a safeguard investigation concerning imports of steel products, OJ C 111, 26 March 2018, p. 29.

36 See Commission Implementing Regulation (EU) 2016/670 of 28 April 2016 introducing prior Union surveillance of imports of certain iron and steel products originating in certain third countries, OJ L 115, 29 April 2016, p. 37.

37 Ibid., p. 29.

Iceland and Liechtenstein), which, according to the Commission, share close economic links between with EU.³⁸ The Commission aims to conclude the full investigation within nine months of the date of initiation.³⁹

A further development in the trade defence area that captured the headlines in Europe in the past year was the EU's response to the US's imposition of Section 232 tariffs on all imports of aluminium and steel into the US at rates of 25 per cent and 10 per cent respectively.⁴⁰ In response thereto, the Commission outlined a three-pronged response earlier this year: first, the launch on 1 June 2018 of legal proceedings against the United States in the WTO.⁴¹ Second, on 18 May 2018, the EU notified the WTO with regard to the suspension of concessions under the GATT 1994 so as to allow for an application of additional customs duties on the importation of certain products originating in the US.⁴² Products that may be subject to additional duties from 20 June 2018 include sweetcorn, cranberries, tobacco and a list of steel products such as bars and rods of stainless steel, angles, shapes and sections of stainless steel, flat-rolled products of alloy steel other than stainless.⁴³ The steel safeguard investigation mentioned above constitute the third part of the EU's response and aim to serve to protect the EU market from the disruptions caused by the diversion of steel from the US market.

III SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

i Legislative changes to the regime

In the past year, the legal framework for the EU's use of trade defence instruments underwent a significant overhaul as a result of the adoption of Regulation (EU) 2017/2321 and Regulation (EU) 2018/825, which introduced a number of important amendments to both the Basic Anti-Dumping Regulation and the Basic Anti-Subsidy Regulation. We highlight below the key features of both Regulations, which largely reflect the original Commission's proposals that were discussed in detail in the previous edition of this book, but which also include a number of new provisions that were added during the EU's legislative adoption process.

38 See Press Release of 18 July 2018, 'Trade: Commission imposes provisional safeguard measures on imports of steel products', available at http://europa.eu/rapid/press-release_IP-18-4563_en.htm (last accessed 22 July 2018). See also Commission Implementing Regulation (EU) 2018/1013 of 17 July 2018 imposing provisional safeguard measures with regard to imports of certain steel products, OJ L 181, 18 July 2018, p. 39.

39 Ibid., p. 32.

40 See the accompanying U.S. chapter in this edition for more information on the Section 232 tariffs.

41 See WTO, Request for Consultations by the European Union of 6 June 2018, 'United States – Certain Measures on Steel and Aluminium Products', WT/DS/548/1.

42 WTO Council for Trade in Goods, Committee on Safeguards, 'Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and other Obligations referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards', G/L1237, 18 May 2018, available at: http://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156909.pdf (last accessed 22 July 2019).

43 Ibid.

Regulation 2017/2321

First, the EU formally adopted Regulation (EU) 2017/2321 containing certain targeted amendments to the basic Anti-Dumping Regulation and the basic Anti-Subsidy Regulation, which was published in the *Official Journal of the European Union* on 19 December 2017, and which entered into force on the day following publication.

As a general matter, the key change to the EU's legal framework for trade defence instruments that resulted from this Regulation was the introduction of new rules for calculating the dumping margin for imports from WTO members in cases where domestic prices and costs are significantly distorted as a result of state intervention. In particular, the Regulation abolished the previous distinction between market economies (MEs) and non-market economies (NMEs) for those countries, and provides instead that where 'significant distortions' are deemed to exist, the Commission must construct the normal value 'exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks.' The Regulation hereby further specifies that the Commission may in those cases use (i) corresponding costs of production and sale in an appropriate representative country with a similar level of economic development; and (ii) undistorted international prices, costs, or benchmarks. It must, however, use domestic costs 'to the extent that they are positively established not to be distorted'.

In this regard, another notable feature of Regulation (EU) 2017/2321 is that it requires an assessment of the existence of 'significant distortions,' which are defined as 'distortions which occur when reported prices or costs, including the costs of raw materials and energy, are not the result of free market forces because they are affected by substantial government intervention' and for which a non-exhaustive list of criteria that must be considered is provided. The Regulation hereby adds that the Commission will publish reports that describe the market circumstances in countries or sectors for which it has well-founded indications of significant distortions, which the EU industry may rely on when filing a complaint or a request for a review and which will also be placed on the file of any investigation into those countries or sectors. The Commission has also emphasised, in response to concerns that Members of the European Parliament (MEPs) raised during the legislative adoption process, that it will do the work of establishing that significant distortions exist and that this requirement will not impose any additional burden on the EU industry.⁴⁴

In addition, a further change to the basic Anti-Dumping Regulation was a new provision that stipulates that, where the Commission decides to apply the new rules and can choose between a number of appropriate representative third countries, preference will be given to countries with an adequate level of social and environmental protection. This provision was inserted during the EU's legislative adoption process and is noteworthy because it allowed, for the first time, for social and environmental standards to play a role in the context of EU trade defence law.⁴⁵

Finally, Regulation (EU) 2017/2321 fully incorporated both the transitional arrangements and the amendment to the Basic Anti-Subsidy Regulation that the Commission had proposed. As discussed in the previous edition of this book, the former entail that the new rules will only apply to investigations initiated on or after the entry into force of the

44 See Press Release of 4 October 2017: 'The EU is changing its anti-dumping and anti-subsidy legislation to address state induced market distortions', available at http://europa.eu/rapid/press-release_MEMO-17-3703_en.htm (last accessed 22 July 2018).

45 Ibid.

Regulation, and that the methodology used in the previous determination will continue to apply for existing measures until an expiry review is initiated. As for the latter, the new rules provide that – in situations where subsidies are only identified in the course of an investigation – the Commission will offer consultations to the country of origin or export concerned, forward that country a summary of the main elements of those subsidies, adjust the notice of initiation of the investigation and invite interested parties to comment.

Regulation 2018/825

On 5 December 2017, the Council and the European Parliament reached an agreement on the Commission's proposal. Following the formal approval in the Council and the European Parliament's plenary vote, the modernisation legislation entered into force on the 8 June 2018. The overhaul covers a broad range of aspects relating to the way the Commission carries out trade defence investigations. The changes deliver solutions to problems raised by EU businesses. Although already elaborately set out in the previous edition of this book, it is worth reiterating the most important changes to the EU's modernised anti-dumping and anti-subsidy legislation.

First, the Regulation provides a new injury margin calculation method, which allows the injury margin to be calculated on the basis of a target price. The target price must reflect the profitability needed to recover full costs and investments, research as well as development and innovation. Moreover, the injury margin includes future expenses related to social and environmental standards, for example under the EU's Emissions Trading System,⁴⁶ if the Union industry presents sufficient evidence to this effect. Additionally, the target price has to include a minimum profit of 6 per cent.

Second, the investigation period is shortened by requiring the Commission to impose provisional measures within seven to eight months of the initiation of the investigation, instead of the former term of nine months.

Third, the Commission will now be issuing an 'early warning' on the imposition of provisional anti-dumping and anti-subsidy measures. This will include a grace period of three weeks during which provisional duties will not be applied, which should allow all operators to adapt to the new situation. After two years, the Commission will review the three weeks early warning system with the option to go up to four weeks or down to two weeks of such pre-disclosure. The non-imposition of provisional measures will also be signalled ahead.

Fourth, the Regulation introduces a help desk for small and medium-sized enterprises, which should facilitate access to trade defence instruments. The help desk is intended to raise awareness and provide information and explanations on trade defence instruments.

Fifth, the Commission is allowed to modulate the application of the lesser duty rule in anti-dumping investigations to take into account the existence of serious distortions regarding raw materials with the imposition of duties reflecting the full amount of dumping in such cases.

Finally, social and environmental standards will be taken into account in the investigations. The EU will normally not accept price undertakings from third countries with an insufficient implementation record of key International Labour Organisation (ILO)

⁴⁶ See generally https://ec.europa.eu/clima/policies/ets_en for more information thereon (last accessed 22 July 2018).

conventions and multilateral environmental agreements. The Commission also intends to review the measures in place in case of changed circumstances concerning social and environmental standards.

IV TRADE DISPUTES BEFORE THE EUROPEAN COURTS

As has been the case in previous years, the EU continued to face regular court challenges concerning its trade policies and trade defence practice. We therefore discuss some of the most significant court developments below.

i Rights of defence arising from non-disclosure of information

Under EU law, in all proceedings initiated against a person, that are likely to result in a measure adversely affecting that person, the rights of the defence must be respected. This fundamental principle must be guaranteed even in the absence of any rules governing the proceedings in question.⁴⁷

The forceful enforcement of that fundamental principle is also reflected in the general trend viewed in last year's trade defence case law. All too often, the decisive factor for annulment of a regulation imposing anti-dumping duties was not substantive deficiencies in the Commission's assessments. That should be no surprise given the well-established, vast discretion that the Commission holds in the sphere of the Common Commercial Policy.⁴⁸ Rather, the European judiciary faulted the Commission for procedural deficiencies that occurred during the course of the investigative procedure. The General Court's judgments in Cases T-460/14 *AETMD v. Council* and T-442/12 *Changmao Biochemical Engineering v. Council* are perfect examples of this trend. In the latter, the applicant, a Chinese exporting producer of tartaric acid, challenged the increase of its definitive anti-dumping duties after an interim review. It argued that the construction of the normal value for its exports was affected by a violation of its rights of defence as the Commission did not provide any information on the origin of the prices used to calculate the normal value. The Commission, in turn, submitted that it was not able to disclose that information as it concerned the pricing of a competitor, and was hence, by its nature, confidential. The General Court disagreed with the Commission. It annulled the contested regulation insofar as it concerned *Changmao* on the basis that it could not totally be ruled out that the outcome would have been different had the applicant been disclosed the origin of the normal value information during the investigation, and not only at the hearing. As such, it held, the obligation to respect confidential information cannot deprive an interested party's rights of defence of their substance.⁴⁹ A similar non-disclosure issue was at hand in the former case, *AETMD v. Council*. That case concerned an interim review limited to dumping requested by a Thai exporter of sweetcorn. The interim review led to a reduction of the anti-dumping duty. The Union industry challenged the interim review on the basis that the lasting change of circumstances was not genuine, and that the relevant information on the file to that effect was confidential. The General Court accepted the Union industry's argument and annulled the contested regulation, holding, in essence, that there

47 See, for instance, judgment of 16 February 2012, *Council and Commission v. Interpipe Niko Tube and Interpipe NTRP*, C-191/09 P and C-200/09 P, EU:C:2012:78, paragraph 77 and the case law cited.

48 *Ibid.*, paragraph 63 and the case law cited.

49 Judgment of 1 June 2017, *Changmao Biochemical Engineering v. Council*, T-442/12, EU:T:2017:372, paragraph 142 and the case law cited.

was an infringement of the procedural rights of the applicant arising from the non-disclosure of the confidential information at hand. In establishing this, it had particular reference to the hearing officer's report and additional correspondence by the hearing officer with the applicant. To the General Court, the incomplete nature of the final disclosure would render a contested regulation unlawful if, owing to that, the interested parties were unable to properly defend their interests in the administrative procedure.⁵⁰ The case has, in the meantime, been appealed to the Court of Justice. It has been registered as Case C-144/18 P *River Kwai International Food Industry v. AETMD*.

ii Non-severability of undertakings from anti-dumping duties

A second interesting development arose from appeals to the General Court's orders of inadmissibility in Cases T-141/14 and T-142/14 *SolarWorld and Others v. Council*. In those cases, the Council, the Commission, and a Chinese chamber of commerce had argued that the definitive regulations would be based on the economic effect of the combination of the measures adopted, that is *ad valorem* duties plus the acceptance of an undertaking. If the anti-dumping duties were extended to all imports as a result of the annulment of Article 3 of the respective regulations, they had argued, the measure would be appreciably different from the measure adopted, although would be by no means certain that *ad valorem* duties in respect of all imports it would have been adopted. The General Court had agreed with those arguments and had held that annulment of Article 3 of Regulations 1238/2013⁵¹ and 1239/2013⁵² alone, which exempted those exporting producers subject to an undertaking from the *ad valorem* duties imposed by those regulations, would affect the substance of the regulations as wholes. Consequently, according to the General Court, those provisions would not be severable from the remainder of those regulations, notably the respective Article 1 thereof, which imposed a definitive anti-dumping or countervailing duty on imports of solar panels from China.⁵³ The General Court's reasoning relied, in this regard, on other case-law establishing that the partial annulment of a Union act is possible only if the elements whose annulment is sought may be severed from the remainder of the act.⁵⁴

On appeal in both C-204/16 P and C-205/16 P *SolarWorld v. Council*, the Court of Justice upheld the General Court's reasoning. It noted that, by imposing an anti-dumping duty alongside an undertaking, the Union legislature had put in place trade defence measures constituting a set or a 'package'. That resulted in the existence of two separate and complementary measures that sought to achieve a common goal. As such, since the Union legislature intended the regulations at issue to be based on the possibility of applying two

50 Judgment of 14 December 2017, *AETMD v. Council*, C-460/14, EU:T:2017:916, paragraph 81 and the case-law cited. Note that the judgment is currently under appeal by the Thai exporting producer, and is registered as Case C-14/18 P *River Kwai International Food Industry v. AETMD*.

51 Council Implementing Regulation (EU) No. 1238/2013 of 2 December 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of crystalline silicon photovoltaic modules and key components (i.e., cells) originating in or consigned from the People's Republic of China, OJ L 325, 5 December 2013.

52 Council Implementing Regulation (EU) No. 1239/2013 of 2 December 2013 imposing a definitive countervailing duty on imports of crystalline silicon photovoltaic modules and key components (i.e., cells) originating in or consigned from the People's Republic of China, OJ L 325, 5 December 2013, p. 66.

53 Judgments of 1 February 2016, *SolarWorld and Others v. Council*, T-141/14, EU:T:2016:67, at paragraph 61 and T-142/16, EU:T:2016:68, also at paragraph 61.

54 *Ibid.*, at paragraph 48.

separate measures alternatively. And, since the annulment of Article 3 would remove such a possibility and eliminate the alternative that the legislature wished to offer when adopting the regulations at issue, the severability requested by the applicants could not be permitted without changing the measures completely.⁵⁵

These decisions will likely influence the result of the pending appeals in Cases C-236/17 P and C-237/17 P *Canadian Solar Emea and Others v. Council SolarWorld*, which last year's chapter highlighted, and which remain pending before the Court of Justice.

iii Circumvention

This third section will consider the two recent judgments in T-462/15 *Asia Leader International (Cambodia) v. Commission* and T-435/15 *Kolachi Raj Industrial v. Commission*, and their impact on the interpretation of Article 13 of the basic Regulation.

Readers of last year's chapter will recall that the judgment in Joined Cases C-247/15 P, C-253/15 P and C-259/15 P *Maxcom v. Chin Haur Indonesia*,⁵⁶ released on 26 January 2017, for the first time characterised the Union's anti-circumvention system in trade defence cases. According to the Court of Justice in those cases, under an Article 13 anti-circumvention investigation, the task of the EU institutions is only to carry out an assessment of circumvention on the basis of *prima facie* evidence for the third country as a whole, and subsequently extend the duties concerned. The task for the exporting producers, newly affected by those extended duties, would then be to show that, for their particular situation and on the basis of the evidence provided by them, an exemption from those duties pursuant to Article 13(4) of the basic Regulation is justified.⁵⁷ Needless to say, those exemptions from the country-wide duty, which take the form of individual decisions, only hold true so long as the factual circumstances on which they are built remain valid.

The judgment in T-462/15 *Asia Leader International (Cambodia) v. Commission* for the first time applies those principles. Thus, in that case, the General Court builds on the *Maxcom v. Chin Haur* case law to hold that one sort of circumvention practice established for any of the exporting producers in the country concerned is sufficient to establish circumvention for the country as a whole, even where other exporting producers are either not involved in that type of circumvention practice or in a different type of circumvention practice.⁵⁸ So, it would again fall to the exporting producer concerned to establish that it is not involved in any type of circumvention practice, be it the type of circumvention practice on the basis of which the duties were extended to the country concerned or not. However, as the applicant concerned was not able to prove that its particular situation justified the grant of an exemption, the General Court held that the Commission was entitled to refuse that exemption request.⁵⁹

The judgment in T-435/15 *Kolachi Raj Industrial v. Commission*⁶⁰ concerned a different part of Article 13 of the basic Regulation. In there, the applicant challenged the evidence

55 Judgments of 9 November 2017, *SolarWorld and Others v. Council*, Case C-204/16, EU:C:2017:838, at paragraph 55, and C-205/16 P, EU:C:2017:840 at paragraph 57.

56 ECLI:EU:C:2017:61.

57 Judgment of 26 January 2017, *Maxcom v. Chin Haur Indonesia*, Joined Cases C-247/15 P, C-253/15 P and C-259/15 P, EU:C:2017:61 at paragraph 59.

58 Judgment of 19 April 2018, *Asia Leader International (Cambodia) v. Commission*, T-462/15, EU:T:2018:196 at paragraph 62.

59 Ibid. at paragraph 88.

60 The case is currently under appeal, which is registered as Case C-709/17 P *Commission v. Kolachi Raj Industrial*.

available to the Commission that it was assembling bicycles from parts originating in China but coming from third countries (such as Sri Lanka), because the Commission had not been able to establish the Chinese origin of the parts concerned. Instead, the Commission had assessed whether the parts concerned originated in Sri Lanka, which, on the basis of the evidence provided, it found not to be true. It then, ‘by analogy’, applied Article 13(2)(b) of the basic Regulation to establish that circumvention of the duties on bicycles and their parts from China was taking place. The General Court, however, found that this ‘by analogy’ application of Article 13(2)(b) to determine the origin of a certain product was not possible, because the investigation at hand was not targeted at assembly operations in Sri Lanka, but, instead, at assembly operations in Pakistan.⁶¹ In addition, that provision of the basic Regulation, in itself, could not be used as a rule of origin, as the Commission had not, at the time of investigation, made use of its powers under Article 14(3) of the basic Regulation to establish special provisions for the determination of origin, and thus had to make use of those contained in the Union’s customs legislation.⁶² On that basis, it annulled the regulation concerned.

iv WTO developments

The previous years’ chapters discussed in detail the findings of the Panel and the Appellate Body in *EU – Biodiesel (Argentina)* (DS473). Early 2018 saw a continuation of this saga with the circulation of the Panel report in *EU – Biodiesel (Indonesia)* (DS480), the parallel dispute that arose from the imposition of anti-dumping duties on imports of biodiesel from Argentina and Indonesia.⁶³ Indonesia had challenged the EU’s cost adjustment methodology under Article 2(5) of the basic Regulation on an ‘as applied’ basis when the Commission substituted the recorded input costs of the exporting producers with cost data derived from ‘international markets’. In fact, the dispute brought by Indonesia was suspended pending appeal of the Argentina dispute to the Appellate Body, and resumed thereafter. It comes therefore as no surprise that the Panel found along similar lines in DS480 as the Appellate Body did in DS473: most importantly, it found that the EU acted inconsistently with the WTO Anti-Dumping Agreement, and in particular with Article 2.2.1.1 thereof, by failing to calculate the cost of production on the basis of the producers’ records, and with Article 2.2 of the WTO Ant-Dumping Agreement and Article VI:1(b)(ii) of the GATT by using a cost for the main input that was not the cost prevailing in the country of origin.⁶⁴ A distinctly novel feature of DS480 compared with DS473, however, was the inconsistency of the profit determination; notably, the Panel held that the EU acted inconsistently with Articles 2.2.2(iii) and 2.2 of the WTO Anti-Dumping Agreement by failing to determine the profit normally realised by exporters or producers on sales of products of the same general category in the domestic market of the country of origin (cap for profits). Other noteworthy aspects of DS480 were the violations of Articles 2.3, 3.1 and 3.2. Remarkably, the EU did not

61 Judgment of 10 October 2017, *Kolachi Raj Industrial v. Commission*, T-435/15, at paragraph 110 et seq.

62 Ibid. at paragraph 113.

63 Council Implementing Regulation (EU) 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.

64 However, we recall the AB’s finding in DS473 that an ‘[investigating] authority is not prohibited from relying on information other than that contained in the records kept by the exporter or producer, including in-country and out-of-country evidence’ (see AB Report, *EU- Biodiesel (Argentina)*, para. 6.73).

appeal the DS480 Panel report, which led to its adoption on 28 February 2018, with the end of the reasonable period of time to implement the recommendations and rulings concerned set for 28 October 2018.⁶⁵

A second major development concerned the release of the long-awaited Appellate Body Report in *EU – Large Civil Aircraft (21.5)* (DS316), finally bringing to an end a story leading back to the year 2004. This dispute concerns the issue of whether certain EU Member States (France, Germany, Spain and the United Kingdom) granted prohibited subsidies to its aircraft manufacturer, Airbus, for the development and production of its series of large civil aircraft programmes. The original Appellate Body finding, in fact, dates back to 2011, but the United States considered that the EU, France, Germany, Spain and the United Kingdom had failed to take sufficient steps to withdraw the subsidies to Airbus, or remove the economic impact of those subsidies on Boeing. That is, where, pursuant to Article 21.5 of the WTO's Dispute Settlement Understanding, the United States brought compliance proceedings against the EU that challenged the efforts made by the latter. In its Article 21.5 Report, the Appellate Body found, most notably, that the majority of support measures by the EU Member States to Airbus challenged by the United States in the 2004 dispute had expired in 2011. As such, under WTO rules, the EU would no longer be required to take any further action regarding state support that no longer existed, such as the alleged support for the A300, A310, A320 and A330/A340 aircraft models.⁶⁶ On prohibited import substitution subsidies, the Appellate Body agreed with the Panel that a subsidy results in the use of domestic over imported goods cannot by itself demonstrate that that subsidy is contingent on the use of domestic over imported goods, whether in law or in fact.⁶⁷ Finally, on adverse effects, the Appellate Body rejected almost all of the United States claims on economic damage to Boeing, although upholding, for different reasons, the Panel's conclusion that, for two types of aircraft markets, the EU had failed to comply with the Dispute Settlement Body recommendations and rulings.⁶⁸ It should also be recalled that the parallel dispute against US government measures in support of Boeing, now also at the stage of compliance proceedings, is still outstanding but should be released soon.

The final development derives from the Appellate Body report in *EU – PET (Pakistan)* (DS486). At issue here were certain countervailing measures by the EU against imports of PET from Pakistan. The Panel had previously found that the EU acted inconsistently with several provisions of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), *inter alia* that the EU acted inconsistent with Article 1.1(a)(1)(ii) and footnote 1 of the SCM Agreement by failing to provide a reasoned and adequate explanation for why it found that the entire amount of remitted duties under the Pakistani Manufacturing Bond Scheme, which it found to be the financial contribution, was in excess of those that have accrued. On appeal, the Appellate Body agreed: it ruled that the EU had not demonstrated that the Panel erred in its interpretation of law.⁶⁹ As to the EU's causation analysis, which had previously been blessed by the Panel, the Appellate Body observed that, while the Panel

65 The chapter on the WTO deals with this dispute in more detail. Reference is therefore had to the discussion therein.

66 Press Release of 15 May 2018: 'WTO rejects vast majority of US claims in Airbus dispute', available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1841> (last accessed 22 July 2018).

67 Appellate Body Report, *EU – Large Civil Aircraft (21.5)*, WT/DS316/AB/RW, at point 5.70 et seq. and point 6.3.

68 Ibid. point 6.43.

69 Appellate Body Report, *EU – PET (Pakistan)*, WT/DS486/AB/R, point 5.140.

had correctly found that a ‘causal link’ existed between the subsidised imports and the injury before it turned to its non-attribution analysis, it would be ‘inappropriate for an investigating authority to examine whether other known factors ‘break’ the causal link in the sense that the injurious effects of each non-attribution factor are so significant that they eliminate the link between the subsidised imports and the injury’.⁷⁰ This would be because ‘the correct causation standard requires instead an examination of whether, in light of the significance of the injurious effects of other known factors, the subsidised imports can be considered a ‘genuine and substantial’ cause of the injury’.⁷¹ With regard to the duty at issue, however, the Appellate Body did not find any fault in the Commission’s assessment of the ‘genuine and substantial’ cause of the injury and the other known factors that it found to have contributed to the injury.⁷²

V OUTLOOK

Investigation work will continue intensively into the second half of 2018, and likely continue at the same level thereafter. Of particular interest to observers will be the developments arising from the safeguard investigation, as well as the anti-dumping and anti-subsidy investigations into tyres and electric bikes. With the first ‘Article 5 investigation’ having been initiated, the coming year also promises to bring novelties on the side of the Commission’s work as well as that of interested parties arising from both the modernisation exercise and the new rules on distortions.

On the legislative front, not much activity should be expected: the past year stood out for its unusual amount of legislative activity, which, in the field of trade defence, is usually quiet at EU level. The coming year will, therefore, likely feature a mere application of those new rules into practice.

With regard to the disputes, however, the wheel will keep on turning as usual: the first half of 2018 has been unusually quiet on the number of judgments released by the General Court and the Court of Justice. That could imply that a wave of judgments may be released during the second half of the year. It is also expected that more applications for annulment and preliminary references reach the European Courts during the second half of the year as a number of investigations reaches their legislative deadline to conclude on definitive measures or termination. The WTO disputes on the US safeguard measures and *EU – Price Comparison Methodologies* (DS516)⁷³ should also bring about some activity in the trade disputes arena. All in all, the coming year promises to be one of the most active in recent EU trade defence history.

70 Ibid. point 5.229.

71 Ibid.

72 Ibid.

73 The chapter on the WTO deals with this dispute in more detail.

INDIA

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I OVERVIEW OF TRADE REMEDIES

Recently designated as the world's sixth largest economy with a population of over 1.3 billion, India has been a member of the General Agreement on Tariffs and Trade since 1948 and is also one of the founding members of the World Trade Organization (WTO) since 1 January 1995.² Its legal regime is crafted in a way that gives effect to India's rights and obligations under the covered agreements of the WTO. India has been a supporter of multilateralism and liberalised trade, and thus, the country's laws and policies aim to uphold the principles of the covered agreements, while at the same time, allowing the domestic industry to mature. Under the Indian legal system, an international treaty does not take precedence over the domestic laws; however, the established jurisprudence in the form of WTO Panel and Appellate Body Reports are regularly cited in the Indian courts and hold value in interpreting the rights and obligations of the interested parties in the investigations.

The objective of trade remedy legislations in India is to strike a balance between free trade in accordance with India's obligations under the covered agreements of the WTO; and ensuring that free trade does not result in unfair trade practices causing injury to the domestic industry in India. In recent times, India has also strived to achieve efficiency and become a manufacturing hub for the world through programmes such as 'Make in India'.³ Other than protective duties and duties imposable in cases of exercise of emergency powers of the central government, the Indian legal regime provides for four types of trade remedies, including anti-dumping duty, countervailing duty, safeguard duty and quantitative restrictions. The anti-dumping duty investigations (including anti-circumvention investigations), anti-subsidy (countervailing duty) and safeguard duty investigations are regulated under the Customs Tariff Act 1975 (the CT Act); whereas the Foreign Trade (Development and Regulation) Act 1992 (the Foreign Trade Act) regulates the imposition of quantitative restrictions.

India is referred to as a prolific user of trade remedies, with a record of having initiated the maximum number of trade remedial investigations up to 2017. The WTO data enumerates that up to December 2017, India has initiated 888 anti-dumping investigations out of which 214 investigations were initiated against China, 65 against Korea, 65 against the European Union, 62 against Taiwan, 49 against Thailand, 39 against Japan and 40 against the United States.⁴ In the context of safeguard investigations, India had up to December

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2 https://www.wto.org/english/thewto_e/countries_e/india_e.htm as accessed on 18 July 2018.

3 <http://www.makeinindia.com/home> as accessed on 18 July 2018.

4 https://www.wto.org/english/tratop_e/adp_e/adp_e.htm as accessed on 18 July 2018.

2017 initiated 43 cases.⁵ This is the highest number of safeguard investigations initiated by any Member to date. However, in the context of countervailing duties (CVD) investigations the picture is very different – only four investigations have been initiated by India up to July 2018, concerning China.⁶ The highest number of CVD investigations have been initiated by the United States, whereby it has initiated 219 CVD investigations up to December 2017.⁷

II LEGAL FRAMEWORK

The regulation of investigations concerning imposition of anti-dumping duties (AD) and CVD are governed by the CT Act alongside the specific rules issued by the central government to this effect. CVD investigations are specifically regulated under Section 9 of the CT Act read with the Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidised Articles and for Determination of Injury) Rules 1995 (the CVD Rules), whereas AD investigations are regulated under Section 9A of the CT Act read with Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles And For Determination of Injury) Rules 1995 (the AD Rules) alongside various Trade Notices. Trade Notices are issued by the Directorate General of Trade Remedies (DGTR). The DGTR is essentially an investigating authority functioning under the Department of Commerce, Government of India, which is also empowered to recommend the quantum of AD, CVD and safeguard duties, upon the conclusion of investigations. Further, Section 9C of the CT Act provides for a provision of appeal before the Customs Excise and Service Tax Tribunal (CESTAT) in both cases involving imposition and non-recommendation of AD and CVD duties. In case of grievances against the findings of CESTAT, appeals can be made to the Supreme Court of India.

In addition to the above, Section 8B of the CT Act provides for imposition of safeguard duty if the government upon investigation is satisfied that any article is imported into India in such increased quantities and under such conditions so as to cause or threaten to cause serious injury to the domestic industry. Unlike an anti-dumping investigation wherein the trigger point is a price based injury, a safeguard duty investigation is initiated to address situation of 'serious injury' on account of 'sudden, significant and sharp' increase in the imports of a product. Further, a safeguard duty investigation covers within its scope the imports of like products from all countries unlike an anti-dumping investigation, which is restricted to imports from countries specifically identified in the application of the domestic industry. The DGTR is the relevant authority vested with the power to conduct safeguard investigations, alongside its power to conduct AD and CVD investigations. The findings of the DGTR are recommendatory in nature and are given effect by the Department of Revenue, Ministry of Finance by means of a customs notification.⁸

Lastly, the Indian legal regime also provides for imposition of Quantitative Restriction (QR). Section 9A of the Foreign Trade Act states that the central government is empowered to impose QRs if imports have taken place in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. This section of the Foreign Trade Act is implemented through the Safeguard Measures (Quantitative

5 https://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm as accessed on 18 July 2018.

6 <http://www.dgtr.gov.in/countervailing-duty-investigation> as accessed on 18 July 2018.

7 https://www.wto.org/english/tratop_e/scm_e/scm_e.htm as accessed on 18 July 2018.

8 <http://pib.nic.in/newsite/PrintRelease.aspx?relid=179195> as accessed on 18 July 2018.

Restrictions) Rules 2012 (QR Rules) and these functions are also discharged through the DGTR. Under the legal guidance, quantitative restrictions are not to exceed the amount or quantity, which has been found adequate upon investigation to prevent or remedy serious injury and to facilitate adjustment by the domestic industry. It is noteworthy that to date no QR investigation has been initiated in India.

The safeguard duty can be imposed if the government upon investigation is satisfied that any article is imported into India in such increased quantities and under such conditions so as to cause or threaten to cause serious injury to the domestic industry.

i Procedure for domestic industry to initiate a trade remedial investigation

AD and CVD investigations

The initiation of an AD or CVD investigation can take place either via an application filed by the domestic industry requesting initiation of the investigation or via *suo moto* initiation by the DGTR based on the information received from the Commissioner of Customs or any other source providing sufficient evidence of dumping or subsidisation, injury and causal link. In the first case, when the investigation is initiated via an application filed by the domestic industry, the applicant must meet the requisite threshold of 'domestic industry'. This threshold is clarified in the legal regime as ensuring that the application should be expressly supported by producers constituting at least 25 per cent of the total production of 'like article'. Further, the threshold of being a domestic industry is deemed to be met when domestic producers whose collective output constitutes more than 50 per cent of the total production of the like article expressly support the application. Usually, such applications are filed by trade associations representing the domestic industry on behalf of the industry seeking the imposition of duty. Such an application must also contain information on whether any domestic producer is related to an exporter or importer of the allegedly dumped or subsidised article, or is itself an importer. In such cases, such related producers or importer can be excluded from scope of producers qualifying as the eligible domestic industry.

Additionally, an application for initiation of AD/CVD investigation must also contain evidence of dumping or subsidisation, material injury or threat of material injury and causal link. Usually, to substantiate dumping, evidences in the form of price-related data pertaining to normal value in the exporting country and import prices of the product in India are taken into consideration. In case of application for initiation of a CVD investigation, the evidences of subsidisation undertaken are usually in the form of laws or regulations in the exporting country providing for tax benefits, duty rebates, preferential loans or grants to the producer or exporter. However, in the case of application for initiation of an AD investigation, the domestic industry is required to provide significant amount of costing data relating to the product under consideration such as data on cost of production, raw material consumption, consumption of utilities and allocation of expenditure, etc. The evidences to substantiate the existence of injury are usually in the form of data on capacity, production, sales, selling price, price undercutting, price underselling, profits and losses, capacity utilisation, exports and export sales realisation, etc.

The application may be submitted by the domestic industry in two versions (confidential and non-confidential) to the DGTR. The DGTR is obligated to ensure that the non-confidential version is available to the authorised interested parties upon inspection of public file. There is no time limit prescribed by the CT Act upon which the DGTR is mandated to initiate the AD/CVD investigation. Additionally, the DGTR is empowered to *suo moto* initiate an investigation as well. The governments of the affected countries are

notified about the initiation of AD investigation by the DGTR, while with respect to a CVD investigation the DGTR engages in pre-initiation consultations with the government or governments of the exporting country.

Furthermore, the Indian AD Rules also contain rules on anti-circumvention within their ambit. The burden of proof is on the applicant to demonstrate circumvention of existing AD duties, which can be said to occur in the following three scenarios:

- a* if an unfurnished or unassembled product is imported to be completed or assembled in India or a third country, and the value of the item after assembly is less than 35 per cent of the cost of the finished product;
- b* if an article is imported in an altered form (either in description, name or composition) from the country of export or origin; or
- c* if producers or exporters subject to anti-dumping duties change their patterns or channels of trade without an economic reason, and for the purposes of avoiding the duty.

Additionally, the applicant is also under an obligation to provide evidence demonstrating that the imports that are circumventing the duty are being dumped. There can be a *suo moto* initiation of an anti-circumvention investigation by the DGTR as well. Similar to an AD investigation, the DGTR informs the government of the exporting country before formally initiating an investigation to determine circumvention.

In AD investigations and anti-circumvention investigations, the DGTR conducts the investigation and recommends the duty to the Ministry of Finance, Government of India, which decides whether or not to impose the recommended duty. The duty may be imposed retrospectively from the date of initiation of investigation. Further, the same product cannot be a subject matter of AD and CVD to compensate for the same situation of dumping or export subsidisation.

Safeguard investigations

A general safeguard duty investigation or a QR investigation can be initiated upon receipt of an application requesting for initiation of the same; or *suo moto* by the concerned authority. In the first case, if the applicant requests the initiation of an investigation, then the applicant must fulfil the requisite threshold to be qualified as an eligible domestic industry. However, the requisite threshold is not defined in the safeguard duty rules and the QR rules. The requirement mentioned is that the application should be filed by producers whose collective output of the like or directly competitive articles constitutes a 'major share' of the total production of the said article in India. The DGTR's practice in safeguard investigations depicts that they assess whether the applicant producers constitute at least 50 per cent of the total production of the like or directly competitive article. In QR investigations, the practice of the DGTR is yet to be tested.

The burden of proof is on the domestic industry to provide *prima facie* evidence of increased imports, serious injury or threat of serious injury, and causal link in a general safeguard duty investigation and QR investigation. The applicants are also under a burden to provide detailed import data (quantity and value-based) pertaining to the product under consideration, for at least three years. Additionally, applicants could also provide an analysis of factors attributable to increased imports and share of imports, share of similar domestic products in the total domestic consumption or demand in India over a period of three years. The application must also provide the names and addresses of exporters or

producers, importers and any trade associations or user associations related to the product. Additionally, the application must also provide a countrywide breakdown of the imports and their percentage of total imports along with a comprehensive adjustment plan that details out the efforts to be taken by the domestic industry to recuperate from the existing situation, and become competitive with the imported products. In a review investigation of imposed safeguard duties, the imposition was revoked when the domestic industry failed to provide a concrete adjustment plan.⁹

The data pertaining to reduction in capacity or idling in capacity, sales volume, cost of production and impact of imports thereon, selling price, profits or losses, inventory and employment statistics can be used by the applicants to demonstrate the existence of serious injury, or threat of serious injury. If the applicant domestic industry has requested for imposition of more than one form of trade remedial duty (AD/CVD or safeguard duty) alongside making an application for imposition of QRs, the same is required to be disclosed in the concerned application.

The applications are required to be submitted in two versions- confidential and non-confidential. The DGTR makes the non-confidential version accessible to all interested parties by making it available in the public file. The safeguard duty rules and QR Rules do not provide for a time frame within which the authority is mandated to initiate an investigation. However, the concerned authority may initiate the investigation upon its satisfaction with the accuracy and adequacy of evidence submitted by the applicants.

ii Procedure for other interested parties in a trade remedial investigation

AD and CVD investigations

The exporters, importers and user industries are expressly identified in the application for initiation of AD or CVD investigations, which forms a basis for the DGTR to identify the known interested parties. The DGTR sends a copy of the initiation notification and a copy of the non-confidential version of the application to these known interested parties. Additionally, the DGTR also informs the governments of the exporting countries through their embassies by providing them with a copy of the two documents (i.e., initiation notification and a non-confidential version of the application). Other prospective interested parties are notified of the decision of initiation of the investigation by way of a public notice comprising information about the date of initiation, exporting countries, products involved, basis of allegation of dumping or subsidisation, summary of injury factors and timelines for submission of information. If such interested parties make a request for accessing the application in writing, the DGTR may provide a non-confidential version of the application to the latter. For ease of access to the interested parties, the public notices are also published on the DGTR website.¹⁰

Pursuant to a Trade Notice¹¹ issued by the DGTR, any party interested in participating in an AD investigation must notify its intention to participate within 15 days of publication of the notice of initiation. The DGTR sends a separate correspondence to the known exporters and gives them 40 days to file the responses and submit an exporter/importer questionnaire.

9 Safeguard investigation concerning imports of Flexible Slabstock Polyol (FSP) into India.

10 www.dgtr.gov.in as accessed on 18 July 2018.

11 Trade Notice 01/2012 issued on 9 January 2012.

For all other parties, the time frame for filing their responses to the application and relevant questionnaire is 40 days from the date of initiation notice. The time period of filing responses may be extended upon successful processing of an application for extension to the DGTR.

The submission of responses and questionnaires by the interested parties is usually in two versions – confidential and non-confidential. Claims of confidentiality have to be substantiated with sufficient justifications to the satisfaction of the concerned authority.¹² The authority designates a date for public hearing where all interested parties are invited to present their views. However, for the views presented to be taken on record they have to be filed in writing, referred to as written submissions. The post-oral hearing written submissions have to be provided in a non-confidential version as well, in case claims of confidentiality are present in the confidential versions of written submissions. This is to ensure that the other parties have sufficient information to rebut the presented claims, if they desire to do so. The post oral hearing written submissions are submitted by the parties and are followed by a rejoinder submission, where parties rebut each other's claims.

The overall time frame for conclusion of an AD/CVD investigation is prescribed to be 12 months, unless extended by another six months by the central government. The DGTR is also empowered to issue preliminary findings during the course of investigation; however, the same becomes effective only after being approved by the Department of Revenue in the form of a customs notification. There is no specification on the time period within which the Department of Revenue is obligated to issue the relevant customs notification. If approved, the preliminary AD remains valid for a period not exceeding six months; however, it can be extended up to nine months by the central government. Additionally, the duty cannot be imposed before the expiry of 60 days from the date of initiation of the investigation. However, a preliminary CVD can only remain in force for four months, and no extension can be granted.

The final findings are issued by the DGTR after completion of the investigation, which may or may not recommend imposition of duties. After the recommendations are issued, the Department of Revenue has three months from date of the final findings to issue a customs notification, failing which the final findings become infructuous and lapses.

India follows the 'lesser duty' rule, whereby the lower out of (1) the margin of dumping/subsidy and (2) the injury margin, is considered for imposition as AD/ CVD.

Safeguard investigations

In safeguard investigations, the authority provides the known exporters, importers, users and exporting country governments with a copy of the initiation notification and a non-confidential version of the application. The parties are usually given 30 days to submit their responses and the respective questionnaires, unless an application for extension of the deadline is successfully processed. For the purposes of ease of access of the other interested parties, a public notice is uploaded on the website comprising details about the date of initiation, the exporting countries, product at issue, volume of imports, basis of the allegation of increased imports, summary of injury factors, time limits for submission of information and the address to which parties may direct their representatives. Further, prospective interested parties are given 15 days to express their intention to participate in the ongoing investigation. If they express their intention, they are provided with a non-confidential

12 Trade Notice 01/2013 issued on 9 December 2013.

version of the application for the purposes of submission of their responses and importer/exporter questionnaire. If required, the interested parties can even request for an extension of the time for submission of their responses and importer/exporter questionnaire.

The overall time frame for the conclusion of safeguard investigations is mandated to be eight months from the date of initiation of the investigation, unless extended by the central government. Within this time frame, the authority also conducts a public hearing and gives an opportunity to all the interested parties to voice their concerns. However, oral submissions are not taken on record until they are presented in writing after the conclusion of the oral hearings. These written submissions are submitted by the parties, followed by the rejoinder submissions where parties rebut each other's claims.

In safeguard investigations, requests for imposition of preliminary duties can be made provided the applicant can establish the existence of critical circumstances in their application. If a provisional safeguard duty is recommended, it is subject to an internal evaluation by the Standing Board of Safeguards (BOS), whose deliberations are not open to the public. If the BOS approves provisional duties, they are given effect by the Department of Revenue issuing a customs notification. A provisional safeguard duty can be in existence for a period not exceeding 200 days from the date of its imposition. However, the legal regime does not prescribe for provisions on provisional QRs.

Additionally, in cases where safeguard duty or QR is recommended for more than a year, an obligation to progressively liberalise the same remains on the Government of India. Further, the duty or QR ceases to have effect on the expiry of four years from the date of imposition, unless the central government is of the opinion that the imposition must continue, in which case it may be extended. However, under no circumstances, can the imposition go beyond a period of 10 years from the date of initial imposition.

iii Procedures for appeals and reviews

India's trade remedy legislations prescribe for the provisions of appeal from the final findings of the DGTR, within its scope. The appeal can be directed against an order concerning the existence, degree and effect of any dumping or subsidy. Section 9C of the CT Act provides that an appeal challenging the customs notification imposing AD, CVD or anti-circumvention duty and giving effect to the finding of the DGTR may be made to CESTAT within 90 days of the date of issuance of the relevant notification. However, in the event of safeguard duty imposition, the recourse against the final findings and the customs notification imposing the duty lies in the form of a writ petition before the High Court.

The trade remedial legislations also contain provisions prescribing the scope of mid-term reviews and sunset review investigations; whereby the review investigations assess whether the continued imposition of the duties is warranted. A review investigation, once initiated, must be completed within 12 months of the date of initiation of the investigation in cases of AD and CVD investigations, unless otherwise extended by the central government. However, in the case of a safeguard and QR investigation, a review investigation must be concluded within eight months unless extended further by the central government.

III TREATY FRAMEWORK

India has repeatedly voiced the consistency of its laws and regulations with its rights and obligations under the WTO. This position has also been reiterated by the Supreme Court of India. In *Commissioner of Customs, Bangalore v. M/s GM Exports and Others*,¹³ the Supreme Court stated:

49 ... Further, the object and purpose of Section 9A is to impose an anti-dumping duty in consonance with the WTO Agreement, which Section 9A gives full effect to.

Further, the Indian Constitution in Article 51(c) also recognises the importance of fostering respect for international law and treaty obligations. In practice, India continues to ensure efficient implementation of its international obligations.

IV RECENT CHANGES TO THE REGIME

The Government of India amended the Government of India (Allocation of Business) Rules 1961 on 7 May 2018, and substituted the Directorate General of Anti-Dumping and Allied Duties (DGAD) with the DGTR in the Department of Commerce, Government of India. DGAD has been renamed vide Notification No. I-34(7)/2018-O&M dated 17 May 2018, issued by the Department of Commerce.

The DGTR is essentially a single umbrella national authority for all trade remedial defences, including, AD, CVD safeguard measures and QRs, which were previously dealt with by different authorities, including the DGAD, Directorate General of Safeguards and Directorate General of Foreign Trade. The constitution of this body is in consonance with the goal of Minimum Government Maximum Governance Policy of the Prime Minister of India.

V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

India ratified the Trade Facilitation Agreement (TFA) on 22 April 2016, which came into force on 22 February 2017 after receiving the relevant number of ratifications by the membership of the WTO. The relevant question that emerges post ratification and implementation of the TFA is of ensuring consistency with the obligations under it. India's rate of implementation of commitments for Category A stands at 72.3 per cent under the TFA and the same for Category B stands at 27.7 per cent, whereby in Category B the time period until February 2022 is available to ensure implementation.¹⁴ However, these statistics relate only to notified items of implementation.

In its domestic domain, India initiated an anti-dumping investigation concerning the imports of solar cells and modules; however, it was terminated as the domestic industry took back its application for initiation.¹⁵ While the anti-dumping investigation was initiated, the domestic industry also filed for initiation of a safeguard investigation concerning the importation of solar cells and modules. The High Court of Delhi disposed of a petition filed

13 2015 (324) ELT 209 (SC).

14 <https://www.tfadatabase.org/members/india> as accessed on 18 July 2018.

15 <http://www.dgtr.gov.in/anti-dumping-cases/solar-cells-whether-or-not-assembled-partially-or-fully-modules-or-panels-or-0> as accessed on 18 July 2018.

by domestic industry requesting for imposition of a 70 per cent provisional safeguard duty.¹⁶ However, the DGTR recently, through final findings dated 16 July 2018, recommended an imposition of safeguard duty for a period of two years regarding imports of solar cells whether or not assembled in modules or panels into India:

- a first year at 25 per cent *ad valorem*;
- b first six months of second year at 20 per cent *ad valorem*; and
- c next six months of the second year at 15 per cent *ad valorem*.

This does not apply for imports from developing nations, as listed in Notification No. 19/2016-custom (NT) dated 5 February 2016; however, the said duty is applicable for imports from China and Malaysia.

VI TRADE DISPUTES

As stated above, India's policy has been inclined towards ensuring consistency of its domestic laws with its obligations under the WTO. This is further reflected in its record of ensuring compliance with WTO decisions. Indian laws have been subject to dispute settlement with the WTO in notable cases, including *India-Patents* (DS550), *India-Autos* (DS146) and *India-Quantitative Restrictions* (DS90). In all these cases, India ensured compliance with the decision of the WTO panel or appellate body by bringing its regime into compliance with the recommendations and rulings of the Dispute Settlement Body. Currently, the United States has challenged the consistency of India's compliance measures in *India-Agricultural Products* (DS430) with its obligations under the WTO. The parties are presently in arbitration and compliance proceedings.

Additionally, keeping in line with India's export interest, India has filed a request for consultations with the United States concerning imposition of tariffs on the imports of steel and aluminium by the United States.¹⁷

VII OUTLOOK

India's outlook towards International Trade has varied across its years of membership in the WTO. Despite being a founding member and a vehement supporter of trade liberalisation in certain aspects, India has taken a step back in negotiations concerning e-commerce and other new issues within the WTO domain.¹⁸ Partially, the rationale points to the fact that there is an absence of a national policy on e-commerce and contours of what e-commerce may cover at a multilateral level remain hazy.¹⁹ While recent news reports indicate that India is working

16 <https://mercomindia.com/india-not-imposing-safeguard-duty-for-now/> as accessed on 18 July 2018.

17 WT/DS547/1.

18 <https://economictimes.indiatimes.com/news/economy/policy/india-opens-e-commerce-talks-at-wto-submits-document/articleshow/61907459.cms> as accessed on 18 July 2018.

19 <https://www.livemint.com/Industry/qt86xlVuL1iDBvQ3rjGpCN/Ecommerce-policy-First-meeting-of-subgroups-expected-by-Ju.html> as accessed on 18 July 2018.

towards developing its national e-commerce policy, the multilateral dialogue on e-commerce remains entangled in the stalled negotiations concerning core issues like agriculture within the WTO.²⁰

Further, despite the ratification of the TFA, it remains to be seen as to what would be the pace of efficient implementation. However, significant progress can be expected based on India's history of performance and positive outlook towards the WTO, despite impediments such as procedural delays.

In terms of trade flows, the United States used to be India's largest trading partner; however, recently China has emerged as the largest trading partner. With the United States and China being at trade loggerheads in recent times, Indian exports to China are expected to see an upward swing.

20 <https://economictimes.indiatimes.com/news/economy/foreign-trade/new-issues-in-wto-important-for-aspirational-india-suresh-prabhu/articleshow/63003319.cms> as accessed on 18 July 2018; <https://economictimes.indiatimes.com/news/economy/policy/draft-ecommerce-policy-champions-india-first/articleshow/65206404.cms> as accessed on 3 August 2018.

JAPAN

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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), etc. and is also subject to WTO Agreements (the GATT Anti-Dumping Agreement) as well as these domestic laws and regulations. In addition, there

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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 (the 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

In Japan, there have been nine anti-dumping investigations, which is a relatively small number compared with those of other countries.²

In the past five years, two cases were subject to anti-dumping investigation. Those were: (1) an investigation on potassium hydroxide originating in Korea and China (petition date: 3 April 2015, invocation date: 9 August 2015); and (2) an investigation on toluene diisocyanate originating in China (petition date: 17 December 2013, invocation date: 25 April 2015).³

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.

2 Page 14 of the 'Trade Remedy Investigations', issued FY2015 by the METI Office for Trade Remedy Investigations, Trade Control Department, Trade and Economic Cooperation Bureau (www.meti.go.jp/policy/external_economy/trade_control/boekikanri/download/trade-remedy/new-pamphlet.pdf).

3 www.meti.go.jp/policy/external_economy/trade_control/boekikanri/trade-remedy/izen.html.

The measures

Requirements

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

- (i) *First, it must be determined that import of the subsidised product has in fact occurred. An import of a subsidised product is deemed to have occurred if the following matters are demonstrated, in particular:⁴*
- (A) *It is demonstrated that the subsidy was achieved through any of the following:*
 - (a) *a government practice involving a direct transfer of funds (e.g., grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g., loan guarantees);*
 - (b) *government revenue that is otherwise due is forgone or not collected (e.g., fiscal incentives such as tax credits);*
 - (c) *a government provides goods or services other than general infrastructure, or purchases goods; or*
 - (d) *a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (a) to (c) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;*
- (B) *It is demonstrated that a benefit is conferred by the measures described in (A) above.*
- (C) *It is demonstrated that the measures described in (A) above are specific. The specificity, as used herein, is determined under the following criteria:*
 - (a) *if the authority granting the subsidy (the granting authority), or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises (an enterprise or industry or a group thereof governed by the granting authority), the subsidy is deemed to be specific;*
 - (b) *if the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. Such criteria or conditions must be clearly spelled out in the law, regulation or other official documentation, so as to be capable of verification. 'Objective criteria or conditions' mentioned above means criteria or conditions that are neutral, that do not favour certain enterprises over others, and that are economic in nature and horizontal in application (e.g., number of employees, size of enterprise);*
 - (c) *if, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying the provision of this*

4 Page 4 of the CVD Proceedings Guidelines, Agreement on SCM 1.1(a).

paragraph (c), account is taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation; and

- (d) a subsidy that is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority is deemed to be specific.
- (ii) 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 there must exist a fact that the establishment of Japanese industry is materially hindered by such import.

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).

The above-mentioned fact is determined based on whether or not the following matters are demonstrated:⁵

- (A) that there has been an increase in import of the subsidised product, either in absolute terms or relative to production or consumption in Japan; provided, however, that if the subsidised product is supplied by more than one country, such increase must be demonstrated for each supplying country;
- (B) that, due to import of the subsidised product, there has been a decrease in price of a Japanese like product or there has been a prevention of price increase which otherwise would have occurred had such subsidised product not been imported; and
- (C) the impact of import of the subsidised product caused to the Japanese industry (including decrease in sales, profit, production, market share, productivity, investment earning rate or operation capacity, or adverse effect on capital flows, inventory, employment, wage, growth, fund raising capacity or investment).
- (iii) 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.
- (iv) Lastly, invocation of duty measures must be necessary to protect the Japanese industry.

The requirements described in (i) through (iii) above are requirements based on previous facts the evidence of which is subject to analysis during the investigation proceedings; however, even if such requirements are met based on previous facts, it may become unnecessary to protect the Japanese industry due to a change of circumstances occurring after the petition or initiation of investigation by authority. In particular, when a promise is accepted, the export price would normally rise until the subsidy is offset, in which case it is no longer necessary to protect the Japanese industry, therefore no duty will be imposed. Also, even if no promise is accepted, if, for example, the petitioner has withdrawn the petition, it is no longer necessary to protect the Japanese industry, and therefore no duty will be imposed, in principle.⁶

5 Page 4 of CVD Proceedings Guidelines.

6 Pages 444–445 of the 'Special Tariff Konmentaru'.

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:⁷

- (A) *Calculation principle: in principle, the subsidy amount is calculated in accordance with the following:*
 - (i) *the conversion currency must be denominated in the local currency; and*
 - (ii) *the relevant product must be sold during the period subject to investigation. The 'date of sale' normally means the day on which substantive sale terms are determined; however, the date of sale is determined for each case individually.*
- (B) *Basic thinking behind the calculation method: the CVD Proceedings Guidelines set out the basic thinking behind the calculation of typical subsidy amounts as they relate to grants, discharge of debts, equity infusion, loans, loan guarantees, provision of goods or services, investment transfer of debts and extension of maturity dates. 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.*
- (C) *Adjustments upon calculation: The following adjustments are made when calculating the subsidy amount.*
 - (a) *Deduction of expenses: expenses necessary for subsidy petition, and export duties for offsetting subsidies, etc. are deducted from the subsidy amount.*
 - (b) *Allocation of subsidy amount:*
 - (i) *If it is deemed that the subsidy is generating a continuous benefit over a period for more than one year (starting from the year in which the subsidy was granted), the relevant subsidy amount is allocated over a reasonable period, in which case, interest arising from such benefit is added.*
 - (ii) *The necessity of such allocation is determined separately considering the nature and terms and conditions, etc. of the particular subsidy.*
- (D) *Calculation of countervailing duty rate: when imposing a countervailing duty by way of an ad valorem duty, the duty rate is calculated by dividing the subsidy amount of the product subject to investigation by the CIF price (the trade price, including the cost of freight and insurance to Japan) of the relevant product imported during the period subject to investigation.*

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).

7 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 that 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’.⁸

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.

8 Page 729 of the ‘Special Tariff Konmentaru’.

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.⁹

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.¹⁰

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.

9 Pages 729–730 of the 'Special Tariff Konmentaru'.

10 Page 731 of the 'Special Tariff Konmentaru'.

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 Overview

The multilateral trade agreements that Japan is currently negotiating are the Trans-Pacific Partnership Agreement (the TPP Agreement) and a Japan–EU Economic Partnership Agreement (EPA).

ii TPP Agreement

The TPP Agreement is a trade agreement that was initially negotiated among 12 countries: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. The TPP Agreement is an ambitious agreement billed as a high-level, comprehensive and balanced treaty. Negotiations of the terms of the TPP

Agreement were basically concluded as of the ministerial conference in Atlanta in October 2015, but the United States declared its withdrawal from the TPP Agreement in January 2017. In May 2017, the 11 countries, excluding the United States, began negotiations on an agreement as a legal framework to realise the contents of the TPP Agreement and, following that, a final agreement was reached. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP11) was signed by the 11 countries on 8 March 2018. The said Agreement, except for some clauses, is an agreement to realise the contents of the TPP Agreement and maintains the high standards of the TPP Agreement.

The TPP Agreement contains provisions that allow temporary emergency measures (transitional safeguards) in order to prevent significant damage to domestic industries resulting from a sharp increase in imports of a product, and also contains anti-dumping duty and countervailing duty clauses.

The transitional safeguards under the TPP Agreement mean that if there is a sharp increase in imports of a product originated in another Member State resulting from the reduction or abolition of tariffs under this treaty, that causes or is likely to cause material damage to the domestic industry that produces the same type of product or products that are directly in competition therewith, then that Member State will be permitted to temporarily suspend the tariff concessions under the TPP Agreement, or even raise the tariff to a certain level for a certain transition period.

The anti-dumping duty and countervailing duty measures preserve all rights and obligations under the relevant WTO Agreements, while also setting out non-obligatory provisions on specific procedures to promote transparency and due process, such as verification of information between the relevant parties.

The TPP11 did not review the above trade remedies. However, the TPP11 stipulates that: 'If the entry into force of the TPP Agreement is imminent or if the TPP Agreement is unlikely to enter into force, the Parties shall, on request of a Party, review the operation of this Agreement so as to consider any amendment to this Agreement and any related matters' (Article 6 of the TPP11).

For this reason, in the case of 'If the entry into force of the TPP Agreement is imminent or if the TPP Agreement is unlikely to enter into force', it is necessary to pay attention to the possibility of a review of the above trade remedies in the future.

iii Japan–EU EPA

Since March 2013, Japan had been negotiating with the EU on an EPA, and, in December 2017, the parties reached agreement in each field except for a settlement system for investment disputes. For trade remedies, emergency measures (transitional safeguards), etc., in the event of an increase in imports of a product originated in another Member State resulting from a reduction or abolition of tariffs, have been established based on this agreement, and Japan and the EU shall finalise and sign the agreement in 2018, aiming for its entry into force before spring of 2019.

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 DEVELOPMENTS¹¹

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/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, etc.

The above-mentioned 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.

¹¹ www.meti.go.jp/policy/external_economy/trade_control/boekikanri/trade-remedy/kaisei.html.

VI TRADE DISPUTES¹²

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.

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.

Japan will seek a resolution to the foregoing two issues 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 two cases are examples of the recent trend.

12 www.mofa.go.jp/mofaj/gaiko/wto/funso/funsou.html.

KOREA

*Dongwon Jung and Sungbum Lee*¹

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

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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.² 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.

2 Jinyul Ju, 'The Korean Supreme Court's First Denial of Direct Effect to the WTO Agreement: 2008 *Shanghai ASA Ceramic Co Ltd v. Ministry of strategy and Finance*', *Seoul International Law Study Book* 16, No. 1 (2009), pp.231–235.

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

Status	Opposite party	Status	Significance
In force (15)	Chile	Became effective in April 2004	First FTA Foothold to enter the Latin American market
	Singapore	Became effective in March 2006	Foothold to enter the ASEAN market
	EFTA	Became effective in September 2006 (EFTA: four countries - Switzerland, Norway, Iceland and Liechtenstein)	Foothold to enter the European market
	ASEAN	Became effective in September 2006 (ASEAN: 10 countries – Malaysia, Singapore, Vietnam, Myanmar, Indonesia, Philippines, Brunei, Laos, Cambodia and Thailand)	First FTA entered into with the large economic bloc
	India	Became effective in 2010	BRICs country Large market
	EU	Became provisionally effective on 1 July 2011 Became fully effective on 13 December 2015	Largest economic bloc in the world (based on GDP)
	Peru	Became effective on 1 August 2011	Rich with resources Foothold to make inroads to Latin America
	US	Became effective on 15 March 2012	Large advanced economic bloc
	Turkey (basic agreement, agreement on trade in goods)	Became effective on 1 May 2013	Foothold to make inroads into the Europe and Central Asia
	Australia	Became effective on 12 December 2014	Rich with resources Major market in Oceania
	Canada	Became effective on 1 January 2015	Advanced market in North America
	China	Became effective on 20 December 2015	No. 1 trade partner of Korea
	New Zealand	Became effective on 20 December 2015	Major market in Oceania
	Vietnam	Became effective on 20 December 2015	No. 3 investee country of Korea
Colombia	Became effective on 15 July 2016	Rich with resources Emerging market in Latin America	
Adoption of the text (1)	Latin America	Initialing on 10 March 2017 (Latin America: six countries – Panama, Costa Rica, Guatemala, Honduras, El Salvador and Nicaragua)	Created new markets in Latin America

³ www.fta.go.kr/main/situation/kfta/ov/.

Status	Opposite party	Status	Significance
Under negotiation (4)	Korea–China–Japan	The fifth negotiation was held in April 2016	Lay groundworks for economic integration of Northeast Asia
	RCEP	The 19th negotiation was held on 19 July 2017 (RCEP: Korea, China, Japan, India, Australia, New Zealand and 10 ASEAN countries)	Contribute to the economic integration of East Asia
	Ecuador SECA	The fifth negotiation was held in November 2016	Rich with resources Foothold to enter the Latin American market
	Israel	The fourth negotiation was held in May 2017	Model country of the creative economy

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.

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.

V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

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

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

COP 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 of trade.⁸ 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.⁹ 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

8 Article 10(1)1 of the Enforcement Rule of the Customs Act.

9 Article 10(2) of the Enforcement Rule of the Customs Act.

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.¹⁰

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.

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.
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.

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.

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:

[W]ith 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 continuation or recurrence of dumping and injury, a product which was excluded from the measure of the original investigation shall not be included in the products subject to anti-dumping duties through a review.

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.¹² 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.¹³

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

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.

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. 68–70.

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

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.

$$\text{Injury margin 3} = \frac{\text{target sales price of domestic products} - \text{actual sales price of domestic products}}{\text{CIF import price}} \times 100$$

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.

$$\text{Injury margin 4} = \frac{\text{CIF price of non-dumped products} - \text{CIF price of dumped products}}{\text{CIF import price}} \times 100$$

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

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).

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 – 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:

- a* the KTC is required to notify the result of the on-site verification to the overseas supplier under investigation;
- b* the overseas suppliers must submit written responses in the Korean language; and
- c* overseas suppliers must provide sufficient good cause to the KTC when they request that information regarding the business be submitted in a confidential manner.

MALAYSIA

*Lim Koon Huan and Manshan Singh*¹

I 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.² 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.³ 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.⁴ 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.⁵ 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.⁶ Second, this led to inflation.⁷

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

1 Lim Koon Huan is a partner and Manshan Singh is an associate at Skrine.

2 Malaysian Parliament Hansard Report dated 20 May 1993 at page 3,370.

3 Ibid.

4 Ibid at 3,372.

5 Ibid at 3,370.

6 Ibid.

7 Ibid.

the ASEAN Free Trade Area, the Countervailing and Anti-Dumping Duties Act 1993 (CADD) was enacted to address the pitfalls of the previous ordinance. One of the primary changes under CADD 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 CADD 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, CADD 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, CADD 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

CADD 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 Malaysia⁸ 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 2017.

CADD 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 CADD, 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 CADD defines exporting country to mean the country of export of the subject merchandise. In instances where the subject merchandise is not exported

8 Anti-dumping Initiations: By Reporting Member 01/01/1995 – 31/12/2014 provided by the WTO.

9 Section 2(1) of CADD.

10 Section 16(1) of CADD.

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, CADD A 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, CADD A 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

CADD A 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

11 Section 2(1) of CADD A.

12 Section 16(2)(a) of CADD A.

13 Section 16(3) of CADD A.

14 Section 16(2)(b) of CADD A.

15 Section 16(5) of CADD A.

16 Section 17(1) of CADD A.

17 Section 17(2) of CADD A.

18 Section 18(2) of CADD A.

19 Section 18(5) of CADD A.

20 Section 2(1) of CADD A.

21 Section 22a(1) of CADD A.

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 petition²⁶ 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 parties²⁹ 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 CADD A.

23 Section 22a(3) and 22a(4) of CADD A.

24 Section 20(1) and 20(2) of CADD A.

25 Section 20(7) of CADD A.

26 Section 20(3) of CADD A.

27 Section 20(4) of CADD A.

28 Section 20(6) of CADD A.

29 Section 2(1) of CADD A 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 CADD A.

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.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.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.³⁷

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.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.³⁹

Much like an anti-dumping investigation, an initiation of investigation of countervailing duties can be made on behalf of the domestic industry⁴⁰ or by the government in special circumstances.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.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.

iii Safeguard measures

Out of all the trade remedies available in Malaysia, safeguard measures perhaps may be the most popular at present. 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

35 Regulation 15(2) of CADDR.

36 Section 34a(1) of CADDA.

37 Anti-dumping Measure: By Reporting Member 01/01/1995 – 31/12/2014 provided by the WTO.

38 Countervailing Initiations: By Reporting Member 01/01/1995 – 31/12/2014 provided by the WTO.

39 Section 2c of CADDA.

40 Section 4(1) of CADDA.

41 Section 4(6) of CADDA.

42 Section 5(1) of CADDA.

on its own initiative.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 injury⁴⁴ or carry the threat of serious injury to the domestic industry.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.⁴⁶

When the government has determined that there is sufficient evidence of serious injury or threat of serious injury, an investigation will be initiated.⁴⁷ This is effected by the publication of the notice of initiation.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.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.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.⁵¹

In the event a negative preliminary determination is made, the investigation can either be terminated or further investigated.⁵² Either way, a preliminary determination would need to be given within 90 days, with an additional 30 days granted upon extension.⁵³ In the event an affirmative preliminary determination is made, a provisional safeguard measure will be applicable.⁵⁴ A provisional safeguard measure imposed shall not exceed 200 days.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.⁵⁶

43 Section 10 of the SA.

44 Section 8(1) of the SA.

45 Section 9(1) of the SA.

46 Section 8(3) of the SA.

47 Section 14(1) of the SA.

48 Section 16 of the SA.

49 Section 2(1) of the SA.

50 Section 18(1) of the SA.

51 Section 20(1) of the SA.

52 Section 20(2) of the SA.

53 Regulation 9 of the SR.

54 Section 20(3) of the SA.

55 Section 22(3) of the SA.

56 Regulation 14 of the SR.

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.⁵⁷ 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.⁵⁸

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.⁵⁹

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.⁶⁰

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

57 Malaysia's Trade Statistics 2015: www.matrade.gov.my/en/malaysian-exporters/services-for-exporters/trade-a-market-information/trade-statistics.

58 Ibid.

59 Article 5.3 of the New Zealand–Malaysia Free Trade Agreement.

60 Article 9.1 of the WTO Agreement on Safeguards.

regard, and the term ‘not a cause of serious injury of threat thereof’⁶¹ could plausibly apply to instances in which one of the parties have more than a 3 per cent share of total imports.⁶² 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, while negotiations are still under way with Hong Kong.

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. However, with the installation of the new Malaysian government following national elections on 9 May 2018, it remains to be seen whether the new trade minister (yet to be appointed at the point of writing) will pursue the CPTPP agenda.

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 Singapore in March 2018.

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.

61 See footnote 58.

62 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.⁶³ 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,⁶⁴ 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.⁶⁵ 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.⁶⁶

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.⁶⁷ 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.⁶⁸ Malaysia’s construction industry at that time underwent massive growth and expansion on the back of the government’s economic transformation programme.

63 Section 40A of the SA.

64 Provided by the WTO.

65 Anti-dumping Initiations: By Reporting Member 01/01/1995 – 31/12/2014 provided by the WTO.

66 The 11th Report on Status and Outlook of the Malaysian Iron and Steel Industry 2014/2015 by MISIF (MISF Report) at page 36.

67 Ibid.

68 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.⁶⁹ 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.⁷⁰

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.⁷¹ In a reported case, an applicant was successful in reviewing and quashing the decision of the government of Malaysia made under CADDA.⁷²

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. At the time of writing, the Malaysian High Court has granted leave or permission to the applicant, who was the petitioner for the safeguard investigation, to review the decision. This confirms for the first time that decisions made under the SA are amenable to review by the courts, although 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, Chinese Taipei and Thailand. In February 2018, anti-dumping duties were imposed on imports from China, South Korea, Chinese Taipei and Thailand. The duties will be in force until 2023.

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

69 Ibid at 38.

70 Ibid.

71 *PT Pabrik Kertas Tjiwi Kimia TBK v. Kerajaan Malaysia* [2007] 3 MLJ 781.

72 Ibid.

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*.⁷³

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. Although it is too early to tell, the new government has been taking contrarian views with regard to matters relating to international trade and foreign policy. As of the date of writing, no Minister of International Trade and Industry has been appointed. Thus the future of international trade in Malaysia seems to be somewhat uncertain.

The new ruling government under the stewardship of Tun Mahatir Mohammed (who also held the position of Prime Minister in the 1980s and 1990s) has taken proactive measures, calling a review of the CPTPP. He has also called for the cancellation of several 'mega' projects affiliated to China. This has cast serious doubts on Malaysia's commitments with regard to the RCEP and the One Belt, One Road Initiative.

73 WTO Disputes by country/territory: Malaysia: www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm#mys.

TURKEY

*M Fevzi Toksoy, Ertuğrul Canbolat and Hasan Güden*¹

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 7th in terms of the number of anti-dumping measures imposed. The anti-dumping measures imposed by Turkey mostly concerned plastics and rubber, textiles, and base metals.² Indeed, the total number of anti-dumping and anti-subsidy investigations that Turkey has initiated at the time of writing is 200.³

From the beginning of 2017 to the beginning of July 2018, Turkey has initiated 33 investigations in relation to trade remedies:

- a* 18 anti-dumping investigations (of which 11 are expiry review investigations);
- b* one anti-subsidy investigation;
- c* eight safeguard investigations; and
- d* six anti-circumvention investigations.

Anti-dumping, countervailing, and safeguard measures are reviewed by different departments within the Turkish Ministry of Trade (the Ministry).

As regards anti-dumping, countervailing, and anti-circumvention measures, the Directorate General for Imports of the Ministry of Trade (the Directorate General) 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 will issue a recommendation to the Board of Evaluation for Unfair Competition in Imports. The Board of Evaluation for Unfair Competition in Imports will then decide whether to authorise the Directorate General to conduct an investigation. If so, the Board of Evaluation for Unfair Competition in Imports publishes an initiation communique in the Official Gazette. As a result of its investigation, the Directorate General can make proposals to the Board as regards measures to be taken.

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2 World Trade Organization, Trade Policy Review, S/331/Rev. 1, p. 68.

3 The following breakdown may be made: 108 measures are in force; 41 measures have expired; 11 measures have been repealed as a result of expiry investigations; 27 investigations have ended without the adoption of any measures; and 13 investigations are still ongoing. Those numbers have been calculated by considering the number of initiation notices and not the number of subject countries.

The Board of Evaluation for Unfair Competition in Imports is empowered to make proposals in the course of an investigation, to evaluate the results of investigations and to submit for the Ministry's approval draft decisions on the imposition of provisional or definitive measures. Eventually, the Board of Evaluation for Unfair Competition in Imports 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 have been violated.

The Ministry is also competent to propose, apply and monitor safeguard measures. More precisely, the Department of Safeguards (within the Directorate General) is authorised to carry out safeguard investigations either on its own initiative or upon complaint. The Board for the Evaluation of Safeguard Measures for Imports decides, among other things, whether to initiate an investigation; to adopt, review, extend, modify or abolish any provisional or definitive safeguard measure; and to determine the form, extent and duration of such measures.

Eventually, the Directorate General for Imports 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 thus been accompanied by the suppression of barriers aiming to substitute imports with domestically-produced inputs.

While liberalising its economy and thus 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 remedies (particularly anti-dumping measures) 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 taking part in the European Union Customs Union in 1995, which meant adopting the EU's common external tariff and the compulsory alignment with the EU's Common Trade Policy.⁴

Turkey is also a member of the WTO and is therefore bound by WTO agreements. These include the General Agreement on Tariffs and Trade (GATT 1994) and the annexed agreements such as the Agreement on Subsidies and Countervailing Measures and the Agreement on Trade-Related Investment Measures that include provisions on investment incentives. In brief, these provide that Turkey cannot:

- a* discriminate between foreign and domestic companies while giving subsidies;
- b* give subsidies that directly promote exports; or
- c* give subsidies that are contingent upon the use of local content.

⁴ The Customs Union Agreement came into force on 31 December 1995.

The GATT 1994 and the Agreement on Implementation of Article VI of GATT 1994⁵ constitute the grounds in Turkish law for every legislation on trade remedies, and are directly applicable regarding all issues that are not addressed in the Turkish law.

i Anti-dumping and anti-subsidy legislation

The relevant legislation mainly consists of:

- a* Law No. 3577 on the Prevention of Unfair Competition in Imports;
- b* Regulation No. 23861 on the Prevention of Unfair Competition in Imports;
- c* Decree No. 99/13482 on the Prevention of Unfair Competition in Imports;
- d* Communiqué No. 2008/6 on the Prevention of Unfair Competition in Imports; and
- e* the Rules and Principles on the Implementation of Communiqué No. 2008/6 on the Prevention of Unfair Competition in Imports.

Dumping in the context of international trade refers to the export of products at a price that is lower than the domestic selling price or lower than the price at which the exporter should sell its products. Although dumping may benefit consumers or users in the importing country, the producers in the same country may well be harmed.

Another trade defence instrument that may lead to the same result and that is much less used by Turkey is anti-subsidy measures (the countervailing duties), whereby the exporter receives financial or fiscal advantages conferring a benefit or any form of income or price support with a view to helping the production or the export of a given product. The measures imposed in that regard aim to ‘countervail’ the injury that is caused or could be caused by subsidies to the domestic industry of the country taking the measures.

In brief, dumping or subsidisation are unfair competition practices that cause or threaten to cause material injury to the domestic industry, or cause material retardation of an industry. Through an objective examination of the facts, the Ministry has to determine whether there has been a significant increase in such imports, either in absolute terms or relative to production or consumption in Turkey.

Once the Ministry determines that imports are dumped, it has further to assess the effect of those imports on prices and on the domestic industry. Concerning the effect on prices, consideration should be given to whether there has been a significant price undercutting by the dumped imports as compared with the prices of the like product in Turkey, or whether the effect of such imports is to depress prices to a significant degree or prevent price increases. As regards the impact on the domestic industry, it has to be determined if the economic indicators of the domestic industry have deteriorated because of the dumped imports.⁶

ii Safeguard legislation

The Turkish legislation regulating the main aspects of safeguard measures is as follows:

- a* Decree No. 2004/7305 on Safeguard Measures in Imports; and
- b* Regulation No. 25486 on Safeguard Measures in Imports (the Safeguard Regulation).

5 Approved by Law No. 4067 dated 26 January 1995. Ratified by the Decision No. 95/6525 of the Council of Ministers dated 3 February 1995.

6 For example, the actual and potential decline in sales, profits, output, market share, productivity, return on investment and utilisation rate of capacity. Factors affecting domestic prices may also be taken into account, such as the magnitude of the dumping margin, actual or potential negative effects on cash flow, inventories, employment, wages, growth and ability to raise capital or investments.

If a given product is imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry producing like or competing products, the Ministry may remedy this serious injury or threat of serious injury provided that the adoption of safeguard measures is not against Turkey's interests (which requires the Ministry to take into account the welfare of all the sectors that may be affected by the contemplated safeguard measure). The remedy taken by the Ministry may take the form of customs duties, additional financial charges, restrictions on the quantity or value of imports, tariff quotas or a combination thereof.

Provisional safeguard measures may also be taken by the Council of Ministers upon the Ministry's proposal if critical circumstances existed where delay would cause damage that would be difficult to repair, thereby making immediate action necessary. Moreover, a preliminary determination providing clear evidence that increased imports have caused or are threatening to cause serious injury is also necessary.

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.

To avoid the payment of additional duties, exporters or producers may be tempted, by putting themselves outside this framework, to move a part of their manufacturing (or assembly) operations to another country. Likewise, they may also be tempted to slightly change the product subject to an anti-dumping or anti-subsidy measure. In brief, they may attempt to circumvent the additional customs duties imposed. The Ministry handles this problem to a certain extent by subjecting the 'new' product to the existing anti-dumping duties.

While the purpose of anti-dumping or anti-subsidy measures is to prevent the domestic market being jeopardised by an unfair price competition, anti-circumvention measures aim to prevent the circumvention of measures already taken. In short, the sole purpose of a regulation extending the implementation of additional duties is to ensure the effectiveness of those duties and to prevent its circumvention.

As anti-dumping or anti-subsidy duties are imposed on a specific product of a specific exporter or producer from a specific country, the circumvention may concern both the defined product and the origin scope, and may be carried out in several ways:

- a* by shipping goods subject to anti-dumping or anti-subsidy duties through a less restrictive country (transshipment or third-country circumvention);
- b* by assembling the goods subject to anti-dumping or anti-subsidy duties in a country not subject to the anti-dumping duties (assembling); and
- c* by slightly modifying the product ('slight modification').

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 to diversify the products it exports. Those 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 the 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.

In light of the foregoing objectives, Turkey first entered into an FTA with the European Free Trade Association countries in 1991,⁷ and then participated in the customs union of the European Union (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 remedies to countries other than the Member States of the EU.

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 instruments of the GATT 1994 and of the WTO constitute a basis for parties' trade policy. 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 recognised. The FTAs concluded by Turkey thus do not contain any different provisions as regards the substantial or procedural rules already applicable to trade remedy cases.

IV RECENT CHANGES TO THE REGIME

The Turkish trade remedies law did not recently undergo any salient amendment. Nevertheless, some changes in the Ministry's practice may be mentioned (see details in Section V, below).

⁷ The entry into force of the concerned agreement being 1 April 1992.

The 7th Chamber of the Council of State, with two decisions taken on 28 December 2017,⁸ repealed the definitive anti-dumping duties imposed against the imports of unbleached kraft liner paper originating in the United States⁹ on the grounds that neither the occurrence of the injury nor the causal link between the dumped imports and the injury has been concretely established and that adverse effects have been attributed to the dumped imports without carrying out a proper examination of other reasons that could have had a bearing on the injury. Nevertheless, one of the dissenting opinions attached to those decisions stressed that the Ministry's examination of the case has been properly performed. The Ministry, however, challenged those decisions in appeal before the General Assembly of the Council of State.

Although of negligible importance, 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 the concerned imports. Accordingly, the Decree of the Council of Ministers on the same subject was also repealed on 18 March 2017.

Eventually, changes regarding the status of China are expected to occur in the near future.

V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

The recent trade remedy investigations launched by the Ministry, particularly those against the EU and Korea, contributed to the development of the case law in that regard. Moreover, the expiry of the 15-year period foreseen by China's Accession Protocol to the WTO (the Protocol) and the market economy treatment (MET) requests made both by China-based companies and by the Chinese government have been the focus of attention. Other issues worth mentioning pertain to the increasing importance attached by the Ministry to assessments based on injury and to the application of the lesser duty rule by the very same authority.

i Market economy status

The expiry of the 15-year period prescribed for the application of the 'surrogate country approach' to China has been put forward by the Chinese government and by Chinese associations in order to affirm that an automatic switch to market economy status has occurred. On the other hand, Chinese exporters, who are seeking to have their cost and price data taken into consideration by the Ministry, claim for their part that they satisfy the conditions for MET laid down by the Turkish legislation.

In the anti-dumping *Solar Panels* case (2017),¹⁰ despite the request by the Chinese Ministry of Trade that the MET be applied to the case at hand, the Ministry implicitly rejected the 'automatic switch' argument regarding the expiry of the above-mentioned Protocol by only referring to the proper implementation of the WTO and Turkish legislations. Additionally,

8 See Decision No. E. 2015/6923 K. 2017/6615 and Decision No. E. 2015/6922 K. 2017/6614.

9 See Communiqué No. 2015/28 on the Prevention of Unfair Competition in Imports, published on 14 July 2015.

10 See Communiqué No. 2017/6 on the Prevention of Unfair Competition in Imports, published on 1 April 2017.

one of the cooperating exporters requested the Ministry to consider that the company's activities are conducted under market economy conditions. Indeed, although the Ministry acknowledged the improvements made by China concerning the compulsory household registration (*bukou* system), it has been outlined that the system still restricts the 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* case (2018),¹¹ 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 the Turkish legislation recognises China as a market economy.

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 to also 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 complainant company or companies, rather than the withdrawing company, and whether the data of the withdrawing company may still be used by the Ministry for the injury determinations following the withdrawal as happened in the *Porcelain* case. Those questions are of importance regarding the latter case, in which the Ministry considered that the complainant company, rather than the withdrawing company, does not satisfy the representativeness criterion.

11 See Communiqué No. 2018/6 on the Prevention of Unfair Competition in Imports, published on 3 March 2018.

iii Non-cooperation versus cooperation

Turkish law provides that the outcome of the investigation 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:

- a in the *Copper Wire Rod* case (2017),¹² in which no exporter cooperated, the Ministry decided to terminate the anti-dumping measure because of the fact that the expiry of the duty would not lead to a continuation or recurrence of the injury;
- b in the *Plywood* sunset review case (2018),¹³ the Ministry resolved to decrease the amount of the previously applied duties despite the absence of cooperating Chinese companies;
- c in the final disclosure regarding the pending *Terephthalic Acid* case (2018),¹⁴ a company that duly submitted its responses has been considered as non-cooperating on the ground that it attempted to obstruct the investigation in order to affect its outcome; and
- d 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.

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 remedy 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 sunset 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* sunset review case (2018),¹⁵ have not been subject to such visits.

v Injury analysis: the importance of price undercutting and suppression

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 import prices are below the domestic selling price of the domestic industry, whereas price suppression gives the percentage at which the import prices are lower than the target price of the domestic industry. Therefore, the

12 See Communiqué No. 2017/36 on the Prevention of Unfair Competition in Imports, published on 29 December 2017.

13 See Communiqué No. 2018/18 on the Prevention of Unfair Competition in Imports, published on 22 May 2018.

14 The Turkish version of the final disclosure is accessible through the following link: <https://www.ticaret.gov.tr/portal/content/conn/UCM/uuid/dDocName:EK-260290> (last accessed on 17 July 2018).

15 See Communiqué No. 2018/13 on the Prevention of Unfair Competition in Imports, published on 20 April 2018.

setting of a reasonable profit margin (required for the calculation of price suppression) is of utmost importance in the establishment of the injury. The Ministry's assessments are based on country-specific rather than company-specific data.

As regards the cooperating exporter's claim for the use of its own data in the *Diocetyl Phthalate* anti-dumping case (2017),¹⁶ the Ministry underlined that an important part of the imports of the concerned product from 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 suppression.

In this regard, 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 suppression were absent, the Ministry did not impose any measure by way of implementing the lesser duty rule. Nevertheless, in recent cases, the Ministry decided to impose measures even in the absence of price undercutting or suppression.

In the *Polyester Synthetic Staple Fiber* sunset review case, in which neither price undercutting nor price suppression has been established for the imports originating in Korea, the Ministry still extended the period of application of the existing measures on the following basis:

In the framework of the evaluations, it has been considered that there has not been price undercutting or price suppression under the implementation of the anti-dumping measures due to the facts that (i) the composition of the imports from the subject countries could have changed following the effectiveness of the anti-dumping measure, (ii) the imports from Indonesia in 2015 and 2016 were very low and thus its price is far from constituting an indicator, and (iii) although the domestic prices in TRY did not increase, the decrease of the USD value of the sales prices in TRY caused by the currency increase in 2015 and 2016 had an effect. In light of the foregoing, it has been determined that the expiry of the measure would be likely to lead to a continuation or recurrence of the injury.

Furthermore, the *Sodium Percarbonates* anti-dumping case (2018)¹⁷ is worth mentioning as the Ministry linked the absence of price undercutting to the domestic producer's waiver from its turnover and profit by not raising its prices in order to be able to compete with the imports. Besides, one of cooperating parties' claim regarding the currency used in the scope of the determination of the price undercutting and suppression has been accepted by the Ministry, so that 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 the price undercutting and price suppression. However, the Ministry rejected this request on the basis of its like product analysis.

Another issue that should be tackled regarding the determination of price suppression pertains to the setting of a reasonable profit margin. Indeed, in the *Tubes and Pipes of Refined Copper* case (2017),¹⁸ unlike its common practice, the Ministry set, as regards the price

16 See Communiqué No. 2017/23 on the Prevention of Unfair Competition in Imports, published on 20 October 2017.

17 See Communiqué No. 2018/7 on the Prevention of Unfair Competition in Imports, published on 2 March 2018.

18 See Communiqué No. 2017/25 on the Prevention of Unfair Competition in Imports, published on 17 October 2017.

suppression 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 suppression 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 actual data of importers.

Regarding the value on which a reasonable profit margin should be implemented, it has been 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.

Finally, it should also be noted that the Ministry refrained from disclosing the non-confidential version of its injury calculations; in cases in which there is a single domestic producer, the Ministry has even 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: is it an acceptable argument?

In the *Tubes and Pipes of Refined Copper* case, in which the operations of the exporting company and of the domestic industry have respectively been conducted in euros and US dollars, the claim has been made that the injury of the domestic industry resulted from the appreciation of the US dollar against the euro during the investigation period. The Ministry nevertheless 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.

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 thus 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 supportive documents. Accordingly, this case shows that the Ministry may well accept such requests in the future provided that sufficient supportive documents are submitted. It is not clear at this stage what kind of documents would be deemed supportive, considering the fact that in order 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.

VI TRADE DISPUTES

Although the relevant parties may appeal for the annulment or suspension of the execution of the Ministry's decision, the Ministry's decisions 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 that interested parties generally prefer 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, Turkey has been involved in four cases as complainant, in nine cases as respondent, and in 77 cases as third country. However, only two cases, in which Turkey is complainant, led to the establishment of a panel.

In the *United States – Countervailing Measures on Certain Pipe and Tube Products* (DS523) case, Turkey complained about the method used by the US authorities to determine which entities are public bodies, which sales have been 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 have also been contested in this case.

In *Morocco – Hot-Rolled Steel* (DS513), Turkey 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.

The outcome of the panel's examination regarding those two cases is expected to be released in the second half of 2018.

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).

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 recourse to trade remedy measures in the past few years in order 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 remedy investigations.

Right after the EU's newly initiated safeguard investigation concerning iron and steel products, on 27 April 2018 the Ministry launched, a safeguard measure investigation of iron and steel. The Ministry, in its initiation notice, stressed that it will decide whether products originating in the EU will be exempted from potential measures. Although no provision states

that the products originating in the EU are exempt from potential measures, the concerned notice raises doubts about whether all exporters will be treated equally, as required by the WTO rules. This step is construed as Turkey keeping the door open for negotiations with the EU where the safeguard investigation concerning iron and steel is pending.

Another example showing that Turkey will closely monitor the stance of the United States and of the EU may be found in the *Polyester Synthetic Staple Fiber* sunset review case, in which the Ministry considered that the US measure against the imports of the subject products from Korea and the ongoing investigations in the United States against Korea are of importance to show the import tendencies.

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.

Eventually, the result of the negotiations between the United States, the EU and China to minimise the industrial concerns may thus have a great impact upon the Turkish Ministry's assessments. Further, the outcome of the pending cases initiated by China at the WTO against the EU and the United States related to their price comparison methodologies will serve as a reference for the Ministry's approach towards China.

UKRAINE

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I OVERVIEW OF TRADE REMEDIES

Trade defence instruments (anti-dumping, countervailing and special (safeguard)² 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) entered into force.

Thereafter, trade defence instruments have been applied by domestic industries quite often. As of July 2018,³ the following anti-dumping investigations and reviews are conducted in Ukraine related to imports that originate in:

- a* Russia – related to imports of glass containers for medical purposes up to 0.15 litres and cement;
- b* Belarus – related to imports of salt, electric incandescent lamps, cement-asbestos boards, bars and cement;
- c* India – related to imports of syringes;
- d* Turkey – related to imports of syringes;
- e* China – related to imports of syringes and medical gum plugs and caps;
- f* Poland – related to imports of medical gum plugs and caps; and
- g* Moldova – related to imports of bars and cement.

At the same time, the following trade defence remedies are applied to imports of such products as originating in:

- a* Russia:
 - 10 anti-dumping duties in respect of:
 - crossing points;
 - fibreboards;
 - ammonium nitrate;

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.

3 According to the official database of the Ministry of Economic Development and Trade of Ukraine – <http://me.gov.ua/Documents/Detail?lang=uk-UA&id=2d92511f-c6fa-468a-97f3-bc353742db15&title=ZakhistInteresivNatsionalnikhTovarovirobnikivNaVnutrishnomuRinku>.

- glass containers for medical purposes up to 0.15 litres;
 - abrasives;
 - certain nitrogen fertilisers;
 - certain types of chocolate products and other cacao-containing products;
 - caustic soda;
 - certain urea-formaldehyde products; and
 - rebars and wire rods; and
- b* China – three anti-dumping duties in respect of incandescent lamps; articles made from ferrous metal; and seamless pipes;
- c* Belarus – two anti-dumping duties in respect of fibreboards and cement-asbestos boards;
- d* Kyrgyzstan – one anti-dumping duty in respect of incandescent lamps; and
- e* two safeguard measures in respect of flexible porous plates, blocks and sheets of polyurethane foam, 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 adoption of key decisions in the course of proceedings. This includes: on initiation of investigations; on positive/negative conclusions on existence of dumping, specific subsidies or surge in imports and their amounts; on positive conclusions on existence of injury; on 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 them 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. Following 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.

- c 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 Kuryer*, the governmental newspaper – Ukrainian law is silent on the exact deadlines. In practice, the relevant term differs considerably from case to case and may vary from three to 14 days. 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 20 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 45 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, such terms differ considerably from case to case and may vary from two to five months after the investigation's initiation. Initially, the MEDT grants 37 days to answer questionnaires. However, the said term may be extended for a period of not more than four weeks based on a duly substantiated request;
 - on-the-spot verifications to be conducted by the MEDT. As of now, such verifications are only conducted in Ukraine on the premises of related importers (if it involves foreign producers and exporters) and of the domestic producers;
 - 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. Following the results of the hearings, all interested parties shall submit post-hearings submissions in writing within five to 10 days of the hearings. Otherwise, their oral statements will be not taken into account; 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 Kuryer*. 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 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;
- h 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;

- i* anti-circumvention investigation is conducted in case of unfair trade practices of foreign producers and exporters aimed at avoiding the application of anti-dumping and countervailing measures; and
- j* 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, such an obligation may be very burdensome for the interested parties, especially in case of submission of answers to questionnaires. Since the MEDT does not conduct on-the-spot verifications on the premises of foreign producers and exporters, it usually requires lots of supporting documents to be submitted together with the answers to the questionnaire, all of which shall be duly translated into Ukrainian.

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.

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, in order 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 MEDT's registry will not register the documents in due time. In such cases, the delayed documents will not be taken into account by the MEDT.

II LEGAL FRAMEWORK

In Ukraine, the trade defence instruments are regulated by:

- a* the 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
- b* the 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 it is not allowed to apply countervailing measures) 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 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 certain 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 their 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 the 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 FTA⁶

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:

- a* 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;
- b* 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
- c* 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 such 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 FTA⁷

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 the 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

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 in regard of 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.

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 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. The consultations shall take place in the Joint Committee if any party so requests within 30 days of the receipt of the notification.

v Canada–Ukraine Free Trade Agreement (CUFTA)⁸

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 good 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.

vi Other FTAs

Ukraine also has FTA Agreements with Azerbaijan, Georgia, Macedonia, Montenegro, Tajikistan, Turkmenistan and Uzbekistan, which also provide for preferential trade conditions and trade cooperation.

8 Entered into force on 1 August 2017.

FTA with Montenegro

Safeguards

The Montenegro–Ukraine FTA provides for separate provisions for global safeguard measures and bilateral safeguard measures.

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. The safeguards may be adopted if the Joint Committee fails to find such solution within 30 days.

Anti-dumping and countervailing measures

The parties reaffirmed their respective WTO obligations without introduction of new legislative provisions.

IV RECENT CHANGES TO THE REGIME

In the past year, Ukrainian legislation in the field of trade defence instruments remained without change.

However, we consider it necessary to point out the following recent practices introduced in 2017 and the first quarter of 2018:

- a* participation of customers in investigation proceedings: since 2017, customers have participated in investigation proceedings more and more actively. This was not typical in previous years. In order to avoid situations when customers do not submit any evidence and then request termination of investigation without any measures, the MEDT has started to send questionnaires to customers and associations thereof;
- b* final determination in safeguard investigations: the Safeguard Law does not stipulate an obligation of the MEDT to disclose its final determination to interested parties. Thus, the interested parties have been deprived of the opportunity to analyse whether the decision

- has been adopted in full compliance with the Agreement on Safeguards or the Safeguard Law, or both. The said determinations have only been disclosed through initiation of court proceedings. However, in the course of the safeguard investigation related to imports into Ukraine of sulphuric acid and oleum, the MEDT changed its approach and disclosed the final determination to the interested parties prior to adoption of the relevant decision. This was done in response to requests submitted by the interested parties with reference to the panel report in *Japan v. Ukraine – Passenger Cars*;
- c recent case law in the field of safeguard measures: as indicated above, instead of using internationally recognised terms such as ‘safeguards’ and ‘safeguard investigations’, Ukrainian law operates using the terms ‘special measures’ and ‘special investigations’. Such difference in terminology resulted in a court decision whereby special measures applied to flexible porous plates, blocks and sheets of polyurethane foam that were adopted under the Safeguards Law are not to be considered as safeguards under the Agreement on Safeguards. Thus, the court has concluded that neither GATT, nor the Agreement on Safeguards shall be applied.⁹ This issue has already been raised by the EU during the meeting of the Committee on Safeguards on 23 April 2018;¹⁰
- d recent case law in the field of anti-dumping measures: Ukrainian courts have recently adopted several landmark decisions:
- the courts have clarified the position in respect of terms within which it is allowed to challenge decisions of the ICIT on application of anti-dumping measures. Specifically, it was confirmed that decisions can be challenged within one month of the application of the relevant measures, irrespective of any further suspension thereof;
 - for the first time in the history of trade defence remedies in Ukraine, the Ukrainian courts have appointed court expert examination to double-check the correctness of dumping margin calculations made by the MEDT;
 - for the first time in the history of Ukraine, Ukrainian courts have requested in one case all confidential documents and information, and in another case a full confidential version of the definitive report. This is quite dangerous because Ukrainian law does not stipulate any special treatment for confidential information submitted by the parties in the course of court proceedings. Under general procedural rules, all such information is available to all participants of the court proceedings – usually domestic industry workers and foreign producers, exporters and importers with conflicting interests; and
- e access to case materials: as indicated above, the transparency of investigations in Ukraine is currently ensured by the obligation of all interested parties to send all their submissions to other interested parties to the investigation for commentary by post. In 2017, the MEDT facilitated this process and allowed interested parties to send copies of all documents by email. However, this has resulted in undue dispatch of the documents and further impossibility for the interested parties to confirm dispatch

9 Decision of Kyiv Administrative Court of Appeal (appeal instance) available at: <http://www.reyestr.court.gov.ua/Review/67033582>; Resolution of District Administrative Court of Kyiv (first instance) available at: <http://www.reyestr.court.gov.ua/Review/65966677>.

10 https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=244716,244496,244354,244355,244356,244331,244332,244333,244335,244327&CurrentCatalogueIdIndex=9&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

thereof. Therefore, in practice, to be on the safe side, parties have continued to send documents by post. Moreover, the MEDT used Google Dropbox to ensure access to materials in some investigations. However, in practice this option has not been very helpful because, in the absence of strict rules for operation of the relevant databases, there have been problems with the frequency of disclosure of documents.

V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

One of the urgent issues related to trade defence instruments in Ukraine is the quite old-fashioned legislation adopted in 1998 that 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, so both the Commission and the MEDT shall act only in a way as directly set forth by law.

Ukrainian law does not precisely define all stages of investigation with specific time limits, as well as not addressing documents to be issued by the MEDT etc., 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 in order 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 investigation. Therefore, even though interested parties usually submit lots of different documents to the MEDT and address all its requests, they are not able to identify the approach taken by the MEDT and to understand the MEDT's relevant position in due course, leaving this until the end of the investigation when it is usually too late to clarify or improve submissions.

Another problem arises from the stipulation in Ukrainian legislation in the field of trade defence instruments of certain inoperative provisions, to name but a few:

- a* the law sets as a mandatory precondition for the initiation of an anti-circumvention investigation, newcomer review, and accelerated review, the placement of the 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 be either 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; and
- c* the anti-circumvention mechanism may be engaged in very limited cases – only in case of increase of imports of the products subject to anti-dumping/countervailing duties from the third countries or in case of assembling of the products in issue in Ukraine from the imported parts. At the same time, the most frequently used type

of anti-dumping/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/countervailing measures. In practice, in the absence of specific instructions of 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 has established that Ukraine has not duly established all relevant circumstances allowing application of safeguard duties as well as seriously infringed procedural rules. As a result, in view of the nature of violations, the Commission has 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.

The Commission and the MEDT were criticised for practice on initiation safeguards. Initially, domestic industries preferred to request safeguard measures rather than anti-dumping and countervailing. As a result, despite the extraordinary nature of safeguards, there were years when safeguards prevailed over anti-dumping measures. This was easily explained because the domestic producers were able to submit import statistics demonstrating an increase in imports (even not so recent, significant and unexpected) without any further analysis of unforeseen developments, non-attribution requirements, etc., while the subject of proof in anti-dumping/anti-subsidy investigations is evidently more difficult. After accession by Ukraine to the WTO, the situation began to improve and several safeguard investigations (i.e., in respect of ferroalloys, certain oil and gas products, refrigerators, freezers and fertilisers) were terminated without application of safeguard measures.

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 is as follows:

- a* *Ukraine v. Armenia – Measures Affecting the Importation and Internal Sale of Cigarettes and Alcoholic Beverages* (DS411)¹¹ – on 25 October 2010 the DSB deferred the establishment of a panel;
- b* *Ukraine v. Moldova – Measures Affecting the Importation and Internal Sale of Goods (Environmental Charge)* (DS421)¹² – on 17 June 2011 the DSB established a panel; however, a panel has not been composed;

11 https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds411_e.htm.

12 https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds421_e.htm.

- c *Moldova v. Ukraine – Taxes on Distilled spirits* (DS423)¹³ – on 20 July 2011 the DSB established a panel; however, a panel has not been composed;
- d *Ukraine v. Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*¹⁴ – on 28 May 2015 Ukraine requested the panel to suspend its proceedings in accordance with Article 12.12 of the DSU ‘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.
- e *Japan v. Ukraine – Definitive Safeguard Measures on Certain Passenger Cars* (DS468)¹⁵ – 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, 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 imports of passenger cars;
- f *Russia v. Ukraine – Anti-Dumping Measures on Ammonium Nitrate from Russia* (DS493)¹⁶ – 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:
- Articles 1, 2.1, 2.2, 2.2.1, 2.2.1.1, 2.4, 5.8, 6.1, 6.2, 6.4, 6.5.1, 6.6, 6.8, 6.9, 9.2, 9.3, 11.1, 11.2, 11.3 and 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;
- g *Ukraine v. Russia – Measures affecting the importation of railway equipment and parts thereof* (DS499)¹⁷ – the panel was composed on 2 March 2017. On 30 July the WTO circulated the panel report;
- h *Ukraine v. Russia – Measures Concerning Traffic in Transit* (DS512)¹⁸ – on 6 June 2017 the Director General composed the panel;
- i *Russia v. Ukraine – Measures relating to Trade in Goods and Services* (DS525)¹⁹ – 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; and
- j *Ukraine v. Russia - Measures Concerning the Importation and Transit of Certain Ukrainian Products* (DS532).²⁰

13 https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds423_e.htm.

14 https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm.

15 https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds468_e.htm.

16 https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds493_e.htm.

17 https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds499_e.htm.

18 https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm.

19 https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds525_e.htm.

20 https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds532_e.htm.

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 community, elaborated the relevant draft laws aimed at improvement of the current regulations. Eventually, on 17 July 2017,²¹ 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. As of today, the draft laws are considered by the Parliament of Ukraine. It is expected that the above draft laws will be adopted by the end of 2018.

21 http://me.gov.ua/Documents/List?lang=uk-UA&tag=docs_project.

UNITED STATES

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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.

i Anti-dumping/countervailing duty

The anti-dumping (AD) and countervailing duty (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,² 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.’³ 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.⁴ 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

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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'.⁵ 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.⁶ The extent to which the 'normal value' exceeds the US price is known as the 'margin of dumping',⁷ 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.⁸ The 'margin' of subsidisation is calculated by spreading some portion of the subsidy benefit amount over the exporter's production or export sales value.⁹

If Commerce calculates a margin of dumping or subsidisation above the *de minimis* level (typically 2 per cent in AD investigations and 1 per cent in CVD determinations), then it issues an affirmative determination.¹⁰

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.¹¹ 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.¹² If ITC finds a causal connection between imports and material injury (or threat of injury) to the domestic industry, it issues an affirmative determination.¹³

5 19 USC § 1677b(c).

6 There are several surrogate countries that Commerce typically identifies; of late the most frequently used are Thailand and Indonesia.

7 19 USC §§ 1677(35) and 1677b.

8 19 USC §§ 1677(5) and 1677(5A).

9 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.

10 19 USC §§ 1671d(a) and 1673d(a).

11 19 USC § 1677(7).

12 *Id.*

13 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.¹⁴ Following that filing, Commerce must confirm that the petitioners and supporters represent a sufficiently large proportion of the industry to have standing;¹⁵ if so, then the case moves to ITC for a preliminary determination as to whether there is a 'reasonable indication' of injury or threat.¹⁶ 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;¹⁷ at that point, importers must begin paying duties at the rates that Commerce has provisionally calculated.¹⁸ 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.¹⁹ 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.²⁰ 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.²¹ 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).²² If the margin is higher than the deposit rate, then the importers are invoiced for the difference (again plus interest).²³ 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.²⁴ If either agency concludes that an order is no longer necessary, then the order is ‘sunset’ (revoked).²⁵ 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,²⁶ 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.²⁷

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).

ii 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 1974,²⁸ 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.²⁹ 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 2001,³⁰ two new 201 proceedings are ongoing on solar cells, modules and panels and large residential washers.³¹

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 1974,³² 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 1962.³³ 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

28 See 19 USC § 2252 et seq.

29 *Id.*

30 See Steel, Inv. No. TA-201-73, USITC Pub. 3479 (Dec. 2001).

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.

trade practices by US trading partners in a variety of ways, including the assessment of tariffs 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.

Action and authority	Triggering event	Standard	Timing and duration	Relief
Import surcharge under Section 122 of the Trade Act of 1974 (19 USC § 2132)	Presidential Proclamation	To address serious US trade deficit, significant dollar depreciation, or correct international balance of payments disequilibrium	Effective: immediately Duration: 150 days, can be extended by Congress	Up to 15 per cent import duties
Action under Trading with the Enemy Act of 1917 (50 USC § 4305)	Presidential proclamation	Restrict trade with countries hostile to the US	Immediate and unlimited	Unlimited
Action under Int'l. Emergency Economic Powers Act of 1977 (50 USC § 1701 et seq.)	Presidential declaration	Declaration of national emergency with respect to a foreign threat	Immediate and unlimited	Unlimited

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 proceedings reflects the desire of the United States and its colleague member states to be able to maintain

34 See 19 USC § 3512(a)(1).

trade remedies regimes notwithstanding the general movement towards free trade. That being 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 Reinivigation 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 of 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 of 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 of the other countries that

35 See Correspondence between US Trade Representative Ron Kirk and Korean Trade Minister Kim Jong-Hoon (10 February 2011), available at https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/korus/2011_02_10_Kirk-Kim%20Letter.pdf.

36 See Presidential Proclamation 9705 of 8 March 2015, ‘Adjusting Imports of Steel into the United States’, 83 Fed. Reg. 11,625 (15 March 2018) and Presidential Proclamation 9710 of 22 March 2018, ‘Adjusting Imports of Aluminum into the United States’, 83 Fed. Reg. 13,355 (28 March 2018).

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 as of this 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

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).

38 See Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Automobiles, Including Cars, SUVs, Vans and Light Trucks, and Automotive Parts, 83 Fed. Reg. 24,735 (30 May 2018)

39 See 'The Washington Post, 'McConnell will not bring up bill challenging Trump tariffs.' (5 June 2018), available at https://www.washingtonpost.com/news/business/wp/2018/06/04/corker-planning-bill-to-curb-trumps-tariffs/?noredirect=on&utm_term=.e9294724f0ec.

ii 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 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 tortured 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

40 See Addressing China’s Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology, 82 Fed. Reg. 39,007 (17 August 2017).

41 See Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 14,906 (6 April 2018).

42 See Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 28,710 (20 June 2018).

43 Id.

(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

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.⁴⁶ 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.⁴⁷

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.

iv 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 galvanealing 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.

44 See *Bell Supply Company, LLC v. United States*, 179 F.Supp.3d 1082 (CIT 2016).

45 Id. at 1088.

46 Id. at 1092.

47 Id. at 1093–1094.

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 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.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.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.

V TRADE DISPUTES

As noted in Sections IV.i and ii, above, the Trump administrations 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 *United States – Conditional Tax Incentives for Large Civil Aircraft*,⁵⁰ the latest chapter in the long-running dispute between Boeing and Airbus about alleged subsidies, the EU

48 See *Certain Cold-Rolled Steel Flat Products From the People’s Republic of China: Initiation of Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders*, 81 Fed. Reg. 81,057 (16 November 2016), and *Certain Corrosion-Resistant Steel Products From the People’s Republic of China: Initiation of Anti-Circumvention Inquiries on the Antidumping Duty and Countervailing Duty Orders*, 81 Fed. Reg. 79,454 (14 November 2016).

49 See *Certain Cold-Rolled Steel Flat Products From the People’s Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders*, 83 Fed. Reg. 23,891 (23 May 2018) and *Certain Corrosion-Resistant Steel Products From the People’s Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders*, 83 Fed. Reg. 23,895 (23 May 2018).

50 *United States -- Conditional Tax Incentives for Large Civil Aircraft*, DS 487.

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.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 panel's determination in large part.⁵² 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.'⁵³

In *United States — Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea*,⁵⁴ 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.⁵⁵ 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.

VII 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

51 See Id., Doc. No. WT/DS487/R (28 November 2016).

52 See Id., Doc. No. WT/DS487/AB/R (4 September 2017).

53 <http://www.defense-aerospace.com/articles-view/release/3/186523/wto-reverses-ruling-on-boeing-tax-breaks%2C-airbus-looks-to-next-case.html>.

54 *United States — Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea*, DS 488.

55 *United States — Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea*, DS 488, Doc. No. WT/DS488/R (14 November 2017).

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.

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He has been involved in most major EU anti-dumping, anti-circumvention and anti-subsidy proceedings since 1990. In this field, he has represented numerous clients before

the European Commission, the European Court of Justice (now the Court of Justice of the European Union), WTO Panels and the WTO Appellate Body.

In the field of international trade law, he has assisted WTO members in numerous WTO dispute settlement proceedings, including *Ukraine – Definitive Safeguard Measures on certain Passenger Cars* (DS468) and *EC – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* (DS397). In this latter dispute, he obtained an unprecedented finding that the EU's Basic Anti-dumping Regulation was 'as such' incompatible with the EU's WTO obligations.

Philippe De Baere regularly lectures at the Carlos III University of Madrid (UC3M) and the University of Leuven (KUL).

ALFREDO A BISERO PARATZ

Wiener-Soto-Caparrós

Alfredo began his legal career in the tax department of Coopers & Lybrand-Harteneck, López y Cía (now PriceWaterhouseCoopers), advising on mining, trusts, technology transfers, investment structures and international tax planning.

He later joined the law firm of Allende & Brea, where, as a senior associate, he advised on tax issues related to the mining and oil and gas sectors, counselled on domestic and international tax planning, and represented clients in tax and customs litigation. In 2006, he was appointed deputy judge of tax matters by the Supreme Court of Justice of Mendoza. He has headed WSC's international tax practice since 2010.

At the University of Mendoza and National University of Cuyo, Alfredo has served in several academic appointments. In 1999, he was visiting professor at the Argentine University of Enterprise (UADE), as professor at the University of Buenos Aires (1998–2000), and as Professor at the Catholic University of La Plata (1996).

Alfredo is admitted to the City of Buenos Aires Bar Association and the Bar Association of the Province of Mendoza. Alfredo is co-founder and former president of the Centre for Argentine and Latin American Fiscal Studies (CEFAL), and is a member of the International Fiscal Association.

FERNANDO BENJAMIN BUENO

Demarest Advogados

Fernando focuses on international trade, customs and government relations area. He successfully represented and advised companies in anti-dumping, anti-subsidies, anti-circumvention and safeguard procedures, including landmark trade remedies cases such as *Steel in Brazil, United States and European Union; Denim in Argentina; Footwear; Tires; French Fries and Wines*. He is constantly involved in matters related to market access through preferential trade agreement and import tax reduction. Fernando received an LLB degree in 2003 and an LLM in tax law in 2005, both from Mackenzie Law School. Fernando participated in the Programme for Young Lawyers at the Brazilian Mission to the WTO in Geneva, Switzerland, in 2008, as well as in the Trade Policy Training Programme at the Brazilian Embassy and in the Academy Programme of WTO Law and Policy from Georgetown's Institute of International Economic Law, both in Washington, DC, United States, in 2011. Fernando participated in the Mastering Trade Policy from Harvard Kennedy School, Cambridge, Massachusetts, United States, in August 2017. He is a member of the board of Government Relations Institute (IrelGov). He is currently a member of the

Federation of Industries of the State of São Paulo – FIESP, Brazilian Institute of Studies of Competition, Consumption and International Trade – IBRAC and Brazilian International Trade Scholars – ABCI Institute. Fernando is recommended by *Chambers Global*, *Chambers Latin America* and *The Legal 500* in the trade and customs area.

ERTUĞRUL CANBOLAT

ACTECON

Ertuğrul Can Canbolat is a senior associate at ACTECON, and has an extensive knowledge of and experience on all aspects of competition law, antitrust and international trade remedies.

Ertuğrul provides legal consultancy services regarding day-to-day competition and regulatory compliance, investigations initiated by the Turkish Competition Authority and merger control issues related to both domestic and cross-border mergers. He also represents clients in judicial review proceedings.

He leads the trade remedies practice of ACTECON and has an extensive experience in defending local and international clients in anti-dumping investigations initiated by the Turkish Ministry of Trade. Ertuğrul's experience includes constructing successful defence strategies, preparing strong counterarguments against injury claims, and advising clients in presenting their case to the Ministry. He has attended many verification visits, public and private hearings and represented Korean, Chinese and European clients in anti-dumping, anti-subsidy and safeguard investigations. He has hands-on experience of the procedural and practical issues implemented by the Ministry. Ertuğrul also defends Turkish exporters in dumping investigations initiated by foreign authorities.

He obtained his LLM degree in international commercial law from the University of Exeter (UK) with distinction and his LLB degree from Bilkent University in 2011. He graduated from Österreichisches Sankt Georgs-Kolleg (Avusturya Lisesi) in Istanbul in 2006. He wrote a dissertation on the intersection between competition law and intellectual property law and earned the Dean's Commendation for academic excellence.

ASHISH CHANDRA

L&L Partners

Mr Ashish Chandra is a partner designate in the international trade and WTO practice group of the firm. *Chambers-Asia Pacific 2018* recommends him for international trade and WTO, noting that Mr Chandra attracts praise for being 'exceptional in his knowledge of the subject matter, and in his presentation and advocacy before the DGAD'. In addition to the above, Mr Ashish Chandra has also been recognised by *The Legal 500 2018* in the category of 'Next Generation Lawyers' in the arena of WTO and international trade.

Mr Chandra has extensive experience in WTO dispute settlement proceedings, wherein recently he represented the Government of India in its first compliance proceedings under Article 21.5 of the DSU, as well as India's first arbitration proceedings under Article 22.6 of the DSU. He has also extensively advised various government departments as well as private organisations on various policy issues in relation to the WTO's covered agreements. Mr Chandra also regularly represents clients in antidumping duty, countervailing duty and safeguard duty investigations before the Directorate General of Trade Remedies as well as before the appellate forums such as the Supreme Court of India, the High Courts and the Customs Excise and Service Tax Tribunal. He has also advised the Government of India on countervailing duty investigations initiated by other countries.

Ashish has taught courses on Indian trade laws at the Institute of Chartered Accountants, Noida. He is also a frequent writer, and has co-authored a chapter on the Sanitary and Phytosanitary Agreement in *WTO Dispute Settlement at Twenty*, a book published by Springer. He also sits on panels of moot court competitions on international trade, and is also invited to speak on trade law issues.

PATRICK MASON BEGG CLARK

Jones Day

Patrick Mason Begg Clark is a member of Jones Day's corporate mergers and acquisitions team, based in the Sydney office. Patrick has experience working with clients responding to investigations conducted by regulators and other government bodies, cross-border transactions and disputes. Prior to commencing work in mergers and acquisitions, Patrick worked on a range of contentious regulatory matters for private Australian companies, including against the Commonwealth of Australia in a successful appeal to the Full Federal Court regarding the imposition of anti-dumping measures imposed on imports of Chinese steel. Patrick holds a Bachelor of Laws (Honours) and a Bachelor of Commerce degree from the Australian National University and worked as an associate to two judges of the Supreme Court of the Australian Capital Territory, prior to joining Jones Day.

JORIS CORNELIS

VVGB Advocaten

Joris specialises in international trade law, general EU and WTO law, customs law and sanctions. He has worked extensively and has in-depth expertise in the area of anti-dumping, anti-subsidy and safeguards, having successfully represented companies and governments in more than 100 anti-dumping and countervailing duty proceedings started by the EU, India, Argentina, Brazil and Russia, including landmark cases such as *Biodiesel*, *Solar Panels*, *Tyres for Buses and Lorries*, *OCTG Pipes*, *WWAN Modems*, *Herbicides*, *HRF* and *PTA*. Joris has been involved in approximately 20 EU Court and WTO dispute settlement proceedings. In recent years, he has successfully represented Kuiburi Fruit Canning Co, Ltd, Zhejiang Xinanchem, PT Ecogreen Oleochemicals, PT Ciliandra Perkasa, PT Pelita Agung Agrindustri and Changmao Biochemical Engineering Co, Ltd in EU Court proceedings.

In the field of WTO dispute settlement, Joris was co-counsel for Indonesia in EU – Biodiesel (Indonesia) and for Ukraine in Ukraine – Ammonium Nitrate (Russia). He continues to be involved in the WTO proceedings concerning *Trade in Large Civil Aircraft*. Joris clerked with the European Commission and has been a member of the Brussels Bar since 2006. He obtained a law degree from the KU Leuven (Belgium), an LLM degree from Kyushu University (Japan) and a doctorate degree from the University of Hong Kong. Prior to joining the Bar, Joris was a teaching assistant at the University of Hong Kong and the academic assistant for the 2005 WTO Asia-Pacific regional trade policy course. Joris is listed by *Chambers*, *The Legal 500*, *Who's Who Legal* and has been listed as a 'Rising Star' in the Legal Media Group's *Rising Stars Guide* since 2015.

BOWEN FOX

Jones Day

Bowen Fox is an associate in Jones Day's Sydney office. The focus of his practice is advising Australian and international clients on high-value disputes. Bowen has experience in insolvencies dealing with international elements, including those with substantial foreign creditors or involving multiple jurisdictions. Bowen also has general experience resolving commercial disputes in Australian state and federal courts, and through arbitration. Bowen holds a Bachelor of Laws (Honours, Class I) degree from the University of Sydney, and previously worked as a research assistant for a defamation law professor.

IGNACIO GARCÍA

Porzio Ríos García

Ignacio García is a partner at Porzio Ríos García. His professional practice is focused on the areas of corporate and labour law, as well as international trade and customs law. He advises the firm's national and international clients in a wide range of matters, including corporate, labour, litigation, immigration, social security, pensions, transfers of executives, downsizing and union negotiations. He is also a recognised expert in private international law matters, contracts and international trade, customs law, trade defence, WTO law and customs disputes.

He was previously a partner at a Global 20 international law firm from 1999 to 2014, where he headed the firm's labour and employment and international trade and customs practice areas.

Mr García obtained his bachelor's degree from the Pontifical Catholic University of Chile in 1993 and his master's degree from Heidelberg University in 1998. He is a professor at the School of Law (graduate and postgraduate programmes) of the Pontifical Catholic University of Chile and the University of Los Andes.

He is appointed as arbitrator for the dispute resolution system of the Economic Complementation Agreement Chile-Mercosur and is an arbitrator for the Chamber of Commerce of Santiago.

Mr García has written articles on specialised areas, including foreign trade, customs law, labour law and international law. He is a frequent speaker at international seminars. He is an editorial board member of Thomson Reuters for the collection of codes of Chile.

Mr García is also the appointed representative of the State of Chile before Unidroit.

FOLKERT GRAAFSMA

VVGB Advocaten

Folkert specialises in international trade law, general EU and WTO law, and customs law. He is particularly well regarded in the area of anti-dumping and anti-subsidy, having successfully represented clients in over 150 anti-dumping and countervailing duty proceedings, including landmark EU and US cases. Recent anti-dumping, anti-subsidy and safeguard proceedings in which Folkert has acted include: *Solar Panels*, *Bicycles*, *Biodiesel*, *Organic Coated Steel*, *Aluminium Road Wheels*, *Purified Terephthalic Acid (PTA)*, *WWAN Modems*, *Fatty Alcohol* and *Magnesium Oxides*. Folkert has been actively involved in approximately 15 EU court and WTO dispute settlement proceedings. Folkert was co-counsel to India (with Edwin Vermulst) in the historic WTO anti-dumping dispute concerning EC – Bed Linen, where the

question of 'zeroing' was settled, and has been involved in the WTO proceedings concerning *Trade in Large Civil Aircraft*. He has co-authored two handbooks with Edwin Vermulst, published a number of articles, and speaks regularly at conferences. A graduate of Stanford University, he clerked with the European Commission and has been a member of the Brussels Bar since 1990. Folkert is an editor of the *Global Trade and Customs Journal* and is ranked in Band 1 in Europe and Belgium in *Chambers Global*.

LACHLAN GREEN

Jones Day

Lachlan Green works in the Sydney office at Jones Day. Lachlan has experience across a variety of transactional and litigation matters. He has worked on regulatory matters involving Australian regulators with multinational clients from a range of jurisdictions, including merger approvals. Lachlan holds a bachelor of laws degree and a bachelor of commerce degree (finance) from the University of Sydney.

HASAN GÜDEN

ACTECON

Hasan Güden is an associate at ACTECON, and focuses on competition law, regulatory issues and trade remedy cases. Hasan holds bachelor's and master's degrees from the Katholieke Universiteit Leuven (Belgium) and a Bachelor of Laws equivalency degree from Galatasaray University (Turkey).

LIM KOON HUAN

Skrine

Lim Koon Huan graduated from the University of Melbourne with a Bachelor of Commerce and LLB (Hons). She was admitted to the Malaysian Bar in 1995 and commenced her legal practice with Skrine.

She has experience in a wide range of civil litigation and arbitration work in the High Court, Court of Appeal and the Federal Court. She co-heads the competition practice group and leads the trade remedies practice group.

She also advises and acts for various local and foreign banks and financial institutions, securities firms, oil and gas multinationals, construction and property development companies in relation procedures, requirements and compliance with Malaysian laws, including trade remedies, competition and anti-corruption practices.

She has authored numerous articles and chapters on Malaysian issues as well as delivering presentations for various seminars and talks to clients on Malaysian law and legal issues of interest. She is listed in *Who's Who Legal: Trade & Customs* and has been a contributing author for the Malaysian chapters of several international publications.

KILIANE HUYGHEBAERT

VVGB Advocaten

Kiliane is an international trade law associate at VVGB. She regularly advises clients in the context of anti-dumping, anti-subsidy and safeguard proceedings and she has experience in litigating before the WTO and the CJEU. Kiliane obtained her law degrees from the

Katholieke Universiteit Leuven (LLB, 2016) and from King's College London (LLM, 2017). In addition, she took part in the programme on international trade law at the World Trade Institute in Bern, as well as in the IELPO programme in Barcelona. After her studies, Kiliane completed an internship at the Appellate Body Secretariat of the WTO.

DONGWON JUNG

Yoon & Yang LLC

Dongwon Jung is a partner at Yoon & Yang, whose main practice areas include international trade, customs duties and intellectual property. Mr Jung participated in the Korean delegation for WTO DDA trade remedy negotiation, Anti-Dumping Committee and the investigation of countervailing duties on the Korean semi-conductor industry by the Japanese government as an investigator of the Korea Trade Commission at the Ministry of Trade, Industry and Energy. Mr Jung conducted several lawsuits, including the administrative litigation regarding safeguards on Chinese garlic and the WTO panel dispute and administrative litigation on Indonesian wood-free paper. Further, Mr Jung handled various anti-dumping investigations regarding a wide range of products, including chemicals, steel, machinery and textiles and conducted the investigation on PDP patent infringement. Currently, he provides advisory services on trade remedy policies and FTAs for the Korea Trade Commission of the Ministry of Trade, Industry and Energy.

NICOLAJ KUPLEWATZKY

Legal Service of the European Commission

Nicolaj is a member of the Legal Service of the European Commission. In that capacity, he provides legal advice to the Commission and its services and represents the former in court cases before the European and national courts and arbitral tribunals. He completed his studies at the Universities of Buckingham (LLB, 2010, *summa cum laude*), Tsinghua (Cert Putonghua, 2010), Hong Kong (LLM, 2011, *cum laude*), and Columbia (LLM, 2014, *magna cum laude*). Before joining the Commission, he worked at two international law firms in Brussels in the areas of WTO law, trade defence investigations, Union customs law, and European economic sanctions and export controls. Nicolaj is a member of the editorial board of the *Global Trade and Customs Journal* and a teaching assistant at the Institute for International Law at the Katholieke Universiteit Leuven. He is admitted as attorney-at-law in the State of New York.

SERGEY LAKHNO

International Law Firm Integrites

Sergey Lakhno is a counsel and head of international trade practice at International Law Firm Integrites. He has more than 15 years of experience in the field of trade law of the World Trade Organization (WTO), preferential trade agreements, application of trade remedy measures (anti-dumping, safeguard, countervailing) aimed at protection of domestic market and interests of the companies in foreign markets, issues of foreign trade regulation, and harmonisation of Ukrainian legislation with the WTO and EU requirements. He has participated in trade investigations against Ukrainian products in the EU, Canada, United States, Brazil, the Eurasian Economic Union markets, as well as in investigations to protect the domestic market of Ukraine from unfair imports.

During 2016 and 2017, Sergey worked in the Antimonopoly Committee of Ukraine, where he practised application of economic analysis instruments in investigations on violation of the law on protection of economic competition.

In 2006–2016, working at Interpipe, Sergey protected company interests in trade remedies investigations in domestic and foreign markets, and dealt with regulatory and customs issues related to its foreign trade activities.

Working in various positions at the Ministry of Economy of Ukraine in 1999–2005, and in 2006 as an adviser to the Minister, Sergey formed the negotiating position and commitments of Ukraine on WTO membership, conditions for state support, and access to the markets of goods and services.

SUNGBUM LEE

Yoon & Yang LLC

Sungbum Lee, an attorney qualified in Korea and New York, is a partner at Yoon & Yang, whose main practice areas include customs, international trade and foreign investments. Sungbum majored in computer science and law at the Korea University, and obtained his LL.M degree at the New York University Law School as class of 2009. After passing the Korean bar in 2002, he joined the Ministry of Trade of the Korean government and took the responsibility on international trade-related matters, including WTO, FTA and BIT for eight years. Mr Lee participated as a representative of the Korean government in a number of Free Trade Agreement negotiations, for example, the Korea–US FTA, Korea–Canada FTA, Korea–ASEAN FTA and Korea–EU FTA, and in a number of WTO cases. He also assists private companies dealing with trade affairs in daily business operations. In particular, Sungbum successfully represented domestic and foreign companies in the recent FTA origin verification proceedings and anti-dumping and countervailing duty investigations conducted by the Korean and foreign governments. Based on such contributions, he received a citation from the Ministry of Foreign Affairs in 2015, from the Ministry of Land, Infrastructure and Transportation in 2016, and from the Ministry of Trade, Industry and Energy in 2017.

WILLIAM MAHER

Jones Day

William Maher is an associate at the Sydney office of Jones Day, with experience across regulatory matters and disputes. William has advised clients on lodging merger authorisations to the Australian Competition and Consumer Commission, Australian Competition Tribunal review proceedings and Anti-Dumping Commission determinations, among other regulatory matters. William has assisted clients with complex international arbitrations seated overseas, domestic arbitrations seated in Western Australia and New South Wales and Australian federal commissions of inquiry. William holds a Bachelor of Laws and a Bachelor of Arts from the University of New South Wales.

ANZHELA MAKHINOVA

Sayenko Kharenko

Anzhela Makhinova is a partner at Sayenko Kharenko, responsible for international trade practice. Anzhela focuses on international trade. She specialises in trade defence remedies (anti-dumping, anti-subsidy, safeguards) representing both exporters and the domestic

industry in Ukraine and abroad as well as in WTO issues. Anzhela also has extensive experience advising clients on all aspects of international trade, including cross-border trade transactions and contracts, agency and distribution, franchising, consumer rights protection, and customs issues. Ms Makhinova has market-leading experience in advising local and global companies on the application of WTO rules and FTAs in Ukraine.

Anzhela is a country expert of the International Distribution Institute (IDI) on franchising in Ukraine as well as a co-chair of the American Chamber of Commerce in Ukraine working group on international trade.

Ms Makhinova is exclusively ranked in international trade for Ukraine in the *Client Choice* awards 2017–2018; recognised among leading lawyers in international trade by *Ukrainian Law Firms* 2017–2018; and named among the world's leading experts in franchising and international trade by *Who's Who Legal: Franchise* and *Who's Who Legal: Trade & Customs* 2016–2017 respectively.

BYRON MANIATIS

Jones Day

Byron Maniatis has experience working on many high-profile trade defence investigations in the EU and other jurisdictions. Byron practices in the areas of WTO, EU trade, export controls, customs law, national security investment screening analyses and EU and Belgian competition law. He has assisted clients in EU trade defence investigations and in a wide variety of other trade matters such as WTO dispute settlement and trade negotiations. He also has worked with clients in matters before EU institutions and EU courts.

Byron has successfully assisted several clients in anti-dumping and anti-subsidy investigations, assisted a WTO member in disputes before panels and the Appellate Body, and has assisted several clients in EU court proceedings. In addition, Byron has handled EU export control matters such as restrictions on dual-use goods, economic sanctions and other restrictive measures adopted by the EU; FDI screening analyses in the context of complex multijurisdictional transactions; and EU customs law and customs issues arising under free trade agreements.

Byron has also been actively involved in Jones Day pro bono initiatives. He has helped set up a pro bono project whereby Jones Day lawyers provide first instance assistance to refugees on the Greek island of Lesbos.

EVA MONARD

Jones Day

Eva Monard has 10 years of experience assisting clients in more than 60 anti-dumping, anti-subsidy and safeguard investigations in over 10 jurisdictions. She advises clients on obligations under EU export control laws and sanctions, assisting them in setting up compliance policies and assessing the compliance of specific transactions with their obligations to dual-use goods and sanctions.

Eva defends the interests of clients before EU institutions such as the European Commission, other administrative authorities and before the EU courts. Eva assists governments during all stages of WTO dispute settlement proceedings before panels and the Appellate Body. In addition, she advises clients on the compatibility of legislation with WTO law and regarding free trade agreements.

Eva's practice focuses on WTO law, EU trade law, export controls, sanctions, foreign investment screening, customs law and EU competition law.

Eva has been hailed in *Chambers* as 'probably the best trade lawyer of her generation' and for her 'open and straightforward style of presenting that makes people like her instantly'. According to *Who's Who*, Eva 'stands out for her exceptional technical expertise, and is highly sought after by clients for her "diligent and hard-working approach"'.

YUKO NIHONMATSU

Atsumi & Sakai

Yuko Nihonmatsu, partner, is a Japanese attorney (*bengoshi*) with extensive experience in international trade law. She has advised and represented both governmental institutions (Japanese and foreign) and private-sector companies in a variety of international trade cases, such as EPA/FTA, and anti-dumping cases, and on customs regulations. She is a graduate of Hitotsubashi University (LLB, 1997) and the Southern Methodist University (LLM, 2009).

FUMIKO OIKAWA

Atsumi & Sakai

Fumiko Oikawa, partner, is a Japanese attorney (*bengoshi*) with extensive experience in international transactions ranging from banking and finance to international trade. She has advised and represented both government and private sector companies on EPA matters, anti-dumping cases and customs regulations. She is a graduate of Gakushuin University (LLB, 1997; LLM, 2000) and the University of Michigan Law School (LLM, 2013).

ALEXANDER H SCHAEFER

Crowell & Moring LLP

Alexander H Schaefer is a partner in the international trade group at Crowell & Moring. Alex represents clients contending with US import regulations, including the customs and trade remedies laws. He assists clients with a broad range of customs issues, including tariff classification, import valuation, focused assessment audits, penalty proceedings, prior disclosures, reconciliation, special duty programmes and free trade agreements. In addition, Alex has represented both petitioners and respondents in a variety of trade remedy cases, including anti-dumping, countervailing duty, and Section 201, 232, and 301 proceedings before the US Department of Commerce, the US International Trade Commission, the US Court of International Trade and the US Court of Appeals for the Federal Circuit.

MANSHAN SINGH

Skrine

Manshan Singh graduated from the University of Leeds, United Kingdom and subsequently completed his master's degree following a programme of advanced study in the field of international corporate law at the same university.

Upon returning to Malaysia, he obtained certain capital markets services representative's licences and underwent training at the Securities Commission of Malaysia. Thereafter, Manshan obtained his certificate in legal practice and commenced his pupillage at Skrine.

Manshan was subsequently admitted as an advocate and solicitor of the High Court of Malaya and has since been a part of Skrine's dispute resolution division. His areas of practice include trade remedies, competition law, corporate and commercial disputes as well as general litigation.

JACQUELINE C SMITH

Jones Day

Jacqueline Claire Smith works as an associate in the Sydney office at Jones Day. Jacqueline has experience across a variety of transactional and litigation matters. She has worked on a range of regulatory matters involving Australian regulators, including the Office of Drug Control, the Australian regulator of the Department of Health. Jacqueline holds a Bachelor of Laws degree and a Bachelor of Arts degree (Spanish Language and Culture) from the Australian National University.

PRUDENCE SMITH

Jones Day

Prudence Smith is a partner at Jones Day, based in its Sydney office. Prudence focuses on antitrust, regulatory and trade law matters. She has worked extensively, and has in-depth expertise, in the areas of cartel conduct, cartel immunity applications lodged with the Australian Competition and Consumer Commission, anti-competitive conduct investigations and litigation, merger authorisations and notifications, energy regulatory merits and judicial appeals, and anti-dumping proceedings.

Prudence holds practising certificates in Australia and New Zealand. Prudence is a graduate of the University of New South Wales (BA 1995, MA 1998, MCOM 1999, LLB 2004).

ANDRÉS SOTOMAYOR

Porzio Ríos García

Andrés Sotomayor is a senior associate at Porzio Ríos García. From 2010–2014 he was legislative adviser and legislative coordinator of the Legislative and Judicial Division, Ministry of the General Secretariat of the Presidency for the Government of Chile. In 2009–2010 he was an attorney at Puga Ortiz, and between 2007 and 2009 he was head of the legal department at Illustrious Municipality of Coyhaique.

His professional practice is focused on counselling the firm's clients in the areas of corporate and commercial law, customs law and international trade, as well as regulatory and administrative law in general.

Mr Sotomayor obtained his bachelor's degree from the Pontifical Catholic University of Chile in 2007 and his master's degree from Georgetown University in 2015.

DREW SUNDBERG

Attorney-at-law (NY)

Drew specialises in international trade and customs law, WTO, EU regulatory law and advising governments undertaking trade negotiations or large scale regulatory reforms. In recent years, Drew has served in leadership roles in several large USAID, EU and UN funded

development projects focused on trade. Among other things, Drew recently headed a team of trade lawyers and specialists advising Afghanistan in its successful bid to join the WTO under the USAID TAFE and ATAR projects in Afghanistan, before returning to Washington DC to serve as a director of the development contractor Chemonics International Inc. Drew has advised stakeholders in numerous EU and US anti-dumping, anti-subsidy and safeguard proceedings and was, among other things, part of an EU award winning team building the trade defence capacity of the Dominican Republic. Drew has regularly advised WTO Member governments on both pre- and post- accession implementation issues in Iraq, Egypt, India, South Korea, Thailand, Ukraine, Slovakia and the Dominican Republic. These issues include WTO-compliant regulatory reform, technical barriers to trade, intellectual property rights, trade remedies and subsidies, customs reform, agricultural support, implementation of WTO dispute settlement rulings and others. He has advised governments in seven WTO dispute settlement proceedings in Geneva. Drew holds a Master's Degree in law from the University of London and is a member of the New York Bar

DAVID TANG

JunHe LLP

David (Weiyang) has over 15 years of experience in international trade disputes, customs, anti-corruption and general corporate practices.

He is highly experienced in international trade disputes (i.e., anti-dumping, countervailing duty, safeguard and Section 337) related to imports to the United States, EU and China. His hands-on approach and ability to quickly understand a client's business and operations has consistently enabled his team to achieve favourable results in complex trade cases. Besides questionnaire responses related to sales, production and accounting as well as on-site verifications, David helps clients to improve their operation and management systems and helps shape their business structure with long-term strategic planning. Most distinguishably, he offers strategic and practical business solutions to exporters as well as importers, such as anti-dumping duty assessment, the setup of importer of record, utilisation of bonded warehouses and advice on related customs issues.

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 consecutively recognised David as a leading lawyer in international trade.

SAURABH TIWARI

L&L Partners

Mr Saurabh Tiwari is a partner in the international trade law and WTO advisory practice group with a focus on cross-border trade and transactional issues. He graduated from the National Law University, Jodhpur. He has a keen interest in exchange control laws and international trade and WTO advisory. In his role, he has advised on the structuring of several cross-border M&As and assisted various multinationals in establishing an India presence, and has recently been focusing on trade remedies and WTO disputes practice at the firm.

Mr Tiwari's expertise encompasses commercial laws, inbound and outbound investments, exchange control transactions, foreign contributions, telecommunications and commercial contracts. He is also a member of the award-winning pro bono practice of the firm. Accredited for his detail-centric approach, research and analytical skills, he has proposed strategic and business-oriented solutions in complex factual matrices. He works very closely with the central government on the policy front, and has also concluded several successful compounding hearings before the Reserve Bank of India.

Saurabh regularly writes in international journals, including the *International Transfer Pricing Journal*, *India Business Law Journal* and *VC Circle*. During his academic pursuits, he was the students' convener of the University's academic committee, and regularly represented the University and won several awards in moot court competitions.

M FEVZI TOKSOY

ACTECON

Dr M Fevzi Toksoy is an EU law specialist and an economist with master's degrees from Istanbul and Brussels (ULB) on European Union law and economics and a PhD in EU competition law. Dr Toksoy focuses on EU and Turkish competition law and international trade remedies. He is the founding partner of ACTECON and offers solutions to customers in competition investigations, merger clearances and preventive competition compliance programmes.

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 the same authority. He also prepared many successful merger notifications, negative clearance and exemption applications in a variety of industries.

Dr Toksoy has a 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 its 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.

Dr Toksoy has advised multinational companies regarding the Turkish part of their M&A transactions and is especially renowned with his experience in complicated merger control cases. He has successfully negotiated remedies with the Turkish Competition Authority in many complex merger cases. He has a practical experience in public and private sector competition law related commercial problems in Turkey. He also conducts competition compliance programmes in different industries and leads and designs workshops and training sessions for major companies.

He serves as an expert member of the Competition Law and WTO Committees of the Turkish Businessmen and Industrialists' Association. He is an Associate Member of ABA and a member of the Antitrust and M&A Committees and national reporter of the International Antitrust Committee. He is a non-governmental agent of the Turkish Competition Authority to the International Competition Network.

He is the co-author of *Competition Law and Policy in Automotive Industry*, was chief editor of *Competition Bulletin* (2000–2002) and editor of *Competition Board Decisions* Vols I, II, III and IV.

Dr Toksoy has been the guest of round tables on the legislative amendments of the Turkish Competition Law hosted by the Competition Authority. He lectures EU and Turkish Competition Law at Marmara University EU Institute.

STUTI TOSHI

L&L Partners

Ms Stuti Toshi is an associate in the international trade and WTO practice group of the firm. In 2016, she graduated with honours in international trade and investment laws and corporate laws from Hidayatullah National Law University. In 2017, she completed a master's of international law and economics from the World Trade Institute, and was the recipient of the Director's scholarship for the programme. Prior to pursuing her master's, she worked for a brief period with the state government of Chhattisgarh.

Ms Toshi was part of the team that represented the Government of India in the arbitration and compliance *India–Agricultural Products* (DS430) proceedings at the World Trade Organization. Stuti is also involved in various trade remedial investigations, reviews and appeals at the Directorate General of Trade Remedies, the Customs Excise and Service Tax Tribunal and the Supreme Court of India, along with providing policy advisory services to governments and other stakeholders, as part of the team at the firm.

JIN WANG

JunHe LLP

Mr Wang is an associate for JunHe LLP and currently practises in its Beijing office. Mr Wang focuses on international trade and tax issues. Mr Wang has represented Chinese and multinational clients to respond to trade remedy investigations conducted by China, the US, the EU, Canada, India, etc. These investigations involve various industries, such as petrochemical, steel, paper, textiles, light and agricultural products. Mr Wang has advised clients on legal issues relating to international trade and customs, including product classification, country of origin, valuation, and customs audit. Mr Wang also advises clients on a broad spectrum of domestic and international tax issues. Previously, Mr Wang had practised auditing and consulting at an accounting firm for three years.

MATTHEW WHITAKER

Jones Day

Matthew Whitaker is an associate at Jones Day in the antitrust and competition practice group in the Sydney, Australia office. In his time at Jones Day, he has gained exposure to a wide range of transactional and litigation matters in the competition and antitrust, trade law, anti-dumping, mergers and acquisitions, and energy practice areas. His main focuses

are in the areas of competition and consumer law and anti-dumping, and he has acted for clients in matters involving extensive interaction with both the Australian Competition and Consumer Commission and the Anti-Dumping Commission. Matthew holds a bachelor of laws degree and a bachelor of science degree (advanced mathematics) from the University of Sydney. He has also worked on other regulatory matters involving the Therapeutic Goods Administration, the Department of Environment and Energy and the Department of Health.

YONG ZHOU

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As one of China's leading anti-dumping lawyers, Mr Zhou's practice in trade remedy and WTO law can be traced back to 1997, when the first Chinese anti-dumping investigation was initiated. Mr Zhou has successfully defended numerous foreign and domestic businesses in more than 100 trade remedy investigations (anti-dumping, countervailing and safeguard as well as Section 337 investigations) by various global trade authorities, including China, the US, the EU, Canada, Australia, India, Turkey, South Korea, Thailand, Indonesia, Egypt, South Africa, Brazil, Argentina, Mexico and other Latin American countries. He has experience across a wide range of industries such as optical fibre communications, automobiles, chemicals, pulp and paper, textiles, solar energy, agricultural products, steel and metals and home furniture. Based on his deep understanding of WTO law, Mr Zhou regularly advises clients, including the Chinese Ministry of Commerce and well-known multinational corporations, on issues relating to the WTO and free trade agreement matters.

As an expert on customs and tax law, Mr Zhou advises clients regarding customs classifications, origin, customs valuations, transfer pricing and commodity inspections. He communicates with the relevant governmental agencies, such as Customs, the Administration of Quality Supervision, Inspection and Quarantine, the Ministry of Environmental Protection and the Food and Drug Administration on behalf of his domestic and foreign clients and provides effective legal solutions.

With working experience at the headquarter of Bank of China, Mr Zhou also advises on corporate and finance, bankruptcy and anti-monopoly/competition law.

Mr Zhou was ranked as a 'leading lawyer' in China by *Chambers and Partners* and *The Legal 500 Asia Pacific* for his international trade and regulatory expertise.

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