

THE INTERNATIONAL  
TRADE LAW  
REVIEW

EIGHTH EDITION

Editors

Folkert Graafsma and Joris Cornelis

THE LAWREVIEWS

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REVIEW

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# CONTENTS

PREFACE.....	v
<i>Folkert Graafsma and Joris Cornelis</i>	
Chapter 1 WORLD TRADE ORGANIZATION .....	1
<i>Tetyana Payosova and Joanna Redelbach</i>	
Chapter 2 UK CUSTOMS AND TRADE .....	14
<i>Matthew Weiniger QC and Alex Fawke</i>	
Chapter 3 ARGENTINA.....	25
<i>Alfredo A Bisero Paratz, Anabella L Lombardo and Anny E Reyes</i>	
Chapter 4 BRAZIL.....	36
<i>Mauro Berenholz, René Medrado, Carol Sayeg and Cora Mendes</i>	
Chapter 5 CANADA.....	47
<i>Peter Jarosz and Philip Kariam</i>	
Chapter 6 CHILE.....	55
<i>Ignacio García and Andrés Sotomayor</i>	
Chapter 7 CHINA.....	62
<i>David Tang, Jessica Cai, Yong Zhou and Jin Wang</i>	
Chapter 8 COLOMBIA.....	74
<i>Juan David López</i>	
Chapter 9 THE EUROPEAN UNION .....	82
<i>Nicolaj Kuplewatzky and Akhil Raina</i>	
Chapter 10 INDIA.....	103
<i>Shiraz Rajiv Patodia and Mayank Singhal</i>	

Chapter 11	JAPAN.....	118
	<i>Kunio Miyaoka, Shunsuke Imura, Ryo Kiuchi and Yu Soh</i>	
Chapter 12	MALAYSIA.....	125
	<i>Lim Koon Huan and Manshan Singh</i>	
Chapter 13	PAKISTAN.....	136
	<i>Saifullah Khan</i>	
Chapter 14	THAILAND.....	146
	<i>Apisith John Sutham, Chalermwut Nilratsirikul and Puminad Pingkarawat</i>	
Chapter 15	TURKEY.....	157
	<i>M Fevzi Toksoy, Ertuğrul Can Canbolat and E Kutay Çelebi</i>	
Chapter 16	UNITED STATES.....	175
	<i>Matthew R Nicely, Devin S Sikes, Julia K Eppard and Brandon J Custard</i>	
Chapter 17	VIETNAM.....	198
	<i>Giang Le</i>	
Appendix 1	ABOUT THE AUTHORS.....	207
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	223

# PREFACE

## I LIVING IN A POST-PANDEMIC TRADE WORLD

We had just got used to face masks and started travelling again. Nevertheless, ‘it ain’t over till it’s over’. Thus, while many of us had expected, or at least hoped, that the disruptions caused by the pandemic would this year be a thing of the past, the war in Ukraine, some continuing lockdowns in Asia, as well as new Omicron subvariants, are evidence that difficult times are not entirely behind us.

Moreover, even if the pandemic has now by and large subsided, the illegal invasion of Ukraine has replaced it for prime-time attention. The most immediate trade impact of Russia’s unprovoked and naked aggression against its one-time brother people has been a sharp rise in commodity prices, as both countries are key suppliers of essential goods such as food, energy, and fertilisers.<sup>1</sup> Grain shipments through Black Sea ports have also frozen, with poorer countries dependent on essential commodities bearing the most serious consequences.<sup>2</sup> To support Ukraine’s economy, the European Union adopted a regulation allowing for the temporary trade liberalisation and other trade concessions with regard to some Ukrainian products.<sup>3</sup> Likewise, the United Kingdom and the United States announced that they will suspend tariffs on certain Ukrainian products for a year. Meanwhile, a large number of countries, including the EU, the UK, the US, Canada, Japan and Australia, imposed sanctions against Russia. As demonstrated by Russia’s large and growing export surplus, these sanctions are slowly starting to work and are having an impact on the Russian economy.<sup>4</sup> Furthermore, the discussions concerning Russia leaving – or being expelled from – the World

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- 1 United Nations News, ‘Ukraine conflict putting global trade recovery at risk: WTO’ (2022), available at <<https://news.un.org/en/story/2022/04/1116052>>, last accessed on 13 June 2022. While a ‘grain corridor’ deal has been recently reached, the security and robustness of this corridor is not guaranteed. See: BBC, ‘Food crisis: Ukraine grain export deal reached with Russia, says Turkey’ (22 July 2022), available at: <https://www.bbc.com/news/world-europe-62254597> (last accessed 2 August 2022).
  - 2 In fact, in trying to avert the worst, India banned exports of wheat, Turkey banned the exports of beans, lentils and seed and olive oil, Serbia banned exports of vegetables oil, maize and wheat, Indonesia banned exports of Cooking oil and its raw materials – to name a few.
  - 3 Regulation (EU) 2022/870 of the European Parliament and of the Council of 30 May 2022 on temporary trade-liberalisation measures supplementing trade concessions applicable to Ukrainian products under the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part [2022] OJ L152/103.
  - 4 The reason for Russia’s growing export surplus is that Western sanctions imports are working either directly (i.e., by cutting Russia’s imports) or indirectly (i.e., by causing capital flight). According to Mark Harrison, history teaches that, in wartime, export surplus is an indicator of a weaker, not stronger,

Trade Organization (WTO) are prone to resulting in medium to long-term consequences,<sup>5</sup> including a risk of fragmentation in terms of Member-blocs based on geopolitics (i.e., possibly, a US-centric and a China-centric bloc, or variations thereof).<sup>6</sup>

The pace of such dire events makes it difficult to step back from the stream of daily trade happenings. Mercifully, the latest news regarding the remarkable (and, in the words of many, ‘unprecedented’)<sup>7</sup> outcomes achieved through the 12th Ministerial Conference (MC12) of the WTO show (once again) that, in times of crisis, ‘the story is not one of trade as a source of vulnerability; it is one of trade as a source of resilience’.<sup>8</sup>

## II REBUILDING TRUST AT THE WTO

The twice-delayed MC12 finally took place in June 2022, and it was a success. A joint statement by over 50 WTO Members expressing solidarity for Ukraine set the scene for five days of intense and prolonged negotiations,<sup>9</sup> which ultimately led to a historical package of trade agreements. Some of the noteworthy outcomes of the MC12 are briefly summarised below.

### i Covid-19 vaccines

Nearly two years after the development of covid-19 vaccines, WTO Members gave the green light to a waiver of certain procedural obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This agreement has been referred to as a major win for the developing countries, which had to wait several months longer than rich countries to receive their vaccines. This wait was accompanied by pain and misery, which could have been entirely avoided. One may wonder whether it took too long to agree on something so critical. Groups advocating for vaccine access were also disappointed that the deal does not cover diagnostic materials and therapeutics – although the decision provides for the WTO Members to consider whether to extend the waiver to those issues at the end of this year.

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economy. For further details, see: ‘Western sanctions on Russia are working, an energy embargo now is a costly distraction’ (13 June 2022), available at <<https://voxeu.org/article/western-sanctions-russia-are-working-energy-embargo-now-costly-distraction>>, last accessed on 14 June 2022.

5 World Trade Organization, ‘The crisis in Ukraine: implications of the war for global trade and development’ (2022), available at <[www.wto.org/english/res\\_e/booksp\\_e/impactukraine422\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/impactukraine422_e.pdf)>, last accessed on 13 June 2022.

6 Eddy Bekkers and Carlos Goes, ‘The impact of geopolitical conflicts on trade, growth and innovation: an illustrative simulation study’ (29 March 2022), available at <<https://voxeu.org/article/impact-geopolitical-conflicts-trade-growth-and-innovation>>, last accessed on 14 June 2022.

7 Director General Ngozi Okonjo-Iweala, 12MC Closing Speech, available at <[www.wto.org/english/news\\_e/spno\\_e/spno27\\_e.htm](http://www.wto.org/english/news_e/spno_e/spno27_e.htm)>, last accessed on 17 June 2022.

8 Deputy Director-General Anabel Gonzalez, speech of 29 October 2021, transcript available at <[www.wto.org/english/news\\_e/news21\\_e/ddgag\\_29oct21\\_e.htm](http://www.wto.org/english/news_e/news21_e/ddgag_29oct21_e.htm)>, last accessed on 14 July 2022.

9 The MC12 was originally scheduled to last for four days, but it was prolonged by one day, and the negotiations lasted until 5 am local time on Friday, 17 June 2022.

## ii Food security and agriculture

Faced by one of the worst food security crisis since World War II, WTO Members committed to: (1) avoiding unjustified export restrictions on food; (2) improving transparency on export restrictions; and (3) exempting humanitarian purchases for the World Food Programme (WFP) from export restrictions completely.<sup>10</sup> WTO Members, however, could not overcome their differences on a work programme for agriculture.<sup>11</sup> Nonetheless, the decision in support of the WFP clearly shows that the WTO can and will react promptly to exceptional challenges if there is enough negotiating capital to do so.

## iii Fisheries

After two decades of talking, delegates reached a partial deal to stop harmful fishing subsidies.<sup>12</sup> The deal prohibits subsidies contributing to illegal, unregulated and unreported (IUU) fishing as well as subsidies for fishing activities on the unregulated high seas. It also restricts the subsidisation of fleets that fish in ‘overfished’ stocks. Developing countries are not exempted from these provisions. Nevertheless, they are afforded more flexibility and are eligible for technical assistance and financial support. According to Director-General Ngozi Okonjo-Iweala, the deal takes ‘a first but significant step forward to curb subsidies for overcapacity and overfishing.’ Yet, in fact, the commitment to ban subsidies that contribute to overcapacity and overfishing as well as the promise to prohibit fuel and ship construction subsidies were dropped. For these reasons, some referred to the deal as ‘pretty meager’.<sup>13</sup> On the other hand, this remains the first WTO Agreement ‘with environmental sustainability at its heart’.<sup>14</sup> While the deal broadly operates as a standard WTO agreement – by prohibiting the worst, restricting the bad and developing transparency around the rest – it departs from the standard in so far as it does have the potential to form the basis for trade, environmental and development wins.<sup>15</sup> The deal will require attention and maintenance, however, since it is bound to expire within four years unless ‘comprehensive disciplines’ are adopted or otherwise

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10 WTO, Draft Ministerial Declaration on the Emergency Response to Food Insecurity of 16 June 2022, WT/MIN(22)/W/17/Rev.1, available at <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W17R1.pdf&Open=True>>, last accessed on 17 June 2022; and WTO, Draft Ministerial Declaration on World Food Programme Food Purchases Exemption from Export Prohibitions of 10 June 2022, WT/MIN(22)/W/18, available at <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W18.pdf&Open=True>>, last accessed on 17 June 2022.

11 The debate around India’s demand to seek a permanent exemption on public stockholdings of food grains from the WTO subsidy rules meant that no consensus could be reached on reforming the agricultural trade policy.

12 WTO, Draft Ministerial Decision on the Fisheries Subsidies of 17 June 2022, WT/MIN(22)/W/22, available at <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W22.pdf&Open=True>>, last accessed on 17 June 2022.

13 Statement by Philip Chou, senior director of global policy with the Washington-based conservation group Oceana. Reported by Paul Withers in ‘WTO agreement to curb fishing subsidies is “meagre,” says expert Social Sharing’ (17 June 2022), available at <[www.cbc.ca/news/canada/nova-scotia/wto-agreement-t-curb-subsidies-prevent-overfishing-1.6492624](http://www.cbc.ca/news/canada/nova-scotia/wto-agreement-t-curb-subsidies-prevent-overfishing-1.6492624)>, last accessed on 17 June 2022.

14 Director General Ngozi Okonjo-Iweala, 12MC Closing Speech, available at <[www.wto.org/english/news\\_e/spno\\_e/spno27\\_e.htm](http://www.wto.org/english/news_e/spno_e/spno27_e.htm)>, last accessed on 17 June 2022.

15 Amar Breckenridge, ‘Miraculous catch or struggling to stay afloat? Early thoughts on the WTO’s 12th Ministerial Conference’ (17 June 2022), available at <[www.trade-knowledge.net/commentary/](http://www.trade-knowledge.net/commentary/)>

agreed,<sup>16</sup> meaning that further substantial action will be required of the WTO Members for the 12MC negotiations not to be in vain. In this latter regard it has been noted<sup>17</sup> that this clause is a double-edged sword: the last few times such expiry clause was used, it was: (1) either designed to make the Agreement on Textiles and Clothing disappear, or: (2) it made certain non-actionable subsidies disappear which Members now have come to regret.

#### **iv E-commerce**

Delegates also agreed to maintain the 24-year old moratorium on tariffs on digitally traded goods, services and other forms of e-commerce transmissions.<sup>18</sup> Since it was agreed in 1998, the extension of the moratorium caused little controversies at each ministerial conference. However, this year, India, Indonesia, Sri Lanka, Pakistan and South Africa threatened to block the renewal. Developing countries increasingly see the ban as a source of lost revenue, but 108 tech company associations urged the WTO to renew the moratorium on the grounds that failure to do so would undermine the global recovery and constitute a serious setback for a body that prides itself in reducing trade barriers. Some have argued that the threat was just a tactic used by developing countries to obtain concessions in other areas. On the other hand, one may wonder whether such countries should be allowed to impose tariffs on data flows if that is where their competitive advantage lies, in much the same way as everything else that works in the trade arena. For now, WTO Members agreed that the ban will remain in place at least until the next ministerial conference or until 31 March 2024, whichever comes first. In any event, the debate raises questions as to whether custom duties on data flows, such as movie and music streaming, will be imposed in the near future.

#### **v WTO reform**

Finally, the Members pledged to undertake a, by now, long-overdue major reform of the WTO encompassing all aspects of its operations.<sup>19</sup> No promise to restore the Appellate Body was made. However, all Members, including the US, acknowledged the challenges relating to the dispute settlement gridlock and committed to addressing them by no later than 2024. This is significant, as it shows that the restoration of the dispute settlement system has been recognised by the entire membership as a priority. While we wait to hear more about this major reform, the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) is yet to be

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miraculous-catch-or-struggling-to-staying-a-float-early-thoughts-on-the-wtos-12th-ministerial-conference/?utm\_source=rss&utm\_medium=rss&utm\_campaign=miraculous-catch-or-struggling-to-staying-a-float-early-thoughts-on-the-wtos-12th-ministerial-conference>, last accessed on 18 June 2022.

16 WTO, Draft Ministerial Decision on the Fisheries Subsidies of 17 June 2022, WT/MIN(22)/W/22, Article 12 available at <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W22.pdf&Open=True>>, last accessed on 17 June 2022.

17 Comments made during the webinar: SIEL Conversations: The Outcomes of MC12 and the Future of the Multilateral Trading System, held on 27 June 2022, accessible at <https://www.youtube.com/watch?v=hi9i7onD34k>; participants included Anabel González, Bernard Hoekman, Victor do Prado, Peter Ungphakorn and Iryna Polovets.

18 WTO, Work Programme on Electronic Commerce: Draft Ministerial Decision of 16 June 2022, WT/MIN(22)/W/23, available at <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W23.pdf&Open=True>>, last accessed on 17 June 2022.

19 WTO, MC12 Outcome Document - Draft of 16 June 2022, WT/MIN(22)/W/16/Rev.1, available at <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W16R1.pdf&Open=True>>, last accessed on 17 June 2022.

afforded the chance to take its first real test.<sup>20</sup> Interestingly, Turkey submitted a notification pursuant to Article 25 of the Dispute Settlement Understanding (DSU) in *Turkey – Pharmaceutical Products (EU)* (DS583) despite the fact that it is not a party to the MPIA. On the one hand, the label – whether this is MPIA or DSU Article 25 – should not make a big difference; what matters is that WTO Members are willing to restore trust and uphold the rule-based multilateral trade system by joining a rational means of dispute resolution.<sup>21</sup> On the other hand, one wonders whether Turkey’s decision not to join the MPIA has any geopolitical reason, such as Turkey being a US key strategic partner.

Overall, despite the unprecedented challenges, the WTO Members have secured a truly unrivalled package of agreements. We are, therefore, pleased to realise that, last year, we were right to feel ‘cautiously optimistic’ about the WTO.<sup>22</sup> On the other hand, now that priorities have been set out and rules have been laid down, it remains to be seen how, in practice, everything will work out. For the just-ended MC12 negotiations to be meaningful, WTO Members must be faithful to their commitments. While Director-General Ngozi Okonjo-Iweala deserves great credit for keeping the WTO alive, its future, health and vitality will depend on national governments – and in particular on whether the EU, the US and China, as major players in the international trade game, (continue to) see value in its existence.

### III NEW TRENDS IN THE OLD CONTINENT

In Europe, Brexit may be done, but its implementation is far from complete. In particular, some substantive issues concerning imports from Northern Ireland remain outstanding.<sup>23</sup> The UK has also set out a phased plan to enforce new regulatory standards and controls for EU goods entering Great Britain,<sup>24</sup> according to which the introduction of sanitary and

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20 At the time of writing, the following disputes involve parties which have submitted notifications pursuant to Article 25 of the Dispute Settlement Understanding indicating their commitment to using the MPIA in case of appeal: DS589: *China – Canola Seed (Canada)*; DS591: *Colombia – Frozen Fries*; DS598: *China – AD/CVD on Barley (Australia)*; and DS602: *China – AD/CVD on Wine (Australia)*. Furthermore, the following disputes involve parties which are both parties to the MPIA and are therefore likely to submit their notifications at the panel stage: DS603: *Australia – AD/CVD on Certain Products (China)*; DS607: *EU – Poultry Meat Preparations (Brazil)*; DS610 *China – Goods and Services (EU)*; and DS611: *China – IPRs Enforcement (EU)*.

21 In connection to this, see Section III.i, where we submit that one of the strategies behind the new the EU Anti-Coercion instrument may be to incentivise WTO members to join the MPIA.

22 See: Folkert Graafsma and Joris Cornelis, *The International Trade Law Review* (7th edition, 2021).

23 Although an agreement to not require the relabelling and retesting of medicines entering into Northern Ireland from Great Britain was achieved in spite of continued supply of these products. See also: Sam Meredith, ‘The UK’s plan to rip up Brexit trade rules slammed for being in “clear breach” of international law’ (14 June 2022), CNBC, available at <[www.cnn.com/2022/06/14/uk-prompts-eu-backlash-over-plans-to-rip-up-northern-ireland-protocol.html](http://www.cnn.com/2022/06/14/uk-prompts-eu-backlash-over-plans-to-rip-up-northern-ireland-protocol.html)>, last accessed on 15 June 2022.

24 Checks on highest risk imports of animals, animal products, plants and plant products were introduced in January 2022 and will remain in place.

phytosanitary checks, which was due in July 2022, has been postponed until the end of 2023.<sup>25</sup> Furthermore, the UK's latest attempt to unilaterally change some terms of the divorce with the EU may trigger interesting legal actions in the near future.<sup>26</sup>

Amid the implementation of Brexit, the UK Trade Remedies Authority (TRA) took its first real steps by initiating four 'independent' (standalone) trade remedies investigations.<sup>27</sup> In the first of these investigations, which concerns Chinese aluminum extrusions, the TRA has already imposed provisional measures requiring importers to have bank guarantees in place from 16 June 2022. As regards the two most recent investigations, which concern allegedly dumped and subsidised optical fibre cables from China, these effectively mirror two investigations concluded a few months ago by the European Commission.<sup>28</sup> It will therefore be interesting to see whether (and to what extent) the TRA will follow the same path of the Commission or whether it will go its own way in conducting the investigations. Some consider the TRA 'weaker' than its counterparts in the EU and the US because its role is confined to investigating complaints and recommending trade defence measures to the government – recommendations that the government will not necessarily follow.<sup>29</sup> By contrast, neither the Commission nor the US International Trade Commission need political approval to adopt trade defence measures. As such, it will also be interesting to see whether it will reach the same or different conclusions.

Other noteworthy developments concerning the UK's strategy as an 'independent trade nation' include: (1) the conclusion of free trade agreements (FTAs) with New Zealand and Australia; (2) the ongoing upgrades of FTAs with Mexico, Canada, Israel and South Korea; (3) the finalisation of a new Digital Economic Agreement with Singapore; (4) the application to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP); and (5) the recent relaunch of the negotiations for an FTA with India. Interestingly, as regards the latter negotiations, the UK announced the ambitious plan to reach an agreement by the end of this year.<sup>30</sup> Yet, the UK will most likely have to concede on its immigration policy to persuade India to lower tariffs on the products which are of interest to the UK exporters (for example, whisky).<sup>31</sup>

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- 25 At the time of writing, this marks the fourth time the UK government has delayed the implementation of sanitary and phytosanitary checks on EU imports.
- 26 BBC News, 'EU set to take legal action against UK over post-Brexit deal changes' (15 June 2022), available at <[www.bbc.com/news/uk-politics-61795553](http://www.bbc.com/news/uk-politics-61795553)>, last accessed on 18 June 2022.
- 27 AD0012: Aluminium Extrusions from China; AD0020: Ironing Boards from Turkey; AD0021: Optical Fibres from China; and AS0022: Optical Fibres from China. For updates, see: UK TRA, 'Investigations currently in progress', available at <[www.trade-remedies.service.gov.uk/public/cases/](http://www.trade-remedies.service.gov.uk/public/cases/)>, last accessed on 15 June 2022.
- 28 See: Commission Implementing Regulation (EU) 2022/72 of 18 January 2022 imposing definitive countervailing duties on imports of optical fibre cables originating in the People's Republic of China and amending Implementing Regulation (EU) 2021/2011 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China [2022] OJ L12/34.
- 29 Emilio Casalicchio, 'Meet the Trade Remedies Authority, the UK watchdog in a political storm' (9 June 2022), available at <[www.politico.eu/author/emilio-casalicchio/](http://www.politico.eu/author/emilio-casalicchio/)>, last accessed on 18 June 2022.
- 30 UK Department for International Trade, 'UK-India Free Trade Agreement: the UK's strategy', available at <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1046839/uk-india-free-trade-agreement-the-uks-strategic-approach.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1046839/uk-india-free-trade-agreement-the-uks-strategic-approach.pdf)>, last accessed on 13 June 2022.
- 31 See: Dharshini David, 'Whisky and visas could be part of a UK-India trade deal' (22 April 2022), available at <[www.bbc.com/news/business-61180390](http://www.bbc.com/news/business-61180390)>, last accessed on 15 June 2022, who writes: 'No other nation

In some respects, in the context of international relations, the EU appears to be following the UK, as it renewed its efforts to conclude an FTA with Australia and started the negotiations to reach a comprehensive Digital Partnership with Singapore.<sup>32</sup> The latter is of particular importance in that, even though the world of trade is still dominated by paper forms, there is scope to improve the current state of play through digitalisation. For example, the initiatives led by the International Chamber of Commerce (such as the digitalisation of bills of lading) could have striking effects in terms of costs and efficiency, provided that the necessary data protection measures are in place.<sup>33</sup>

In addition, over the past few months, the EU institutions have been working on several pieces of EU legislation aimed at defending the EU's interests and values more fiercely. Moreover, the Commission has published several reports to illustrate and quantify how it is putting its trade policy into practice.<sup>34</sup> Following last year's edition, the most noteworthy developments which show this new EU trend are summarised below and will be addressed in more detail in the chapter on the EU.

### **i Draft regulation on foreign subsidies**

The Commission, the European Parliament and the European Council have started discussions to agree on the final text of a new Regulation on Foreign Subsidies, which could potentially be adopted as early as the end of this year.<sup>35</sup> The Proposed Regulation is extremely

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drinks as much whisky as India - which should have Scotland's world-famous industry celebrating. But each bottle of Scotch sold in India comes with a hefty price tag attached, thanks to tariffs of 150% on imported liquor. So currently the majority of whisky drunk in India is made within its borders.'

32 According to the European Commission, the partnership between the EU and Singapore is aimed at advancing cooperation 'on the full spectrum of digital issues, including digital economy and trade, as well as key enablers for the successful digital transformation of our societies and economies'. See: European Commission, 'Joint Statement: EU and Singapore agree to accelerate steps towards a comprehensive Digital Partnership' (14 February 2022), available at <[https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_22\\_1024](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_1024)>, last accessed on 13 June 2022.

33 See: International Chamber of Commerce, 'ICC digital initiatives for the next century of global trade', available at <<https://iccwbo.org/media-wall/news-speeches/icc-digital-initiatives-that-will-equip-business-for-the-next-century-of-global-trade/>>, last accessed on 13 June 2022.

34 See, for example: European Commission, 'First Annual Report on the screening of foreign direct investments into the Union' (2022), available at <[https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc\\_159935.pdf](https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc_159935.pdf)>, last accessed on 13 June 2022; 'Report on the implementation of Regulation (EU) 2021/821 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items' (2022), available at <[https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc\\_159936.pdf](https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc_159936.pdf)>, last accessed on 13 June 2022; 'Report on Implementation and Enforcement of EU Trade Agreements' (2022), available at <[https://trade.ec.europa.eu/doclib/docs/2021/october/tradoc\\_159886.pdf](https://trade.ec.europa.eu/doclib/docs/2021/october/tradoc_159886.pdf)>, last accessed on 13 June 2022; and '39th Annual Report from the Commission to the European Parliament and the Council on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities and the Use of Trade Defence Instruments by Third Countries targeting the EU in 2020' (2022), available at <[https://trade.ec.europa.eu/doclib/docs/2021/august/tradoc\\_159782.PDF](https://trade.ec.europa.eu/doclib/docs/2021/august/tradoc_159782.PDF)>, last accessed on 13 June 2022.

35 For a comparison of the amendments proposed by the European Parliament and the European Council, see: Council of the European Union, '8993/22 - Subject: Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market' (11 May 2022), available at <<https://data.consilium.europa.eu/doc/document/ST-8993-2022-INIT/en/pdf>>, last accessed on 28 May 2022.

far-reaching, particularly because it: (1) aims at tackling subsidies affecting both goods and services within the EU internal market; (2) targets any company that benefits from foreign subsidies and that operates in the EU, regardless of the country providing the subsidy and the country in which the company is established; and (3) empowers the European Commission to commence investigations and impose redressive measures on its own motion.

Questions arise as to the compatibility of this instrument with the WTO rules, as the definition of ‘subsidy’ under the draft regulation on foreign subsidies arguably covers a larger number of potential subsidies compared to the definition provided by the WTO Agreement on Subsidies and Countervailing Measures (e.g., subsidies granted to non-EU parent companies of subsidiaries established in the EU; subsidies granted by a third country to an entity established in a different country; financial contributions in the form of special rights or tax exemptions; measures ‘economically equivalent’ to a financial contribution; and transfer pricing). Moreover, if adopted, the draft regulation on foreign subsidies will have a strong impact on countries with large economies, which are those granting the subsidies (i.e., the US, the UK, Russia and, above all, China). If such countries start following the same logic as the EU, they may well retaliate by restricting their own markets to EU companies.

## **ii Revised enforcement regulation**

Last year, the EU published its amendments to the Enforcement Regulation. The Revised Enforcement Regulation now (1) covers trade in services and IPR; and (2) empowers the EU to take retaliatory action where the adjudication of a trade dispute is hampered by the ‘non-cooperation’ of a trading party.<sup>36</sup> On the one hand, if the EU exploits this instrument to obviate the DSB’s authorisation to impose countermeasures (in the event of non-compliance), questions arise as to its compatibility with the WTO legal framework. On the other hand, the Revised Enforcement Regulation seems to promote the use of the MPIA by preventing parties from appealing into ‘the void’. Ultimately, should this instrument incentivise other WTO Members to join a rational and alternative means of dispute resolution (i.e., the MPIA or other arbitration mechanism), it may be welcomed.

## **iii Anti-coercion instrument**

On 8 December 2021, the Commission published its proposal for a new instrument that would significantly enhance its trade defence instruments.<sup>37</sup> As the name suggests, the purpose of the proposed Anti-Coercion Instrument is to ‘deter countries from restricting or threatening to restrict trade or investment to bring about a change of policy in the EU in areas such as climate change, taxation or food safety’. An obvious example of a situation that could trigger the countermeasures prescribed by this instrument is the WTO challenge recently brought by the EU against China concerning alleged restrictions on imports, exports,

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36 Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union’s rights for the application and enforcement of international trade rules [2021] OJ L49/1.

37 European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries’ (8 December 2021), COM (2021) 775 final. For the amendments proposed by the European Parliament, see: European Parliament, ‘Amendments 58-280’ (30 May 2022), 2021/0402(COD).

and supply of services from and to Lithuania.<sup>38</sup> Yet, some ambiguities remain as to: (1) who will make decisions about imposing new defensive policies (i.e., the Commission or the EU Member States); (2) the definition of ‘economic coercion’; and (3) the types of remedy available under the instrument could cause legal complications as well as frictions with the third countries targeted by the instrument (i.e., mostly, but not only, China).<sup>39</sup>

#### **iv Carbon border adjustment mechanism**

The Commission’s proposal regarding the carbon border adjustment mechanism (CBAM) still needs to be finally enacted by concluding its legislative procedure. Debates concerning technical and practical issues (e.g., questions as to whether the EU should reserve to maintain free allocations under the EU’s emission trading scheme in order to prevent carbon leakage) seem to be slowing down its enactment.<sup>40</sup> Should the CBAM be adopted, the EU should be ready to deal with WTO complaints by other countries. For example, affected WTO members could argue that the CBAM equates to a discriminating tax or charge on imports or that the CBAM is inconsistent with the WTO ‘national treatment’ principle. Furthermore, some countries may not even wait for complaints to be processed by the DSB and take measures to counteract the new instrument (e.g., retaliatory measures may target like-for-like products or different products important to the EU’s economy).<sup>41</sup> Either way, the result might be a decline in total trade and total EU exports. Therefore, one might wonder whether this initiative will go the way of some of its precedents, such as the Emission Trading System Aviation Scheme, which was suspended before being fully implemented.<sup>42</sup>

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38 DS610: China – Goods, and Services (EU), facts and status available at <[www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds610\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds610_e.htm)>, last accessed on 15 June 2022. It is also worth noting that, unsurprisingly, this EU challenge is being backed up by the US, Australia and the UK.

39 See, for example, Article 2 of the Commission’s proposal (n. 32 above), according to which the draft regulation ‘applies where a third country interferes in the legitimate sovereign choices of the Union or a Member State by seeking to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member State, by applying measures affecting trade and investment.’ The legal text does not specify what actions may amount to ‘interference’, does not explain what ‘seeking to prevent or obtain’ means and does not even define ‘sovereignty’. This raises questions, for example, as to whether the remedies available under the instrument may be triggered by a third country’ policies which affects EU actors but whose integrity is challenged by another third country instead of the EU (e.g., US sanctions on Iran affecting EU traders).

40 Kira Taylor, ‘Lawmakers criticise plan for ‘CBAM reserve’ in EU carbon market reform’ (2022), available at <[www.euractiv.com/section/energy-environment/news/lawmakers-criticise-plan-for-cbam-reserve-in-eu-carbon-market-reform/](http://www.euractiv.com/section/energy-environment/news/lawmakers-criticise-plan-for-cbam-reserve-in-eu-carbon-market-reform/)>, last accessed on 13 June 2022; and Borderlex, ‘In brief: CBAM vote in plenary postponed’ (8 June 2022), available at <<https://borderlex.net/2022/06/08/in-brief-cbam-fails-in-plenary/>>.

41 Frederik Erixon, Oscar Guinea, Vanika Sharma and Renata Zilli Montero, ‘The new wave of defensive trade policy measures in the European Union: design, structure and trade effects’ (2022), p. 50, available at <[https://ecipe.org/publications/new-wave-of-defensive-trade-policy-measures-in-eu?mc\\_cid=f536eccd53&mc\\_eid=eae92434a4](https://ecipe.org/publications/new-wave-of-defensive-trade-policy-measures-in-eu?mc_cid=f536eccd53&mc_eid=eae92434a4)>, last accessed on 14 June 2022.

42 For information about the ETS Aviation Scheme, see: Lorand Bartels, ‘The WTO Legality of the Application of the EU’s Emission Trading System to Aviation’ (2012), 3(2) Eur. J. Int. Law 429, available at <<https://academic.oup.com/ejil/article/23/2/429/487254>>, last accessed on 15 June 2022.

v **Continued bilateral dispute settlement activity**

On the day of finalising this preface, an important panel report on the third bilateral dispute settlement instigated by the EU was released.<sup>43</sup> This bilateral dispute between the EU and SACU, the first to involve international organisations on both sides, has been a testament to the enduring power of peaceful dispute settlement in international relations. Substantively, the case is interesting as well since it is the first time a safeguards regime has been subject to this type of adjudication. While we will discuss this case in detail next year, the panel ruled in favour of the EU and held that the safeguard measure was not proportionate and went beyond what was needed to remedy or prevent any serious injury or disturbances. Moreover, the delay between the investigation and the adoption of the safeguard measure was excessive and not in line with the EU–SADC EPA.<sup>44</sup>

**IV IS THE UNITED STATES CHANGING ITS ATTITUDE TOO?**

This year more than ever, it is impossible to talk about the EU's trade position without talking about the US. Indeed, following the suspension of the long-standing *Boeing/Airbus* dispute, the EU and the US decided to 'hit the pause button on [their] steel and aluminium trade dispute, while hitting the start button on cooperating on a new Global Arrangement on Sustainable Steel and Aluminium'.<sup>45</sup> As proof of their 'renewed trust', the US agreed not to apply Section 232 duties, and the EU agreed to suspend related tariffs on US products.<sup>46</sup> Against this background, they also established the EU–US Trade and Technology Council, which has the aim 'to deepen transatlantic trade and economic relations based on these shared values'.<sup>47</sup> Considering that, together, the EU and the US economies account for nearly a third of world trade flows, the parties' efforts to strengthen their trade relations could have a major impact on the global economic governance.

This is even more so if we ask ourselves what role, if any, this renewed alliance will have in the context of the Indo-Pacific Economic Framework (IPEF), which was officially launched by US President Joe Biden in May 2022.<sup>48</sup> The IPEF is a clear attempt to restore the US' leadership role in the Indo-Pacific and, at the same time, to limit China's leverage in

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43 The first cases were litigated under the EU–Korea FTA and the EU–Ukraine FTA, see [https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/bilateral-disputes\\_en](https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/bilateral-disputes_en).

44 More details can be found on [https://policy.trade.ec.europa.eu/news/panel-rules-favour-eu-southern-african-customs-unions-safeguard-eu-poultry-cuts-2022-08-03\\_en](https://policy.trade.ec.europa.eu/news/panel-rules-favour-eu-southern-african-customs-unions-safeguard-eu-poultry-cuts-2022-08-03_en).

45 European Commission, 'EU and US agree to start discussions on a Global Arrangement on Sustainable Steel and Aluminium and suspend steel and aluminium trade disputes' (31 October 2021), available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_5721](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5721), last accessed on 15 June 2022.

46 European Commission, 'Joint EU-US Statement on a Global Arrangement on Sustainable Steel and Aluminium' (31 October 2021), available at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_5724](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5724), last accessed on 15 June 2022.

47 European Commission, 'EU-US Trade and Technology Council', available at [https://ec.europa.eu/info/strategy/priorities-2019-2024/stronger-europe-world/eu-us-trade-and-technology-council\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/stronger-europe-world/eu-us-trade-and-technology-council_en), last accessed on 15 June 2022.

48 For further information about the IPEF, see: Su-Lin Tan 'The Indo-Pacific Economic Framework: what it is – and why it matters' (25 May 2022), available at [www.cnbc.com/2022/05/26/ipef-what-is-the-indo-pacific-framework-whos-in-it-why-it-matters.html](https://www.cnbc.com/2022/05/26/ipef-what-is-the-indo-pacific-framework-whos-in-it-why-it-matters.html), last accessed on 15 June 2022.

the region.<sup>49</sup> Thus, although unlikely to become a formal FTA, the IPEF will not only bolster trade efforts through the Asia-Pacific Economic Cooperation, but it also has the potential to substantially influence the current global geopolitical order. As such, the EU will have to pay careful attention to the forthcoming negotiations.

It is fair to assume that the recent appointment of Katherine Tai as the new US Trade Representative is playing an important role in reshaping the US' international relations. Tai's nomination received significant worldwide support, and her attitude seems to be in sharp contrast with that of her predecessor, Robert Lighthizer. Most importantly, while it is clear that the US is trying to move 'away from a traditional dispute settlement mechanism',<sup>50</sup> some of Tai's statements lead us to believe that the US is now more willing 'to engage on dispute settlement as part of [a] larger vision for reinvigorating the WTO'.<sup>51</sup> Yet, will Katherine Tai's negotiation skills and political acumen be sufficient to navigate the US' complex relationship with China?

## V AND WHAT ABOUT CHINA?

In China, new lockdowns are (again) disrupting maritime trade just as supply chain constraints seemed to be easing. Nevertheless, nothing, let alone covid-19, seems to be getting in the way of China's gradual approach to trade deals.

Amid the cheering of the new US' IPEF strategy, China kept a relatively low profile in hosting discussions for the largest trade agreement ever concluded outside the WTO. The Regional Comprehensive Economic Partnership (RCEP) has now come into force for 11 signatories.<sup>52</sup> At the national level, one of the most interesting implications of China signing the RCEP, is that the Chinese government committed to binding prohibitions against the localisation of data, which constitutes a departure from its long-standing hard sovereignty stance on this matter. At the international level, the RCEP may make it more difficult for US President Joe Biden to reverse the course of its predecessor's unilateralist actions. China is likely to continue sponsoring the huge market access offered by the RCEP, which the IPEF – at least currently – lacks.<sup>53</sup> Consistent with its adherence to multilateralism, China is also likely to focus its efforts on the on-going negotiations to join the CPTPP and the Digital Economy Partnership Agreement.

Ultimately, as evidenced by the last two decades of China's trade history, it has been consistent in supporting multilateralism. Meanwhile, the US (supported by the EU) is

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49 Frederic Grare, 'Ambitions and access: the new economic framework for the Indo-Pacific' (7 June 2022), available at <<https://ecfr.eu/article/ambitions-and-access-the-new-economic-framework-for-the-indo-pacific/>>, last accessed on 15 June 2022.

50 International Economic Law and Policy Blog, 'Katherine Tai on IPEF Enforceability' (2022), available at <<https://ielp.worldtradelaw.net/2022/06/katherine-tai-on-ipef-enforceability.html>>, last accessed on 15 June 2022.

51 International Economic Law and Policy Blog, 'Katherine Tai on Fixing WTO Dispute Settlement' (2022), available at <<https://ielp.worldtradelaw.net/2022/06/katherine-tai-on-fixing-wto-dispute-settlement.html>>, last accessed on 15 June 2022.

52 The RCEP has come into force for Australia, Brunei Darussalam, Cambodia, China, Japan, Lao PDR, New Zealand, Singapore, Thailand, Vietnam and Korea.

53 See: Su-Lin Tan, 'Left out of the Indo-Pacific deal, China pushes toward the world's largest trade deal' (2022), available at <[www.cnbc.com/2022/06/06/left-out-of-the-indo-pacific-deal-china-pushes-toward-rcep-trade-deal.html](http://www.cnbc.com/2022/06/06/left-out-of-the-indo-pacific-deal-china-pushes-toward-rcep-trade-deal.html)>, last accessed on 18 June 2022.

pushing to terminate China's special and differential treatment under the WTO rules. This was also evidenced by the recent MC12 negotiations regarding the TRIPS, during which the US (unsurprisingly) demanded that China be exempted from the vaccine waiver. The resulting tensions were resolved by including a footnote in the draft to recognise China's statement that it would not use the waiver as a binding commitment.<sup>54</sup> According to the new US Trade Representative, Katherine Tai, this deal proved that 'we can work together to make the WTO more relevant to the needs of regular people'. Nevertheless, if the US and the EU persist in trying to change the rules of the WTO game,<sup>55</sup> there is a risk of China learning the new rules quickly to then retaliate against the West.<sup>56</sup>

## VI AFRICA: A NEW BIG TRADE PLAYER ON THE HORIZON

Speaking about large-scale trade deals, the African Continental Free Trade Area (AfCFTA) – the world's largest new free trade area since the establishment of the WTO in 1994 – came into force in January 2021.<sup>57</sup> The AfCFTA was referred to as a new 'very large elephant in the room'.<sup>58</sup> However, despite the enthusiasm, little progress has been made over the past year.<sup>59</sup> Sluggish negotiations on rules of origin and tariff schedules, concerns about the member countries' political commitment, lack of expertise at the national level as well as lack of coordination at the regional level appear to represent the main challenges to proper implementation. If these challenges are addressed, the AfCFTA is expected to lift 30 million people out of extreme poverty and significantly increase the income of 68 million people.<sup>60</sup>

The predictions cannot but increase the attractiveness of the AfCFTA's members as potential trade partners. While China has been strengthening its ties with the region by increasing imports of African agricultural goods and raw materials,<sup>61</sup> the US is considering

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- 54 WTO, Draft Ministerial Decision on the TRIPS Agreement of 17 June 2022, WT/MIN(22)/W/15/Rev.2, available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W15R2.pdf&Open=True>, last accessed on 17 June 2022.
- 55 For example, by interpreting the WTO rules in 'creative' ways so as to target Chinese State-owned enterprises, as explained by Simon J. Evenett, Juhi Dion Sud and Edwin Vermulst in 'The European Union's New Move Against China: Countervailing Chinese Outward Foreign Direct Investment' (2020), 15(9) KLI BV 413.
- 56 Henry Gao, 'China's Changing Perspective on the WTO: From Aspiration, Assimilation to Alienation' (8 November 2021), available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3958510#:~:text=The%20paper%20argues%20that%20the,the%20core%20values%20of%20WTO](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3958510#:~:text=The%20paper%20argues%20that%20the,the%20core%20values%20of%20WTO)>, last accessed on 18 June 2022.
- 57 As of June 2022, only 43 of the 54 signatories have ratified the AfCFTA and deposited their instruments of ratification of the Agreement with the AfCFTA Secretariat.
- 58 Webber Wentzel in alliance with Linklaters, 'AfCFTA Insights Series' (2020), p. 6, available at <[www.webberwentzel.com/News/Documents/2021/africa-legal-webber-wentzel-2020-review.pdf](http://www.webberwentzel.com/News/Documents/2021/africa-legal-webber-wentzel-2020-review.pdf)>, last accessed on 13 June 2022.
- 59 UN Economic Commission for Africa (UNECA), 'The AfCFTA Country Business Index (ACBI) Report' (2022), available at <<https://repository.uneca.org/bitstream/handle/10855/47595/b12003657.pdf?sequence=1&isAllowed=y>>, last accessed on 13 June 2022.
- 60 The World Bank, 'The African Continental Free Trade Area' (2020), available at <[www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area](http://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area)>, last accessed on 13 June 2022.
- 61 Virusha Subban, 'China's trade ties with Africa continue to strengthen' (2022), Namibia Economist, available at <<https://economist.com.na/70954/special-focus/chinas-trade-ties-with-africa-continue-to-strengthen/>>, last accessed on 18 June 2022.

options as to how it can promote the AfCFTA's success.<sup>62</sup> On its part, the EU appears slow in responding to the African policy changes.<sup>63</sup> Thus, overall, China seems to be ahead of the game (compared to the West) in terms of international trade relationships with the African continent. Given the AfCFTA's potential, such relationships may well be another factor capable of impacting the global economic governance in the near future.

## VII LAST BUT NOT LEAST: TRADE REMEDIES

We live in the shadow of the pandemic, and many investigations continue to be conducted remotely. While this might help save some money in the short run, and reduce our carbon footprints, it also places heavy burdens on the companies being investigated by the relevant authorities. Investigations still take much longer than they used to, and the workload for respondents is not decreasing, on the contrary.

So what has changed in the trade remedies instruments (TDIs) context? The EU is carrying on with its ever-growing scrutiny of foreign subsidies, including in anti-dumping investigations. To remedy alleged distortions of the EU internal market, the Commission has been using TDIs to tackle new forms of subsidisation, for example, in the field of investment financing. Clearly, this needs to be considered in the wider context of the EU's increasingly defensive approach towards foreign trade actors. China remains the EU's main target, and the self-invented<sup>64</sup> methodology under Article 2(6a)(a) of the EU Basic Anti-Dumping Regulation continues to be applied unabated in anti-dumping investigations against China.<sup>65</sup> On its part, China has become more active in initiating both anti-dumping and anti-subsidy investigations.

The number of conducted investigations is increasing in Brazil, Turkey and India as well. In connection to this, it is interesting to note that the Indian Ministry of Finance seems to be following a peculiar trend by rejecting a significant number of recommendations by the

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62 Landry Signé's testimony before the United States House Foreign Affairs Committee: Subcommittee on Africa, Global Health, and Global Human Rights. Hearing titled: 'Understanding the African Continental Free Trade Area and How the U.S. Can Promote its Success' (27 April 2022), recording available at <<https://foreignaffairs.house.gov/hearings?ID=990AD3E3-C705-4156-88F1-CFA6EDD6314A>>, last accessed on 18 June 2022.

63 Iza Lejarraaga, 'Trading aims: The value of Africa's deep integration trade agreement' (3 May 2022), available at <<https://ecfr.eu/publication/trading-aims-the-value-of-africas-deep-integration-trade-agreement/>>, last accessed on 18 June 2022; and Foundation for European Progressive Studies, 'The EU-AU Trade and Development Partnership: towards a new era?' (October 2021), <<https://feeps-europe.eu/wp-content/uploads/downloads/publications/211103%20policy%20brief%20aue%20relations%20on%20trade%20and%20development.pdf>>, last accessed on 18 June 2022.

64 Or some would say: copied from the US.

65 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 [2016] OJ L176/21, Article 2(6)(a). For a recent application of the methodology under Article 2(6)(a), see: Commission Implementing Regulation (EU) 2022/469 of 23 March 2022 correcting Implementing Regulation (EU) 2022/72 imposing definitive countervailing duties on imports of optical fibre cables originating in the People's Republic of China and amending Implementing Regulation (EU) 2021/2011 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China [2022] OJ L96/36, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R0469>>, last accessed on 19 June 2022.

Directorate General of Trade Remedies (DGTR) to impose anti-dumping and countervailing measures, without providing explanations as to its decisions.<sup>66</sup> The latest decision not to impose measures contrary to the DGTR's recommendations states that non-imposition has been decided 'considering the overall public interest'. However, except for this, the Ministry of Finance gave no further explanation for not following the DGTR's advice.<sup>67</sup> This, like the TRA's situation in the UK, may raise questions as to the 'strength' of the DGTR.

In the US, one of the latest developments concerns the highly debated tariffs on solar panels. As the war in Ukraine drove up energy prices worldwide, the US tariffs on solar panels received severe criticisms that, instead of punishing Chinese panel makers, they were 'crushing US companies and consumers'.<sup>68</sup> Therefore, President Joe Biden has recently announced the use of the Defence Production Act to promote domestic production and declared a two-year tariff exemption for solar panel products from Cambodia, Malaysia, Thailand and Vietnam. Unsurprisingly, China is not on this list. Nevertheless, the Chinese photovoltaic exporters may take advantage of this move, as they would not be responsible for tariffs eventually imposed as a result of an investigation into Chinese solar panel makers for alleged tariff circumvention.<sup>69</sup>

Interestingly, at the WTO level, China successfully obtained leave to retaliate up to US\$645 million in annual goods, ranging from solar panels to steel wire, against the US.<sup>70</sup> This is the second time that China has been granted a favourable retaliation ruling at the expense of the US.<sup>71</sup> This may likely add to the heated *US v. China* saga in that, while China's aim is not to raise tariffs but rather to push the US to lower them, the US is still refusing to correct its practices in accordance with the WTO rulings. Yet, the latest developments concerning solar panels make us wonder whether the US' approach is hampering its trade interests instead of furthering them. Without a doubt, it will be interesting to see how the US is going to resolve the dilemma.

Finally, other interesting WTO rulings handed down over the past year include, among others: *Turkey – Pharmaceutical Products (EU)* (DS583), which, as discussed above, is currently under appeal pursuant to Article 25 DSU; and *EU – Safeguard Measures on Certain*

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66 For example, the Indian Ministry of Finance rejected the Directorate General of Trade Remedies' positive recommendations regarding imports of Caprolactam, Glass Fibre, Vitamin C, Rubber Chemical PX-13 and Melamine.

67 While imposition of duties is indeed discretionary, as clarified by the Indian Supreme Court in *Designated Authority v. Andhra Petrochemicals* (2020), the exercise of this discretion cannot be arbitrary. See on this point: *Jubilant Ingrevia v. Designated Authority* (2021) CESTAT Anti-Dumping Appeal No. 50461 of 2021.

68 T.J. Rodgers 'Tariffs on China Throw Shade on the U.S. Solar Industry' (24 May 2022), *Wall Street Journal*, available at <[www.wsj.com/articles/biden-solar-industry-tariff-china-philippines-climate-change-carbon-emissions-energy-prices-manufacturing-11653403852](http://www.wsj.com/articles/biden-solar-industry-tariff-china-philippines-climate-change-carbon-emissions-energy-prices-manufacturing-11653403852)>, last accessed on 19 June 2022.

69 Global Times, 'China's PV firms eye bright prospects under US' tariff exemption for solar panels' (6 June 2022), available at <[www.globaltimes.cn/page/202206/1267417.shtml](http://www.globaltimes.cn/page/202206/1267417.shtml)>, last accessed on 19 June 2022.

70 Arbitrator Decision, DS437: US – Countervailing Measures (China), WT/DS437/ARB, adopted on 26 January 2022.

71 See: Arbitrator Decision, DS471: US – Anti-Dumping Methodologies (China), WT/DS471/ARB, adopted on 1 November 2019, which authorised China to request the DSB to suspend concessions or other obligations up to US\$3,579.128 million per annum.

*Steel Products* (DS595). As for the future, we should keep an eye on the ongoing disputes in *China – AD/CVD on Wine (Australia)* (DS602) and *China – AD on Stainless Steel (Japan)* (DS601).

## VIII SUMMARY

Referring to the past year as ‘interesting and challenging’ sells it short. It was impossible to highlight all noteworthy developments in trade law within this preface. Fortunately, what makes this edition of *The International Trade Law Review* particularly insightful are the comprehensive analyses provided by our loyal contributors. We are therefore evermore grateful to: Tetyana Payosova and Joanna Redelbach for the chapter on World Trade Organization; Matthew Weiniger QC and Alex Fawke for the chapter on UK Customs and Trade; Alfredo A Bisero Paratz, Anabella L Lombardo and Anny E Reyes for the chapter on Argentina; Mauro Berenholc, René Medrado, Carol Sayeg and Cora Mendes for the chapter on Brazil; Peter Jarosz and Philip Kariam for the chapter on Canada; Ignacio García and Andrés Sotomayor for the chapter on Chile; David Tang, Jessica Cai, Yong Zhou and Jin Wang for the chapter on China; Juan David López for the chapter on Colombia; Nicolaj Kuplewatzky and Akhil Raina for the chapter on The European Union; Shiraz Rajiv Patodia and Mayank Singhal for the chapter on India; Kunio Miyaoka, Shunsuke Imura, Ryo Kiuchi and Yu Soh for the chapter on Japan; Lim Koon Huan and Manshan Singh for the chapter on Malaysia; Saifullah Khan for the chapter on Pakistan; Apisith John Sutham, Chalermwut Nilratsirikul and Pumirad Pingkarawat for the chapter on Thailand; M Fevzi Toksoy, Ertuğrul Can Canbolat and E Kutay Çelebi for the chapter on Turkey; Matthew R Nicely, Devin S Sikes, Julia K Eppard and Brandon J Custard for the chapter on United States; and Giang Le for the chapter on Vietnam. Finally, we would like to thank Camilla Nervegna at VVGB for her most kind and invaluable assistance.

We wish all our readers much enjoyment with this latest edition of *The International Trade Law Review*.

**Folkert Graafsma and Joris Cornelis**

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# THAILAND

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## I OVERVIEW OF TRADE REMEDIES

Thailand has been an active user of trade remedy measures during the past two decades. To date, Thailand has initiated a total of 55 trade remedy investigations, of which 49 were anti-dumping (AD) investigations and six were safeguard investigations. However, Thailand has never initiated any countervailing (CVD) or anti-circumvention (AC) investigations to date, though this is likely to change in the future as a result of changes to the legal framework and the domestic industries' perceived need for CVD and AC investigations.

The main target countries of trade remedy measures imposed by Thailand are Asian countries, primarily China, South Korea and Taiwan. The majority of trade remedy investigations have revolved around steel and metal products.

In 2021, a relatively low number of trade remedy investigations were initiated by the Department of Foreign Trade (DFT) in Thailand, with a total of only four investigations and reviews conducted, compared to 10 investigations and reviews in the previous year. However, there were as many as seven trade remedy determinations issued in 2021. The Committee on Anti-dumping and Subsidy (the Committee) found affirmative findings and imposed AD measures with the lone exception being the safeguard determination.<sup>2</sup>

## II LEGAL FRAMEWORK

### i Anti-dumping and countervailing legislation

The primary AD and CVD legal instrument under Thai law is the Anti-Dumping and Countervailing Act BE 2545 (1999), which was amended by the Anti-Dumping and Countervailing Act (Issue No. 2) BE 2562 (2019) (the AD/CVD Act). In addition, there are 14 relevant sub-regulations that provide detailed rules and administrative procedures for AD and CVD investigations.

The legal provisions of Thai trade law are modelled on, and broadly consistent with, the World Trade Organization's (WTO) legal framework. Nonetheless, there are also some elements under Thai law that do not appear in the WTO legal framework, as outlined below.

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1 Apisith John Sutham is a counsel and Chalermwut Nilratsirikul and Pumirad Pingkarawat are associates at Weerawong, Chinnavat & Partners Ltd.

2 The safeguard investigation on *Aluminium Foil* was terminated on 4 September 2021 as the legal standing and representation requirements of the domestic industry were not met.

First, Section 7 of the AD/CVD Act imposes a broad obligation on the investigating authorities to take into consideration the impacts on the importers, end users and the public when imposing AD or CVD measures.

In past investigations, the DFT relied on the public interest clause for providing exemptions to the AD measures. The most common form of application of the public interest clause is a re-export exemption whereby the AD committee collects AD duty at zero per cent on subject merchandise that is imported for production and re-export.<sup>3</sup>

In addition, the public interest clause is used as the legal basis for providing exemptions to certain product specifications, usage or application in certain downstream industries. The common exemptions under this category include exemptions for the import of products for use in the automotive industry and the home appliance industry that have strategic importance to the Thai economy, as well as certain product specifications that cannot be produced by the domestic industry. It should be noted that the DFT has never relied upon the public interest consideration as the sole reason to terminate outright any investigation or not to impose measures.

Second, Thai law provides a significantly different definition of domestic industry from the definition in the WTO legal framework. Under the WTO Anti-Dumping Agreement (ADA), a domestic industry is defined as the domestic producers whose production output constitutes a major proportion of the total domestic output. However, the AD/CVD Act explicitly provides that the required production output of the domestic producers must be more than half of the total domestic production output. As a result, the DFT has little flexibility when determining legal standing and representation of the domestic industry.

## **ii Safeguard legislation**

The primary legal instrument of safeguard investigations is the Safeguard Measure Against Increased Imports Act BE 2550 (2007) (the Safeguard Act). In addition, there are 10 sub-regulations that are applicable to safeguard investigations.

Thai safeguard laws are broadly transposed from the WTO Agreement on Safeguards. However, the laws are silent on other obligations mandated in Article XIX of the General Agreement on Tariffs and Trade (GATT), including that increased imports must be the result of an unforeseen development. Notwithstanding the foregoing, Section 41 of the Safeguard Act contains a provision that requires all safeguard investigations to be conducted in accordance with Thailand's international commitments relating to safeguard investigations. In practice, the DFT has adhered to the obligations under Article XIX of GATT and, in virtually every investigation, has applied the criterion of unforeseen development in safeguard investigations.

## **iii Anti-circumvention legislation**

In 2019, the AD/CVD Act was amended to incorporate a section on AC law (the AC law), which allowed the DFT to extend the application of existing AD or CVD measures to import products that are involved in circumventing activities. In addition, there are nine relevant sub-regulations that were recently issued to provide the detailed rules and administrative procedures of AC investigations.

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<sup>3</sup> However, the re-export exemption is granted on a case-by-case basis, and does not automatically occur in all measures.

In broad terms, the AC law requires that the following criteria must be satisfied:

- a* the alleged circumventing activity is related to a slight modification of products, transshipment, channelling, completion operation or assembly operation;
- b* there is a change in the pattern of trade;
- c* the alleged activities do not have sufficient due cause or economic justification;
- d* the alleged activities undermine the remedial effect of the original measures in terms of price or volume; and
- e* there is evidence of dumping or subsidy.<sup>4</sup>

One of the important elements of the AC law is that AC investigations and measures are applicable only to importers and exporters that are allegedly engaged in AC activities – they do not apply on a country-wide basis.<sup>5</sup> However, the application of AC investigations and measures for specific exporters has created two major practical implications as follows:

- a* Prima facie evidence: when submitting an AC petition, the petitioner must demonstrate prima facie evidence indicating that all criteria for imposing AC measures are satisfied. However, a petitioner generally does not have access to information at the individual exporter level and may have access to only country-wide information. For example, regarding import statistics, which are used to demonstrate a change in the pattern of trade, petitioners would normally be able to access import statistics on a country-wide basis, and would not have access to the import statistics that are specific to the alleged exporters.
- b* Cost and benefit for applying anti-circumvention investigation: the limited scope of application of AC measures to specific exporters may render AC measures to be less attractive tools for the domestic industry, given the extensive amount of evidence, administrative costs and effort required.

### III TREATY FRAMEWORK

Thailand is the founding member of the Association of Southeast Asian Nations (ASEAN) trade bloc, and is a contracting party in 13 other bilateral and multilateral free trade agreements with China, South Korea, Japan, Australia, New Zealand, Chile, Peru and India, among others.

On 15 November 2020, Thailand became a signatory to the Regional Comprehensive Economic Partnership (RCEP), the world's largest trade pact covering 2.2 billion people and 30 per cent of the world's GDP,<sup>6</sup> that built upon the existing multilateral agreements between ASEAN and other nations (the ASEAN+1 Agreements). The RCEP became effective on 1 January 2022, and has provided further economic integration between the Asian nations, especially the unified rules of origin and accumulation rules that apply to and have facilitated the movement of goods across the region, thereby allowing more import products to qualify for the preferential tariffs scheme.

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4 Section 71/3 of the Anti-Dumping and Countervailing Act BE 2542 (1999) amended by the Anti-Dumping and Countervailing Act (Issue No. 2) BE 2562 (2019).

5 See Clause 3(2) of the Notification of the Ministry of Commerce regarding the List of Information in the Notice of Investigation on Circumvention of Anti-Dumping or Countervailing Measures BE 2564 (2021).

6 See Ministry of Foreign Affairs, Kingdom of Thailand (<https://www.mfa.go.th/en/content/rcepsigning?cate=5d5bcb4e15e39c306000683c>), last accessed 4 July 2022.

Thailand announced its interest in acceding to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in 2018. A number of committees were established to assess the benefits and impacts of accession to the CPTPP. There has been strong opposition from the public and political parties, particularly with regard to the CPTPP's requirement to become a member of the International Union for the Protection of New Varieties of Plants (1991).<sup>7</sup> The decision on whether Thailand will join the CPTPP has not yet been made.<sup>8</sup>

Another key element of Thailand's treaty framework is the free trade agreement between Thailand and the European Union, which has been on hold since 2014. In June 2021, the Thai government announced that it will resume negotiations with the European Union to conclude the free trade agreement.<sup>9</sup> In addition, Thailand is negotiating free trade agreements with the European Free Trade Association (EFTA), Turkey and Pakistan, and is participating in further negotiations for the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation.<sup>10</sup> At the ASEAN level, on 17 November 2021, ASEAN and Canada also officially announced an agreement to proceed with the negotiation of an ASEAN–Canada Free Trade Agreement.

#### IV RECENT CHANGES TO THE REGIME

In 2019, major amendments were made to the Thai trade remedy legal framework, especially on AD, CVD and AC investigations, as a result of the promulgation of the Anti-Dumping and Countervailing Act (Issue No. 2) BE 2562 (2019) (the Amended Act). The Amended Act repealed some provisions of the Anti-Dumping and Countervailing Act BE 2542 (1999) (the Original Act) and revised some aspects of the AD and CVD legal provisions to be more consistent with the WTO legal framework.<sup>11</sup> In addition, the Amended Act incorporated AC provisions providing the legal framework for substantive and procedural aspects of AC investigations.

Furthermore, during 2020 and the first half of 2021, 11 sub-regulations were issued to update the detailed rules related to AD and CVD investigations to reflect the Amended Act, as well as to provide detailed rules on AC investigations. The key changes to the legal framework of trade remedy investigations are outlined below.

##### i Countervailing investigations

A CVD investigation has never been initiated by Thailand. One of the reasons is likely to be the unsupportive legal framework of the old regime.

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7 *Bangkok Post*, CPTPP procrastination not an option (<https://www.bangkokpost.com/opinion/opinion/2140151/cptpp-procrastination-not-an-option>), last accessed 5 July 2022.

8 *Bangkok Post*, Behind the scenes: Thailand's IPEF talks (<https://www.bangkokpost.com/opinion/opinion/2314838/behind-the-scenes-thailands-ipef-talks>), last accessed 4 July 2022.

9 *National News Bureau of Thailand*, Thailand and EU resumes FTA negotiations ([https://thainews.prd.go.th/en/news/print\\_news/TCATG210614182226146](https://thainews.prd.go.th/en/news/print_news/TCATG210614182226146)), last accessed 5 July 2022.

10 Ministry of Foreign Affairs, Kingdom of Thailand (<https://www.mfa.go.th/en/content/bimstec-summit-2?cate=5d5bcb4e15e39c3060006842>), last accessed 1 July 2022.

11 The remarks regarding the Amended Act mentioned that some legal aspects of the Original Act were inconsistent with international trade practices. Therefore, the revision was necessary to enhance the effectiveness of the enforcement of the AD and CVD measures for the purpose of protecting the domestic industry.

The CVD provisions set out in the Original Act were broad and did not precisely reflect the obligations under the WTO legal framework. In addition, there was a lack of detailed substantive and procedural rules to the extent that the old regime arguably did not permit the DFT to practically carry out a CVD investigation.

The Amended Act repealed nearly all the provisions in the Original Act that were related to CVD investigations and updated the law to be more consistent with the obligations in the WTO Agreement on Subsidies and Countervailing Measures (the SCM Agreement). For example, Section 63 of the AD/CVD Act was revised to provide a list of activities that are regarded as a 'financial contribution', which is broadly in line with Article 1.1 of the SCM Agreement.

In addition, sub-regulations have been issued to provide detailed rules on key substantive and procedural aspects of CVD investigations that will enable the investigating authority to carry out CVD investigations, including the calculation of the amount of benefit conferred, an illustrative list of export subsidies and sampling criteria.

## **ii New anti-dumping and countervailing petition forms**

In March 2021, the Ministry of Commerce issued a notification to repeal and update all the existing petition forms for AD and CVD investigations, including petition forms for original investigations, and changed circumstance and expiry reviews.

In broad terms, the new petition forms incorporate practical requirements into written and clearer instructions. For example, in practice, the DFT allows the petitioner to demonstrate and submit only one form of prima facie injury evidence in the petition, on a mutually exclusive basis (i.e., either there is material injury to the domestic industry or threat of material injury thereof, or material retardation of the establishment of the domestic industry). This practice has now been incorporated into the instructions of the new petition form.<sup>12</sup>

Moreover, the new petition form simplifies the data required for the petition. For example, in the injury sections of the new petition forms, petitioners are required to provide information to demonstrate injury based on the yearly data of the past three years, as opposed to the quarterly data required by the old petition form.<sup>13</sup>

The new petition form will likely provide more certainty and make the work easier for the would-be petitioner, as well as reduce any excess information. However, some petitioners may find it more difficult to demonstrate injury based on the yearly information, especially if the injury is not clearly discernible in the yearly data but appears in the quarterly data.

## **iii Particular market situation in anti-dumping investigations**

Another important aspect that was introduced in the legal amendments is the notion of a particular market situation (PMS). The PMS authorises the DFT to disregard normal value information submitted by the exporter and apply a third-country representative price, or construct the normal value when there is a market situation in the export countries that could impede an accurate comparison of normal value with export price.

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12 The instructions of Section 8 of the Petition Form Por.Ror.1.

13 For example, the instructions in Section 8.1 related to volume effect requires the petitioner to submit yearly information for the past three years.

Although PMS is not a new concept under Thai law as the PMS clause can be found in the Original Act, the PMS clause has rarely been used by the DFT. The reason for this could be due to the lack of a platform for the petitioner to submit PMS arguments.

As a result of the legislative amendments, a new Subsection has been added in the petition form allowing the petitioner in an AD investigation to submit arguments and evidence related to the PMS in the exporting countries.<sup>14</sup> As a result, it is plausible that there will be more arguments on PMS and application of the PMS clause in future Thai AD investigations.

#### **iv Time limit for revising petitions**

In the previous legal framework, there was no time limit imposed on the DFT to consider a petition. This meant the DFT could ensure that every aspect of the submitted information was accurate and verifiable. However, often, the information and evidence required to demonstrate injurious dumping exceeded the prima facie standard and nearly reached the standard required to be proved in the actual investigations. Consequently, the time required by the DFT to consider and approve the submitted petition was usually prolonged and ranged from several months to several years. However, in March 2021, the notification of the Ministry of Commerce on repealing and updating petition forms (see Section IV.ii) came into effect and imposed a time limit for the petitioner to revise any shortcomings in the petition as identified by the DFT within four months of the date of the first submission of the petition. If a petitioner fails to revise the petition or provide the requested information within the four-month period, the petition will be regarded as abandoned.

It can be observed that the imposition of the time limit for revising a petition has resulted in a shorter time period for the DFT to consider petitions, as it is not able to continue requesting additional information. In addition, the requirement has dissuaded the DFT from issuing several supplemental questions to perfect all aspects of the petition, which may result in a lower prima facie standard to be proven by the petitioners.

## **V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS**

Significant practical developments and key issues in Thai trade remedy investigations are highlighted below.

### **i Public interest implications in light of global surges in steel price**

Since late 2020, there has been a surge in the prices of various steel and metal products globally, which has had a significant impact on downstream users.<sup>15</sup> In addition, a large number of downstream industries have been severely affected by the covid-19 pandemic. As the majority of trade remedy measures in Thailand revolve around steel and metal products,<sup>16</sup> the situation has come to the attention of the Thai government and has prompted the authority to pivot its application of trade remedy investigations, as witnessed in recent AD investigations.

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14 Section 4.4 of the Petition Form Por.Ror.1.

15 *Bangkok Post*, Rising metal prices to affect key industries (<https://www.bangkokpost.com/business/2106615/rising-metal-prices-to-affect-key-industries>), last visited 5 July 2022.

16 Refer to the discussion in Section I.

In the original AD investigation on pre-painted Galvalume steel (PPGL) from China and Korea, the Committee issued its final determination on 30 April 2021,<sup>17</sup> stating that AD measures will be imposed for a period of five years. However, during the first six months, AD duty was collected at zero per cent. The final determination cites the current situation in relation to global steel and metal prices and the impact of the covid-19 pandemic on the Thai economy as the reasons for providing an exemption during the first six months. Subsequently, as the global surge in steel prices remained an ongoing issue and, in fact became more severe after the six-month exemption period had lapsed, the AD Committee ordered an extension of the period for collecting AD duty at zero per cent for another six months.<sup>18</sup> Similar AD Committee orders also appeared in AD measures on tinplate from China, South Korea, Taiwan and the European Union<sup>19</sup> and AD measures on tin-free steel from China, South Korea, and the European Union,<sup>20</sup> in which the AD Committee ordered the collection of AD duty at zero per cent for a period of six months with an extension of another six months.

In addition to the original investigation, the expiry review determination on hot-rolled steel from 14 countries issued on 8 June 2021 also contained a similar hardship exemption clause.<sup>21</sup> Although the Committee decided to continue imposing AD measures for another five years, the AD duty rate of zero per cent would apply during the first six months of the measures.

In view of the above developments, future trade remedy investigations that are related to steel and metal products are likely to be subject to the same treatment until the pricing situation normalises.

## ii Public interest implications in light of the Russia–Ukraine conflict

Since February 2022, the Russia–Ukraine conflict has significantly disrupted the global supply of key commodities, including steel products. The situation has given rise to concerns that the imposition of AD measures will exacerbate the already fragile post-covid recovery. As a result, in recent AD investigations, the Committee and the DFT have requested interested parties to submit information related to the Russia–Ukraine conflict to assess potential impact on ongoing investigations, which may be caused by issues such as high energy prices impacting the supply chain, shortage of raw materials and products that are subject to investigation, and their pricing trends.

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17 Notification regarding Final Determination of AD Investigation on Painted Hot Dip Plated or Coated with Aluminium-Zinc Alloys of Cold-Rolled Steel originating in the People's Republic of China and the Republic of Korea, published in the Royal Gazette on 30 April 2021.

18 Notification regarding AD Measures on Painted Hot Dip Plated or Coated with Aluminium-Zinc Alloys of Cold-Rolled Steel originating in the People's Republic of China and the Republic of Korea (Issue No. 2), published in the Royal Gazette on 1 November 2021.

19 Notification of the Committee on Dumping and Subsidy Regarding Antidumping on Tinplate in Coils and not in Coils Originating in the People's Republic of China, the Republic of Korea, Taiwan and the European Union (No. 2) B.E. 2565 (2022), published in the Royal Gazette on 13 May 2022.

20 Notification of the Committee on Dumping and Subsidy Regarding Antidumping on Tin Free Steel in Coils and not in Coils Originating in the People's Republic of China, the Republic of Korea and the European Union (No. 2) B.E. 2565 (2022), published in the Royal Gazette on 13 May 2022.

21 Notification of the Committee on Dumping and Subsidy regarding Sunset Review Determination of Hot Rolled Steel in Coils and not in Coils Originating from 14 countries, published in the Royal Gazette on 8 June 2021.

In relation to AD measures on tinplate and AD measures on tin-free steel, the AD Committee received feedback citing overwhelming concerns regarding the potential impact of the Russia–Ukraine conflict from interested parties to the investigations. Subsequently, in May 2022, the Committee issued notifications to suspend the collection of AD measures for another six months pursuant to the public interest clause under Section 7 of the AD/CVD Act.<sup>22</sup>

### **iii Application of sampling**

The AD/CVD Act and the relevant sub-regulation provide a legal basis for the DFT to apply sampling in determining AD duty or CVD when cooperating exporters or importers are too numerous and burdensome to complete the investigation within the statutory time limit.<sup>23</sup> In previous trade remedy investigations, there had been limited circumstances where the DFT applied the sampling technique; therefore, the DFT practice related to sampling was not well established.

Notwithstanding the above, in the recent AD determination on *Galvanized steel* from China issued in September 2021, the DFT relied on sampling in determining AD rates for Chinese exporters, as 12 exporters had submitted the questionnaire responses. In applying sampling, the DFT selected the three largest cooperating exporters by export volume to Thailand during the period of investigation and determined individual dumping margin rates for these exporters based on their specific information. For the remaining nine cooperating exporters not selected for sampling, the AD Committee assigned a dumping margin rate based on the average dumping margin rates of the sampling cooperating exporters. Finally, the remaining exporters that did not fully cooperate in the investigation were subject to the best information available treatment and assigned the All Others rate.

It is also worth mentioning that, in applying sampling, the DFT only focused on reviewing the questionnaire responses of the exporters selected for sampling and conducted the verification process only on the sampled exporters.

### **iv Strict application of custom classification in trade remedy investigation in Thailand**

In many jurisdictions, the tariff classification system is not a dispositive factor in determining the scope of the subject merchandise and the like product.<sup>24</sup> However, in Thai practice, custom classification has been heavily relied on by the DFT in determining product scope, collecting information for determining the existence of dumping and imposing measures. For example, when determining whether the petitioner was the producer of a like product, the DFT would primarily assess whether the petitioner can produce and sell any product at the commercial quantity that falls under the tariff classification codes subject to the investigation, while other factors such as product characteristics, applications and end uses, although taken into consideration, would appear to be less of a decisive factor than tariff classification.

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22 See notes 19 and 20.

23 Section 18 and 50, the Anti-Dumping and Countervailing Act BE 2545 (1999), as amended by the Anti-Dumping and Countervailing Act (Issue No. 2) BE 2562 (2019).

24 For example, in the United States, the European Union, India, Australia and Malaysia, the initiation notification explicitly provides that HS codes in these respective countries are not regarded as having the force of law in examining product scope.

Nevertheless, in recent investigations, there are signals that the DFT may have shifted its practice toward the use of other factors beyond the mere tariff classification to determine the product scope. For example, in an AD investigation initiated in 2021, the petitioner faced the situation that its domestically produced products were identical to imported products in terms of physical characteristics, application and end uses. However, it also appeared that the major proportion of those imported products were misclassified into different tariff classification codes from those tariff classification codes that could be produced by the petitioner. After considering the facts at issue, the DFT decided to initiate an investigation covering the large proportion of imported products, notwithstanding different custom classifications.

#### **v Recent developments in granting re-export exemption on Thai AD measures**

It can be said that re-export exemption on trade remedy measures has become a norm for Thai trade remedy investigations. In particular, all of the original AD measures determined during 2013 to mid-2021 were granted re-export exemption. Nevertheless, in three AD measures determined in late 2021, namely (1) tinsplate from South Korea, Taiwan, and the European Union; (2) tin-free steel from China, South Korea, and the European Union; and (3) hot-rolled steel from Vietnam and Egypt, the DFT and the AD Committee took an unusual approach by not granting re-export exemption on the AD measures.

The aforementioned recent AD Committee determinations affirm that granting re-export exemption is neither a strict requirement under Thai law nor is it automatically granted in every trade remedy measure. In contrast, the granting of a re-export exemption is generally considered only upon the request of interested parties, and the AD Committee can exercise discretion in determining whether or not to grant a re-export exemption on a case-by-case basis.

## **VI TRADE DISPUTES**

The number of trade disputes in Thailand has fallen during the past 10 years. In terms of WTO dispute settlements, Thailand has submitted a total of 14 complaints to the WTO Dispute Settlement Body, of which 13 were between 1995 and 2008. During 2009 and 2017, Thailand did not submit any complaints to the WTO Dispute Settlement Body.

The most recent complaint, submitted in 2018, involved the additional duty imposed by Turkey on imports of air conditioning machines from Thailand, as part of the suspension of concession for safeguard duty. However, on 19 November 2020, the chair of the panel decided to suspend the dispute process for 12 months following a request to do so from Thailand. As the panel was not requested to resume the dispute after the 12-month period was over, the authority of the panel established for this dispute had lapsed.<sup>25</sup>

In terms of domestic trade disputes, Thai law permits interested parties that are not satisfied with the final determination of the AD and CVD investigation to appeal the decision to the Central Intellectual Property and International Trade Court (the IPIT Court).<sup>26</sup> The decision of the IPIT Court is subject to the scrutiny of the Court of Appeal for Specialised

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25 Note by the Secretariat on Turkey – Additional Duties on Imports of Air Conditioning Machines from Thailand, Lapse of Authority for the Establishment of the Panel (WTDS573/6).

26 Section 61 of the Anti-Dumping and Countervailing Act BE 2542 (1999).

Cases (the Court of Appeal) and the Supreme Court of Thailand. The final determination in a safeguard investigation can be appealed to the Administrative Court of First Instance and is subject to the review of the Supreme Administrative Court.

Notwithstanding the above, the number of judicial reviews related to trade remedy investigations in Thailand is limited. To date, there have only been two appeals made to the Supreme Court of Thailand, both of which were related to the same AD investigation on glass blocks from Indonesia. The Supreme Court decision in 2007 focused on court procedural issues,<sup>27</sup> while the decision in 2015 touched on the substantive aspects of the Original Act.<sup>28</sup> One of the central issues in the 2015 Supreme Court decision was whether the Committee erred by imposing AD measures on all glass blocks that fell into the tariff classification code indicated in the notice of the initiation – in particular, when submitting the petition, the petitioner only applied for the specific size of glass block that it can produce, and did not apply for the other types and sizes of glass block that fall into the same tariff classification code. The Supreme Court held that the Committee and the DFT have the authority to initiate an investigation and impose AD measures on a product scope that is different from the product scope initially proposed by the petitioner. In addition, the Supreme Court held that the DFT and the Committee could use the tariff classification code as the basis for determining the scope for imposing AD measures in this particular investigation, as the remaining glass block types and sizes that fell into the tariff line were regarded as like products.<sup>29</sup> This Supreme Court decision may have inadvertently influenced and provided justification for the DFT to use customs classification as the primary factor to assess like products, as discussed above.<sup>30</sup>

Furthermore, the Court of Appeal issued a decision in May 2021 providing guidance on the interaction between AD investigations and anticompetitive practices. Regarding AD measures on Galvalume from Vietnam,<sup>31</sup> the downstream association appealed the Committee's final determination. One of the arguments submitted to the IPIT Court was that the Committee failed to consider the issue of public interest when imposing the AD measures. In particular, the petitioner of the AD investigation was the sole producer of Galvalume products in Thailand, and the imposition of the AD measures would only have strengthened the dominant position of the petitioner in the Thai market. The IPIT Court ruled in favour of the downstream association and repealed the Committee's decision by relying on the public interest obligation. However, the Court of Appeal reversed the IPIT Court findings, arguing that the mere fact that the petitioner was the sole producer of the product in Thailand did not preclude the imposition of the AD measures on the product, as the issue of the impact resulting from the dominant position must be assessed from the perspective of sales and market share. The Court of Appeal also noted that although Section 7 of the AD/CVD Act requires the DFT and the Committee to take into account the impact on the public, the notion of the public interest cannot override the objective and purposes of the AD/CVD Act, which is to protect the domestic industry from unfair practice.<sup>32</sup>

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27 Judgment of the Supreme Court of Thailand No. 2038/2550.

28 Judgment of the Supreme Court of Thailand No. 15649-15650/2558.

29 *ibid.*, at 42.

30 See discussion in Section V.iv.

31 Anti-Dumping measures on Hot Dip Plated or Coated with Aluminium Zinc Alloys of Cold Rolled Steel Originating from Vietnam.

32 Judgment of the Court of Appeal in case No. 249/2562.

The above-mentioned Court of Appeal judgment may be subject to further judicial review by the Supreme Court, particularly as the downstream association has appealed the Court of Appeal's decision to the Supreme Court of Thailand.<sup>33</sup> Nevertheless, it will provide some comfort for future petitioners that submit petitions involving products that are produced by a single domestic producer. At the same time, the judgment may have diminished the importance of the public interest consideration, as the DFT may rely on the judgment when rejecting public interest arguments.

## **VII OUTLOOK**

There have been significant developments in trade remedy investigation laws as a result of amendments to the AD/CVD Act and sub-regulations during the past three years. Looking ahead, it can be expected that DFT practices in relation to trade remedy investigations will undergo significant developments to reflect these changes to the Thai legal framework.

Furthermore, given the global circumstances that have caused a sharp increase in the price of many products in the Thai market, the perceived need for trade remedy measures to protect domestic industry would likely be seen as less necessary in the near term. Consequently, we expect that the number of original trade remedy investigations to be initiated in the second half of 2022 will remain low. However, the main focus of the trade remedy investigations during this period is likely to be on interim review requested by exporters, taking advantage of the pricing trend to request a review of existing AD rates.

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33 At the time of writing, the association has filed a request for an appeal of the judgment to the Supreme Court.

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