Trade & Customs 2020

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LEXOLOGY®
Getting The Deal Through

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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Overview

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Not since the 1906 general election in the United Kingdom did a superpower election focus so much on trade as the 2016 US election. The free trade Liberals in 1906 won a huge majority based on a platform of a 'free breakfast table' of duty-free wheat (for bread) and sugar (for tea and jam) – compare that to current US quotas on sugar and the EU Common Agricultural Policy – amid fears of steel dumping by the rising disruptive giant economy, the United States.

At the time of writing, the high-level political noise about trade in the US and Europe is overshadowing positive developments at a working level. At the multilateral level, World Trade Organization (WTO) governments, Director General Roberto Azevêdo and the Secretariat worked hard to produce results in December 2015, at least in agriculture (a possible ban on some agricultural export subsidies) and tariffs on electronics goods (ITA II, even including some items for ordinary consumers), at the WTO Ministerial Conference in Nairobi, and made some progress in Buenos Aires in December 2017. The WTO system is still dogged by many of the bad memories from the collapse of the Doha Round in Geneva in 2008, with chillingly familiar references to 'special safeguard mechanisms', 'special products', 'special treatment' and so on. And even with successful efforts on agriculture and tariffs, it leaves behind important work from the Doha agenda to moderate the trade-diverting or protectionist effects of preferential trade agreements (PTAs); agricultural subsidies; anti-dumping measures and other rules (where progress so far has been blocked by the US, its protectionist import-competing industries and their allies in the US Administration and Congress); and much else. That left fishing subsidies as a topic for the December 2017 Ministerial Conference in Buenos Aires, where a little progress was made. A cautious plurilateral negotiation on digital trade has just begun in Geneva.

The most significant regional agreement is the CPTPP, although the Asian mega-regional Regional Comprehensive Economic Partnership (RCEP), including India, China and Japan, could become more significant if it has substantial liberalisation and is completed soon. The CPTPP, which includes 11 countries, collectively representing over 20 per cent of world GDP, went into effect on 30 December 2018. The CPTPP includes some novel attempts to move beyond traditional PTAs, including an initial start on regulatory cooperation, some possibly helpful language encouraging limitations and exceptions on intellectual property necessary for the operation of the internet, and what looks like a functioning dispute settlement system. Its progenitor, the TPP, became a political football in the US elections, with both candidates pledging to reject it. President Trump withdrew the US in January 2017. Chile organised a meeting in March 2017 where the remaining 11 TPP countries decided to explore ways to move forward, leading to signature in late 2017 and ratification by the main countries and entry into force in 2018.

Perhaps more important will be whether other countries join CPTPP, including perhaps Korea, Colombia and Costa Rica, and even the UK after Brexit, and eventually the Philippines, Thailand and possibly even Taiwan and Indonesia, although the last two may be delayed for different reasons. With all those countries in, the TPP would have over 40 per cent of the world's GDP, once the US joins in a few years' time.

To that must be added the impact of the current US–EU negotiation. Earlier negotiations of a TTIP started in 2012. The TTIP looked like it could go well beyond any prior PTA in areas such as regulation and regulatory cooperation, and also in terms of major changes in the traditional model of investor–state dispute settlement (ISDS), before the Trump administration killed it in 2017, before beginning more limited talks in 2019. (Trump and Juncker had agreed in 2018 to limit the talks to non-automotive industrial tariffs and limited regulatory cooperation). Like the CPTPP, the completion of US–EU talks could force its near neighbours to try to join, probably including Switzerland, Turkey, Norway, Ukraine and, it seems, the UK after Brexit (all of which would be quite disadvantaged by having to meet US competition in the EU while being at a disadvantage to EU exporters in the US). Added up, the CPTPP with the US joining, plus an EU–US FTA, plus all the countries that would have to join, would exceed 70 per cent of the world's GDP. That would force China to engage, without the rancor of the current of US–China trade war.

Plurilateral agreements being negotiated within or alongside the WTO most notably include the Trade in Services Agreement (TISA), where significant drafting progress has been made but significant disagreements remain. Perhaps the most notable aspect of TISA is that after it was fiercely denounced when it was launched by the BRICS countries (Brazil, Russia, India, China and South Africa), China more than a year ago asked to join, in effect stating that it was no longer really a BRIC country and preferred to be tied to the economies represented in TISA (and, notably, the then-TPP and TTIP) rather than its fellow BRICS. Other plurilaterals within the WTO include the ongoing attempt to negotiate rules for a digital economy and lower tariffs on environmentally desirable goods. It seems unlikely that President Trump will pursue the latter.

WTO dispute settlement has been active as well. Perhaps the most significant group of cases has involved safety and standards issues. Several important panel and Appellate Body (AB) decisions are due in 2019, including AB decisions in the WTO challenge to Australia's requirement of plain packaging for cigarettes by the remaining plaintiff governments after Ukraine dropped out (Honduras, the Dominican Republic, Cuba and Indonesia), which Australia won at the panel level; important new compliance cases in the Boeing–Airbus fight; the cases against UAE and the US on 'national security' measures; and numerous trade remedy cases – if the AB continues to function.

In effect, the WTO Dispute System Settlement Understanding has created an impressive-looking machine for generating normative judgments (perhaps now sabotaged by the successful US move to 'fire' (block reappointment of) AB judges for disagreeing with the US Trade Representative's views, thus undermining the crucial appearance of independence), while being unable to enforce them against large countries in any commercially meaningful time period. WTO governments

certainly perceive that they can get away with this in national trade remedy decisions, as the solar panel wars show. The EU, China, US and India all heavily subsidise solar panel production to get the cost of solar panels to a point of commercial viability – that is, equal to or lower than fossil fuels (a task made more challenging by the recent rise in fossil fuel production). But at the same time, they put up trade barriers to eliminate competition with their local producers (around two-thirds of all EU anti-dumping duties are applied to renewable energy). Even more laughably, Canada, having lost an attempt to defend its local-content regime in Ontario for solar power in the Canada–FIT WTO case, started an anti-dumping proceeding to replace the local content rule. All calculate, quite openly, that they can 'get away with it' for three or four years of WTO litigation with no obligation to repay any illegally collected duties – a period long enough in modern business terms to effectively terminate trade, particularly in a fast-moving industry such as solar energy.

This may be only an appetiser for the cage match started in December 2016 – the expiry (or not?) of the 15-year period during which China could be treated as a non-market economy (NME) in anti-dumping cases. Preliminary rounds have included an outpouring of articles by highly ranked lawyers, interventions by parliamentarians (at least in the EU and the US), and a demonstration in Brussels by steelworkers advocating a preferred reading of the text of a WTO protocol of accession (and they knew the text – I was there). It seems likely that the US will continue to treat China as an NME, in effect challenging China to contest that decision in the WTO (why else undermine the AB's independence?). This must be for political reasons (not only for voters, but to show fealty to the special interests that have captured it), because it is unnecessary – the US and other countries long ago gave up anything but the pretence of objectivity in calculating anti-dumping or countervailing duties for all countries, instead calculating that it can drag out court or WTO litigation for years (and not comply with WTO decisions), even though it means that major US exporters suffer from foreign retaliation. And if that doesn't work, the US will continue to seek protection for uncompetitive industries by claiming 'national security', as it did in 2019 in the WTO for steel and aluminium.

That leaves the EU with the option of nominally complying (by treating China officially as a market economy) while in fact calculating the numbers by using other methodologies, so far upheld by a WTO panel pending appeal. Other countries can perhaps take comfort in the observation that China to date has focused its WTO complaints almost entirely on the US and the EU.

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The [CP] Trans-Pacific Partnership

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The Trans-Pacific Partnership, or TPP, is a trade agreement signed on 4 February 2016 involving 12 countries: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. The text was released on 26 January 2016, in 'scrubbed' form. The US, under the new Trump Administration, formally withdrew its signature (so there would be no lingering legal obligations as a signatory) in late January 2017. The other TPP countries met in Santiago, Chile in March 2017 and decided to redraft it without the US (essentially, by 'suspending' the obligations the US most sought). The resulting Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) was signed in late 2017 and ratified by sufficient countries in time to enter into force (with initial tariff cuts) on 30 December 2018.

The origins of the TPP began with the P4, formed in the middle of the last decade by Brunei, Chile, New Zealand and Singapore. By 2008, Australia and Peru had joined, and Vietnam was in the process of joining. Ambassador Susan Schwab, then US Trade Representative for the Bush administration, took the US into the negotiations that year in a way that did not lead the Obama administration to drop it as a Bush initiative.

The Obama administration, after considerable debate, decided to make the TPP its main trade policy initiative in its first term. Trade is a divisive issue within the Democratic Party, and some in the new administration had hoped to avoid trade issues during the first year in office in 2009, while focusing on the enormous challenges of the global financial crisis.

Even before the 2008 election, the Obama administration had wanted to focus on Asia (at least in part to match increasing Chinese influence), while at the same time some thought the TPP was 'too small' to bother the unions. Whatever the reasons, in November 2009, President Barack Obama at the Asia-Pacific Economic Cooperation summit in Japan announced that the US would engage with the TPP. Although 'engage' sounds to some like a euphemism for a half¬-hearted commitment, it turned out to be a more legalistic choice of words – even before obtaining formal negotiating authority (trade promotion authority – TPA) through legislation, the Obama administration had decided to follow the domestic formalities of the TPA legislation that had expired in 2008. One part of that legislation was that 'negotiations' could not start until 90 days after the president had notified Congress of the intention to enter into negotiations.

There are two key aspects of the CPTPP agreement.

Size

The original P4 was an extraordinarily successful lobbying exercise in which, by setting up a high-quality free trade agreement (FTA), the four countries created an attractive target to which others then signed up. The P4 itself comprised fewer than 30 million people, but the CPTPP countries form a market of more than 400 million people. With Vietnam in the TPP negotiation, Malaysia had to join, because otherwise many of Malaysia's key exports of consumer electronics and, to some extent, garments, would be placed at a decided disadvantage. That was likely to mean that the Philippines, Indonesia, Korea, and eventually Taiwan and Thailand, and so on, could join. Colombia has also indicated an interest in joining, which logically would pressure Central American countries to join as well. If the UK joins (in the event of Brexit), the TPP could include more than 30 per cent of world GDP. That by itself inevitably means a great deal of impact on international trade. Not least, it forces other World Trade Organization (WTO) members to think about what, if anything, they wish to multilateralise from the TPP. It has already contributed to the eventual negotiation of a US–EU FTA, the completion of an EU FTA with Japan, and USMCA, the renegotiated NAFTA.

If CPTPP reaches its ambitious goals, however, it seems unlikely in the shorter to medium term to include China, India, the EU, the Middle East or Africa. So it will probably accelerate the pace of bilateral and plurilateral deals among the countries in those regions and around the world. It will be interesting to see whether this leads to greater trade liberalisation, or whether the added complexity of the resulting 'spaghetti bowl' creates too much paperwork (at present, a huge percentage of the trade preferences negotiated on paper are never in fact used, as economic actors prefer to go with the simplicity of the alternative, though higher, WTO-negotiated most-favoured nation rates to avoid the added cost of qualifying for lower FTA rates).

There was a raging debate during the negotiation about the TPP's 'transparency', with a lot to be said on both sides. The original purpose of opacity in trade negotiations was to protect the civil servants negotiating tariff reductions, which would help prevent consumers from being pressured by protectionists' local interests out to sabotage those tariff cuts. However, even the original US negotiating structure under the frequently renewed negotiating authority from 1934 onwards required precise identification of the tariff lines (and sometimes principal suppliers) involved, allowing the protected local industries to guess pretty well what was going on and react accordingly. The 'cleared adviser' or 'advisory committee' structure put in place after 1974 in the US (and subsequently in Canada, Australia and other countries) gives local industries far greater access to information than consumers and citizens at large (especially as many consumers' NGOs have lost interest in the possible benefits of trade to consumers).

Market liberalisation

The US approach after the North American Free Trade Agreement (NAFTA) had been for full liberalisation on goods, meaning the removal of all tariffs, tariff-rate quotas and so on, although often with very long

phase-outs (as much as 20 years). The US has achieved this in all post-NAFTA FTAs with two significant exceptions. In the US–Canada and the US–Australia FTAs, the US refused to increase market access for sugar (and, not coincidentally, Australia refused to allow investor–state arbitration in the investment chapter). The tables were turned in the US–Korea FTA, where Korea refused to liberalise access to the rice market. There were other less public exclusions, some achieved by attaching conditions (thus, the US insisted on Singapore opening its market to imports of chewing gum, but allowed Singapore to retain the right to require sales to be based solely on a doctor's prescription). There has, of course, been one big exception – effectively excluding footwear and clothing from liberalisation even if tariffs were cut to zero, by imposing unreachable rules-of-origin limits. This posed an obstacle to the TPP negotiations with Vietnam, whose current exports to the US are largely footwear and clothing. The irony, of course, is that the amount of footwear produced in the US may not even reach 1 per cent of total demand, and clothing is estimated at 2 per cent or less of demand, but one should never underestimate the power of entrenched US lobbies. The problem, as one would expect, is that Vietnam made clear that if it got only part of the full market access it would like for its exports of footwear and clothing to the US (especially where there is no significant local production), then the US would only get the same degree of market access for what the US wants out of Vietnam. The TPP deal with Vietnam balanced partial (but very beneficial) access for Vietnam to US clothing and footwear markets in return for less than full access to Vietnam for US exporters of other goods and services. Similar deals in the TPP meant that there were some notable exceptions to the complete elimination of tariffs, in particular, agricultural products in Japan (although reductions were substantial, for example, from 38.5 per cent to 9 per cent on beef). What seems likely is that the pursuit of one of the original goals – simplifying existing US FTAs with TPP countries into a single schedule – will instead lead to an even greater mass of tariff complexity (at least in the first years). It is hard to see how a series of bilateral US FTAs post-TPP withdrawal will open markets as much as the TPP deals (see 'Agriculture' below).

Services

Because progress in the WTO on services has been so slow, there was considerable pent-up demand within the TPP countries for further liberalisation, which led to useful openings through detailed item-by-item 'schedules', although complete liberalisation remains far away. The services area is buttressed by a more general (and not very binding) chapter on 'regulatory coherence'.

Agriculture

With Japan added, there was more than enough market access available to sort out most of the necessary deals. That may continue without the US. For example, the initial headlines in 2008 included 'US Dairy Industry Resistance to Imports from New Zealand,' but the US dairy industry is now a major exporter and the opening of markets in Vietnam, Malaysia, Canada and Japan made the deal worthwhile for it, even if there is eventually slightly greater access by New Zealand to US (and other) markets. As noted, there were large cuts in Japanese agricultural tariffs, down to single digits (and possibly some exotic tariff-rate quotas), but not the zero tariffs demanded for all other products.

Just as important in the agricultural area is the SPS area (sanitary and phytosanitary measures taken by governments in the name of food and animal safety, but often disguised forms of protectionism). Progress was made in the SPS area beyond the WTO rules, which have proven to be quite weak in their enforceability, as countries take advantage of the slowness of WTO dispute resolution to impose barriers that are blatantly unjustified, such as the notable ban by 80 WTO members on imports of pork from Mexico, Canada and the US during the 'swine flu' episode, even though it is completely certain that no one can get swine flu from eating pork. Even larger in dollar terms – the largest single trade barrier to US exports – are the various BSE restrictions that continue to apply to US beef exports in various WTO member states and candidate members despite OIE classification of the US as a 'negligible' risk based on the measures that have been taken. Powerful agricultural exporting interests in the US, Australia, Canada and New Zealand pressed successfully for at least an improved and much faster dispute resolution or rapid response to go with the relatively limited but enforceable improvements and interpretations of WTO terminology, which is all that seemed to be within the ambition of the negotiation (perhaps because of resistance by each country's local regulators).

The supply chains

As with SPS, the business community's ambition may have exceeded the willingness of governments to change in this area. Certainly, major improvements in trade facilitation and other obstacles will be made, but, as one senior business executive pointed out, 'If you don't fix all the links in the chain, the [supply] chain won't work'.

Trade remedy law and state-owned enterprises

The US has taken such a hard line in its FTAs since NAFTA that no discussion can occur of anti-dumping or countervailing duty rules (and decreasingly limited) changes to safeguard law. That barrier was symbolically broken by Deputy US Trade Representative Karan Bhatia in the US–Korea FTA, which required pre-initiation consultations in anti-dumping cases between the two countries – something not required by WTO rules. The US, Canada and Australia are all in very protectionist modes in the trade remedy area, publicly aimed at China, but in practice hitting imports from all sources, so no binding change could occur in TPP (although some push to use US 'best practices'), despite pressures from other TPP countries generally. The US successfully pushed a complex mix of strict and lax rules on 'state-owned enterprises' (with disciplines on companies' majority-owned by central governments – but excluding some US government-owned companies and all sub-central government state-owned enterprises). The final CPTPP continued this progress without the US.

Internet

The TPP was billed as a '21st Century Trade Agreement', but surprisingly little thought was given to the internet at the outset of the negotiations, beyond the usual list of proposals by IP holders to further limit the internet in favour of protecting rights holders. The political debacle of proposed legislation with similar ideas in the US (the Stop Online Piracy Act and the Protect IP Act (SOPA and PIPA)) and the similar popular revolt against the Anti-Counterfeiting Trade Agreement (ACTA) in Europe, Mexico and Australia, created the scary possibility that a similar rebellion could occur against the TPP, with the claim that the TPP, in effect, is SOPA or ACTA, and the whole agreement be dragged down. As a result, some progress was made on improving 'free flow of data', banning data localisation (except for financial services) and encouraging limitations and exceptions to copyrights.

Intellectual property

The US pushed hard for improved protection, in particular, for pharmaceuticals. But this is political dynamite in most TPP countries and a huge cash cost for the many countries with government healthcare systems. The US got some increased protection, notably a smaller than requested increase in protection for 'biologics' (eight years, not 12, although the pharmaceutical industry is still fighting). This was suspended in CPTPP, originally to lure the US back in, but now it makes it easier for other countries to join CPTPP.

Dispute settlement

Perhaps the greatest challenge for the TPP negotiators was the creation of a dispute settlement system with enough credibility that private sector actors would push governments to use it. Astoundingly, there have been zero disputes raised under any of the trade provisions of any US FTA signed after NAFTA (and no such disputes within NAFTA since 2001, with the exception of a few ICSID cases and a few challenges to trade remedy cases under Chapter 19 of NAFTA, which will not be replicated in the TPP at US insistence). There has been one dispute between non-US parties in CAFTA-DR. All other disputes among parties to those agreements instead go to the WTO – even though the WTO can only enforce WTO obligations, and not other obligations under the relevant FTAs. A major effort was made by the very high-quality government lawyers working on the TPP to fix the problems in prior FTAs. It will be a major test of the renewed CPTPP to see if the CPTPP governments make the efforts necessary to make the new dispute system work.

There are also disputes under the investor-state mechanisms in the investment chapters. One interesting aspect of this negotiation was the adoption of a proposal by several countries to preclude investor–state dispute settlement cases against regulation of the sale of tobacco products, in the wake of the US loss of a WTO case (*Clove Cigarettes*); and the 'rent-a-plaintiff' WTO case against Australia by Ukraine, and the 'rent-a-forum' investor–state cases against tobacco regulation in Australia and Uruguay. No politician (or CEO, for that matter) is willing to admit to being in favour of teenage smoking, of course, but powerful economic interests linked to tobacco mobilised major business lobbies and their allies against such proposals until the very end, when those lobbies decided to take their gains from the TPP and leave the tobacco lobby out in the rain.

Ratification

There are several theoretical paths to final completion of the agreement now that the US has pulled out. The US will eventually need to move toward TPP because the EU FTAs with Vietnam, Singapore, Chile, Peru, Canada, Mexico and Japan, and the recent Australian FTA with Japan, means that US exporters are already losing sales at an alarming rate (the US lost $100 million in beef exports in Japan to Australia just in the one month of January 2016). CPTPP means that the US (and other non-CPTPP countries) now face competition in, for example, Japan, with CPTPP countries benefitting from three rounds of CPTPP tariff cuts (30 December 2018; 1 January 2019; and 1 April 2019).

Conclusion

The world is awash with trade deals and litigation already. The CPTPP will provide new ideas in at least some areas, and could soon provide a trade agreement covering than 30 per cent or more of the world economy. Either of those facts would have the effect of increasing interest in other deals (notably the US–EU), and, with luck, a multilateral agreement within the WTO that can replace some or all of the current patchwork of bilateral and regional deals. One way or another, there is an enormous amount of work to be done by lawyers, governments, companies, law firms, universities, public interest groups and any number of other bodies.

WTO disputes in Ukraine–Russia trade relations

Nataliia Isakhanova and Olesia Kryvetska
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In the trade wars of recent years, Ukraine and Russia have accumulated a critical mass of controversial issues. Since 2014, tensions in bilateral trade have been fostered with the political breakdown triggered by Russia's military aggression against Ukraine (ie, the occupation of the Crimean Peninsula and the war in the eastern territory of Ukraine). This situation has brought both states to the international dispute settlement fora, including the WTO.

Currently, the WTO Dispute Settlement Body (DSB) is considering five disputes between Ukraine and Russia: DS499 (under appeal pending); DS512 (Panel report adopted by the WTO DSB); DS532 (in consultations); DS493 (under appeal pending); DS525 (in consultations).

Moreover, Ukraine has launched WTO disputes against Russia's economic allies (DS530 against Kazakhstan, DS569 against Armenia and DS570 against the Kyrgyz Republic). Ukraine's claims address anti-dumping measures imposed on Ukrainian steel pipes. The roots of these disputes go back to the longstanding anti-dumping measures imposed originally by Russia and further extended by the Eurasian Economic Commission. Currently, Kazakhstan, Armenia and the Kyrgyz Republic being Eurasian Economic Union member states, find themselves as respondents in the WTO disputes initiated by Ukraine.

WTO disputes initiated by Ukraine against Russia

DS499: Russia – Measures Affecting Importation of Railway Equipment

Ukraine filed its first WTO case against Russia on 21 October 2015 by challenging certain measures imposed on the importation of railway rolling stock, railroad switches, other railroad equipment and parts thereof (railway products) from Ukraine. Ukraine raised its claims under the TBT Agreement and the GATT 1994.

On 15 July 2011, the Commission of the Customs Union adopted Decision No. 710 concerning a series of new technical regulations that set forth safety and technical requirements for placing certain railway products in the Customs Union market. According to Decision No. 710, starting from 2 August 2014 all conformity assessment certificates for railway products would have to be registered with the Federal Budgetary Organisation 'Register of Certification on Federal Railway Transport' (FBO 'RCFRT') in accordance with the new procedures set forth in the technical regulations.

Further amended, Decision No. 710 provided for a transitional period that allowed importation of the railway products until 1 August 2016, subject to conformity assessment certificates issued prior to the entry into force of the above-mentioned technical regulation, and importation of those railway products that were not previously subject to mandatory conformity assessment procedures. Nevertheless, as of late 2013, Russia started suspending the conformity assessment certificates previously registered with the FBO 'RCFRT' to Ukrainian producers of railway products. Ukraine claimed in the request for consultation that Russia had failed to provide reasonable explanations for these unwarranted suspensions of the certificates to Ukrainian exporters and to the Ukrainian authorities.

Moreover, the competent authorities in Russia refused to recognise the certificates issued to Ukrainian producers by conformity assessment bodies located in the Republic of Belarus and in the Republic of Kazakhstan pursuant to the respective newly adopted technical regulation of the Customs Union.

Finally, in February 2015, the Russian authorities rejected applications for new conformity assessment certificates submitted under the new procedures by the Ukrainian producers previously affected by the suspension of their conformity assessment. Ukraine claims that Russia failed to provide any reasonable explanation for the grounds for the rejection.

In sum, Ukraine challenged three types of measures at issue:

- suspension of the valid conformity assessment certificates;
- rejection of new applications for conformity assessment certificates, and
- non-recognition of conformity assessment certificates issued by the competent authorities in the other Customs Union (CU) member states if the certificates covered products not produced in a CU country.

On 30 July 2018, the Panel circulated its final report and arrived at the following conclusions:

- regarding the certificates suspension, the Panel found that Russia acted inconsistently with article 5.2.2, third obligation of the TBT Agreement in respect of 13 out of 14 instructions suspending certificates. The Panel dismissed other claims raised by Ukraine in this part;
- regarding the decision rejecting application for certificates, the Panel found that Russia acted inconsistently with article 5.1.2, first and second sentence, and article 5.2.2, third obligation, of the TBT Agreement, in respect of certain decisions through which FBO 'RCFRT' returned without consideration applications for certificated submitted by Ukrainian producers under CU Technical Regulation 001/2011. The Panel dismissed several other claims raised by Ukraine in this part; and
- regarding the non-recognition of certificates, the Panel found that Russia acted inconsistently with articles I:1 and III:4 of the GATT 1994. As for Ukraine's claims under article 2.1 of the TBT Agreement, the Panel considered them to be out of the scope of application of this legal provision. The Panel also exercised judicial economy in respect of Ukraine's claims under article X:3 (a) of the GATT 1994.

Ukraine also claimed the existence of the systemic import prevention to be in breach with Russia's obligation under articles I:1, XI:1 and XIII:1 of the GATT 1994, but the Panel dismissed these arguments.

Currently the Panel report in DS499 is under appeal upon the request of both disputing parties.

DS512: Russia – Measures Concerning Traffic in Transit

In September 2016, Ukraine challenged a set of measures imposed by Russia that resulted in a breach of freedom of transit enshrined in article V of the GATT 1994; unnecessary delays and restrictions; and MFN-based discrimination with regard to charges, regulations and formalities that at the end of the day resulted in an import ban of Ukrainian products exported to the territory of countries in Central and Eastern Asia and Caucasus, prohibited by article XI:1 of the GATT1994.

The first group of measures at issue addressed Russia's ban on international cargo transit through its territory from Ukraine to Kazakhstan by road and rail networks (since January 2016) and Russia's ban on all road and rail transit to Kazakhstan and Kyrgyzstan of goods subject to non-zero import duties according to the Common Customs Tariff of the Eurasian Economic Union, as well as goods falling under the import ban pursuant to Resolution No. 778 (since July 2016).

The second group of measures at issue addressed instructions of the Federal Service for Veterinary and Phytosanitary Surveillance of the Ministry of Agriculture of the Russian Federation (Rosselkhoznadzor) dated November 2014. These instructions targeted the cargo transit of goods covered by Resolution No. 778 that were exported from Ukraine to Kazakhstan and other third countries. Russia prohibited transit through the checkpoints in Belarus and allowed such entry exclusively through checkpoints located at the Russian part of the external border of the Customs Union.

Remarkably, Russia did not submit any defence in respect of the claims raised by Ukraine and rather invoked security exceptions under article XXI(b) of the GATT 1994.

The Panel report in this case was circulated to the disputing parties on 5 April 2019. The Panel found the actions of Russia to be justified under article XXI(b)(iii) of the GATT 1994. The findings of the Panel are very important for WTO dispute settlement practice as they open Pandora's Box related to interpretation of article XXI(b) of the GATT.

First of all, the Panel arrived at the decision that article XXI(b)(iii) was not totally 'self-judging'. While recognising that the 'chapeau of Article XXI(b) allows a Member to take action "which it considers necessary" for the protection of its essential security interests', the Panel highlighted however, that 'this discretion is limited to circumstances that objectively fall within the scope of the three subparagraphs of Article XXI(b)'.

Upon the assessment of certain circumstances and evidence in respect of relations between Russia and Ukraine, the Panel concluded that the 'situation between Ukraine and Russia since 2014' was an 'emergency in international relations' within the meaning of article XXI(b)(iii), and the measures at issue were taken in time of such emergency in international relations accordingly. It is remarkable that the Panel based its finding, inter alia, on UN General Assembly Resolution No. 68/262 of 27 March 2014 as well as UN General Assembly Resolution No. 71/205 of 19 December 2016, which make explicit reference to the Geneva Conventions of 1949 and apply in cases of *declared war or other armed conflict* between High Contracting Parties.

According to the legal test proposed by the Panel report, the specific language 'which it considers' of the chapeau of article XXI(b) means that a member enjoys its own discretion to define what its 'essential security interests' are, and to decide whether its actions are necessary for the protection of its essential security interests. On the other hand the Panel underscored that 'the discretion of a Member to designate particular concerns as "essential security interests" is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith'.

Therefore, the Panel's report in DS512 may be summed up in three key messages:

- by having found that Russia's measures are justifiable under the GATT 1994 article XXI(b)(iii), the Panel based its conclusion, inter alia, on the fact that the situation between Ukraine and Russia was recognised by the UN General Assembly as involving armed conflict;
- the Panel interpreted 'emergency in international relations' within the meaning of the GATT article XXI(b)(iii) as a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state; and
- Russia would have been found in breach of article V:2, first and second sentences, and paragraph 1161 of Russia's Working Party Report (based on the Ukraine's prima facie case arguments), 'had the measure not been taken in time of an "emergency in international relations"'.

The Panel Report in DS512 triggers an important issue as for its consistency with *jus cogens*. Notably, some experts question an approach that entitles an aggressor state to justify its actions against a victim state by invoking the security exceptions under the GATT 1994 article XXI(b)(iii).

Meanwhile, Ukraine did not appeal the Panel report. According to the Ministry of International Development and Trade of Ukraine (the MEDT), the interdepartmental working group carried out a detailed legal analysis of the Panel report and concluded that it contained a number of substantive findings that were favorable from Ukraine's perspective. In particular, the MEDT considers the Panel report to be an actual recognition by the WTO of the existence of an armed conflict between Ukraine and Russia.

In addition, according to the MEDT's official statement, the report enabled Ukraine itself, in accordance with its own interests, to impose sanctions against Russia in light of the Panel's finding in respect of the existence of an 'emergency in international relations' under the GATT 1994 article XXI(b)(iii).

Therefore, according to the MEDT, the Panel's interpretation provided a legal clarification of the concept of 'emergency in international relations' in accordance with the provisions of the WTO agreements, and such an interpretation makes clear to the WTO members their right to 'substantiate' their own restrictive actions with the GATT 1994 article XXI(b)(iii). Moreover, according to the MEDT, the Panel's finding will reduce the likelihood of application of protectionist and discriminatory trade measures that would contradict the fundamental principles of the WTO law and unjustifiably claimed to be taken in time of 'emergency in international relations'.

Therefore, the MEDT interdepartmental working group decided to refrain from initiating the appellate proceeding, taking into account the positions of all its members and the partner countries of Ukraine regarding the possible consequences of appeal in this case, as well as Ukraine's priorities in international trade in the long run.

The official statement of the MEDT is available at the website of the Cabinet of Ministers of Ukraine: www.kmu.gov.ua/ua/news/mizhvidomcha-robocha-grupa-pri-minekonomrozvitku-rekomenduvala-utrimatisya-vid-apelyacijnogo-oskarzhennya-u-spravi-pro-obmezhennya-rosiyeyu-tranzitu-z-ukrayini.

Following the decision, the WTO Dispute Settlement Body adopted the Panel report in DS512 at its meeting on 26 April 2019.

DS532: Russia – Measures Concerning the Importation and Transit of Certain Ukrainian Products

In October 2017, Ukraine filed a request for consultations concerning measures imposed by Russia pursuant to article 4 of the DSU, article XXIII of the GATT 1994, article 24.8 of the Agreement on Trade Facilitation (TFA), article 14.1 of the TBT Agreement and article 11.1 of the Agreement on the Application of Sanitary and Phytosanitary

Measures (SPS Agreement), allegedly inconsistent with Russia's obligations under the respective WTO-covered agreements.

Ukraine's complaint may be divided into four main sections depending on the product line group concerned and the legal basis of the claims.

The first group of measures concerns an import ban and transit ban on confectionery products originating from Ukraine that resulted from a series of inspections executed by Rospotrebnadzor as well as stemming from the relevant decisions of the agency.

The second group of measures challenged by Ukraine encompasses the measures affecting trade in juice products originating in Ukraine on the basis of a series of letters and notices of Rospotrebnadzor prescribing the ban of imports and transit of these products.

The third and forth groups of measures concern import bans on beer, beer-based beverages, other alcoholic beverages and wallpaper and similar coverings respectively.

In conclusion, Ukraine states that all of these measures are based on non-transparent investigations which infringe WTO rules and should be cancelled. Since October 2017, the dispute has been at the consultation stage.

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WTO disputes initiated by Russia against Ukraine

DS493: Ukraine – Anti-Dumping Measures on Ammonium Nitrate

In November 2015, Russia challenged anti-dumping duties imposed by the Interdepartmental Commission on International Trade of Ukraine (a public body authorised to adopt trade remedy measures) against the imports of nitrate ammonium originating in Russia.

Ukraine has been applying the antidumping measures at issue since May 2008 at a duty rate of 36.03 per cent (specific rate of 20.51 per cent applied to LSC '*Dorogobuzh*'). Following the sunset review, anti-dumping measures were extended until July 2019. In March 2017, however, the Ministry of Agrarian Policy and Food of Ukraine insisted on an interim review of the measures, claiming that domestic production in Ukraine would not meet the demand for nitrate ammonium on the Ukrainian market. In their turn, domestic ammonium nitrate producers also advocated the interim review, claiming that the anti-dumping duties as applied did not suffice to prevent the damage caused to domestic industry by dumped imports from Russia. Taking into account both positions, on 13 April 2017, the Interdepartmental Commission on International Trade of Ukraine initiated an interim review that resulted in the extension of the application and an increase in the anti-dumping duty rate to 42.96 per cent (individual rate of 29.25 per cent applied to LSC '*Dorogobuzh*').

Thus, Russia's claims in DS493 concern, inter alia, both substantive and procedural matters such as the construction of normal value, dumping margin calculation, determination of injury and causation, failure to provide non-confidential summaries to the parties, likelihood-of-injury determination, failure to provide access to non-confidential materials, lack of transparency concerning the publication of the Ministry's report and disclosure of the essential facts underlying the relevant determinations.

On 20 July 2018, the Panel Report in this dispute was circulated to the disputing parties. On the one hand, the Panel did not find violations concerning the 'likelihood-of-injury' determinations made by the Ukrainian authorities (ie, approved consistency with articles 11.2 and 11.3 of the Anti-Dumping Agreement). On the other hand, the Panel upheld Russia's claims under article 2 (articles 2.2.1.1 and 2.2) of the Anti-Dumping Agreement concerning Ukraine's cost assessment. In the original anti-dumping investigation (2007–2008), when calculating the normal value, the MEDT refused to take into account the gas costs reported by Russian producers, and replaced them with gas prices at the Russian and German border.

Ukraine's position before the Panel was that the gas price, being controlled by the Russian government, was artificially lower on the Russian market than the export price of gas from Russia. That is why, according to the MEDT, such domestic prices on the Russian market did not reasonably reflect the production and sales costs accrued by Russian producers.

In Russia's view, the MEDT examined rather the reasonableness of gas costs, which is not permitted by article 2.2.1.1 (Russia made reference to the panel report in *EU-Biodiesel Argentina*), and the Panel supported Russia's position. Ukraine has appealed this finding.

Hence, if the WTO Appellate Body upholds the Panel's position, this decision will have a far-reaching effect for anti-dumping investigations in Ukraine and other jurisdictions against Russian imports. In fact, the Panel recognised that the system of gas dual pricing in Russia cannot be a basis for normal value construction. Of course, it will be reflected in the lower dumping margin calculated for Russian producers. So the Panel's findings provide a disappointing message for domestic industries that seek protection from Russian dumped imports in foreign jurisdictions.

The Panel Report has been under appeal since August 2018.

DS525: Ukraine – Measures Relating to Trade in Goods and Services

On 19 May 2017, Russia initiated a WTO dispute against Ukraine over certain measures (challenged both *as such* and *as applied*) imposed by Ukraine due to protection of its national security interest. Russia's request for consultations covers inter alia import bans on certain Russian products as well as economic sanctions against Russian individuals and companies.

It is noteworthy, however, that some claims raised by Russia reflect its own trade policy measures, for instance trade embargoes on food and agricultural products from other WTO members under Resolution No. 778, or arbitrary TBT and SPS restrictions on certain products from Ukraine and EU member states.

In any case, Ukraine may use the Panel's findings from the report in DS512 in order to justify its actions against Russia as those 'taken in time of emergency in international relations' with Russia within the meaning of article XXI(b)(iii) of the GATT 1994.

To sum up, the current WTO disputes between Ukraine and Russia deal with different types of trade-restrictive measures that range from, on the one hand, specific bilateral trade issues such as trade remedies and technical barriers to trade, to, on the other hand, restriction of freedom of transit, trade embargoes and economic sanctions affecting trade in goods and services that have a far-reaching impact on the multilateral trade system.

Brazil

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LEGAL FRAMEWORK

Domestic legislation

1 What is the main domestic legislation as regards trade remedies?

The Brazilian legislation regarding trade remedies comprises the following laws and statutes:

- Decree No. 1,355/1994: enacts the Final Act that incorporates the results of the Uruguay Round of the Multilateral Trade Negotiations of the General Agreement on Tariffs and Trade (GATT 1994);
- Law No. 9,019/1995: regulates the application of the measures specified in the Agreement on Implementation of article VI of GATT 1994 (Anti-Dumping Agreement) and in the Agreement on Subsidies and Countervailing Measures;
- Decree No. 1,488/1995: regulates the administrative proceeding concerning the application of safeguards;
- Decree No. 1,751/1995: regulates the administrative proceeding concerning the application of countervailing measures;
- Decree No. 8,058/2013: regulates the administrative proceeding concerning the application of anti-dumping duties;
- Decree No. 8,807/2016: regulates the Brazilian Chamber of Foreign Trade (CAMEX);
- SECEX's Ordinance No. 8/2019: regulates the administrative proceeding relative to the public interest analysis with the objective of potentially suspending or altering anti-dumping duties and countervailing measures due to public interest reasons; and
- SECEX's Ordinance No. 21/2010: regulates anti-circumvention proceedings applicable to antidumping measures.

Although already in force, SECEX's Ordinance No. 8/2019 was open for public consultation from 17 April 2019 to 31 May 2019 and thus may still be subject to alterations in its final wording.

The Ministry of Economy (which has incorporated the former Ministry of Industry, Foreign Trade and Services – MDIC) website provides the above-mentioned list of relevant legislation: www.mdic.gov.br/comercio-exterior/defesa-comercial/856-legislacao-defesa-comercial.

International agreements

2 In general terms what is your country's attitude to international trade?

Brazil is now in the middle of a shift in its attitude to international trade.

In the last decade, the focus of Brazilian trade policy has been on expanding the Southern Common Market (Mercosur) and strengthening its influence at the multilateral level.

In force since 1994, Mercosur is a regional customs union and trade bloc that currently includes Brazil, Argentina, Paraguay and Uruguay. The main objectives of Mercosur are:

- promoting the free transit of goods and services between participating countries, by means of eliminating customs duties and non-tariff restrictions, among others;
- establishing common external tariffs to be adopted before third countries; and
- coordinating macroeconomic and sectoral policies (eg, international trade, agricultural, monetary and exchange rates) with a view to ensuring proper competition conditions between the participating countries.

Venezuela became a member in 2012, but it was subsequently suspended in 2016 after not complying with its Mercosur membership obligations. On the other hand, Bolivia's protocol of accession was signed in 2015 and the country is now awaiting the conclusion of its membership process. There are also countries associated with Mercosur (Chile, Colombia, Ecuador, Guiana, Peru and Suriname) that, even though they do not receive the benefits of member countries, are allowed to participate in summits of common interest.

Mercosur is under the purview of the Latin American Integration Association (ALADI), which is a broader agreement that aims to promote integration between Latin American countries. As a result of the participation of Mercosur in ALADI, Brazil has been involved in several trade agreements with ALADI members. Mercosur has free trade agreements currently in force with:

- Chile (Economic Complementation Agreement – ACE – No. 35/1996);
- Bolivia (ACE No. 36/1997);
- Mexico (ACE No. 54/2002 and ACE No. 55/2002);
- Peru (ACE No. 58/2005);
- Colombia, Ecuador and Venezuela (ACE No. 59/2005, ACE No. 69/2014 and ACE No. 72/2017);
- Cuba (ACE No. 62/2007);
- India (Preferential Trade Agreement – ACP – 2009);
- Israel (Free Trade Agreement – FTA – 2010);
- South Africa, Namibia, Botswana, Lesotho and Swaziland (ACP, 2016); and
- Egypt (FTA, 2017).

The above-mentioned list of agreements can be found at the Ministry of the Economy's website: www.mdic.gov.br/comercio-exterior/negociacoes-internacionais/796-negociacoes-internacionais-2.

There is also an FTA signed between Mercosur and Palestine, which is not in force yet due to pending ratification. In addition, Mercosur is currently involved in ongoing negotiations for the establishment of FTAs with Canada and Singapore, and has just completed an FTA with the European Union (see question 32).

In addition, Brazil has engaged in the negotiation and adoption of other types of international agreements, especially on the investment facilitation front. Deviating from a traditional bilateral investment agreement, Brazil has entered into agreements on cooperation and facilitation

of investments with the following countries: Mozambique, Ethiopia, Angola, Malawi, Mexico, Colombia, Chile, Peru, Suriname and Guiana, as well as the Mercosur countries (ie, Argentina, Paraguay and Uruguay).

Moreover, Brazil also plays a significant role in the multilateral trading system by actively participating and fostering discussions in the World Trade Organization (WTO) and other international forums. Furthermore, Brazil's rapprochement with the other BRICS countries (Russia, India, China and South Africa) also aims to maintain policy coordination with developing and emerging countries in topics relevant to international trade.

With respect to compliance with the WTO Agreements, Brazil has been a respondent in 16 disputes before the WTO to date. Brazil has been a complainant in 33 cases, and has acted as a third party in 140 cases. There are currently six ongoing cases involving Brazil, all of them as a complainant (DS506, DS507, DS514, DS522, DS568 and DS579).

Brazil has also formally requested its accession to the Organisation for Economic Co-operation and Development (OECD) in May 2017, which decision is still pending. The country is one of the largest and most-engaged non-OECD members, having adopted over 54 instruments of the OECD.

The election of right-wing politician Jair Bolsonaro as president in late 2018 brought about significant changes in Brazilian trade policy. Mr Bolsonaro was elected on a platform of promoting free trade and increasing Brazil's presence in the global economy and in global value chains. This agenda has been pushed through mainly by the newly created Ministry of the Economy (resulting from the merger of three ministries and concentrating prerogatives on economic, commercial and industrial public policy), which has been staffed with liberal, pro-free trade officials at top-ranking levels.

In view of this, the government has repeatedly announced its intentions (and also taken concrete action) to open up the Brazilian economy on different fronts, including: the systematic reduction of tariffs, particularly for capital equipment, technology and telecommunications products; the rationalisation and streamlining of Brazil's use of trade remedies mechanisms such as anti-dumping and countervailing measures; and microeconomic reforms aiming at enhancing firms' competitiveness and attracting foreign investment.

Although Brazil continues to be an active participant in multilateral discussions and in the WTO in particular (including having contributed to discussions for the unlocking of the WTO Appellate Body), the country has also expressed its intention to prioritise bilateral trade discussions over multilateral agreements, in line with the position of the United States on the subject.

In general, Brazil is seeking a general alignment with the United States on trade and other policy areas, in a deviation from previous administrations' emphasis on South–South relations. One concrete example of such a shift has been Brazil's agreement to forego its Least Developed Country status under the WTO framework in exchange for the United States' support of Brazil's accession to the OECD.

TRADE DEFENCE INVESTIGATIONS

Government authorities

3 | Which authority or authorities conduct trade defence investigations and impose trade remedies in your jurisdiction?

The Subsecretariat of Trade Defence and Public Interest (SDCOM) of the Secretariat of Foreign Trade (SECEX) of the Special Secretariat of Foreign Trade and International Affairs (SECINT) of the Ministry of Economy is responsible for conducting investigations regarding trade remedies in Brazil. After concluding the investigation process, SDCOM issues its final determination, recommending (or not) the application of trade remedies to SECINT.

SECINT, in its turn, is the ultimate authority in charge of the decision to impose trade remedies, based on SDCOM's recommendations. The decision not to apply trade remedies (negative decision) is made by SECEX.

It should be noted that Decree No. 9,679/2019, of 2 January 2019 (altered by Decree No. 9,745, of 8 April 2019) promoted a restructuring of the ministries that encompass the Brazilian Federal Government's Executive Branch. As a result, MDIC and its departments and secretariats (eg, SDCOM and SECEX) were incorporated by the Ministry of Economy.

Complaint filing procedure

4 | What is the procedure for domestic industry to start a trade remedies case in your jurisdiction? Can the regulator start an investigation ex officio?

Trade remedies cases are initiated in Brazil by means of a written and formal request presented by the domestic industry before SDCOM. According to the applicable legislation (Decree No. 1,488/1995, concerning safeguards; Decree No. 1,751/1995 concerning countervailing measures; and Decree No. 8,058/2013 concerning anti-dumping duties), a trade remedies claim will be accepted by SDCOM only if it is formally submitted by domestic producers responsible for at least 25 per cent of the total production of the similar product and, once consulted by SDCOM, the domestic producers of the similar product that expressed their support for the claim represent at least 50 per cent of the total production in Brazil.

To trigger the initiation of an investigation, the domestic industry must demonstrate, through positive evidence, the existence of:

- subsidised or dumped imports;
- alleged injury to the domestic industry; and
- a respective causal link between the subsidised or dumped imports and the injury suffered by the domestic industry during the period of investigation.

As regards the application of safeguards, according to Decree No. 1,488/1995, the authorities will consider:

- the volume and rate of increase of the imports (in both absolute and relative terms);
- the share of the national market captured by such imports;
- the prices of the imports, and especially whether such imports were under-priced in comparison to the similar product produced in Brazil;
- the consequent impact of the imports on the domestic industry, including analysis of relevant economic factors (eg, production level, inventories or sales); and
- the impact of other factors not related to the analysed imports on the domestic industry.

In exceptional circumstances, SECEX may initiate an investigation ex officio, provided that it disposes of significant evidence regarding the existence of the requirements that justify opening the proceeding.

With regard to anti-dumping investigations, Decree No. 8,058/2013 states that the authorities shall examine the petition within 15 days after its filing. Within five days, SDCOM may request the presentation of additional information, which shall be examined within 10 days. If SDCOM considers that no further information is required, the decision on whether to initiate the investigation shall be published within 15 days.

Contesting trade remedies

5 | What is the procedure for foreign exporters to defend a trade remedies case in your jurisdiction?

Once SDCOM decides to initiate an investigation, a public notice from SECEX is published in Brazil's Official Gazette with a summary of all the relevant information of the proceeding, including a list of the known interested parties. All known interested parties involved in the proceeding (including foreign governments, foreign exporters and producers, importers and domestic producers) will receive an official letter informing them about the initiation of the investigation.

Such interested parties (except foreign governments) will receive a questionnaire asking them to submit relevant information on the product, the market and internal economic indicators (eg, sales and costs) to SDCOM. The timeframe to respond to the questionnaire is 30 days from acknowledgement of the issuance of the questionnaire (presumed to be on the next business day after the issuance of the questionnaire), which can be extended by an additional 30 days (in anti-dumping investigations). During the course of the administrative proceeding, SDCOM may also request additional information or clarifications. The interested parties can be represented by themselves or by legal representatives with adequate powers of representation.

In the case of anti-dumping investigations, the deadline for the parties to submit new information and evidence (the evidentiary stage) in the case files is 120 days from the date of publication of the preliminary determination by SDCOM. After that, the parties will have the opportunity to submit their arguments based only on information already available in the case records. Brazilian regulations state that SDCOM must finish the investigation within 10 months from its initiation, although it allows this timeframe to be extended up to 18 months, according to WTO rules. Nevertheless, the final decision on the imposition of commercial remedies lies with SECINT (or SECEX), after receiving SDCOM's recommendation.

WTO rules

6 | Are the WTO rules on trade remedies applied in national law?

The WTO rules currently in force are considered part of Brazilian legislation through Decree No. 1,355/1994 (which implemented the WTO Marrakesh Agreement). In addition, the specific Brazilian legislation concerning the application of anti-dumping duties, countervailing measures and safeguards is consistent with the WTO rules. It is not uncommon for interested parties in a trade remedies investigation to resort to the language of the WTO Appellate Body or Panel reports in support of the their arguments in the proceeding. The Brazilian authorities are mindful of Brazil's obligations to the WTO and generally give weight to such reports in their determinations.

Appeal

7 | What is the appeal procedure for an unfavourable trade remedies decision? Is appeal available for all decisions? How likely is an appeal to succeed?

Upon completion of the investigation, Brazilian legislation allows interested parties to file an administrative appeal against a SECEX or SECINT decision imposing trade remedy measures, seeking reconsideration of the decision.

Furthermore, although it is not precisely an appeal procedure, interested parties may request the initiation of a public interest evaluation proceeding to be examined by SDCOM. Such a proceeding may result in the suspension or alteration of the anti-dumping duties or countervailing measures for public interest reasons (eg, risk of shortage of the product in the Brazilian market or contradiction of another public policy). In short, SDCOM shall conduct a cost-benefit assessment, whereby it considers whether the benefits of the application of the trade remedies would outweigh potential losses to Brazilian society.

Unfavourable trade remedies decisions may also be challenged via judiciary appeals. Although Brazilian courts can re-examine both formal and procedural issues and issues on the merits, they can be more deferential to specialised decisions from specialist governmental bodies. With this in mind, it is common for many interested parties to avoid bringing merit-related matters regarding trade remedies into discussion before the courts.

Considering all of the above-mentioned possible appeals, case law indicates that appeals to date have rarely succeeded. In this sense, actively participating in the proceeding and cooperating with SDCOM is extremely important when trying to ensure the best possible outcome.

Review of duties/quotas

8 | How and when can an affected party seek a review of the duty or quota? What is the procedure and time frame for obtaining a refund of overcharged duties? Can interest be claimed?

Affected parties may request, by means of a written petition, review of either existing anti-dumping duties or quotas, although the measures will remain in force during the course of the review proceeding.

In cases of anti-dumping duties, the measures can be reviewed in the following situations:

- *change in circumstances*: by proving that the circumstances that justified the imposition of measures in the past have changed, any interested party that participated in the anti-dumping investigation or in the sunset review proceeding may request the review of the duties (this type of proceeding shall be concluded within 10 months, extendable for an additional two months in exceptional cases);
- *sunset review*: provided that an application is filed at least four months before the end of its term, anti-dumping duties can be extended for an additional five years if the domestic industry demonstrates that the termination of the measure shall lead to a continuation or recurrence of dumping and injury to the domestic industry (the proceeding shall take no longer than 10 months, extendable for an additional two months in exceptional cases). The measure will remain in effect while the sunset review proceeding is ongoing;
- *review for new producers or exporters (new shippers review)*: this is a request available to foreign producers or exporters that did not export to Brazil during the investigated period of an anti-dumping proceeding to obtain an individual margin (such review proceeding shall last up to seven months);
- *anti-circumvention review*: this involves the alteration of the scope of an anti-dumping measure with a view to including imports from other origins that are being used by foreign producers and exporters to circumvent the application of the duties (proceeding to be concluded within six months, extendable in exceptional circumstances for an additional three months); and
- *reimbursement review*: this is a request by importers of the product subject to anti-dumping duties to obtain reimbursement of anti-dumping duties previously paid, applicable if the dumping margin calculated during the review proceeding ends up being lower than the duty in force (review proceeding to be concluded within 10 months).

Furthermore, it is possible for interested parties to promote the request for a partial or complete review of the application of countervailing measures if:

- the measures are no longer necessary to offset the actionable subsidy;

- it is unlikely that there will be injury to the domestic industry if the measures are suspended; or
- the trade remedy is no longer sufficient to offset the injury caused by the subsidy. Such review proceedings for countervailing measures shall be concluded within 12 months.

Compliance strategies

9 What are the practical strategies for complying with an anti-dumping/countervailing/safeguard duty or quota?

Foreign exporters and producers should fully respect decisions issued by the Brazilian authorities regarding trade remedies, since Brazil has been continually strengthening its control over compliance with trade remedies, including rigid regulations on non-preferential rules and anti-circumvention measures.

Furthermore, it is worth noting that in the case of anti-dumping investigations, foreign exporters and producers may negotiate a price undertaking commitment with SDCOM during the course of the proceeding. Through such a commitment, the respective exporter or producer commits to exporting the product to Brazil at a minimum price in exchange for not having duties levied on its exports. Price undertaking commitments may only be proposed in the period from the issuance of the preliminary determination until the end of the evidentiary stage.

A similar instrument may be adopted with regard to countervailing measures investigations. The proceedings can be suspended, without the application of measures for countries whose government agrees to eliminate or reduce the subsidy or for exporters who voluntarily agree to price commitments for the export of the product to Brazil, so that the Brazilian authorities become convinced that the adverse effect on the domestic industry resulting from the subsidy is eliminated.

CUSTOMS DUTIES

Normal rates and notification requirements

10 Where are normal customs duty rates for your jurisdiction listed? Is there an exemption for low-value shipments, if so, at what level? Is there a binding tariff information system or similar in place? Are there prior notification requirements for imports?

Brazil's customs duty rates are defined by the Mercosur Common Tariff (TEC), which is applied uniformly by all Mercosur members to extra-zone imports.

Considering that under certain circumstances there may be a need to modify the applicable customs duties on certain goods, exceptions are provided for Mercosur members to unilaterally alter the applicable duties. Currently, Brazil may temporarily alter the applicable customs duties on the following terms:

- in accordance with Resolution GMC 08/2008, Brazil may reduce the applicable tariffs in cases of supply and demand discrepancy, such as a shortage of products available regionally;
- in accordance with Decision CMC 26/2015, Brazil may establish a List of Exception, with 100 products with tariffs that are higher or lower than those applicable in the TEC (extended by the Mercosur countries until the end of 2021); and
- in accordance with Decision CMC 25/15, Brazil may reduce to 2 per cent or 0 per cent the applicable tariffs under a tariff exception to capital and computing goods that are not produced locally.

The current TEC and its temporary alterations may be accessed on the Ministry of Economy's website at www.mdic.gov.br/index.php/comercio-exterior/estatisticas-de-comercio-exterior-9/arquivos-atuais.

Low-value shipments (imports valued up to US$3,000 by international postal or courier companies) may be subject to simplified import procedures and to a simple tax rate as a substitute for the taxes usually due upon importation. The only tax exemption regarding low values is for shipments sent by natural persons to natural persons of up to 50 reais, which are characterised as gifts.

Brazilian companies may ask the Federal Revenue Service (RFB) to assess the tariff classification of products they intend to import. The tariff classification informed by the RFB is binding, and the importer is exempted from penalties arising from incorrect tariff classification for the purposes of customs clearance of the assessed imports.

Depending on their tariff code, certain products may be subject to an import licence to be issued by the competent authorities – usually prior to shipment of the goods abroad. The administrative handling table indicating the goods that require such licensing as well as the corresponding governmental body may be accessed at www.mdic.gov.br/comercio-exterior/importacao/tratamento-administrativo-de-importacao.

Special rates and preferential treatment

11 Where are special tariff rates, such as under free trade agreements or preferential tariffs, and countries that are given preference listed?

The preferential tariffs deriving from FTAs and exceptions to the Mercosur Common Tariff can be accessed on the Ministry of Economy's website at http://capta.mdic.gov.br/preferencia-tarifaria/index.

Other special tariff rates may be accessed at www.mdic.gov.br/index.php/comercio-exterior/estatisticas-de-comercio-exterior-9/arquivos-atuais.

12 How can GSP treatment for a product be obtained or removed?

In Brazil, the authority responsible for the GSP is SECEX's Subsecretariat of International Negotiations. In order to obtain GSP treatment for a product, the following requirements must be complied with:

- the product must be included in the GSP list of the grantor country;
- the product must originate from the exporter beneficiary country;
- the product must be transported directly from the beneficiary exporter country to the grantor importing country; and
- a proof of origin adequate to the Customs Authority, usually the Certificate of Origin Form A, must be presented.

To be considered as originating in a country, the product must be entirely manufactured in the country, or must suffer a 'substantial transformation', according to the Rules of Origin of the grantor country. In Brazil, according to MDIC Ordinance No. 43 of 22 November 2012, Banco do Brasil is the only institution allowed to issue the Certificate of Origin Form A, which is the necessary document in order for the export to be afforded preferential treatment granted under the GSP.

The countries and bodies currently granting GSP treatment to Brazilian products are:

- Australia;
- Japan;
- Norway;
- New Zealand;
- Switzerland;
- the United States; and
- the Eurasian Economic Community.

Further information may be found at www.mdic.gov.br/comercio-exterior/negociacoes-internacionais/807-sgp-sistema-geral-de-preferencias.

13 | Is there a duty suspension regime in place? How can duty suspension be obtained?

Yes. The Brazilian customs regulations provide for certain customs regimes designed to suspend the duties due upon importation. The RFB is the body responsible for granting and scrutinising the use of such regimes, which are listed below:

- temporary admission, which allows for total suspension for goods that are only temporarily staying in Brazil (eg, for testing and experiments, or for events) or partial suspension for goods that are to be used economically for a certain period;
- free trade zones , such as the Manaus Free Trade Zone, which are areas with full exemption from the taxes due upon importation, including import tax and the tax on manufactured products, for most products imported into the free trade zone;
- drawback, which suspends, exempts or reimburses the applicable taxes for imported inputs and raw materials that are used in the manufacturing of products in Brazil that will be exported;
- bonded warehouses, in which goods may be imported and stored with full suspension of taxes for a certain period before being nationalised or returned abroad;
- temporary exportation, which allows for exportation with full suspension of taxes for a certain period, including import taxes during the return of the products to Brazil. When the product exported temporarily is subject to manufacturing operations, only the aggregated value will be subject to taxation during the product's return to Brazil; and
- special customs regimes for suspension of taxes on the importation of machines and inputs designed to improve and boost the expansion of specific sectors in Brazil, such as the mining, natural gas and crude oil exploration sectors (eg, REPETRO, RECOM and REPEX).

Challenge

14 | Where can customs decisions be challenged in your jurisdiction? What are the procedures?

In general terms, customs decisions can be challenged at judicial and administrative levels.

Interested parties may challenge the decision and such challenges will then be examined by a first-instance administrative body of judgment. After that, it is possible to present an appeal to the Administrative Council of Tax Appeal at the administrative level to review unfavourable customs decisions.

If a final and unfavourable decision is rendered at the administrative level, the taxpayer may still refer the matter to the Judiciary Power. Although it is almost always advisable to pursue administrative litigation before resorting to the Judiciary Power (due to the possibility of a more technical approach), it is not mandatory to do so.

TRADE BARRIERS

Government authorities

15 | What government office handles complaints from domestic exporters against foreign trade barriers at the WTO or under other agreements?

The main government offices responsible for assessing and handling complaints of foreign trade barriers to Brazilian exports are SDCOM and the Subsecretariat of International Negotiations, all under SECEX. Domestic exporters also receive relevant support and assistance in this respect from the MRE's Trade Litigation Division.

Additionally, in November 2017 Brazil instituted a centralised online system tasked with monitoring and quantifying trade barriers, SEM Barreiras, which is jointly controlled by the Ministry of Economy, the MRE and MAPA, and may count on the participation and input of other governmental bodies whose functions relate to international trade. The purpose of such a system is to serve as a channel through which companies, associations and individuals may report trade barriers to Brazilian exports, as well as to monitor actions taken by the Brazilian government to remove or mitigate barriers. SEM Barreiras' website is www.sembarreiras.gov.br/painel.

Finally, the National Institute of Metrology, Standardization and Industrial Quality also provides assistance to domestic exporters with respect to technical barriers as the focal point for Brazil's notifications to the WTO Technical Barriers to Trade Committee under the Technical Barriers to Trade Agreement.

Complaint filing procedure

16 | What is the procedure for filing a complaint against a foreign trade barrier?

Formal complaints concerning trade barriers must be made before the Subsecretariat of International Negotiations through the filing of specific forms. All complaints are submitted to public consultation through publication in the Official Gazette. Interested parties may also report the existence of trade barriers to SEM Barreiras (question 15).

Once complaints and notifications have been filed and registered, they are dealt with by the Ministry of Economy and the MRE on a diplomatic level, through different diplomatic procedures directly with the country imposing the barriers, or in international fora, which may ultimately include requesting information about the measure at a WTO Committee or even consultations before the WTO Dispute Settlement Body (DSB), with a view to removing the trade barrier.

Grounds for investigation

17 | What will the authority consider when deciding whether to begin an investigation?

The authority will consider the sufficiency and accuracy of the information and data presented by the domestic exporter, as well as the economic and political impact (perceived and expected) of the trade barrier to Brazil. Brazilian regulations do not specify a process that may lead to a formal investigation or proceeding seeking to tackle foreign trade barriers. There have been discussions about the implementation of a trade barrier proceeding, but such discussions have not yet progressed to a final result.

Measures against foreign trade barriers

18 | What measures outside the WTO may the authority unilaterally take against a foreign trade barrier? Are any such measures currently in force?

Brazil traditionally adopts a diplomatic stance and cooperative approach with respect to trade barriers imposed by third countries, in line with its overall foreign trade policy. In this respect, it is the general approach of the Brazilian authorities that potential countermeasures seeking to induce the dismantling of a foreign trade barrier will follow the WTO Dispute Settlement rules, which will only allow for the imposition of countermeasures after positive rulings from a WTO Panel and the Appellate Body have been issued and after an arbitrator's decision authorising the countermeasures.

Private-sector support

19 | What support does the government expect from the private sector to bring a WTO case?

Only the MRE may officially represent Brazil before the WTO's DSB. The MRE may also resort to private law firms to assist in such representation, which is carried out through public tender. Nonetheless, the affected private sector is unofficially expected to actively assist in the conduct of disputes, both in the context of building a case and of preparing a defence. Such engagement takes place during every stage of a WTO dispute, from the mustering of evidence and drafting of submissions to meetings with the WTO Panels and the Appellate Body.

Notable non-tariff barriers

20 | What notable trade barriers other than retaliatory measures does your country impose on imports?

See question 18.

EXPORT CONTROLS

General controls

21 | What general controls are imposed on exports?

As a general rule, exports are not subject to taxation. In order to be able to export, a company must be enrolled with the RFB. Such enrolment, known as RADAR, provides access to the integrated foreign trade system (SISCOMEX), through which all Brazilian foreign trade transactions are processed.

A commercial invoice should be issued by the Brazilian exporter and it must contain, at least:

- name and address of the exporter;
- full name and address of the importer, buyer or predetermined order;
- characteristics of the goods;
- marking;
- numbering and number of reference to the different volumes;
- quantity and type;
- gross weight;
- net weight;
- country of origin;
- country of acquisition;
- country of departure;
- total price and price per unit of each type of goods and the value and nature of any given discounts;
- transportation cost;
- conditions and currency of payment; and
- condition of sale.

The packing list is essential for customs clearance for export. Normally, it contains information about the goods, such as net weight, gross weight, the packaging setting, value per unit, volume and specific contents. However, the exporter should contact the importer so as to check the requirements of the importing country.

The Export Registry (RE), filed by the exporter through SISCOMEX, is the set of commercial, financial, foreign exchange and tax information that characterises an export transaction and defines its treatment.

Before submitting the RE to SISCOMEX, the exporter must check if the goods to be exported require prior approval, since several authorities may be competent to examine and approve the export of goods, depending on their tariff code. See question 22 for more details.

The exporter (most commonly through its customs broker) registers the RE directly with SISCOMEX, indicating the tariff code of the exported goods. A tax invoice or bill of sale must also be issued to accompany the goods throughout the operation, from its exit from the Brazilian exporter's facility to the actual exportation and customs clearance.

The transporter hired by the parties must then issue a bill of lading or airway bill, a document that will specify the type, quantity and destination of the goods and attest to their shipment to the place of destination (indicated in the commercial invoice).

The RE and the other export documents must be prepared before the registration of the export declaration (DE) and the respective shipping of the goods. The DE formally initiates the exportation customs clearance to be processed at SISCOMEX. Every RE must be registered with a respective DE, although a DE may contain more than one RE. The DE must indicate the number of the registered RE; the identification of the facilities of the exporter involved in the exportation process; the number of the bill of sale; quantity, volume, net and gross weight of the exports; the total value of the operation; and the route negotiated with the foreign importer, as well as other information.

With the registration of the DE at SISCOMEX and the presentation of the export documents (invoice, packing list etc) to the RFB, the exportation customs clearance is processed. It is not uncommon for RFB to request further information before approving the transaction.

Brazil has a set of export controls based on the use and classification of goods. Such controls must be reviewed before any operation so as to obtain the necessary authorisation. In particular, products considered as 'sensitive goods' are subject to stricter controls.

The list of products subject to prior consent in exports and the consenting authorities is available at www.mdic.gov.br/index.php/comercio-exterior/exportacao/tratamento-administrativo-de-exportacao.

Government authorities

22 | Which authorities handle the controls?

The bodies and agencies are listed below, based on their area of expertise related to the controlled goods:

- the Brazilian Electricity Regulatory Agency: www.aneel.gov.br;
- the National Petroleum Agency: www.anp.gov.br;
- the National Sanitary Surveillance Agency: portal.anvisa.gov.br;
- the National Nuclear Energy Commission: www.cnen.gov.br;
- army command: www.eb.mil.br;
- the SECEX's Subsecretariat of Operations for Foreign Trade: www.mdic.gov.br/index.php/comercio-exterior/despachos-de-comercio-exterior;
- the National Department of Mineral Production: www.dnpm.gov.br;
- the Federal Police: www.dpf.gov.br;
- the Brazilian Institute of Environment and Renewable Natural Resources: www.ibama.gov.br;
- the Ministry of Science and Technology: www.mctic.gov.br; and
- the Ministry of Defence: www.defesa.gov.br.

A particular case is the exportation of sensitive goods. The Interministerial Commission on Controlling Exports of Sensitive Goods (composed of representatives from the MRE, the Ministry of Defence, the Ministry of Economy, and the Ministry of Science and Technology) was established with the responsibility for drafting regulations implementing Law 9112/95 and applying penalties for non-compliance with and violation of export controls.

Special controls

23 | Are separate controls imposed on specific products? Is a licence required to export such products? Give details.

The list of products subject to special controls and to export duty is set out in Annex XVII of SECEX Ordinance No. 23 of 14 July 2011, available at http://portal.siscomex.gov.br/legislacao/biblioteca-de-arquivos/secex/portaria-no-23-de-14-de-julho-de-2011.

Special attention should be paid to the regulation of the export of goods and services with potential military applications and, consequently, to the export of goods or related services with potential application in the development of weapons of mass destruction, whether nuclear, chemical or biological, and their delivery vehicles, such as missiles.

Brazilian export controls comprise the following:

- sensitive goods: goods relevant for the production of weapons, dual-use goods and goods used in the nuclear, chemical or biological areas;
- dual-use goods: products that can be used for purposes of war, even if they have been developed for civil applications; and
- services related to sensitive goods: services related to the supply of information or technology for the development of sensitive goods.

These sensitive goods and services are directly linked and classified as to their nature in four major areas: nuclear, chemical, biological and projectile, according to the specific treatment internationally provided.

Therefore, producers must receive authorisation prior to starting preliminary negotiations on exports, and they must comply with legal requirements, including when participating in international bids and international exhibits.

The exportation of sensitive goods and services related to sensitive goods is subject to prior approval by the competent authorities, as listed in question 22, which includes the presentation of documents evidencing their final use, such as the end use certificate.

The administrative procedure for the approval of export authorisation is confidential. The competent authority in charge of approving such authorisation depends on the product in question.

The Brazilian authorities adopt political and strategic considerations in taking the final decision on exports. Presentation of contracts related to the export operation and other related documents may be required. Such export authorisation is normally valid for two years.

After receiving the proper authorisation, the company must follow general exportation procedures. Thus, copies of contracts and other documents may be required to approve the RE, and, consequently, the exportation.

Supply chain security

24 | Has your jurisdiction implemented the WCO's SAFE Framework of Standards? Does it have an AEO programme or similar?

According to the WCO, Brazil has expressed its intention to implement the WCO Framework of Standards to Secure and Facilitate Global Trade. Furthermore, the RFB fully implemented the AEO programme in 2017, which is regulated by RFB Normative Instruction 1598/2015. Eligible companies may request AEO status through a process of recognition before the RFB.

Applicable countries

25 | Where is information on countries subject to export controls listed?

See question 29.

Named persons and institutions

26 | Does your jurisdiction have a scheme restricting or banning exports to named persons and institutions abroad? Give details.

Brazil does not have a scheme imposing controls for exports to named persons and institutions.

Penalties

27 | What are the possible penalties for violation of export controls?

The non-fulfilment of export controls by exporters may trigger several penalties depending on the facts under scrutiny. The possible penalties can be summarised as follows:

- warnings;
- fines that vary according to the value of the transaction;
- forfeiture of the goods;
- suspension of the right to export; and
- prohibition to perform foreign trade transactions.

As a general rule, responsibility for violation does not depend on intent or on the nature and extent of the effects of the violation. Depending on the nature of the violation, it may also trigger criminal liabilities for the employees of the companies or individuals liable for the non-compliance.

FINANCIAL AND OTHER SANCTIONS AND TRADE EMBARGOES

Government authorities

28 | What government offices impose sanctions and embargoes?

The Ministry of Economy is responsible for the imposition of sanctions, embargoes and commercial remedies, based on the guidelines adopted by the Ministry of Foreign Affairs, in accordance with the decisions of the United Nations (UN). Brazil does not impose sanctions and embargoes unilaterally.

Applicable countries

29 | What countries are currently the subject of sanctions or embargoes by your country?

All decisions related to the imposition of sanctions or economic embargoes made by Brazil are in accordance with the guidelines adopted by the UN and with Ordinance No. 23/2011) (www.mdic.gov.br/comercio-exterior/legislacao/862-portaria-secex-consolidada). In the case of imports into Brazil, the countries with restrictions are North Korea, Eritrea, Libya and Somalia, mainly regarding the manufacture of weapons and related materials. In the case of exports from Brazil, the countries with restrictions are Sierra Leone, Iraq, Somalia, Democratic Republic of the Congo, North Korea, Sudan, Libya and Eritrea, also related to weapons manufacturing, military equipment, combat vehicles and parts replacement.

Specific individuals and companies

30 | Are individuals or specific companies subject to financial sanctions?

There are no individuals or specific companies subject to financial sanctions in Brazil.

OTHER RELEVANT ISSUES

Other trade remedies and controls

31 Describe any trade remedy measures, import or export controls not covered above that are particular to your jurisdiction.

There are no particular trade measures applied in the Brazilian jurisdiction.

UPDATE & TRENDS

Key developments

32 Are there any emerging trends or hot topics in trade and customs law and policy in your jurisdiction?

On 28 June 2019, after more than 20 years of negotiations, Mercosur and the European Union have finally entered into a free trade agreement. These two economic blocs represent together approximately 25 per cent of the world's GDP and a market of 780 million people.

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LEGAL FRAMEWORK

Domestic legislation

1 What is the main domestic legislation as regards trade remedies?

- Decree with Force of Law No. 31/2004, which establishes the revised and updated text of Law 18525/86, found at www.leychile.cl/Navegar?idNorma=29924;
- Finance Ministry Decree No. 1314/2013: www.leychile.cl/Navegar?idNorma=1049587&idParte=&idVersion=;
- Free trade agreements (FTAs) executed by Chile with its trade partners, at www.direcon.gob.cl/acuerdos-comerciales/; and
- the World Trade Organization (WTO) Agreements.

International agreements

2 In general terms what is your country's attitude to international trade?

Chile has been widely recognised as one of the global leaders in economic freedom (see www.heritage.org/index/country/chile). Its strong commitment to trade liberalisation led Chile to unilaterally reduce its tariffs to a flat 6 per cent, and to the signature of numerous trade agreements with most of its trade partners, which has lowered the average tariff to 1.8 per cent; it expects to reduce it even more over the next decade. Chile has recently joined the Pacific Alliance and is part of the negotiation of the Trans-Pacific Partnership (TPP). It was the first South American country to join the Organisation for Economic Co-operation and Development. Chile's strict compliance with the rule of law and respect for international agreements is well known, which accounts for the country's impeccable track record on compliance with WTO decisions; see www.wto.org/english/thewto_e/countries_e/chile_e.htm.

TRADE DEFENCE INVESTIGATIONS

Government authorities

3 Which authority or authorities conduct trade defence investigations and impose trade remedies in your jurisdiction?

The National Commission for Investigation of Price Distortions in Imported Merchandise (Commission of Price Distortions): www.cndp.cl.

Complaint filing procedure

4 What is the procedure for domestic industry to start a trade remedies case in your jurisdiction? Can the regulator start an investigation ex officio?

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

Complaints about dumping or subsidies should be submitted by the industry of domestic production, whose collective production represents more than 50 per cent of the total production of the similar product.

Requests for safeguard should be submitted by the industry of domestic production affected by serious injury or threat thereof; that is, all producers of similar or directly competitive products in the country, or those whose collective production of similar or directly competitive products constitutes a major proportion of the total domestic production.

Ex officio initiation of the investigation by the Commission takes place only in exceptional cases, when it has the background to justify it. In practice, this is very rare.

Any complaint or request must be submitted to the Technical Secretariat of the Commission in writing, addressed to the President of the Commission and accompanied by the form provided by the Technical Secretariat. This form should include the background and evidence showing that there is:

- a distortion of prices (in case of dumping and subsidies) and how it causes significant damage to the domestic industry affected; and
- an increase of imports (in case of safeguards) and how it causes or threatens to cause damage to the similar or directly competitive domestic production.

The Commission reviews the evidence and determines whether there is sufficient merit to initiate an investigation.

If declared admissible, the resolution is published in abstract in the Official Gazette. If declared inadmissible, the decision is notified by registered letter to the complainant. Initiation of the investigation starts when the resolution is published in the Official Gazette.

Investigations of dumping and subsidies must be concluded within one year, and in any event within 18 months, except in exceptional circumstances.

For investigations of safeguard, the Commission must decide within 90 days.

Once decided, the initiation of an investigation should be notified:

- in the case of dumping:
  - to the government of the country involved; and
  - to the accused companies;
- in the case of subsidies:
  - to the government of the country involved;
- in the case of safeguard:
  - to the Safeguards Committee of the WTO; and
  - to the countries with which Chile has signed trade agreements.

Once notified of the initiation of the investigation, the Commission makes available the text of the complaint to all interested parties involved.

During the course of the investigation, the Commission may require additional information from the complainant or petitioner, and other interested parties. The Commission also sends questionnaires to interested parties for comment on the case.

Any information that is confidential is protected by the Commission if there is sufficient justification. Such information is not disclosed without the specific permission of the party that has provided it.

Interested parties have the right to present information orally, for which public hearings are held where they present their arguments, offer their opinions and pronounce on the information provided by the other parties involved in the investigation. However, any information given orally must be submitted in writing and made available to other interested parties.

As regards on-site visits, during investigations of dumping or subsidies the Commission may carry out investigations in a foreign territory to verify information provided or to obtain further details.

The Secretariat prepares a technical report based on the information collected, which is confidential and which provides the necessary elements for the Commission's decision regarding the existence of price distortions or increased imports and how they affect domestic production.

During the investigation, the Commission can recommend to the President of the Republic, through the Minister of Finance, the application of provisional measures. These measures are implemented through the enactment of a Presidential Decree.

Anti-dumping and countervailing duties must be implemented 60 days from the date of initiation of the investigation, and they cannot exceed four months, or six months in qualified cases.

Safeguard measures must be implemented within the first 30 days from the start of the investigation and they cannot exceed 200 days.

On the conclusion of the investigation the Commission may recommend:

- not to apply a measure: the Commission issues a resolution ending the investigation which is published in the Official Gazette; or
- the application of a definitive measure: the recommendation and its background are sent to the President of the Republic, through the Minister of Finance, for a decision. The President enacts a presidential decree instructing the implementation of the recommended measure.

Duration of the measures

Anti-dumping and countervailing duties cannot exceed one year from the publication of the presidential decree in the Official Gazette. Furthermore, the recommended measure cannot exceed the margin of distortion.

Safeguard measures cannot exceed two years from the publication of the presidential decree in the Official Gazette, if there were no provisional measures. If provisional measures were applied during the investigation, the period of two years is counted from the date of publication of the decree. It is renewable for a maximum of two years.

Contesting trade remedies

5 | What is the procedure for foreign exporters to defend a trade remedies case in your jurisdiction?

The same procedure described above applies to foreign exporters. Investigations considered admissible are published in the Official Gazette and normally the Commission notifies exporters that have been identified.

WTO rules

6 | Are the WTO rules on trade remedies applied in national law?

Yes. WTO rules on trade remedies are applied in national law, as Chile is an active WTO member. Chilean trade remedy legislation makes express reference to WTO legislation and makes it applicable in the cases and under the conditions established in such domestic legislation.

Appeal

7 | What is the appeal procedure for an unfavourable trade remedies decision? Is appeal available for all decisions? How likely is an appeal to succeed?

There is no specific appeal procedure against trade remedy decisions, so the general regulation applies, according to which the affected party has the following options.

Administrative actions

Administrative appeal is a claim before the same agency (Commission of Price Distortions) within five days following its publication. The agency has 30 days to resolve it. The action may consider legal or policy issues.

Hierarchic appeal is a similar claim, but it is submitted before the head of the agency. In this particular case, it would be the Minister of Economy.

Presentation to the Comptroller General of the Republic can be made by anyone before the controller entity in order to discuss the legality of a resolution. It is a short procedure in which the Comptroller requests information of the affected agencies and makes a decision.

Jurisdictional actions

Appeal for nullity of public law is an action before a civil judge (ordinary courts of justice). The trial will follow the rules of the general procedure; therefore, it is a long process that could take years. However, the plaintiffs may ask for precautionary measures in order to avoid the effects of the contended act.

The argument for the claim in this case would be an administrative act against the Constitution; therefore, it is just a legal claim and not a policy issue. Even though, theoretically, there is no statute of limitation for this action, the courts have said that the general rules should be applicable; hence, there is a five-year statute of limitation.

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

All of the above-mentioned actions (except for that before the Comptroller General) require an affected right or a legitimate interest of the plaintiff (usually steered and represented by Members of Parliament, but in fact anyone could file these actions).

Review of duties/quotas

8 | How and when can an affected party seek a review of the duty or quota? What is the procedure and time frame for obtaining a refund of overcharged duties? Can interest be claimed?

If, after an investigation, the authority does not recommend the application of definitive measures, the affected party may seek reimbursement of any provisional measures paid, plus interest rate.

Compliance strategies

9 What are the practical strategies for complying with an anti-dumping/countervailing/safeguard duty or quota?

The strategy will depend on each case, but generally, seeking reviews and refunds of overcharged duties is a path that should be considered, as Chilean courts apply the rule of law and will decide in favour of whoever can support a case in sufficient fashion, even if the decision goes against the Chilean state.

CUSTOMS DUTIES

Normal rates and notification requirements

10 Where are normal customs duty rates for your jurisdiction listed? Is there an exemption for low-value shipments, if so, at what level? Is there a binding tariff information system or similar in place? Are there prior notification requirements for imports?

Customs duty rates are listed in the Customs Tariff (www.aduana.cl/arancel-aduanero-vigente/aduana/2016-12-30/090118.html), which constitutes a binding tariff information system. There are no exemptions for low-value shipments except for non-commercial goods purchased in duty-free shops (up to US$500) and travellers' luggage.

There are no requirements of prior notice. However, qualified goods such as chemicals, weapons, animals and others require prior control for their importation: www.aduana.cl/importaciones-de-productos/aduana/2007-02-28/161116.html.

Special rates and preferential treatment

11 Where are special tariff rates, such as under free trade agreements or preferential tariffs, and countries that are given preference listed?

Special tariff rates are listed in the Customs Tariff and in free trade or other commercial agreements signed by Chile: www.direcon.gob.cl/acuerdos-comerciales/.

Additionally, in 2013, the Chilean Congress passed a law for the elimination of duties for the Least Developed Countries: www.aduana.cl/ley-20-690-eliminacion-aranceles-a-los-pma/aduana/2014-03-07/092144.html.

12 How can GSP treatment for a product be obtained or removed?

There is no generalised system of preferences. Preferential treatment is granted based on the product and its origin, following the trade agreements to which Chile is a party.

13 Is there a duty suspension regime in place? How can duty suspension be obtained?

There is a specific regime of admission under which goods may be kept in special facilities, upon prior authorisation by Customs Authority, for up to 90 days. No duties are paid until goods are taken out of the facility. An interest rate is charged in addition to the duties if the goods are kept for more than 30 days.

On the other hand, regulation allows for temporary admission in which no customs duties or reduced rate duties are paid during a specific period. After that period, if the goods have not been re-exported, full duties shall be paid.

Additionally, importers who obtain AEO certification by the Customs Authority, and medium and small companies (ie, S corporations) who import goods that have not previously been subject to suspensive regimes provided for by law, and that meet certain legal requirements, may withdraw foreign goods that are kept in customs storage facilities for their import, without prior payment of duties, taxes, fees and other charges they may cause, except for the payment of storage and mobilisation services. However, such importers must provide an immediate execution bank cheque or insurance policy or an equivalent as a guarantee, in order to ensure the payment of duties, taxes and other charges, and any eventual adjustments and interest that may be accrued. In case the payment is not made within the legal term, said guarantee will be made effective until full payment of the duties, taxes and other charges due, including any adjustments and interests.

Also, foreign goods may be subject to customs deposit destination, for a period of one year, without prior payment of duties and other charges caused by their import, and must be subject to minor processes such as assembling, packaging, finishing, ironing, bagging, packaging or labelling. The requirements and guarantees that the interested parties must fulfil in order to authorise the referred destination will be established by supreme decree.

Challenge

14 Where can customs decisions be challenged in your jurisdiction? What are the procedures?

There are two main options for challenging customs decisions in Chile.

The first is to submit a claim before the same authority within 15 days of its decision. The authority has 30 days to decide the claim.

The second option is to file a lawsuit before the Tax and Customs courts within 90 days of the customs decision. The procedure is similar to a trial in which the authority must present its defences and there will be a period to present and discuss evidence (including witnesses). The final decision of the court may be challenged before a court of appeal and then, if applicable, before the Supreme Court.

TRADE BARRIERS

Government authorities

15 What government office handles complaints from domestic exporters against foreign trade barriers at the WTO or under other agreements?

The Directorate General of International Economic Relations (Direcon) (www.direcon.gob.cl/la-institucion/), which is under the Ministry of Foreign Affairs.

Complaint filing procedure

16 What is the procedure for filing a complaint against a foreign trade barrier?

There is no formal investigation process for such complaints.

Grounds for investigation

17 What will the authority consider when deciding whether to begin an investigation?

The authority addressing a complaint will likely take into consideration the complaint's merits and the evidence presented to substantiate it, the interests of other Chilean importers or exporters, the broader political relationship between Chile and the country or territory in question, and the remedies available to address the barrier.

Measures against foreign trade barriers

18 | What measures outside the WTO may the authority unilaterally take against a foreign trade barrier? Are any such measures currently in force?

In the event of acts, policies or practices of the government of a country that adversely affect, or lead directly or indirectly to adverse effects on, trade in goods or services of Chile, the government may take measures including suspension or withdrawal of statutory rights or privileges granted to that country or imposition of a surtax on its goods. In the event that it is not possible to agree on proper compensation with a country that has applied a safeguard measure, Law 18,525 authorises the President of the Republic to apply additional duties applicable to goods exported from the other country. Currently there are no measures in force.

Private-sector support

19 | What support does the government expect from the private sector to bring a WTO case?

Any assistance that reduces the government's cost in proceeding with the case is likely to be welcome. The government will expect affected domestic private sector interests to provide relevant economic data and other evidentiary material that will substantiate the complaint. Assistance from qualified private sector counsel and experts in preparing and reviewing arguments and obtaining and reviewing evidence may have a bearing on whether the government proceeds with the case.

Notable non-tariff barriers

20 | What notable trade barriers other than retaliatory measures does your country impose on imports?

Chile imposes strict sanitary and phytosanitary controls, mainly to protect Chilean agriculture. Chile maintains a price band system for wheat, wheat flour and sugar that, under several FTAs and following a WTO panel loss against Argentina, will be phased out for imports. Mixtures containing more than 65 per cent sugar content, such as high fructose corn syrup, are subject to the sugar price band system. The price band system guarantees a minimum and maximum import price for the affected products, adding a special tax to the tariff rate to raise the price to the minimum price. The government sets a minimum import price that is normally higher than both international and Chilean domestic prices. Since 2008, the minimum price has been adjusted downward by 2 per cent per year. The export or import process requires every company operating in the country to contract the services of a customs agent. The customs agent is the link between the exporter or importer and the National Customs Service. The customs agent's mission is to facilitate foreign trade operations and to act as the official representative of the exporter or importer in the country. Customs agents' fees are not standardised. This is an extra cost borne by non-Chilean companies operating in the country. However, companies established in any of the Chilean duty-free zones are exempt from the obligation to use a customs agent when importing or exporting goods.

EXPORT CONTROLS

General controls

21 | What general controls are imposed on exports?

The documentation required for exporting from Chile is the single export document (DUS), the bill of lading (or airway bill) and the commercial invoice (unless the export is not for commercial purposes and the value of the goods is less than US$2,000 free on board; or unless a pro forma is applicable).

Specific goods, such as food, fruit and minerals, have specific certifications and requirements related to weight.

Exports are not subject to duties or taxes.

Government authorities

22 | Which authorities handle the controls?

The Customs Service is the main authority. Moreover, the customs agent (the equivalent to the customs broker) is an auxiliary of the authority, and therefore has some faculties to control.

Furthermore, there are goods that require a licence and their exportation is controlled by the following public agencies: the Agricultural and Livestock Service (www.sag.cl), the Public Health Institute (www.ispch.cl) and the National Fisheries Service (www.sernapesca.cl).

Additionally, the Customs National Director, at the request of interested parties, may certify persons as authorised economic operators (AEOs) who may act in the foreign trade logistics chain in order to access the benefits related to the control and simplification of customs processes, according to their role in the chain. A regulation will establish the activities that can be considered for the referred certification.

In the case of import and export destinations, the Customs Authority may certify persons for the purpose of assisting in the determination of weight and moisture content, sample collection, preparation of representative samples, measurement, calibration, chemical analysis and other factors to be determined by resolution of the Customs National Director.

In both of the cases mentioned above, a regulation will establish the requirements and obligations of the people who access said certifications.

Special controls

23 | Are separate controls imposed on specific products? Is a licence required to export such products? Give details.

Weapons, related goods and 'dual-use' equipment are subject to a special regime controlled by the General Directorate for National Mobilisation. Anyone interested in exporting must be previously registered in a Registry of Exporters and exports shall be authorised by the General Directorate for National Mobilisation.

Supply chain security

24 | Has your jurisdiction implemented the WCO's SAFE Framework of Standards? Does it have an AEO programme or similar?

Chile is part of the WCO's SAFE Framework of Standards. An amendment to the Chilean Customs Ordinance that came into force in March 2017 incorporates the AEO programme into the Chilean legal system as a definitive measure, and Decree No. 1140 of the Ministry of Finance has regulated the programme in detail. The AEO programme allows companies to prove that their processes are safe and that their controls and procedures guarantee compliance with customs regulations, leading to improvements in the efficiency of clearance processes, reduction of times, costs and losses in production, and predictability of the supply chain.

Applicable countries

25 | Where is information on countries subject to export controls listed?

There is no list of countries subject to export controls.

There is a list of countries considered as tax havens or harmful preferential tax regimes (www.leychile.cl/Navegar?idNorma=218210), but this is only for tax purposes.

Named persons and institutions

26 | Does your jurisdiction have a scheme restricting or banning exports to named persons and institutions abroad? Give details.

There are no restrictions or bans on exports based on the person or institution abroad.

Penalties

27 | What are the possible penalties for violation of export controls?

The export of banned products, tax evasion or exporting through illegally authorised facilities or not through the Customs Service are punishable under smuggling or fraud legislation. Sanctions will depend on the value of goods. If it is more than approximately US$1,650, sanctions range from one to five times the goods' value or from 60 days to three years of prison. If the value is less than approximately US$1,650, sanctions range from one to five times the goods' value.

There are other sanctions established for offences or infringements corresponding to penalties from approximately US$65 or a determined percentage of the imported goods' value.

FINANCIAL AND OTHER SANCTIONS AND TRADE EMBARGOES

Government authorities

28 | What government offices impose sanctions and embargoes?

There are no sanctions or embargoes in place, but the President of the Republic would be enabled to impose such measures.

Applicable countries

29 | What countries are currently the subject of sanctions or embargoes by your country?

There are no countries subject to sanctions or embargoes.

Specific individuals and companies

30 | Are individuals or specific companies subject to financial sanctions?

There are no individuals or companies subject to financial sanctions.

OTHER RELEVANT ISSUES

Other trade remedies and controls

31 | Describe any trade remedy measures, import or export controls not covered above that are particular to your jurisdiction.

There are none.

UPDATE & TRENDS

Key developments

32 | Are there any emerging trends or hot topics in trade and customs law and policy in your jurisdiction?

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

Chile has executed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which includes Australia, Brunei Darussalam, Canada, Chile, Malaysia, Mexico, Japan, New Zealand, Peru, Singapore and Vietnam. This important agreement has recently been approved by the Chamber in congress, and it is expected that it will be soon approved by the Senate.

The CPTPP is the result of the negotiations between the parties of the Trans-Pacific Partnership (TPP) after the withdrawal of the United States, and therefore has the same goals of integration and modernisation, Nonetheless, 20 sections were suspended (most of them relating to the Intellectual Property chapter, pushed by the United States).

The CPTPP addresses numerous topics: trade facilitation, trade defences, trade of goods and services, public procurement, competition, environmental commitments, transparency and anti-corruption rules and dispute resolution clauses, among others.

In a world scenario in which free trade is being challenged, the execution and approval of this agreement implies a confirmation of the Chilean commitment to free trade.

Brexit

Brexit should not affect Chile severely, because exports from Chile to the UK represent only 1 per cent of the country's exports. However, it may have a limited impact on some sensitive industries, such as the wine industry.

Nevertheless, Chile and the UK have subscribed to an Association Agreement with the same terms as the agreement between Chile and the EU, except for those amendments needed to adapt the agreement to a bilateral one. Hence, Brexit should not affect Chile from that perspective.

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LEGAL FRAMEWORK

Domestic legislation

1 | What is the main domestic legislation as regards trade remedies?

China introduced trade remedies into its legislative system in 1994, when its first Foreign Trade Law was announced. Along with that, China set out a series of interim regulations on anti-dumping, countervailing and safeguarding, and initiated investigations against imported products. As a commitment to joining the World Trade Organization (WTO), China amended its Foreign Trade Law (effective as of 1 July 2004) and rewrote a dozen regulations on anti-dumping, countervailing and safeguarding before or after its WTO accession at the end of 2001. In April 2018, the Ministry of Commerce (MOFCOM) published its newly approved Regulations for Anti-dumping and Countervailing Hearings, Rules for Anti-dumping Questionnaire Response, and Regulations on Interim Review on Anti-dumping and Margins. Most laws and regulations (in Chinese with English translation) are compiled by the government body and are accessible on MOFCOM's website at gpj.mofcom.gov.cn/article/bi/bj/bk/201204/20120408096549.shtml.

International agreements

2 | In general terms what is your country's attitude to international trade?

China is a great advocate of free trade, as it has benefited from foreign trade in the last few decades. As the world's second-largest economy, China has a positive attitude towards international trade. China's exports are vigorously supported by the government and China has developed a large part of its current manufacturing capability for this purpose.

Despite the Trump administration's unsupportive attitude towards free trade, China has taken substantial steps to prove that it is a significant supporter of global trade. In June 2018, China lowered its customs duty for certain vehicles and commodities, and it has announced enhanced protection for intellectual property.

As a member of the WTO, China has been in favour of or supporting free trade and views free trade agreements (FTAs) as platforms for further opening up to the outside world and speeding up domestic reforms, as an effective approach to integrate into the global economy and strengthen economic cooperation with other economies, and as a particularly important supplement to the multilateral trading system. At the time of writing, China has 16 FTAs in force, 11 under negotiation and 11 under consideration. A list of all of China's FTAs can be found at fta.mofcom.gov.cn.

China has made great efforts to comply with the WTO Agreement and is involved in several WTO trade disputes as a petitioner, defendant and intervening third party. Nevertheless, so far no ruling has been issued by the WTO Dispute Settlement Body (DSB) against China concerning the implementation of WTO decisions.

TRADE DEFENCE INVESTIGATIONS

Government authorities

3 | Which authority or authorities conduct trade defence investigations and impose trade remedies in your jurisdiction?

MOFCOM is responsible for anti-dumping and countervailing duty investigations. In particular, the Trade Remedy and Investigation Bureau (TRB) (trb.mofcom.gov.cn) conducts investigations and proposes the final measures to take. For cases concerning agricultural products, the Ministry of Agriculture (english.agri.gov.cn) may also be involved. The imposition of remedial duties or any likewise definite measures on imports is determined by the Customs Tariff Commission of the State Council upon recommendation by MOFCOM, and enforced by the General Administration of Customs (GAC) (english.customs.gov.cn).

Complaint filing procedure

4 | What is the procedure for domestic industry to start a trade remedies case in your jurisdiction? Can the regulator start an investigation ex officio?

Trade remedy proceedings are typically initiated based on a petition filed on behalf of the domestic industry. MOFCOM ex officio can also self-initiate an investigation, but this rarely happens.

The law requires that the petition shall be supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. Moreover, no investigation shall be initiated when the output of those domestic producers expressly supporting the application accounts for less than 25 per cent of total production of the like domestic product.

As required, a petition must include the following information:

- general information of the petitioner (name, address, etc);
- information about the product concerned;
- information about like products in the domestic market;
- the quantity and value of similar domestic products;
- how the imported product has affected the quantity and price of domestic products; and
- evidence of:
  - dumping or subsidies, or both;
  - injury to the domestic industry; and
  - a causal link between the two.

After receiving the petition, MOFCOM shall make a decision on whether the petition has been duly made with sufficient support from the domestic industry within 60 days. Ex officio investigations may be initiated if MOFCOM has sufficient evidence of:

- dumping or subsidies;
- injury to the domestic industry; and
- causation between the two.

Contesting trade remedies

5 | What is the procedure for foreign exporters to defend a trade remedies case in your jurisdiction?

MOFCOM shall publish the decision to initiate an investigation and notify the applicants, any known exporters and importers, the governments of the exporting countries (regions) and other interested organisations and parties (hereinafter collectively referred to as 'the interested parties'). As soon as the decision to initiate an investigation is published, MOFCOM shall provide the full text of the application to the known exporters and the governments of the exporting countries (regions).

Any interested party, including foreign producers, intending to participate in the investigation must register with the TRB within 20 days after the publication date of the initiation notice through filling in and submitting the registration form as required by TRB. Foreign producers are required to submit the following information:

- general information about the company (company name, legal domicile, contact number, etc);
- power of attorney if the producer is being represented by counsel;
- information on exports of the product concerned; and
- information on any affiliated company that is involved in the production or sale of the product concerned.

A foreign producer who fails to register within the tight deadline may not be accepted to participate in the investigation and will quite possibly be subject to higher duty than cooperating producers. In the event that MOFCOM limits the number of respondents for individual examination, MOFCOM will select the respondents for individual examination through a sampling method. After the investigation is initiated, anti-dumping or countervailing duty questionnaires, or both, will be issued and any respondents will then have a 37-day deadline to respond, subject to a one to two-week extension upon request. The TRB often issues supplemental questionnaires when necessary. In addition, the TRB will conduct on-site verifications of questionnaire responses, before or after the preliminary determination (if any). Respondents may voluntarily submit additional information to the TRB for clarification, and may request a hearing or attend a hearing if granted.

China does not set a deadline for preliminary determinations. In most cases preliminary determinations are made within six to nine months after the start of the investigation. If the preliminary result is affirmative, MOFCOM will request importers to post a cash deposit for importation of the subject goods to GAC. Final determinations should be made within a year from the publication date of the initiation notice, which is extendable for six months. If the result of an investigation is affirmative, importers of the subject products will have to follow measures specified in the final determination. However, if the final result is negative, the cash deposit shall be refunded.

WTO rules

6 | Are the WTO rules on trade remedies applied in national law?

China became a member of the WTO on 11 December 2001. The WTO Agreements are not Chinese law, under which international treaties do not automatically convert into domestic law. In compliance, China has promulgated and amended various laws and regulations to fulfil its WTO obligations. In instances where the WTO DSB has ruled that Chinese laws or practice have violated WTO provisions, China has been constantly seeking to change Chinese law or agency practice to bring it into conformity. China, as the main target in trade remedies by most trading partners (partially because it is labelled as a non-market economy), does not trade with other countries as non-market economies.

Appeal

7 | What is the appeal procedure for an unfavourable trade remedies decision? Is appeal available for all decisions? How likely is an appeal to succeed?

During a trade remedy investigation, interested parties may appeal unfavourable trade remedy decisions through administrative review and judicial review.

Administrative review

Interested parties may file for an administrative review against a MOFCOM decision within 60 days of becoming aware of the decision. MOFCOM (the Department of Treaty and Law, rather than the TRB) will review the case, and issue a review decision within 60 days upon acceptance of the review request, which is subject to a 30-day extension. MOFCOM may make a decision to sustain, repeal or amend its determination on the basis of the administrative review. If a party is not satisfied with the result of the review, it can either file judicial review (ie, administrative litigation, described below) or appeal to the State Council for a further review. The results of further review made by the State Council are final, and not subject to judicial review.

Judicial review

A party may choose to file a petition for judicial review with the Beijing Second Intermediate People's Court against a MOFCOM decision or MOFCOM review decision, each with a different deadline (90 or 15 days respectively), upon receipt of the decision. The court will review and make a decision within a prescribed deadline (within 90 days upon acceptance of the petition by law, but may be subject to extension), which is extendable pending the complexity of the case. If a party is not satisfied with the verdict of the lower court, it may appeal to the appellate court (Beijing Supreme Court) within 15 days. The final decision made by the appellate court (within 60 days upon acceptance of the petition by law, but may be subject to extension) is effectively binding and not subject to appeal.

Review of duties/quotas

8 | How and when can an affected party seek a review of the duty or quota? What is the procedure and time frame for obtaining a refund of overcharged duties? Can interest be claimed?

Like many other countries, China has established several different types of reviews in its trade remedy regime.

Interim review

Foreign producers and exporters or domestic industry and importers may submit a request for interim review within 30 days as of the one-year anniversary of the final determination. The requesting party should provide a supportable explanation of the new circumstances that warrant a recalculation of the anti-dumping or countervailing margin. MOFCOM will review and decide whether to initiate such a review, and revise the margin if so demonstrated.

New shipper review

Foreign producers who are required to pay an anti-dumping duty but who did not export the products to China during the period of investigation (and, as such, could not participate in the investigation) may file for a new shipper review order to calculate their own anti-dumping margin. If the new shipper begins exporting after the period of investigation but before the final determination, it shall file the request within three

months of the final determination. If the new shipper begins to export after the final determination, it shall file the request for review within three months of the actual export.

Sunset review

MOFCOM publishes a notice on its website about six months before the ending date of five years after any anti-dumping or countervailing duties are imposed. Upon that, any interested parties may submit comments to MOFCOM, request a hearing and likewise engage in such proceedings. If the dumping or subsidy will recur after revocation of the order, MOFCOM will determine to continue the measure and duties, or other measures will be extended by another five years.

Duty refunds

Regarding refunds of over-collected duties, parties may apply to MOFCOM for refunds. However, such request should be timely. In particular, for imports after the investigation but before the final determination, the request shall be filed within three months after the final determination; and for imports after the final determination, it must be filed within three months of payment.

Compliance strategies

9 What are the practical strategies for complying with an anti-dumping/countervailing/safeguard duty or quota?

The general strategy for complying with an anti-dumping duty, a countervailing or safeguard duty or quota is to seek review of the existing duty or quota. However, in China, anti-dumping or countervailing duty orders are in fact very unlikely to be amended or cancelled through reviews.

CUSTOMS DUTIES

Normal rates and notification requirements

10 Where are normal customs duty rates for your jurisdiction listed? Is there an exemption for low-value shipments, if so, at what level? Is there a binding tariff information system or similar in place? Are there prior notification requirements for imports?

There is an import and export tariff inquiry system on the GAC official website (www.customs.gov.cn/publish/portal0/tab67735/). Normal customs duty rates, most-favoured nation (MFN) rates and relevant requirements for imports are listed there.

As for the low-value exemption level, a regulation of 8 April 2016 provides that one cross-border e-commerce retail transaction with a value below 2,000 yuan may be exempted from custom duty, and the annual exempted value for one customer shall be limited to 20,000 yuan. For more details, please refer to http://gss.mof.gov.cn/zhengwuxinxi/zhengcefabu/201603/t20160324_1922968.html.

Special rates and preferential treatment

11 Where are special tariff rates, such as under free trade agreements or preferential tariffs, and countries that are given preference listed?

China's current implementation of the import tariff rates are MFN rates, the agreement tariff rate, the preferential tariff rate and the general tariff rate. Preferential tariff rates and general tariff legislation are listed within the Customs Tariff. In GAC Announcement No. 65 2017, GAC publishes special tariff rates and lists of countries and regions, which is available at www.customs.gov.cn/customs/302249/302266/302267/799770/index.html.

12 How can GSP treatment for a product be obtained or removed?

There is no formal GSP in China. However, the Chinese government grants preferential treatment to some least-developed countries that have good diplomatic relations with China. Ninety-five per cent of imported goods are within the scope of the preferential treatment. China imposes zero tariff on 97 per cent of imported goods from the least-developed countries, including Gambia, Sao Tome and Principe, the Comorian Union, Mauritania, Togo, Liberia, Niger, Rwanda, Angola, Zambia and Nepal. For a full list of such goods, refer to http://gss.mof.gov.cn/zhengwuxinxi/zhengcefabu/201612/t20161223_2498029.html.

13 Is there a duty suspension regime in place? How can duty suspension be obtained?

According to Chinese law, duty suspension may be granted by GAC to the following merchandise:

- goods displayed or used in exhibitions, trade fairs, meetings or other similar activities;
- articles for performances or competitions in cultural or sports exchange activities;
- devices, equipment or articles used in news reporting, or the shooting of films or television programmes;
- devices, equipment or articles used in scientific research, education or medical activities;
- transportation and special types of vehicles used in activities listed above;
- samples of goods;
- instruments and tools used in installation, debugging and testing equipment;
- containers for holding goods; and
- other goods not used for commercial purposes.

To qualify for duty suspension, goods are required to meet the following criteria:

- being re-exported within six months of importing into China (or filing an extension at least 30 days prior to the original deadline);
- a security deposit paid by the importer; and
- approval by GAC.

Challenge

14 Where can customs decisions be challenged in your jurisdiction? What are the procedures?

Customs decisions can be challenged by administrative reconsideration or administrative litigation in China. Interested parties may submit a petition for administrative reconsideration within 60 days of learning that the customs action was taken, file a lawsuit within 15 days of receipt of the written administrative reconsideration decision, or file a complaint within six months from the date that they learned that the customs action was taken. The time periods described in question 7 shall apply.

For more details of GAC administrative reconsideration, refer to www.customs.gov.cn/publish/portal0/tab514/info83560.htm.

TRADE BARRIERS

Government authorities

15 What government office handles complaints from domestic exporters against foreign trade barriers at the WTO or under other agreements?

Complaints from domestic exporters about foreign trade barriers and other issues concerned are handled by the TRB under MOFCOM. Dispute settlement under the WTO DSB framework or other bilateral or multilateral agreements is handled by the Department of Treaty and Law of MOFCOM (see http://tfs.mofcom.gov.cn).

Complaint filing procedure

16 What is the procedure for filing a complaint against a foreign trade barrier?

A complaint against a foreign trade barrier may be filed by an interested party or may be self-initiated by MOFCOM. Petitions on behalf of the domestic industry must be presented to MOFCOM in writing, by natural or legal persons or organisations representing the domestic industry. MOFCOM must decide within 60 days of the date of receipt of a petition whether there are valid grounds to initiate an investigation.

The information to be included in the petition differs according to the trade barrier concerned in each case. Generally, basic information about the petitioner and the domestic industry of the products or services affected and evidence of negative effects are required.

Grounds for investigation

17 What will the authority consider when deciding whether to begin an investigation?

After receiving a petition and the relevant materials (see question 16), MOFCOM will review all the information contained in the petition through questionnaires and on-site verifications as necessary. If the information and evidence provided by the petition are accurate and sufficient, then MOFCOM will initiate an investigation.

Measures against foreign trade barriers

18 What measures outside the WTO may the authority unilaterally take against a foreign trade barrier? Are any such measures currently in force?

China only takes measures against a foreign trade barrier within the framework of the WTO or under other bilateral and multilateral agreements, and holds bilateral consultations with the government of the importing country to solve the trade barrier. In April 2018, the Customs Tariff Commission of the State Council of China announced the cessation of a tariff concession and imposed a tariff of 15 per cent on 120 items of products including fruits from the US and a tariff of 25 per cent on eight items, including pork, from the US, in response to the new US tariffs on steel and aluminium, as a result of 232 investigations, which took effect on 8 March.

Private-sector support

19 What support does the government expect from the private sector to bring a WTO case?

The government expects no financial support from the private sector in bringing a WTO case. However, when bringing a case to the WTO, relevant domestic enterprises, industries, organisations or legal persons are expected to cooperate and provide necessary trade data and information in order to support the case.

Notable non-tariff barriers

20 What notable trade barriers other than retaliatory measures does your country impose on imports?

Import prohibitions, restrictions and non-automatic licensing are maintained in China to safeguard national security, public morality, human, animal and plant health, and the environment and exhaustible natural resources; to comply with China's obligations under international agreements; and for balance of payments reasons. There is an import licensing regime, under which there are three types of licences:

- automatic licences, which are in place to monitor trade volumes of imports that are not restricted, for statistical purposes. Goods subject to automatic import licensing are listed in the Catalogue of Goods subject to Automatic Licensing (see www.mofcom.gov.cn/article/b/c/201712/20171202690183.shtml);
- non-automatic licences. Certain products (such as key old mechanical and electrical products and ozonosphere-consuming products) require import licences in China (see www.mofcom.gov.cn/article/b/c/201801/20180102693327.shtml); and
- tariff-rate quota certificates. Only eight types of products are restricted by the tariff-rate quota, which are listed in the Catalogue of Goods subject to Tariff-rate Quota (see http://gss.mof.gov.cn/zhengwuxinxi/zhengcefabu/201712/P020171215531850286810.pdf).

EXPORT CONTROLS

General controls

21 What general controls are imposed on exports?

In July 2017, MOFCOM published the draft of the Export Control Law of People's Republic of China to collect suggestions from society. There are some trends indicated in this draft: reunification of the previous related export control systems; clarifying the authority of the competent authorities and the authority of law enforcement; and increasing the punishments for violation of the law. However, the final version is still unpublished.

Under the current regime, the Registration Regulation of Foreign Trade Operators, which took effect on 1 July 2014, enterprises that are willing to export shall register themselves with the administrative offices. However, such registration is mainly for statistical purposes, and does not impose limitations or controls on exports.

Meanwhile, pursuant to article 16 of the Foreign Trade Law, the Chinese authorities are allowed to restrict or forbid relevant imports or exports based on the following purposes:

- state security, social welfare or public morality;
- protection of human health or security, the life or health of any animal or plant, or the environment;
- the import or export administration of gold or silver;
- conserving exhaustible natural resources that are in short supply or subject to effective protection;
- limited market capacity of the destination country or region;
- occurrence of severe disorder in export activities; and
- other circumstances as provided for in those international treaties or agreements to which China has acceded.

Article 17 of the same law authorises the Chinese government to take necessary measures regarding fissile material or any materials used in the production thereof, as well as other military supplies such as weapons and ammunitions. China may take any necessary measures relating to export activities in wartime or for the purpose of maintaining worldwide peace and safety.

Government authorities

22 | Which authorities handle the controls?

Multiple authorities are equipped to exercise export control when necessary.

For restricted goods, MOFCOM, specifically the Bureau of Industry, Security and Export Control (BJSEC), the Quota & Licence Administrative Bureau (QLAB) of MOFCOM, and the National Development and Reform Commission (en.ndrc.gov.cn) are in charge of determining the quantity of export limitation, and GAC shall enforce the restriction on export of these goods.

For forbidden goods, MOFCOM and GAC take charge of surveillance.

Additionally, the State Council (english.gov.cn) and the Ministry of National Defence (eng.mod.gov.cn) oversee the export of military materials; and the China Atomic Energy Authority (www.caea.gov.cn/n360680/index.html) is responsible for the restrictions on nuclear materials and related items.

Special controls

23 | Are separate controls imposed on specific products? Is a licence required to export such products? Give details.

MOFCOM and GAC have recently revised the Managing List of Dual-Use Items and Technologies Importing and Exporting Approval, which came into effect on 1 January 2018.

Other regulations setting controls on specific products are listed as follows:

Regulation	Issuing body	Products regulated	Licence required?
Nuclear Export Controlling Regulation	State Council	Nuclear material, equipment, items used for nuclear reactors, and relevant technologies	Yes
Dual-use Nuclear Product and Relevant Technologies Export Controlling Regulation	State Council	Dual-use Nuclear Equipment and Related Technologies (Listed by MOFCOM and China Atomic Energy Authority)	Yes
Dual-Use Biological Products and Related Equipment and Technologies Export Controlling Regulation	State Council	Dual-Use Biological Products and Related Equipment and Technologies (Listed by MOFCOM)	Yes
Guided Missiles and Related Items and Technologies Export Controlling Regulation	State Council	Guided Missiles and Related Items and Technologies (Listed by The State Council)	Yes
Chemical Products and Related Equipment and Technologies Export Controlling Regulation	State Council	Chemical Products and Related Equipment and Technologies (Listed by MOFCOM and GAC)	Yes

Supply chain security

24 | Has your jurisdiction implemented the WCO's SAFE Framework of Standards? Does it have an AEO programme or similar?

China signed the letter of intent regarding the SAFE Standards in 2005, and has since then been dedicated to enforcement of the WCO's SAFE Framework of Standards.

Pursuant to Order No. 237 of GAC, the Regulation on PRC Custom Enterprise Credit Management took effect on 1 May 2018; meanwhile, the interim regulation pursuant to Order No. 225 of GAC was officially revoked.

Applicable countries

25 | Where is information on countries subject to export controls listed?

No general list is available of the countries subject to export control by China.

MOFCOM, as well as other governmental agencies, may issue regulations (or orders) on export restriction or controls on some specific country to implement a UN sanctions resolution. Generally, the regulations (or orders) can be found on the websites of MOFCOM and GAC.

Named persons and institutions

26 | Does your jurisdiction have a scheme restricting or banning exports to named persons and institutions abroad? Give details.

China has no restrictions on exports to named persons and institutions.

Penalties

27 | What are the possible penalties for violation of export controls?

Pursuant to article 82 of the revised Customs Law effected on 5 November 2017, transporting, carrying and posting goods and items whose import or export are forbidden or restricted to shall be deemed as a smuggling activity. For those activities that are not subject to criminal penalty, GAC may confiscate the goods, items and unjustified income, and confiscate or destroy the instruments used for smuggling.

For smuggling that does not constitute a crime, GAC shall confiscate the smuggled goods, articles and illegal gains and a fine may be imposed; smuggling that constitutes a crime would be subject to criminal penalties under the Criminal Law.

Pursuant to article 46 of the Regulations on Technology Import and Export Administration of the PRC, which took effect on 1 January 2012, where a technology whose import and export are prohibited or restricted is imported or exported without approval, the person concerned shall be prosecuted for criminal liability according to the provisions for the crimes of smuggling, illegal business operation or divulging national secrets or other crimes under the Criminal Law. Where such imports or exports are not so serious as to be prosecuted for criminal liability, a penalty shall be imposed according to the circumstances pursuant to the relevant provisions of the Customs Law, or the competent foreign trade department under the State Council may issue a warning, confiscate illegal income or impose a fine of from one to five times the illegal income. The competent foreign trade department under the State Council may revoke the foreign trade business licence.

According to article 151 of the Criminal Law, smuggling of prohibited products would be punished with fixed-term imprisonment of not more than five years or criminal detention, and fined separately or together; if the circumstances are serious, the sentence would be fixed-term imprisonment for more than five years and a fine.

FINANCIAL AND OTHER SANCTIONS AND TRADE EMBARGOES

Government authorities

28 | What government offices impose sanctions and embargoes?

Economic sanctions or trade embargoes (in compliance with the UN's sanction resolution) are administered by several Chinese governmental agencies, including:

- MOFCOM (http://english.mofcom.gov.cn);
- BJSEC (http://cys.mofcom.gov.cn/);
- QLAB (www.licence.org.cn/);

- GAC (english.customs.gov.cn);
- the Ministry of Industry and Information Technology of the PRC (www.miit.gov.cn);
- the State Administration of Science, Technology and Industry for National Defence (www.sastind.gov.cn); and
- the China Atomic Energy Authority (www.caea.gov.cn/n6443414/index.html).

Applicable countries

29 What countries are currently the subject of sanctions or embargoes by your country?

In compliance with the UN's resolution, the Chinese government has implemented several embargoes against North Korea, pursuant to several notices and lists made by MOFCOM, GAC, the Department of Information and Industrialisation and the China Atomic Energy Authority. The items subject to the embargo include iron ores, coals, military weapons, and some dual-use materials and technologies. For example, on 8 April 2018, MOFCOM and GAC issued a forbidden notice on the export of certain dual-use items, technologies and conventional weapons related to weapons of mass destruction and their means of delivery to North Korea according to UN Resolution No. 2375 (see http://cys.mofcom.gov.cn/article/zcgz/201804/20180402729387.shtml).

Specific individuals and companies

30 Are individuals or specific companies subject to financial sanctions?

No individuals or specific companies are subject to financial sanctions from China.

OTHER RELEVANT ISSUES

Other trade remedies and controls

31 Describe any trade remedy measures, import or export controls not covered above that are particular to your jurisdiction.

All trade remedy measures and import and export controls are detailed as above.

UPDATE & TRENDS

Key developments

32 Are there any emerging trends or hot topics in trade and customs law and policy in your jurisdiction?

China, though slowing down compared with some years ago, is still a key element in world trade and economic growth. On the other hand, China is encountering a more complex international and domestic environment. The uncertainty of Brexit and the unpredictability of the Trump administration have brought challenges to China while it explores international markets more aggressively, such as taking the Belt and Road Initiative. In domestic markets China is undergoing an uneasy change from an export and investment-driven economy to a consumption-oriented one. A housing price bubble is seen everywhere, from big cities such as Shanghai and Beijing to some third or even forth-tier cities.

On 11 December 2016 China marked the 15th anniversary of its accession to the WTO. However, the United States, the EU and other countries have refused to recognise China's market economy status and continue to calculate a dumping margin for Chinese products using a non-market economy approach. China requested consultations with the United States and EU respectively one day after the deadline, which has triggered a legal battle with its key trading partners.

MOFCOM is working to improve its trade remedy and other trade and customs regime. In April 2018, MOFCOM published its newly approved Regulations for Anti-dumping and Countervailing Hearings, Rules for Anti-dumping Questionnaire Response, and Regulations on Interim Review on Anti-dumping and Margins.

We are hopeful of a better performance for the Chinese economy, and of a fairer, more transparent and internationally engaging trade regime in China.

* *The information in this chapter is accurate as of July 2018.*

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LEGAL FRAMEWORK

Domestic legislation

1 | What is the main domestic legislation as regards trade remedies?

The main Colombian trade remedies laws and regulations are:

- Law 07/1991 – General Law of Foreign Trade, which provides protective measures against unfair practices in favour of domestic production. This sets the requirements, procedures and criteria for the imposition of duties;
- Law 170/1994, which enacts the Final Act of the Uruguay Round and incorporates the results of the Multilateral Trade Negotiations of the General Agreement on Tariffs and Trade;
- Decree 1750/2015, which established the administrative procedures for the investigation and application of anti-dumping measures;
- Decree 299/1995, which established the administrative procedures for the investigation and application of countervailing measures;
- Decree 152/1998, which established the administrative procedures for the investigation and application of safeguard measures;
- Decree 1407/1998, which established the administrative procedures for the investigation and application of safeguard measures with countries where no free trade agreements (FTAs) have been signed;
- Decree 1820/2010, which established the administrative procedures for the investigation and application of bilateral safeguards;
- Decision 456/1999, which established the administrative procedures for the investigation and application of anti-dumping measures within the framework of the Andean Community of Nations (CAN);
- Decision 457/1999, which established the administrative procedures for the investigation and application of countervailing measures within the framework of the CAN; and
- Decision 452/1999, which established the administrative procedures for the investigation and application of safeguard measures within the framework of the CAN.

Colombian trade remedies legislation may be consulted on the Ministry of Commerce, Industry and Tourism (MCIT) website at www.mincit.gov.co/normatividad.

International agreements

2 | In general terms what is your country's attitude to international trade?

Colombia's trade policy has been continuously oriented towards a further opening to other nations by seeking closer integration with countries in the region and also with the rest of the world through the negotiation of preferential agreements in order to increase foreign trade and investment flow. In this regard, Colombia has taken part in various negotiations to strengthen existing bilateral and regional agreements, and has signed and negotiated new agreements to ensure preferential access to strategic markets. The latter does not disregard the particular importance granted to Colombia's participation in the WTO within its trade policy strategy. Therefore, for Colombia, maintaining an open trade regime within a transparent multilateral system, complemented by regional and bilateral efforts, is of great importance.

Colombia has a fundamentally open trade regime with average tariffs that have been decreasing throughout the years. Although its general orientation has been guided towards greater openness and reduction of international trade barriers, some non-tariff restrictions still persist, mainly related to technical requirements and sanitary and phytosanitary (SPS) measures. The country's trade regime also shows certain complexities due to the amount of existing legal regulation.

TRADE DEFENCE INVESTIGATIONS

Government authorities

3 | Which authority or authorities conduct trade defence investigations and impose trade remedies in your jurisdiction?

The MCIT, and specifically the Directorate of Foreign Trade through the Subdirectorate of Commercial Practices (SPC), is in charge of investigating the existence of unfair trade practices and injuries to the domestic industry, as well as determining and imposing the corresponding remedies, such as safeguard measures and anti-dumping and countervailing duties.

The Directorate of National Taxes and Customs (DIAN) is in charge of the collection of the applicable anti-dumping and countervailing duties.

For more information, see www.mincit.gov.co/mincomercioexterior/defensa-comercial.

Complaint filing procedure

4 | What is the procedure for domestic industry to start a trade remedies case in your jurisdiction? Can the regulator start an investigation ex officio?

To initiate dumping, countervailing or safeguard investigations, the interested party must request it on behalf of the affected domestic industry. It is necessary for the request to be supported by producers of a similar product or like product who represent more than 50 per cent of the affected domestic industry.

The affected domestic industry in whose name the request is submitted should be identified by means of a list containing all known domestic producers or the producer associations of the similar product. A description of the volume and value of the like product's domestic production must also be submitted.

Some substantive conditions must be certified to justify or support the implementation of measures of a nature that will require the collection and consolidation of sensitive information from the petitioners, as is the case when demonstrating the similarity or competitive relation between the domestic product and the imported product.

In general, most of the documents and information are of an economic and countable nature, and thus must be duly analysed and prepared in order to reflect legal concepts regarding unfair practices, injury and threat of material injury. A considerable amount of this information and documentation may be confidential.

Once the request is formally filed, the SPC will proceed as follows:

- merit assessment to open the investigation: the Directorate of Foreign Trade, through the SPC, will have a period of 20 business days, counted from the day following the date of submission of the request, to make this assessment. If the investigating authority finds it necessary to request missing information for this assessment, such information will be requested to the petitioner. This requirement will interrupt the 20-day period, which will start again when the petitioner duly provides the requested information. This period may only be extended once for up to 10 additional days. If, when assessing the request, the investigating authority deems there is merit in opening the investigation, it must do so by means of a resolution published in the Official Journal;
- preliminary determination: the investigating authority will decide on the preliminary results of the investigation through a motivated decision, and if necessary, order the imposition of provisional duties. The investigating authority has two months, counted from the day following the publication date of the opening resolution, for this stage of the investigation. This period may be extended ex officio or at the request of an interested party by up to 20 days;
- final report presentation: within a period of three months, counted from the day following the publication date of the preliminary determination, the SPC will summon the Trade Practices Committee to present the final results of the investigation and to provide its opinion of the matter. This period may be extended by up to 15 days when special circumstances justify it;
- essential facts: three days after the Trade Practices Committee provides its opinion on the results of the investigation, the SPC will send a document to the interested parties with the essential facts on which the decision to impose or not definitive measures is based. The parties have 10 days to express their comments to the investigating authority. On the other hand, the investigating authority has 10 days to submit these comments to the Trade Practices Committee to assess them and present a final recommendation to the Directorate of Foreign Trade to impose or not definitive duties; and
- investigation conclusion: the Directorate of Foreign Trade will decide on the matter through a motivated resolution within 10 days following the recommendation submitted by the Trade Practices Committee. This resolution will be published in the Official Journal.

During this process, the following administrative procedures are carried out:

- evidence: the investigating authority will examine the necessary evidence ex officio or at the request of an interested party. The period to examine evidence expires after one month following the publication date of the preliminary determination. The investigating authority may accept ex officio evidence from the beginning of the investigation to the final recommendation of the Trade Practices Committee, without limiting the foregoing procedure;
- arguments: interested parties have the opportunity, within 15 days after the expiration of the period, to examine evidence, present their arguments or opinions regarding the investigation and contest provided and accepted evidence; and
- hearings: within 10 days following the publication date of the preliminary determination, interested parties to the investigation may request a hearing to present and refute arguments. This hearing will be conducted within 15 days from the day it is accepted.

Unlike anti-dumping and countervailing duties procedures, in the case of safeguards, the authority must issue a 'compliance receipt' within five business days from the day following the filing of the request and must check whether it complies with all requirements established in legal regulations. Then it will proceed to assess the case's merit for the opening of the investigation.

The authority in charge of providing a concept on the relevance of the imposition of a safeguard measure is the Customs, Tariffs, and Foreign Trade Committee. Subsequently, the Superior Council of Foreign Trade finally decides whether or not to impose the measure.

Duration of the measures

Anti-dumping and countervailing duties procedures cannot exceed five years, counted from the resolution's date of publication in the Official Journal. Anti dumping duties may be less than the dumping margin if a lower amount is sufficient to eliminate the inflicted injury on the affected domestic industry.

Safeguard measures shall only be imposed for the period that is necessary to prevent or remedy the inflicted injury or the serious threat of it and facilitate a readjustment of the affected domestic industry. This period shall not exceed four years, including the time during which a provisional measure was in effect.

Ex officio initiation of the investigation by the Directorate of Foreign Trade will only take place in exceptional cases when special circumstances justify it. In practice, ex officio initiation is very rare.

Contesting trade remedies

5 | What is the procedure for foreign exporters to defend a trade remedies case in your jurisdiction?

Within five business days after the publication date of the resolution opening the investigation, a copy of the investigation requirement and the questionnaires are sent to interested parties and to diplomatic or consular representatives of the countries under investigation. Other interested parties are summoned during the same period by published notice in the Official Journal, for them to express their opinions or to request the examination of relevant evidence.

Finally, within the period mentioned above, the investigating authority will make available to foreign producers, exporters, authorities of the exporting country and other interested parties the text of the submitted request, taking into account reservation of confidential information.

Exporters may take part as an interested party in all stages throughout the process, as explained previously.

WTO rules

6 | Are the WTO rules on trade remedies applied in national law?

Colombia has been a member of the WTO since 1995.

WTO rules on trade remedies are applied in domestic law. Colombian trade remedy legislation references WTO legislation and makes it applicable in cases and under the conditions established in such domestic legislation.

Additionally, WTO legal provisions are considered 'international treaties' and thus are considered hierarchically superior to domestic law.

Colombia has not recognised China as a market economy and uses the concept of 'Meaningful State Intervention', as established in 2017.

Appeal

7 What is the appeal procedure for an unfavourable trade remedies decision? Is appeal available for all decisions? How likely is an appeal to succeed?

There is no right to appeal against a decision imposing unfavourable measures by the Directorate of Foreign Trade of the MCIT. An appeal can be made before the administrative courts, filing for the restoration of rights and nullity action.

The interested party has a period of four months, counted from the decision's notification, to present the claim. The judicial decision is impartial and will depend on what has been examined and proven in the process.

However, the Directorate of Foreign Trade has the power to revoke the adopted decision before the claim is admitted in court if, ex officio or at the request of a party, it is proven that its decision is manifestly against the constitution or the law, or it causes an unjustified grievance to a person and is contrary to the public or social interest.

The success rate of revocation processes and their claims before the courts is low.

Review of duties/quotas

8 How and when can an affected party seek a review of the duty or quota? What is the procedure and time frame for obtaining a refund of overcharged duties? Can interest be claimed?

The SPC is in charge of reviewing, ex officio or at the request of an interested party, duties or quotas, provided that at least one year has elapsed since their imposition. A review process may be initiated to determine whether there have been changes in the circumstances leading to its imposition.

This process shall be conducted when a producer or exporter subject to a definitive duty reduces the export price in a way that annuls the imposed corrective duty.

In any case, the interested party requesting the review must prove whether there has been a change in the circumstances that justifies its request.

However, the authority may also initiate a review ex officio, no later than two months before the fifth year of the imposition of a definitive duty, or at the request of the affected domestic industry at least four months before the expiration of the definitive duty.

In cases where provisional duties are imposed, importers may, upon submitting their import declaration, opt to cancel the duties or provide a guarantee before DIAN to secure their payment.

There will be a refund of paid provisional duties, cancellation or reduced charge of the provided guarantee for such purposes, when the definitive duties are lower than the provisional duties that have been effectively paid or guaranteed in an amount equivalent to the difference between them. If definitive duties are not imposed, the cancellation and return of the guarantee or of the total paid amount as provisional duties will be ordered. There is no clear procedure on such reimbursement of provisional duties.

Compliance strategies

9 What are the practical strategies for complying with an anti-dumping/countervailing/safeguard duty or quota?

In Colombia, no reviews or refunds are provided for in legal regulation.

There have been cases where domestic manufacturers have promoted circumvention proceedings against jurisdictions used as alternative suppliers of goods subject to dumping duties. Likewise, they have requested the authorities to verify the origin and customs value of these kinds of goods imported into the country.

CUSTOMS DUTIES

Normal rates and notification requirements

10 Where are normal customs duty rates for your jurisdiction listed? Is there an exemption for low-value shipments, if so, at what level? Is there a binding tariff information system or similar in place? Are there prior notification requirements for imports?

Custom duty rates upon import and export of goods are set forth in the Executive Decree that contains the Colombian Harmonised Tariff Schedule. If the shipments are equal to or less than US$200, they are exempt from customs duties. In addition, in the latest tax reform, contained in Law 1943 of 2018, it is expressly informed that these jurisdictions are also exempt from Value Added Tax.

The rates were set by Decree 2153/2016, which can be consulted on the following website: https://importacionescarga.dian.gov.co/WebArancel/DefMenuConsultas.faces.

There is an obligation to submit an Anticipated Import Declaration for some products deemed sensitive, such as garments, footwear, steel and aluminium.

Special rates and preferential treatment

11 Where are special tariff rates, such as under free trade agreements or preferential tariffs, and countries that are given preference listed?

Special tariff rates and countries that may be given preference can be accessed through the DIAN website: https://muisca.dian.gov.co/WebArancel/DefMenuConsultas.faces.

A list of trade agreements subscribed to by Colombia can be consulted at www.tlc.gov.co.

12 How can GSP treatment for a product be obtained or removed?

Colombia does not grant special treatment under the Generalized System of Preferences. Colombia is considered as a developing country that is working towards reaching a sustainable economy and improving the country's international trade. Thus, preferential treatment is only granted based on the product and its origin, following trade agreements to which Colombia is a party.

Furthermore, according to the UNCTAD List of GSP Beneficiaries of 2018, Colombia is still a GSP beneficiary of Australia, Belarus, Japan, Kazakhstan, New Zealand, Russian Federation and Turkey.

13 Is there a duty suspension regime in place? How can duty suspension be obtained?

There is a duty suspension regime in place called Temporal Import for Re-Exportation in Current State, which is applied to capital goods, merchandise destined for sport events, technical tests, participation in fairs and exhibits etc.

These imports are authorised for six months, which can be extended for six additional months. They are guaranteed through an insurance policy of 150 per cent of the import duties.

There are also mechanisms such as free trade zones, which are geographically enclosed extra-territorial areas for import–export duties. While those foreign goods stay in the free trade zones, import duties are suspended. Such duties will only be generated when they exit the free zone into the rest of the country.

Other systems are applied, such as the Special Import–Export System, which allows the importation of raw materials with the respective import duties suspended as long as all of these materials are

used to produce exportable goods. This mechanism is authorised and managed by the MCIT, which grants a number of annual import quotas to producers and exporters.

Challenge

14 | Where can customs decisions be challenged in your jurisdiction? What are the procedures?

There is an array of legal remedies that can be presented to different Customs Authority units besides that which adopts the initial decision. This is what is called the 'administrative route'. Generally, the challenge is filed within 15 days after the initial decision is notified.

The final decision of the Customs Authority can be contested before the Contentious-Administrative Jurisdiction. Generally, the interested party has four months to present the claim. Depending on the case's magnitude, the judicial decision can also be appealed before the last judicial instance, the Council of State.

TRADE BARRIERS

Government authorities

15 | What government office handles complaints from domestic exporters against foreign trade barriers at the WTO or under other agreements?

The Permanent Mission representing the Colombian government at the WTO and the MCIT: www.mincit.gov.co/mincomercioexterior/inicio.

Complaint filing procedure

16 | What is the procedure for filing a complaint against a foreign trade barrier?

There is no formal investigation process for such complaints.

Grounds for investigation

17 | What will the authority consider when deciding whether to begin an investigation?

The authority addressing a complaint will likely take into consideration the complaint's merits and the evidence presented to support it, the interest of other Colombian importers or exporters, the broader political relationship between Colombia and the country or territory in question, and the available remedies to address the barrier.

Measures against foreign trade barriers

18 | What measures outside the WTO may the authority unilaterally take against a foreign trade barrier? Are any such measures currently in force?

Colombia, as a member of the WTO, is obliged to followed its dispute settlement procedure in order to impose any global measure against trade barriers. However, the government is entitled to determine and impose certain measures in the event that international trade causes harm to any sector of the Colombian economy.

Private-sector support

19 | What support does the government expect from the private sector to bring a WTO case?

In principle, the private sector may not provide support for the specific cost of a WTO case. However, the government will expect domestic private sector interest in providing relevant economic data and other evidence to support the complaint.

Notable non-tariff barriers

20 | What notable trade barriers other than retaliatory measures does your country impose on imports?

As a general rule, all goods are authorised to be freely imported. Some of them require registration or approval at the time of importation for SPS reasons. Exceptionally, some goods require prior licensing, such as goods that are used in the production of narcotics. It is not mandatory for the goods to be deposited in a warehouse prior to carrying out the import process, but importers can do this if they wish while they obtain all the documents for importation.

EXPORT CONTROLS

General controls

21 | What general controls are imposed on exports?

As a general rule, exports are not subject to tax payments except for gold, emeralds and coffee. Goods are exported through Export Declarations. Prior approvals must be requested when dealing with food, medicines, cosmetics and live animals for SPS reasons. For all other goods, the invoice, commercial supporting documents and transportation documents are required.

Government authorities

22 | Which authorities handle the controls?

DIAN authorises and controls exports of goods from Colombia. Other authorities (eg, the National Food and Drug Surveillance Institute, the Colombian Agricultural Institute, Anti-narcotics Police and ministries) may intervene in controls when the product requires a prior approval for export: www.invima.gov.co; www.ica.gov.co.

Special controls

23 | Are separate controls imposed on specific products? Is a licence required to export such products? Give details.

In Colombia, there are strict regulations and controls for the imports and exports of weapons, munitions, explosives and dual-use goods. This special legal regime is controlled by the Ministry of Defence and the Colombian Military Industry. Dual-use goods are also included within this regime.

Additionally, Colombia imposes export restrictions on wild animals and goods that are considered of cultural heritage (unless they are destined for exhibitions, in which case a permit from the Culture Ministry is required).

Supply chain security

24 | Has your jurisdiction implemented the WCO's SAFE Framework of Standards? Does it have an AEO programme or similar?

Colombia is part of the WCO SAFE Standards Framework. Currently, exporters, Importers and Customs Agencies are allowed to be AEOs. Additionally, the Colombian Customs is preparing new regulations so that other actors such as ports can also be AEOs.

Applicable countries

25 | Where is information on countries subject to export controls listed?

There is no list of countries subject to export controls.

There is a list of countries considered as tax havens or harmful preferential tax regimes, but only regarding tax purposes (www.minhacienda.gov.co/HomeMinhacienda; Unique Regulatory Decree 1625/16).

Named persons and institutions

26 | Does your jurisdiction have a scheme restricting or banning exports to named persons and institutions abroad? Give details.

There are no restrictions or bans on exports to persons or institutions abroad.

Penalties

27 | What are the possible penalties for violation of export controls?

Violations of export controls are generally penalised through the imposition of fines. If exports are used to smuggle merchandise, there will be additional criminal penalties and merchandise confiscation.

FINANCIAL AND OTHER SANCTIONS AND TRADE EMBARGOES

Government authorities

28 | What government offices impose sanctions and embargoes?

DIAN is the legally authorised entity to impose sanctions and confiscate merchandise regarding the import and export of goods.

Applicable countries

29 | What countries are currently the subject of sanctions or embargoes by your country?

There are no countries subject to sanctions or embargoes.

Specific individuals and companies

30 | Are individuals or specific companies subject to financial sanctions?

There are no individuals or specific companies subject to financial sanctions.

OTHER RELEVANT ISSUES

Other trade remedies and controls

31 | Describe any trade remedy measures, import or export controls not covered above that are particular to your jurisdiction.

Not applicable.

UPDATE & TRENDS

Key developments

32 | Are there any emerging trends or hot topics in trade and customs law and policy in your jurisdiction?

The Colombian Customs Authority is working on the implementation and improvement of its risk control systems, as well as on the evaluation of the provisions applicable to e-commerce with the purpose of issuing legislation that facilitates these operations.

Taking into account that Brexit will happen on 31 October 2019 and that negotiations between the UK and the EU have been taking place for a considerable period of time, the Colombian government has begun negotiations with the UK for the creation of an FTA, with the goal of maintaining economic and international trade conditions with the UK when its departure from the EU is formalised.

At the time of writing, the final text of the FTA is awaiting approval in Congress. The negotiators hope that Congress will approve the final text of the FTA before 31 October.

The negotiations with the UK were initially based on the trade conditions of the current FTA with the EU. Minimal changes were made in adjusting it to international trade between Colombia and the UK in particular. Assuming that the UK and the EU will establish a withdrawal agreement with a transitional period, the UK will still be a beneficiary of the EU's FTAs, which means that international trade between Colombia and the UK will not be jeopardised by Brexit.

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LEGAL FRAMEWORK

Domestic legislation

1 What is the main domestic legislation as regards trade remedies?

The legal basis for trade defence instruments (TDI) (ie, anti-dumping (AD), countervailing (CV) and safeguards (SG)) is the founding Treaty on the Eurasian Economic Union of 29 May 2014 between the Republic of Belarus, the Republic of Kazakhstan and the Russian Federation as amended upon accessions of the Republic of Armenia and the Kyrgyz Republic (EAEU Treaty) and, specifically, Annex 8 thereof, which contains Protocol No. 8 on Application of Safeguards, Anti-dumping and Countervailing Measures in Respect of Third Countries (TDI Protocol). A number of secondary acts of the Eurasian Economic Commission (EEC) regulate specific aspects of TDIs, including confidentiality matters, cooperation among the EAEU and member states' authorities, internal decision-making procedures and methodological materials for domestic producers aimed at facilitating the preparation of complaints. The EAEU Treaty and the secondary acts are available at the EAEU Law Portal at https://docs.eaeunion.org/en-us/. All documents are in Russian, while selected legal acts are also translated into Armenian, Belarusian, Kazakh, Kyrgyz and English. Specifically, the database provides an unofficial translation of the EAEU Treaty, including the TDI Protocol.

TDIs of the Eurasian Economic Union (EAEU) are imposed on imports into the single customs territory of the EAEU. For the purposes of the legal framework of TDIs, the domestic industry of the EAEU is defined by reference to producers in all EAEU member states.

International agreements

2 In general terms what is your country's attitude to international trade?

The primary external trade policy objectives of the EAEU members have been to liberalise regional trade and promote deeper economic integration among the Commonwealth of Independent States (CIS) countries. Those goals were pursued with the Customs Union (CU) of Russia, Kazakhstan and Belarus, which was formed in 2010; and more recently, the CU was complemented and overtaken by the more comprehensive regime of economic integration within the EAEU as of 1 January 2015. The new EAEU has the legal status of an international organisation vested with legal personality, which was not the case for the CU.

The EAEU is open to accessions by other countries. Armenia and Kyrgyzstan became new member states of the EAEU on 2 January 2015 and 12 August 2015, respectively. There are certain transitional arrangements in the areas of import tariffs and foreign trade regulation that apply to these newly acceded member states. No other EAEU accession negotiations are currently ongoing.

On 22 August 2012, Russia acceded to the World Trade Organization (WTO). This is considered to be the beginning of a process of gradual liberalisation, particularly with regard to import tariffs, of the CU/EAEU's trade with the rest of the world in accordance with WTO rules. In joining the WTO as a member of the CU, Russia committed to ensure compliance of the CU (and its successor, the EAEU) TDI regimes with Russia's WTO obligations and commitments. A number of Russian industries have regularly expressed concerns regarding the potential negative effects of Russia's WTO accession and have asked for increased protection of their trade interests.

Since accession to the WTO, Russia has been involved in a number of disputes, including seven cases as complainant and nine cases as respondent. In four disputes – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union (DS475), Tariff Treatment of Certain Agricultural and Manufacturing Products (DS485), Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy (DS479) and Russia — Measures affecting the importation of railway equipment and parts thereof (DS499) – Russian policies and measures were found partially inconsistent with the WTO Agreements. While the disputed measures in DS479 and DS485 had already been brought into conformity in accordance with the Panel's findings, the disputed measure in DS499 is under appeal and the disputed measure in DS475 is still at the implementation stage, with a risk of retaliatory actions against Russia. In another dispute – Measures Concerning Traffic in Transit (DS512) – the Panel dismissed the claims against Russia and found no breaches of the WTO Agreements.

At the time of writing, two of the complaints that Russia brought to the WTO have reached the stage of WTO Panel report and were under appeal.

In September 2016, for the first time since its accession, Russia went through the WTO Trade Policy Review Mechanism; other WTO members had an opportunity to examine in detail Russia's trade and trade-related policies and pose their questions and express views.

Russia received over 700 questions and comments from over 50 WTO members. Many welcomed the tremendous liberalisation efforts and remarkable improvements in Russia's trade policy, while others noted that there is still much for Russia to do to improve. Many WTO members demonstrated great interest in Russia's investment regime and EAEU developments, and raised new concerns in the areas of sanitary and phytosanitary and technical barriers to trade (TBT), local content requirements, customs control and import restrictions, as well as the transparency of certain policies.

Kazakhstan, a member of the EAEU, also became a member of the WTO on 30 November 2015. According to Kazakhstan's WTO tariff concessions, one-third of its import tariff lines for goods are bound at rates lower than those provided under Russia's bound tariff rates in the WTO or in the EAEU's common customs tariff. In response to this issue, as a transitional solution Kazakhstan undertook not to allow the re-export of goods imported into Kazakhstan at lower tariffs to other

EAEU member states. Accordingly, to qualify for free circulation status within the EAEU, goods imported into Kazakhstan at lower rates should become subject to the higher EAEU import tariff. For this purpose, a special control system was introduced to monitor the movement of such goods, based on electronic customs declarations, invoicing and instant information exchange between the competent authorities of the EAEU member states. Kazakhstan is a respondent in one WTO dispute brought by Ukraine in September 2017 – Anti-Dumping Measures on Steel Pipes (DS530). At the time of writing, the dispute is at the consultation stage.

Armenia and Kyrgyzstan have been WTO members since 2003 and 1998, respectively. Their accession to the EAEU has triggered similar issues concerning tariff differences of their WTO tariff bindings with the EAEU common customs tariff. As a result, these countries also agreed temporary derogations (ie, lower tariffs) from the EAEU common customs tariff for certain goods imported for internal consumption. Such tariff derogations from the EAEU are only temporary; both new EAEU member states have announced their intention to enter into their respective tariff renegotiations in the WTO with the affected WTO members, while the actual renegotiations have not yet started.

WTO accession negotiations for Belarus formally started in 1993, but were suspended for decades until the accession process was resumed on 24 January 2017. Belarus has been invited to submit written replies to members' questions, an updated Legislative Action Plan, copies of relevant draft and adopted legislation, and additional documentation such as updated information on domestic support to agriculture, state-trading enterprises and subsidies. The Working Party on accession remains active in 2019. Belarus expressed its strong commitment to conclude WTO accession negotiations by the 12th Ministerial Conference, which will take place in June 2020 in Nur-Sultan (previously Astana), Kazakhstan.

TRADE DEFENCE INVESTIGATIONS

Government authorities

3 | Which authority or authorities conduct trade defence investigations and impose trade remedies in your jurisdiction?

Since 1 July 2012, the authority for trade defence investigations in the EAEU is the EEC and the administrative service directly in charge of conducting trade defence investigations is the EEC's Department for Internal Market Defence. The webpage of the Department for Internal Market Defence is available in the English language at www.eurasiancommission.org/en/act/trade/podm/Pages/default.aspx.

Final decisions to impose measures following investigations are made by the Board of the EEC, consisting of the EEC Ministers representing all the EAEU member states (www.eurasiancommission.org/en/Pages/structure.aspx).

Complaint filing procedure

4 | What is the procedure for domestic industry to start a trade remedies case in your jurisdiction? Can the regulator start an investigation ex officio?

According to paragraph 186 of the TDI Protocol, an investigation can be initiated by the EEC on its own initiative or on the basis of a complaint lodged by the domestic industry manufacturing like products (relevant for AD and CV investigations) or like or directly competitive products (in the case of SG). In practice, so far all investigations have been initiated following domestic industry complaints.

A complaint can be lodged either by individual domestic producers or by a group or association of domestic producers manufacturing a major share of like products (for AD and CV) or like or directly competitive (for SG) products. The EAEU applies thresholds for domestic industry that are similar to those in other jurisdictions. In particular, the complainant must demonstrate that its complaint is expressly supported by at least 25 per cent of the total EAEU production, and, moreover, it must be supported by over 50 per cent of the volume of the like (or directly competitive) products manufactured by those producers which have expressed an opinion on the complaint.

The EEC will decide whether to open an investigation within 30 calendar days from the date when the complaint is deemed to have been submitted. This deadline may be extended where the EEC decides to request additional information or evidence; however, any such extension will not exceed 60 calendar days from the date of submission of the complaint.

The requirements for the preparation of a complaint are also similar to those in other jurisdictions: namely the complainants must provide a detailed description of the product concerned and the like or directly competitive products; detailed data on domestic capacity and production; an estimate of domestic consumption; trade data; data on the indicators relevant for injury analysis; available data on dumping by the imports from or specific subsidies in the targeted third country; and evidence on trends in imports and factors that may interfere with the analysis of a causal link with material or serious injury or threat thereof. The complaint must also contain a proposal on the form, amount and duration of the measures, and adjustment plans (if relevant, usually in the case of SG). Normally, all the data should cover a period of three calendar years preceding the year of submission of the complaint as well as data on further periods where representative statistics are available. All written submissions must be accompanied by non-confidential and relatively detailed summaries.

Contesting trade remedies

5 | What is the procedure for foreign exporters to defend a trade remedies case in your jurisdiction?

The notice of initiation of a specific TDI investigation is published on the website of the EEC (www.eurasiancommission.org). The date of publication on the website is the first day of the new investigation.

Notifications are also sent to interested parties identified in the complaint and reasonably known to the investigating authorities. Notifications are also usually sent through diplomatic channels to the respective foreign governments of the affected countries. In recent practice, written notifications have occasionally reached their addressees with delays, causing difficulties for interested parties to comply with further procedural deadlines.

Interested parties (exporting producers, importers, consumer associations and authorities of exporting countries) can participate in the investigation in person or can appoint legal representatives. There are currently no restrictions on foreign attorneys acting as representatives of interested parties before the EEC. All investigations are, however, conducted in Russian and all documents must be submitted in Russian or accompanied by a Russian translation.

Within 25 days from the publication on the EEC's website, interested parties must submit a letter to the EEC to be registered as participants in the investigation. Only registered interested parties (namely, participants) may obtain access to the non-confidential files, including a copy of the complaint. Participants must also request public hearings within 45 days and then subsequently submit their memorandum with defensive arguments and data relevant to the investigation within 60 calendar days from the date of initiation. The same deadlines apply to all types of TDI investigations in the EAEU.

Questionnaires must be answered within 30 days from their receipt (extensions are possible). The same deadline applies to all information requests in the course of the investigation.

Public hearings are normally scheduled within six to seven months after initiation. Within 15 days after the hearings interested parties are entitled to submit information in writing as provided orally in the course of the public hearings.

Safeguard investigations are normally concluded within nine months, with a possible extension of no more than three months. The respective periods for AD and anti-subsidy investigations are 12 months for conclusion and six months for extension.

Upon completion of the investigation and before the final decision, the EEC will send to the participants for comments a draft report on the main findings and conclusions of the investigation. The EEC Board will decide on the imposition of measures usually within 30 to 45 days from receipt of the report on the investigation and of a draft decision from the investigating authority.

WTO rules

6 | Are the WTO rules on trade remedies applied in national law?

The EAEU is not in itself a WTO member; Russia has been a WTO member since 2012, Kazakhstan since 2015, Armenia since 2003 and Kyrgyzstan since 1998. Belarus is still negotiating its terms of accession.

According to the terms of accession of Armenia and Kyrgyzstan to the EAEU, their individual WTO accession commitments do not extend to other EAEU member states or to the EAEU as a whole.

All definitions of terms, procedural requirements and time limits that apply pursuant to the TDI Protocol and that are actually applied by the EEC in TDI investigations aim to follow the respective WTO rules on TDIs.

According to the generally accepted understanding, specific provisions in the WTO Agreements and the respective WTO accession commitments of the EAEU member states that have been implemented by the EAEU as part of the international agreements among its member states become an integral part of the EAEU's legal order and should prevail over other laws that conflict with it. This position follows from the Treaty on the Functioning of the Customs Union in the Context of the Multilateral Trading System of 19 May 2011, which remains in force upon creation of the EAEU (Annex 31 of the EAEU Treaty). However, the WTO Agreements on TDIs do not have direct effect with respect to legal entities and individuals in the EAEU, and the latter cannot directly invoke the provisions of these WTO Agreements before the Court of the Eurasian Economic Union (EAEU Court). Arguably, such legal claims can be done by reference to the provisions of the EAEU Treaty and other international agreements within the EAEU that implement the respective WTO provisions.

Under the TDI Protocol all third countries are treated as market economy countries.

Appeal

7 | What is the appeal procedure for an unfavourable trade remedies decision? Is appeal available for all decisions? How likely is an appeal to succeed?

As of 1 January 2015, the EAEU Court is the sole competent institution for judicial review of TDI measures adopted by the EEC Board. All acts and actions (inactions) that allegedly violate provisions of the EAEU Agreements and individual rights provided under those Agreements can be challenged before the EAEU Court. Since its establishment, the EAEU Court has issued only one judgment dismissing claims submitted by an exporting producer from Ukraine in relation to AD measures on steel rebar. Notably, this was the first proceeding under the enhanced rules of procedure, which required a report from a specially appointed expert group.

In 2012–2014, the EurAsEC Court (the predecessor of the EAEU Court, but limited to CU matters only) had considered three TDI cases (all three concerned AD measures). In its practice, the EurAsEC Court demonstrated a reasoned approach and willingness to interpret the rules of the CU in light of specific WTO provisions and, particularly, with due regard to the judicial practice of the Court of Justice of the European Union, including, to a certain extent, the applicability of the relevant WTO rules in the domestic legal order. However, the EurAsEC Court did not uphold any of the above three legal actions lodged against TDI measures.

Review of duties/quotas

8 | How and when can an affected party seek a review of the duty or quota? What is the procedure and time frame for obtaining a refund of overcharged duties? Can interest be claimed?

The EAEU respects all relevant WTO disciplines on reviews and refunds, and there is a legal possibility to request minimum price undertakings and interim/administrative, newcomer and expiry/sunset reviews, as well as refunds of AD or CV duties paid, in accordance with the TDI Protocol. In 2016–2019, the EEC initiated a number of review proceedings, including interim reviews, expiry reviews and an anti-circumvention inquiry.

In 2015, the EEC accepted the very first minimum price undertaking from several cooperating exporting producers in the AD investigation on oil country tubular goods from China. In the following years, one Chinese producer failed to comply with the conditions of the price undertaking, which was consequently withdrawn with respect to this company. In 2018, the EEC also accepted price undertakings from two cooperating exporting producers in the AD investigation on herbicides from the European Union (EU).

Under the TDI Protocol, reviews may be initiated upon the request of an interested party (an exporting producer, complainants). The EEC may also initiate an ex officio interim review, for example, as a result of an amicable out-of-court settlement or implementation of the EAEU Court's rulings. In particular, a similar development took place in the course of one judicial proceeding within the EAEU Court, where, as a result of an agreement with the complainant, the judicial proceeding was suspended, and the EEC agreed to initiate an interim review limited to the determination of dumping. The review resulted in a minor revision of the AD duties imposed. After reopening of the judicial case on the complainant's initiative, the EAEU Court found the revised duties to be consistent with the CU legal order and dismissed the action.

Therefore, interested parties are encouraged to request reviews and refunds where this is warranted by evidence.

Compliance strategies

9 | What are the practical strategies for complying with an anti-dumping/countervailing/safeguard duty or quota?

The EAEU and the EEC's practice in this respect remains rather limited. Parties have the right to request minimum-price undertakings, reviews and refunds as discussed under question 8. While it has already happened in practice, in general, the EEC is often reluctant to accept price undertakings. Where a measure or decision of the EEC in this respect is deemed unlawful, it may be challenged before the EAEU Court.

It is noted that the TDI Protocol provides for anti-circumvention investigations and measures. In 2017, the EEC completed an anti-circumvention proceeding regarding original measures on seamless tubes and pipes of stainless steel originating from China, which were extended to products originating from Malaysia.

CUSTOMS DUTIES

Normal rates and notification requirements

10 Where are normal customs duty rates for your jurisdiction listed? Is there an exemption for low-value shipments, if so, at what level? Is there a binding tariff information system or similar in place? Are there prior notification requirements for imports?

The normal (most-favoured nation – MFN) customs duty rates on import of goods into the common customs territory of the EAEU are listed in the Unified Customs Tariff of the Eurasian Economic Union (ETT). The ETT is revised annually in accordance with the Eurasian Economic Union's Single Commodity Nomenclature of Foreign Economic Activities (TN VED EAEU), which in turn is based on the Harmonized System of the World Customs Organization. The authority empowered to adopt and amend the ETT and the TN VED EAEU is the EEC Board.

Information on import duty rates is available in Russian on the EEC website (www.eurasiancommission.org/ru/act/trade/catr/ett/Pages/default.aspx). This section of the website is updated regularly and contains generally correct information on duty rates; however, it is made available for information purposes only and is not legally binding.

However, certain tariff lines for goods destined solely for domestic consumption in Kazakhstan, Armenia and Kyrgyzstan are temporarily exempt from the common ETT tariff rates (see question 2), while Russia and Belarus apply ETT rates to all imported goods. If the exempt goods are to be released for free circulation within the EAEU, they become subject to the common ETT rates.

On 1 January 2018, the Customs Code of the Eurasian Economic Union (CC EAEU) replaced the previously applied Customs Code of the Customs Union.

The EAEU member states have concluded a separate accord concerning export duties. According to this accord, each member state of the EAEU establishes its own list of certain goods in respect of which export duties may apply, which is communicated to the EEC. On that basis, the EEC maintains a consolidated list of products subject to export duties for all member states of the EAEU. Member states retain the power to adopt and amend the export duty rates applied on export of goods, contained in the consolidated list and originating in their territories. Similar rules are reflected in the CC EAEU. Export duty rates are subject to periodic amendments by decisions of governments of the member states. There is no single official public database at the EAEU level where up-to-date export duty rates can be consulted.

Customs authorities of EAEU member states have a system of issuing preliminary customs classification decisions that may affect the customs duty rate applicable to a product for which such a decision has been requested (similar to the systems of issuing binding tariff information practised in other jurisdictions). Preliminary decisions taken at the national level are reported to the EEC and listed in a special database, which is available in Russian at the website of the EEC at www.eurasiancommission.org/ru/docs/Lists/List/AllItems.aspx.

According to article 22 of the CC EAEU, the EEC may also adopt decisions and clarifications on customs classification of certain goods upon respective proposals or requests from customs authorities of EAEU member states. There is no unified database of such decisions or clarifications.

According to the CC EAEU, all imported goods are subject to a prior notification procedure; however, only part of the information, which relates to risk assessment and choice of customs control form, is mandatory for prior submission, while other information remains optional, aimed at facilitating customs clearance. Prior notification may be done electronically at the websites of national customs authorities of the EAEU member states.

EAEU member states maintain a duty-exemption regime for low-value shipments, including for e-commerce, in accordance with Decision of the EEC Council N107 of 20 December 2017. The authorities decided to proceed with the gradual reduction of the maximum value and weight thresholds applied to duty exemptions. Therefore, from 1 January 2019 the threshold for international postal deliveries is set at €500 or 31 kg during one calendar month, while from 1 January 2020 it will be €200 or 31 kg per package. No further reductions are envisaged by the current EAEU legislation.

Note that while EAEU legislation defines the maximum threshold for duty exemptions, the CC EAEU allows each EAEU member state to introduce even lower limits, as provided above.

Special rates and preferential treatment

11 Where are special tariff rates, such as under free trade agreements or preferential tariffs, and countries that are given preference listed?

There is no single database at the EAEU level that lists duty rates applicable under preferential arrangements or preferential trade agreements.

The EAEU applies a Unified System of Tariff Preferences (USTP, analogous to the EU Generalised Scheme of Preferences) to promote economic growth and welfare in developing and least developed countries. Articles 36 and 37 of the EAEU Treaty specify tariff preferences granted to developing countries (75 per cent and 0 per cent of the MFN rate, for developing and least developed countries, respectively) and refers to preferential rules of origin applied to such imports.

The USTP preferences apply to goods included in a special list of goods and a list of countries eligible for such preferences. These lists are established by the EEC. The respective lists as well as the relevant legislation are available on the EEC's website (www.eurasiancommission.org/ru/act/trade/dotp/commonSytem/Pages/normatBaza.aspx).

There is no official list or unified database for the existing preferential trade agreements of the EAEU member states with third countries. The agreements are numerous; however, the most noteworthy is the multilateral Agreement on a Free Trade Area of the CIS Countries (FTA CIS), which has been in force among the majority of the CIS countries since 2012. The FTA CIS has been suspended between Russia and Ukraine since 1 January 2016 due to exceptional national security reasons.

Traditionally, most CIS countries continue to maintain a network of bilateral free trade agreements (FTAs) between themselves.

In addition to the above multilateral FTA CIS, Russia currently maintains bilateral preferential trade agreements with Azerbaijan, Georgia, Serbia, Tajikistan, Turkmenistan and Uzbekistan. Kazakhstan has bilateral preferential trade agreements with Azerbaijan, Georgia, Serbia and Tajikistan. Belarus maintains preferential trade agreements with Azerbaijan, Serbia, Tajikistan, Turkmenistan and Uzbekistan; and Armenia with Georgia, Tajikistan and Turkmenistan. Kyrgyzstan has a bilateral preferential trade agreement with Uzbekistan.

Many of these agreements have specific product exclusions. The EEC is currently taking steps to encourage the EAEU member states to renegotiate existing bilateral trade agreements and conclude new ones so that the EAEU may become a party to them.

Notably, in its capacity of an international organisation vested with legal personality, the EAEU signed an FTA with the Socialist Republic of Vietnam, including a protocol on investment facilitation. This is the first ever FTA established between the EAEU and a third country, and it entered into force on 5 October 2016. Recently, the EAEU concluded FTA negotiations with Serbia and the signature of the respective agreement is expected in October 2019.

In 2018–2019, the EAEU signed an agreement on trade and economic cooperation with China and a temporary agreement aiming

at the establishment of a free trade zone with Iran, as well as a memorandum of cooperation with the largest regional associations – ASEAN and Mercosur.

12 How can GSP treatment for a product be obtained or removed?

According to articles 36 and 45 of the EAEU Treaty, the EEC administers the USTP and is responsible for maintaining and updating the following lists:

- a list of eligible developing countries entitled to the general tariff preference (currently 102 countries);
- a list of eligible least developed countries entitled to the special tariff preference (currently 49 countries); and
- a list of eligible goods originating from developing countries and least developed countries that fall within the scope of the USTP.

The eligibility criteria for the inclusion of countries in the above lists are set out in the Regulation on Conditions and Procedure for the Application of EAEU Unified System of Tariff Preferences adopted on 6 April 2016. This Regulation specifies the country-related criteria, which are complex and include not only relative volume of import and level of country income criteria, but also a number of other requirements, some of which can be regarded as policy or discretionary criteria. The EEC adopts a list of eligible goods at its own discretion unless the products are considered to be sensitive for domestic industry or subject to the tariff quotas.

13 Is there a duty suspension regime in place? How can duty suspension be obtained?

The EEC is empowered to adopt decisions on tariff suspensions upon requests from the EAEU member states.

Given the recent delegation of respective powers from the EAEU member states to the EEC, there is not yet an established formal procedure for requesting tariff suspensions. Therefore, economic operators may be advised to address substantiated requests for tariff suspensions to their national competent ministries, which in turn can refer the request to the EEC.

The possibility for EAEU member states to provide unilaterally customs privileges in the form of partial or complete reduction of normal customs duty rates for specific tariff lines or end uses is provided for in article 43 and Annex 6 of the EAEU Treaty (ie, Protocol on Common Customs Tariff Regulation). These customs privileges may not benefit individual companies and shall not depend on the origin of the goods.

Challenge

14 Where can customs decisions be challenged in your jurisdiction? What are the procedures?

Acts or omissions of the EEC that affect the individual rights and interests of economic operators provided under the EAEU agreements, including customs tariff policy matters, may be challenged directly by affected economic operators before the EAEU Court.

Decisions of the customs authorities of the EAEU member states can be challenged according to procedures provided in each national jurisdiction. Customs decisions of the Russian authorities can be challenged via an administrative appeal before the higher customs authority and via a judicial challenge before the Russian civil and arbitration courts in accordance with Chapter 51 of the Federal Law on Customs Regulation in the Russian Federation and on amendments into certain legal acts of the Russian Federation (No. 289-FZ of 3 August 2018). Customs decisions in Kazakhstan are challenged in accordance with several procedures, depending on the type of customs decision being challenged. The challenge involves higher administrative authorities and the national courts. These procedures are provided for in the Code of the Republic of Kazakhstan on Customs Affairs (No. 123-VI ZRK of 26 December 2017) and other legal acts. Customs decisions in Belarus are challenged by a complaint to the customs authorities or to the court (Law on Customs Regulation in the Republic of Belarus No. 129-Z of 10 January 2014). Similar possibilities for challenging customs decisions through higher-level customs authorities or national courts are also available in Armenia and Kyrgyzstan.

TRADE BARRIERS

Government authorities

15 What government office handles complaints from domestic exporters against foreign trade barriers at the WTO or under other agreements?

The EEC has not yet received a mandate from the EAEU member states for handling complaints against trade barriers in third countries, and the fundamental reason is that not all member states are WTO members yet. The member states of the EAEU that are WTO members (Armenia, Kazakhstan, Kyrgyzstan and Russia) can use WTO mechanisms to tackle trade barriers affecting their exported goods. However, under article 39 of the EAEU Treaty the EEC shall monitor trade barriers in third countries and undertake respective consultations with the latter countries together with the EAEU member states.

Complaints against trade barriers are handled by the competent ministries responsible for the economy and trade of each member state. Russia represents a particular interest in light of its leading experience as a WTO member and the volume of its export trade. In Russia, the competent authority for handling trade barrier complaints is the Ministry of Economic Development (MED), which has an experienced team of foreign trade experts who regularly deal with complaints about trade barriers in third countries. The comprehensive and up-to-date list of trade barriers on foreign markets identified by the Russian authorities is published on the MED's Information Portal for Foreign Trade at www.ved.gov.ru/rus_export/torg_exp/ (in Russian).

Complaint filing procedure

16 What is the procedure for filing a complaint against a foreign trade barrier?

The national laws of the EAEU member states do not provide for a specific procedure for the filing of complaints against trade barriers in third countries. However, the competent authorities are generally open to hearing the concerns of domestic businesses. There are no specific time limits. In Russia complaints are submitted in free written form and are considered by the MED.

Economic operators in Armenia, Kazakhstan, Kyrgyzstan and Russia may submit a complaint based on arguments in line with WTO rules and challenging effective trade barriers against exports of Armenian, Kazakh, Kyrgyz and Russian-originating goods and services. Such complaints are handled by the Ministry of Economy in Armenia, the Ministry of National Economy of Kazakhstan, the Ministry of Economy in Kyrgyzstan and the Ministry of Economic Development in Russia, and may be used as a basis for possible consultations or dispute settlement proceedings under WTO rules.

Grounds for investigation

17 What will the authority consider when deciding whether to begin an investigation?

The authorities as a rule recommend that interested parties collect available relevant data, such as legislative or administrative acts of the third country's authorities that are believed to be the reason for the trade barrier, statistical information on trade flows that have decreased or are expected to decrease as a result of the imposition of the trade barrier, and data on the negative impact of the trade barrier on the business of the complaining company or effect on the economy of the EAEU member states.

As of 2013, the EEC undertakes monitoring and reporting of foreign trade barriers for goods exported by the EAEU members. The respective reports and lists of foreign trade barriers are published on the EEC's website (www.eurasiancommission.org/ru/act/trade/dotp/Pages/dostup.aspx).

Measures against foreign trade barriers

18 What measures outside the WTO may the authority unilaterally take against a foreign trade barrier? Are any such measures currently in force?

Following the accession of EAEU members to the WTO, their actions must comply with WTO rules. Only Belarus is still a non-WTO member; however, the obligations of Belarus under the EAEU Treaty (which seek to ensure, where possible, compliance with WTO rules) may have a restrictive effect on the ability of Belarus to take unilateral actions against foreign trade barriers.

Under the EAEU Treaty, the EAEU as an international organisation with legal personality may undertake retaliatory measures in accordance with the bilateral or multilateral agreements of the EAEU. In this regard, the EAEU member states have working procedures in place to take parallel coordinated action in case a third country imposes a trade barrier or other trade-restrictive measures on one of them. The relevant member state will report the case to the EEC. In consultation with the EEC, member states may then agree upon taking parallel unilateral or multilateral retaliatory measures. Such parallel actions on behalf of the EAEU might become particularly relevant if Armenia, Kazakhstan, Kyrgyzstan or Russia were to be authorised by the WTO to impose retaliatory measures as a result of successful WTO dispute settlement proceedings following non-compliance.

Article 40 of the EAEU Treaty explicitly authorises unilateral retaliatory measures under multilateral (WTO) or bilateral (FTA) international agreements where individual EAEU members are parties. In August 2018, Russia unilaterally increased tariffs up to 30 per cent on a number of US goods (eg, optical fibres and road machinery) as retaliation for the US Section 232 measures on steel and aluminium products. Other EAEU members have not taken recourse to similar retaliatory measures against the US. Although, hypothetically, similar measures are available to EAEU members in response to the definitive safeguard measures of the EU on certain steel products, adopted in February 2019, they have not taken recourse to this retaliatory instrument.

However, there are notable exceptions to the above EAEU rules. According to article 47 and section X of Annex No. 7 (Protocol on Measures of Non-Tariff Regulation Applicable to Third Countries) of the EAEU Treaty, in exceptional circumstances, the EAEU members may unilaterally impose bans and quantitative limitations on imports as well as licensing, exclusive rights and authorisation requirements in regard to imports from third countries. Normally, the duration of such restrictive measures should not exceed six months. In cases where a specific foreign trade barrier might be qualified as relating to exceptional circumstances, such unilateral retaliatory measures would be justified under EAEU law (see also question 29).

Private-sector support

19 What support does the government expect from the private sector to bring a WTO case?

As yet there are no specific rules in the EAEU member states concerning the establishment of procedures and requirements for the preparation of WTO dispute settlement complaints. The practical support for the preparation of a WTO case – such as the initiative for relevant research, evidence, translations and expert advice – is largely a task for the business community. The competent authorities, such as Russia's Ministry of Economic Development, can step in when the business has prepared the groundwork, including reliable WTO legal argumentation, and can then ensure effective support.

Notable non-tariff barriers

20 What notable trade barriers other than retaliatory measures does your country impose on imports?

The EAEU Treaty provides for a harmonised system of non-tariff trade regulation on the basis of Annex No. 7 of the EAEU Treaty (Protocol on Measures of Non-Tariff Regulation Applicable to Third Countries), as well as on the basis of other EAEU Treaty provisions and Annexes relating to specific types of non-tariff measures (eg, technical regulations, sanitary and hygienic measures, veterinary and phytosanitary surveillance and export control measures).

The above Protocol stipulates general rules and principles for the adoption, imposition and use of specific types of non-tariff measures. While the adoption of each non-tariff measure and management of the respective unified lists of the measures are done by the EEC, administration and enforcement of the measures remain within the competence of the EAEU member states and are governed by their national laws. According to the Protocol, the EAEU may introduce the following non-tariff measures on imports and exports:

- bans and quantitative restrictions;
- exclusive rights;
- automatic licensing; and
- authorisations (non-automatic licensing; see also Rules on Issuance of Licences and Authorisations on Exports and Imports of Goods, in the Addendum to Annex No. 7 of the EAEU Treaty).

The unified and regularly updated lists of goods and respective non-tariff measures of the EAEU are available on the EEC website at www.eurasiancommission.org/ru/act/trade/catr/nontariff/Pages/ed-perechen_title.aspx.

Other non-tariff measures, such as for export controls, technical regulations and SPS measures, including plant quarantine measures, are routinely applied by the EAEU and its member states. They are subject to Chapter XI and Annexes 9–12 of the EAEU Treaty as well as national implementing legislation. The most notable trade restrictions in Russia and the EAEU are traditionally of an SPS nature, including bans on the import of poultry and meat from the US owing to a bird flu epidemic or because of a zero-tolerance policy on residues of antibiotics and steroids (such as ractopamine, which is banned in Russia and also in other jurisdictions, such as the EU and China). Other goods subject to extensive safety controls and requirements in Russia and the EAEU include pork and other meat products from the EU due to the alleged African swine fever outbreaks (the latter restrictions were found to be inconsistent with Russia's obligations and subject to possible retaliatory measures from the EU unless Russia were to effectively lift the ban), cheese, certain detergents and confectionery from Ukraine, and other

items. Parallel to this, all EAEU members make extensive use of stringent import licensing regimes for alcohol and pharmaceuticals.

EXPORT CONTROLS

General controls

21 | What general controls are imposed on exports?

The majority of goods exported from the customs territory of the EAEU are free from export controls and export taxes and duties. There are, however, exceptions, which often affect certain natural resources, hydrocarbons and energy goods, raw materials (including a number of metals), certain agricultural and forestry products, dual-use goods etc. The matter of customs duties on export in the context of the EAEU has been addressed in question 10; therefore, this section deals with other export controls. Exceptions for similar primary goods may also apply in internal trade among the EAEU member states.

The rules on export controls in the external trade of member states are provided in the Agreement on Unified Rules of Export Control of Member States of the Eurasian Economic Community (the Agreement) of 28 October 2003. The Agreement has been in force for the EAEU members since 1 January 2010 and is relevant also for internal trade among them. However, on 16 May 2014 Kazakhstan denounced the Agreement and currently applies its own national rules. Further, Kazakhstan has requested the exclusion of the provisions on export control from the scope of the EAEU Treaty.

The Agreement contains a set of common harmonised rules and procedures with regard to trade in specific raw materials; dual-use goods and equipment; technology and services that might be used in weapons of mass destruction and missile delivery systems; and military goods and equipment. The Agreement establishes a common list of goods and technology subject to export control.

Under the Agreement, the participants are called on to communicate and cooperate among themselves, and coordinate in the enforcement of export controls on goods included in the common list.

However, the member states retain certain powers and remain responsible for the establishment and management of national competent authorities in charge of administering export controls and issuing export licences for the listed goods. Procedures involving customs declarations, controls and, where relevant, payments of export taxes and duties apply to exports of goods and technologies on the common list outside the territory of the EAEU.

Government authorities

22 | Which authorities handle the controls?

The following authorities handle export controls in the EAEU member states.

In Russia, the Federal Service for Technical and Export Control (FSTEC (fstec.ru)) is in charge of all matters on export control. It acts pursuant to the Federal Law on Export Control No. 183-FZ, of 18 July 1999.

In Kazakhstan, the Committee of Industry Development and Safety of the Ministry for Investments and Development of the Republic of Kazakhstan is responsible for export controls. It acts on the basis of the Law of Republic of Kazakhstan on Export Control No. 300 III of 21 August 2007.

In Belarus, the State Military-Industrial Committee of the Republic of Belarus (www.vpk.gov.by) is in charge of export controls under the Law of the Republic of Belarus on Export Control No. 363-3 of 11 May 2016.

In Armenia, the Ministry of Economic Development and Investments grants authorisation for the export of dual-use goods and technologies (www.mineconomy.am/en/81) under the Law of the Republic of Armenia on export control of dual-use items and technologies and their transit across the territory of the Republic of Armenia of 27 April 2010.

In Kyrgyzstan, the Commission on Military and Technical Cooperation and Export Control is responsible for the maintenance and enforcement of the National Control List of items subject to export control in the Kyrgyz Republic (Law of the Kyrgyz Republic on Export Control, No. 30, of 23 January 2003).

Special controls

23 | Are separate controls imposed on specific products? Is a licence required to export such products? Give details.

On 21 September 2004, the participants of the EurAsEC – including Russia, Kazakhstan (withdrew on 16 May 2014), Belarus, Armenia and Kyrgyzstan – adopted common lists of goods and technologies subject to export control (Decision of the EurAsEC Interstate Council No. 190 of 21 September 2004). This decision remains in force and operational under the new EAEU regime, excluding Kazakhstan.

Those lists contain six model sub-lists for goods and technology items subject to export controls. The titles of the sub-lists include pathogenic microorganisms and substances and genetically modified organisms; special chemicals suitable for use in chemical weapons; and nuclear materials and non-nuclear materials and respective technologies, dual-use technologies and equipment, including but not limited to those applicable for nuclear uses, for use in military weapons, and for missiles. The specific contents of each sub-list are developed in the national legislation of each participant.

Exports of listed items are subject to non-automatic licences or permissions (an authorisation with attached conditions) issued by the national export control authorities indicated under question 22 above. There are individual (transaction-specific) and general (long-term) licences. At the EAEU level, the responsible national authorities are required to regularly exchange information on issued licences or permissions and on the conditions attached to such permissions.

Debates between the member states of the EAEU on the future of export control regulation in the EAEU are ongoing. At this stage it is difficult to foresee the potential outcomes for the future of common export control regulations.

Supply chain security

24 | Has your jurisdiction implemented the WCO's SAFE Framework of Standards? Does it have an AEO programme or similar?

The CC EAEU and other agreements concerning the EAEU have made efforts to take into account the World Customs Organization's (WCO) SAFE Framework of Standards to facilitate global trade, as well as the related concept of authorised economic operators (AEO). Some provisions of the WCO's SAFE Framework of Standards are also implemented directly into the national legislation of EAEU member states.

Under Chapter 61, the CC EAEU establishes an AEO programme and provides for the legal status of AEOs and the scope of their rights and responsibilities.

Since the AEO programme was fully implemented at the EAEU level only upon adoption of the CC EAEU, AEOs registered during previous years under the CC CU and national legislation of EAEU member states are subject to transitional arrangements – their status under the national legislation is confirmed for two years from the date of entry into force of the CC EAEU.

Applicable countries

25 | Where is information on countries subject to export controls listed?

The administration of export controls in the EAEU and its member states (except Kazakhstan) is based on the sub-lists of goods subject to export control (see question 23) rather than on lists of countries of destination. However, the country of destination is relevant for the imposition of economic sanctions with respect to specific countries, persons and entities. For information on economic sanctions, see question 28.

Named persons and institutions

26 | Does your jurisdiction have a scheme restricting or banning exports to named persons and institutions abroad? Give details.

As stated above, export controls with regard to the destination of the goods and technologies, including with respect to persons and institutions in third countries, are relevant in the context of economic sanctions. See question 30.

Penalties

27 | What are the possible penalties for violation of export controls?

Penalties for violation of export controls are imposed according to the national legislation of the member states of the EAEU. All countries provide for administrative and criminal liability for individuals found to have violated export control rules. Their actions can also be subject to civil damage claims. Legal entities may be subject to financial penalties or may be prohibited from running foreign economic activities for up to three years, or both. The gravity of the penalties is similar in all EAEU member states.

In Russia, criminal offences related to export controls are subject to financial penalties up of to 500,000 roubles, imprisonment for up to three years and a prohibition on engaging in certain activities for up to five years or forced labour for up to three years. However, for violations committed by an organised group of persons or in connection with weapons of mass destruction, the imprisonment period is up to seven years and the financial penalty is up to 1 million roubles.

Administrative liability is limited to penalties of up to 20,000 roubles for legal entities and 2,000 roubles for individuals, with or without confiscation of the goods or property subject to the offence.

FINANCIAL AND OTHER SANCTIONS AND TRADE EMBARGOES

Government authorities

28 | What government offices impose sanctions and embargoes?

The EEC may introduce measures on foreign trade to implement economic sanctions against specific third countries due to the international obligations of EAEU member states, such as sanctions approved by the United Nations Security Council. The measures should be adopted unanimously by all member states. The legal basis for imposition of economic sanctions is contained in the Protocol on Measures of Non-Tariff Regulation Applicable to Third Countries (Annex No. 7 of the EAEU Treaty).

Under the above Protocol, the EAEU member states may also adopt sanctions and embargoes at the national level for the protection of national security interests, in cases of balance of payments difficulties and for other reasons similar to general exceptions of the WTO Agreements as well as in exceptional situations, which are not clarified further in the EAEU Treaty. Such measures can be introduced pursuant to the respective domestic legislation (eg, article 13 of the Federal Law of the Russian Federation on Fundamentals of the State Regulation of Foreign Trade, No. 164-FZ, of 8 December 2003). Normally, the duration of such unilateral measures should not exceed six months. Other countries within the EAEU are called upon to respect and tolerate the unilateral measures adopted by an EAEU member state and affecting foreign trade with third states.

On 4 June 2018, the Federal Law on Measures to Mitigate (Counteract) Unfriendly Actions of the United States of America and Other Foreign States entered into force. The law aims to facilitate the adoption and introduction by the President and government of potential retaliatory measures against the US's sanctions imposed on certain Russian companies and individuals in April and May 2018, as well as against further unfriendly acts (sanctions) of the US and other countries, including those which decided to pursue the US's measures. Potential retaliatory measures could be of a political (eg, seizure of international cooperation) or economic nature (trade embargoes, limitations on trade in services, participation in the governmental contracts and privatisation etc), as well as other measures. The language of the new law grants wide discretion to the authorities in terms of qualifications of unfriendly acts and specific individuals, as well as legal or public entities targeted by potential retaliatory measures, and regarding the choice and extent of the countermeasures. At the same time, trade restrictions must not apply to imports into Russia of vital goods that are not produced domestically and to goods imported for personal use. The new law also obliges all individuals and organisations within the Russian jurisdiction to implement the above countermeasures strictly.

Applicable countries

29 | What countries are currently the subject of sanctions or embargoes by your country?

The member states of the EAEU introduce and maintain sanctions and trade embargoes on the basis of the respective United Nations Security Council resolutions. However, the exact scope and conditions may vary from one member state to another. For that reason, there is no single source of information on trade embargoes or economic sanctions maintained in the EAEU by its member states. Individual measures are provided for in various governmental decrees, or resolutions of the member states.

In 2019, the EAEU member states maintained trade embargoes and sanctions adopted by the UN Security Council, including such countries as Afghanistan, Central African Republic, Democratic Republic of the Congo, Democratic People's Republic of Korea, Guinea-Bissau, Iran, Libya, Mali, Somalia, South Sudan, Sudan, Yemen and various individuals and organisations (eg, ISIL and Al-Qaida) suspected of participation in terrorist networks or activities and residing in various third countries, including but not limited to the above (see question 30).

On 6 August 2014, Russia banned imports of certain agricultural products, raw materials and foodstuffs from the US, the EU, Canada, Australia, Norway, Ukraine (effective from 1 January 2016), Albania, Montenegro, Iceland and Liechtenstein in response to the economic sanctions in connection with events in Ukraine in 2014. The list of banned imports covers all kinds of meat and meat products (including sausages and similar products, and offal, fish and other seafood), milk and dairy products (cheeses, cottage cheese etc), vegetables, fruits and nuts, but excluding Atlantic salmon and trout juveniles, lactose-free milk, seed potatoes and onion, hybrid sweetcorn and seed peas, food supplements, vitamin mineral complexes, food flavourings or additives and protein concentrates. Baby food was explicitly excluded from the above prohibitions. Initially, the measures were imposed for a one-year period subject to prolongation or amendments in scope. On 27 May 2016, the Russian government relaxed import restrictions on beef, poultry meat and vegetables intended for the production of baby food in Russia. By June 2019, Russia had not introduced new countersanctions or trade embargoes against the EU or changed the existing ones.

In addition, in response to the incident with a Russian military aircraft on 24 November 2015, Russia introduced a package of economic sanctions against Turkey taking full effect as of 1 January 2016. Most of the restrictive measures were lifted in 2017 and 2018.

Other EAEU member states did not join the restrictive measures imposed by Russia. Although EAEU members formally respect and comply with the above Russian restrictions, there are numerous media reports on circumvention cases.

Specific individuals and companies

30 | Are individuals or specific companies subject to financial sanctions?

Individuals, specific organisations and companies are already subject to financial sanctions by the member states of the EAEU. The measures applied to individuals and entities include freezing financial and economic assets.

Sanctions against persons and entities take place at the national level. The authorities of each member state maintain and publish lists of organisations and persons, in particular those suspected of terrorist activities (eg, Russia's FSTEC website and Decision of the Council of Ministers of the Republic of Belarus No. 336 of 11 March 2006). The national authorities of EAEU member states regularly exchange information relating to sanctioned persons and entities.

The names of newly affected legal entities and individuals subject to financial sanctions are as a rule annexed to the national legal act of the member state implementing new sanctions.

According to the Russian Federal Law 272-FZ of 28 December 2012 on Measures Impacting Individuals Involved in Violations of Fundamental Human Rights and Freedoms and of Rights and Freedoms of Citizens of the Russian Federation, the Russian authorities can prohibit entry and seize the property and assets of listed foreign individuals considered to have been involved in violations of fundamental rights and freedoms and in offences against Russian citizens. This federal law is widely seen as a retaliatory measure by Russia against legislation in the US known as the Sergei Magnitsky Rule of Law Accountability Act of 2012, which imposes individual sanctions on persons involved in violations of human rights and the rule of law in Russia. Some individuals subject to sanctions under Federal Law 272-FZ of 28 December 2012 are listed at www.mid.ru/ru/maps/us/-/asset_publisher/unVXBbj4Z6e8/content/id/2047929. In March 2014, nine officials from the US and 13 Canadian officials became subject to a ban on entering Russia in response to the sanctions against Russia related to the crisis in Ukraine.

These lists are subject to continuous amendments for the purpose of expansion or annulment at any time without prior notice.

OTHER RELEVANT ISSUES

Other trade remedies and controls

31 | Describe any trade remedy measures, import or export controls not covered above that are particular to your jurisdiction.

Traditionally, the EAEU member states have relied on export taxes or export duties, mostly on raw materials and hydrocarbons. The rationale for export taxes has been to secure significant income for national budgets as well as to redistribute income from large businesses to the state and eventually to contribute to more equal distribution of the nations' wealth from natural endowments. Export taxes may also potentially affect precious metals and minerals and rare earths; however, this area is now regulated by WTO rules and commitments – at least as far as the largest member state, Russia, is concerned.

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Member states also have recourse to non-tariff measures on imports and exports of goods (see question 20).

In addition, the EEC maintains a list of strategic goods that can be subject to temporary export restrictions in case of shortages and other critical situations (see Decision of the Commission of the Customs Union of 27 January 2010 No. 168, and notably its Annex 1, as amended).

Unilateral measures by the member states of the EAEU restricting imports or exports of goods from their national territories remain exceptional, but are still possible. In particular, Russia's import ban of 6 August 2014 (see question 29) on certain food products from the US, the EU and other countries can be regarded as a unilateral measure. If the latter jurisdictions continue to prolong and intensify economic sanctions affecting Russia in the future, new Russian unilateral measures should not be excluded.

Additional tariffs imposed on imports of a wide range of steel and aluminium products by the US, allegedly on national security grounds, in January 2018 could ignite and escalate many trade conflicts around the globe. The consequences of the above and further potential unilateral protectionist actions on the world trade are difficult to predict. However, it is certain that they may significantly change the trade regimes of many countries and territories in the near future.

UPDATE & TRENDS

Key developments

32 | Are there any emerging trends or hot topics in trade and customs law and policy in your jurisdiction?

In recent years, Russia and other EAEU member states have followed a moderate external trade policy while trying to focus on import substitution and internal market protection. In the meantime, Russia has effectively defended its rights in the notable WTO dispute with Ukraine on Measures Concerning Traffic in Transit invoking the national security provisions under the GATT 1994. On the other hand, Russia continues to face criticism from the US and EU on many restrictive market access measures and industrial subsidisation policies. In future, we expect further involvement of other EAEU member states in WTO affairs.

European Union

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LEGAL FRAMEWORK

Domestic legislation

1 | What is the main domestic legislation as regards trade remedies?

The EU's anti-dumping rules are set out in Council Regulation (EU) 2016/1036 on the protection against dumped imports from countries not members of the EU (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02016R1036-20180608).

The EU's anti-subsidy rules are set out in Council Regulation (EU) 2016/1037 on the protection against subsidised imports from countries not members of the European Community (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02016R1037-20180608).

The EU safeguard rules with regard to imports from other members of the WTO are set out in Council Regulation (EU) 2015/478 on the common rules for imports (related to imports from WTO members) (https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1470399764467&uri=CELEX:32015R0478).

The safeguard rules for imports from countries that are not members of the WTO are set out in Council Regulation (EU) 2015/755 on common rules for imports from certain third countries (related to imports from non-WTO members) (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02015R0755-20170519).

International agreements

2 | In general terms what is your country's attitude to international trade?

The EU is a WTO member and comprises 28 member states. Among the founding principles are the four freedoms of movement, namely the free movement of goods, free movement of people, free movement of capital and free movement of services. Within the EU, most trade is therefore free. Exceptions exist for certain types of goods, such as military items, certain dual-use items, waste, pesticides and biocides, and for reasons of national security and health.

As regards third countries, the EU forms a customs union with common import and export rules, and customs duties and trade defence measures apply uniformly among member states. Specific restrictions and requirements, such as licensing, registration, classification, labelling and packaging requirements exist, at both EU and member state level, for the import and export of several products, such as military items, certain dual-use items, endangered species, waste and biocides, and other chemicals, for public policy reasons.

Overall, in recent years, and in light of international developments, the EU has partially moved away from the rather liberal approach towards international trade it has had in the past. Commission President Jean-Claude Juncker clarified the new position in September 2017 as follows: 'Let me say once and for all: we are not naïve free traders. Europe must always defend its strategic interests'. Accordingly, the EU and certain member states have become more focused on ensuring that international trade is fair, undistorted and balanced. For instance, in response to the US's unilateral imposition of higher customs tariffs on certain steel and aluminium products, the EU brought WTO challenges, used a mechanism under the WTO Safeguards Agreement to increase customs tariffs on imports of certain US products and initiated its own safeguard investigation on imports of certain steel products. The EU has also challenged China's policy on technology transfer before the WTO and is preparing a framework programme, for public policy and security reasons, to better screen foreign investments in strategic industries.

The EU has entered into various bilateral and multilateral trade and partnership agreements with third countries. In January 2016, the Deep and Comprehensive Free Trade Agreement between the EU and Ukraine entered into force. In December 2015, the negotiations of the EU–Vietnam FTA and Investment Protection Agreement (IPA) were completed and procedures are now under way to allow their adoption. The Council is reviewing the agreements in view of their future signature, following which the European Parliament will be called on to give its consent. Following the translations of the two texts, the next step will be for the European Parliament to give its consent, which will probably take place in autumn 2019. This would enable ratification of the FTA by the end of the year. However, the IPA will take longer to enter into force due to the requirement for member state ratification. The EU–Canada Comprehensive Trade and Economic Agreement was signed in 2016 and approved by the European Parliament in February 2017. In September 2017, the agreement entered into force provisionally. It is presently with the EU member states for ratification. On 30 April 2019, the Court of Justice of the EU delivered an opinion confirming the compatibility of the Investment Court System (ICS) with the EU Treaties. This means that no changes need to be made to the text of the EU–Canada agreement and member states' ratifications can proceed. Equally, no change will be required in the ICS provisions included in the agreements with Singapore, Mexico and Vietnam. On 1 February 2019, the EU–Japan Economic Partnership Agreement entered into force. Negotiations continue separately for an IPA with Japan. The last discussions on the IPA took place on 20–22 March 2019 in Tokyo. The next discussions are planned for the autumn of 2019.

Currently, the EU is negotiating several free trade and partnership agreements, including ones with Australia and New Zealand, India, Indonesia, Chile, Mercosur and Malaysia, and is negotiating an update to the FTA with Mexico and the partnership agreement with the African-Caribbean-Pacific (ACP) countries. The EU is also in discussions with Turkey to update the EU–Turkey Customs Union arrangements. The Council of the EU approved two mandates on 15 April 2019 for an agreement with the US on the elimination of tariffs for industrial goods and conformity assessments.

Special trade regimes are in place for developing and least-developed countries under the General System of Preferences (GSP), the

ACP partnership agreement (see above) and the OCT preference, which relates to certain overseas countries and territories. A complete list of the current bilateral and multilateral trade agreements to which the EU is party, as well as unilateral preference arrangements, is available at https://ec.europa.eu/trade/policy/countries-and-regions/. In addition, the EU is part of the Trade in Services Agreement negotiations and the negotiations of the Agreement on Environmental Goods.

TRADE DEFENCE INVESTIGATIONS

Government authorities

3 Which authority or authorities conduct trade defence investigations and impose trade remedies in your jurisdiction?

The European Commission – Directorate General for Trade (DG Trade) (https://ec.europa.eu/trade/) conducts EU trade remedy investigations. Trade defence measures are imposed by the Commission after consultation of the EU member states in the context of the Council. Member states can veto the imposition of trade defence measures with a qualified majority, weighted by member state population. The Commission is also responsible for the review, adaptation and extension of trade defence measures.

The collection of duties and the enforcement of compliance upon importation lie with the customs authorities of the EU member states. National customs authorities are also competent to investigate potential infringements.

The European Commission's anti-fraud office (OLAF) (https://ec.europa.eu/anti-fraud/home_en) can conduct investigations into potential avoidance of payment of conventional customs duties or trade defence measures, and provide the results of those investigations to national authorities for enforcement and other follow-ups.

Complaint filing procedure

4 What is the procedure for domestic industry to start a trade remedies case in your jurisdiction? Can the regulator start an investigation ex officio?

Trade remedy investigations are normally initiated upon request by an EU industry. Since the Trade Defence Instruments (TDI) Modernisation entered into force in June 2018, natural or legal persons and associations not having legal personality, including trade unions, can also file a request on behalf of the EU industry. For new cases, expiry reviews and full interim reviews, the request must be supported by EU producers that account for at least 25 per cent of EU production of the product subject to the request (and EU producers representing more than 50 per cent of EU production that express a position must not oppose the request). For SMEs the TDI Modernisation provisions introduced further assistance.

The Commission can also open investigations ex officio, which it has so far done mostly in the context of the review of long-standing anti-dumping measures and the review of the scope, form or amount of the measures.

Anti-dumping and anti-subsidy complaints must include prima facie evidence of dumping and subsidies respectively, material injury and the existence of a causal link between the allegedly dumped or subsidised imports and the alleged injury. In new investigations, the complaint should also demonstrate that the imposition of trade defence measures would not conflict with the overall interest in the good functioning of the EU's economy. In expiry reviews, the complaint must demonstrate that there is a likelihood of continuation or recurrence of dumping or subsidisation and material injury should the existing measures be allowed to lapse. An anti-circumvention application must demonstrate prima facie a change in pattern of trade caused by a practice for which there is no other justification than the imposition of trade defence measures.

Requests for the imposition, extension or modification of trade defence measures must be made in writing and accompanied by supporting evidence on dumping or subsidisation, injury, causation and the EU interest. Complainants are required to submit a version of the complaint for inspection by interested parties containing non-confidential summaries of all confidential data and information.

Upon receipt of a request for the initiation of a new investigation or an anti-circumvention investigation, the Commission has 45 days to formally initiate the proceedings. Expiry review requests must be lodged with the Commission at least three months before the expiry of the measures, and the Commission must initiate the expiry review no later than the date of expiry. There is no statutory time limit within which the Commission must decide upon the initiation of an investigation based on an interim review request.

Before formally initiating a trade defence investigation, the Commission consults the EU member states. In anti-subsidy investiwwgations, the Commission also sends a note verbale to the government of the country or countries involved in the investigation.

Trade defence investigations are formally initiated by a publication in the EU's Official Journal (OJ).

Contesting trade remedies

5 What is the procedure for foreign exporters to defend a trade remedies case in your jurisdiction?

Applications for the imposition, extension or modification of trade defence measures must contain lists of known concerned parties, that is, exporting producers in the subject countries, importers, users and other EU producers.

Upon initiation, the Commission invites all known parties to declare their interest to participate in the investigation. In addition, the publication of the initiation of a trade remedy case in the OJ contains an invitation to everyone that considers itself concerned to come forward to register as interested parties within 10 days. In subsidy cases, the EU will also send a note verbale to the government of the subject country, which will then inform the national exporting producers. An executive summary of the applications, including the product definition of the goods subject to the investigation and the names of the known interested parties, is published on the Commission's website.

Parties that make themselves known to the Commission within the prescribed deadline (and are selected in the sample where sampling is applied) receive a questionnaire that must normally be filled in and returned to the Commission within 37 days. In the questionnaire response, exporting producers must provide detailed information, in particular with regard to their domestic and export sales and production costs. In addition, all parties are entitled to make additional written submissions on topics of relevance to the investigation and have a hearing in person with the case handlers and the hearing officer.

New anti-dumping investigations must be completed within 14 months, and new anti-subsidy investigations within 13 months. No earlier than 60 days and no later than eight or nine months after initiation, the Commission can impose provisional anti-dumping or anti-subsidy measures. Final measures are imposed by the Commission if the investigation shows that dumped or subsidised imports caused material injury to the EU industry and the imposition of trade defence measures is in the overall EU interest.

Trade remedy measures normally remain in place for five years. During that period, the EU industry, exporting producers and other interested parties (eg, users) can request an interim review in the case of changed circumstances of a lasting nature that justify a review of the measures in place. After five years, the EU industry can request an

expiry review, whereby the Commission analyses whether there is a risk of continuation or recurrence of dumping or subsidisation and material injury if the measures were allowed to lapse.

WTO rules

6 | Are the WTO rules on trade remedies applied in national law?

The EU (as well as its member states) is a WTO member and WTO law forms an integral part of EU law. As such, the EU generally recognises and complies with WTO obligations, including in the area of trade defence.

The EU has been involved in numerous disputes before the WTO Dispute Settlement Body (DSB), as both complainant and defendant, as well as as an intervening third party.

Overall, the EU has been quite careful to comply with WTO rulings. In the area of anti-dumping and anti-subsidy rules, the EU has passed specific legislation to facilitate bringing EU law into compliance with WTO rulings (see Regulation (EU) 2015/476 of the European Parliament and of the Council of 11 March 2015 on the measures that the Union may take following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters).

However, WTO law does not generally have direct effect in the EU and it can be directly invoked before the EU courts only where the EU intended to implement a particular WTO obligation, or where an EU act refers explicitly to specific WTO provisions (see in particular ECJ Cases 70/78 *Fediol* and C-69/89 *Nakajima*).

Appeal

7 | What is the appeal procedure for an unfavourable trade remedies decision? Is appeal available for all decisions? How likely is an appeal to succeed?

The Commission imposes provisional and definitive trade remedy measures by way of regulations (secondary EU acts). Final measures can be appealed under article 263 of the Treaty on the Functioning of the European Union (TFEU) before the EU's General Court within two months from the publication of the regulation. Provisional measures can be appealed only with regard to any autonomous or independent effects capable of being attributed solely to them (ie, not also dealt with by the regulation imposing the definitive measures).

Exporting producers and the EU producers that cooperated in the Commission investigation, as well as their representative industry associations, have standing to bring direct challenges under article 263 TFEU of trade remedy measures. Importers have standing only in limited situations, but can bring a challenge of trade remedy measures before national courts and then ask the national court to seek a preliminary ruling from the EU Court of Justice (ECJ) under article 267 TFEU.

On the substance, an appeal will be successful if the Commission has committed a severe procedural breach, a manifest error of assessment, a violation of the law or a misuse of powers. In most cases brought to date, the appeal has not been successful, but there are many examples of successful appeals.

Review of duties/quotas

8 | How and when can an affected party seek a review of the duty or quota? What is the procedure and time frame for obtaining a refund of overcharged duties? Can interest be claimed?

Importers can make requests for refunds of anti-dumping or countervailing duties paid within six months from importation of the subject goods. A request must be filed with the Commission via the member state where the goods were released for free circulation, and must demonstrate that the amount of dumping or subsidisation decreased as compared to the duties imposed by the definitive measures. Therefore, while the requests for duty refunds can only be filed by the importing party paying the duties, they require the full cooperation of the relevant exporting producer or producers. Since June 2018, there is also the possibility for exporters to request the refund of anti-dumping or countervailing duties paid after the opening of an expiry review which is terminated without the continuation of the measures in question.

Exporting producers can also request that the Commission initiate an interim review with a view to lowering an anti-dumping or countervailing duty applicable if there are changes of a lasting nature – as compared to the initial investigation – that affect the dumping or countervailing margin. The Commission will generally not grant an interim review request until at least one year after the imposition of the definitive measures. The result of an interim review could be an increase, as well as a decrease, of the initial measures.

Compliance strategies

9 | What are the practical strategies for complying with an anti-dumping/countervailing/safeguard duty or quota?

For cost, insurance and freight (CIF) sales, importers are usually the parties liable for the payment of customs duties. They therefore have a strong interest and should work with the exporter in the subject country to ensure that all exports and imports are made in compliance with applicable trade defence measures. Illegal avoidance of trade remedy duties, for example, by circumvention or the issuance of false origin certificates, are customs fraud and can lead to criminal prosecution, the retroactive imposition of duties and high fines. The Commission, customs authorities of member states and OLAF have frequently and systematically investigated circumvention practices and customs fraud in relation to the importation of products subject to anti-dumping or anti-subsidy duties, including aluminium foil, bicycles, citric acid, hand pallet trucks, molybdenum wire, solar modules and seamless pipes and tubes of stainless steel.

Exporting producers and importers therefore often rely on the options provided under the EU trade laws, for example, refund and review proceedings, as discussed under question 8, when seeking ways to lower or eliminate the payment of anti-dumping or anti-subsidy duties.

CUSTOMS DUTIES

Normal rates and notification requirements

10 | Where are normal customs duty rates for your jurisdiction listed? Is there an exemption for low-value shipments, if so, at what level? Is there a binding tariff information system or similar in place? Are there prior notification requirements for imports?

Imports must comply with the customs formalities set out in the Union Customs Code (UCC) (Council Regulation 952/2013), and the relevant implementing regulations (ie, the UCC Delegated Act (Commission Delegated Regulation 2015/2446) and the UCC Implementing Act (Commission Implementing Regulation 2015/2447)). These acts are supported by the UCC Transitional Delegated Act (Commission Delegated Regulation 2016/341) and the UCC Work Programme (Commission Implementing Decision No. 2016/578).

Certain goods, such as military items, endangered species, waste, biocides and other chemicals are subject to special licensing, registration, classification, labelling and packaging requirements before they can be placed into free circulation.

The EU customs duties payable upon importation are set out in the Combined Nomenclature. A link to the current version is available on the website of the European Commission's Directorate General for Tax

and Customs (DG TAXUD) at https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/what-is-common-customs-tariff/combined-nomenclature_en.

Goods whose value does not exceed the amount of €150 are exempted from the payment of customs duties when they are provided directly to the buyer (https://ec.europa.eu/taxation_customs/individuals/buying-goods-services-online-personal-use/buying-goods/buying-goods-online-coming-from-a-noneu-union-country_en).

National customs authorities issue binding tariff informations (BTIs) and binding origin informations (BOIs) upon a written request by an economic operator. The BTIs and BOIs are valid for imports of the applicant (only) throughout the EU, but other operators often base their own requests on existing rulings. A list of BTIs currently in place can be accessed via the website of the Commission's DG TAXUD at https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/what-is-common-customs-tariff/binding-tariff-information-bti_en.

Special rates and preferential treatment

11 | Where are special tariff rates, such as under free trade agreements or preferential tariffs, and countries that are given preference listed?

The EU acts implementing international agreements into EU law specify the special tariff rates applicable under those agreements. A list of the EU's current international agreements with links to the respective implementing laws can be found at https://ec.europa.eu/trade/policy/countries-and-regions/.

Further rules can be found in the UCC (Council Regulation 952/2013), the UCC Delegated Act (Commission Delegated Regulation 2015/2446) and the UCC Implementing Act (Commission Implementing Regulation 2015/2447), respectively.

Regulation (EU) No. 978/2012 sets out the EU's scheme of generalised tariff preferences (GSP) (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02012R0978-20180307). It establishes:

- a general preference arrangement for developing countries;
- a special incentive arrangement for sustainable development and good governance (GSP+); and
- a special arrangement for the least-developed countries (Everything But Arms (EBA)).

Under the GSP, import duties for non-sensitive goods are reduced to zero and for sensitive goods by 3.5 per cent (and 20 per cent for sections S-11a and S-11b of Annex V). Countries that apply for, and to which the EU grants, GSP+ status benefit from additional duty suspensions. For least-developed countries that comply with the EBA conditions, all tariff duties except for Combined Nomenclature Chapter 93 (arms) are suspended.

12 | How can GSP treatment for a product be obtained or removed?

Overall, the Commission can add and remove countries from the list of GSP beneficiaries according to the international status and classification of a country. The GSP benefits for a developing country (except for least-developed countries) can be removed if a country has been classified by the World Bank as a high-income or an upper-middle-income country during three consecutive years or if that country benefits from a preferential market access arrangement that provides the same tariff preferences as the GSP or better. The removal takes effect one (in the first instance) and two (in the second instance) years, respectively, after the entry into force of the decision or preferential agreement.

In addition to the entire withdrawal of GSP benefits, the GSP also provides for the suspension of the duty reductions for imports of specific products if they exceed a certain value threshold over three consecutive years.

The EU can also withdraw the GSP preferences temporarily in respect of all or of certain products originating in a beneficiary country, for any of the following reasons:

- serious and systematic violation of human and labour rights and environment and governance principles;
- export of goods made by prison labour;
- serious shortcomings in customs controls on the export or transit of drugs (illicit substances or precursors), or failure to comply with international conventions on anti-terrorism and money laundering;
- serious and systematic unfair trading practices, including those affecting the supply of raw materials, which have an adverse effect on the EU industry and which have not been addressed by the beneficiary country;
- serious and systematic infringement of the objectives adopted by Regional Fishery Organisations or any international arrangements to which the EU is a party concerning the conservation and management of fishery resources; and
- in cases of fraud, irregularities or systematic failure to comply with or to ensure compliance with the rules concerning the origin of the products and with the procedures related thereto, or failure to provide administrative cooperation as required for the implementation and policing of the GSP.

13 | Is there a duty suspension regime in place? How can duty suspension be obtained?

Economic operators can request a suspension of tariffs on all or a certain quota of imports of semi-finished products or raw materials if these products are not available or not available in sufficient quantities in the EU.

A suspension request must be filed with the European Commission via the member state where the economic operator is located, on the form attached as Annex I of Commission Communication 2011/C 363 (https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:363:0006:0017:EN:PDF).

Member states submit the requests they receive twice a year, in March and September, to the Economic Tariff Questions Group (ETQG). The ETQG consists of representatives of the Commission, the member states and Turkey, and examines the requests in three meetings (four if required). EU producers of a product for which duty suspension is requested can object to the request until the second meeting. Appeals against existing duty suspensions must be filed before the first ETQG meeting of a given DS cycle.

Approved duty suspensions enter into force nine months after the submission of the request (ie, for duty suspension requests submitted in March, in January of the following year, and for duty suspension requests submitted in September, in July of the following year). Duty suspensions are usually in place for five years and can be renewed.

Challenge

14 | Where can customs decisions be challenged in your jurisdiction? What are the procedures?

Customs decisions are taken by the national customs authorities of the EU member states. Accordingly they can be challenged at national level before the administrative or judicial courts of the member states. National courts can apply to the ECJ for a preliminary ruling (under article 267 TFEU) if the issue before them concerns a matter of interpretation of EU law.

Economic operators can also challenge certain decisions by the Commission, such as decisions on refund and remission requests, directly before the General Court under article 263 TFEU.

TRADE BARRIERS

Government authorities

15 | What government office handles complaints from domestic exporters against foreign trade barriers at the WTO or under other agreements?

The EU Trade Barrier Regulation (EU) 2015/1843 provides a complaint mechanism for EU exporters that experience discriminatory trade practices in third countries.

EU exporters can contact the DG Trade of the European Commission (https://ec.europa.eu/trade/import-and-export-rules/export-from-eu/), and if DG Trade considers a complaint is adequately substantiated it will take measures to address the situation. Normally, the Commission will first seek an amicable solution with the importing country via bilateral talks. If this is not possible, the EU can request consultations at the WTO.

Complaint filing procedure

16 | What is the procedure for filing a complaint against a foreign trade barrier?

Under article 5 of Council Regulation (EC) No. 2015/1843, a complaint may be lodged with the Commission by an EU industry sector or individual enterprises. The complaint must detail the obstacles to trade and the injurious effect caused to the EU industry or business. Upon receipt, the Commission will decide within 45 days whether to initiate an examination procedure.

Member states can also request that the Commission initiate an examination procedure.

Grounds for investigation

17 | What will the authority consider when deciding whether to begin an investigation?

When making its decision, the Commission considers the evidence presented by the complainant, particularly the evidence of the existence of a trade barrier, the indication as to how this barrier breaches international trade rules and the evidence that the trade barrier results or threatens to result in adverse trade effects or injury. Regard will also be had to the interests of the EU as a whole, as well as to the wider implications that the decision may have for the EU's common commercial policy.

Measures against foreign trade barriers

18 | What measures outside the WTO may the authority unilaterally take against a foreign trade barrier? Are any such measures currently in force?

Under article 13(3) of Council Regulation (EC) No. 2015/1843, the EU may take unilateral commercial policy measures, such as a suspension or withdrawal of concessions, an imposition (or increase) of customs duties or the introduction of quantitative restrictions.

However, in relation to WTO members, article 13(2) of Council Regulation (EC) No. 2015/1843 first obliges the EU to go through the WTO dispute settlement process. Regulation (EU) No. 654/2014 of the European Parliament and of the Council of 15 May 2014 lays down specific provisions for the exercise of the EU's rights for the application and enforcement of international trade rules, in particular those established under the auspices of the WTO. A recent example is the EU's adoption of additional customs duties on products from the US, including Harley Davidson motorbikes, in July 2018, in response to the US imposition of additional tariffs on imports of steel products from inter alia the EU.

In practice, for most trading partners, the measures the EU is able to take outside the WTO framework are limited to bilateral talks.

Private-sector support

19 | What support does the government expect from the private sector to bring a WTO case?

For the EU to bring a case to the WTO DSB, there must be a severe and clear enough infringement of the obligations of the third country that have a material impact on EU industry. Also, the EU considers the level of the infringement and the effects on the wider EU economy. In principle, the European Commission relies on industry to provide relevant market and industry facts and information, but does not expect any particular legal support from the private sector in order to bring a WTO action.

Notable non-tariff barriers

20 | What notable trade barriers other than retaliatory measures does your country impose on imports?

Generally, the EU does not maintain non-tariff barriers on imports. There are, however, import requirements, such as customs clearance formalities, and for certain products licensing, registration, classification, labelling and packaging requirements, at EU and member state level, for reasons of public health or safety, including military items, certain dual-use items, endangered species, waste, biocides and other chemicals.

Import restrictions exist for instance at national level for certain military items.

At EU level, the following goods are among those subject to non-tariff import restrictions and possibly intra-EU transfer restrictions:

- *endangered species*: Council Regulation (EC) No. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1431359714963&uri=CELEX:01997R0338-20141220);
- *timber*: Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010R0995);
- *waste*: Regulation (EC) No. 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1431360214820&uri=CELEX:02006R1013-20140526); and
- *certain chemical substances and mixtures*: Regulation (EC) No. 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No. 1907/2006 (Text with EEA relevance) (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02008R1272-20180301).

EXPORT CONTROLS

General controls

21 | What general controls are imposed on exports?

The main instruments setting out the import and export rules of the EU are the:

- Union Customs Code (Council Regulation 952/2013);
- UCC Delegated Act (Commission Delegated Regulation 2015/2446);
- UCC Implementing Act (Commission Implementing Regulation 2015/2447);

- UCC Transitional Delegated Act (Commission Delegated Regulation 2016/341);
- UCC Work Programme (Commission Implementing Decision No. 2016/578);
- EU Dual-Use Regulation 428/2009; and
- national regulations on export of military and dual-use items.

Under articles 263 and seq of the UCC, goods intended for export are subject to an export declaration. Furthermore, certain goods, such as military items listed in the national military lists, dual-use items listed in Annex I to Regulation 428/2009, waste and endangered species, require a licence prior to their export.

Government authorities

22 | Which authorities handle the controls?

National customs authorities implement the EU customs rules, impose and collect import and export duties, oversee goods in transit and under special customs procedures, and pursue customs and export violations. A list of national customs authorities can be found here: https://ec.europa.eu/taxation_customs/national-customs-websites_en. If the export of a good requires a licence, this must be obtained from the responsible authorities and included in the export documentation (see also questions 23 and 28).

Special controls

23 | Are separate controls imposed on specific products? Is a licence required to export such products? Give details.

Certain goods, technology and software require prior authorisation for exports and intra-EU transfers (from one EU member state to another).

Particularly noteworthy are the export and intra-EU transfer restrictions with regard to military items and certain dual-use items. Military items listed on the military lists of the member states require a licence for export and intra-EU transfer. Dual-use items listed in Annex I to Regulation 428/2009 require a licence for export and dual-use items listed in Annex IV to Regulation 428/2009 also require a licence for intra-EU transfers. The licensing procedure is handled by the national export control authorities of the EU member states. Member states may also impose additional (stricter) export controls. Information on additional national rules and the national authorities responsible for export controls and sanctions is available at DG Trade's website at http://ec.europa.eu/trade/import-and-export-rules/export-from-eu/dual-use-controls/.

Additional restrictions on exports and intra-EU transfers exist, inter alia, for waste, endangered species, pesticides, biocides, food and chemicals.

Supply chain security

24 | Has your jurisdiction implemented the WCO's SAFE Framework of Standards? Does it have an AEO programme or similar?

Yes, the EU has implemented an authorised economic operator system. Further information on the EU's AEO system is available at https://ec.europa.eu/taxation_customs/dds2/eos/aeo_consultation.jsp?Lang=en.

Applicable countries

25 | Where is information on countries subject to export controls listed?

The EU export controls on military and dual-use items apply equally to all non-EU countries. For partner countries and countries considered safe destinations, simpler procedures are in place, but there is no system of licence exception as in the US. In addition, the EU and member states have imposed sanctions and embargoes against various third countries (see questions 26 and 29).

Named persons and institutions

26 | Does your jurisdiction have a scheme restricting or banning exports to named persons and institutions abroad? Give details.

The EU has imposed specific restrictions on natural and legal persons engaged in terrorism by Regulations 2580/2001 and 881/2002 (https://ec.europa.eu/fpi/what-we-do/sanctions_en). Recently the EU also introduced Regulation 2019/796 which imposes specific restrictions on natural and legal persons engaged in cyber-attacks that threaten the EU or its member states (see question 32). In addition, country-specific embargoes also contain person-related sanctions (see question 30).

Penalties

27 | What are the possible penalties for violation of export controls?

Violations of export controls can be subject to administrative or criminal sanctions, or both, depending on the gravity of the violation and the specific law of the respective EU member state. Smaller violations can lead to revocation of export privileges (eg, global licences), warnings and fines. More severe violations will, in addition, entail higher fines, and can lead to prison sentences for the operators responsible.

FINANCIAL AND OTHER SANCTIONS AND TRADE EMBARGOES

Government authorities

28 | What government offices impose sanctions and embargoes?

In the EU, the competences to impose sanctions and embargoes are split between the Commission and the EU member states. This is because the EU member states have not delegated to the EU the competence to impose military embargoes and certain person-related sanctions, such as travel bans. These types of sanctions are, therefore, formally implemented at national level by each member state authority on the basis of a common decision taken by the EU member states in the framework of the Common Foreign and Security Policy. The imposition of economic sanctions, including the freezing of funds, is within the EU's competence. These sanctions are therefore implemented in the form of Regulations under the TFEU.

The export control and customs authorities of the member states are responsible for the handling of export licence applications and the prosecution of violations of sanctions and embargoes.

Applicable countries

29 | What countries are currently the subject of sanctions or embargoes by your country?

The EU and its member states have imposed various embargos and sanctions against third countries. Most notably, the EU has comprehensive embargo regimes that restrict trade with North Korea, Russia and Syria. The previously comprehensive Iran sanctions were largely lifted in January 2016.

A complete list with a summary of the restrictions together with links to the respective regulations is available at https://ec.europa.eu/fpi/what-we-do/sanctions_en. In addition, there are specific sanctions targeting natural and legal persons to combat terrorism (see questions 26 and 30).

Specific individuals and companies

30 Are individuals or specific companies subject to financial sanctions?

Yes, natural and legal persons can in particular be subject to asset freezes. Sanctions usually also contain a general prohibition to make funds or economic resources available to sanctioned legal and natural persons. An up-to-date list of persons and entities subject to EU sanctions can be accessed at https://ec.europa.eu/fpi/what-we-do/sanctions_en.

OTHER RELEVANT ISSUES

Other trade remedies and controls

31 Describe any trade remedy measures, import or export controls not covered above that are particular to your jurisdiction.

Not applicable.

UPDATE & TRENDS

Key developments

32 Are there any emerging trends or hot topics in trade and customs law and policy in your jurisdiction?

Brexit

On 29 March 2017, the United Kingdom (UK) invoked article 50 of the Treaty of the European Union (TEU), according to which the country was deemed to leave the EU within two years. However, after three unsuccessful attempts to get a Withdrawal Agreement agreed with the European Commission ratified by the House of Commons, the UK Government requested an extension of article 50 in order to avoid leaving the EU without a deal. On 10 April 2019, the EU leaders of the remaining 27 member states agreed to grant the UK an extension until 31 October 2019 to allow for the ratification of the Withdrawal Agreement. As a result of this extension, the UK took part in European Elections on 26 May 2019.

The Withdrawal Agreement foresees a transitional period until 31 December 2020, which could be extended by up to two more years if both parties agree. The transitional period is meant to provide citizens, businesses and administrations time to adapt to the new situation, and for the UK and the EU to negotiate a new trade deal. During the transitional period, the UK will remain in the EU Customs Union and the Single Market, but it will not be represented in the EU decision-making bodies.

If the Withdrawal Agreement is ratified by both sides before 31 October 2019, the UK will leave on the first day of the following month. The European Council has reiterated that there can be no reopening of negotiations on the Withdrawal Agreement, and that any unilateral commitment, statement or other act should be compatible with the text and the spirit of the Withdrawal Agreement and must not hamper its implementation. The decision was taken in agreement with the UK. Until 31 October 2019, the UK still has the possibility of revoking its invocation of article 50 and cancel Brexit altogether.

US tariff increase on imports of certain steel and aluminium products

On 8 March 2018, the US adopted safeguard measures in the form of a tariff increase on imports of certain steel and aluminium products. The tariff increase became effective with respect to the EU on 1 June 2018, with an unlimited duration.

Commission Implementing Regulation (EU) 2018/724 mandated the Commission to give written notice, no later than 18 May 2018, to the WTO Council for Trade in Goods that, absent disapproval by the Council for Trade in Goods, the EU suspends the application to the trade of the US of import duty concessions under the GATT 1994 in respect of certain products (listed in Annex I and Annex II to the Regulation), so as to allow for an application of additional customs duties on the importation of these products originating in the US.

On 18 May 2018, the Commission gave the above written notice and the WTO Council for Trade in Goods did not disapprove within 30 days. The EU thereby suspended, in the WTO, the application of import duty concessions to the trade with the US under the GATT 1994 in respect of these products.

Consequently, having regard to article 2 of Regulation 2018/724, the Commission imposed additional customs duties on the products listed in Annex I and Annex II through Commission Implementing Regulation (EU) 2018/886 of 20 June 2018.

Safeguard measures on certain steel products

On 1 February 2019, the European Commission published Regulation 2019/159 imposing definitive safeguard measures on imports of various steel products. The measures concern 26 steel product categories and consist of tariff-rate quotas above which a duty of 25 per cent will apply.

According to Regulation 2019/159, the measures should remain in place for a period of up to three years, but can be reviewed in the case of changed circumstances. Anti-dumping duties on several steel products have been suspended for the period of application of the safeguard measures. On 17 May 2019, the Commission published a notice of initiation of the review of the safeguard measures due to questions related to the Union interest.

Safeguards in free trade agreements

On 13 February 2019, the Council and the European Parliament adopted Regulation 2019/287 concerning bilateral safeguard measures in trade agreements.

The EU regularly concludes trade agreements with third countries, most of which include bilateral safeguard clauses or other mechanisms for the temporary withdrawal of tariff preferences or preferential treatment. Before February 2019, the bilateral safeguard mechanism had been decided separately for each trade agreement. Regulation 2019/287 brings a consistent horizontal framework for the inclusion of such provisions in future agreements.

Regulation 2019/287 currently covers the implementation of the EU–Japan, EU–Singapore and EU–Vietnam free trade agreements. Further agreements can be added to the scope of Regulation 2019/287 by means of future delegated acts.

Iran sanctions

In August 2018, the EU revived the Blocking Statute in response to the US reimposing sanctions against Iranand withdrawing from the Joint Comprehensive Plan of Action (JCPOA). The Blocking Statute shall protect EU operators doing legitimate business in and with Iran from the impact of the re-imposed US sanctions. It prohibits compliance by EU operators with any requirement or prohibition laid down in (certain) US Iran embargo legislation (Iran Sanctions Act of 1996 (ISA); Iran Freedom and Counter-Proliferation Act of 2012 (IFCA); National Defence Authorization Act For Fiscal Year 2012 (NDAA); Iran Threat Reduction And Syria Human Rights Act of 2012 (TRA); and Iranian Transactions and Sanctions Regulations (ITSR)). (The Commission can, however, grant exceptions.) EU natural and legal persons that incur losses because a (contracting) party is complying with the named US rules can claim damages from the latter in EU courts.

In addition, on 31 January 2019, France, Germany and the UK (the E3) set up INSTEX SAS (Instrument for Supporting Trade Exchanges), a special payment mechanism to supporting legitimate European trade with Iran. INSTEX essentially works like a barter trading or offsetting mechanism. For example, a Spanish company buys goods from an

Iranian company A for €1 million. A German company sells goods to an Iranian company B for €1 million. Via INSTEX (in the EU and an Iranian counterpart) the sums would be offset and money can be paid from the Spanish company via its bank 1 to INSTEX and by INSTEX via bank 2 to the German company (and likewise on the Iranian side). This way no international (outside EU) payment transaction would be required on the EU side (and the Iranian side, respectively). So far INSTEX has only been used for humanitarian goods, such as medicines, medical equipment and agricultural equipment, which are in any event exempt from the US's Iran sanctions. However, the idea is ultimately to use INSTEX also for other goods and in particular oil exports from Iran. The US has voiced concerns about the use of INSTEX and not excluded sanctioning the mechanism and parties using it. For further information, the Commission has published a Guidance note to help EU companies with the understanding of the relevant legal acts and the implementation of the Blocking Statute (http://www.gard.no/Content/26003686/Guidance%20note%20on%20blocking%20statute.pdf).

EU creates framework to sanction parties for cyber-attacks threatening the Union or its member states

On 15 May, the EU published Decision 2019/797 and Regulation 2019/796 concerning restrictive measures against cyber-attacks threatening the Union of its member states. The laws sets up a framework to impose travel bans, the freezing of accounts and a prohibition to provide economic and financial resources to natural or legal persons that are considered involved in cyber-attacks (including attempted attacks) on the EU and its member states.

Cyber-attacks are actions originating from outside the EU involving the following:

- access to information systems;
- information system interference;
- data interference; or
- data interception, where such actions are not duly authorised by the owner or by another right holder of the system or data or part of it, or are not permitted under the law of the EU or of the member state concerned.

The cyber-attacks covered are those that represent an external threat. This includes cyber-attacks that:

- originate, or are carried out, from outside the EU;
- use infrastructure outside the EU;
- are carried out by any natural or legal person, entity or body established or operating outside the EU; or
- are carried out with the support, at the direction or under the control of any natural or legal person, entity or body operating outside the Union.

Cyber-attacks constituting a threat to member states include those affecting information systems relating to, inter alia:

- critical infrastructure, including submarine cables and objects launched into outer space, which is essential for the maintenance of vital functions of society, or the health, safety, security, and economic or social well-being of people;
- services necessary for the maintenance of essential social and economic activities, in particular in the sectors of: energy (electricity, oil and gas); transport (air, rail, water and road); banking; financial market infrastructures; health (healthcare providers, hospitals and private clinics); drinking water supply and distribution; digital infrastructure; and any other sector which is essential to the member state concerned;
- critical state functions, in particular in the areas of defence, governance and the functioning of institutions, including for public elections or the voting process, the functioning of economic and civil infrastructure, internal security, and external relations, including through diplomatic missions;
- the storage or processing of classified information; or
- government emergency response teams.

Cyber-attacks constituting a threat to the EU include those carried out against its institutions, bodies, offices and agencies, its delegations to third countries or to international organisations, its common security and defence policy operations and missions and its special representatives. In addition, restrictive measures can also be imposed in response to cyber-attacks on third countries and international organisations where deemed necessary to achieve common foreign and security policy objectives in the relevant provisions of article 21 of the Treaty on European Union.

First trade defence measures based on new anti-dumping methodology

On 3 May 2019, the Commission published its first anti-dumping and anti-subsidy measures based on the new anti-dumping methodology for imports from countries with significant market distortions. The measures were adopted following an expiry review investigation on imports of organic coated steel from China.

In line with the new anti-dumping methodology, when establishing the normal value, the Commission assessed the existence of significant distortions in the Chinese market, taking into account the potential impact of factors such as:

- the market in question being served to a significant extent by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country;
- state presence in firms allowing the state to interfere with respect to prices or costs;
- public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces;
- the lack, discriminatory application or inadequate enforcement of bankruptcy, corporate or property laws;
- wage costs being distorted; and
- access to finance granted by institutions that implement public policy objectives or otherwise not acting independently of the state.

The analysis showed that prices or costs, including the costs of raw materials, energy and labour, are not the result of free market forces in China, since they are affected by substantial government intervention within the meaning of article 2(6a)(b) of the Basic Anti-Dumping Regulation. On that basis, the Commission concluded that it was not appropriate to use domestic prices and costs to establish normal value and consequently proceeded to construct the normal value exclusively on the basis of corresponding costs of production and sale in an appropriate representative country. The Commission considered Mexico to be the most appropriate representative country since it has a substantial production of the product under review, a complete set of data available for all factors of production, manufacturing overheads, SG&A and profit and a higher level of social and environmental protection.

Temporary suspension of EU GSP preferences for Cambodia

In February 2019, the European Commission launched a procedure that could lead to the temporary suspension of Cambodia's preferential access to the EU market under the EBA trade scheme. The Commission did so on the grounds that there is evidence of serious and systematic violations of core human rights and labour rights in Cambodia. The aim of the Commission's action is to improve the situation for the people on the ground by getting Cambodia to comply with its obligations under the core United Nations (UN) and International Labour Organization (ILO) Conventions.

Further developments in the EU–US WTO Boeing–Airbus dispute

On 28 March 2019, the WTO Appellate Body ruled that the US had failed to remove the massive and trade distorting subsidies that it had been granting to Boeing. On 9 April 2019, the US proposed to impose US$11 billion tariffs in retaliation for the EU's illegal aid to Airbus. On 11 April 2019, the DSB of the WTO adopted the reports of the Appellate Body. The decision marked the final step in the compliance proceedings launched in 2012 in this long-running dispute. On 17 April 2019, the European Commission launched a public consultation on a preliminary list of products from the US on which the EU may take countermeasures in the context of the Boeing dispute. The list covers a range of items, from aircraft to chemicals and agri-food products, that overall represent around US$20 billion of the US's exports to the EU.

The EU is currently taking steps towards requesting a WTO-appointed arbitrator to determine the exact appropriate level of countermeasures. Once the arbitrator delivers a decision, the EU will prepare a final list and request authorisation from the DSB to take countermeasures against the US.

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LEGAL FRAMEWORK

Domestic legislation

1 What is the main domestic legislation as regards trade remedies?

Anti-dumping and countervailing duty investigations

The Customs Tariff Act 1975 (the Act) governs the conduct of anti-dumping (AD) (including anti-circumvention investigations), anti-subsidy and safeguard duty investigations, while the Foreign Trade (Development and Regulation) Act 1992 (the Foreign Trade Act) regulates safeguard measures in the nature of quantitative restrictions (QRs). See www.dgtr.gov.in.

The conduct and imposition of duty in AD and countervailing duty (CVD) investigations are governed by the Act and the specific rules promulgated respectively in this regard. Specifically, CVD investigations are regulated by section 9 of the Act read with the Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidised Articles and for Determination of Injury) Rules 1995 (the CVD Rules), while AD investigations are regulated by section 9A of the Act read with the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles for Determination of Injury) Rules 1995 (the AD Rules) and Trade Notices as issued by the Directorate General of Trade Remedies (DGTR), which is the investigating authority functioning under the Department of Commerce, Government of India. Appeals against anti-dumping and countervailing duties are provided under section 9C of the Act and appeals in both cases are made before the Custom Excise and Service Tax Appellate Tribunal (CESTAT).

Safeguard duty investigations

In India, two types of safeguard investigations can be initiated: one that involves the levy of a duty and another that involves imposing QRs on imports. Further, safeguard duty investigations can either be in the nature of a general safeguard duty investigation, where the duties, once imposed, apply to imports from all countries (under section 8B of the Act), or a China-specific safeguard investigation (under section 8C of the Act) where duties are imposed on imports specifically from China. The latter is termed the Transitional Product-Specific Safeguard Investigation (China-specific safeguards).

The provisions under section 8B of the Act are implemented through the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 (Safeguard Rules), while the provisions under section 8C of the Act are implemented through Customs Tariff (Transitional Product Specific Safeguard Duty) Rules, 2002 (China Safeguard Rules).

Section 8C of the Act concerning China-specific safeguard investigations was enacted to give effect to article 16 of China's Accession Protocol. The Accession Protocol, which came into effect on 11 December 2001, provides under article 16(9) that the China-specific safeguard mechanism would be terminated 12 years after the date of accession, which put the date of termination at 10 December 2013. However, neither section 8C of the Act nor the China Safeguard Rules contain an explicit sunset clause for the termination of the China-specific safeguard investigations. Nonetheless, despite the absence of an explicit reference to a sunset period, no new China-specific safeguard investigation has been initiated since 2013, indicating that the investigating authority is likely to refrain from initiating new China-specific safeguard investigations. The authority to conduct safeguard investigations lies with the DGTR.

On the issue of injury determination, it is pertinent to mention here that the standard of injury suffered by the domestic industry also varies in the two types of safeguard duty cases. In a general safeguard investigation, a demonstration of 'serious injury' or threat of 'serious injury' is required, while in a China-specific safeguard investigation the standard is one of market disruption or threat of market disruption.

The authority to impose QRs is provided under section 9A of the Foreign Trade Act, which states that the central government may impose QRs if imports have taken place in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. The provisions of section 9A of the Foreign Trade Act are implemented through the Safeguard Measures (Quantitative Restrictions) Rules 2012 (Quantitative Restrictions Rules) (see www.dgft.gov.in). The functions of the authority conducting safeguard QR investigations were earlier discharged by the Directorate General of Foreign Trade (DGFT), but have now been transferred to the DGTR.

International agreements

2 In general terms what is your country's attitude to international trade?

India, as one of the founding members of the GATT in 1947 and subsequently the WTO, supports liberalisation of international trade and believes that increased market access is imperative for the growth of developing countries. India is also a firm supporter of capacity building among developing and least-developed countries and is of the view that capacity building is imperative if these countries are to reap the benefits of liberalised trade. In terms of trade flows, while the US and EU have traditionally been India's largest trading partners, in recent years India's engagement with other developing countries has ensured that south–south trade is furthered. As of 2019, the US has regained its top spot as India's largest trading partner, while China has fallen to the number two position.

India's engagement in regional-trading or free-trading blocs is recent, even though the first regional trade agreement (RTA) entered into by India was in 1975, when India became a member of the Bangkok Agreement, which was renamed the Asia-Pacific Trade Agreement in 2005. The first free trade agreement (FTA) entered into by India was in 2000, when it entered into an FTA with Sri Lanka.

However, it is only in the past decade that India has entered into a significant number of FTAs, RTAs and comprehensive economic

cooperation agreements (CECAs). As of April 2014, India has entered into 18 different agreements in the nature of FTAs, RTAs and CECAs. Prominent among them are the South Asian Free Trade Agreement; the India–Korea Comprehensive Economic Partnership Agreement (CEPA); the India–Singapore CECA; the India–ASEAN FTA; the India–Malaysia CECA; the India–Chile preferential trade agreement; and the India–Japan CEPA. India is currently negotiating FTAs with the European Free Trade Association, the EU, the South African Customs Union (SACU) and Bay of Bengal Initiative on Multi-Sectoral Technical and Economic Cooperation (BIMSTEC). India is also engaged in negotiating a mega-regional FTA, known as the Regional Comprehensive Economic Partnership (RCEP), with the 10 member states of the Association of Southeast Asian Nations (ASEAN) and Australia, China, Japan, South Korea and New Zealand, which is likely to be concluded by the end of 2019.

India has been a responsible member of the WTO and this is reflected in its record of compliance with WTO decisions. India's laws have been under scrutiny in notable cases such as India-Patents, India-Autos and India-Quantitative Restrictions. In all three cases, India complied with the decisions of the WTO by bringing its regime into compliance with the recommendations of the Dispute Settlement Body. Currently, the United States has challenged India's compliance measure in India-Agricultural Products (DS430). The United States had requested retaliation under article 22.2 of the Dispute Settlement Understanding (DSU). India objected to the United States' claim of retaliation, pursuant to which the parties pursued arbitration proceedings under article 22.6 of the DSU. Additionally, India initiated compliance proceedings under article 21.5 of the DSU, wherein it claimed that its compliance measures are in conformity with the recommendations and rulings of the Dispute Settlement Body. At the time of writing, both proceedings are ongoing.

TRADE DEFENCE INVESTIGATIONS

Government authorities

3 Which authority or authorities conduct trade defence investigations and impose trade remedies in your jurisdiction?

In India, since May 2018, pursuant to a notification by the Government of India (Allocation of Business) 340th Amendment Rules, 2018, the Directorate General of Anti-Dumping and Allied Duties (DGAD) has been renamed the Directorate General of Trade Remedies (DGTR), vide Notification No. I-34(7)/2018-O&M dated 17 May 2018, which falls under the purview of the Department of Commerce. Consequently, the DGTR is now entrusted with conducting AD investigations (including anti-circumvention), CVD investigations and safeguard investigations.

The DGTR determines the injury and dumping or subsidisation in an AD or CVD investigation, respectively. The findings of the DGTR (preliminary and final findings) are recommendatory in nature and are given effect by the Department of Revenue of the Ministry of Finance by means of a customs notification (see commerce.gov.in).

The Department of Revenue has the discretion to accept, modify or even refuse the recommendations for the imposition of duty, if it deems it necessary. Hence, it is not unusual to find that in some cases, despite the DGTR recommending preliminary or final duty, the Department of Revenue does not issue a customs notification. It should be noted that there is no formal hearing procedure or opportunity for making further representations before the Department of Revenue.

With respect to safeguard duty investigations, the DGTR determines both a finding on increased imports and serious injury, as the case may be. The findings, whether preliminary or final, are recommendatory in nature and the same are given effect by the Department of Revenue by means of a customs notification.

Safeguard quantitative restrictions were introduced to the Foreign Trade Act in 2010 followed by the Quantitative Restrictions Rules in May 2012. According to the Quantitative Restrictions Rules, the authorised officer was entrusted with conducting the safeguard investigation and determining both the issues of increased imports and serious injury or threat of serious injury and recommending the extent and duration of QRs to be imposed. While the notification transferring the functions of the authorised officer to the DGTR was issued only in May 2018, no safeguard investigations concerning quantitative restrictions have been initiated by the DGTR to date.

India is a prolific user of trade remedies and among all the WTO members had initiated the highest number of trade remedial investigations up to 2017. According to the WTO data, up to December 2018, India had initiated 919 AD investigations, out of which 223 investigations were initiated against China, 68 against the Republic of Korea, 67 against the European Union, 64 against Chinese Taipei, 52 against Thailand, 39 against Japan and 41 against the US. India is followed by the US, which had initiated 694 anti-dumping investigations up to December 2018.

Similarly, India had, up to December 2017, initiated 43 safeguard duty investigations, which is the highest number of safeguard investigations initiated by any member to date. In terms of CVD investigations, however, the picture is quite different, where up to December 2017, India had initiated three CVD investigations, all against China. In stark contrast, the US had initiated 219 CVD investigations up to December 2017, which is the highest number of CVD investigations initiated by any member.

Complaint filing procedure

4 What is the procedure for domestic industry to start a trade remedies case in your jurisdiction? Can the regulator start an investigation ex officio?

An AD or CVD investigation can be initiated either upon the receipt of an application requesting initiation of the investigation or suo moto by the DGTR based on the information received from the commissioner of customs or any other source that provides sufficient evidence of dumping or subsidisation, material injury and causal link. If the AD or CVD investigation is initiated based on an application, then the applicant must meet the criterion of 'domestic industry' as provided in the AD or CVD Rules, which state that an application should be expressly supported by domestic producers who account for at least 25 per cent of the total production of the 'like article' or by domestic producers whose collective output constitutes more than 50 per cent of the total production of the 'like article' produced by that segment of the domestic industry expressing either support or opposition to the application. Typically, a trade association representing the domestic industry files the application on behalf of the industry seeking the duty. The application must also contain information on whether any particular domestic producer is related to an exporter or importer of the allegedly dumped or subsidised article or is itself an importer, in which case such a producer may be excluded from the group of domestic producers seeking to qualify as the domestic industry.

The application must contain evidence of dumping or subsidisation, material injury or threat of material injury and causal link. The evidence with respect to dumping is in the form of price-related data pertaining to the normal value in the exporting country and prices of the product when imported into India.

With respect to a CVD investigation, the evidence of subsidisation could be in the form of laws or regulations in the exporting country providing tax benefits, duty rebates, preferential loans or grants to the producer or exporter. In AD investigations, the domestic industry is also required to provide a significant amount of costing data relating to the product in question, such as data on cost of production, raw material consumption, consumption of utilities and allocation of expenditure, etc. The evidence with respect to injury is in the form of data on capacity,

production, sales, selling price, price undercutting, price underselling, profits and losses, capacity utilisation, exports and export sales realisation etc.

The domestic industry submits confidential as well as non-confidential versions of the application to the DGTR, which then ensures that sufficient copies of the latter are kept in the public file to be made available to authorised interested parties upon inspection of the public file. The Act does not specify a time limit within which the DGTR has to initiate the AD or CVD investigation. However, the DGTR cannot initiate an investigation unless it is satisfied with the accuracy and adequacy of the evidence submitted as part of the application. Additionally, in the case of a CVD investigation, the DGTR cannot initiate the case unless it has held consultations with the government of the exporting country.

As stated above, India has introduced to the AD Rules provisions governing the conduct of anti-circumvention investigations. An applicant for an anti-circumvention investigation must establish the circumvention of existing AD duties, which can be said to occur in any of the following cases:

- if an unfinished or unassembled product is imported to be completed or assembled in India or a third country and the value of the item after assembly is less than 35 per cent of the cost of the finished product;
- if an article in altered form (either in description, name or composition) is imported from the country of export or origin; or
- if producers or exporters subject to AD duty change their patterns or channels of trade without economic reason and so as to avoid the duty.

The applicant is also required to provide evidence that establishes that imports circumventing the duty are being dumped. As in the case of AD investigations, the DGTR conducts the investigation and recommends the duty to the Ministry of Finance, which may levy the duty retrospectively from the date of initiation of the investigation. An investigation pertaining to anti-circumvention may also be initiated suo moto by the DGTR.

Requirements in safeguard investigations

As in the case of an AD or CVD investigation, a general safeguard duty investigation and a QR investigation can be initiated either suo moto by the authority or upon receipt of an application requesting initiation of a safeguard investigation. If the investigations are initiated on the basis of an application, then the applicant must fulfil the eligibility criteria of a domestic industry. In this respect, unlike AD or CVD Rules, which expressly provide the percentage of support required for qualifying as the domestic industry, the Safeguard Duty Rules and the QR Rules only mention that the application should be filed by producers whose collective output of the like or directly competitive articles constitute a major share of the total production of the said article in India. In practice, the DGTR requires that the production of the applicant producers constitutes at least 50 per cent of the total production of the like or directly competitive article. The aforesaid interpretation of the DGTR, with respect to the standing of the domestic industry, is yet to be tested in QR investigations.

The domestic industry is required to provide prima facie evidence of increased imports, and serious injury or threat of serious injury in a general safeguard duty investigation and QR investigation. The causal link needs to be established in all cases. In all of the aforementioned investigations, the applicants are required to provide detailed import data (quantity and value) of the product under investigation for at least three years; factors attributable for increased imports and share of imports; and share of similar domestic products in the total domestic consumption or demand in India over a period of three years. The application must also provide the names and addresses of exporters or producers, importers, and any trade associations or user associations related to the product.

In general safeguard duty and QR investigations, the application must also provide a countrywide breakdown of the imports and their percentage of total imports and further provide an adjustment plan that details the efforts proposed to be taken by the domestic industry to make a positive adjustment to import competition.

Serious injury and threat thereof can be established by providing data on reduction in capacity or idling in capacity, sales volume, costs of production and impact of imports thereon, selling price, profits or losses, growing inventory and loss of employment. If the domestic industry has filed an application for AD or CVD duty or safeguard duty when petitioning for QRs, the same is required to be disclosed in the concerned application. Applicants are required to provide confidential and non-confidential versions of the application and access to the non-confidential version of the application is provided to all interested parties by placing it in the public file.

As in the case of AD or CVD investigations, the Safeguard Rules and the QR Rules also do not provide any time frame within which an investigation must be initiated. However, the concerned authority examines the accuracy and adequacy of the information provided in the petition and satisfies itself that there is sufficient evidence of increased imports, injury and causal link.

Contesting trade remedies

5 What is the procedure for foreign exporters to defend a trade remedies case in your jurisdiction?

In AD or CVD investigations, the domestic industry application expressly identifies the names and addresses of the exporters, importers and user industry that form the basis upon which the DGTR informs the known interested parties of the initiation. The DGTR informs such known individual exporters, importers, users and trade associations by sending a copy of the initiation notification and a copy of the non-confidential version of the application. The governments of the exporting country, through their embassies, are also provided with a copy of the initiation notification and the non-confidential version of the application.

All other parties not expressly identified in the petition are notified of the decision of initiation of the investigation by way of a public notice that contains information pertaining to the date of the initiation, the exporting countries and product involved, the basis of the allegation of dumping or subsidisation and summary of the injury factors, the time limits for submission of information, and the address to which the interested parties may direct their representations. Such interested parties are provided with the non-confidential version of the application upon a request in writing to the authority. Public notices are also published on the website of the DGTR (see www.dgtr.gov.in).

In the case of AD investigations, the DGTR stipulated in a Trade Notice in September 2018 that a party interested in participating in an investigation must notify its intent to participate within 40 days of publication of the notice of initiation. The time period for response may also be extended upon an application to the DGTR.

Interested parties are required to submit confidential and non-confidential versions of their submissions or questionnaire responses to the DGTR. During the course of the investigation, a public hearing is held where all the interested parties are allowed to present their views. However, views presented at the hearing are not taken into account by the DGTR unless submitted in writing, generally within five days of the hearing. If the interested participating parties incorporate confidential information in the written submission pursuant to the public hearing, a non-confidential version of the same is required to be forwarded to all the other participating interested parties. Parties are allowed to rebut the written submissions of the other parties; however, the rebuttal submissions are not exchanged between the parties and are submitted to the DGTR for its record and examination.

An AD or CVD investigation must be concluded within 12 months from the date of initiation of the investigation unless extended by another six months by the central government. The DGTR may make preliminary findings during the course of the investigation that become effective once approved by the Department of Revenue by means of a custom notification. The law is silent on the time period within which the Department of Revenue is required to give notice of the custom notification imposing the duty recommended in the preliminary findings. Once notice has been issued, an anti-dumping duty remains in force for a period not exceeding six months, which can be further extended to nine months by the central government. However, in no event can the preliminary duty be imposed before the expiry of 60 days from the date of the initiation notification. A countervailing duty, however, can only remain in force for four months and no extension can be granted.

The investigation concludes with the issuance of the final findings and the Department of Revenue has three months from the date of the final findings to issue the custom notification imposing the duty recommended by the DGTR in the final findings. As mentioned above, the Department of Revenue can confirm or modify the recommendations of the DGTR, if it deems necessary. If the custom notification is not issued within three months of the publication of the final findings, the recommendations lapse and the duty is not imposed. It should be noted that India follows the 'lesser duty rule' and imposes a duty that is the lesser of the margin of dumping and injury margin. Margin of injury is calculated as the difference between the non-injurious price (akin to a fair selling price) and the landed value of imports.

Safeguard investigations

As in the case of AD or CVD investigations, the authority in a safeguard investigation provides the known exporters, importers, users and the exporting country governments with a copy of the initiation notification and a copy of the non-confidential version of the application and usually requires these parties to respond to the allegations in the application and submit the respective questionnaires within the prescribed timelines. This time can be extended upon an application to the authority. Other parties are notified of the investigation by means of a public notice that details the date of the initiation, the exporting countries and product at issue, the volume of imports, the basis of the main allegation on increased imports and a summary of the injury factors, the time limits for submission of information and the address to which parties may direct their representations. Parties are expected to convey their intent to participate within 40 days of the initiation notification, pursuant to the Trade Notice issued by the DGTR in September 2018, upon which they are provided with a non-confidential version of the petition in order to submit a response to the allegations of injury and submit an exporter or importer questionnaire as the case may be. Extension may be provided upon an application made to the DGTR to that effect.

Safeguard investigations are mandated to be concluded within eight months from the date of initiation of the investigation unless extended by the central government. During this time, the authority holds a public hearing where views presented orally must be submitted in writing to be taken on record. Parties exchange post-hearing written submissions and are also provided with an opportunity to rebut the claims of the other parties. Rebuttal submissions, however, are not exchanged and are merely submitted to the DGTR.

Preliminary duties (QRs cannot be recommended on a provisional basis) may be recommended by the DGTR if 'critical circumstances' are established. As in the case of AD or CVD investigations, these findings of the DGTR are recommendatory in nature and are given effect by the Department of Revenue by means of a custom notification. In all cases of safeguard investigations, if the final duty or QR is recommended for more than a year, it must be progressively liberalised. The duty or QR in any event ceases to have effect on the expiry of four years from the date of its imposition, unless the central government is of the opinion that the duty or QR must continue, in which case it may be extended. However, under no circumstance can the duties or QRs be imposed beyond a period of 10 years from the date of the initial imposition.

WTO rules

6 | Are the WTO rules on trade remedies applied in national law?

India's trade remedy rules have been promulgated in accordance with the respective WTO-covered agreements. Under the Indian legal system, an international treaty does not take precedence over the domestic laws. However, in view of the fact that India is a member of the WTO and the Indian domestic trade remedy legislation is based on WTO agreements, the established jurisprudence in the form of WTO Panel and Appellate Body decisions is regularly cited by the Indian courts and holds a persuasive value in interpreting the rights and obligations of the interested parties in the investigations.

Furthermore, the AD Rules provide that a country will be treated as a non-market economy if it has been designated as such by the DGTR or by the competent authority of any other country during a three-year period preceding the initiation of the investigation.

Appeal

7 | What is the appeal procedure for an unfavourable trade remedies decision? Is appeal available for all decisions? How likely is an appeal to succeed?

India's trade remedy legislation contains provision for an appeal against an order regarding the existence, degree and effect of any subsidy or dumping. Section 9C of the Act provides that an appeal challenging the customs notification imposing AD, CVD or anti-circumvention duty and giving effect to the findings of the DGTR may be made to the CESTAT within 90 days from the date of issuance of the concerned notification.

Appeals against custom notifications levying general safeguard duty lie before a High Court in the form of a writ petition.

Review of duties/quotas

8 | How and when can an affected party seek a review of the duty or quota? What is the procedure and time frame for obtaining a refund of overcharged duties? Can interest be claimed?

India's trade remedy laws enable parties to seek reviews of the existent duties or quota.

In this respect, the Act and the AD and CVD Rules provide for a mid-term review investigation that can be initiated on the basis of an application by an interested party one year after the date of imposition of the duty. A mid-term review investigation may be requested on the grounds that one or more of the circumstances relevant to the imposition of duty have changed, requiring modification of duty, or that withdrawal of the anti-dumping duties is warranted because the grounds that need to be present for the continued imposition of duties no longer exist. Some of the factors that may be considered as 'changed circumstances' for a review investigation are:

- change in non-injurious price of the domestic industry;
- change in normal value of the exports;
- change in export price of the exports;
- change in landed values;
- change in domestic production pattern;
- change in legal status of the domestic producer or exporter; and
- change in the condition of the domestic industry or producers.

Furthermore, the above-mentioned AD and CVD Rules also provide for sunset review investigations that can be initiated either suo moto by the

designated authority or upon an application by the domestic industry. A review investigation, once initiated, must be completed within 12 months from the date of initiation of the investigation.

In respect of safeguard duty and QR investigations, the law imposes an obligation upon the authority to review the continued need for imposition of the safeguard duty or QR. If the duty or QR has been imposed for over three years, the law requires the concerned authority to review the situation no later than the mid-term of such imposition. Upon review, the authority may recommend withdrawal of the duty or QR, or the increased liberalisation of the duty or QR. The period for conclusion of a review investigation is eight months, which may be extended by the central government.

Refunds

In the case of AD duty, the Act and the AD Rules provide for refund of AD duties in two different circumstances: first, when the importer has paid AD duty in excess of the margin of dumping, and second, where the final duty is lower than the provisional duty. In the latter case, the importer must file an application for refund of the excess AD duty in accordance with the Customs Act 1962. If the application for refund of duty is not adjudicated within three months from the date of filing, the importer is entitled to interest at the rate notified by the central government.

In the former case, the importer must file an application before the DGTR establishing the fact that excess AD duty has been paid on certain imported goods. If the DGTR agrees with the applicant, the recommendation for refund of the differential duty paid by the importer will be forwarded to the central government, which will notify the amount of differential duty refundable to the importer. Pursuant to the said notification, the importer will file an application for refund of duty before the customs authorities at the port of import within three months from the date of notification, and the said application must be decided upon by the customs authorities within 90 days from the date of receipt of application. It is to be noted that unlike refund of excess duty paid in cases where the final duty is lower than the provisional duty, there is no provision for interest where the anti-dumping duty is refunded due to a difference in the dumping margin.

With regard to CVD, the Act provides for refund of CVD in cases where the final duty is lower than the provisional duty. In such cases, the importer must file an application for refund of excess CVD under the terms of the Customs Act, on which, if not adjudicated within three months from the date of filing, the importer is entitled to interest at the rate notified by the central government.

In respect of safeguard duty, the Safeguard Rules impose an obligation upon the DGTR to review the continued need for imposition of the safeguard duty. The said rules further provide for refund of safeguard duty where the final safeguard duty is lower than the provisional duty. In such cases, the importer must file an application for refund of excess duty paid in accordance with the Customs Act and if the refund application is not adjudicated within three months from the date of filing of the application, the importer shall be entitled to interest at the rate notified by the central government.

In respect of QRs, the Quantitative Restrictions Rules impose an obligation upon the DGTR to review the continued need for imposition of the QRs. Since the restriction is in the form of a quota, the issue of refund of duty and consequent interest liability does not arise.

Compliance strategies

9 What are the practical strategies for complying with an anti-dumping/countervailing/safeguard duty or quota?

The general strategy for complying with an AD, CVD, safeguard duty or QR is to seek review of the existing duty or quota or to challenge the duty or quota where necessary. Attempts are made frequently to re-source from other countries or to reformulate products. However, with the recently introduced provisions related to anti-circumvention investigations, any re-sourcing and reformulating could come under the purview of such investigations.

CUSTOMS DUTIES

Normal rates and notification requirements

10 Where are normal customs duty rates for your jurisdiction listed? Is there an exemption for low-value shipments, if so, at what level? Is there a binding tariff information system or similar in place? Are there prior notification requirements for imports?

Normal customs duty rates are contained in the Customs Tariff Act, 1975 (the Act). The rate of duties published in the Act is the binding tariff and can be accessed at www.icegate.gov.in. Exports of goods through couriers or foreign post offices using e-commerce of FOB value up to 500,000 rupees per consignment shall be entitled for rewards under Merchandise Exports from India Scheme (MEIS). If the value of exports is more than 500,000 rupees per consignment then MEIS reward would be calculated on the basis of FOB value of 500,000 rupees only. Such goods can be exported in manual mode through the Foreign Post Offices at New Delhi, Mumbai and Chennai. The objective of MEIS is to offset the infrastructural inefficiencies and associated costs involved in the export of goods and products that are produced and manufactured in India.

There are no prior notification requirements for imports in general.

Special rates and preferential treatment

11 Where are special tariff rates, such as under free trade agreements or preferential tariffs, and countries that are given preference listed?

India does not provide for preferential tariffs under the Generalised System of Preferences (GSP).

India has entered into trade agreements with various countries, including Nepal, Chile, Singapore, Malaysia, Japan, Korea and Afghanistan, and is also party to various other PTAs and FTAs. The special tariff rates applicable under these preferential agreements are provided in the Act. Though the special tariff rates are published in the Act, the same are notified under section 25 of the Customs Act 1962. Once notified, the special tariff rates form part of the Act, and are placed at the end of the chapter in which the particular good is classified. See commerce.gov.in.

12 How can GSP treatment for a product be obtained or removed?

India does not grant preferential tariff rates under the GSP.

13 Is there a duty suspension regime in place? How can duty suspension be obtained?

Duty exemptions are generally provided by the central government in the larger public interest and such exemptions are notified under section 25 of the Customs Act 1962. Post-notification, the exemption becomes part of the tariff, and the published rate is applied on the import of such goods.

To obtain a duty exemption, the applicant must approach the Department of Revenue of the Ministry of Finance, and is required to substantiate with reasons the need for claiming the duty exemption. Only if the government is satisfied with the claims is the duty exemption notified. The notification pertaining to such exemption is placed before

both Houses of Parliament and is notified subsequent to approval from both Houses of Parliament.

Challenge

14 | Where can customs decisions be challenged in your jurisdiction? What are the procedures?

Customs decisions typically fall into the following categories, against which the challenge will be brought before the authorities mentioned in the respective category.

General customs matters

General customs matters are challenged before quasi-judicial authorities who have pecuniary jurisdiction over the subject matter of appeal. In matters involving customs duty up to 500,000 rupees, the Assistant Commissioner or Deputy Commissioner of Customs is the first adjudicating authority. Appeal against his or her decision is the responsibilty of the commissioner of customs (appeals) and then to the CESTAT. If the decision of the CESTAT relates to issues involving valuation or determination of duty then appeal would lie to the Supreme Court; and in all other cases the appeal lies to the High Court of the state where the customs decision has been rendered. In the latter cases, where appeal has been filed before the High Court, the High Court's decision can be challenged before the Supreme Court.

In cases where the amount of duty involved is up to 5 million rupees, the decision can be challenged before the Additional Commissioner or Joint Commissioner of Customs. The said decision can be challenged before the Commissioner of Customs (Appeals). The order of the Commissioner of Customs (Appeals) can be challenged before the CESTAT and the CESTAT decision can be challenged before either the High Court or the Supreme Court based on the criteria mentioned above.

In cases where the duty amount involved is more than 5 million rupees, the decision can be challenged before the commissioner of customs (appeals). The decision of the commissioner of customs (appeals) can be challenged directly before CESTAT, and the CESTAT decision can be challenged before either the High Court or the Supreme Court based on the criteria mentioned above.

Matters relating to levy of anti-dumping and countervailing duty

As mentioned above, under section 9C of the Act, an appeal against the existence, degree and effect of any subsidy or dumping will lie before CESTAT. The decision of CESTAT can be challenged directly before the Supreme Court. Typically, an appeal is filed before CESTAT against the government's notification levying an AD or anti-subsidy duty, which could either be against a provisional levy or the final levy. All other matters incidental to such notification, namely the recovery or refund of anti-dumping or anti-subsidy duty on imported goods, shall be considered as regular custom matters, and the appeal shall lie as in 'General customs matters' above.

Matters relating to levy of safeguard duty

The levy of a safeguard duty can be challenged directly before the High Court under a High Court's writ jurisdiction.

TRADE BARRIERS

Government authorities

15 | What government office handles complaints from domestic exporters against foreign trade barriers at the WTO or under other agreements?

The Department of Commerce, which is part of the Ministry of Commerce and Industry, handles complaints against trade barriers.

Complaint filing procedure

16 | What is the procedure for filing a complaint against a foreign trade barrier?

No procedures have been laid down for filing a complaint against a foreign trade barrier. However, the government maintains a database of non-tariff trade barriers, typically in the nature of sanitary and phytosanitary measures and technical-barriers-to-trade measures in force in other countries against exports from India. If exporters are of the opinion that measures maintained by a member are adversely affecting India's trade interests, usually the trade association representing the exporters brings the matter to the notice of the Ministry of Commerce, which may then decide to investigate the issue further and engage in bilateral discussions with the concerned member. In other cases, depending on the severity of the problem, the government may decide to initiate WTO dispute proceedings against the concerned member.

Grounds for investigation

17 | What will the authority consider when deciding whether to begin an investigation?

See question 16.

Measures against foreign trade barriers

18 | What measures outside the WTO may the authority unilaterally take against a foreign trade barrier? Are any such measures currently in force?

As a responsible member of the WTO, India refrains from taking unilateral measures to seek compliance from members maintaining trade barriers.

Private-sector support

19 | What support does the government expect from the private sector to bring a WTO case?

Usually, WTO cases are supported by government funds and no formalised system exists for the private sector to support WTO litigation. Depending on the facts of the case, the private sector or trade association may make source studies and data available that may be required to support its case.

Notable non-tariff barriers

20 | What notable trade barriers other than retaliatory measures does your country impose on imports?

Most imported goods fall under the open general licence category, which means that there is no requirement to obtain any kind of permit or licence to import such goods. However, where necessary, the government may require the obtaining of a permit or licence from the appropriate government authority before making imports. Examples of goods that require prior import licences are certain copper alloys, zinc waste and scrap, radio and television transmitters, communications jamming equipment etc. There are certain products that require a prior no-objection certificate, subsequent to which an import permit is issued by the DGFT. As an example, in the case of the import of certain telecoms equipment, the DGFT issues an import permit only if the importer has obtained a no-objection certificate from the Department of Telecommunications.

Indian Customs does not impose any import trade deposit requirements.

EXPORT CONTROLS

General controls

21 | What general controls are imposed on exports?

The Foreign Trade (Development and Regulation) Act 1992 (FTDR Act) empowers the government of India to formulate the export policy and to issue orders prohibiting, restricting or otherwise regulating the export of goods. As per the Foreign Trade Policy of India 2015–2020 (FTP), exports and imports shall be 'free' except when regulated by way of 'prohibition', 'restriction' or 'exclusive trading through State Trading Enterprises (STEs)' as laid down in the Indian Trade Classification (Harmonized System) (ITC (HS)) of Exports and Imports. The import and export policies for all goods are indicated against each item in the ITC (HS). Schedule 2 of the ITC (HS) lays down the Export Policy regime.

Goods that are classified as prohibited are not permitted to be exported. On the other hand, restricted items can be permitted for export only in accordance with an authorisation, permission or licence granted by the DGFT or in accordance with the procedure prescribed in a Notification/Public Notice issued by the government. Further, there are some items that are 'free' for export, but subject to conditions stipulated in other Acts or in law for the time being in force (Paragraph 2.01(b) of the FTP). Export of items that do not require any authorisation, permission or licence from the DGFT has been denoted as 'Free' under the ITC (HS), subject to the policy conditions contained, if any, under the relevant chapter heading or sub-heading or conditions stipulated in other acts or in law for the time being in force. Further, restrictions and prohibitions are applicable on export of certain classes of goods to specified countries. In addition to the prohibitions and restrictions prescribed in the FTDR Act, the FTP and Export Policy (Schedule 2 of ITC (HS)), export of goods are also subject to conditions stipulated in other acts or in law for the time being in force.

While exporting, an exporter must file a shipping bill with the customs authorities at the port declaring the description, nature and quantity of the goods under export. The said shipping bill must be accompanied by a packing list and invoice. Once the said documents are verified by the customs authorities, the goods may be exported.

While most products are not subject to an export duty, there are a few exceptions, such as coffee, tea, black pepper, sugar, iron ore and its concentrates, raw cotton, raw wool, specific jute items, and certain goods of iron or steel (tubes and pipes, bars and rods).

Government authorities

22 | Which authorities handle the controls?

Levy and collection of customs duties, Integrated Goods and Service Tax and surcharge is undertaken by the customs officers appointed under the provisions of the Customs Act 1962. Documentation requirements necessary for the import and export of goods are also regulated under the Customs Act 1962 and rules framed thereunder and are verified by the customs officers at the port of import or export.

It should be noted that requirements pertaining to import licences, conditions on import or export, notification of restricted goods or prohibited goods for import and export etc are all regulated by the DGFT under the provisions of the FTDR Act read together with the Foreign Trade Policy 2015–2020.

Thus, controls with respect to documentation pertaining to import or export are regulated by Customs, while controls in relation to licensing and corresponding related documents are regulated by the DGFT.

Special controls

23 | Are separate controls imposed on specific products? Is a licence required to export such products? Give details.

Separate controls are applicable to specific products, and exporters in such cases must obtain a permit in the form of an export licence from the DGFT before exporting these specific products. As an example, items falling into the category of special chemicals, organisms, materials, equipment and technologies (SCOMET) can be exported pursuant to the fulfilment of certain conditions. The conditions imposed on items falling under SCOMET require, among other things, that any export of SCOMET items shall be in compliance with the Weapons of Mass Destruction and their Delivery System (Prohibition of Unlawful Activities) Act 2005; units engaged in the export of SCOMET items need to obtain prior central government approval before foreign government representatives or foreign private parties make any site visits; and the application should be accompanied by an end-use certificate. Certain chemicals can be exported to countries that are party to the Chemical Weapons Convention and the DGFT may require a copy of the bill of entry evidencing shipment to the destination country within 30 days of delivery.

The controls for SCOMET items and the procedure for application are provided under the Foreign Trade Policy and the Handbook of Procedure (available at www.dgft.gov.in/).

Supply chain security

24 | Has your jurisdiction implemented the WCO's SAFE Framework of Standards? Does it have an AEO programme or similar?

India has implemented WCO's SAFE Framework of Standards. The government of India notified the authorised economic operator (AEO) programme in India on 23 August 2011 (available at www.cbec.gov.in).

The said programme was implemented through Circular No. 37/2011-Cus dated 23 August 2011, wherein the procedure for securing AEO status is prescribed. Under the said circular, any importer or exporter can apply for AEO status provided the applicant has been financially solvent for three years prior to the year of application. The application must be accompanied by a process map, security plan, site plan and self-assessment form. Pursuant to the application, an AEO programme team will examine the applicant's record of compliance for the past four years to ensure adherence to customs, central excise and service tax laws, as well as allied laws. In addition, the applicant should also have a satisfactory system of managing commercial and transport records, a mechanism for ensuring the safety and security of the business and supply chain and a proper mechanism for cargo, conveyance, premises and personnel safety. Once the application is considered to be valid on the above grounds, the application is sent to the AEO team for conducting a pre-certification audit at the applicant's premises. Satisfaction with the above requirements leads to the granting of AEO status.

Applicable countries

25 | Where is information on countries subject to export controls listed?

Restriction on exports to certain countries is provided under the Foreign Trade Policy 2015–2020 (available at www.dgft.gov.in), which is notified under section 5 of the Foreign Trade (Development and Regulation) Act 1992.

The notified countries are Iraq (prohibition on export of arms and related material), the Islamic State in Iraq and the Levant, also known as Daesh (trade in oil and refined oil products, modular refineries and

related materials, besides items of cultural (including antiquities), scientific and religious importance is prohibited with the Islamic State in Iraq and the Levant), the Democratic People's Republic of Korea (direct or indirect export of all items, materials, equipment, goods and technology that could contribute to Korea's nuclear-related, ballistic missile-related or other weapons of mass destruction-related programmes, and luxury goods, including but not limited to items specified in Annex IV of UN Security Council Resolution 2094 (2013)), Iran (direct or indirect export to Iran or import from Iran of any items, materials, equipment, goods or technology mentioned in INFCIRC/254/Rev.9/Part I and INFCIRC/254/Rev.7/Part 2 (IAEA Documents) as updated by the IAEA from time to time and S/2015/546 (UN Security Council document) as updated by the Security Council from time to time) and Somalia (direct or indirect import of charcoal is prohibited from Somalia).

Named persons and institutions

26 | Does your jurisdiction have a scheme restricting or banning exports to named persons and institutions abroad? Give details.

There is no scheme under which controls are imposed on named persons and institutions.

Penalties

27 | What are the possible penalties for violation of export controls?

The possible penalties include seizure and confiscation of goods, penalties on the exporter, and suspension or cancellation of the export licence.

FINANCIAL AND OTHER SANCTIONS AND TRADE EMBARGOES

Government authorities

28 | What government offices impose sanctions and embargoes?

India does not impose trade sanctions on any country, but regulates exports to certain countries as mentioned above.

Applicable countries

29 | What countries are currently the subject of sanctions or embargoes by your country?

India does not impose trade embargoes on any country, but regulates exports of certain products to identified countries (commerce.nic.in).

Specific individuals and companies

30 | Are individuals or specific companies subject to financial sanctions?

No, individuals or specific companies are not subject to financial sanctions.

OTHER RELEVANT ISSUES

Other trade remedies and controls

31 | Describe any trade remedy measures, import or export controls not covered above that are particular to your jurisdiction.

All trade remedy measures are detailed above.

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UPDATE & TRENDS

Key developments

32 | Are there any emerging trends or hot topics in trade and customs law and policy in your jurisdiction?

The government of India is exploring ways to enhance the competitiveness of the products manufactured in India for the emerging global trade scenario and to provide adequate support measures to domestic manufacturers. In this regard, the government has constituted two panels: a panel constituted of Special Economic Zones (SEZ) stakeholders to review India's existing SEZ policy; and a High-Level Advisory Group on trade policy issues to make recommendations on pursuing opportunities, addressing challenges and finding a way forward amid emergent issues in the contemporary global trade scenario. Both panels have proposed extensive recommendations keeping in mind the extant international trade scenario and WTO framework. These recommendations are of immense importance in view of the recent challenge by the United States against India's alleged export linked subsidies at the WTO.

Also, India is part of the ongoing negotiations in one of the mega-trade deals (RCEP). RCEP is the first regional trade agreement in which India is engaging in negotiations with countries such as China, Australia and New Zealand. The implications of RCEP will depend upon the obligations that would be undertaken; however, it is expected to provide significant opportunities for Indian manufacturers (for instance, new avenue for exports) and at the same time may pose a few potential challenges once the negotiations are concluded and the same comes into force.

Japan

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LEGAL FRAMEWORK

Domestic legislation

1 What is the main domestic legislation as regards trade remedies?

The main domestic legislation regarding trade remedies is as follows:

- the Customs Tariff Act: http://law.e-gov.go.jp/htmldata/M43/M43H0054.html (Japanese only); and
- the Cabinet Order on Anti-Dumping Duties: http://law.e-gov.go.jp/htmldata/H06/H06SE416.html (Japanese only).

International agreements

2 In general terms what is your country's attitude to international trade?

Japan became a signatory to the General Agreement on Tariffs and Trade (GATT) in September 1955. Under GATT, Japan gradually liberalised trade and reaped many benefits as a nation from trade liberalisation generally. This helped Japan achieve the transition from post-Second World War recovery to industrial development.

Since the 1990s, the network of free trade agreements (FTAs) around the world has grown significantly. Even in Japan, a nation that has been a staunch supporter of multilateral trade arrangements under GATT and WTO, calls for FTAs have increased, and in January 2001, Japan began negotiating an economic partnership agreement (EPA) with Singapore, which was concluded in November 2002, becoming Japan's first EPA. By February 2019, Japan had EPAs in place with 18 other countries.

Japan's EPAs tend to extend beyond customs duties and liberalisation of services to cover investment, government procurement, intellectual property rights, migration and the business environment, and are aimed at expanding both trade and investment between the countries, with the more comprehensive EPAs extending to topics not covered under WTO rules.

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP or TPP11) between 11 member countries entered into force on 30 December 2018. TPP11 is a significant agreement, as its members account for 12 per cent of world GDP. It also has a level of liberalisation (rate of tariff elimination) in market access for goods higher than those of conventional FTAs and EPAs, and covers the environmental, labour, intellectual property, competition and e-commerce matters.

In addition, on 1 February 2019, the Agreement between the European Union (EU) and Japan for an Economic Partnership entered into force. The EU is an important trading partner for Japan, accounting for approximately 11 per cent of exports and 12 per cent of imports. The EU is the second largest destination for Japanese investment after the US, and the largest source of inward investment. The CPTPP and the Agreement between the EU and Japan for an Economic Partnership will create a better business environment for companies in countries party to the agreements, and by actively utilising these agreements, it is expected that business opportunities will expand for Japanese companies.

As of February 2019, Japan is negotiating EPAs or FTAs with eight counterparties, including Colombia, China, South Korea, the Regional Comprehensive Economic Partnership (RCEP) and Turkey, in addition to negotiating the TPP and RCEP multilateral agreements.

TRADE DEFENCE INVESTIGATIONS

Government authorities

3 Which authority or authorities conduct trade defence investigations and impose trade remedies in your jurisdiction?

The Ministry of Finance (MoF) (www.mof.go.jp/english/index.htm) and the Ministry of Economy, Trade and Industry (METI) (www.meti.go.jp/english/index.html) are the authorities that conduct trade defence investigations and enforce the Customs Tariff Act in Japan.

Complaint filing procedure

4 What is the procedure for domestic industry to start a trade remedies case in your jurisdiction? Can the regulator start an investigation ex officio?

Those with interests in Japanese industry (a domestic producer of foreign goods in the same category as the goods under investigation, or a producer that produces at least 25 per cent of the total domestic production of those goods) can make a complaint to the Minister of Finance for anti-dumping duties upon submission of the necessary documents with adequate evidence to establish the following facts:

- name and address or residence of the applicant;
- name, brand, product type and characteristics of the goods that have been dumped;
- name of the supplier of the dumped goods and the country of origin;
- background to the complainant's interests in industry in Japan;
- outline of the facts regarding the import of the dumped goods, and the effective damage etc, that the imports have caused to the industry in Japan;
- if requesting that any of the matters provided in the documents submitted, or all or part of the evidence submitted, be handled in confidence, a statement to this effect, and the reasons for requesting the same;
- the state of support for duties from related producers, etc, or related labour unions; and
- other relevant matters.

The authority responsible for investigating the request will confirm that the necessary documents have been submitted that adequately evidence the above matters; once they are satisfied of this, they will begin investigating whether or not to act on the request. The confirmation usually takes around two months, and once an investigation starts it will generally be completed within one year after commencing the investigation (and no more than 18 months).

The guidelines for preparing the documents required when requesting anti-dumping duties can be found at: www.meti.go.jp/policy/external_economy/trade_control/boekikanri/download/trade-remedy/20170401guideline.pdf (Japanese only), and www.meti.go.jp/policy/external_economy/trade_control/boekikanri/download/trade-remedy/adgl_tebiki2.pdf (Japanese only).

Contesting trade remedies

5 | What is the procedure for foreign exporters to defend a trade remedies case in your jurisdiction?

Once a decision has been made to commence an investigation, the Minister of Finance will promptly notify directly interested parties (the importers, etc, of the goods under investigation) and the party or parties that requested the investigation in writing, providing the name of the goods to be investigated and the estimated term of the investigation etc, and will also announce this publicly in the Official Gazette. For a period specified by the MoF after the investigation starts, interested parties may make written representations to the Minister of Finance giving their opinions regarding the investigation.

The Minister of Finance will also notify directly interested parties in writing of important facts that form the basis of a final decision on whether to impose duties or the tariff rate to apply etc (reasons for a duty, dumping margin etc). In response, directly interested parties may make counter-arguments in writing within a designated period.

WTO rules

6 | Are the WTO rules on trade remedies applied in national law?

Japan is a member of the WTO.

The Customs Tariff Act incorporates into Japanese law the provisions of article 6 of the General Agreement on Tariffs and Trade (GATT) Agreement on Implementation of article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-dumping Agreement).

Appeal

7 | What is the appeal procedure for an unfavourable trade remedies decision? Is appeal available for all decisions? How likely is an appeal to succeed?

A party subject to a dumping duty (ie, the importer) may appeal to the Minister of Finance within three months from the day after becoming aware of the unfavourable trade remedies. If the Minister's decision on the appeal is also unfavourable, the party may then take the matter to court to seek to have the trade remedies annulled etc, which must be done within six months from the day after becoming aware of the Minister's decision. If there are valid reasons for doing so, the process of appeal to the Minister may be bypassed, instead going straight to an appeal to the court. However, generally speaking, it is highly unlikely that a trade remedy decision could be overturned by such appeal or court litigation process.

Review of duties/quotas

8 | How and when can an affected party seek a review of the duty or quota? What is the procedure and time frame for obtaining a refund of overcharged duties? Can interest be claimed?

Extension of the duty period

Anti-dumping duties can be imposed for a maximum of five years, but this may be extended if an interested party can submit evidence to the Minister of Finance (no later than one year before the end of the duty period) that adequately shows that actual damage would continue to be incurred, or would be incurred again, as a result of the importation of the designated goods to which the dumping duty applies or to Japanese industry as a result; the Minister of Finance will then investigate the claim and may extend the dumping duty period for a further period of up to five years.

Revision etc of the duty as a result of changed circumstances

Interested parties may make a request for the revision or abolition of a dumping duty not less than one year from the start of the designated period of duties with regard to designated goods, if it is accepted, upon submitting adequate evidence, that the circumstances have changed regarding (i) dumping of the designated goods, or (ii) the facts of the actual damages etc caused to the Japanese industry as a result of the importation of the designated goods. A determination of whether or not to revise or abolish the dumping duty generally takes no more than one year.

Refund of anti-dumping duties

If the amount of the anti-dumping duty paid by the importer of designated goods can be shown to be more than the actual amount of the difference that arose through the dumping of the designated goods, then the importer may request a refund of the dumping duty from the Japanese government upon presenting adequate evidence to support the request. Instigation of the request may result in either refunding the dumping duty up to the amount requested, or a rejection if there is insufficient reason for doing so.

Compliance strategies

9 | What are the practical strategies for complying with an anti-dumping/countervailing/safeguard duty or quota?

To date, the Japanese government has only conducted seven anti-dumping investigations, six of which led to anti-dumping duties being imposed. This includes two that are currently under provisional measures and those for which the duty period has already been completed. In the past, Japan had been reticent about using anti-dumping duty measures, as they might have placed Japanese businesses in a difficult position.

In recent years, there has been an increase in concern over export dumping conduct globally, as economic growth in developing countries has slowed and industries find themselves with overcapacity, and Japanese companies have begun to take measures to fight dumping. The Japanese government has streamlined the process for companies to petition for an anti-dumping investigation, simplified the way in which the investigations themselves are conducted, and taken other measures to improve the domestic anti-dumping system.

CUSTOMS DUTIES

Normal rates and notification requirements

10 Where are normal customs duty rates for your jurisdiction listed? Is there an exemption for low-value shipments, if so, at what level? Is there a binding tariff information system or similar in place? Are there prior notification requirements for imports?

Based on the principle of no taxation without legislation, there are specific laws or treaties that stipulate six main different customs duty rates:

- general rate (Customs Tariff Act): a rate that is set from a long-term perspective based on the state of domestic industry etc;
- temporary rate (Act on Temporary Measures concerning Customs): a provisional, flexible rate applied in special circumstances;
- generalised system of preferences (GSP) rate (Act on Temporary Measures concerning Customs): a rate that is applied to imported goods where the country of origin is a developing country that has requested preferential tariffs and Japan has accepted this request (generalised system of preferences beneficiary);
- least developed countries (LDCs) preferences rate (Act on Temporary Measures concerning Customs): this is a rate that applies specifically to imported goods for which the country of origin is a preferential beneficiary and also an LDC, in which case the tax rate is zero. The LDC preferences rate (zero tax) will also apply in the case of the importation of general preferential goods originating from an LDC;
- WTO treaty tariff rate: this is a rate that is agreed (binding rate) as the maximum duty applicable to imported goods originating from a WTO member country. It also applies to countries with beneficial customs duty treatment, or countries with most-favoured nation status under bilateral treaties; and
- EPA tariff rate: this is a rate that is set out in specific EPAs between Japan and certain other countries. Certain duties are reduced or eliminated for goods originating from such countries according to a schedule in the relevant EPA.

The rates described in the list above are set out in the Customs Tariff Act or other related laws and treaties based on the International Convention on the Harmonised Commodity Description and Coding System (HS Treaty); the customs tariff schedule can be found on the Customs website: www.customs.go.jp/english/tariff/2019_4/index.htm

Goods with a total customs value of ¥10,000 or less per parcel or customs declaration are exempted from customs duty and consumption tax, save that:

- alcoholic beverages and tobacco (of whatever value) are subject both to consumption tax and to liquor tax and tobacco tax, respectively; and
- the exemptions do not apply to goods such as leather bags, leather shoes and knitted apparel, as they are considered inappropriate from the viewpoint of their impact on domestic industries or other circumstances.

General import freight and international parcels with a total customs value of not more than ¥200,000 are subject to simplified tariffs, which sometimes leads to the application of customs rates lower than the general customs rates. For example, cheese subject to simplified tariffs has a customs rate of 5 per cent, although the general customs rates for cheese are in the range of 19.6–40 per cent. However, the simplified tariff rates do not apply to personal items and unaccompanied baggage, goods exempt from tariffs or duty free, and any goods for which it is not appropriate to apply the simplified tariff rates considering the impact on Japanese industries.

An importer may make an enquiry with Customs about the tariff classification (tariff code) and the tariff rate that would be applied to products that the importer is planning to import, and obtain a written ruling in response, before commencing the importation (Advance Classification Ruling System). The tariff classification, tariff rate and statistical code listed on this Advance Classification Ruling System are then applied to the import declaration.

Special rates and preferential treatment

11 Where are special tariff rates, such as under free trade agreements or preferential tariffs, and countries that are given preference listed?

All tariff rates, including preference rates under EPAs, are set forth in the customs tariff schedule on the website listed above.

GSP beneficiaries (countries and territories) are listed at: www.customs.go.jp/english/c-answer_e/imtsukan/1504_e.htm.

12 How can GSP treatment for a product be obtained or removed?

In order to receive preferential tariff treatment, it is necessary for an importer to submit a certificate of origin, the GSP (Form A), at the time of import declaration. This certificate must be issued at the time of exportation by customs authorities or any other officially authorised body, such as a chamber of commerce and industry in the country of origin, based on the declaration made by the exporter. The goods must be imported directly to Japan for preferential tariff treatment.

There is also a system whereby preferential tariffs are no longer available for products that originate from preferential treatment beneficiary countries or regions once the country's or region's economy has developed or achieved a high level of global competitiveness.

Entire graduation

A country or region is excluded from the list of beneficiaries of Japan's GSP scheme for all items when the country or region has been continuously classified as a 'high-income country' in the World Bank Statistics, published by the International Bank for Reconstruction and Development, for three years up to the previous year.

Under a 2017 amendment of the Act on Temporary Measures concerning Customs, the standards for exclusion from the preferential treatment above require the country or region to fulfil both being classified continuously in the World Bank Statistics as an 'upper-middle-income country' for three years; and that the value of exports of the country is no less than 1 per cent of the total value of worldwide exports. The new standards will be implemented from April 2019.

Partial graduation

Products originating from a beneficiary country or region are excluded from preferential treatment when (1) the beneficiary is classified as a 'high-income economy' in the World Bank Statistics of the previous year, and (2) the value of Japan's imports of the product originating from the beneficiary exceeds ¥1 billion and 25 per cent of the total value of Japan's worldwide imports of the product in the trade statistics for the previous two years. From April 2018, the standards of a country subject to (1) above require the country to be classified as an 'upper-middle-income country' in the World Bank Statistics, as well as the value of its exports being no less than 1 per cent of the total value of worldwide exports.

Certain countries or certain products originating from the beneficiary countries or regions are excluded from preferential treatment when certain conditions are met.

13 | Is there a duty suspension regime in place? How can duty suspension be obtained?

Currently, there is no formal duty suspension regime in Japan.

Japan does have a tariff quota system under which a specified quota of certain products may be imported without tariffs or with low tariffs (primary tariff rate) to meet domestic demand for low-priced imported products, but once this quota is met, a relatively high tariff (secondary tariff rate) is applied to further imports in order to protect domestic producers. This tariff quota system differs from the duty suspension regime in that there is a limit to the number of imported goods.

Challenge

14 | Where can customs decisions be challenged in your jurisdiction? What are the procedures?

Any person who is not satisfied with an administrative disposition taken by the Director-General of Customs under the Customs Act or other related laws and regulations may file a protest within three months from the day following the day of the receipt by the petitioner of the notification of the disposition (request for reinvestigation). For a request for reinvestigation, the Director-General of Customs reviews the validity of the administrative disposition and notifies the petitioner of the result with a copy of the decision letter.

If the petitioner is still not satisfied with the decision in response to a request for reinvestigation, it may file an appeal with the Minister of Finance within one month from the day following the day of the delivery of the decision letter. In addition, instead of requesting an investigation, any person who is not satisfied with an administrative disposition taken by the Director-General of Customs may also directly file an appeal to the Minister of Finance within three months from the day following the day of the receipt by the petitioner of the notification of the administrative disposition. These procedures are called a 'request for review'. In a request for review, the Minister of Finance reviews and examines the validity of the administrative disposition and notifies the petitioner of the result with a copy of the written verdict.

If the petitioner is still not satisfied with the decision made by the Ministry of Finance it may file an appeal to the court within, in principle, six months from the day of the receipt of the written verdict.

TRADE BARRIERS

Government authorities

15 | What government office handles complaints from domestic exporters against foreign trade barriers at the WTO or under other agreements?

The government offices that handle complaints from domestic exporters against foreign trade barriers at the WTO or under other agreements are METI, the MoF and other ministries responsible for the specific industry in Japan.

In particular, METI publishes a 'Report on Compliance by Major Trading Partners with Trade Agreements – WTO, FTA/EPA and IIA' and 'METI Priorities Based on the Report', for the purpose of improving compliance among major trading partners whose trade policies and trade measures might not be consistent with the international rules of the WTO etc. The Multilateral Trade System Department and Office for WTO Compliance and Dispute Settlement, Trade Policy Bureau within METI has a webpage dedicated to dealing with enquiries regarding trade policies and measures of foreign countries that are faced by companies and business operators. This office will consider whether the foreign government's measures are consistent with WTO and other international rules and provide advice, including, in some circumstances, assisting with the launch of WTO dispute settlement procedures.

Complaint filing procedure

16 | What is the procedure for filing a complaint against a foreign trade barrier?

The Japanese government takes the approach of using the WTO and other international trade rules to settle disputes regarding international economic issues. When a company, export cooperative or other interested party is faced with a foreign trade barrier and brings the matter to the attention of the ministry responsible for that particular industry, the ministry will interview the interested parties to ascertain the facts. If necessary, the ministry will collaborate with METI and other relevant ministries to handle the matter consistently from the Japanese government's perspective, which can include requesting discussions with the relevant foreign government, and failing a satisfactory outcome through such negotiations, filing a complaint through dispute resolution procedures under the WTO or the relevant EPA.

Grounds for investigation

17 | What will the authority consider when deciding whether to begin an investigation?

When a company, export cooperative or other interested party is faced with a foreign trade barrier and brings the matter to the attention of METI, the MoF and other Japanese ministries responsible, the Japanese government will look at the evidence provided and decide whether to begin an investigation based on whether the foreign government's actions are in violation of WTO or other international rules.

Measures against foreign trade barriers

18 | What measures outside the WTO may the authority unilaterally take against a foreign trade barrier? Are any such measures currently in force?

Japan also uses international trade rules outside the WTO to resolve disputes relating to international economic matters.

If the relevant government authority determines that there is a foreign trade barrier that is against an international trade rule, the Japanese government will conduct bilateral negotiations with the other country and take other appropriate measures, such as investor–state arbitration (where a bilateral investment treaty or BIT exists) and other EPA or BIT dispute settlement processes.

The 2018 edition of the Government White Paper on Unfair Trade noted that, in recent years, due to market distortionary measures by some emerging-market countries, there have been growing concerns that the competitive basis or function of the markets underlying the multilateral free trade system may be being distorted, and there is also a warning that in some developed countries there is a swing back to the 'result-oriented' concept, which evaluates the trade policies and measures of other countries as unfair based only on the disadvantageous result of trade with specific partners.

In contrast, METI is promoting comprehensive efforts to secure a level playing field through the Trilateral Trade Ministers' Meeting among Japan, the US and the EU, and so on, and for reciprocal countermeasures that do not conform to the WTO rules that will not benefit any country, the ministry is responding to the structural issues faced by the multilateral free trade system, such as by improving the WTO dispute resolution procedures and working on the importance of maintaining and strengthening it in various places; in addition, for individual projects the ministry has indicated that it will actively seek solutions

while continuing to make use of bilateral and multilateral consultations and WTO dispute resolution procedures etc.

In December 2017, 70 WTO member countries and regions announced the 'Joint Ministerial Statement on Investment Facilitation for Development', and called for the start of discussions with the aim of developing a multilateral and regional framework on investment facilitation. However, since there is a history of the launch of negotiations being postponed, negotiations on investment rules in the WTO have never been agreed; also in these discussions, given that market access, investment protection and Investor State Dispute Settlements (ISDSs) are excluded from the debate, and that negotiations in the WTO cannot proceed without consensus among all member states and regions, methods outside the WTO, such as bilateral agreements and multilateral discussions, are even now still considered more effective.

Private-sector support

19 | What support does the government expect from the private sector to bring a WTO case?

If an industry wishes to bring a WTO case, it must discuss the case with the relevant government authority in detail. As a part of this consultation process, the industry would be required, at its own cost, to collect data, conduct research and provide necessary information in order to enable the authority to determine whether or not to begin an investigation and bring a WTO case.

Notable non-tariff barriers

20 | What notable trade barriers other than retaliatory measures does your country impose on imports?

Under the Customs Act, any person wishing to import goods must declare them to Customs, obtain an import permit and make payment of customs duty and excise taxes after necessary examination of goods (Import Declaration).

The Customs Act prohibits the importation of the following goods:

- heroin, cocaine, MDMA, opium, cannabis, stimulants, psychotropic substances and other narcotic drugs (excluding those designated by Ministry of Health, Labour and Welfare Ordinance);
- firearms (pistols etc), ammunition (bullets) thereof and pistol parts;
- explosives (dynamite, gunpowder etc);
- precursor materials for chemical weapons;
- germs that are likely to be used for bio-terrorism;
- counterfeit, altered or imitation coins, paper money, banknotes or securities, and forged credit cards;
- books, drawings, carvings and any other goods that may harm public safety or morals (obscene or immoral materials, eg, pornography);
- child pornography;
- goods that infringe upon intellectual property rights; and
- goods that constitute unfair competition under the Unfair Competition Prevention Law.

The Foreign Exchange and Foreign Trade Act and other laws and regulations control the import of cargoes that have an adverse impact on the economy, industries, sanitation, health, public safety or public morals etc in Japan by requiring permits, approvals etc or inspections by administrative agencies or satisfaction of other conditions on the import of such cargoes. For example, imported plants are required to go through plant quarantine, and the importation of certain plants from specific areas, harmful plants and animals such as insects, mites or bacteria, and soil and plants to which soil is attached is banned unless permission is obtained for use in testing and research etc (Plant Protection Act). Also, in order to prevent the invasion of infectious animal diseases from overseas, imports of cloven-hoofed animals such as cattle, pigs and sheep, equine animals and fowl are banned unless a certificate of import quarantine is obtained upon inspection by the Animal Quarantine Service of the Ministry of Agriculture, Forestry and Fisheries or a permit is obtained from the Minister of Agriculture, Forestry and Fisheries (Act on Domestic Animal Infectious Diseases Control).

The importing of endangered animals and plants is subject to restrictions under the Convention of International Trade in Endangered Species of Wild Fauna and Flora (Convention) and it is necessary to obtain an export permit issued by the government authority as stipulated by the Convention, as well as an import licence issued by METI.

EXPORT CONTROLS

General controls

21 | What general controls are imposed on exports?

For exports from Japan, an export declaration, inspection and permit are required under the Customs Act. An export declaration requires submission of an export declaration in a prescribed form, an invoice, a package list and other documents. When an exporter wishes to export cargo (or technology; hereinafter the same) that requires a permit or approval under laws or regulations other than the Customs Act, the exporter must be able to prove to customs that these requirements have been met.

Government authorities

22 | Which authorities handle the controls?

The Customs and Tariff Bureau of the MoF handles export customs clearance procedures, though permits and approvals for export of certain cargo are governed by other government agencies; the most important of these is the Foreign Exchange and Foreign Trade Act (Foreign Exchange Act), METI being the government agency responsible for permits and approvals for export of cargo under the Foreign Exchange Act.

Special controls

23 | Are separate controls imposed on specific products? Is a licence required to export such products? Give details.

For security purposes, the Foreign Exchange Act controls the export of certain cargo using two methods: list control and catch-all control.

Specific cargo subject to export controls is designated in the Export Trade Control Order (Export Order) and the Foreign Exchange Order. List control requires exporters to obtain an export permit from METI if their export cargo is on the control list and falls within the specifications set out in the Ordinance of the Ministry Specifying Goods and Technologies Pursuant to Provisions of the Appended Table 1 of the Export Control Order and the Appended Table of the Foreign Exchange Order. Based on international export control regimes, the said list includes arms and other dual-use equipment that may be used for the development of weapons of mass destruction.

Catch-all control is a system whereby exporters must obtain a permit from METI for their export cargo other than those included in the control list (excluding food and timbers etc) if notified by METI to apply for an export permit (inform requirement) or if it is judged, based on expected usage and the end user, that such cargo might be used for the development of weapons of mass destruction.

Supply chain security

24 | Has your jurisdiction implemented the WCO's SAFE Framework of Standards? Does it have an AEO programme or similar?

In order to implement the WCO's SAFE Framework of Standards, Japan amended the Customs Tariff Act and relevant laws in 2012 to introduce advance filing rules, which require shipping companies to submit information electronically to customs for maritime container cargo to be loaded on a vessel bound for a port in Japan at least 24 hours before departure of the vessel from the port of loading. In addition, the Customs and Tariff Bureau of the MoF implemented the authorised economic operator (AEO) programme, a system conforming with international standards. Under this programme, companies that have well-organised cargo security management and compliance systems are given the benefit of simple and reduced customs clearance procedures. Currently, Japan has signed mutual recognition of this AEO programme with 10 other countries and regions.

Applicable countries

25 | Where is information on countries subject to export controls listed?

The catch-all control described in question 23 only applies to exports shipped to certain regions, and the Export Order exempts certain countries ('white countries') from the catch-all control. Some of the catch-all controls provide for various cases where prior permits are required for cargo exported to countries and regions subject to a UN arms embargo, as listed in the Export Order: www.meti.go.jp/policy/anpo/securityexportcontrol3.html.

For the purposes of national security and international cooperation etc, the Foreign Exchange Act requires exporters to obtain approval from METI for the export of cargos to certain regions. The destinations subject to this requirement are listed in the Export Order.

Named persons and institutions

26 | Does your jurisdiction have a scheme restricting or banning exports to named persons and institutions abroad? Give details.

METI publishes an 'End User List', which lists foreign companies and organisations believed to be involved in the development of weapons of mass destruction, etc. The End User List is not an embargo list, though export to companies and organisations on the list requires a permit from METI unless it is clear that the export cargo is not to be used for the development of weapons of mass destruction based on the way in which the cargo will be used, the way in which the cargo is traded, the terms of the transaction and other factors.

The End User List (as of 26 April 2019) can be found at: www.meti.go.jp/policy/anpo/hp/190426_3.pdf.

Penalties

27 | What are the possible penalties for violation of export controls?

Customs Act

- 10 years imprisonment with labour or a fine of not more than ¥30 million, or both for an individual;
- forfeiture of the embargoed goods and non-permitted export goods; and
- dual liability also applies.

Foreign Exchange Act

- a fine of not more than ¥1 billion (in the case of a juridical person) and 10 years imprisonment with labour and/or a fine of not more than ¥30 million (in the case of an individual), if five times the price of the subject of the violation exceeds ¥1 billion (in the case of a juridical person), ¥30 million (in the case of an individual), the fine increases to not more than five times that price;
- administrative sanction for banned export of cargos for a maximum of three years, and prohibition on taking office as an officer in charge of another company; and
- dual liability also applies.

FINANCIAL AND OTHER SANCTIONS AND TRADE EMBARGOES

Government authorities

28 | What government offices impose sanctions and embargoes?

The MoF and METI have the authority to implement economic sanctions if they are deemed necessary in order to perform international agreements; they are deemed necessary for Japan to contribute to international efforts for world peace; or a cabinet decision is made to take countermeasures deemed necessary to maintain the peace and safety of Japan.

Applicable countries

29 | What countries are currently the subject of sanctions or embargoes by your country?

Currently, comprehensive economic sanctions are in force in respect of North Korea, and partial economic sanctions are in force in respect of Iran, Libya, Syria, Somalia, Ukraine and Iraq.

Details are at: www.meti.go.jp/policy/external_economy/trade_control/01_seido/04_seisai/seisai_top.html (Japanese only).

Specific individuals and companies

30 | Are individuals or specific companies subject to financial sanctions?

Yes. See 'List of economic sanctions and individuals/activities subject thereto' (as of 26 April 2019), www.mof.go.jp/international_policy/gaitame_kawase/gaitame/economic_sanctions/list.html (Japanese only).

OTHER RELEVANT ISSUES

Other trade remedies and controls

31 | Describe any trade remedy measures, import or export controls not covered above that are particular to your jurisdiction.

Not applicable.

UPDATE & TRENDS

Key developments

32 | Are there any emerging trends or hot topics in trade and customs law and policy in your jurisdiction?

Brexit

According to the Customs and Tariff Bureau of the Ministry of Finance, if the Draft Agreement on the withdrawal of the United Kingdom from the EU, which was issued on 1 February 2019, becomes effective, a transition period will be established after Brexit, and the Agreement between

the EU and Japan for an Economic Partnership will apply to the UK until December 31, 2020. Conversely, if the transition period cannot be established in the Draft Agreement, the Agreement between the EU and Japan for an Economic Partnership will not apply to the UK after Brexit; therefore, the most favored tax rate will apply to transactions between Japan and the UK. Further, both the Japanese and British prime ministers have indicated that they will conclude a bilateral agreement based on the EPA between Japan and the EU after Brexit.

Withdrawal of the US from TPP

After the US left the TPP Agreement, TPP11, with the other 11 member countries excluding the US, became effective on 30 December 2018. Japan has now started negotiations with the US for a Trade Agreement on Goods (TAG), and it was confirmed that the US will not invoke additional tariff measures on Japanese automobiles and parts during the negotiations. The US has moved to introduce a restraining provision against the conclusion of any FTA with non-market economies in TAG, and this provision may be a major obstacle to Japan's promotion of mega-FTAs (RCEP, Japan–China–Republic of Korea Free Trade Agreement).

Slowdown of TTIP and RCEP

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

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

The EU–Japan EPA came into effect on 1 February 2019. In addition to matters relating to tariffs on industrial products and agriculture, forestry and fishery products, and matters relating to trade in services, investment and e-commerce, the EU–Japan EPA covers state-owned enterprises and subsidies, intellectual property (geographical indication), and matters concerning regulatory cooperation etc. No agreement was reached on the investment rules concerning investment protection and investment dispute resolution procedures between investors and investment recipient countries.

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LEGAL FRAMEWORK

Domestic legislation

1 What is the main domestic legislation as regards trade remedies?

The main legislation governing trade remedies in Jordan is the National Production Protection Law No. 21 of 2004. The law has two bylaws: the National Production Protection Regulation No. 55 of 2000, regulating safeguard investigations and measures, and the Anti-Dumping and Anti-Subsidies Regulation No. 26 of 2003, regulating anti-dumping (AD) and anti-subsidies investigations and measures. The rules of the law and regulations were derived from the WTO Agreements on Safeguards, Anti-Dumping and Subsidies and Countervailing Measures.

The law and regulations are published in Arabic at the website of the Ministry of Industry, Trade and Supply at www.mit.gov.jo/Pages/viewpage?pageID=164.

International agreements

2 In general terms what is your country's attitude to international trade?

Jordan is an open market economy, and has been embracing market liberalisation policies since its accession to the WTO in April 2000. Today, Jordan has six effective FTAs: the Greater Arab Free Trade Agreement (GAFTA) and bilateral agreements with Canada, EFTA, the EU, Singapore and the US. It is in the process of negotiating with Kenya and Mexico.

Jordan has a good track record of compliance with WTO decisions. To date, no Jordanian measures have been contested at the Dispute Settlement Body of the WTO. Also, Jordanian authorities and courts give due consideration to the WTO's dispute settlement panel's decisions, as observed in various legal precedents concerning trade remedy and customs cases.

TRADE DEFENCE INVESTIGATIONS

Government authorities

3 Which authority or authorities conduct trade defence investigations and impose trade remedies in your jurisdiction?

The National Production Protection Directorate (NPPD) is the competent authority in Jordan investigating trade remedy complaints (ie, anti-dumping, subsidies and countervailing measures, and safeguards). The NPPD is not an independent governmental body; rather, it is a directorate within the Ministry of Industry, Trade and Supply, which investigates trade remedy petitions and recommends proper measures to the Minister of Industry, Trade and Supply.

As regards enforcement, the Customs Department is the competent authority imposing trade remedy measures against subject imports through the levy and collection of tariff rates (ad valorem or specific) and supervision of quotas.

The NPPD's web address is https://mit.gov.jo/Pages/viewpage.aspx?pageID=192.

The Customs Department's web address is www.customs.gov.jo.

Complaint filing procedure

4 What is the procedure for domestic industry to start a trade remedies case in your jurisdiction? Can the regulator start an investigation ex officio?

According to the law, trade remedy petitions should be filed by the domestic industry of a specific product as a whole, or a major proportion thereof, in order for such petition to be considered to have been applied by or on behalf of the domestic industry. The NPPD is also entitled to self-initiate investigations if there is concrete evidence that imports are increasing in the market or being sold at dumped or subsidised prices, causing injury to the domestic industry producing like products or threat thereof.

As a requirement for initiating the safeguard investigation, the applicants of the safeguard petition must constitute not less than 25 per cent of the whole domestic industry. As regards anti-dumping and countervailing measures petitions, initiation shall be accepted by the NPPD if the petition has been supported by domestic producers whose production constitutes more than 50 per cent of the total production of the like product produced by the domestic industry expressing either support for or opposition to the application. However, no AD or SCM investigation shall be initiated if domestic producers supporting the petition account for less than 25 per cent of total production of the like product produced by the domestic industry.

The domestic industry may be represented by any relevant industrial union or chambers for filing SG, AD or SCM petitions.

As regards official fees, the filing of a trade remedy petition is subject to an official fee of 250 Jordanian dinars. Upon filing, the NPPD examines the petition and must decide whether or not to initiate the investigation within 14 days from the filing date of a 'complete' petition, subject to an extension for a similar period.

Evidence supporting the petitions usually constitutes financial statements of the domestic industry duly ratified by an authorised auditor, invoices, price lists, social security documents, and samples of the domestic product and the imported products.

If the petition is accepted for initiation purposes, applicants are required to pay initiation fees of 750 Jordanian dinars. Agricultural producers petitioning against agricultural imports are exempted from filing and initiation fees.

Contesting trade remedies

5 What is the procedure for foreign exporters to defend a trade remedies case in your jurisdiction?

The law requires the NPPD to give all interested parties, including foreign exporters, ample opportunity to participate in the investigation. In safeguard investigations, exporters are usually notified through Jordan's notification to the WTO on the initiation of investigation as required by law and the Safeguards Agreement, providing all relevant information concerning the petition, procedures and time frames of the investigation. The NPPD is also required to publish an initiation advertisement in two daily newspapers containing information on the petition in addition to procedures of the investigation and the deadlines for all interested parties to participate in the investigation. Additionally, in practice, the NPPD usually notifies the embassies of major exporting countries on the initiation of investigation.

As for anti-dumping and anti-subsidies investigations, the law obligates the NPPD to notify known foreign exporters upon receipt of AD or SCM petitions. The law also requires the NPPD to publish an initiation advertisement in two daily newspapers containing all procedural timelines and participation requirements of the investigation, including the collection and submission of questionnaires, deadlines for written submissions, and the public hearings.

The time frames of the investigations intervals are not set by the law or the regulations; rather they are at the discretion of the NPPD to set. In the safeguard investigations conducted by the NPPD, such time frames are usually set in the initiation decision, the initiation notification and the newspaper advertisement. In practice, the NPPD usually gives all interested parties in a safeguard investigation 21 days to request participation and to collect questionnaires, one month to return the questionnaires from the receipt date and approximately two months to provide written submissions, whether in support of or against the petition.

The duration of a safeguard investigation, according to law, is six months from the initiation date, subject to extension in special circumstances for an additional period of two months. The duration of anti-dumping and anti-subsidies investigations is 12 months, subject to an extension of an additional period of six months.

WTO rules

6 Are the WTO rules on trade remedies applied in national law?

Upon joining the WTO, Jordan conformed its national legislation with the WTO Agreements, including the agreements on safeguards, anti-dumping and subsidies and countervailing measures. The rules of the National Production Protection Law and its by-laws have been completely derived from said WTO agreements. On the other hand, the WTO Agreements are superior to national laws in the Jordanian legal system, as most of the related national laws contain provisions giving the WTO Agreements and practise due consideration when interpreting the rules. Moreover, the Law for Ratifying the Accession of Jordan to the WTO No. 4 for the Year 2000 accords superiority to the WTO Agreements over national laws when a conflict arises, and this has been followed and considered by Jordanian courts and competent authorities.

Jordan has not treated any country as a non-market economy, and has not officially declared its position on same, especially since no anti-dumping investigation has yet been initiated in Jordan.

Appeal

7 What is the appeal procedure for an unfavourable trade remedies decision? Is appeal available for all decisions? How likely is an appeal to succeed?

According to the law, only final decisions (determinations) can be appealed before the Administrative Court. An affected party may file a lawsuit before the Administrative Court within 60 days from the issuance date. The judgments of the Administrative Court may be appealed to the Higher Administrative Court.

Appeals before the Administrative Court usually succeed if there is a significant procedural violation committed by the relevant administrative institution in establishing the decisions or determinations.

Review of duties/quotas

8 How and when can an affected party seek a review of the duty or quota? What is the procedure and time frame for obtaining a refund of overcharged duties? Can interest be claimed?

With regard to AD and SCM measures, any affected party may request review of the measures at any time after imposition provided that such party can present justified reasons to conduct the review. As for safeguards, the review request is not available for affected parties under the law. However, the law obligates the NPPD to conduct a mid-term review provided that the duration of the safeguard measure is not less than three years. Any trade remedy measure can be reviewed after six months of its application under competition law.

To obtain a refund of overcharged duties, the affected party should submit a refund claim, supported by the relevant customs statement, to the Department of Value Affairs at the Customs Directorate. Upon receipt and acceptance of the claim, the Value Affairs Department drafts a refund memo for examination by the Audit Office, the Department of Income Tax and the Finance and Collection Department within the Customs Directorate, and if the memo is approved by the three departments the Value Affairs Department issues a cheque to the claimant for the amount of the extra duty paid.

Compliance strategies

9 What are the practical strategies for complying with an anti-dumping/countervailing/safeguard duty or quota?

A practical strategy for complying with trade remedy measures is typically to contest the measures and to seek review and refunds on a regular basis under the National Production Protection Law and Competition Law. Importers may also seek re-sourcing of the product from other countries or reformulating them.

CUSTOMS DUTIES

Normal rates and notification requirements

10 Where are normal customs duty rates for your jurisdiction listed? Is there an exemption for low-value shipments, if so, at what level? Is there a binding tariff information system or similar in place? Are there prior notification requirements for imports?

Customs duty rates are listed in the Harmonized Tariff Schedule published annually in the Official Gazette at the outset of each year. Also, modifications of tariff rates are published regularly in the same Gazette. The complete tariff schedule can be found at the Customs Directorate's website: www.customs.gov.jo.

Normally under Jordanian customs law only non-commercial shipments of foodstuff, children's toys, footwear and apparel that are

valued at or below a monthly threshold of US$140.80 (per individual) are excluded from the requirement to provide a certificate of origin, and hence exempted from customs duties and taxes. Low-valued commercial shipments are not excluded under the customs law.

The Customs Directorate has an information system for Jordanian companies to assess the tariff classification of products, which can be accessed at www.customs.gov.jo/ar/e_services.aspx (currently in Arabic, as the English version is under construction). The information system, however, is not binding.

Certain types of imports are subject to non-automatic licensing under Imports and Exports Law No. 21 of 2001 for reasons of protection of health, safety, the environment, national security, public order and morals, and the conservation of natural resources. Importers of products subject to non-automatic licensing are required to obtain prior approvals from certain governmental agencies to obtain an import licence from the Ministry of Industry, Trade and Supply. Non-automatic licences are issued within 15 working days of submission of documents. The licensee has the right to import the quantity specified in the licence during the period of its validity. The web portal for inquiring about prior approvals is http://e-service.mit.gov.jo:8888/E-Services/faces/administration/maintainInstituteAims.jsp.

Special rates and preferential treatment

11 | Where are special tariff rates, such as under free trade agreements or preferential tariffs, and countries that are given preference listed?

All tariff rates, whether preferential or normal, are listed on the Customs Directorate's website at https://services.customs.gov.jo/JCcits/sections.aspx. The system also lists countries enjoying tariff preferential treatment. The system is in Arabic and the English version is under construction.

12 | How can GSP treatment for a product be obtained or removed?

Jordan does not participate in the Global System of Trade Preferences (GSTP). Jordan receives trade preferences under the Generalized System of Preferences schemes of Japan, New Zealand, Belarus, Kazakhstan, Australia and the Russian Federation. Also, Jordan has established Qualified Industrial Zones (QIZs) under the Jordan–US Free Trade Agreement where most QIZ factories export their products to the US with preferential trade preferences.

To obtain GSP treatment for a certain product, importers should apply to the Industrial Development Directorate (IDD) at the Ministry of Industry, Trade and Supply by completing a form provided by the IDD for this purpose.

13 | Is there a duty suspension regime in place? How can duty suspension be obtained?

Duty suspension is possible under Jordanian Customs Law No. 20 of 1998, as it can be requested for temporary admission imports, imports destined for free trade zones and raw materials imported to manufacture products in Jordan for exportation purposes. Duty suspension can be obtained by applying to the Customs Directorate, provided the applicant provides a bank guarantee or cash guarantee as required by article 88 of the Customs Law.

Challenge

14 | Where can customs decisions be challenged in your jurisdiction? What are the procedures?

Under article 80 of the Customs Law, affected parties may file administrative appeals of decisions pertaining to the value of the goods, their origin, their standards or their tariff classification to a dispute settlement committee appointed by the Minister within the Customs Directorate. The committee reviews the dispute and then recommends proper measures to the Customs General Director. The decisions of the General Director can be appealed to the Customs Court of First Instance within 30 days from date of notification of the decision.

As for judicial appeals, affected parties may challenge any customs decision by filing a lawsuit before the Customs Court of First Instance. The Customs Court has jurisdiction to review any violation of the rules of customs law, free trade agreements, standards and metrology law, investment law and sales tax law.

The judgments of the Customs Court of First Instance can be appealed to the Customs Appellate Court. The judgments of the Customs Appellate Court can be appealed to the Cassation Court.

TRADE BARRIERS

Government authorities

15 | What government office handles complaints from domestic exporters against foreign trade barriers at the WTO or under other agreements?

There is no specific office or procedure set forth by Jordanian law for complaining about foreign trade barriers under the WTO or free trade agreements. However, in practice, complaints are usually filed with the Ministry of Industry, Trade and Supply, which examines the complaints and conducts the necessary communications with the concerned agencies in the relevant foreign countries through Jordanian embassies, delegations and commercial attachés.

Complaint filing procedure

16 | What is the procedure for filing a complaint against a foreign trade barrier?

See question 15.

Grounds for investigation

17 | What will the authority consider when deciding whether to begin an investigation?

The ministry does not conduct an investigation, but would ask applicants to provide documents supporting their allegations of the existence of technical barriers against their exports.

Measures against foreign trade barriers

18 | What measures outside the WTO may the authority unilaterally take against a foreign trade barrier? Are any such measures currently in force?

Jordan may suspend concessions provided under free trade agreements if a technical barrier is unjustly imposed against certain Jordanian exports by a free trade partner country, and in accordance with the rules of such free trade agreements. Also, the government may apply different measures against non-WTO members, such as prohibition and quantitative restrictions. Recently the Government of Jordan has prohibited importation of 194 products from Syria in response to

technical barriers applied against the entry of several Jordanian products to the Syrian market.

Private-sector support

19 | What support does the government expect from the private sector to bring a WTO case?

Jordan has never raised any dispute with member countries at the WTO level. However, whenever there is a claim by any affected Jordanian exporter against technical barriers applied by member countries against Jordanian imports, the government expects claimants to cover lawyers' fees and all associated expenses, and to provide the necessary data, information and evidence supporting their allegations. The same applies to trade remedies issues.

Notable non-tariff barriers

20 | What notable trade barriers other than retaliatory measures does your country impose on imports?

Under Import and Export Law No. 21 of 2001, the government can impose prohibitions or restrictions on imports. Some imports are prohibited by reason of public safety, health and environment, or protection of national resources, or to implement UN Security Council resolutions.

Import licences, both automatic and non-automatic, are issued mainly by the Ministry of Industry, Trade and Supply. Importation Decree No. 109 of 2015 lists the products subject to automatic and non-automatic licences.

Non-automatic import licences are used for the protection of health, safety, national security, public order, the environment, morals and the conservation of natural resources. They may also be issued for products subjected to quantitative restrictions.

The Ministry of Agriculture is responsible for SPS measures to protect animal and plant health against pests and diseases.

EXPORT CONTROLS

General controls

21 | What general controls are imposed on exports?

Export controls on certain products take the form of export prohibitions, restrictions and licensing as regulated under the Import and Export Law No. 21 of 2001.

Export prohibition can be imposed on certain products to fulfil international obligations, such as for nuclear weapons and chemical products. Some products can also be subjected to export fees or temporary fees to prevent shortages of certain products in the local market.

Government authorities

22 | Which authorities handle the controls?

Generally, export prohibitions and licensing arrangements for all products are handled by the Ministry of Industry and Trade, except for agricultural products, which are arranged by the Ministry of Agriculture. Such controls are enforced by the Customs Directorate.

Export fees are applied by different governmental agencies. For example, export fees on mining and quarrying products are collected by the Natural Resources Authority, and on agricultural products by the Ministry of Agriculture.

Special controls

23 | Are separate controls imposed on specific products? Is a licence required to export such products? Give details.

There are separate controls imposed on specific products, such as wheat flour and dual-use materials. For example, wheat flour and other wheat products are subject to export licensing arrangements to ensure that the consumer subsidies granted to these products are reimbursed by exporters when the products are exported.

Also, some controls are imposed to fulfil international obligations, such as for nuclear weapons and chemical products, and those on endangered species. Jordan is a contracting party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and a signatory to the Chemical Weapons Convention and the Treaty on the Non-Proliferation of Nuclear Weapons.

Supply chain security

24 | Has your jurisdiction implemented the WCO's SAFE Framework of Standards? Does it have an AEO programme or similar?

Yes. Jordan does implement the WCO's SAFE Framework of Standards. The Customs Directorate has applied an AEO programme since 2005. The programme title is the Golden List, designed to enhance the security and facilitation of international trade.

Applicable countries

25 | Where is information on countries subject to export controls listed?

Export controls are not specific to certain countries. However, they are published in the Official Gazette. Information on export controls can be requested from the Directorate of Trade of the Ministry of Industry, Trade and Supply (www.mit.gov.jo/Pages/viewpage.aspx?pageID=136).

Named persons and institutions

26 | Does your jurisdiction have a scheme restricting or banning exports to named persons and institutions abroad? Give details.

Yes. However, the information is not publicly available, but can be requested by importers from the Central Bank of Jordan.

Penalties

27 | What are the possible penalties for violation of export controls?

The penalties for violating export controls vary according to the type of control applied. Violations of export prohibitions are subject to criminal liabilities under customs law, where the penalty for exporting a product prohibited from exportation is a fine not less than 50 Jordanian dinars up to 1,000 Jordanian dinars, and if such violation is repeated the violator would face imprisonment for one month up to three years. Fees violations are subject to different fines regulated under the different laws organising export fee payments for each concerned institution.

FINANCIAL AND OTHER SANCTIONS AND TRADE EMBARGOES

Government authorities

28 | What government offices impose sanctions and embargoes?

The Central Bank of Jordan (www.cbj.gov.jo).

Applicable countries

29 What countries are currently the subject of sanctions or embargoes by your country?

Such information is not published publicly, but may be requested by importers from the Central Bank of Jordan at www.cbj.gov.jo.

Specific individuals and companies

30 Are individuals or specific companies subject to financial sanctions?

Such information is not published publicly, but may be requested by importers from the Central Bank of Jordan at www.cbj.gov.jo.

OTHER RELEVANT ISSUES

Other trade remedies and controls

31 Describe any trade remedy measures, import or export controls not covered above that are particular to your jurisdiction.

Not applicable.

UPDATE & TRENDS

Key developments

32 Are there any emerging trends or hot topics in trade and customs law and policy in your jurisdiction?

The Jordanian government terminated the FTA with Turkey on 22 November 2018. The Jordanian government has stated subsequently that it will be reviewing and analysing all FTAs signed by Jordan to reassess their impact on Jordan's economy.

The Jordanian government recently reached an agreement with the EU to ease rules of origin for Jordanian exports and to include all Jordanian companies across Jordan, not only those operating in development areas and free zones.

The controversial amendments to income tax law have been published recently in the amended Law No. 38 of 2018. The new amendments have increased income taxes on the industrial sector and have terminated the export subsidies that Jordanian exports enjoyed for the last two decades in exempting profits generated from exportation from income tax. Also the new amendments have introduced, for the first time, a 20 per cent income tax on e-commerce businesses.

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LEGAL FRAMEWORK

Domestic legislation

1 What is the main domestic legislation as regards trade remedies?

The Customs Act and the Act on the Investigation of Unfair International Trade Practices and Remedy against Injury to Industry (the Trade Remedies Investigation Act) are the two main domestic laws as regards trade remedies in Korea.

English versions of the Customs Act and the Trade Remedies Investigation Act are available at http://elaw.klri.re.kr/eng_service/lawView.do?hseq=37150&lang=ENG and http://elaw.klri.re.kr/eng_service/lawView.do?hseq=31963&lang=ENG.

International agreements

2 In general terms what is your country's attitude to international trade?

Korea is a member of the WTO, which supports free trade. Korea has entered into 15 free trade agreements (FTAs) with Chile, Singapore, EFTA, ASEAN, India, the EU, Peru, the US, Turkey, Australia, Canada, China, Colombia, New Zealand and Vietnam. Korea has also concluded an FTA negotiation with six Central American countries: Costa Rica, Guatemala, Honduras, Panama, El Salvador and Nicaragua. Korea has complied with WTO decisions in good faith. As to Korea's track record on compliance with WTO decisions, an article 21.5 panel under the Dispute Settlement Understanding has been requested only once out of eight WTO dispute cases in which Korea was the losing party.

TRADE DEFENCE INVESTIGATIONS

Government authorities

3 Which authority or authorities conduct trade defence investigations and impose trade remedies in your jurisdiction?

Trade remedy investigations and trade remedy measures are conducted by different government bodies. Trade remedy investigations are conducted by the Korea Trade Commission (KTC) (www.ktc.go.kr:20443/en/main.do), a government body within the Ministry of Trade, Industry and Energy (MOTIE). If affirmative decisions are made by the KTC, the Ministry of Strategy and Finance (MOSF) (english.mosf.go.kr) imposes trade remedy measures such as anti-dumping duties, countervailing duties and safeguard measures. The Korea Customs Service (KCS) is responsible for collecting any duties arising from trade remedy cases (www.customs.go.kr/kcshome/site/index.do?layoutSiteId=english).

Complaint filing procedure

4 What is the procedure for domestic industry to start a trade remedies case in your jurisdiction? Can the regulator start an investigation ex officio?

With respect to anti-dumping or countervailing duty investigations, persons interested in the domestic industry that suffers material injury etc, under article 51 of the Customs Act, or 'the minister of the competent ministry in charge of such domestic industry' may ask the Minister of Strategy and Finance to levy anti-dumping or countervailing duties as prescribed by Ordinance of the Ministry of Strategy and Finance, and such request shall be deemed a request filed with the KTC established pursuant to the provisions of article 27 of the Act on the Investigation of Unfair International Trade Practices and Remedy against Injury to Industry (the Act) for making an investigation necessary to levy anti-dumping or countervailing duties (article 51 of the Customs Act and articles 59 and 73 of the Enforcement Decree of the Customs Act). As for safeguard investigations, where the increased import of particular goods is causing, or is feared to cause, serious injury to a domestic industry that produces the same kind of goods as the particular goods or goods in direct competition with the particular goods, any interested person in such domestic industry or the heads of the central administrative agencies in charge of the domestic industry may apply to the KTC for an investigation into the injury to the domestic industry caused by the importing of such goods (article 15 of the Act).

For anti-dumping duty investigations, evidential data fully attesting to the fact of dumping goods imported and material injury etc caused thereby must be included in the filing. For safeguard investigations, evidence of serious injury caused by increased imports must be included in the filing (article 59.4 of the Enforcement Decree of the Customs Act). For countervailing duty investigations, adequate evidential data concerning the fact of importing goods for which subsidies etc are paid and the fact of material injury etc caused thereby must be provided to the KTC (article 74.2 of the Enforcement Decree of the Customs Act). As for safeguard investigations, the details, scope and duration of measures that are necessary for remedying the injury to the domestic industry concerned, where there is serious injury or a threat of serious injury to the domestic industry concerned, must be provided to the KTC (article 15 of the Enforcement Decree of the Act).

Upon receiving a request for an anti-dumping or countervailing duty investigation, the KTC shall decide whether to make an investigation into the fact of dumping or importing goods for which subsidies etc are paid, and the fact of damage etc caused thereby, within two months from the day on which such request is received. Upon receipt of any safeguard application, the KTC shall decide whether to commence an investigation in consultation with the head of a related central administrative agency within 30 days from the date of the application.

Any person who intends to request an anti-dumping duty investigation shall furnish the data including the information on the relevant

goods, material injury etc caused by the import of the relevant goods to the domestic industry, the extent of support by domestic producers of the goods of the same kind for the relevant request of an investigation and evidential data fully attesting to the fact of dumping goods imported and material injury etc caused thereby (article 59.4 of Enforcement Decree of the Customs Act). Any person interested in the domestic industry that suffers material injury etc due to the import of goods for which subsidies etc are paid shall, when he or she intends to file an application for an investigation thereof, file an application stating the matters, including the information on the relevant goods, material injury etc caused by the import of the relevant goods to the domestic industry and the extent of support by domestic producers of the goods of the same kind for the relevant request of an investigation, appended by related evidential data, with the KTC (article 73.4 of Enforcement Decree of the Customs Act). A person who applies for a safeguard investigation, as to whether increased imports of particular goods cause injury to the domestic industry in accordance with article 15 of the Act, shall submit to the KTC an application indicating the information including the goods concerned, the circumstances in which imports of the goods concerned have caused or are threatening to cause serious injury to the domestic industry and the details, scope and duration of measures that are necessary for remedying the injury to the domestic industry concerned, where there is serious injury or a threat of serious injury to the domestic industry concerned etc accompanied by the materials verifying the details of the request (article 15 of the Enforcement Decree of the Act).

If the Trade Commission decides that an increase in the import of particular goods causes or is feared to cause serious injury to domestic industry, it may undertake an ex officio investigation (article 16.3 of the Act). There is no explicit provision on whether the KTC may undertake an ex officio investigation in case of an anti-dumping or countervailing duty.

Contesting trade remedies

5 What is the procedure for foreign exporters to defend a trade remedies case in your jurisdiction?

When the KTC determines to commence an anti-dumping or countervailing duty investigation, it shall notify the applicant for such investigation, the government of the supplying country of the relevant goods, a supplier and other interested persons of matters concerning the determination of the investigation commencement and shall publish such matters in the Official Gazette within 10 days from the day on which the decision to commence the investigation is made (articles 60.3 and 74.3 of the Enforcement Decree of the Customs Act). However, where a decision on whether to commence a safeguard investigation is made, the KTC shall publish such fact in the Official Gazette (article 16.2 of the Enforcement Decree of the Act).

Exporters who receive questionnaires from the KTC must notify the KTC as to whether or not they intend to respond to such questionnaires by no later than three weeks from the initiation of the investigation.

Exporters who are not specifically identified by the KTC may submit an application to the KTC seeking voluntary participation in the investigation within three weeks of the initiation of the investigation. The KTC has discretion in deciding whether to accept such an application, typically taking into consideration the KTC's workload. If accepted, the KTC will send a questionnaire to such voluntary respondents, or inform them in writing that they are not included in the investigation.

The Minister of Strategy and Finance or the KTC may, when deemed necessary or there is a request from any interested person, give such interested person an opportunity to state his or her opinion at a public hearing etc or persons in conflict of their interests an opportunity to consult with each other (articles 64.8 and 78.8 of the Enforcement Decree of the Customs Act).

For anti-dumping and countervailing duty investigations, when any supplier is asked whether he or she has been involved in dumping goods or not, he or she shall be given a period of at least 40 days from the day on which a written inquiry is delivered to him or her for answering such inquiry, and if the relevant supplier asks to extend such period, citing the grounds therefor, proper consideration shall be given to his or her request (article 64.1 of the Enforcement Decree of the Customs Act). The KTC may also issue a supplemental questionnaire. A one or two-week extension may generally be granted, provided that sufficient reasons for the extension are provided.

The KTC shall conduct a preliminary investigation into whether there is adequate evidence presuming the existence of the fact of dumping or importing goods for which subsidies etc are paid, and the fact of material injury etc caused thereby, and report the results thereof to the Minister of Strategy and Finance within three months from the day on which the matters concerning the determination of the investigation commencement are published in the Official Gazette (articles 61.2 and 75.2 of the Enforcement Decree of the Customs Act). The Minister of Strategy and Finance shall determine whether to take provisional measures and the contents thereof within one month from the day on which the results of the preliminary investigation are reported. If deemed necessary, the period of one month may be extended by up to 20 days (articles 61.3 and 75.3 of the Enforcement Decree of the Customs Act). The KTC shall commence a full-scale investigation beginning from the day following the day on which the results of a preliminary investigation are reported unless special grounds prescribed by Ordinance of the MOSF exist that make it impossible to do so, and the results of such full-scale investigation shall be reported to the Minister of Strategy and Finance within three months from the day on which the full-scale investigation commences (articles 61.5 and 75.5 of the Enforcement Decree of the Customs Act). Where necessary to extend the investigation period in connection with the investigation above and any interested person requests the extension of the investigation period, citing good cause, the KTC may extend the investigation period by up to two months (articles 61.6 and 75.6 of the Enforcement Decree of the Customs Act).

For anti-dumping duty investigations, where the Minister of Strategy and Finance receives the results of a full-scale investigation, he or she shall determine whether to levy anti-dumping duties and substances thereof within 12 months from the date on which such results are published in the Official Gazette and take measures to levy anti-dumping duties. Where any special reason is deemed to exist, he or she may take measures to levy anti-dumping duties within 18 months from the date of publication in the Official Gazette (articles 61.6 and 61.7 of the Enforcement Decree of the Customs Act).

For countervailing duty investigations, the Minister of Strategy and Finance shall decide whether to levy a countervailing duty and the contents thereof, and take a measure to impose such countervailing duty within one month from the day on which the results of the full-scale investigation are received. If deemed necessary, the period of one month may be extended by up to 20 days. The Minister of Strategy and Finance shall take a measure to levy a countervailing duty within one year from the day on which the matters concerning the determination on the commencement of an investigation are published in the Official Gazette. If special reasons are deemed to exist, the Minister of Strategy and Finance may take the measure to impose such countervailing duty within 18 months from the day on which the matters concerning the determination on the commencement of such investigation are published in the Official Gazette (articles 75.7 and 75.8 of the Enforcement Decree of the Customs Act).

WTO rules

6 | Are the WTO rules on trade remedies applied in national law?

The WTO rules on trade remedies, such as Agreement on Implementation of article VI of the General Agreement on Tariffs and Trade 1994 (the AD Agreement), the Agreement on Subsidies and Countervailing Measures (the SCM Agreement) and the Agreement on Safeguards, are reflected in Korean domestic laws and regulations because Korea is a WTO member. According to paragraph 1 of article 6 of the Constitution of Republic of Korea (the Constitution), treaties duly concluded and promulgated under the Constitution and the generally recognised rules of international law shall have the same effect as the domestic laws of Korea. If there is a conflict between the treaties and the domestic laws, the principles of lex specialis and lex posterior would be applied. The KTC generally follows the practice of the WTO. Paragraph 3 of article 58 of the Enforcement Decree of the Customs Act (the Decree) provides for a non-market economy (NME) for the purpose of anti-dumping investigations. However, there is no specific country that is currently treated as an NME. For reference, Korea recognised China and Russia in 2005 and Vietnam in 2009 as having attained market economy status.

Appeal

7 | What is the appeal procedure for an unfavourable trade remedies decision? Is appeal available for all decisions? How likely is an appeal to succeed?

Article 13 of the AD Agreement and article 23 of the SCM Agreement provides that each member whose national legislation contains provisions on anti-dumping and countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of article 11 of the AD Agreement and article 21 of the SCM Agreement.

As Korea's domestic legislation includes provisions for trade remedies, including anti-dumping and countervailing duty measures, it maintains judicial and administrative procedures for the purpose of the prompt review of an unfavourable trade remedies decision.

Paragraph 2 of article 120 of the Customs Act provides that any administrative litigation against any illegal measure shall not be initiated unless a request for evaluation or adjudication and a decision thereon under the Customs Act is made. In other words, an interested party shall file a request for evaluation or adjudication first, and after a decision thereon is made, the party may initiate administrative litigation. According to paragraph 3 of article 120 of the Customs Act, the administrative litigation shall be initiated within 90 days from the date on which the notice of the decision is given in response to the request for evaluation or adjudication was received.

Review of duties/quotas

8 | How and when can an affected party seek a review of the duty or quota? What is the procedure and time frame for obtaining a refund of overcharged duties? Can interest be claimed?

An affected party may file a request for a review. Any request for a review may be made after the expiration of one year from the day on which the relevant anti-dumping duties are imposed, or the countervailing duty or the pledge is put into force and such request shall be made before six months from the day on which the effect of anti-dumping duties or the pledge is lost.

The Customs Act and the Decree stipulated regarding refunds of overcharged anti-dumping or countervailing duties. Paragraph 3 of article 53 and paragraph 2 of article 59 of the Customs Act provides that if the amount of anti-dumping or countervailing duties falls short of the amount of provisional anti-dumping or countervailing duties, the difference therefrom shall be refunded. Paragraph 1 of article 67 of the Decree provides that where the amount of anti-dumping duties is lower than that of the provisional anti-dumping duties, the amount of provisional anti-dumping duties, which is equivalent to a difference, shall be refunded. The Customs Act and the Decree, however, do not explicitly provide for any procedure and time frame for those refunds.

Compliance strategies

9 | What are the practical strategies for complying with an anti-dumping/countervailing/safeguard duty or quota?

Seeking reviews could be a way to comply with trade remedy measures. Also, it has been generally observed that importers re-source merchandise from other countries after the imposition of trade remedy measures. Proactively responding to the investigating authorities prior to the imposition of trade remedy measures would also be recommended, as it is generally understood that earnest efforts made during the investigation process would bring a fair result.

CUSTOMS DUTIES

Normal rates and notification requirements

10 | Where are normal customs duty rates for your jurisdiction listed? Is there an exemption for low-value shipments, if so, at what level? Is there a binding tariff information system or similar in place? Are there prior notification requirements for imports?

The applicable normal customs duty rates are shown in the Harmonised System of Korea, which is available at unipass.customs.go.kr/clip/index.do. The normal customs duty rate for industrial products imported into Korea is generally 8 per cent ad valorem, while the customs duty rates for agricultural products are generally much higher.

An exemption for low-value shipments applies to goods valued at US$150 or less if such goods are considered self-use goods.

Depending on the imported products, Korean importers may be subject to certain certification, reporting or approval requirements stipulated under various laws and regulations governing the importation of such products (ie, other than the Customs Act), such as the Pharmaceutical Affairs Act, the Medical Devices Act and the Chemicals Control Act, among others. While there are generally no prior notification requirements for imports, Korean importers seeking to import certain pharmaceutical and medical device products are required to submit a pre-importation report to the relevant industry association before obtaining customs clearance, and the relevant industry association's acceptance of such report is a precondition for customs clearance.

Importers seeking to import any products that are subject to additional requirements under laws and regulations other than the Customs Act are strongly encouraged to ensure full compliance in view of the KCS's aggressive enforcement actions.

Special rates and preferential treatment

11 | Where are special tariff rates, such as under free trade agreements or preferential tariffs, and countries that are given preference listed?

The texts of the various FTAs to which Korea is a member and preferential tariff rates thereunder are available at www.customs.go.kr/kcshome/main/content/ContentView.do?contentId=CONTENT_ID_000002349&layoutMenuNo=23266. Information relating to preferential treatment provided under GSP programmes maintained by Korea is available at https://unipass.customs.go.kr/clip/index.do.

12 How can GSP treatment for a product be obtained or removed?

The MOSF may determine the scope of GSP treatment as applied to particular products and countries upon receiving an opinion from interested parties. If a domestic industry or interested party believes that continuing with a GSP programme may cause (or is likely to cause) material damage to the domestic industry, such industry or party may file a petition with the MOSF seeking to suspend the GSP programme.

When the MOSF determines that it is not proper to levy general preferential tariffs, such as the increase in imports of certain preferential goods, which may cause serious damage to domestic products that produce the same or similar products, the application of the general preferential tariffs to designated goods and country of origin may not be made. In addition, when the Minister of Strategy and Finance decides that it is improper to impose the general preferential tariffs considering the income level of the particular preferential tariff beneficiary country, the proportion of total amount of imports from the target country, the degree of international competitiveness of the specific preferential goods of the target country, and other circumstances, the application of general preferential tariffs can be excluded.

13 Is there a duty suspension regime in place? How can duty suspension be obtained?

Subject to KCS's review and approval, a customs bonded area or free trade zone may be established where the movement of goods into such areas or zones would not give rise to customs duty implications in Korea, unless the goods actually enter into the territory of Korea, in which case the applicable customs duties and other import-related taxes will be payable. Also, certain Korean importers may be exempt from the general requirement that all applicable customs duties and other taxes should be paid at the time of customs clearance, provided that such importers qualify for and participate in the monthly aggregate programme (which would allow the importers to pay customs duties etc on a monthly basis) and collateral programme (allowing the importers to delay payment of customs duties etc for up to 15 days).

Challenge

14 Where can customs decisions be challenged in your jurisdiction? What are the procedures?

If the KCS issues a notice prior to the imposition of customs duties, an importer may appeal such pre-imposition to the Customs Appeal Committee (CA Committee), which is a committee composed of high-ranking customs office officials and civilian experts that hears Korean importers' grievances regarding KCS's expected duty impositions. A Korean importer may appeal the pre-imposition to the CA Committee within 30 days upon receiving the pre-imposition notice.

If the CA Committee decides to adopt the KCS's pre-imposition, the KCS will then issue a final imposition notice. In such case, the Korean importer would be required to pay the additional duties and other taxes as indicated in the final imposition notice within 15 days after the receipt thereof, regardless of whether the importer decides to further appeal the KCS's decision. Appeal against the pre-imposition notice to the CA Committee is an optional remedy to taxpayers (ie, is not a mandatory procedure). If taxpayers decide not to appeal to the CA Committee, KCS will issue the final imposition notice.

After paying the additional imposition as set forth in the final imposition notice, the next step is to appeal the final imposition to the Tax Tribunal (TT), the Board of Audit and Inspection of Korea (BAI) or the KCS. For practical reasons, however, taxpayers typically choose to appeal to the TT because the KCS is likely to uphold the decisions made by regional customs offices. Any appeal before the TT must be filed no later than 90 days after receiving the final imposition notice. Such appeal to the TT, BAI or KCS is a mandatory preliminary procedure before initiating an administrative litigation (ie, taxpayers must appeal to the TT, BAI or KCS before filing complaint to court).

The TT is a quasi-judiciary body under the jurisdiction of the Prime Minister's Office, separate from the KCS. A final determination from the TT is made by a panel of four members, which is composed of two senior government officials associated with the MOSF (which has jurisdiction over the KCS authorities) and two civilian experts. The TT is statutorily required to make its decision within three months from the date of filing an application for appeal. In practice, however, a typical TT proceeding takes much longer than three months, and in many cases more than one year, depending on the TT's caseload and the complexity of the issues raised in the appeal.

Finally, a Korean importer may appeal the decision made by the TT to the administrative court, the High Court and ultimately the Supreme Court of Korea.

TRADE BARRIERS

Government authorities

15 What government office handles complaints from domestic exporters against foreign trade barriers at the WTO or under other agreements?

The KTC and the Trade Dispute Settlement Division of MOTIE (www.motie.go.kr) are primarily responsible for receiving grievances from domestic exporters and interested parties and handling complaints against foreign trade barriers on both substantial and procedural matters, although other relevant ministries or government agencies may also be involved with regard to substantial matters of the complaints. For instance, in the case of agricultural products, the Ministry of Agriculture, Food, and Rural Affairs, and in the case of standards, the Korean Agency for Technology and Standards, is involved in the complaint procedure.

Complaint filing procedure

16 What is the procedure for filing a complaint against a foreign trade barrier?

Under article 25-2 of the Act on the Investigation of Unfair International Trade Practices and Remedy against Injury of Industry (the Act), the KTC may conduct an investigation on whether the domestic industry producing the specific goods or services suffers, or is feared to suffer, any injury due to the systems and practices of the trade counterparts that violate international trade norms such as WTO Agreements. According to article 25 of the Decree of the Act, the procedures are followed as below.

First, a person who intends to file an application for an investigation into injury by foreign trade barriers shall submit to the KTC an application, accompanied by the materials verifying the details.

Second, where the KTC is applied to for an investigation into injury, it shall decide whether to commence the investigation into injury within 60 days from the date of receipt of the application and the KTC has decided whether to commence the investigation into injury, it shall notify the applicant of the details, and it shall notify the government of the trading partner country of the details only if it has decided to investigate into injury and publish such fact in the Official Gazette.

Third, the KTC shall judge whether the domestic industry producing goods or services suffers any injury or threat thereof, due to the system and practices of the trading partner country within one year from the date of decision to commence the investigation into injury. When the KTC has judged as a result of investigation that the domestic

industry suffers or has concerns over suffering injury, it may recommend the head of related central administrative agency to implement the measures necessary for corrections of the details of violations of the international trade norms by the trade counterparts. Necessary measures pursuant to article 25-3 of the Act means the following:

- the execution of bilateral consultation with the trading partner country;
- the execution of improvement procedures for the system and practices of the trading partner country through the World Trade Organization etc; and
- the execution of measures necessary for the correction of violation of international trade norms by the trading partner country.

Since the above investigation procedure was established in 2004, no single investigation into foreign trade barriers has yet been initiated.

Meanwhile, a complaint to the WTO Dispute Settlement Body or other forum may be processed through the following procedure. First, stakeholders or associations of those who are injured or to be injured by trade barriers etc request the filing of a complaint to MOTIE. Even if there is no such action, the government can ex officio consider whether to file a complaint. Upon receipt of the request to file a complaint, the Trade Dispute Settlement Division of MOTIE will examine the need for the complaint and the chance of winning the case, together with the relevant departments, and report to a superior authority. If the opinion is made regarding the complaint through internal approval by MOTIE, the government's official position on the complaint will be decided at the Ministerial Meeting on International Economic Affairs presided over by the Minister of Strategy and Finance and Deputy Prime Minister of Economy. If the decision is made at the Ministerial Meeting on International Economic Affairs, a request for a consultation, commencing the dispute settlement procedure, will be made to the WTO through the diplomatic missions abroad, including the Permanent Mission of the Republic of Korea in Geneva.

Grounds for investigation

17 | What will the authority consider when deciding whether to begin an investigation?

Standards for such investigation are not expressly stipulated and are left to the discretion of the authorities. In general, the authorities first examine the need to initiate the investigation from a legal point of view and examine the implications of the investigation for diplomatic and economic relations with the country concerned.

Measures against foreign trade barriers

18 | What measures outside the WTO may the authority unilaterally take against a foreign trade barrier? Are any such measures currently in force?

Korea does not take unilateral trade measures against foreign trade barriers that surpass the WTO framework, nor would specific statutory guidelines exist to allow unilateral actions outside of the WTO.

Private-sector support

19 | What support does the government expect from the private sector to bring a WTO case?

Based on past cases where Korea was involved as a petitioner or defendant, the Korean government has been provided from the private sector involved in the WTO proceedings with some financial support in terms of legal fees and translation costs. It appears that the Korean government needs the support of the private sector for the time being due to restraints on the budget for WTO dispute settlement proceedings.

Notable non-tariff barriers

20 | What notable trade barriers other than retaliatory measures does your country impose on imports?

The Korean government takes the position that it does not maintain any trade barrier that is inconsistent with its obligations under the WTO Agreements. Some foreign governments may, however, disagree with this claim. For example, Japan has challenged some of Korea's import bans, and testing and certification requirements for radio-nuclides, which the Korean government said was necessary to protect Korean consumers from radioactive pollutant risks. In addition, several measures, including a ban on exporting the local mapping data to foreign companies and environmental measures, are being criticised by some foreign governments.

EXPORT CONTROLS

General controls

21 | What general controls are imposed on exports?

All goods intended for export must undergo export clearance procedures. These clearance procedures include declaring the goods intended for export to the KCS and obtaining acceptance of the export declaration by the KCS, as well as loading the goods for transportation between Korea and the importing foreign country. Any person who intends to export goods must file an export declaration with and receive acceptance from the head of the customs office having jurisdiction over the location of the relevant goods before loading the goods for transportation.

Separately, exports of 'strategic items' and 'strategic technology' (collectively 'strategic items') require approval from the relevant authorities for purposes of maintaining international peace and security in accordance with multinational strategic materials export control regimes.

Also, the Korean government controls exports of 'national core technologies' under the Act on Prevention of Divulgence and Protection of Industrial Technology.

Government authorities

22 | Which authorities handle the controls?

MOTIE has authority over exports of strategic items under the Foreign Trade Act. Also, MOTIE has authority over exports of national core technologies under the Act on Prevention of Divulgence and Protection of Industrial Technology.

The Defence Acquisition Program Administration (www.dapa.go.kr) is responsible for controlling exports of certain defence materials and major defence industry materials designated as strategic items under the Defence Acquisition Program Act.

The Nuclear Safety and Security Commission (NSASC, www.nssc.go.kr) is responsible for controlling exports of certain atomic-related materials designated as strategic items under the Nuclear Safety Act.

The KCS (www.customs.go.kr) has authority over export clearance procedures under the Customs Act.

Special controls

23 | Are separate controls imposed on specific products? Is a licence required to export such products? Give details.

As mentioned above, the Korean government requires a licence prior to the export of strategic items, which include dual-use equipment, military equipment and satellites. The Dual-use Control List has 10 categories of goods and is regularly updated to incorporate resolutions made by the relevant multinational treaties. These 10 categories are as follows:

- category 1: Special materials and related equipment;
- category 2: Materials processing;
- category 3: Electronics;
- category 4: Computers;
- category 5: Telecommunications and information security;
- category 6: Sensors and lasers;
- category 7: Navigation and avionics;
- category 8: Marine;
- category 9: Aerospace and propulsion; and
- category 0: Nuclear materials, facilities and equipment.

Categories 1 to 9 are controlled by MOTIE, while category 0 (nuclear materials, facilities and equipment) is controlled by the NSASC.

A licence may also be required under end-use controls, which apply to otherwise non-controlled goods to be supplied to an end user where there are concerns about possible end use as weapons of mass destruction.

Among the strategic items, defence materials and major defence industry materials included in the Military Goods Control List are controlled by the Defence Acquisition Program Administration. Lastly, certain products shipped to North Korea require approval from the Ministry of Unification.

Supply chain security

24 | Has your jurisdiction implemented the WCO's SAFE Framework of Standards? Does it have an AEO programme or similar?

Yes. Korea implemented the WCO's SAFE Framework of Standards (which was established in June 2005) and amended provisions of the Customs Act in January 2008 to introduce the AEO programme. The KCS's AEO programme was first implemented in April 2009. So far, Korea has executed AEO Mutual Recognition Arrangements (MRAs) with 14 countries, including, among others, the US, Japan and China, allowing participants of the KCS's AEO programme to take advantage of the benefits accorded under the similar programmes implemented by MRA countries. In total, nine parties (exporters, importers, customs brokers, warehouse operators, transporters, freight forwarders, sea carriers, air carriers and terminal operators) have been designated under the AEO programme.

Applicable countries

25 | Where is information on countries subject to export controls listed?

The Korean government's export controls on strategic items apply equally to all countries.

The Foreign Trade Act merely makes a distinction between exports to Zone A and Zone B countries. Zone A countries include countries that are signatories to the major multinational regimes. Currently, 29 countries are classified as Zone A countries. All other countries are classified as Zone B countries. Since 2007, a licence is required to export strategic items from Korea to any country (including both Zone A and B countries). Approval for Zone A countries, however, is rather routinely granted, while approval for Zone B countries typically involves substantial and lengthy review by MOTIE and is not readily granted.

Named persons and institutions

26 | Does your jurisdiction have a scheme restricting or banning exports to named persons and institutions abroad? Give details.

The Korean government publishes and updates a Denial List (www.yestrade.go.kr) to restrict or ban exports of strategic items to certain named persons and institutions designated by the UN Security Council or other multinational export control regimes. Exports to those individuals and institutes are subject to scrutinised review by the relevant authority.

Exports of non-strategic items to certain persons and institutions in countries sanctioned by the UN Security Council (the list of which can also be found at www.yestrade.go.kr) require a catch-all licence.

Penalties

27 | What are the possible penalties for violation of export controls?

In the event that strategic items are exported without an export licence, an exporter may be subject to certain criminal sanctions, the severity of which may depend on specific purposes under which the illegal exports were made. For example, if illegal exports were made for purposes of international proliferation, the applicable criminal sanctions are imprisonment for up to seven years or a criminal fine of up to five times the transaction value or both. If the illegal exports were made for other purposes, the applicable sanctions are imprisonment for up to five years or a criminal fine of up to three times the transaction value.

In addition to the foregoing, exporters who violate export control regulations may be prohibited from exporting strategic items for a period of up to three years.

In the case of unauthorised illegal export, or false or fraudulent acquisition, an exporter must receive educational sanctions for a maximum of eight hours. If an exporter violates the duty to keep documents or fails to comply with educational sanctions, an administrative fine of 10 million won or less may be imposed.

For a violation of the Act on Prevention of Divulgence and Protection of Industrial Technology requirements relating to 'national core technologies', certain aggravated criminal sanctions will apply (eg, imprisonment for up to 15 years or criminal fine of up to 1.5 billion won if the violation was for purposes of using the industrial technology in a foreign country, or imprisonment for seven years or a criminal fine of up to 0.7 billion won if the illegal export was made for other purposes).

FINANCIAL AND OTHER SANCTIONS AND TRADE EMBARGOES

Government authorities

28 | What government offices impose sanctions and embargoes?

In Korea, financial sanctions are enforced by the MOSF via Foreign Exchange Transaction Act and MOSF Notification, and trade embargoes are generally imposed by MOTIE via the Foreign Trade Act and MOTIE Notification.

Applicable countries

29 | What countries are currently the subject of sanctions or embargoes by your country?

Under MOTIE Notification No. 2017-169, exports of designated arms and related items to the following countries are prohibited: Somalia, DR Congo, Sudan, Eritrea, Lebanon, Libya, Syria, North Korea, Central African Republic and Yemen.

The Korean government imposes strong controls on trade with North Korea, and, therefore, exports of any and all items intended

for trading with North Korea may be restricted (via the Inter-Korean Exchange and Cooperation Act). Accordingly, anyone who intends to contact North Korea or its people or engage in trade with North Korea, as a matter of general principle, should obtain prior approval from the Ministry of Unification (www.tongtong.go.kr).

Specific individuals and companies

30 Are individuals or specific companies subject to financial sanctions?

Korea imposes sanctions on certain entities and individuals as designated by the UN Security Council. Under MOSF Notification No. 2017-39, the following entities and individuals are subject to the Bank of Korea prior approval requirement:

- those in Somalia and Eritrea as designated by the UN Security Council;
- those connected to the Islamic State of Iraq and the Levant (ISIL) or Al-Qaeda as designated by the UN Security Council;
- those connected to the Saddam Hussein regime as designated by the UN Security Council;
- those in Liberia as designated by the UN Security Council;
- those in the DR Congo as designated by the UN Security Council;
- those in the Republic of Cote d'Ivoire as designated by the UN Security Council;
- those in Sudan as designated by the UN Security Council;
- those in North Korea as designated by the UN Security Council;
- those in Iran as designated by the UN Security Council;
- those connected to the Gaddafi regime as designated by the UN Security Council;
- those connected to the Afghanistan Taliban as designated by the UN Security Council;
- those in the Central African Republic as designated by the UN Security Council;
- those in Yemen as designated by the UN Security Council;
- those in the Republic of South Sudan as designated by the UN Security Council;
- those designated by the US President's Executive Order No. 13224 and separately designed by the MOSF;
- those designated by the US President's Executive Order No. 13382 and separately designed by the MOSF;
- those designated by the US President's Executive Order No. 13573, No. 13582 and separately designed by the MOSF; and
- those designated by the Council of the European Union and separately designated by the MOSF.

OTHER RELEVANT ISSUES

Other trade remedies and controls

31 Describe any trade remedy measures, import or export controls not covered above that are particular to your jurisdiction.

There are none other than those discussed above.

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LEGAL FRAMEWORK

Domestic legislation

1 What is the main domestic legislation as regards trade remedies?

The main domestic legislation regarding trade remedies is:

- the Countervailing and Anti-Dumping Duties Act 1993;
- the Safeguards Act 2006; and
- the Strategic Trade Act 2010.

There is also subsidiary legislation (regulations, orders) issued thereunder.

International agreements

2 In general terms what is your country's attitude to international trade?

Malaysia has been active in its involvement in international trade and has become one of the major trading nations in the world. International trade is a key contributor to Malaysia's economic growth and development.

Malaysia's main exports include electrical and electronics products, chemicals, machinery, appliances and manufactured metals. In terms of natural resources, Malaysia exports crude oil, liquefied natural gas, palm oil and natural rubber. In return, the country imports mainly electronics, machinery, petroleum products, plastics, vehicles, iron and steel products and chemicals.

In 2018, Malaysia's annual exports rose by 6.7 per cent to 998.01 billion ringgit, surpassing the earlier target of 4.4 per cent. The stronger-than-expected growth in 2018 was due to the expansion in manufactured and mining exports by 9.1 per cent and 7.1 per cent respectively. The growth in these areas have compensated for the lower performance of agriculture goods.

Malaysia's main trading partners are the United States, the European Union, Thailand, Singapore, Japan and China.

Malaysia is a founding member of the World Trade Organization (WTO) by virtue of its membership in the General Agreement on Tariffs and Trade (GATT) since 1957.

As a WTO member, Malaysia accords high priority to the rules-based multilateral trading system under the WTO, and has continuously been undertaking voluntary reductions and elimination of tariffs to enhance Malaysia's competitiveness; and over the years has adopted open and transparent trade policies and measures.

In addition, Malaysia is committed to building regional and bilateral trade arrangements with individual regional groupings and countries.

At the regional level, Malaysia is part of the ASEAN Free Trade Area (AFTA) together with other ASEAN member states such as Brunei, Cambodia, Indonesia, Laos, Myanmar, the Philippines, Singapore, Thailand and Vietnam, which creates a complete free trade area among them. ASEAN presently has AFTA free trade agreements (FTAs) with China, Japan, Korea, India, Australia and New Zealand.

Through AFTA, Malaysia has also entered into the ASEAN Trade in Goods Agreement and, together with Brunei, Singapore and Thailand, has embarked on a self-certification pilot project since 1 November 2010 that is aimed at facilitating an enhanced environment for trade.

Malaysia has also developed significant relations economically and politically with the Gulf Cooperation Council (GCC) and is keen to have strong bilateral trade ties with the GCC through future FTAs.

As a member of the Organisation of the Islamic Conference (OIC), Malaysia has actively supported and promoted intra-OIC trade and has ratified the Framework Agreement on Trade Preferential System among the OIC countries.

On 4 February 2016, Malaysia signed the Trans-Pacific Partnership (TPP) Agreement, an FTA initiative with Australia, Brunei, Canada, Chile, Japan, Mexico, New Zealand, Peru, Singapore, Vietnam and the United States. Although the United States subsequently withdrew from the TPP under the Trump administration, the other members of the TPP have agreed to pursue the trade deal without the United States. On 9–10 November 2017, the TPP was renamed the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP) and was signed by the remaining 11 member countries on 9 March 2018 after eight rounds of negotiations. However, with the installation of the new Malaysian government following national elections on 9 May 2018, it remains to be seen whether the Prime Minister and his Cabinet will pursue the CPTPP agenda and proceed with ratification.

Malaysia is also involved with the Regional Comprehensive Economic Partnership (RCEP). RCEP is a proposed FTA between the 10 member states of ASEAN and the six existing states that ASEAN currently has FTAs with. RCEP, spearheaded by China, would potentially include up to three billion people, constituting almost half of the world's population. RCEP is currently being negotiated, with the most recent round held in Bangkok on 24 May 2019

On a bilateral basis, Malaysia has established FTAs with Japan, Pakistan, New Zealand, India, Chile, Australia and Turkey, while negotiations are still under way with the United States and the European Union.

TRADE DEFENCE INVESTIGATIONS

Government authorities

3 Which authority or authorities conduct trade defence investigations and impose trade remedies in your jurisdiction?

The Trade Practices Section of the Ministry of International Trade and Industries, Malaysia (MITI, www.miti.gov.my) is the authority that has been tasked to investigate and deal with unfair trade practices on behalf of the government of Malaysia.

Complaint filing procedure

4 What is the procedure for domestic industry to start a trade remedies case in your jurisdiction? Can the regulator start an investigation ex officio?

Generally, any domestic industry or local producer can petition the authority for trade remedies such as anti-dumping, countervailing and safeguard duties against foreign producers or exporters of a similar product.

In a trade remedy petition, cogent evidence in the form of reliable statistics must be provided to the investigative authority. Depending on the type of trade remedies sought, the following information is usually included in the petition:

- the identity of the domestic industry on behalf of which the petition is submitted, including the names and addresses of the other producers of the like product in the domestic industry, and in the case where the petition is submitted on behalf of the regional producers of the similar product, information and details to support the carrying out of an investigation on a regional basis;
- in the case of an anti-dumping or countervailing petition, the petitioner must show that the domestic producers supporting the petition collectively account for more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the petition, and that the domestic producers expressing support for the petition account for at least 25 per cent of the total production of the like product produced by the domestic industry;
- a detailed description of the merchandise that defines the requested scope of the investigation, including technical characteristics and uses of such merchandise and its current Malaysian tariff classification;
- the name of the country in which the merchandise is produced and, if such merchandise is imported from a country other than that in which it is produced, the name of the intermediate country;
- the name and address of each party the petitioner believes is producing the merchandise for export or is exporting to Malaysia; and:
  - in relation to a countervailing duty petition, is receiving a subsidy; or
  - in relation to an anti-dumping duty petition, is selling the merchandise at prices below the normal value;
- any factual information, particularly documentary evidence, relevant to the alleged subsidy or dumping, including:
  - in relation to a countervailing duty petition, the authority that provided the subsidy and the manner in which the subsidy is provided and an estimate of the value of the subsidy to producers or exporters of the merchandise; or
  - in relation to an anti-dumping duty petition, information relevant to the calculation of the normal value and export price of the merchandise;
- for countervailing and anti-dumping petitions filed, the volume and value of the merchandise imported into Malaysia during the last two years and during any other recent period that the petitioner believes to be more representative or, if the merchandise was not imported into Malaysia during the two-year period, information as to the likelihood of its sale for importation into Malaysia. In relation to safeguards, the data period required is three years;
- the name and address of each party who the petitioner believes is importing or, if there were no importations, is likely to import the merchandise;
- evidence of injury to the domestic industry caused by the merchandise and the causal link between the imports of the merchandise and the alleged injury; and
- in relation to a safeguard petition, the petitioner is also required to submit an adjustment plan for the duration of the proposed imposition of the definitive safeguard measure and the proposed relief measures allowing the domestic industry to recover its competitiveness.

Contesting trade remedies

5 What is the procedure for foreign exporters to defend a trade remedies case in your jurisdiction?

On receipt of an anti-dumping, countervailing or safeguard petition from the domestic industry or local producers, MITI will issue a notification of the receipt of the petition to governments of the exporting countries concerned. MITI is then obliged to examine the petition to determine whether the evidence presented justifies the initiation of an investigation, the level of support or opposition of the petition by the domestic industry, as well as the public interest involved. If MITI finds that there is insufficient evidence, or it is not in the public interest to proceed, the petition will be rejected.

If MITI decides to initiate an investigation, it will:

- notify all interested parties (the foreign government or manufacturers concerned and local importers) of the decision to initiate the relevant investigation;
- publish a notice of initiation of investigation, and gazette the same; and
- send out a questionnaire and a copy of the non-confidential version of the petition to foreign producers or exporters and local importers to obtain information on prices and injury factors.

In the case of a filed safeguard petition, the Committee on Safeguards of the WTO must also be notified of any decision to initiate a safeguard investigation.

All interested parties will have the opportunity to submit both written (including submitting confidential and non-confidential versions) and oral representations. Legal representation, whether foreign or local, is allowed.

The general timeline of an anti-dumping or countervailing investigation is as follows:

- the decision to initiate the preliminary investigation is to be made within 30 days from the date of receipt of the petition;
- preliminary determination and the final investigation are to be made within 120 days from the date of initiation, and if necessary this can be extended for another 30 days; and
- final determination is to be made within 120 days from the date of the preliminary determination.

The general timeline of a safeguard investigation is as follows:

- the decision to initiate the preliminary investigation is to be made within 30 days from the date of receipt of petition;
- preliminary determination and the final investigation are to be made within 90 days from the date of initiation; and
- final determination is to be made within 200 days from the date of the preliminary determination.

WTO rules

6 Are the WTO rules on trade remedies applied in national law?

Malaysia acknowledges and recognises that its international rights and obligations in this area are governed by its membership of the WTO and by the WTO Agreement on Anti-Dumping and on Subsidies and Countervailing Measures, as well as the Agreement on Safeguards. As such, the trade remedy laws in Malaysia incorporate and apply the WTO rules on trade remedies.

'Non-market economy country' is defined in the Countervailing and Anti-Dumping Duties Act 1993 to mean any foreign country that the government of Malaysia determines operates on a centrally planned economy and not on market principles of cost or pricing structures or a free-enterprise economy. There is no definitive list of such non-market economy countries, but each situation will be decided on a case-by-case basis.

Appeal

7 What is the appeal procedure for an unfavourable trade remedies decision? Is appeal available for all decisions? How likely is an appeal to succeed?

An interested party who is not satisfied with or who is aggrieved by MITI's decision in relation to a final determination or a final administrative review determination may file a judicial review application in the High Court within 30 days of the publication of the final determination or the final administrative review determination in question. The High Court would then review administrative acts carried out by MITI as prescribed under the national legislation and WTO rules on trade remedies to determine whether these administrative acts have been properly observed. The High Court is not, however, concerned with the merits of the matter.

An interested party who is not satisfied or who is aggrieved by the decision of the authority in relation to a final determination or a final administrative review determination may also utilise the WTO dispute settlement mechanism and bring an appeal to the WTO Appellate Body in Geneva, Switzerland.

Review of duties/quotas

8 How and when can an affected party seek a review of the duty or quota? What is the procedure and time frame for obtaining a refund of overcharged duties? Can interest be claimed?

An administrative review may be sought in the following situations:

- where there are changed circumstances in the dumping margin or the amount of subsidy; or
- where the duties imposed or undertakings entered into are no longer considered necessary or maintainable.

Such a review can only be made one year after the date of the publication of the imposition of the definitive duties.

An exporter or a producer whose exports of the subject merchandise are subject to a definitive anti-dumping duty, but who has not exported the subject merchandise to Malaysia during the period of investigation, may apply for an expedited review.

An importer may also request a refund review for any 12-month period after the final determination of an anti-dumping duty investigation.

MITI shall conduct a refund review as requested by the importer only if the importer has:

- filed a refund application with the Customs Department within 30 days of entry of the merchandise into Malaysia; and
- submitted sufficient and complete evidence to show that the amount of anti-dumping duties collected during that 12-month period exceeds the dumping margin determined.

A refund review shall be completed within 180 days from the date MITI decides to conduct such a review.

The results of the refund review shall determine the final anti-dumping duty applicable for each entry for which the appropriate refund was requested and shall also be the basis for the anti-dumping duty rate applicable to all entries made after the review is completed.

If the margin of dumping is found to be less than the anti-dumping duty paid, the difference shall be refunded. If the margin of dumping is found to be greater than the anti-dumping duty paid, the importer shall pay the difference.

In the case of a safeguard petition, MITI is obliged to conduct a mid-term review where safeguard measures have been imposed for a term exceeding three years. Such a review is to be completed within 180 days of the date of initiation of the review.

Compliance strategies

9 What are the practical strategies for complying with an anti-dumping/countervailing/safeguard duty or quota?

An affected party may avail itself of the various review procedures set out in the relevant legislation when changes in circumstances arise.

Price undertakings are also a viable and attractive option in lieu of the imposition of definitive duties. Such undertaking may, however, only be offered after an affirmative preliminary determination has been reached.

CUSTOMS DUTIES

Normal rates and notification requirements

10 Where are normal customs duty rates for your jurisdiction listed? Is there an exemption for low-value shipments, if so, at what level? Is there a binding tariff information system or similar in place? Are there prior notification requirements for imports?

Customs duties are paid on an ad valorem basis on imports and exports as provided under the Malaysian Customs Act 1967. The rates, and any applicable exemptions, are set by subsidiary legislation made under the Customs Act, and depend on the type of goods imported or exported. The rates generally range from zero to 40 per cent, with much higher rates imposed on alcohol and tobacco products.

The complete list of the applicable duties can be found at the Royal Malaysian Customs Department's website (www.customs.gov.my or http://tariff.customs.gov.my). For e-commerce using air courier services, goods imported not exceeding a total value of 500 ringgit per consignment are exempt from custom duties.

Malaysia uses both the Harmonized Commodity Description and Coding System (HS Code) and ASEAN Harmonized Tariff Nomenclature (AHTN).

AHTN is used for trade transactions between Malaysia and the other ASEAN countries, while the HS Code applies for trade with non-ASEAN countries.

Import permits may be required for certain products to be imported. See question 20.

Special rates and preferential treatment

11 Where are special tariff rates, such as under free trade agreements or preferential tariffs, and countries that are given preference listed?

This information can be found at the MITI website (http://fta.miti.gov.my/?mid=49).

12 How can GSP treatment for a product be obtained or removed?

The Generalised System of Preferences (GSP) is a system whereby developed countries grant preferential treatment to eligible products imported from developing countries, so that exports of developing countries would be competitive in the developed countries' markets. The preferential treatment is in the form of reduced import duties, and

is granted without reciprocal obligation on the part of the developing countries.

GSP treatment for a product can be obtained when the product genuinely originates from the beneficiary countries and when certain origin conditions are satisfied. The product must also be transported directly from the exporting preference-receiving country to the preference-giving country.

The claim for GSP treatment must be supported by documentary evidence as to origin and consignment. The documentary evidence accepted for the purposes of GSP is the certificate of origin (more commonly referred to as 'form A'), which in Malaysia can be obtained by the interested manufacturer or exporter from the Federation of Malaysian Manufacturers.

In Malaysia, the authorised issuing or endorsing authority for form A is MITI.

In order to obtain GSP treatment, manufacturers or exporters are required to submit an application for cost analysis approval to the Trade Cooperation and Industry Coordination Section of MITI. An approval letter will be issued by the Trade Cooperation and Industry Coordination Section for products that qualify under the rules of origin under the GSP scheme. Once an approval letter is issued, MITI will endorse the said form A submitted by the interested manufacturer or exporter.

13 | Is there a duty suspension regime in place? How can duty suspension be obtained?

No, there is no duty suspension regime in place. However, Malaysia has established numerous free trade zones and licensed manufacturing warehouses with various investment incentives where manufacturing companies can produce or assemble imported products primarily for re-exportation. Customs controls in these zones are minimal, and all machinery and raw materials and components used in the manufacturing process may be imported duty-free.

Challenge

14 | Where can customs decisions be challenged in your jurisdiction? What are the procedures?

The Customs Appeal Tribunal (CAT) is an independent body, established to decide on appeals against the decision of the director-general of customs pertaining to matters under the Customs Act 1967, the Sales Tax Act 2018, the Service Tax Act 2018 and the Excise Act 1976.

A filing fee of 100 ringgit is payable for each appeal lodged, and must include particulars such as the name, address, particulars of dispute, reasons of appeal and the remedy sought.

An appeal to the CAT must be filed within 30 days from the date of notification in writing of the decision of the director-general of customs.

The CAT's decision is deemed to be an order of a sessions court and can be enforced accordingly. The appellant or the Director-General of Customs may appeal against the decision of the CAT to the High Court on a question of law or of mixed law and fact.

TRADE BARRIERS

Government authorities

15 | What government office handles complaints from domestic exporters against foreign trade barriers at the WTO or under other agreements?

The Trade Practices Section of MITI.

Complaint filing procedure

16 | What is the procedure for filing a complaint against a foreign trade barrier?

Malaysia does not have a specific procedure for trade barrier complaints and adopts the WTO procedure for dispute settlement. This includes requesting consultations, formally demanding negotiations to try to settle the matter or, as a last resort, requesting the WTO to set up a panel of three arbitrators to judge the case.

Grounds for investigation

17 | What will the authority consider when deciding whether to begin an investigation?

See question 16.

Measures against foreign trade barriers

18 | What measures outside the WTO may the authority unilaterally take against a foreign trade barrier? Are any such measures currently in force?

Alternative measures include government-to-government negotiations and the threat of possible trade sanctions.

Private-sector support

19 | What support does the government expect from the private sector to bring a WTO case?

Where it is deemed necessary, the government will institute a WTO case in Geneva through the Attorney General's Chambers (AGC). The private sector is expected to assist by forwarding the necessary trade information and figures to the AGC and attending to any queries the AGC might have in preparation of the WTO case.

Notable non-tariff barriers

20 | What notable trade barriers other than retaliatory measures does your country impose on imports?

The government of Malaysia operates a system of import licensing. Import permits are required for a number of items, including arms and explosives; motor vehicles; certain drugs and chemicals; plants; soil; tin ore, slag or concentrates; and various essential foodstuffs. Prohibited imports include multicolour copying machines, any 'indecent or obscene' articles and certain poisonous chemicals.

All imported beef and poultry products must originate from facilities that have been approved by Malaysian authorities as halal.

Import duties generally range from zero to 40 per cent. In line with Malaysia's commitment to the ASEAN Common Effective Preferential Tariffs scheme, all industrial goods traded within ASEAN are subject to import duties of between zero and 5 per cent only.

In addition to import duties, the government of Malaysia also imposes excise duties on certain selected categories of imports such as automobiles, leaf tobacco, cigarette products and alcoholic beverages.

EXPORT CONTROLS

General controls

21 | What general controls are imposed on exports?

Goods may be exported to any country except Israel. Exports are controlled only in certain cases as follows:

- gazetted or controlled goods (usually this applies when the goods are in short supply);

- goods sensitive in nature and strategic or hazardous items; and
- goods regulated or prohibited by international agreements to protect endangered wildlife species.

There are two categories of controls on items for export:
- items that are absolutely prohibited from being exported to all countries, for example turtle eggs, rattan, arms and related materials, petroleum and petroleum products; and
- products that require an export licence and are subject to government control, for example livestock and livestock products, grains, minerals and toxic or hazardous materials.

MITI and the Ministry of Domestic Trade, Co-operatives and Consumerism administer the requisite licences for most of the controlled goods.

Government authorities

22 | Which authorities handle the controls?

The Royal Malaysian Customs Department (RMCD) is responsible for the enforcement of customs and related laws, including issuance of legally binding advance rulings on valuation and classification matters, among others. Matters in dispute (eg, product classification and valuation of goods for customs purposes) can be brought before the CAT.

Special controls

23 | Are separate controls imposed on specific products? Is a licence required to export such products? Give details.

Yes. The Strategic Trade Act 2010 (STA) was enacted to strengthen the country's ability to curb exports and transhipment of strategic items and technology, including arms and related material (eg, military items; nuclear materials, facilities and equipment; special materials and related equipment; material processing; sensors; lasers; navigation and avionic equipment; and electronics and computers) as well as activities that will or may facilitate the design, development, production and delivery of weapons of mass destruction). The STA is administered by MITI.

The STA controls the transactions of strategic items, unlisted items and restricted activities.

A special permit is required for transactions of strategic items or of unlisted items to a restricted end user, while transactions of strategic items or unlisted items to a prohibited end user are not allowed.

For further information, see www.miti.gov.my/index.php/pages/view/2581.

Supply chain security

24 | Has your jurisdiction implemented the WCO's SAFE Framework of Standards? Does it have an AEO programme or similar?

The authorised economic operator (AEO) is a concept introduced by the SAFE Framework of Standards referring to operators involved in the movement of goods along the international trade supply chain who have achieved the required security standards and are accredited by the member country. The AEO scheme developed by the RMCD is based on a similar concept.

The RMCD AEO website presently lists 59 approved AEO companies (www.customsgc.gov.my).

Applicable countries

25 | Where is information on countries subject to export controls listed?

A definitive and comprehensive list of strategic items is prescribed in the Strategic Trade (Strategic Items) Order 2010. Information on the subject items can also be found at www.miti.gov.my/miti/resources/STA%20Folder/PDF%20file/pua_20170331_P.U_.(A)90_.pdf.

Restricted end users and prohibited end users are determined by the Minister of International Trade and Industry through the issuance of a ministerial order, and such an order may include from time to time regimes, countries' bodies corporate or individuals subject to United Nations Security Council sanctions, as well as any persons of concern to Malaysia.

Currently the list of restricted end users and prohibited end users can be found in the Strategic Trade (Restricted End-Users and Prohibited End-Users) Orders 2010, 2011, 2014 and 2016 (PU(A) 484/2010, PU(A) 150/2011, PU(A) 88/2014, PU(A) 313/2014 and PU(A) 177/2016).

Restricted end users

These are:
- North Korea and Iran (embargoed and no exception for transit);
- Democratic Republic of the Congo, Ivory Coast, Lebanon, Sudan and Libya (embargoed and subject to transit permit for military items);
- Afghanistan, Iraq, Liberia, Rwanda and Somalia (subject to transit permit for military items); and
- Eritrea (subject to transit permit for restricted military items).

Prohibited end users

These are:
- various named individuals and entities of the Democratic People's Republic of Korea included in the List that is established, maintained and updated by the United Nations Security Council pursuant to the United Nations Security Council Resolution 1718 (2006); and
- various named individuals and the Islamic Republic of Iran included in the List that is established, maintained and updated by the United Nations Security Council pursuant to the United Nations Security Council Resolution 2231 (2015).

Named persons and institutions

26 | Does your jurisdiction have a scheme restricting or banning exports to named persons and institutions abroad? Give details.

Yes – see question 25 for the list of restricted end users and prohibited end users as presently in force under the Strategic Trade (Restricted End-Users and Prohibited End-Users) Order 2010, 2011, 2014 and 2016.

Penalties

27 | What are the possible penalties for violation of export controls?

Both the Customs Act 1967 and the Strategic Trade Act 2010 have their own penalty provisions and in summary provide for the following penalties for violation of export controls:
- a jail sentence of between two years and life imprisonment, depending on the severity and type of offence; and
- fines of between 10,000 ringgit and 30 million ringgit.

In addition, in view of the serious repercussions from the misuse of strategic items and unlisted items for the purpose of restricted activities, the STA also imposes capital punishment for certain offences where the breach or offence results in death.

FINANCIAL AND OTHER SANCTIONS AND TRADE EMBARGOES

Government authorities

28 | What government offices impose sanctions and embargoes?

MITI is the authority charged with imposing trade sanctions.

Applicable countries

29 | What countries are currently the subject of sanctions or embargoes by your country?

North Korea and Iran, in relation to strategic items (see www.miti.gov.my/index.php/pages/view/3420), and Israel generally, under the Customs (Prohibition of Imports) Order 2017 subject to a special licence issued by MITI.

Specific individuals and companies

30 | Are individuals or specific companies subject to financial sanctions?

No.

OTHER RELEVANT ISSUES

Other trade remedies and controls

31 | Describe any trade remedy measures, import or export controls not covered above that are particular to your jurisdiction.

Ever since Malaysia started producing locally made cars, Malaysia has implemented measures to protect its automobile manufacturing industry from foreign competition using high tariffs and non-tariff trade barriers. Government policies also distinguish between 'national' cars (ie, domestic producers Proton and Perodua) and 'non-national' cars, which include most vehicles manufactured in Malaysia by non-Malaysian-owned firms.

MITI oversees a system of approved permits, which allow the holder to import cars and distribute them locally.

UPDATE & TRENDS

Key developments

32 | Are there any emerging trends or hot topics in trade and customs law and policy in your jurisdiction?

In light of the ongoing trade war, in 2019, there has been a substantial increase in the number of trade protection measures sought by the domestic industry in Malaysia – making it one of the busiest years on record. This trend is expected to continue into 2020.

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LEGAL FRAMEWORK

Domestic legislation

1 What is the main domestic legislation as regards trade remedies?

The main Mexican legislation regarding trade remedies is:

- Article 131 of the Federal Constitution: www.diputados.gob.mx/LeyesBiblio/pdf/1_150519.pdf;
- Foreign Trade Law and its Regulations: www.diputados.gob.mx/LeyesBiblio/pdf/28.pdf and www.diputados.gob.mx/LeyesBiblio/regley/Reg_LCE.pdf;
- Customs Law and its Regulations: www.diputados.gob.mx/LeyesBiblio/pdf/12_241218.pdf and www.diputados.gob.mx/LeyesBiblio/regley/Reg_LAdua_221217.pdf;
- Federal Law of Administrative Procedure: www.diputados.gob.mx/LeyesBiblio/pdf/112_180518.pdf;
- Ministry of Economy Internal Regulations: www.diputados.gob.mx/LeyesBiblio/regla/n163.pdf; and
- Tax Administration Service Internal Regulations: www.diputados.gob.mx/LeyesBiblio/regla/n154.pdf

Article 131 of the Federal Constitution establishes the exclusive faculty of the Federation to regulate at all times and prohibit if necessary, for security reasons, the circulation inside the Republic of all goods, whatever their provenance. In addition, it entitles the President to increase, diminish or suppress the quotas of export and import tariffs, and to create others; as well as to restrict and to prohibit imports, exports and transit of products, when deemed urgent, in order to regulate foreign trade, the economy of the country and the stability of national production.

The Foreign Trade Law regulates unfair foreign trade practices, investigation procedures, safeguard measures and remedies.

The Customs Law establishes regulations regarding the application of anti-dumping or countervailing duties.

The Federal Law of Administrative Procedure shall apply to acts, procedures and resolutions of the Federal Public Administration.

In addition, the Ministry of Economy Internal Regulations control the activity of the Ministry of Economy to determine and impose trade remedies. The Tax Administration Service (SAT) Internal Regulations grant the power to such entity to collect such trade remedies.

Further, according to jurisprudential criteria, international treaties and agreements are considered hierarchically superior to domestic legislation. In this regard the following agreements must be considered:

- agreement concerning the application of article VI of the General Agreement on Tariffs and Trade (GATT): www.gob.mx/cms/uploads/attachment/file/31687/19-adp.pdf;
- agreement concerning subsidies and countervailing measures: www.gob.mx/cms/uploads/attachment/file/31688/24-scm.pdf;
- agreement concerning safeguard measures: www.gob.mx/cms/uploads/attachment/file/31676/25-safeg.pdf; and
- free trade agreements.

Depending on the treaty, additional regulations and dispute resolution measures can be found in the corresponding chapter of each treaty.

Finally, regarding appeals against trade remedies, the following domestic legislation should be considered:

- the Federal Tax Code: www.diputados.gob.mx/LeyesBiblio/pdf/8_241218.pdf;
- the Federal Contentious Administrative Procedure Law: www.diputados.gob.mx/LeyesBiblio/pdf/LFPCA_270117.pdf; and
- the Amparo Appeal Law: www.diputados.gob.mx/LeyesBiblio/pdf/LAmp_150618.pdf.

The Federal Tax Code regulates the revocation appeal procedure; meanwhile, the Federal Contentious Administrative Procedure Law regulates trials before the Federal Court of Administrative Justice (TFJA). Additionally, the Amparo Law regulates the procedure of the extraordinary means of defence named amparo before the Federal Courts.

International agreements

2 In general terms what is your country's attitude to international trade?

Mexico is a member of the World Customs Organization (WCO) and the World Trade Organization (WTO).

Mexico currently has 12 FTAs with 46 countries, including the North American Free Trade Agreement (NAFTA) with the US and Canada, which has made Mexico one of the main producers and exporters in the automotive sector worldwide. Likewise, it has signed 32 Agreements for the Promotion and Reciprocal Protection of Investments with 33 countries and nine agreements within the framework of the Latin American Integration Association.

On 23 May 2018, Mexico published in the Official Gazette of the Federation (DOF) its approval of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which is an FTA between Mexico, Australia, Brunei, Canada, Chile, Japan, Malaysia, New Zealand, Peru, Singapore and Vietnam, allowing Mexico to open its market to new economies.

Currently, Mexico is renegotiating the NAFTA terms, which may be updated later in 2019. Also, the Mexican Government is exploring the options to actualise the free trade agreement with the European Union.

Mexico has been involved in 24 cases as complainant, 14 cases as respondent and 84 cases as a third party in WTO disputes, and has an acceptable compliance record with WTO decisions.

TRADE DEFENCE INVESTIGATIONS

Government authorities

3 Which authority or authorities conduct trade defence investigations and impose trade remedies in your jurisdiction?

The Ministry of Economy, through the International Commercial Practices Unit (UPCI), is the authority empowered to investigate and impose trade remedies in Mexico (www.gob.mx/se/acciones-y-programas/industria-y-comercio-unidad-de-practicas-comerciales-internacionales-upci?state=published).

However, the Ministry of Finance and Public Credit (SHCP), through the SAT, is the authority empowered to collect anti-dumping and countervailing duties imposed as trade remedies (www.sat.gob.mx).

Complaint filing procedure

4 What is the procedure for domestic industry to start a trade remedies case in your jurisdiction? Can the regulator start an investigation ex officio?

The determination of trade remedies in Mexico is carried out through an investigation that analyses the existence of dumping and subsidies, the damage or threat of damage to a domestic industry, and the causal relationship between them. With regard to safeguard measures, the authority will investigate and analyse if the increase in imports damages a branch of national production.

The initial procedure of the investigation regarding trade remedies, such as dumping, subsidies and safeguard measures, is as follows:

- the investigations are initiated ex officio or at the request of a party in the affected national industry that represents at least 25 per cent of the total production of identical or similar merchandise, produced by the branch of national production that is considered affected;
- a written request must be submitted to the UPCI, stating the arguments that support the need to apply anti-dumping or countervailing duties, complying with the following requirements:
    - general information about the promoter, volume and value of the national production of the product identical or similar to that of the imported product, the country of origin of the merchandise, the persons who made the exports in conditions detrimental to Mexico, and the evidence that shows that the importing of the goods in question damages or threatens to damage the domestic industry;
    - in the case of dumping, an indication of the difference between the normal value and the comparable export price;
    - regarding subsidies, the foreign government or foreign authority involved, the form of payment, the amount of the subsidy or the impact of the subsidy on the export price; and
    - in safeguard measures, the facts and data showing that the increase in imports causes serious injury or threat of serious injury to the domestic industry of identical, similar or directly competing merchandise.

The procedure following the presentation of the request is:

- within 17 business days the UPCI may request additional information and documents, which must be provided by the parties within 20 business days;
- within 20 business days after the request, the UPCI may discard the request if it does not meet the legal requirements; and
- within 25 business days following the presentation of the trade remedy request, the UPCI may admit the request and announce the initiation of the investigation.

Contesting trade remedies

5 What is the procedure for foreign exporters to defend a trade remedies case in your jurisdiction?

Once the resolution to initiate the investigation has been published in the DOF, the UPCI must notify the interested parties, including foreign exporters, so that within a period of 23 business days they can appear before the UPCI and present the arguments, information and evidence that they deem pertinent.

The UPCI will give the applicants the opportunity to present their counter arguments or replies within the next eight business days. Interested parties in the investigation procedure may be represented before the authority through a legal representative appointed for that purpose, who shall have a law degree, except for those who belong to the boards of directors of the interested parties.

If necessary, the UPCI may require other evidentiary elements, information and data that it deems pertinent to the investigation.

Within a period of 90 business days following the beginning of the investigation, the UPCI will issue a preliminary ruling through which it will be able to determine provisional anti-dumping or countervailing duties; not impose anti-dumping or countervailing duties and continue with the investigation procedure; or terminate the investigation if there is insufficient evidence.

Once the preliminary ruling is issued and published in the DOF, the UPCI will grant a term of 20 business days so that the interested parties may submit additional arguments, information and evidence.

Within a period of 210 business days following the beginning of the investigation, a final resolution will be issued by the UPCI in which it may impose definitive anti-dumping or countervailing duties; revoke the provisional anti-dumping or countervailing duties; or declare the investigation concluded without imposing anti-dumping or countervailing duties.

During the investigation, interested parties may request the UPCI to hold a conciliatory hearing in which solutions will be proposed. An agreement following the conciliatory hearing will be considered as a final resolution.

Likewise, when in the course of the investigation the exporter of the goods voluntarily commits to modify their prices or cease their exports, or if the government of the exporting country eliminates or limits the subsidy, the UPCI may suspend or terminate the investigation without applying the trade remedy, after analysing whether these commitments eliminate the harmful effect of the unfair practice.

Regarding safeguard measures, once the resolution of the initiation of the investigation has been published in the DOF, the determination of safeguard measures must be made within a period of no more than 210 business days, counted from the day following publication.

It is important to consider that these measures will be subject to the provisions set out in the international treaties, agreements and conventions to which Mexico is a party.

In the case that the circumstances are critical and there is evidence that the increase in imports has caused or threatens to cause damage, provisional safeguard measures could be established within a period of 20 days, counted from the day following the publication in the DOF of the beginning of the investigation. The duration of the provisional safeguard measures may not be more than six months.

The final resolution that confirms, modifies or revokes the safeguard measures must be published within 210 business days after the day following the publication in the DOF of the resolution that initiated the procedure.

WTO rules

6 | Are the WTO rules on trade remedies applied in national law?

Yes. Mexico has incorporated the WTO provisions on trade remedies in its Foreign Trade Law and its Regulations.

As stated in question 1, according to jurisprudential criteria, international treaties and agreements are considered hierarchically superior to domestic legislation. Mexico has been an active member of the WTO since 1995, and thus the WTO rules on trade remedies, the Agreement concerning the application of article VI of the General Agreement on Tariffs and Trade, the Agreement concerning Subsidies and Countervailing Measures and the Agreement concerning Safeguard Measures are applied and followed in practice.

The Foreign Trade Law and its Regulations consider non-market economies when cost and price structures do not reflect market prices.

Mexico will be able to determine whether an economy is a market economy based on whether the currency of the foreign country is convertible in a generalised manner in the international currency markets; the salaries of that country are established through free negotiation between workers and employers; the decisions of the sector or industry of that country adapt to the market without interference from the state; and foreign investments are allowed.

Appeal

7 | What is the appeal procedure for an unfavourable trade remedies decision? Is appeal available for all decisions? How likely is an appeal to succeed?

The challenge mechanisms against trade remedies decisions are described below.

Revocation appeal

This appeal proceeds against resolutions issued by the UPCI that dismiss the request for initiation of the investigation procedure; declare the end of the investigation without imposing an anti-dumping or countervailing duty or safeguard measures; determine definitive anti-dumping or countervailing duties or safeguard measures.

The appeal must be filed within 30 business days following the notification of the resolution, before the same authority that issued the act (UPCI), stating the facts, arguments and probatory support in relation to the illegality of the resolution. The authority must issue a resolution within three months, confirming or revoking its act. If it is not issued within that period, the interested party may consider that the authority ruled negatively and begin a nullity trial before the TFJA, which will order the authority to expressly report the grounds and reasons it took into consideration to deny the request.

In practice, the probability of success of this type of appeal is low, since the appeal is heard by the same authority. Therefore, this often leads to the authority confirming its resolution.

Despite the above, it is important to consider that this means of defence must be exhausted before initiating a nullity trial before the TFJA, since its interposition is not optional.

Nullity trial

This trial proceeds after the revocation appeal has concluded.

A nullity appeal must be filed before the TFJA, which is a specialised three-judge court in administrative, tax and foreign trade matters, within 30 business days following the notification of the revocation appeal resolution.

The court will issue the corresponding ruling within 45 business days following the date on which the trial instruction was closed, in which it will decide to confirm the validity of the resolution or declare its nullity.

In practice, this is the most effective means to revoke an unfavourable trade remedy decision. However, the resolution time can be longer than the 45 days stated in the law.

Amparo

The constitutionality of the judgments issued by the TFJA declaring the validity of the unfavourable trade remedies resolutions may be challenged through an amparo before the corresponding Federal Collegiate Courts (TCC).

The amparo must be filled within a period of 15 business days counted from the notification of the decision of the TFJA.

Extraordinarily, the amparo resolution may be challenged before the Supreme Court of Justice, but only when constitutional issues are asserted.

Review of duties/quotas

8 | How and when can an affected party seek a review of the duty or quota? What is the procedure and time frame for obtaining a refund of overcharged duties? Can interest be claimed?

As a general rule, the anti-dumping or countervailing duties will be eliminated within a period of five years, unless before the end of that period the UPCI has initiated an annual or a sunset review to determine whether the suppression of that duty would lead to the continuation or repetition of the unfair trade practice.

The anti-dumping or countervailing duties may be reviewed annually at the request of a party or at any time ex officio by the UPCI, following the same procedure for its determination.

Interested parties may request in writing to the UPCI to carry out a review or a sunset review, providing the information and proof that justifies their petition, along with the forms established by the authority for such effects.

If the importers involved paid excessive or unduly severe anti-dumping or countervailing duties, or if as a result of one of the appeals referred to in question 7 the anti-dumping or countervailing duties are revoked, the interested party may request a refund of the difference in its favour of the total duties paid, duly updated with the respective interest.

The refund process must be requested from the SAT, which is the authority in charge of collecting anti-dumping or countervailing duties.

The interested party has a term of five years as of the date of payment to request a refund. The procedure is as follows:

- once the refund request is submitted, if there are errors, the authority could request the taxpayer to clarify the irregularities of its request within a period of 10 business days. If it does not do so it will be considered to have withdrawn the request;
- the authorities may require the taxpayer, within a period no longer than 20 business days, to submit additional documents that it considers necessary and relate to the refund request; and
- the return must be made within a period of 40 business days following the date on which the application was submitted. In practice this time frame is regularly exceeded.

Compliance strategies

9 | What are the practical strategies for complying with an anti-dumping/countervailing/safeguard duty or quota?

There are several alternatives to deal with an anti-dumping or countervailing duties, as well as safeguard measures, depending on each case.

If the anti-dumping, countervailing duty or safeguard measure is considered illegal or if the circumstances have changed, a review or challenge mechanism may be filed by the interested parties, following the procedures and forms established in the law for such purposes.

Alternatively, goods may be sourced from another jurisdiction or supplier that has not been subject to such duties.

Reformulating the products may be considered when analysing if the tariff classification of the new product is subject to any anti-dumping or countervailing duties or safeguard measures.

CUSTOMS DUTIES

Normal rates and notification requirements

10 | Where are normal customs duty rates for your jurisdiction listed? Is there an exemption for low-value shipments, if so, at what level? Is there a binding tariff information system or similar in place? Are there prior notification requirements for imports?

Customs duty rates are listed in the General Import Duties and General Export Duties Law (LIGIE) which contains the Tariff Schedule for each good.

For purposes of guidance and information, the Mexican government launched the Comprehensive Foreign Trade Information System (SIICEX), where tariffs, duties, free trade agreements, anti-dumping or countervailing duties, safeguard measures and other information regarding goods are listed. However, this information is not binding (www.siicex.gob.mx/portalSiicex/).

The Customs Law, its Regulations and the General Rules of Foreign Trade establish certain exceptions for some merchandise on which customs duties will not be paid; for example passenger baggage on international trips, donations for cultural and teaching purposes, and works of art destined to be part of permanent collections of museums open to the public.

Some low-value shipments carried out by the postal service are consider exempt from customs duties if the customs value is equal to or less than the equivalent in national or foreign currency of US$50.

The general requirements for importing goods into Mexico are: enrolment in the Federal Register of Taxpayers, prior registration in the General Importers Registry, and filling an import entry that contains all the information regarding the value, transport and other data regarding the imported goods.

Some products, depending on their nature and tariff classification, may be subject to specific requirements, including prior import notices; enrolment before the Importers Specific Sector Registry; and specific requirements and permissions of the authority in charge of the regulation of the good to be imported (eg, health supplies require prior import permits and these are issued by the Ministry of Health).

Currently, 118 tariff classifications are subject to prior permits, of which 97 correspond to imports. The products subject to prior import permission are crude oils of petroleum, gasoline, turbosine, propane, butane, articles of clothing, anti-pollution equipment, and research and development equipment, among others.

Registration in the Importers Specific Sector Registry will be necessary for the importation of chemical, radioactive and nuclear products, firearms and ammunition, explosives and material related to explosives, cigars, footwear, textiles and clothing, ethyl alcohol, hydrocarbons, steel and automobiles .

Special rates and preferential treatment

11 | Where are special tariff rates, such as under free trade agreements or preferential tariffs, and countries that are given preference listed?

Special or preferential tariff rates under free trade agreements signed by Mexico can be found in the treaties themselves and their annexes (www.siicex.gob.mx/portalSiicex/).

There are also Sectoral Promotion Programmes (PROSEC), which are instruments aimed at entities producing certain goods, in which they are allowed to import with preferential ad valorem tariffs raw materials that will be used in the elaboration of specific products, no matter whether the goods to be produced are destined for export or for the domestic market (www.gob.mx/cms/uploads/attachment/file/224497/2.3.2_PROSEC.pdf).

Additionally, to promote national productivity, the Ministry of Economy has implemented the benefit of Rule Eight, which allows manufacturers to import with preferential tariffs, inputs, parts, components, machinery, equipment and other goods related to production processes, particularly for PROSEC programmes (www.siicex.gob.mx/portalSiicex/Transparencia/Permisos/infgeneral.htm).

12 | How can GSP treatment for a product be obtained or removed?

There is no formal procedure for a product to obtain or remove GSP treatment. However, the Ministry of Economy has implemented a procedure before its Foreign Trade Commission, which will analyse the commercial circumstances and reasons brought by any interested individual or entity before determining a recommendation for a GSP amendment.

13 | Is there a duty suspension regime in place? How can duty suspension be obtained?

Yes. The President may be empowered by the Congress of the Union to suppress the quotas of export and import tariffs issued by the Congress itself, and to create others when it deems it urgent, in order to regulate foreign trade, the economy of the country or the stability of national production, or to perform any other purpose for the benefit of the country.

Challenge

14 | Where can customs decisions be challenged in your jurisdiction? What are the procedures?

Customs decisions can be challenged through a revocation appeal before the issuing authority, a nullity appeal before the TFJA and through an amparo before the Federal Courts. Exceptionally the Supreme Court of Justice may consider cases, following the procedures indicated in question 7.

TRADE BARRIERS

Government authorities

15 | What government office handles complaints from domestic exporters against foreign trade barriers at the WTO or under other agreements?

The Ministry of Economy, the Permanent Mission of Mexico before the WTO and the Ministry of Foreign Affairs are the offices in charge of these procedures (www.gob.mx/se/, www.gob.mx/se/acciones-y-programas/representaciones-comerciales and www.gob.mx/sre).

Complaint filing procedure

16 | What is the procedure for filing a complaint against a foreign trade barrier?

There is no formal procedure for national exporters to file a complaint against a foreign trade barrier. Notwithstanding the foregoing, the Internal Regulations of the Ministry of Economy and the Ministry of

Foreign Affairs empower these authorities to defend and represent the interests of nationals against foreign trade barriers imposed by other countries.

Therefore, depending on the treaty or agreement to which Mexico is a party, the mentioned authorities will request the affected party to provide the information and documentation they deem necessary for such purpose.

Grounds for investigation

17 | What will the authority consider when deciding whether to begin an investigation?

Apart from the probatory support provided by the parties, the authorities must verify the existence of the alleged trade barrier and the violation of the applicable treaty or agreement.

Measures against foreign trade barriers

18 | What measures outside the WTO may the authority unilaterally take against a foreign trade barrier? Are any such measures currently in force?

The authorities must comply with the dispute resolutions dispositions set out in the international treaties and agreements to which Mexico is a party.

Despite the above, based on article 131 of the Federal Constitution, the Federation can prohibit the circulation of all kinds of imported goods, whatever their origin, for security reasons, when it deems it urgent in order to regulate foreign trade, the economy of the country or the stability of national production, or to perform any other purpose for the benefit of the country.

As an example, on 8 March 2018, through proclamations 9704 and 9705, the United States established tariffs of 25 per cent and 10 per cent on imports of steel and aluminium. In response, Mexico, on 5 June 2018, put in place measures equivalent to those taken by the United States until the same were eliminated. After President Trump agreed to remove the above-mentioned tariffs, on 10 May 2019 Mexico eliminated its retaliatory measures.

Private-sector support

19 | What support does the government expect from the private sector to bring a WTO case?

The Mexican government acts independently when presenting a case before the WTO, and no contribution of any kind is expected from the private sector. However, the private sector can provide information and documentation that it deems pertinent and necessary for the Mexican government to bring a WTO case.

Notable non-tariff barriers

20 | What notable trade barriers other than retaliatory measures does your country impose on imports?

When importing into Mexico, importers must comply with the non-tariff restrictions and regulations applicable to the specific tariff classification. Among these we may find quotas, general and sectoral import registries, notices, permits and marking requirements.

EXPORT CONTROLS

General controls

21 | What general controls are imposed on exports?

As a general rule, most exports are not subject to taxes, duties or restrictions. Nevertheless, exporters must enrol before the Federal Register of Taxpayers; enrol in the sectoral exporters registry for certain goods; comply with non-tariff restrictions and regulations when applicable; and file an export entry before customs, declaring the customs value and identification of the goods.

Additionally, specific goods may be subject to permits or controls based on their tariff classification or on their nature and use.

Government authorities

22 | Which authorities handle the controls?

The authorities that handle export controls in Mexico are the Ministry of Economy and the SHCP.

Depending on the tariff classification, some other authorities may participate in export controls, granting licences or prior permits.

Special controls

23 | Are separate controls imposed on specific products? Is a licence required to export such products? Give details.

Yes. There are certain vulnerable goods for which specific permits or requirements must be fulfilled before export (eg, dual goods and dangerous substances).

Regarding the export of alcoholic beverages, cigarettes, tobacco, energising beverages, some minerals (such as silver and gold), among others, annex 10 of the General Rules of Foreign Trade establishes a register before the sectoral export registry.

Supply chain security

24 | Has your jurisdiction implemented the WCO's SAFE Framework of Standards? Does it have an AEO programme or similar?

Yes. On 5 June 2005, Mexico signed a letter of intent to implement the WCO's SAFE Framework Standards, and since then it has certified several companies that meet the established requirements and signed mutual recognition agreements.

In Mexico, the SAT implements the authorised economic operator certification programme (AEO), which seeks to strengthen the security of the foreign trade logistics chain through the implementation of internationally recognised minimum-security standards in coordination with the private sector.

Applicable countries

25 | Where is information on countries subject to export controls listed?

Countries subject to export controls are listed in the 'Agreement that modifies the diverse by which measures are established to restrict the export or import of various goods to the countries, entities and persons indicated' http://dof.gob.mx/nota_detalle.php?codigo=5509634&fecha=28/12/2017 and http://dof.gob.mx/nota_detalle.php?codigo=5526421&fecha=14/06/2018.

This agreement is issued in compliance with article 24 of the United Nations Charter (UN Charter), regarding the primary responsibility of any member to maintain international peace and security.

Named persons and institutions

26 | Does your jurisdiction have a scheme restricting or banning exports to named persons and institutions abroad? Give details.

No. However, as question 25 states, Mexico restricts the export of certain goods to certain countries in compliance with the UN Charter.

Penalties

27 | What are the possible penalties for violation of export controls?

The possible penalties related to the violation of export controls are the imposition of fines; suspension or cancellation of the exporter's registers; suspension or cancellation of the customs agent's patent; seizure of the goods; and in some cases, criminal penalties.

FINANCIAL AND OTHER SANCTIONS AND TRADE EMBARGOES

Government authorities

28 | What government offices impose sanctions and embargoes?

In general, the SAT is the authority that may impose sanctions related to exports.

However, there are some goods that require prior permits or licences issued by other authorities responsible for regulating certain goods. In such cases, the responsible authority may be empowered to impose fines and other sanctions.

Applicable countries

29 | What countries are currently the subject of sanctions or embargoes by your country?

There is no country subject to sanctions or embargo by Mexico. However, as stated in questions 25 and 26, the export of some goods to certain countries is prohibited.

Specific individuals and companies

30 | Are individuals or specific companies subject to financial sanctions?

Individuals and legal entities that violate the provisions of current Mexican legislation when exporting or importing goods from and into national territory can be subject to financial penalties.

OTHER RELEVANT ISSUES

Other trade remedies and controls

31 | Describe any trade remedy measures, import or export controls not covered above that are particular to your jurisdiction.

In general terms, the trade remedies and controls applicable in Mexican legislation have been covered in this article. Nevertheless, because Mexico is very dynamic when implementing new controls, measures and sanctions, we strongly recommend that new importers and exporters perform a detailed analysis, on a case-by-case basis, to avoid any delays and inconvenience in their trade operations.

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UPDATE & TRENDS

Key developments

32 | Are there any emerging trends or hot topics in trade and customs law and policy in your jurisdiction?

Current hot topics include negotiations with the United States regarding the establishment of tariffs to Mexican products; draft amendments regarding temporary imports (IMMEX) on sensitive goods (eg, steel); and modifications to the steel import licensing process. Note that these topics are currently under discussion by the corresponding authorities and have not entered into force.

Turkey

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ACTECON

LEGAL FRAMEWORK

Domestic legislation

1 | What is the main domestic legislation as regards trade remedies?

Turkey adopted its first legislation providing for trade remedies as early as 1989 to protect its domestic producers following the trade liberalisation (and the ensuing elimination of import restrictions) initiated in 1980. In this regard, Turkey's domestic legislation includes the following:

- Law No. 3577 on the Prevention of Unfair Competition in Imports (Law No. 3577);
- Regulation on the Prevention of Unfair Competition in Imports (Regulation on Unfair Competition);
- Decree on the Prevention of Unfair Competition in Imports (Decree on Unfair Competition);
- Regulation on Safeguard Measures in Imports (Regulation on Safeguards);
- Decree on Safeguard Measures in Imports (Decree on Safeguards);
- Communiqué No. 2008/6 on the Prevention of Unfair Competition in Imports; and
- Procedure and Principles of Implementation for Communiqué No. 2008/6 on Prevention of Unfair Competition in Imports.

This legislation may be found at: www.trade.gov.tr/legislation/import/trade-defence-policy.

International agreements

2 | In general terms what is your country's attitude to international trade?

From an international standpoint, being a party to the Agreement Establishing the World Trade Organization, Turkey is also bound by the annexed agreements, which include, among others, the General Agreement on Tariffs and Trade (GATT 1994), the Agreement on Implementation of article VI of GATT 1994 (Anti-Dumping Agreement), the Agreement on Subsidies and Countervailing Measures, and the Agreement on Safeguards.

Turkey is also a member of other international organisations, such as the OECD, the G20 and the United Nations Conference on Trade and Development, so that its policies regarding international trade are in line with the concerned organisations' rules and disciplines. As a candidate to join the European Union (EU), Turkey has been reforming its domestic legal order to progressively integrate the EU's *acquis communautaire*, thereby closely following the legal developments taking place in the EU. In addition, Turkey formed a customs union with the EU in 1995, which obliges Turkey to adopt the EU's common external tariff. Most importantly, Turkey must also (theoretically) align its trade policy with the EU's Common Trade Policy. It follows, inter alia, from these obligations that Turkey must enter into a free trade agreement (FTA) with the countries with which the EU has signed such an agreement. It should, however, be indicated that Turkey is not under an obligation to include as such the provisions contained in the FTAs concluded by the EU, and may consider its industrial and trade priorities when negotiating.

There are currently 20 FTAs (EFTA, Israel, Macedonia, Bosnia and Herzegovina, Palestine, Jordan, Tunisia, Morocco, South Korea, Egypt, Albania, Georgia, Montenegro, Serbia, Chile, Mauritius, Malaysia, Moldova, Faroe Islands and Singapore) in force to which Turkey is a party. The FTAs signed with Kosovo, Venezuela, Qatar, Sudan and Lebanon are undergoing the ratification process, whereas the FTA entered into with Syria was suspended in 2011. Further, the FTA negotiations with Ghana are reported to be concluded and the FTA is expected to be signed soon. The scope of the FTAs in force with EFTA, Macedonia, Bosnia and Herzegovina, Albania, Montenegro, Moldovia, Malaysia, Serbia and Georgia is planned to be revised and is currently in negotiation. Moreover, the countries and organisations with which Turkey is continuing its negotiations or talks to start such negotiations in order to sign an FTA are, respectively:

- Ukraine, Libya, the Gulf Cooperation Council, Djibouti, Democratic Republic of the Congo, Cameroun, Chad, the Seychelles, Japan, Pakistan, Thailand, Indonesia, Peru, Ecuador, Colombia, Mexico and MERCOSUR; and
- Algeria, South Africa, African Caribbean and Pacific Group of States, Vietnam, India, United States, Canada and Central America.

Turkey has also signed and ratified various bilateral investment treaties (BITs) (see the list of countries at www.trade.gov.tr/legislation/bilateral-investment-treaties) as well as trade and cooperation agreements with a large number of countries. On 8 June 2019, Turkey and Canada entered into a memorandum of understanding regarding the Joint Economic and Trade Commission (JETCO) in order to strengthen the economic ties between the two countries.

Turkey is a notable user of trade remedies and is expected to remain so under the current global protectionist tendency.

Trade defence investigations

Government authorities

3 | Which authority or authorities conduct trade defence investigations and impose trade remedies in your jurisdiction?

Under the Turkish legislation regarding trade remedy investigations (question 1), the Directorate General for Imports of the Ministry of Trade (the Ministry) is authorised to conduct a preliminary examination ex officio or upon an application that is submitted by the domestic industry. The Department of Dumping and Subsidy, the Department of Safeguards and the Department for Monitoring and Assessment of Import Policies are the competent administrative units to conduct trade remedy investigations.

If the Directorate General for Imports is convinced that the initiation of an investigation is justified, it will present its recommendations to the

Board of Evaluation for Unfair Competition in Imports or the Board for the Evaluation of Safeguard Measures for Imports, and if the competent board resolves that an investigation should be initiated, it submits its resolution to the Minister of Trade for approval. Subsequently, the initiation notice will be announced in the Turkish Official Gazette and any interested party may find the relevant questionnaire at the Ministry's website. The case-handlers appointed for the concerned case will carry out all the analyses and examinations during the proceedings. The case-handlers will prepare a report on the basis of those analyses and examinations against which any cooperating party may present its comments.

Different authorities are competent for the enactment of anti-dumping and anti-subsidy measures and for safeguard measures.

After having decided whether to impose an anti-dumping or anti-subsidy measure, the Board of Evaluation for Unfair Competition in Imports transfers the proposed decision to the Minister of Trade, whose approval is necessary for the entry into force of the measure through the publication of a communiqué in the Official Gazette.

If the Board for the Evaluation of Safeguard Measures for Imports decides that a safeguard measure should be taken, it publishes a communiqué along with the Ministry's evaluations in the Official Gazette. This decision proposes to the Presidency of the Republic of Turkey that a safeguard measure should be imposed. If the Presidency of the Republic of Turkey is of the same opinion, a presidential decree is published in the Official Gazette to announce the entry into force of the safeguard measure.

Complaint filing procedure

4 What is the procedure for domestic industry to start a trade remedies case in your jurisdiction? Can the regulator start an investigation ex officio?

A trade remedy investigation can be initiated upon an application of domestic producers or ex officio by the Ministry if there is sufficient evidence that dumped or subsidised imports of a certain product have caused injury to the domestic industry. The content of the application form varies depending on the requested trade remedy and can be accessed at the Ministry's website.

Application for the imposition of an anti-dumping or anti-subsidy measure

According to Law No. 3577, an application may be made by or on behalf of the domestic industry in writing. The complaint shall be considered to have been brought by or on behalf of the domestic industry if it is supported by the producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application and shall not be less than 25 per cent of the total production of the like product produced by the domestic industry in Turkey (the representativeness test). In the case of fragmented industries involving a large number of producers, the support and opposition of the domestic industry may be determined by using statistically valid sampling techniques.

Such an application must include, among other things, the following information and details: the applicant and the other domestic producers; the products concerned by the application; the production process of those products; like products; the market structure; the applicant's imports of those products; sales, cost and accounting structure of the applicant; pricing; the applicant's economic indicators (eg, productivity, sales, costs, profitability, employment, capacity usage rate, investment); known exporters and importers; and the dumping or subsidy, material injury, threat of material injury or material retardation of the establishment of an industry, and causation allegations (eg, dumping calculation; schedule, amount or characteristics of the subsidy; development of imports, both in absolute and relative terms; and imports' effects on the domestic industry's prices). In addition, the applicant must provide a non-confidential version of the application and the Ministry is obliged to respect confidentiality under both the relevant domestic legislation and the Anti-Dumping Agreement. Upon the Ministry's first review of the application, potential deficiencies will be noticed to the applicant and missing or additional information will be required.

An investigation shall not be initiated where it is determined that the dumping or subsidy margin is de minimis or that the import volume is deemed negligible. The criteria used in this regard are as follows:

- regarding dumping investigations, cases where:
  - the margin of dumping expressed as a percentage of the export price is less than 2 per cent; or
  - the volume of dumped imports from the concerned country is found to account for less than 3 per cent of imports of the like product and, where more than one country is involved, imports from countries accounting for less than 3 per cent individually do not account collectively for more than 7 per cent of imports of the like product; and
- regarding subsidy investigations, cases where:
  - the amount of subsidy is less than 1 per cent of the value of the product concerned; or
  - as regards imports from developing countries:
    - the amount of subsidy does not exceed 2 per cent of the value of the product concerned; or
    - the volume of subsidised imports from the concerned country is found to account for less than 4 per cent of the total imports of the like product and, where more than one developing country is involved, imports from developing countries accounting for less than 4 per cent individually do not account collectively for more than 9 per cent of the total imports.

Within 45 days following the proper submission of a complete application, the Directorate General for Imports must conclude its examination and submit its proposal (whether to initiate an investigation) to the Board of Evaluation for Unfair Competition in Imports. If the Board of Evaluation for Unfair Competition in Imports resolves to start an investigation, this will be presented to the Minister of Trade's approval. Afterwards, the relevant country is notified about the initiation of an investigation and an initiation notice is published in the Official Gazette. On the other hand, if the Board of Evaluation for Unfair Competition in Imports decides not to conduct an investigation, only the applicant(s) will be notified.

As regards the initiation of an expiry review investigation, the Ministry announces through a communiqué the measures that will expire on a given date. Producers may require the extension of the applicable measures at the latest within the three months prior to the expiry date. Such applications should be substantiated by documents demonstrating that dumping or subsidy and injury are likely to continue or recur. Moreover, once the measures have been in force for one year, an interim review investigation may be requested by an exporter, importer or domestic producer on the ground that a change took place regarding dumping, subsidy or injury.

Application for the imposition of a safeguard measure

The Regulation on Safeguards stipulates that the relevant natural or legal persons or the professional organisations or chambers with which they are affiliated may submit a written application for the imposition of a safeguard measure. This form may be obtained from the Directorate General for Imports.

The application must mainly consist of the following information and details: the applicant and the other domestic producers; the products concerned by the application; the production process of those products; customers; the market structure; the factors influencing the

demand and competition; development of imports, both in absolute and relative terms; unforeseen developments, serious injury or threat of serious injury and causation allegations; the applicant's costs and economic indicators (eg, productivity, sales, costs, profitability, employment, capacity usage rate, investment); and adaptation plan to the new competition environment to be created if a safeguard measure is brought into force.

Afterwards, the Directorate General for Imports will conduct a preliminary examination, in the course of which additional information or documents could be requested. The outcome of this preliminary investigation is then presented to the Board for the Evaluation of Safeguard Measures. The Board could either decide that an investigation should be launched (in which case an initiation notice is published in the Official Gazette and is notified to the WTO) or that an investigation is unwarranted (in which case the applicant is notified of the Board's decision).

Contesting trade remedies

5 | What is the procedure for foreign exporters to defend a trade remedies case in your jurisdiction?

The relevant country is notified that an investigation has been initiated and a communiqué is published in the Official Gazette (see question 4). Initiation communiqués address the following subjects: the subject products, the country of origin or consignment, allegations made regarding the concerned imports and the timeframe imposed on interested parties to submit their responses to the questionnaire.

The usual period of investigation is 12 months, but an additional six-month extension can be applied by the Ministry. In most cases the Ministry concludes the investigation by the end of the 12 months. The use of an extra six months depends on the number of cooperating firms, as well as the number of subject countries and subject products.

After the initiation of an investigation, questionnaires are sent to known importers and exporters of the subject product, and to the embassies in Turkey of the countries subject to investigation. Any parties that are willing to cooperate with the investigating authority should submit their responses to the questionnaire within 37 days in the case of anti-dumping and anti-subsidy investigations (which may be extended by the Directorate General for Imports upon request) and at most 40 days in the case of safeguard investigations. During those investigations, the interested parties may submit their comments (in writing) against the evaluations and allegations made by the case-handler or the domestic industry. Additionally, parties may also present their comments orally during potential hearings.

Finally, the Ministry indicates in initiation notices that the responses to the questionnaires, all the documents and observations must be submitted in Turkish.

WTO rules

6 | Are the WTO rules on trade remedies applied in national law?

Yes, Turkey is a member of the WTO. Article 90 of the Constitution of the Republic of Turkey provides that international agreements duly put into effect have the force of law. Turkey has signed and ratified the Agreement Establishing the WTO (and all the agreements annexed) so that those agreements are legally binding legal instruments.

Appeal

7 | What is the appeal procedure for an unfavourable trade remedies decision? Is appeal available for all decisions? How likely is an appeal to succeed?

The decisions taken in respect of trade remedies are administrative acts over which the Council of State exercises sole jurisdiction.

Turkish law confers on the investigating authority a wide discretion and that approach is generally backed by the Council of State's case law. It is therefore important to be cautious of the likelihood of success of an appeal procedure against a decision of the Ministry. Judicial review success in trade remedy cases is thus dependent on the quality of supporting evidence and on the nature of the investigating authority's errors in making its determinations.

In this regard, it should be noted that the Council of State had annulled Communiqué No. 2015/28 on the Prevention of Unfair Competition in Imports through its decision (dated 28 December 2017 and numbered 2015/6922 E., 2017/6614 K.) on the grounds that there was no concrete and sufficient evaluation regarding injury and causation. However, the concerned decision was overturned upon the Ministry's appeal by the majority of the members' votes of the Plenary Assembly of the Tax Law Division.

Review of duties/quotas

8 | How and when can an affected party seek a review of the duty or quota? What is the procedure and time frame for obtaining a refund of overcharged duties? Can interest be claimed?

The Regulation on Unfair Competition allows interested parties to request the initiation of the following investigations:

- interim review investigation – exporters, importers or domestic producers may request the review of a definitive measure after one year of the entry into force. The request must be supported by sufficient evidence demonstrating that the review is warranted. Additionally, the request must be submitted in writing to the Directorate General for Imports;
- expiry review investigation – measures about to expire are announced in the Official Gazette in the last year of the five-year validity period of the concerned measures. Domestic producers of the subject product may request the initiation of an expiry review investigation at the latest three months before the end of the validity period. The request must be supported by sufficient evidence and must be submitted in writing to the Directorate General for Imports;
- new exporter or shipper review investigation – exporters or producers that have not exported the product subject to measures to Turkey during the period of investigation may request in writing the determination of individual dumping or subsidy margins from the Directorate General for Imports. To this end, the applicant should prove that it is not related to any of the exporters or producers subject to the measures in question and that it has exported the subject product to Turkey after the period of investigation or has concluded an irrevocable contractual obligation to export a significant quantity;
- anti-absorption reinvestigation – the domestic industry may request such an investigation in writing on the ground that the definitive measures have been neutralised due to a fall in export prices. The request shall contain sufficient evidence of the measures being absorbed; and
- anti-circumvention investigation – the domestic producers claiming that an applicable measure is being circumvented may submit a written request for the initiation of an anti-circumvention investigation to the Directorate General for Imports (along with the documents demonstrating that there is a change in the pattern of trade between a third country and Turkey or the country subject to measures and Turkey or individual companies in the country subject to measures and Turkey, stemming from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the applicable measure, and the remedial effects of the duty are being undermined or nullified).

Furthermore, the Regulation on Safeguards sets out that a safeguard measure may be imposed in the form of customs duties, additional financial charges, quantity or value restrictions, tariff quotas or a combination of these measures. The duration of safeguard measures shall not exceed four years, including the duration of any provisional measure, unless it is extended. The duration of the measure may be extended in accordance with the results of a new investigation to be initiated, provided it is determined that the safeguard measure continues to be necessary to prevent or remedy serious injury and there is evidence that the domestic producers are adjusting to the conditions of the market. An extended measure shall not be more restrictive than it was at the end of the initial period and shall continue to be liberalised. The total period of application of a safeguard measure shall not exceed 10 years.

Lastly, a refund application must be submitted within six months of the collection date of the measures. The application must be supported by the evidence concerning the following subjects: the dumping or subsidy margin for a representative period; the amount of refund of taxes claimed; customs documentation regarding the calculation of the measures; and the producer's or exporter's normal value and export prices to Turkey for a representative period. A refund application must be submitted in writing to the Directorate General for Imports. The Directorate General for Imports must take its decision within 12 months, but this timeframe can be extended by six months. If the decision is positive, the relevant authorities must grant a refund within 90 days from the date of the refund decision.

Compliance strategies

9 What are the practical strategies for complying with an anti-dumping/countervailing/safeguard duty or quota?

Depending on the commercial terms used by the parties, importers in Turkey are generally liable for the payment of the customs duties on imports. Accordingly, importers will benefit from close cooperation with exporters in order to take all the appropriate precautions and to minimise the risks associated with the implementation of trade remedies. Moreover, any activity violating the customs legislation could potentially trigger the application of hefty administrative fines along with the retroactive collection of the duties and in certain circumstances the application of criminal sanctions.

FInally, any strategy that will closely monitor the subject products, market structures (including upstream and downstream markets), competitiveness, cost-price analysis, pricing policy and Turkey's approach may be useful for potential review cases (see question 8 for review and refund investigations).

CUSTOMS DUTIES

Normal rates and notification requirements

10 Where are normal customs duty rates for your jurisdiction listed? Is there an exemption for low-value shipments, if so, at what level? Is there a binding tariff information system or similar in place? Are there prior notification requirements for imports?

Lists containing the applicable customs duty rates can be accessed in Turkish at the Ministry's website (www.ticaret.gov.tr/ithalat/ithalat-rejimi). Additionally, binding tariff information or an advance ruling can be given by the Customs Undersecretariat upon a taxpayer's written request. Importers may request binding tariff information concerning:

- the determination of import or export taxes: calculation of export tax refunds in the scope of the agricultural policy and all payments given to import or export; and
- usage of import, export or prior consent documents: binding tariff information is binding from the date the information is given and valid for six years from the date the information is given.

The exemptions from custom duty and exceptions are listed under article 167 of the Customs Law, whose fourth paragraph regulates the exemption for low-value shipments. As a general practice, the President of the Republic determines the exemptions, including the exemption for low-value shipments, in accordance with Turkey's current trade policy. Currently, article 45 of the Decree on the Implementation of Certain Articles of the Customs Law (the Decree) stipulates that books or printed publications sent by post or fast cargo for personal use whose value does not exceed €150 for each shipment are exempt from customs duty. In addition, article 62 of the Decree sets out the following customs duty rates for goods and books or printed publications for personal use sent by post or fast cargo and for the goods referred to in article 59 of the Decision brought into Turkey by passengers:

- 18 per cent for those consigned from the EU;
- 20 per cent for those consigned from other countries;
- 0 per cent for books or similar printed publications; and
- 20 per cent in addition to the above-mentioned rates for the goods listed in Annex IV of the Special Consumption Tax Law no 4760.

However, books or printed publications that are sent to or procured by public institutions and organisations, libraries and museums, as well as organisations engaging in educational or scientific research, are exempt from customs duty. Turkey's customs tariff system (Customs Tariff Statistics Positions) is based on the World Customs Organization's Harmonized System and is updated and approved every year by the President of the Republic. The Customs Tariff Statistics Positions establishes 12-digit codes for the identification and classification of imported and exported products.

Special rates and preferential treatment

11 Where are special tariff rates, such as under free trade agreements or preferential tariffs, and countries that are given preference listed?

Reduced customs duty rates are published in the lists annexed to the Import Regime Decree and are provided for in the FTAs concluded by Turkey. Article 16 of Decision No. 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union obliges Turkey to harmonise its tariffs so as to align with the EU's preferential customs regime.

The EU's regime is only partly applied, and thus certain countries that are covered by the EU's GSP regime are not included in Turkey's GSP regime. Those countries may be considered either as third countries or beneficiaries from special incentive arrangements. (See the Annex 4 to the Import Regime Decree for the list of GSP beneficiary countries: www.resmigazete.gov.tr/eskiler/2019/05/20190510-15.pdf.) The lists of applicable customs duty rates depending on the concerned country's status (GSP or not) are provided in Turkish at the Ministry's website (www.ticaret.gov.tr/ithalat/ithalat-rejimi).

Turkey currently benefits from the GSP regimes of Japan, Russia, Belarus, Kazakhstan, New Zealand, Australia and Canada. The US recently expelled Turkey from its GSP regime.

12 How can GSP treatment for a product be obtained or removed?

GSP treatment for a product can be obtained from and removed by the Directorate General for Imports within the Ministry.

Pursuant to the Import Regime Decree, Turkey takes any necessary measure for countries, establishments and companies that disturb the

balance of commerce and payments in Turkey's commercial relations, breaching their obligations determined by international agreements or acting contrary to the principle of universality within the context of international agreements.

13 | Is there a duty suspension regime in place? How can duty suspension be obtained?

Turkey has a tariff suspension system. The products that are free of customs duties are listed in Appendix V of the Import Regime Decree.

Producers located in Turkey can request tariff suspension for raw materials, semi-finished goods or components to be used in their production and that are not available either in the EU or in Turkey. Additionally, the amount of import duty saved must be at least €15,000.

All the requests are forwarded to the Economic Tariff Questions Group within the European Commission. Those requests are first evaluated by this group and the outcome is sent to the Commission. After the final decision by the Commission, suspension updates enter into force in the EU and Turkey simultaneously. Suspension decisions are valid for five years.

Challenge

14 | Where can customs decisions be challenged in your jurisdiction? What are the procedures?

An application can be made either before the competent mediation commission within 30 days after the notification or before the Head Directorate within 15 days from the date of notification.

If the Head Directorate refuses the application, the relevant parties can appeal the decision before the administrative courts within 30 days from the date of notification of the concerned decision.

TRADE BARRIERS

Government authorities

15 | What government office handles complaints from domestic exporters against foreign trade barriers at the WTO or under other agreements?

According to the Regulation on Trade Barriers, complaints from domestic exporters are handled by the Turkish Trade Barrier Notification Centre.

Complaint filing procedure

16 | What is the procedure for filing a complaint against a foreign trade barrier?

The relevant parties can file a complaint regarding a foreign trade barrier on the website of the Ministry. A working group on trade barriers reviews whether the notified issue constitutes an actual trade barrier. After sufficient data is gathered on the issue in order to provide a legal basis in light of international treaties, the issue will be submitted to the relevant units to take legal action. The complainant will be informed of any legal issues and actions with regard to its complaint.

The relevant parties may also file a complaint against a foreign technical barrier on the website of the Turkish Trade Barrier Notification Centre.

Grounds for investigation

17 | What will the authority consider when deciding whether to begin an investigation?

The authority will consider whether all the documents and information sent by applicants constitute sufficient evidence to justify initiating an investigation.

Measures against foreign trade barriers

18 | What measures outside the WTO may the authority unilaterally take against a foreign trade barrier? Are any such measures currently in force?

Turkey has signed and ratified treaties with the EU, China, the EFTA countries, Israel, Russia, Ukraine, Iran, Lebanon and Bulgaria. Some measures may be taken against foreign trade barriers in accordance with these treaties.

Private-sector support

19 | What support does the government expect from the private sector to bring a WTO case?

The government does not have any known expectations in this regard from the private sector.

Notable non-tariff barriers

20 | What notable trade barriers other than retaliatory measures does your country impose on imports?

Imports of the products listed in the annexes of Communiqué No. 2019/1 on Product Safety and Inspection are inspected by the Inspectors for Standardisation of Foreign Trade for commercial quality. A Control Certificate is given to the importers if the products meet the required standards.

Agricultural products are inspected by the Ministry of Agriculture and Rural Affairs pursuant to Communiqué No. 2019/1 on Product Safety and Inspection published by the Directorate General for Product Safety and Inspection. Before importing these agricultural products, a Control Certificate is required from the ministry. Upon inspection by the ministry, a Letter of Conformity is issued to the importer provided that the products in question do not constitute any health risks.

As to plants and animals, a phytosanitary certificate issued by the country of origin is additionally required for plants and related products, and health certificates may be required for livestock and animal products, depending on the country of origin.

EXPORT CONTROLS

General controls

21 | What general controls are imposed on exports?

Products listed in Appendix 1 of the Regulation on Trade Barriers and Standardisation of Foreign Trade are subject to mandatory standards and quality controls. Exporters must apply to the relevant Group Presidency of Inspectorates for the Standardisation of Foreign Trade to export the listed products. A Control Certificate is issued by the Group Presidency of Inspectorates for the Standardisation of Foreign Trade if the products meet the required standards.

Government authorities

22 | Which authorities handle the controls?

In general, the inspectorates of standardisation for foreign trade are empowered to conduct conformity assessments of the exported products against required standards, technical regulations and quality. Those are also competent to deliver the relevant documentation in this regard. Furthermore, the administrative authorities in charge of controlling and those in charge of approving the exportation of the goods subject to control are mentioned in each of the relevant regulations. The main authorities administering export control are the Ministry of National Defence for military materials and equipment, the Turkish

Atomic Energy Authority for nuclear and nuclear dual-use materials, and the Ministry of Trade for other dual-use materials.

Special controls

23 | Are separate controls imposed on specific products? Is a licence required to export such products? Give details.

Specific certificates and analysis may be required in particular in cases of plant and livestock exports. The details are as follows:

- phytosanitary certificate – export of unprocessed agricultural products requires a phytosanitary certificate in order to attest that the consignment meets phytosanitary export requirements. The certificate is prepared in line with the 1951 Rome Treaty; and
- health certificate – all agricultural products require a health certificate based on the requirements of the purchasing country. The evaluations of the inspection report and analysis results are based either on the requirements of the purchasing country or on the Turkish Food Codex.

There are also additional procedures, such as the EU's requirement for an analytical report as well as a health certificate to show that aflatoxin levels are acceptable in the case of exportation of nuts and dried fruits, or the requirement of a radiation analysis to prove that radiation levels are below the limits for exportation of mushrooms.

The Russian Federation also requires additional analysis when exporting fresh fruits and vegetables. Exports of livestock and animal products may also differ from country to country. Under the Regulation on the Protection of Export of Dual-Use and Sensitive Products and Communiqué on the Export of Chemical Products that are listed in the Appendix of the Chemical Weapons Agreements, the Ministry controls the export of dual-use and chemical products. According to the legislation, the exporter must apply to the Istanbul Mining and Metals Exporters Union's Secretary General to obtain a licence.

Additionally, Turkey is a party or member to the Wassenaar Arrangement, the Chemical Weapons Convention, the Missile Technology Control Regime, The Australia Group, the Zangger Committee and the Nuclear Suppliers Group.

Supply chain security

24 | Has your jurisdiction implemented the WCO's SAFE Framework of Standards? Does it have an AEO programme or similar?

Turkey is a party to the WCO's SAFE Framework of Standards Agreement. According to article 5/A of the Customs Law no 4458, the AEO status can be granted by the Customs Undersecretariat to economically active residents who have the requisite qualifications, such as financial capability.

Applicable countries

25 | Where is information on countries subject to export controls listed?

The following communiqués establish lists of products subject export control:

- the Communiqué setting out the List regarding War Tools and Equipment, Weapons, Ammunitions and Spare Parts thereof, Military Explosive Materials, and Technologies thereof established on the basis of the Law No. 5201;
- Communiqué No. 96/31 on the Goods whose Export is Prohibited or Subject to a Pre-Authorization;
- Communiqué No. 2006/7 on the Goods whose Export is Subject to Registration; and
- Communiqué No. 2007/1 on the 'Warning List regarding Nuclear Transfer' and the 'List of Nuclear Dual-Use Goods', which indicate the items of the goods falling under the regulation on the granting of the document that will serve as a basis for the approval of the use of nuclear and nuclear dual-use goods.

Named persons and institutions

26 | Does your jurisdiction have a scheme restricting or banning exports to named persons and institutions abroad? Give details.

No, there is no scheme restricting or banning exports in Turkey. Nevertheless, Turkey implements the lists of sanctioned individuals and entities established by the United Nations and by the EU.

Penalties

27 | What are the possible penalties for violation of export controls?

The violation of an export control rule can lead to the imposition of an administrative fine that is double the customs value of the goods whose exportation is prohibited by a general administrative act (article 235(2) of Law No. 4458 on Customs). The exportation of goods whose exportation is subject to the granting of a licence, to the satisfaction of a condition or to an approval may lead to an administrative fine worth the customs value.

From a criminal viewpoint, Anti-Smuggling Law No. 5607 provides that, unless the behaviour concerned constitutes an offence requiring a heavier punishment, persons who export goods whose exportation has been prohibited can be subject to imprisonment for from one to three years and to a judicial fine which is equivalent to 5,000 days. According to article 52(2) of the Turkish Penal Law, the amount of a fine equivalent to one day varies between 20 lira and 100 lira and must be determined on the basis of the economic situation and other personal characteristics of the person concerned.

FINANCIAL AND OTHER SANCTIONS AND TRADE EMBARGOES

Government authorities

28 | What government offices impose sanctions and embargoes?

The President of the Republic is authorised to impose embargoes. Any customs-related sanctions are to be applied by customs authorities and deputies.

Applicable countries

29 | What countries are currently the subject of sanctions or embargoes by your country?

There are currently no official sanctions or embargoes applied by Turkey. On the other hand, Turkey applies the sanctions taken by the United Nations against certain countries.

However, the practice in Turkey can differ for foreign-originating companies in Turkey (Turkish companies with foreign partners and companies working with EU countries or the US). Foreign-originating companies may refrain from working with countries such as Iraq, Iran, Syria, China, Lebanon, North Korea, Liberia and Zimbabwe owing to sanctions or embargoes applied in the country where they originate.

Specific individuals and companies

30 | Are individuals or specific companies subject to financial sanctions?

There is currently no official list of individuals or specific companies subject to financial sanctions applied by Turkey.

However, practice in Turkey can differ for foreign-originated companies in Turkey, Turkish companies with foreign partners and companies working with EU countries or the US. Foreign-originated companies may refrain from working with persons, groups and entities subject to financial sanctions in the country in which they originate.

OTHER RELEVANT ISSUES

Other trade remedies and controls

31 | Describe any trade remedy measures, import or export controls not covered above that are particular to your jurisdiction.

There are no measures or import or export controls that are not covered above.

UPDATE & TRENDS

Key developments

32 | Are there any emerging trends or hot topics in trade and customs law and policy in your jurisdiction?

Turkey's approach to global trade in the middle of protectionist tendencies

On 7 May 2019, the Turkish Ministry of Trade published its decision to close the safeguard investigation concerning imports of certain iron and steel products without imposition of any measures due to the finding that there had not been an increase (either absolute or relative to domestic production) in imports of the subject products and a serious injury or threat of serious injury due to the increase in imports had not been established.

The above-mentioned safeguard investigation had been initiated by the Turkish Ministry in April 2018 as a response to the ongoing worldwide protectionist approach in the international trade regime as regards steel imports, and more particularly, immediately after the US's Section 232 tariffs and the EU's initiation of a safeguard investigation concerning imports of certain iron and steel products. Furthermore, similar to the EU's approach, the Turkish Ministry had imposed a provisional safeguard measure that took the form of a system of tariff rate quotas in excess of which an additional duty of 25 per cent was paid.

The Ministry's closing decision is of significance given the recent events suggesting that nations are more and more following a protectionist tendency. This also shows Turkey's attachment to its commitments under WTO rules and its determination not to jeopardise trade liberalisation. Indeed, the Minister of Trade highlighted in the recent G20 Ministerial Meeting on Trade and Digital Economy held on 8–9 June 2019 that even though the adoption protectionist measures could be considered as a response to short-term difficulties, those may also distort the global supply chains and diminish trust in the global trading system.

Furthermore, Turkey and Canada entered into a memorandum of understanding regarding JETCO in order to strengthen the economic ties between the two countries. Turkey is currently focused on a potential FTA with Japan, is closely monitoring developments in the Brexit process and is discussing all the precautions that could be taken to avoid potential trade barriers post-Brexit.

On the other hand, the Ministry of Trade follows a strict approach regarding circumvention practices in imports and has lately initiated several anti-circumvention investigations. Moreover, Turkish customs authorities have deployed all available resources concerning the problem of a possible circumvention of the duties applicable to imports.

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New draft customs law

Turkey has not yet implemented the UCC, the UCC Implementing Act, and the UCC Delegated Act which entered into force in 2017, so that the Turkish Customs Law and its implementing regulations are still based upon the old Council Regulation 2913/92 on the Community Customs Code and the provisions for its implementation. On the other hand, the Turkish government is currently discussing drafting new customs legislation and it is likely that the rules to be enacted will be more harmonised with EU customs legislation.

In the meantime, the Ministry of Trade has recently been working to achieve digitalisation, modernisation and transparency in customs in order to facilitate safe trading and to fight smuggling.

Finally, the economic sanctions adopted by the US against Iran, the implementation of those sanctions by US authorities and the potential effects of those sanctions on Turkish companies doing business with Iran have pushed them to implement a compliance programme in this regard.

Ending of Turkey's designation to the US's GSP programme

Following Turkey's retaliatory additional duties on US$1.78 billion of US imports, the Office of the US Trade Representative announced on 3 August 2018 the initiation of a review of Turkey's eligibility for the US Generalized System of Preferences (GSP) programme. The allegation underlying this review is that Turkey no longer complies with the market access criterion, requiring Turkey to assure the US reasonable and equitable access to its market. As a result of this review, Turkey was expelled on 19 May 2019 from the US GSP programme through Proclamation 9887 (www.federalregister.gov/documents/2019/05/21/2019-10761/to-modify-the-list-of-beneficiary-developing-countries-under-the-trade-act-of-1974).

Ukraine

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LEGAL FRAMEWORK

Domestic legislation

1 What is the main domestic legislation as regards trade remedies?

The main domestic legislation regarding trade remedies is as follows:

- Law No. 959-XII on Foreign Economic Activity, 16 April 1991 (last amended 7 February 2019);
- Law No. 330-XIV on Protection of Domestic Industry against Dumped Imports, 22 December 1998 (last amended 4 October 2018);
- Law No. 331-XIV on Protection of Domestic Industry against Subsidised Imports, 22 December 1998 (last amended 4 October 2018); and
- Law No. 332-XIV on Application of Safeguard Measures against Imports to Ukraine, 22 December 1998 (last amended 4 October 2018).

English translations of these laws, accurate as at January 2013, can be found in Ukraine's notification to the WTO regarding laws and regulation on trade remedy matters available on the WTO website (G/ADP/N/1/UKR/1/Suppl.1, G/SCM/N/1/UKR/1/Suppl.1 and G/SG/N/1/UKR/1/Suppl.1) at www.wto.org/english/thewto_e/countries_e/ukraine_e.htm.

On 4 October 2018, the law of Ukraine 'On Amendments to the Customs Code of Ukraine and some other laws of Ukraine regarding the introduction of a "single-window" system and optimisation of control procedures for goods moving across the customs border of Ukraine' was adopted. Inter alia, this Law provides a uniform single-window system used in all branches of international economic activity and improves the procedure for acquiring of licences for goods that are or may be subject to special (safeguard) duty, anti-dumping duty and countervailing duty.

Furthermore, in March 2018, the Ukrainian government submitted to Parliament five draft laws concerning the reform of trade defence instruments in Ukraine. The draft laws comprise new versions of the laws of Ukraine 'On Protection from Dumped Imports', 'On Protection from Subsidised Imports' and 'On Safeguard Measures', as well as including a draft law 'On Amendments to the Legislative Acts in the Area of Trade Defence' and a draft law 'On Amendments to the Customs Code of Ukraine Concerning Trade Defence'. The draft laws are currently being considered by Committees of the Ukrainian Parliament.

International agreements

2 In general terms what is your country's attitude to international trade?

Trade liberalisation at multilateral level

As a WTO member Ukraine has been taking advantage of the WTO negotiating and dispute settlement mechanisms. Since accession to the WTO in 2008 Ukraine has participated in 54 WTO disputes. In nine of these Ukraine has participated as a complainant, in four as a respondent and in 41 as a third party. The current disputes that Ukraine is involved in as complainant are the following:

As complainant:

- DS499: *Russia – Measures Affecting the Importation of Railway Rolling Stock, Railway Switches, other Railway Equipment and Parts Thereof* (Panel report under appeal on 27 August 2018);
- DS512: *Russia – Measures Concerning Traffic in Transit* (Report(s) adopted, no further action required on 26 April 2019);
- DS530: *Kazakhstan – Anti-dumping Measures on Steel Pipes* (in consultations on 19 September 2017);
- DS532: *Russia – Measures Concerning the Importation and Transit of Certain Ukrainian Products* (in consultations on 13 October 2017);
- DS569: Armenia – *Anti-Dumping Measures on Steel Pipes* (in consultations on 17 October 2018); and
- DS570: Kyrgyz Republic – *Anti-Dumping Measures on Steel Pipes* (in consultations on 17 October 2018).

The current disputes that Ukraine is involved in as respondent are the following:

- DS493: *Ukraine – Anti-Dumping Measures on Ammonium Nitrate* (complainant – the Russian Federation; Panel report under appeal on 23 August 2018); and
- DS525: *Ukraine – Measures relating to Trade in Goods and Services* (complainant – the Russian Federation; in consultations on 19 May 2017).

Moreover, Ukraine has ratified the Trade Facilitation Agreement and acceded to the revised Government Procurement Agreement. Ukraine is also a party to the protocol amending the Agreement on Trade-Related Aspects of Intellectual Property Rights that provides for facilitating access to affordable medicines for poorer countries.

Trade liberalisation at regional level

Since 2014 Ukraine has been a party to the EU–Ukraine Association Agreement. The Association Agreement came into full force on 1 September 2017. The economic part of the Association Agreement establishing the Deep and Comprehensive FTA commenced in January 2016. It was, however, being provisionally applied until both chambers of the Dutch Parliament upheld ratification of the Association Agreement.

The EU–Ukraine Association Agreement provides for political association and economic integration between the parties and includes a 'deep and comprehensive free trade agreement' (DCFTA) as an integral part. The Association Agreement was the first example of a new generation of agreements between the EU and Eastern Partnership countries focusing on core reforms, good governance, economic recovery and growth and cooperation in a number of sectors, including energy; transport; environmental protection; industrial cooperation; social

development and protection; equal rights; consumer protection; and education, youth and cultural cooperation. Special attention was given to respect for human rights and fundamental freedoms, the rule of law, democracy, market economy and sustainable development. The DCFTA, apart from the liberalisation of services and the elimination of tariffs for most goods, stipulates harmonisation with EU standards, conformity assessment requirements, sanitary and phytosanitary rules, and norms on intellectual property protection, public procurement and competition. The DCFTA also includes specific provisions on trade-related energy matters.

In January 2019, the EU initiated a trade dispute against Ukraine based on the EU–Ukraine Association Agreement (for details, see question 21)

Ukraine has also FTAs with the CIS states (1994), Macedonia (2001), GUAM states (Georgia, Ukraine, Azerbaijan and Moldova) (2002), the EFTA states (2010), Montenegro (2012), Canada (2016) and Israel (2019). Furthermore Ukraine and Turkey anticipate concluding an FTA by the end of 2019.

Ukraine's trade deal with the EFTA states was the first comprehensive and modern FTA concluded by Ukraine. The FTA covers trade in goods and services, investment, intellectual property rights, government procurement, competition, institutional provisions and dispute settlement.

Ukraine is a party to the Commonwealth of Independent States (CIS) FTA between Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan and Ukraine. The CIS FTA covers trade in goods. On 19 May 2018, the President of Ukraine signed a decree to withdraw all Ukrainian envoys from the statutory bodies of the Commonwealth of Independent States (CIS).

In addition to the CIS FTA, Ukraine has carried out preferential trade regimes with the CIS countries under bilateral FTAs with Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan. The FTA between Ukraine and Russia was suspended in January 2016 to the extent that the EU–Ukraine Association Agreement strengthened their trade ties and Russia decided to suspend the free trade area with Ukraine on the basis of Annex 6 to the CIS FTA. Annex 6 entitles members of the Customs Union to introduce the most-favoured nation (MFN) tariff against imports from another party to the CIS FTA, provided that the preferential trade regimes concluded by the latter party with third countries resulted in an increase in imports to the Customs Union.

The GUAM FTA, although signed in 2002, has not proved to be effective. In March 2017, the GUAM states signed a series of arrangements on fostering the FTA and mutual recognition of certain customs procedures.

The Canada–Ukraine Free Trade Agreement (CUFTA) covers trade in goods only. It also includes separate chapters on competition policy, monopolies and state enterprises; e-commerce; intellectual property; government procurement; labour; environment; transparency; and trade-related dispute settlement. CUFTA came into force on 1 August 2017. The Israel–Ukraine Free Trade Agreement was signed in January 2019. It is expected that ratification will take place by the end of 2019. As with the CUFTA, it covers trade in goods only.

On 1 February 2018, Ukraine acceded to the regional Convention on pan-Euro-Mediterranean preferential rules of origin (PEM Convention). The PEM Convention is expected to increase Ukraine's share of value added and promote FDI and employment.

TRADE DEFENCE INVESTIGATIONS

Government authorities

3 Which authority or authorities conduct trade defence investigations and impose trade remedies in your jurisdiction?

In Ukraine, trade defence investigations are conducted by:

- the Ministry of Economic Development and Trade of Ukraine (the Ministry) (www.me.gov.ua); and
- the Interdepartmental Commission on International Trade (the Commission) (www.me.gov.ua).

The Ministry, through the department that deals with cooperation with the WTO and trade defence matters, is entitled to conduct trade defence investigations, but not to adopt preliminary or final determinations. Upon the results of the conducted investigation the Ministry prepares a report that forms the basis for the Commission to make a determination regarding the imposition or non-imposition of preliminary or final measures.

The Commission makes decisions regarding:

- the initiation of investigations;
- positive or negative determinations on dumping, injury and the causal link between them; and
- the imposition of anti-dumping measures.

The Commission is an interdepartmental body that consists of representatives of various ministries and governmental agencies, such as the Ministry of Economic Development and Trade, the Ministry of Foreign Affairs, the Ministry of Agricultural Policy and Food, the Ministry of Energy and Coal Industry, the Ministry of Infrastructure, the State Fiscal Service and the Antimonopoly Committee. The Minister of Economic Development and Trade is the head of the Commission by virtue of his or her office.

Complaint filing procedure

4 What is the procedure for domestic industry to start a trade remedies case in your jurisdiction? Can the regulator start an investigation ex officio?

In order to start a trade remedies case, the domestic industry must submit an application to the Ministry of Economic Development and Trade. At the same time, anti-dumping or anti-subsidy investigations can begin, upon an application submitted by trades unions of employees and governmental bodies, if they possess relevant evidence of dumping or subsidisation and material injury. Safeguard investigations can also be initiated upon information collected by the Ministry itself. In practice, however, nearly all trade remedies cases are initiated upon application made by the domestic industry.

The Ministry examines the application and forwards to the Commission a report on the results of such examination with recommendations either to launch the investigation or to deny the application. The Commission will take a decision on whether to initiate a trade remedies investigation generally within the 30-day period from the date of submission of the application.

The application to start an anti-dumping or anti-subsidy investigation shall contain the evidence of dumping or subsidisation, injury and causation. The application shall include the following information:

- general information regarding the applicant;
- data on the applicant's production of the products concerned (by volume and value);
- a list of all known domestic producers of like products (or associations of domestic producers of like products) and, if possible,

of the volume and value of production of like products by these producers;
- products (including their full description) that are stated to be the subject of dumping or subsidisation and the name of the country (or countries) of origin or export that is the subject of the application; and
- a list of known exporters, foreign producers and importers of products under investigation.

For anti-dumping investigations:
- the prices at which products under investigation are sold for consumption in the domestic market of the country or countries of origin or export (or, where such information is available, the prices at which the products are sold from the country of origin or export to a third country or on the constructed value of products); and
- information on export prices, or prices at which the products are first resold to an independent buyer in the importing country.

For anti-subsidy investigations:
- evidence with regard to the existence, amount and nature of the subsidy in question, and evidence that a subsidy is actionable; and
- the volumes and dynamics of allegedly dumped or subsidised imports, and the effect of these imports on prices of like products in the importing country market and the state of the domestic industry.

The application to launch an anti-dumping or anti-subsidy investigation also contains information on public interest.

The application to start a safeguard investigation shall include information regarding the volume and prices of the allegedly increased imports. It normally also includes general data regarding the domestic industry, evidence regarding serious injury caused to the domestic industry, a description of the products concerned, causation and public interest.

The ex officio initiation procedure is not envisaged as such for competent authorities. However, if the executive authority in Ukraine possesses evidence of dumping and injury to the domestic industry the law requires that these materials are forwarded or submitted to the Ministry for assessment and in case of necessity to advise the Commission to initiate an investigation.

The new draft laws on trade defence instruments referred to in question 1 explicitly provide for initiation procedure ex officio. Within this procedure the Ministry will be entitled to recommend upon its own initiative to the Commission to initiate a trade investigation. The Commission must adopt a decision based on the Ministry's report within 10 days, provided the Ministry's report is substantiated by the relevant evidence.

Contesting trade remedies

5 | What is the procedure for foreign exporters to defend a trade remedies case in your jurisdiction?

Foreign exporters participate in a trade remedies case as interested parties, but they do not acquire this status automatically. Foreign exporters can enjoy all the rights of the interested parties if they inform the Ministry of their desire to participate in the investigation within the established time limit.

After taking a decision to initiate a trade defence investigation, the Commission publishes a notice in the Official Newspaper (https://ukurier.gov.ua/uk/). The public notice aims to inform all parties concerned, including foreign exporters, about a launched investigation. As standard practice, the notice sets a term of 30 days for the registration of foreign exporters and producers (as well as other parties concerned) as an interested party to the investigation.

Once a company is registered as an interested party, it enjoys all relevant rights prescribed by law to defend its interests, such as submitting commentaries, participating in the hearing, submitting a post-hearing brief and reviewing a case record. If the deadline for registration is missed, the right to enjoy such opportunities is forfeited.

Normally, a public notice also sets a deadline of 60 days (45 days in safeguard investigations) for submitting an initial commentary regarding the investigation. This commentary can be submitted both by interested parties registered with the Ministry and by non-registered parties.

Shortly after the initiation of the investigation, the Ministry sends a questionnaire to known foreign exporters and producers. The Ministry usually considers foreign producers and exporters as being known if they are registered as an interested party. Sometimes the Ministry sends the questionnaire to non-registered foreign exporters. Foreign producers (exporters) usually have to reply to the questionnaire within 37 days from the date of the Ministry's sending of the questionnaire. They can also request an extension, which is granted by the Ministry in the majority of cases. The standard duration of an extension is two weeks.

In almost every investigation the Ministry holds public hearings with the participation of all interested parties (domestic industry, foreign producers and exporters, embassies of exporting countries, importers etc). After the public hearings, the participants in the hearings submit post-hearing briefs, which are taken into consideration by the Ministry during the investigation.

A foreign producer or exporter also has a right to request consultation with the domestic industry, where both parties can present and discuss their arguments. After the consultation, the written briefs are submitted to the Ministry.

In addition, the Ministry, in the course of the investigation, may send additional requests for information or clarification of previously submitted information.

All information submitted to the Ministry by an interested party shall be sent promptly by this interested party to all other participants in the investigation. The interested parties are also entitled to review the public case record in the Ministry. In practice, interested parties can comment on written information submitted by other interested parties.

The period of an anti-dumping or anti-subsidy investigation shall not exceed one year from the date of publication of the notice on its initiation. The Commission may prolong the term of an investigation for up to 18 months. The duration of a safeguard investigation shall not exceed 270 days from the date of initiation of such investigation. Under extraordinary circumstances this term may be extended by the Commission to up to 330 days.

WTO rules

6 | Are the WTO rules on trade remedies applied in national law?

Ukraine belongs to a group of countries where international treaties ratified by parliament become a part of domestic legislation. In particular, pursuant to article 9 of the Constitution of Ukraine, international treaties that are in force and agreed to be binding by parliament are part of domestic legislation. Article 19.1 of the Law on International Treaties of Ukraine additionally says that international agreements ratified by parliament are a part of domestic legislation and shall be applied under the procedure provided for the norms of domestic legislation. Furthermore, if the international agreement, duly ratified by parliament, sets rules other than those envisaged in Ukrainian legislation, the rules of the international agreement shall apply (article 19.2 of the Law on International Treaties of Ukraine).

Thus, WTO trade remedies agreements have direct effect in Ukraine. They are applied by the Ministry in the course of the investigation along with domestic trade remedies laws (ie, the Ministry refers

directly to WTO rules in its requests, letters and reports). If there is a contradiction between a domestic rule and a corresponding WTO rule, the latter shall be applied. Finally, the compliance of national measures with international treaties ratified by the Ukrainian parliament can be challenged before national courts.

Foreign producers and exporters often refer to WTO trade remedies agreements while presenting their position before the investigating authority in the course of investigations. They can also litigate final or preliminary determinations on the imposition of trade remedy measures before national courts, invoking provisions of the WTO Agreements.

Appeal

7 What is the appeal procedure for an unfavourable trade remedies decision? Is appeal available for all decisions? How likely is an appeal to succeed?

Any final or preliminary determination in a trade remedies case can be challenged in the administrative court within 30 days after the imposition of an unfavourable measure. Trade remedies cases are often quite complicated and their consideration may continue for several years, due to the fact that the Ukrainian judicial system is composed of three instances (first instance courts, appeal courts and cassation courts). However, the complainant, in accordance with the procedural codes, has the possibility to submit a request for injunctive relief in order to stop the execution of the unfavourable trade remedies decision.

Review of duties/quotas

8 How and when can an affected party seek a review of the duty or quota? What is the procedure and time frame for obtaining a refund of overcharged duties? Can interest be claimed?

Review

Foreign producers or exporters can seek a review of anti-dumping or countervailing duty measures after one year from their date of application. Such a request shall be submitted to the Ministry and should provide sufficient evidence and proof of the necessity of an interim review. The interim review shall be launched if the request proves that:

- continuation of application of anti-dumping or countervailing duty measures is no longer necessary for the prevention of dumping or subsidisation;
- continuation or resumption of injury is unlikely, should the anti-dumping or countervailing duty measures be cancelled or altered; or
- applied anti-dumping or countervailing duty measures are not or shall not be sufficient for the prevention of dumping or subsidisation that causes injury.

In the course of the interim review, the Ministry examines whether the circumstances of dumping or subsidisation and injury have changed considerably, whether the applied measures have had the desired effect and whether there is prevention of injury previously established during the original investigation.

The domestic anti-dumping and countervailing duties law also provides for expiry review and newcomers' review.

Refund

Importers may apply for a refund of anti-dumping or countervailing duties, provided an importer proves, and the Commission takes a decision that, the margin of dumping or subsidisation on the basis of which the rate of the duty has been calculated was decreased to a zero rate or a lower rate than the initially calculated margin of dumping.

The application for refund is submitted to the State Fiscal Service. The application shall be supplemented with documents confirming importation of goods into Ukraine, their customs clearance and payment of the anti-dumping or countervailing duty within six months from the date of accepting the Commission's decision on imposition of the duty. The Fiscal Service shall immediately forward the application to the Ministry. A copy of the application shall also be sent to the Commission and the Ministry of Finance of Ukraine.

The Commission, on the proposal of the Ministry, shall consider the application together with the conclusions of the Fiscal Service and the Ministry of Finance of Ukraine. The Commission shall take a decision based on the results of such consideration. The Commission may also take a decision on initiation of an interim review of the anti-dumping or countervailing measures.

The Commission shall generally take a decision regarding a refund within 12 months, but not later than 18 months from the date of submission by an importer of the application. The Ministry of Finance of Ukraine shall refund the stipulated amounts within 90 days of the date of making a relevant decision by the Commission.

Compliance strategies

9 What are the practical strategies for complying with an anti-dumping/countervailing/safeguard duty or quota?

If a trade remedies measure is imposed, foreign producers or exporters can challenge the determination with the national courts or seek review of anti-dumping or countervailing duties measures not earlier than a year after the measures are imposed. If targeted foreign producers have factories in several countries, they may consider shipping into Ukraine products of different origin (in the case of anti-dumping or countervailing duty measures). In the case of anti-dumping, companies whose products are under investigation may also voluntary undertake to review their prices or cease exports at dumped prices to settle an investigation.

CUSTOMS DUTIES

Normal rates and notification requirements

10 Where are normal customs duty rates for your jurisdiction listed? Is there an exemption for low-value shipments, if so, at what level? Is there a binding tariff information system or similar in place? Are there prior notification requirements for imports?

The Ukrainian Classification of Commodities of Foreign Economic Activity is based on the six-digit Commodity Description and Coding System (used for the purpose of accounting for the exports and imports of goods), which is developed on the basis of the Harmonized Commodity Description and Coding System. Under the classification, goods are codified in sections, groups, trade positions and sub-positions, and their names and digital codes are unified and assigned with respective tariff rates. Customs duty rates are listed in Law No. 584-VII on Customs Tariff, 19 September 2013. As a WTO member, Ukraine is subject to the goods schedule indicating bound rates. The information on binding tariffs and applied rates can be accessed at www.wto.org/english/thewto_e/countries_e/ukraine_e.htm. No prior notification is needed for imports under Ukrainian legislation.

Ukrainian laws provide for tariff preferences to e-commerce imports. Since 1 July 2019, amendments to the Tax Code of Ukraine have come into force that decrease the tax-free maximum threshold to a total invoice value of the shipment not exceeding €100 per person and total customs value of the shipment not exceeding €150 per legal entity (article 196.1.17 of the Tax Code Of Ukraine).

Under the Customs Code of Ukraine the import duty-free threshold amounts to an invoice value of €150 (artIcle 374.6 of the Customs Code

of Ukraine). Shipments with an invoice value ranging between €150 and €10,000 are subject to a 10 per cent import duty plus VAT (in the amount of 20 per cent) enshrined in the Tax Code of Ukraine (article 374.7 of the Customs Code of Ukraine).

Special rates and preferential treatment

11 Where are special tariff rates, such as under free trade agreements or preferential tariffs, and countries that are given preference listed?

Unlike the EU, Ukraine has no generalised scheme of preferences, and consequently only those countries having FTAs with Ukraine can benefit from preferential tariffs. At the time of writing, Ukraine has FTAs with the EU, CIS countries (except for Russia since 2016), Macedonia, Georgia, Montenegro, the EFTA states and Canada, and is concluding an FTA with Israel (currently signed, but not yet ratified). Ukraine is also negotiating an with FTA with Turkey.

Import duty is differentiated in respect of the goods originating from countries that are members of customs unions with Ukraine or which form free trade zones with it. In case of the introduction of any special preferential customs procedure in accordance with international treaties ratified by the parliament of Ukraine, the preferential rates of import duty set by the customs tariff of Ukraine shall be applied.

Preferential rates of import duty set by the customs tariff of Ukraine shall be applied for goods originating from Ukraine or member countries of the WTO or the countries with which Ukraine has entered into bilateral or regional agreements under MFN treatment.

12 How can GSP treatment for a product be obtained or removed?

Ukraine does not grant GSP treatment to any country. Only countries subject to FTAs with Ukraine have preferential tariffs. In order to benefit from the regime, the company concerned must provide the customs authorities with a valid certificate of origin confirming that the product is produced in the territory of the FTA member state. In the case of the Agreement on Free Trade Area of 2011 between Ukraine and other CIS countries, tariff rates on imports are mainly eliminated, and export duties are fixed with a further reduction. Generally, all tariff rates and other trade liberalisation measures are prescribed and fixed in respective trade agreements. For instance, the EU–Ukraine Association Agreement also contains in its annexes the schedules of tariff rates on imports and exports, and other measures subject to implementation and execution with respect to preferential trade regime.

13 Is there a duty suspension regime in place? How can duty suspension be obtained?

Ukraine has no system where the company concerned can submit a request for a duty suspension regime. A general system of duty exemption is determined, however, by the Customs Code of Ukraine (article 282), where the goods subject to exemption are listed. Among such goods are means of transport for commercial use, raw materials, and oil engaged in scheduled international transportation of goods or passengers (or both), as well as items necessary for their normal operation, Ukrainian currency, foreign currency, securities, goods that are imported within the framework of international technical assistance under international treaties, goods for product-sharing agreements, archival documents, several types of pharmaceutical products, equipment for the purpose of alternative energy, and goods and items paid for at the expense of grants (sub-grants) provided, for example, under the programme of the Global Fund to Fight AIDS, Tuberculosis and Malaria in Ukraine.

In May 2015, the President of Ukraine signed laws providing amendments to the Customs Code and Tax Code of Ukraine prescribing exemption of defence products from import duties. The exemptions apply to components (materials, components, parts, equipment and component parts) that are imported into Ukraine for use in the production of defence products if the customer of such products is the state. At the same time, these products are not exempted from import duty if they originate or are imported from the territory of a country recognised as an occupying state or aggressor in relation to Ukraine under the law.

Besides that, items such as goods imported into the customs territory of Ukraine within the framework of international technical assistance in accordance with international treaties, goods (raw materials, products, machinery and equipment) coming to Ukraine under international technical assistance given on a free and irrevocable basis for further service, preparation for decommissioning, and decommissioning of power-generating units of the Chernobyl nuclear power plant, goods or items paid for at the expense of grants (sub-grants) provided under the programme of the Global Fund to Fight AIDS, Tuberculosis and Malaria in Ukraine, goods treated as humanitarian aid and goods imported into the customs territory of Ukraine to the address of the Red Cross Society of Ukraine are subject to exemption from specific types of duties.

Furthermore, there exists a temporary admission regime (article 103 of the Customs Code of Ukraine). Goods subject to this regime shall be fully or partially exempted from payment of import duties. The list of such goods is prescribed in articles 105 and 189 of the Customs Code of Ukraine and in Annexes B.1–B.9, C and D of the convention on temporary admission.

Challenge

14 Where can customs decisions be challenged in your jurisdiction? What are the procedures?

The Customs Code of Ukraine No. 4495-VI of 13 March 2012 (the Customs Code), has been in force since 1 June 2012 (last amended 4 April 2018). With regard to challenging the actions of customs authorities, the Customs Code envisages two types of appeal. The first is pre-trial appeal of the decisions, acts and omissions of the customs authorities, and the second (article 29 of the Customs Code) is a judicial procedure, which is regulated by separate law. Article 29 states also that if the decisions, acts or omissions by a state fiscal authority or its officials are appealed both at a supreme authority (superior public official) and in court and the court initiates a legal proceeding, such appeal shall no longer be proceeded by the said supreme authority (superior public official). Article 24 of the Customs Code contains the list of decisions, acts and omissions that may be challenged. Moreover, in comparison to the previous version of the Customs Code, such list includes not only particular decisions of customs authorities on the customs issues that may be challenged, but also the decisions that satisfy or refuse to satisfy the complaints of legal or natural persons.

Decisions, acts and omissions may be appealed to higher authorities and officials. Superior public officials in respect of the officials and other employees of the state fiscal authorities are the chief executives of those authorities. Higher authorities are the following:

- for customs officials – the heads of the customs authorities;
- for customs posts – the head of that branch of customs posts;
- for customs of the specialised customs authorities and customs organisations – the State Fiscal Service; and
- for the State Fiscal Service – the Ministry of Finance of Ukraine.

Requirements regarding the form and content of the complaints, the terms of their submission, and the procedure and terms for their consideration, as well as liability for illegal actions related to submission and consideration of the complaints, are determined by the Law of Ukraine

No. 393/96-BP on Public Appeals. A duly submitted complaint on the decision, act or omission of the customs authority shall be considered for not more than one month (may be urgently or within 15 days), but may be extended to up to 45 days. Moreover, the term of consideration may be even shorter if the citizen duly substantiates the reason. A complaint shall be submitted within one year after the decision is adopted, but not later than one month after notification of the decision. The judicial procedure implies filing the case before the relevant administrative court.

TRADE BARRIERS

Government authorities

15 | What government office handles complaints from domestic exporters against foreign trade barriers at the WTO or under other agreements?

Normally, the Ministry is responsible for handling complaints against trade barriers and relevant WTO issues. In 2014, the Cabinet of Ministers of Ukraine with its Regulation No. 550 appointed the Deputy Minister of Economy – Trade Representative of Ukraine. The Trade Representative, among other things, deals with issues of ensuring the promotion of the economic interests of Ukraine in European and global markets and the coordination of trade missions abroad, and provides for analysis of status and trends of international trade, proposals concerning priorities of Ukraine's trade policy development, the impact of trade remedies on trade development and proposals for improving the efficiency of their usage to achieve economic growth. The most important objective of the Trade Representative with respect to the WTO and foreign trade barriers is that the Trade Representative is in charge of monitoring WTO members' compliance with their WTO commitments in order to efficiently and timely protect the rights and interests of Ukraine and its enterprises. To this end the Trade Representative provides for such actions as, inter alia, identification of the facts or the threat of application by foreign countries, customs unions or economic groups, anti-dumping, countervailing and safeguard measures with respect to products originating in Ukraine, and the conducting of investigations to establish the facts of discriminatory or hostile actions by other states, customs unions or economic groups with respect to the legitimate rights and interests of the foreign economic activity of Ukraine.

The Trade Representative also performs the function of the representative of Ukraine to the WTO and the Black Sea Trade and Development Bank, and reports directly to the Minister of Economic Development and Trade. The Trade Representative ensures the predictability and transparency of Ukraine's trade policy.

Within the structure of the Ministry of Economic Development and Trade there is an independent structural unit – the trade defence department. This has a division for domestic market protection and a division on the protection of trade interests on foreign markets. Its objectives include measures to protect the interests of Ukrainian businesses in anti-dumping, countervailing and safeguard investigations carried out by foreign states with respect to Ukrainian products; protecting the rights and interests of Ukraine in the trade and economic sphere, using WTO instruments and international agreements of Ukraine; and representation of Ukraine at the WTO Dispute Settlement Body.

In 2017, the Cabinet of Ministers of Ukraine by its Resolution established the International Trade Council as an interim consultative and advisory body of the Cabinet of Ministers of Ukraine. It is composed of the heads of the highest executive Institutions, including the Minister of Economic Development and Trade and the Deputy Minister of Economy – Trade Representative of Ukraine. Among the main objectives of the Council are the formation and implementation of the basic principles and position of the Ukrainian side on issues arising within the framework of membership in the World Trade Organization; solving of problematic issues of Ukraine's cooperation within the framework of this organisation, as well as participation of Ukraine in activities within the framework of the World Trade Organization; and determination of ways and mechanisms of dispute settlement related to the protection of the rights and interests of Ukraine in the trade and economic sphere, including within the framework of the World Trade Organization.

The Ministry's home page is www.me.gov.ua. In addition, the Ministry of Justice of Ukraine (www.minjust.gov.ua) has the authority to represent Ukraine in foreign and international courts and jurisdictional authorities. Consequently, if the WTO dispute enters the stage of panel establishment and composition, the Ministry of Justice cooperates with the Ministry of Economic Development and Trade.

Complaint filing procedure

16 | What is the procedure for filing a complaint against a foreign trade barrier?

The company concerned addresses the respective department within the Ministry (through the particular department and Trade Representative) with a letter outlining the scope of the trade barrier. The general term of response to the complaint letter of the concerned company is one month. Upon examination of the complaint, the Ministry may either initiate a meeting with the company to discuss the barrier in question or refuse to initiate the proceedings. If the complaint is well grounded, the Trade Representative may initiate the establishment of working groups to prepare draft legal acts on this issue or to convene meetings regarding the particular trade and foreign economic issues concerned.

Moreover, in early June 2016, the government of Ukraine adopted the procedure of protection of the trade and economic rights and interest of Ukraine within the framework of the WTO. The procedure is approved by a Decree of the Cabinet of Ministers of Ukraine of 1 June 2016 No. 346. If the interested authorities or diplomatic missions of Ukraine reveal any measures taken by other economies being inconsistent with the WTO commitments, they must respectively inform the Ministry of Economic Development and Trade of these measures within five days. Along the same lines, the interested organisations (companies) must submit the relevant communication to the Ministry, providing formal requisites of the companies as well as sufficient evidence and materials supporting the alleged violation. Upon considering the communications, the Ministry may either find this allegation substantiated and decide on the establishment of an interdepartmental working group or find the allegation groundless.

The interdepartmental working group is responsible for cooperation between interested authorities and interested organisations; it elaborates on and submits to the Ministry possible mechanisms and instruments of settlement concerning the trade-distortive measures faced by interested Ukrainian authorities and organisations; it participates in the drafting and preparation of documents and materials pursuant to the procedures prescribed by the Dispute Settlement Understanding of the WTO; and it submits to the Ministry the recommendations on engagement of legal and economic advisers and independent experts in the consultations or dispute settlement or both. The interdepartmental working group is jointly headed by the Minister of Economic Development and Trade of Ukraine and the Trade Representative of Ukraine.

Grounds for investigation

17 | What will the authority consider when deciding whether to begin an investigation?

Formally, the Ministry of Economic Development and Trade firstly considers whether the application contains all sufficient grounds for

initiating the WTO case. Furthermore, the authority normally considers trade policy and relations with the member imposing the trade barrier, the volume of production, the export or import of the subject merchandise, and the injury that is caused by the trade barrier. A particular role in this process is performed by the Trade Representative of Ukraine, who deals with issues of analysis, proposals and recommendations concerning illegitimate foreign trade barriers. In accordance with article 4.19 of Regulation No. 550 of the Cabinet of Ministers of Ukraine of 16 October 2014, it may initiate special investigations concerning such measure.

Measures against foreign trade barriers

18 | What measures outside the WTO may the authority unilaterally take against a foreign trade barrier? Are any such measures currently in force?

Ordinary procedure against non-WTO members

Ukraine may find the facts of discriminatory or hostile actions of non-WTO members. The procedure for finding such facts (or their absence) is set forth in the Law on Foreign Economic Activity and in the Order of Conducting Investigations Aimed at Establishing Facts of Discriminatory and/or Hostile Actions of Other States, Customs Unions or Economic Groups Concerning Legitimate Rights and Interests of Business Entities of Ukraine, adopted by Decree No. 2120 of the Cabinet of Ministers of Ukraine, 22 November 1999. Such an investigation is conducted by the Ministry of Economic Development and Trade of Ukraine (it may be initiated by the Trade Representative) upon application of a business entity or executive agency of Ukraine, which may be submitted to the Ministry, to the office of the Trade Representative, or through trade missions and diplomatic and consular institutions. Upon receipt of a duly executed application followed by evidence and documents and in accordance with Order No. 2120, the Ministry conducts an investigation lasting 60 days. The Ministry submits its report on the results of the investigation to the Interdepartmental Commission on International Trade for making a decision on the presence or absence of facts of discriminatory actions. The decision of the Commission is published in the official gazette. The applicant may withdraw the application. In this case, the application is deemed as not submitted.

According to the Law on Foreign Economic Activity, Ukraine may introduce such measures in the form of partial or full trade embargo, cancellation of MFN status and special preferential regime, imposition of special duties and quotas, foreign economic operations licensing etc.

'Fast-track' procedure against a state recognised as an aggressor or occupant

Since December 2015, the Cabinet of Ministers of Ukraine is entitled to take unilateral countermeasures against a state that is recognised as an aggressor or occupant (articles 9 and 29 of the Law on Foreign Economic Activity). Herewith, such measures can be taken pursuant to the decision of the Cabinet of Ministers of Ukraine without completing the previous investigation and consultation stages.

Private-sector support

19 | What support does the government expect from the private sector to bring a WTO case?

Commonly, to bring a WTO case the companies concerned should be prepared to handle lawyers' fees, translations and supporting documents containing, inter alia, all necessary information about the facts and statistics concerning the alleged violation, the foreign state competent authority allegedly violating the rules and procedures etc. Having prepared the position paper, companies address the Ministry and the Trade Representative with the issue. Trade statistics are compiled by the State Statistics Committee. More rarely, the Ministry engages other state enterprises, including expert institutions or economic research institutes. The fees for such state enterprises' services are expected to be borne by the company concerned. As transparency in relations and permanent dialogue between business and the government act as a cornerstone in the protection of the private sector's interests, in pursuing such goals in Ukraine special trade councils help to establish such communication

Notable non-tariff barriers

20 | What notable trade barriers other than retaliatory measures does your country impose on imports?

Every year the government of Ukraine compiles the list of products subject to an import/export licensing and quotas regime. The list of such products for 2019 can be found in Regulation No. 1136 of the Cabinet of Ministers of Ukraine dated 27 December 2018 (available at: https://zakon.rada.gov.ua/laws/show/1136-2018-%D0%BF).

In practice, one of the most notable barriers for imports may be regarded as the practical determination of the customs valuation of goods. Although the WTO Customs Valuation Agreement has direct effect in Ukraine and the provisions of the Customs Code of Ukraine incorporate the procedures for customs valuation, importers face the problem of declaring higher prices for goods than their transaction value.

EXPORT CONTROLS

General controls

21 | What general controls are imposed on exports?

The following general requirements must be fulfilled to export products from Ukraine:

- exporters shall provide customs authorities with the required set of documents for exporting products (customs declaration; invoices; contracts; specifications; certificate of origin; bill of lading; documents confirming payment of customs fees and duties; and various certificates, if it may be necessary for specific products (phytosanitary certificate, ecological certificate, permission to import (export) or to transit the narcotic drugs, psychotropic substances or precursors of narcotic drugs and psychotropic substances, veterinary certificate etc));
- exporters shall settle customs payments, if any are envisaged by the legislation current on the day of exportation. The notion of 'customs payments' includes customs duties, VAT and excise duty (article 4.27 of the Customs Code of Ukraine);
- exported products are subject to a zero VAT rate (article 195 of the Tax Code of Ukraine) and are not subject to excise tax (article 213 of the Tax Code of Ukraine);
- export customs duties can be introduced by laws passed by the Ukrainian parliament. Currently, Ukraine applies export duties to barley; ferrous alloy scrap metal; non-ferrous scrap metal and semi-processed products with that use; waste and scrap of ferrous metal; seed grains of certain sunflowers; and livestock and certain leather primary products; and
- exporters shall fulfil the requirements of non-tariff regulation if any are envisaged by legislation on the day of exportation (eg, licensing or certification).

An exporter shall be registered with a local customs office in order to perform export transactions.

In addition, pursuant to the Law on Foreign Economic Activity, it is generally prohibited in Ukraine to export the following:

- goods considered part of the national, historical, archaeological or cultural heritage of the Ukrainian people;
- natural resources that are exhausted, if this limitation also applies to the internal consumption or production;
- products that infringe intellectual property rights;
- goods subject to Resolutions of the UN Security Council regarding limitations or embargoes on supplying with goods in the proper state;
- timber and lumber of valuable and rare breeds of trees; and
- postal parcels that could pose a threat to life and health.

In January 2019, the EU requested consultations with Ukraine under the EU–Ukraine Association Agreement on Ukraine's export ban on unprocessed wood. The consultations did not resolve the dispute. On 21 June, the EU submitted a request for panel establishment. This is the first EU FTA-based dispute to reach the panel stage. The full text of the request is available at: http://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157943.pdf.

Ukrainian exporters must comply with currency restrictions prescribed in Resolutions of the Board of National Bank of Ukraine. These restrictions are claimed by exporters to have substantial trade-restrictive effects. Notably, the National Bank of Ukraine required exporters to surrender about 50 per cent of their foreign currency proceeds. Under Ukrainian laws, the settlement period for exporters-residents' revenue in import-export transactions did not exceed 180 days.

Nevertheless, at the beginning of 2019 the National Bank of Ukraine approved a new currency regulation system and unveiled a road map for currency liberalisation. Starting from February 2019, for example, the deadline for settlement of import-export contracts has been extended to up to 365 days.

In addition, Ukrainian exporters face constant difficulties with VAT returns, which are subject to burdensome administration and have become a systemic problem of the domestic tax system.

Government authorities

22 | Which authorities handle the controls?

Export controls are predominantly handled by the following authorities:
- the Parliament of Ukraine (iportal.rada.gov.ua);
- the Cabinet of Ministers of Ukraine (www.kmu.gov.ua);
- the National Bank of Ukraine (www.bank.gov.ua);
- the Ministry of Economic Development and Trade of Ukraine (www.me.gov.ua);
- Deputy Minister of Economic Development and Trade – Trade Representative of Ukraine (www.me.gov.ua);
- the State Fiscal Service (minrd.gov.ua);
- the Interdepartmental Commission on International Trade;
- the State Service of Export Control of Ukraine (www.dsecu.gov.ua);
- the State Food Safety and Consumer Protection Service of Ukraine (www.consumer.gov.ua); and
- the National Standardisation Body of Ukraine – Ukrainian National Research and Educational Center for Standardisation, Certification and Quality (www.ukrndnc.org.ua).

Special controls

23 | Are separate controls imposed on specific products? Is a licence required to export such products? Give details.

Export controls are predominantly handled by the following authorities:
- the Parliament of Ukraine (iportal.rada.gov.ua);
- the Cabinet of Ministers of Ukraine (www.kmu.gov.ua);
- the National Bank of Ukraine (www.bank.gov.ua);
- the Ministry of Economic Development and Trade of Ukraine (www.me.gov.ua);
- the Deputy Minister of Economic Development and Trade – Trade Representative of Ukraine (www.me.gov.ua);
- the State Fiscal Service (minrd.gov.ua);
- the Interdepartmental Commission on International Trade;
- the State Service of Export Control of Ukraine (www.dsecu.gov.ua);
- the State Food Safety and Consumer Protection Service of Ukraine (www.consumer.gov.ua); and
- the National Standardisation Body of Ukraine – Ukrainian National Research and Educational Center for Standardisation, Certification and Quality (www.ukrndnc.org.ua).

Supply chain security

24 | Has your jurisdiction implemented the WCO's SAFE Framework of Standards? Does it have an AEO programme or similar?

On 13 March 2012, the Ukrainian parliament passed a new version of the Customs Code of Ukraine in order to implement the WCO's SAFE Framework of Standards into domestic customs legislation and harmonise it with several international treaties (in particular, the International Convention on the Simplification and Harmonization of Customs Procedures, the Convention on Temporary Admission and the Customs Convention on the International Transport of Goods under Cover of TIR Carnets).

According to the Compendium of AEO Programmes (2012), the Authorised Economic Operator (AEO) programme has not yet been introduced in Ukraine; however, there are developments regarding this matter at governmental and parliamentary level. At the end of 2014, the State Fiscal Service of Ukraine developed amendments to the Customs Code of Ukraine in order to simplify the procedure of goods registration, in particular within the framework of further implementation of the AEO programmes.

In 2015, Ukraine also ratified the WTO Trade Facilitation Agreement and EU–Ukraine Association Agreement. Both agreements, inter alia, provide for objectives to ensure additional measures to simplify trade procedures for entities satisfying certain criteria, in other words, authorised economic operators. In pursuit of the agreements mentioned, on 25 April 2016, the Ukraine government approved the draft law prepared by the Ministry of Finance of Ukraine on the implementation in Ukraine of the AEO Institute. The draft law provides for issuance by the competent authorities of certificates of two types – regarding security and safety or regarding simplification of customs procedures. To receive such preferences, applicants must show impeccable financial solvency, appropriate record-keeping, compliance with customs legislation and taxation rules, and a business reputation.

After its proper approximation and adoption, the above-mentioned draft law will permit the mutual recognition of AEOs by Ukraine and the EU.

At present, this draft law is at the stage of reviewing and updating.

Applicable countries

25 | Where is information on countries subject to export controls listed?

Among other functions, the State Export Control Service of Ukraine takes measures to implement the decisions of the Security Council to establish or cancel an embargo on the export of goods. It also provides for the monitoring and analysis of exports from Ukraine and the exchange of relevant information on exports of particular categories of goods with the relevant authorities of foreign states and international organisations.

Countries subject to export controls are defined by regulations adopted by the Cabinet of Ministers of Ukraine. These regulations are based on Resolutions of the UN Security Council. For instance,

the Resolution of the Cabinet of Ministers of Ukraine No. 302 on Implementation of the Resolutions adopted by the Security Council of the UN regarding Libya, 18 April 2012, was passed to fulfil Resolutions No. 1970 dated 26 February 2011, No. 1973 dated 17 March 2011, No. 2009 dated 16 September 2011, No. 2016 dated 27 October 2011, No. 2017 dated 31 October 2011 and No. 2022 dated 2 December 2011, or Order No. 359p of the Cabinet of Ministers of Ukraine on implementation of the Resolution UN Security Council No. 2231 dated 20 June 2015 regarding Iran.

Within the context of Russian military actions against Ukraine and the occupation of Crimea, the National Security and Defence Council of Ukraine, in its decision of 27 August 2014, prohibited exports to the Russian Federation of military and dual-use production.

The countries currently subject to export controls are listed on the UN website. This list can also be found on the website of the State Service of Export Controls of Ukraine with the indication of the relevant Resolutions of the UN Security Council and the Regulations of the Cabinet of Ministers of Ukraine.

Named persons and institutions

26 | Does your jurisdiction have a scheme restricting or banning exports to named persons and institutions abroad? Give details.

The Law of Ukraine No. 1644-VII on Sanctions, 14 August 2014 (the Law on Sanctions), provides for such a possibility in the form of the restriction of economic operations. The Law on Sanctions is described in detail in questions 28–30. The Law on Sanctions was amended on 17 December 2017. ThIs law permits the National Security and Defence Council to impose sanctions on specified persons by submission of the Parliament of Ukraine (parliament), the President of Ukraine, the Cabinet of Ministers of Ukraine, the National Bank of Ukraine and the Security Service of Ukraine.

Penalties

27 | What are the possible penalties for violation of export controls?

The penalty for violation of export controls is a fine, as envisaged by Ukrainian legislation. Individual licensing and temporary suspension of foreign economic activity as penalties were withdrawn from the Law of Ukraine 'On Foreign Economic Activity' in early 2019.

The penalty may be imposed by the Ministry upon request of the fiscal authorities, National Bank of Ukraine, the Antimonopoly Committee of Ukraine, the Security Service of Ukraine and other authorities, or on the basis of a court ruling.

FINANCIAL AND OTHER SANCTIONS AND TRADE EMBARGOES

Government authorities

28 | What government offices impose sanctions and embargoes?

The Law on Foreign Economic Activity authorises the parliament of Ukraine to introduce trade embargoes (complete or partial) and to cancel MFN treatment or special preferential treatment as a trade sanction in response to the discriminatory or hostile acts of other states. Other types of sanctions regarding exporters and importers can be also applied by cabinet ministers of Ukraine (ie, the introduction of licensing) and the Commission (ie, the introduction of extra duties or quotas).

At the same time, the law says that if Ukraine and the state that acted in a discriminatory or hostile manner towards Ukraine are members of the same international intergovernmental organisation, consideration and settlement of the dispute is carried out in accordance with the rules and procedures of such organisation. In other words, Ukraine cannot introduce these trade sanctions in response to allegedly discriminatory or hostile actions by WTO members; it must submit the matter to the WTO dispute settlement procedure.

In addition, the Law on Sanctions provides for the imposition of special economic and other restrictive measures – sanctions. In accordance with article 5 of this law, proposals concerning the implication, cancellation and alteration of sanctions may be submitted to the National Security and Defence Council of Ukraine by the parliament of Ukraine, the President of Ukraine, the Cabinet of Ministers of Ukraine, the National Bank of Ukraine and the Security Service of Ukraine. A decision on the application, cancellation and amendment to sanctions against a foreign state or an undefined group of individuals of a certain type of activity (sectoral sanctions), shall be adopted by the National Security and Defence Council of Ukraine and come into effect following the decree of the President of Ukraine. Such decision is to be approved within 48 hours from the date of issuing of the President's decree by the Supreme Council of Ukraine. The decision enters into force from the moment of adoption by the parliament of Ukraine and is mandatory for execution. In addition, the National Bank of Ukraine (NBU) is entitled to adopt special currency regulations.

On 19 May 2017, Russia challenged at the WTO certain trade restrictions that had been imposed by Ukraine due to protection of its national security interests (DS525). Russia's Request of Consultations covers, inter alia, the import ban on Russian products as well as financial and economic sanctions against Russian individuals and companies. The parties are likely to proceed to the panel stage.

Applicable countries

29 | What countries are currently the subject of sanctions or embargoes by your country?

According to article 29 of the Law of Ukraine on Foreign Economic Activity of Ukraine, Ukraine can enforce a complete or partial embargo in response to the discrimination or unfriendly actions of other countries, customs unions or economic groups.

Currently no countries are subject to trade embargoes by Ukraine (except for those introduced based on the Resolutions of the Security Council of the United Nations). The countries currently subject to export controls are listed on the website of the UN.

Moreover, as mentioned in question 18, Ukraine has been applying import bans for certain products from the Russian Federation starting from January 2016 until 31 December 2019, and has prohibited exports to the Russian Federation of military and dual-use production for military end use of this production by the Russian Federation. Notably, the Decree of the Cabinet of Ministers of Ukraine No. 1147 of 30 December 2015 provides for a list of products originated from Russia that are prohibited from importing to Ukraine. The products range from confectionery to small grain crops, soya sauce, tomato sauce, fresh and preserved fish and fish roe. The Ukrainian version of the list (last amended on 22 April 2019) is available at: http://zakon3.rada.gov.ua/laws/show/1147-2015-%D0%BF/paran10#n10. The Cabinet of Ministers of Ukraine each year extends the term of validity of the Decree and updates it.

Specific individuals and companies

30 | Are individuals or specific companies subject to financial sanctions?

Financial sanctions on individuals or companies (such as freezing assets, a ban on entry to a country and embargoes on weapons) can be introduced in fulfilment of a relevant decision of the UN Security Council.

In accordance with article 1 of the Law on Sanctions, sanctions may be imposed by Ukraine on a foreign state, a foreign legal entity, a legal

entity that is controlled by a foreign entity or individual, non-resident foreigners, stateless persons and entities engaged in terrorist activities. Sanctions may be imposed in response to potential threats to national interests, national security, sovereignty and the territorial integrity of Ukraine or any other state, occupation of the territory of Ukraine or any other state, following violations of the Universal Declaration of Human Rights, the Charter of the United Nations under the resolutions of the General Assembly and the Security Council of the United Nations, or decisions and regulations of the Council of the European Union. Economic sanctions may take the form of trade operations blocking and account freezing; partial restriction or full suspension of transit, flights and transportation through Ukraine; cancellation or suspension of licences; and suspension of economic and financial obligations etc.

The Decision of the National Security and Defence Council of Ukraine as of 28 April 2017 (enacted by the Decree of President of Ukraine as of 15 May 2017 No. 133/2017) (last amended on 19 March 2019) (http://zakon3.rada.gov.ua/laws/show/n0004525-17/paran2#n2) is the latest version of the list of natural and legal persons subject to sanctions. The document includes, among other things, such sanctions as the prohibition on moving capital out of the territory of Ukraine; the prohibition on state purchase contracts on goods, works and services with entities; and the freezing of assets of particular persons. Following the adoption of this document, the previous decisions of the National Security and Defence Council lost their validity.

OTHER RELEVANT ISSUES

Other trade remedies and controls

31 Describe any trade remedy measures, import or export controls not covered above that are particular to your jurisdiction.

Within the framework of the EU–Ukraine Association Agreement the EU cancelled tariffs for more than 84 per cent of food products and provided tariff quotas for 36 Ukrainian agricultural products. However, on the one hand, some tariff quotas were met by Ukraine within half a year; in particular, the quota for honey was met this year within three days. On the other hand some quotas remained unfulfilled. According to the data for 2018, Ukrainian exporters fully met their quotas for 15 products. Consequently, the extension of EU tariff-rate quotas for agricultural products from Ukraine is one of the compelling issues that both sides have been negotiating since the EU–Ukraine free trade area started to apply. On 4 July 2017, the European Parliament backed additional tariff quotas for Ukrainian products.

UPDATE & TRENDS

Key developments

32 Are there any emerging trends or hot topics in trade and customs law and policy in your jurisdiction?

Export promotion

At the end of 2018, the PJSC Export-Credit Agency was established as a legal entity.

At present, a number of measures are being taken to ensure the fulfillment of the main tasks of the PJSC Export-Credit Agency, defined by its Charter, in order to stimulate a large-scale expansion of exports of goods (including works and services) of Ukrainian origin, including the development and approval of the relevant regulatory framework of the Agency.

Reform of trade defence instruments in Ukraine

In March 2018, the Ukrainian government submitted to Parliament five draft laws concerning the reform of trade defence instruments in Ukraine. The draft laws comprise new versions of the laws of Ukraine 'On Protection from Dumped Imports', 'On Protection from Subsidised Imports' and 'On Safeguard Measures, as well as the draft laws 'On Amendments to the Legislative Acts in the Area of Trade Defence' and 'On Amendments to the Customs Code of Ukraine Concerning Trade Defence. The draft laws are currently being considered by Parliament.

This reform has been necessary for a long time. The current Ukrainian trade remedies legislation was adopted in 1998, 10 years before Ukraine acceded to the WTO.

When it comes to trade investigations in Ukraine, certain systemic problems exist. Many of them were articulated in the WTO dispute filed by Japan against Ukraine over safeguard measures on passenger cars (DS468). The lack of transparency is an important problem here, be it initiation of the investigation, or application of measures.

The new draft laws provide for significant improvement applicable to all three types of trade investigations. The most important changes are exemplified below by proposed rules concerning anti-dumping proceeding.

1 Enhancement of procedural transparency

1.1 The draft law introduces a new compulsory stage: within eight months (for anti-dumping and anti-subsidy investigations) and six months (for safeguard investigations) from the date the investigation was launched, the Ministry of Economic Development and Trade must prepare a preliminary report and send it to the Commission;

1.2 The draft law obliges the Ministry to disclose to interested parties its calculations of dumping margin and injury margin;

1.3 The draft law also obliges the Ministry to prepare and send to interested parties a non-confidential version of important procedural documents, such as the Ministry's preliminary report on the results of the investigation, the Ministry's determinations on substantial facts and circumstances and information about the Commission's final decision;

1.4 The interested parties will get electronic access to non-confidential materials during the investigation;

1.5 The draft law specifies the requirements for information to be provided by interested parties at the request of the Ministry; failure to comply with these requirements may lead to non-incorporation of relevant information in the proceeding materials; and

1.6 If any information submitted by any interested party is rejected during the investigation, the Ministry shall immediately provide the party with an explanation for the reasons that have led to arguments being accepted or rejected, and give an opportunity to submit additional information.

2 Improvement of some procedural issues and increase in predictability of application of trade remedies

2.1 The draft law regulates in detail the procedure of ex officio initiation of the trade investigations by the Ministry;

2.2 The procedure and grounds for extending the Ministry's deadlines will be better regulated;

2.3 The draft law provides for a detailed mechanism for the application of preliminary measures, review procedure, consultations and hearings, acceptance of price undertakings from exporters of the product subject to anti-dumping investigation, grounds for extending the scope of products subject to anti-dumping measures and suspension of anti-dumping measures;

2.4 The draft law contains a chapter on anti-circumvention investigations;

2.5 The draft law introduces disciplines on the provision of financial guarantees in specific cases (ie, preliminary measures application, anti-circumvention investigations, and surveillance and regional surveillance measures); and

2.6 The draft law governs internal procedure concerning the implementation of WTO Panel and Appellate Body reports.

3 Composition and functions of the Interdepartmental Commission on International Trade

3.1 Pursuant to the current laws, the composition of the Commission is approved by the Cabinet of Ministers of Ukraine upon the proposal of the Minister of Economic Development and Trade. According to the draft laws, the members of the Commission will be appointed by the Minister of Economic Development and Trade of Ukraine;

3.2 Pursuant to the current laws, the Commission may take its decisions exclusively at meetings. The draft laws provide for more flexibility and allow the Commission's decisions to be made after the members sign them in working order; and

3.3 The draft law considerably extends the list of decisions that may be taken by the Commission, given that the new draft law regulates in detail the review procedure for anti-dumping measures, the expansion of the product scope subject to anti-dumping measures and the provision of financial guarantees in specific cases.

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United Arab Emirates

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Overview

The United Arab Emirates (UAE) is a federation comprising seven Emirates: Abu Dhabi, Dubai, Sharjah, Ajman, Umm Al Quwain, Fujairah and Ras Al Khaimah. Each Emirate is a separate legal jurisdiction. Abu Dhabi, Dubai and Ras Al Khaimah each have their own separate court systems. The other four Emirates use the Federal Courts. There is no supreme court to which appeals can be made from the courts of each Emirate. Thus, the highest court in each Emirate is the Court of Cassation. Below the Court of Cassation there are two tiers of courts: a Court of First Instance and a Court of Appeal. In each Emirate, UAE Federal Law applies as well as the laws and decrees enacted by each Emirate. In case of conflict, UAE Federal Law has primacy.

The UAE is a civil law-based legal system, except in respect of two financial free zones: the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM). UAE civil and commercial laws do not apply in these two free zones; instead, the DIFC and ADGM have enacted their own laws, which are substantially based on English common law. However, while DIFC laws have existed for a number of years, the ADGM laws are still being drafted and enacted. Both the DIFC and the ADGM have their own courts' system, with international judges from England and other Commonwealth countries as well as Emirati judges. The DIFC Courts have been operating since 2007. The ADGM Courts only started operating earlier this year and, as of the time of writing this chapter, no cases have yet been heard before the ADGM Courts. There are various other free zones in the UAE, which often have their own regulations and procedures, but are governed by UAE Federal Law and do not have their own court systems.

It is important to emphasise that UAE laws are not capable of interpretation with complete certainty, as no system of binding judicial precedent exists in UAE courts. The DIFC Courts and ADGM Courts, being common law courts, have a system of binding precedent. The DIFC Courts also frequently refer to English and other Commonwealth judgments, which are treated as highly persuasive. The ADGM Courts are also expected to do the same.

The Cooperation Council for the Arab States of the Gulf (GCC) was established in 1981 and is a regional organisation composed of six Gulf Arab states: the UAE, Saudi Arabia, Oman, Kuwait, Bahrain and Qatar (collectively, the GCC states). In the UAE, laws and policies in some areas, including customs procedures and tariffs, are developed and applied at the GCC level.

LEGAL FRAMEWORK

Domestic legislation

1 | What is the main domestic legislation as regards trade remedies?

The GCC Common Law on Anti-Dumping, Countervailing Measures and Safeguard Measures and its Rules of Implementation as ratified by UAE Federal Law No. 7 of 2005 (the Anti-Dumping Law) is the primary legislation with respect to trade remedies.

International agreements

2 | In general terms what is your country's attitude to international trade?

The UAE has long been a hub for international trade and continues to seek to expand that role through trade, investment and development, primarily focused on diversifying the economy, emphasising competitiveness and technology sectors. Furthermore, the UAE focuses on free zones and economic specialised zones, which form important facets of the UAE economy and its growth strategy. Advantages for investment within free zones include no corporate or personal income taxes (which is the same throughout the UAE), exemptions from customs duties and exemptions from several domestic regulations that apply within the customs territory; moreover, foreign ownership in free zones is not limited to 49 per cent, as it is within the customs territory. Currently, about two-thirds of exports of non-oil related products are from free zones.

The Unified Economic Agreement of 1981 (UEA) under the GCC created a free trade area between the GCC states and is compatible with article XXIV of the General Agreement on Tariffs and Trade 1994 (GATT 1994). The free trade area eliminated customs duties and other restrictive regulations on commerce in all trade between GCC states for goods originating in the GCC.

The UAE is a member of the Greater Arab Free Trade Area (GAFTA), which entered into force on 1 January 1998. GAFTA eliminated all customs tariffs among GAFTA member states as of 1 January 2005. GAFTA covers trade in goods only; however, members are involved in negotiations to create an agreement in trade of services.

In 2015, the UAE, as part of the GCC, entered into free trade agreements with Singapore and the European Free Trade Association (EFTA). Currently, the UAE and its GCC partners are negotiating free trade agreements with the EU, Japan, China, India, Pakistan, Turkey, Australia, New Zealand, Korea and Mercosur, which includes Brazil, Argentina, Uruguay and Paraguay. The UAE has also concluded several trade, economic and technical cooperation agreements with various countries.

TRADE DEFENCE INVESTIGATIONS

Government authorities

3 | Which authority or authorities conduct trade defence investigations and impose trade remedies in your jurisdiction?

The Department of Anti-Dumping (DOA) within the UAE Ministry of Economy(MOE):www.economy.gov.ae/english/Ministry/MinistrySectors/IndustrialAffairsSector/anti-dumping/Pages/actions.aspx.

Complaint filing procedure

4 What is the procedure for domestic industry to start a trade remedies case in your jurisdiction? Can the regulator start an investigation ex officio?

An investigation may be initiated in response to a complaint filed by a UAE industry against dumped imports into the UAE or ex officio by the DOA. Industries considering filing an anti-dumping complaint must lodge an application with the DOA evidencing dumping, injury and a causal link between the dumped imports and the alleged injury. Once the complaint is filed, the DOA will examine the complaint to determine whether there is sufficient evidence to justify the initiation of an anti-dumping investigation and, if the conditions are met, an investigation will be initiated. An anti-dumping investigation is normally concluded within 12 months or up to a maximum of 18 months, during the course of which the DOA provides all interested parties in filing a complaint – in particular, exporters, producers and importers – the opportunity to submit their views, hold public hearings and send questionnaires to the involved parties in order to collect relevant information. If all the conditions are met, an anti-dumping duty will be imposed on imports of the concerned products originating in or exported from the exporting country or countries concerned. The DOA provides a flowchart with respect to the investigation procedures, which can be found at www.economy.gov.ae/english/Ministry/MinistrySectors/IndustrialAffairsSector/anti-dumping/Documents/Document%205%20Flow%20Charts%20-%20English%20-%20DumpingEV.pdf.

Contesting trade remedies

5 What is the procedure for foreign exporters to defend a trade remedies case in your jurisdiction?

Generally, parties are notified of an investigation through diplomatic channels and through public publications. The DOA, once having initiated an investigation, will also send questionnaires to concerned parties. Exporters are able to defend trade remedies cases by making submissions to the DOA.

WTO rules

6 Are the WTO rules on trade remedies applied in national law?

The UAE has been a member of the WTO since 10 April 1996 as well as a member of GATT since 8 March 1994. However, WTO rules do not take precedence over domestic law. Having said that, the UAE complies with WTO rules, agreements and commitments and the UAE's trade remedies are generally consistent with the WTO. The UAE's trade remedy rules, as legislated in the Anti-Dumping Law, are based on the respective WTO rules.

Appeal

7 What is the appeal procedure for an unfavourable trade remedies decision? Is appeal available for all decisions? How likely is an appeal to succeed?

A separate appeal regime does not exist with regard to trade remedies. However, the general rule is that any ministerial decision is appealable to the Abu Dhabi Court of First Instance (ADCFI). The DOA is a department within the MOE and, therefore, its decisions may be appealed to the ADCFI.

Review of duties/quotas

8 How and when can an affected party seek a review of the duty or quota? What is the procedure and time frame for obtaining a refund of overcharged duties? Can interest be claimed?

Precise information related to this question is not available; however, it appears that this would fall under the remit of the DOA and, therefore, these types of issues would have to be dealt with as part of the trade remedy hearings held by the DOA.

Compliance strategies

9 What are the practical strategies for complying with an anti-dumping/countervailing/safeguard duty or quota?

This is rather fact-specific and would depend on the particular issues attributed to the case.

CUSTOMS DUTIES

Normal rates and notification requirements

10 Where are normal customs duty rates for your jurisdiction listed? Is there an exemption for low-value shipments, if so, at what level? Is there a binding tariff information system or similar in place? Are there prior notification requirements for imports?

Generally, most customs duty is calculated on cost, insurance and freight (CIF) value at a flat rate of 5 per cent, with the exception of alcohol products (50 per cent duty) and tobacco products (100 per cent duty). CIF value is normally calculated by reference to the commercial invoices associated with the related shipment; however, the customs authorities of each individual Emirate are not required to accept the figures if the goods have been undervalued, and may set an estimated value on the goods.

There are various exemptions to customs duty, such as essential items (including staple foodstuffs and pharmaceuticals) as well as items that are for personal use purposes.

Further information can be obtained from the UAE Federal Customs Authority (FCA) website: www.fca.gov.ae.

Special rates and preferential treatment

11 Where are special tariff rates, such as under free trade agreements or preferential tariffs, and countries that are given preference listed?

The UAE has a standard tariff rate of 5 per cent, with some specific exceptions.

12 How can GSP treatment for a product be obtained or removed?

Not applicable.

13 Is there a duty suspension regime in place? How can duty suspension be obtained?

No.

Challenge

14 | Where can customs decisions be challenged in your jurisdiction? What are the procedures?

Article 61 of the Common Customs Law for the GCC States (Common Customs Law) sets out the procedure for settling disputes related to customs decisions. A valuation committee composed of customs administration officials seeks to settle disputes arising between customs and persons concerned with regard to the value of imported goods. The committee may seek the assistance of experts at its discretion. However, an importer may also seek to appeal customs decisions to the UAE court with competent jurisdiction.

TRADE BARRIERS

Government authorities

15 | What government office handles complaints from domestic exporters against foreign trade barriers at the WTO or under other agreements?

A separate entity or office does not exist and there is no precise information available on dealing with such an issue. As such, complaints from domestic exporters against foreign trade barriers are likely to be dealt with on an ad hoc basis by the UAE Ministry of Foreign Affairs (MOF).

Complaint filing procedure

16 | What is the procedure for filing a complaint against a foreign trade barrier?

There is no precise information with regard to this question and it appears that these types of issues would be dealt with on an ad hoc basis.

Grounds for investigation

17 | What will the authority consider when deciding whether to begin an investigation?

There is no precise information with regard to this question and it appears that these types of issues would be dealt with on an ad hoc basis.

Measures against foreign trade barriers

18 | What measures outside the WTO may the authority unilaterally take against a foreign trade barrier? Are any such measures currently in force?

It is difficult to advise on this particular issue as it has not come up in the past. The UAE could, theoretically, suspend trade as a result of a foreign trade barrier; however, this is completely speculative.

Private-sector support

19 | What support does the government expect from the private sector to bring a WTO case?

The UAE has not, to date, commenced any action or had action commenced against it in the WTO. It would be likely that the UAE government would retain the legal services of a private law firm and charge those fees to the private exporter; however, this is speculative given that there have been no cases in the WTO involving the UAE (aside from as a third party).

Notable non-tariff barriers

20 | What notable trade barriers other than retaliatory measures does your country impose on imports?

General import documentation is required; however, the UAE maintains a free exchange and liberal trading system with limited trade barriers.

EXPORT CONTROLS

General controls

21 | What general controls are imposed on exports?

Declaration documents, including packing lists and export invoices, are usually required.

Government authorities

22 | Which authorities handle the controls?

Generally, the FCA and customs authority of each individual Emirate.

Special controls

23 | Are separate controls imposed on specific products? Is a licence required to export such products? Give details.

The UAE has specific types of goods that are restricted or prohibited from being imported, exported or transhipped through the UAE. A specific list can be found at www.dubaicustoms.gov.ae/en/eServices/ServicesForBusinesses/CustomsInformation/Pages/Prohibited-and-Restricted-Goods.aspx.

Supply chain security

24 | Has your jurisdiction implemented the WCO's SAFE Framework of Standards? Does it have an AEO programme or similar?

Dubai Customs implemented the WCO SAFE Framework and introduced the AEO programme in September 2015, and was the first UAE customs authority to introduce an AEO programme. Other Emirates are expected to follow suit in due course.

Applicable countries

25 | Where is information on countries subject to export controls listed?

There is no centrally available list of countries subject to export controls.

Named persons and institutions

26 | Does your jurisdiction have a scheme restricting or banning exports to named persons and institutions abroad? Give details.

The UAE does not have a centrally available scheme restricting or banning exports to named persons and institutions abroad.

Penalties

27 | What are the possible penalties for violation of export controls?

Specific information is not available.

FINANCIAL AND OTHER SANCTIONS AND TRADE EMBARGOES

Government authorities

28 | What government offices impose sanctions and embargoes?

Generally, the UAE does not publicise sanctions in place apart from the Arab League Boycott of Israel and specific individuals and entities (eg, designated terrorist individuals and organisations). US, EU and UN sanctions are enforced on an ad hoc basis. The UAE government is ultimately in charge of imposing such sanctions and embargoes.

Applicable countries

29 | What countries are currently the subject of sanctions or embargoes by your country?

There is no publicly available information on whether trade with specific countries or entities is prohibited.

Specific individuals and companies

30 | Are individuals or specific companies subject to financial sanctions?

There is no publicly available information regarding individuals or specific companies that are subject to financial sanctions. It is generally understood that the UAE follows UN sanction protocols.

OTHER RELEVANT ISSUES

Other trade remedies and controls

31 | Describe any trade remedy measures, import or export controls not covered above that are particular to your jurisdiction.

All measures and controls have been discussed above.

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LEGAL FRAMEWORK

Domestic legislation

1 | What is the main domestic legislation as regards trade remedies?

The primary legislation for US trade remedies law is the Tariff Act of 1930, as amended (the Act). The vast majority of US trade remedy actions take the form of anti-dumping (AD) or countervailing duty (CVD) actions. Statutory authority for AD actions is located in Subtitle B of Title VII of the Act (see 19 USC, section 1671 et seq). Authority for CVD actions is at Subtitle A of Title VII of the Act (see 19 USC section 1671 et seq).

The third most common trade remedy is safeguards. The Trade Act of 1974 provides for section 201 safeguard or 'escape clause' actions to provide temporary restrictions on imports (see 19 USC, sections 2251 to 2254). Other trade remedies include section 301 actions (see 19 USC, sections 2411 to 2420), which focus on violations of trade agreements or other foreign practices that restrict US commerce, section 406 actions for relief from 'market disruption' imports from non-market economy countries (see 19 USC, section 2436), section 232 national security investigations (see 19 USC, section 1862) and section 337, which focuses on unfair practices in import trade such as patent and copyright infringement.

International agreements

2 | In general terms what is your country's attitude to international trade?

The US believes in a system of open trade subject to the rule of law. Since the Second World War, the US's policy has generally been that engagement in world trade offers US producers access to large foreign markets, while at the same time competition from foreign producers helps keep prices down for numerous goods, thereby reducing pressures from inflation. Additionally, the majority of US citizens have generally found that trade promotes economic growth, social stability and democracy in individual countries and advances world prosperity, the rule of law and peace in international relations.

However, an open trading system requires that countries allow fair and non-discriminatory access to each other's markets. Thus, the US participates in multilateral and bilateral agreements granting countries favourable access to its markets if they reciprocate by reducing their own trade barriers. Efforts to liberalise trade have traditionally focused on reducing tariffs and certain non-tariff barriers to trade. However, the US also frequently urges foreign countries to deregulate their industries and to take steps to ensure that the remaining regulations are transparent, do not discriminate against foreign companies and are consistent with international practices. US interest in deregulation arises in part out of concern that some countries may use regulation as an indirect tool to keep exports from entering their markets.

Under the Trump Administration, US trade policy has focused increasingly on reducing trade deficits, obtaining reciprocity in the treatment of imports and exports between countries and promoting bilateral negotiations. In order to gain negotiating leverage with trading partners, the Trump Administration has imposed tariffs under section 232 (national security) on a variety of steel and aluminium products from nearly all countries and section 301 (unfair trade actions) on imports from China. The Trump Administration is also seeking reforms at the WTO, primarily with respect to the dispute settlement process.

While the US pursues a general adherence to the principles of non-discrimination, it has joined certain preferential trade arrangements. The US Generalized System of Preferences (GSP) programme, for instance, seeks to promote economic development in poorer countries by providing duty-free treatment for certain goods that these countries export to the US; the preferences cease when the producers of a product no longer need assistance to compete in the US market. Another preferential programme, the Caribbean Basin Initiative, seeks to help an economically struggling region that is considered politically important to the US; it gives duty-free treatment to all imports to the US from the Caribbean area except textiles, some leather goods, sugar and petroleum products. The US is currently a party to 14 free trade agreements (FTAs) with 20 countries.

TRADE DEFENCE INVESTIGATIONS

Government authorities

3 | Which authority or authorities conduct trade defence investigations and impose trade remedies in your jurisdiction?

AD and CVD investigations are carried out concurrently by the Enforcement and Compliance division in the International Trade Administration (ITA) of the Department of Commerce (DOC) (www.trade.gov) and the US International Trade Commission (ITC) (www.usitc.gov). The ITA is charged with determining whether sales have been made at less than fair value for AD investigations and whether illegal subsidies were granted in CVD investigations. The ITC meanwhile determines whether the relevant US domestic injury has been harmed or is threatened with harm by reason of dumped or subsidised merchandise. If both agencies make positive determinations (ie, dumping or subsidisation occurred and the US domestic injury has been harmed or is threatened with harm), then an order against the subject merchandise is imposed. The ITA will direct US Customs and Border Protection (CBP) to collect tariffs calculated to offset the dumping or subsidisation it ultimately finds.

In safeguard actions, the ITC determines whether merchandise is entering the country in such increased quantities as to constitute a 'substantial cause of serious injury, or threat of serious injury'. If the ITC makes an affirmative determination, it provides remedy recommendations to the US Trade Representative (USTR), which then conducts its

own inquiry with the assistance of the Trade Policy Staff Committee. The USTR then makes its final recommendation to the office of the President.

Complaint filing procedure

4 What is the procedure for domestic industry to start a trade remedies case in your jurisdiction? Can the regulator start an investigation ex officio?

AD and CVD investigations are typically initiated based on a petition filed simultaneously with the ITA and the ITC by a domestic interested party, such as a manufacturer or a union within the domestic industry producing the product which competes with the imports to be investigated (see 19 USC section 1673a(a) (AD); 19 USC section 1671a(a) (CVD)). The ITA can also self-initiate an investigation. While self-initiation rarely happens, in 2017, the US self-initiated investigations on aluminium plate from China.

The law requires that the petitioners represent at least 25 per cent of domestic production and that of the percentage of the industry expressing an opinion on the petition, greater than 50 per cent be in favour of the petition. The petition is required to contain certain information, including information about the party filing the petition and a thorough description of the goods and exporters of the goods addressed in the petition. The petition must also provide evidence supporting the allegation of dumping or subsidisation. The petition must provide data relevant to the price of the merchandise in the US market and appropriate comparison market, and names and addresses of US importers of the merchandise. Additionally, for subsidisation the petition should provide facts about the subsidy, such as what government body authorises it, how it is provided or paid, and its value to the producers or sellers of the merchandise.

The petition must also provide evidence of material injury, such as the volume and value of the imported merchandise over the last three years both in absolute terms and relative to US consumption or production; the effect of the merchandise in undercutting, depressing or suppressing the price of like products in the US; the actual and potential decline in output, sales, market share, profits, productivity, return on investment and utilisation of capacity; the actual and potential negative effects on cash flow, inventories, employment, wages, ability to raise capital and investment; and any further information that demonstrates actual or potential injury or retardation to US industry as a result of the dumped or subsidised merchandise.

The ITA must determine the sufficiency of the petition within 20 days of receiving it (this can be extended by an additional 20 days under certain circumstances) (see 19 USC section 1671a(c) and 1673a(c)). If the ITA finds the petition sufficient and initiates the investigation, the ITC must make a preliminary determination of injury within 45 days.

A section 201 investigation may be initiated by the filing of a petition by any group considered to be representative of an industry, including a trade association, firm, union or group of workers (see 19 USC section 2252(a)(1)). It can also be initiated at the request of the President, the USTR, the House Ways and Means or Senate Finance Committees or the ITC itself (see 19 USC section 2252(b)(1)(A)).

Contesting trade remedies

5 What is the procedure for foreign exporters to defend a trade remedies case in your jurisdiction?

The investigations and reviews conducted by the ITA and the ITC in trade remedy cases are done in a transparent manner that allows for the participation of all interested parties. Upon receipt of a petition, the administering authority must notify the government of any exporting country named in the petition by delivering a public version of the petition to an appropriate representative of such country (see 19 USC section 2271). If the ITA determines that a petition satisfies all statutory requirements to initiate an investigation, notice is made by the publication of a notice of initiation in the Federal Register. The notice of initiation will describe the general history of the proceeding and the ITA's findings, and will specify due dates for the submission of comments or responses required to participate in the investigation. The ITA will then send questionnaires to mandatory respondents, specifying when responses to the questionnaires are due.

Meanwhile, the ITC posts an alert on its website a day or two after the petition is filed, posts a preliminary investigation schedule and publishes a notice in the Federal Register, sends questionnaires to the domestic producers, importers and foreign exporters and holds a staff conference 20 days after the petition is filed. Parties wishing to participate in the preliminary phase of the ITC investigation must file an entry of appearance within seven days of the Federal Register notice. The ITC preliminary phase must be completed within 45 days of receipt of the petition.

The time frames for investigation differ for the ITA and the ITC. In CVD cases, the law allows the ITA 65 days to make a preliminary determination, which can be extended to 130 days at the petitioner's request or if the ITA determines that the case is extraordinarily complicated. Final determinations are due 75 days after publication of the preliminary determination, unless the ITA aligns the CVD investigation with the AD investigation, in which case it is due on the due date of the AD final determination. In AD cases, the ITA preliminary determination must be made within 140 days, but this can be extended to 190 days at the petitioner's request or if the case is deemed by the ITA to be extraordinarily complicated. The final determination is due 75 days after publication of the preliminary determination. The final determination can be extended to 135 days at the request of the petitioner if the preliminary determination was negative, or the exporters if the preliminary determination was affirmative.

Between initiation of the investigation and the preliminary determination, the ITA solicits information from foreign producers and exporters. The ITA selects as many mandatory respondents as it deems its resources will allow it to investigate – typically the largest two or three exporters of the merchandise under investigation – and requires these mandatory respondents to provide extensive company, sales and cost data in response to standard questionnaires. The ITA uses these data to calculate AD and CVD margins for each respondent. The ITA assigns an average of these calculated margins to cooperating parties that were not individually investigated. After the preliminary determination, the ITA conducts on-site verification of the submitted data and releases a report of its findings. All parties have the opportunity to submit comments and arguments at times throughout the process, and to submit case briefs regarding the ITA preliminary determination before the final determination.

As discussed above, the ITC preliminary determination must be made within 45 days of receipt of the petition. If that determination is negative, the investigation ends. If that determination is affirmative, and the ITA final determination is affirmative, the ITC investigation continues to its final determination, which must take place by the later of either within 120 days of the ITA's preliminary affirmative determination or within 45 days of the ITA's affirmative final determination. The ITC also holds hearings prior to making its final determination and allows parties to submit briefs both before and after the hearing.

For safeguard investigations, the ITC usually makes its injury determination within 120 days, but may extend that deadline by up to 30 additional days if the investigation is deemed extraordinarily complicated. The ITC's report to the President must be submitted within 180 days of the petition filing, but this can be extended to 240 days if critical circumstances are alleged.

WTO rules

6 | Are the WTO rules on trade remedies applied in national law?

The US is a signatory member of the WTO. While the WTO Agreements are not US law, to ensure that US AD and CVD procedures comply with the WTO Anti-Dumping and Subsidies Agreements, Congress enacted the Uruguay Round Agreements Act (URAA) in 1994. As the statement of administrative action for the URAA explains, the URAA was 'intended to bring US law fully into compliance with US obligations under [the WTO Agreements]', including the provisions of the Anti-Dumping and Subsidies Agreements. Thus, in Congress's view, the URAA ensures that the ITA and ITC will act fully in conformity with the provisions of the Anti-Dumping and Subsidies Agreements when issuing their AD and CVD. In instances where the WTO Dispute Settlement Body has ruled that US laws or practice have violated WTO provisions, the US has generally sought to change US law or agency practice to bring it into conformity.

Appeal

7 | What is the appeal procedure for an unfavourable trade remedies decision? Is appeal available for all decisions? How likely is an appeal to succeed?

Parties may appeal any final factual findings or legal conclusions by the ITA or ITC, or any negative preliminary determination by the ITC, at the US Court of International Trade (CIT). Parties may also contest decisions to suspend an investigation and decisions not to initiate an investigation, the final results of administrative reviews, and scope determinations. CIT decisions can be further appealed to the Court of Appeals for the Federal Circuit, and even the US Supreme Court. Countries subject to the North American Free Trade Agreement (NAFTA) may request binding review by a binational panel.

The courts and binational panels apply a deferential standard of review when assessing administrative agency determinations. The court examines whether factual determinations by the agency are supported by substantial evidence, and whether legal determinations are in accordance with the law. In instances where the law is not clear, the court cannot substitute its own judgment for that of the agency, but only determine whether the agency's interpretation of the law 'is based on a permissible construction of the statute'.

Review of duties/quotas

8 | How and when can an affected party seek a review of the duty or quota? What is the procedure and time frame for obtaining a refund of overcharged duties? Can interest be claimed?

Each year an interested party may request an administrative review under an AD or CVD order at the ITA (see 19 USC section 1675 and 19 CFR section 351.213). The review requests are due by the last day of the anniversary month of the order (ie, the month in which the order was published). Administrative reviews are similar to investigations, but with longer timetables. The ITA will recalculate AD and CVD margins pursuant to the review. Preliminary results of review are due within 245 days (or 365 if extended) of the last day of the anniversary month and final results within 120 days of the publication of the preliminary results (or 180 if fully extended).

In instances where the cash deposit of duties exceeds the final liquidation amount, the CBP will refund the difference, plus interest. Likewise, if the cash deposit is less than the final liquidation, the party is charged the difference, plus interest for any entries made after publication of the order or orders.

The ITA and ITC also conduct periodic reviews pursuant to US laws implementing article 11.2 of the Anti-Dumping Agreement and article 21.2 of the Subsidies Agreement to determine the need for continued imposition of duties. These reviews are referred to as 'sunset reviews' at the ITA and 'five-year reviews' at the ITC. During these reviews, at the request of interested parties, the ITA determines whether the continued imposition of the duties is necessary to offset the dumping or subsidies, and the ITC determines whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If either determination is negative, the order is terminated.

Compliance strategies

9 | What are the practical strategies for complying with an anti-dumping/countervailing/safeguard duty or quota?

Parties may have the opportunity to have their AD or CVD rates lowered during yearly administrative reviews. Each year, the ITA reviews as many mandatory respondents as it deems its resources will allow – usually two respondents. Thus, a party wishing to reduce its AD or CVD margin will only be selected for individual review if it is one of the largest producers or exporters to apply. Other companies that request reviews (but are not selected) generally receive the weighted-average margin of the selected respondents.

If a party has applied for review and is selected as a respondent, strategies for obtaining a lower AD rate are primarily based on having increased the US price, lowered the normal value, or identified and eliminated sales and practices that tend to increase margins (eg, sample sales, sales of second quality product). For CVD cases, the respondent would have to eliminate the use of subsidies found to be countervailable.

CUSTOMS DUTIES

Normal rates and notification requirements

10 | Where are normal customs duty rates for your jurisdiction listed? Is there an exemption for low-value shipments, if so, at what level? Is there a binding tariff information system or similar in place? Are there prior notification requirements for imports?

Tariff duty rates are listed in the Harmonized Tariff Schedule of the United States (HTSUS) and can be found at www.usitc.gov/tata/hts/index.htm. The HTSUS lists the applied duty rates for countries with most-favoured nation (MFN) status, the non-MFN rates and special rates applied to countries with which the US has entered into FTAs or to which it provides unilateral trade preferences under the GSP or other programmes. Eligible shipments made to one person on one day with a value of under $800 are generally exempt from duties. Alcohol, cigarettes and tobacco and goods subject to Partner Government Agency requirements (Food and Drug Administration, Environmental Protection Agency etc) are not eligible for this exemption.

Pursuant to 19 CFR Part 177, an importer can request a binding ruling from the CBP's Office of Regulations and Rulings. The request can cover classification and other issues such as customs valuation and right to make entry. The rulings are binding on the CBP with respect to the specific goods and transactions described in the ruling request. These rulings also provide guidance to the importing public. Published rulings are available at rulings.cbp.gov. Ruling requests can be submitted electronically at https://erulings.cbp.gov/home.

For cargo security reasons, importers are required to provide prior notification to the CBP of goods imported by ocean vessel. These security-related prior notifications are known as the 'Importer Security Filing' (ISF). The Food and Drug Administration (FDA) requires prior notification for food imports. Rules for prior notice can be found at www.fda.gov/Food/GuidanceRegulation/ImportsExports/Importing/ucm2006837.htm. The notification requirements allow the FDA to manage risk associated with imported food.

Steel products must also be licensed prior to importation. The Steel Import Monitoring and Analysis system requires licences for imports of steel mill products. Rules for the steel importation licensing requirements can be found at https://hq-web03.ita.doc.gov/Steel/SteelLogin.nsf.

Special rates and preferential treatment

11 Where are special tariff rates, such as under free trade agreements or preferential tariffs, and countries that are given preference listed?

All tariff rates are set forth in the HTSUS at the website listed above. The FTA and preferential tariff eligible countries are identified in the General Notes to the HTSUS.

12 How can GSP treatment for a product be obtained or removed?

Importers can request GSP treatment at the time of importation by claiming GSP on the entry documents submitted to the CBP.

The US has a system for requesting modifications to the GSP list. The instructions can be found at https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp.

The USTR chairs an inter-agency group that governs the GSP programme. The GSP Committee conducts an annual review to consider changes to the lists of products and countries that are eligible for GSP treatment. Interested parties can submit petitions for the removal of products or countries. Products generally automatically lose eligibility if a country becomes proficient in the production and export of that product as evidenced by import values exceeding a threshold established by USTR. However, countries can submit petitions requesting a waiver of the GSP eligibility requirement.

13 Is there a duty suspension regime in place? How can duty suspension be obtained?

Historically, Congress has passed a Miscellaneous Tariff Bill that included non-controversial duty suspensions (generally for goods not produced in the US). In accordance with the American Manufacturing and Competitiveness Act of 2016, the US has adopted a more formal duty suspension process. Entities seeking duty suspension must now submit a request to the ITC, which will review the requests and make recommendations to Congress. Under these new procedures, duty suspension requests must demonstrate that the potential loss of revenue to the US will be less than $500,000 in a calendar year.

Challenge

14 Where can customs decisions be challenged in your jurisdiction? What are the procedures?

Once an entry is liquidated by the CBP, the first step is filing a protest with the CBP port following the procedures provided in 19 CFR 174.12. The protest must be filed within 180 days of liquidation of an entry. If this fails, then the decision can be appealed to the US Court of International Trade, and that decision can be appealed to the US Court of Appeals for the Federal Circuit.

TRADE BARRIERS

Government authorities

15 What government office handles complaints from domestic exporters against foreign trade barriers at the WTO or under other agreements?

Generally, complaints related to foreign trade barriers are taken to the USTR. However, depending on the issue, other agencies may be involved. For example, if the dispute includes an agricultural product, then the US Department of Agriculture will be involved. However, the USTR always has the lead on WTO disputes.

Complaint filing procedure

16 What is the procedure for filing a complaint against a foreign trade barrier?

Generally, complaints against foreign trade barriers are handled informally with the USTR and other agencies as appropriate. However, in 2007, the administration created the Interagency Trade Enforcement Center (ITEC). ITEC is an USTR-led body with 22 trade analysts with expertise in a wide range of areas needed for successful enforcement. This is the group tasked with investigating cases and working with domestic industries in collecting data to support possible cases.

However, there is a formal process under which petitions can be filed under section 301 of the Trade Act of 1974, which provides the authority and procedures to commence dispute settlement proceedings and if necessary impose trade sanctions. Any party may file a petition requesting that the USTR initiate an investigation of an act, policy or practice that violates a trade agreement or is unjustifiable and burdens and restricts US commerce. The USTR has 45 days in which to decide whether to initiate an investigation.

Grounds for investigation

17 What will the authority consider when deciding whether to begin an investigation?

First, the legal merits of the case will be considered. If the USTR does not consider the foreign action to be a violation, the case will not be brought. Moreover, the weaker the case, the less likely it is that it will be brought. Assuming that the legal merits are strong, the USTR will consider the US economic interest in the case. For example, is a trade barrier having a significant impact on US exports? The greater the volume of exports impacted, the greater the chance that the case will be brought. Finally, the political relations with the target country will be taken into consideration.

Measures against foreign trade barriers

18 What measures outside the WTO may the authority unilaterally take against a foreign trade barrier? Are any such measures currently in force?

Section 301 provides for unilateral action, but only when the alleged violation is not covered by the WTO Agreements, NAFTA or certain other FTAs. If the alleged violation is not covered by a trade agreement and the action is deemed to be 'unjustifiable, unreasonable, or discriminatory, and burdens and restricts US commerce' then the USTR is authorised to take unilateral action to remedy the trade barrier.

Section 232 also authorises the President to impose tariffs or quotas to address imports that negatively impact the national security of the US. For the purposes of section 232, the economic security of the US is considered part of its national security.

The US has used Section 301 to apply duties of up to 25 per cent on a wide variety of Chinese goods as part of the ongoing dispute with

certain Chinese practices with respect to forced technology transfers and lack of adequate protection of intellectual property rights.

Private-sector support

19 | What support does the government expect from the private sector to bring a WTO case?

Formally none. The USTR has a group of lawyers and professionals that will prepare the written statements, conduct negotiations and participate in hearings. However, the resources of the USTR are very thin and if an industry wants to increase the chances of having a case brought and winning the case, it will offer legal and other support for the case. This support could, and often does, include collecting data, drafting portions of the written submission, conducting research and providing technical support. This support is paid for by the private parties and not the USTR.

Notable non-tariff barriers

20 | What notable trade barriers other than retaliatory measures does your country impose on imports?

If asked, the US government generally and the USTR in particular would say none. However, in fact there are a number of explicit trade restrictions. For national security reasons, trade with certain countries – including North Korea, Cuba, Iran and Syria – is restricted or largely prohibited. Under the guise of its export control laws, the US has also restricted certain commercial dealings with certain Russian entities.

Outside of the national security area, restrictions are in place for phytosanitary reasons. For example, the US maintains restrictions on poultry imports from various countries due to health concerns. Additionally, importation of endangered species and items from endangered species is restricted under the Convention on International Trade in Endangered Species of Wild Fauna and Flora regime. The US also maintains quotas on such products as sugar, peanuts, peanut butter and cheese. A list of the commodities subject to quotas can be found at www.cbp.gov/trade/quota/guide-import-goods/commodities.

EXPORT CONTROLS

General controls

21 | What general controls are imposed on exports?

Export controls serve multiple purposes, such as guarding national security, protecting the economy and supporting national foreign policy. As a result, different government agencies have different rules and lists specifying who or what is considered export-sensitive and where export controls apply. Most US exports, however, take place under expressly defined exceptions or waivers and do not require a specific export licence or other special authorisation. Export licences are only required in certain situations involving national security, foreign policy and terrorist concerns. Additionally, certain places, as well as denied persons and organisations, are subject to additional restrictions.

Government authorities

22 | Which authorities handle the controls?

The US Department of Commerce – Bureau of Industry and Security (BIS) (www.bis.doc.gov) is responsible for implementing and enforcing the Export Administration Regulations (EAR), which regulate the export and re-export of most commercial items. The government often refers to the items and products that the BIS regulates as dual-use – items that have both commercial and military or proliferation applications – but purely commercial items without an obvious military use are also subject to the EAR.

The US Department of State, Directorate of Defence Trade Controls (www.pmddtc.state.gov) has authority over defence articles and defence services, under the International Traffic in Arms Regulations (ITAR).

The US Treasury, Office of Foreign Assets Control (OFAC) (www.treasury.gov), prohibits or restricts trade with a list of countries and an ever-growing directory of individuals and companies.

The Department of Energy's US Nuclear Regulatory Commission (www.nrc.gov) controls the export and re-export of nuclear materials, nuclear technology and technical data for nuclear power.

Special controls

23 | Are separate controls imposed on specific products? Is a licence required to export such products? Give details.

The US Department of State controls the export of 'defense articles and defense services' under the ITAR. Items in this category to be export-controlled are placed on the US Munitions List, which is maintained by the Department of State in conjunction with the US Department of Defense. This list includes such obvious things as firearms, ammunition and explosives, but also military vehicles (land, air and sea); spacecraft (including non-military); military and space electronics; protective personnel equipment; guidance and control equipment; and components, auxiliary equipment and miscellaneous articles related to military equipment. Export of any item or technology on the US Munitions List requires specific authorisation from the Department of State. For practical purposes, the ITAR regulations dictate that information and material pertaining to defence and military-related technologies may only be shared with US persons if approval from the US Department of Defense is received or special exemption is used.

Dual-use items are regulated under the EAR, based on the Commerce Control List maintained by the BIS. The export control provisions of the EAR are intended to serve the national security, foreign policy, non-proliferation and short-supply interests of the US and, in some cases, to carry out its international obligations. Some controls are designed to restrict access to dual-use items by countries or persons that might apply such items to uses inimical to US interests. The EAR also include some export controls to protect the US from the adverse impact of unrestricted export of commodities in short supply.

The Department of Energy's US Nuclear Regulatory Commission controls the export and re-export of nuclear materials, nuclear technology and technical data for nuclear power.

Supply chain security

24 | Has your jurisdiction implemented the WCO's SAFE Framework of Standards? Does it have an AEO programme or similar?

The CBP has taken a lead role in the development of international standards in customs security, including the adoption of the World Customs Organization's SAFE Framework. In this leadership role, the CBP has developed the US Customs–Trade Partnership Against Terrorism (C-TPAT), a voluntary government-business initiative to build cooperative relationships that strengthen international supply chain and US border security. The C-TPAT engages with industry by providing certifications to companies that voluntarily agree to adopt and integrate the programme's security guidelines into their supply chains. The programme is open to all parties participating in the movement of international goods, including carriers for ocean, air, rail and road; and importers, foreign manufacturers, brokers, consolidators, ocean transportation intermediaries, port authorities and terminal operators (see www.cbp.gov/border-security/ports-entry/cargo-security/ctpat).

The Container Security Initiative (CSI) is a programme through which the US CBP negotiates bilateral cargo security agreements with

the governments of US trading partners to establish procedures for screening and inspecting high-risk maritime cargo containers before they are loaded aboard vessels bound for the US. The CSI is now operational at 58 ports in North America, Europe, Asia, Africa, the Middle East, and Latin and Central America (see www.cbp.gov/border-security/ports-entry/cargo-security/csi/csi-brief).

Applicable countries

25 | Where is information on countries subject to export controls listed?

In the Commerce Country Chart, the EAR maintain lists of every country subject to export controls and the reasons for the listing (see www.bis.doc.gov/index.php/regulations/export-administration-regulations-ear).

The ITAR includes a list of 'proscribed countries' that are subject to US arms embargoes. The State Department maintains a general policy of denying licence applications for exports of ITAR-controlled items to the proscribed countries. The list of ITAR-proscribed countries, which is available at www.pmddtc.state.gov/ddtc_public?id=ddtc_public_portal_country_landing, is significantly broader than the list of countries subject to US economic sanctions (see question 29).

OFAC administers and enforces economic and trade sanctions against targeted countries for particular foreign policy and national security reasons. The list is subject to change at any time. A current list of OFAC sanctions programmes and additional guidance regarding prohibited transactions is available at www.ustreas.gov/ofac.

Named persons and institutions

26 | Does your jurisdiction have a scheme restricting or banning exports to named persons and institutions abroad? Give details.

The US government provides a downloadable file that consolidates the export screening lists of the Departments of Commerce, State and the Treasury into one spreadsheet as an aid to industry in conducting electronic screens of potential parties to regulated transactions at http://2016.export.gov/ecr/eg_main_023148.asp.

Penalties

27 | What are the possible penalties for violation of export controls?

The penalties are provided for under the follow legislation:

- International Traffic in-Arms Regulations (ITAR)
  - up to $1 million per violation or imprisonment of up to 20 years, or both pursuant to 22 USC 2778(c).

- Export Administration Regulations
  - Export Administration Act of 1979
    - criminal: up to $1 million per violation or imprisonment of up to 20 years, or both; and
    - administrative: up to $11,000 per violation or $120,000 per violation for items involving national security.
  - International Emergency Economic Powers Enhancement Act
    - criminal: up to $100,000 per violation or imprisonment of up to 20 years, or both; and
    - administrative: up to the greater of $250,000 per violation or twice the amount of the transaction.
  - Office of Foreign Assets Control
    - Trading with the Enemy Act of 1917, 50 USC, section 5
      - criminal (wilful violation): up to $1 million per violation, and up to $100,000 in individual fines, per violation or imprisonment of up to 10 years, or both;
      - criminal (knowing violation): up to $100,000 or up to 10 years in prison, or both, per violation; and
      - civil: up to of $65,000 per violation.

- International Emergency Economic Powers Act, 20 USC section 1701
  - criminal: up to $1 million per violation or imprisonment of up to 20 years, or both; and
  - civil: up to $250,000 per violation or twice the amount of the transaction that is the basis of the violation, whichever is the greater.

FINANCIAL AND OTHER SANCTIONS AND TRADE EMBARGOES

Government authorities

28 | What government offices impose sanctions and embargoes?

Economic sanctions are administered by OFAC (www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx).

Applicable countries

29 | What countries are currently the subject of sanctions or embargoes by your country?

A list of the current OFAC sanctions list is included at www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx. Comprehensive sanctions are imposed on North Korea, Syria, Iran, Sudan and Cuba. Other sanctions are maintained against Belarus, the Central African Republic, Myanmar and Russia. This list is revised frequently.

Specific individuals and companies

30 | Are individuals or specific companies subject to financial sanctions?

Yes, OFAC maintains a list of specially designated persons, which can be found at www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx.

OTHER RELEVANT ISSUES

Other trade remedies and controls

31 | Describe any trade remedy measures, import or export controls not covered above that are particular to your jurisdiction.

The US has a range of import measures intended to protect the environment and wildlife that have extraterritorial reach. These laws include the Marine Mammal Protection Act, which bans the importation of marine mammals and marine mammal products. It also prohibits the importation of tuna that is not caught in nets that protect dolphins. A similar law is in effect to protect sea turtles. Similarly, the High Seas Driftnet Fisheries Enforcement Act imposes sanctions on countries that allow driftnets to be used in the high seas. The Lacy Act makes it illegal to engage in the trade of fish, wildlife or plants taken in violation of US law.

Intellectual property rights and unfair trade practices are also enforced with the use of the trade laws. Under section 337 of the Tariff Act of 1930, it is unlawful to engage in unfair methods of competition

and unfair acts if the effect is to injure or threaten to injure an industry in the US. Under section 337, it is also unlawful to import goods that infringe a valid patent, copyright or design.

UPDATE & TRENDS

Key developments

32 Are there any emerging trends or hot topics in trade and customs law and policy in your jurisdiction?

The Trump Administration has prioritised the reduction of US trade deficits and has expressed a strong preference for bilateral negotiations over multilateral approaches. The Trump Administration has consistently raised concerns regarding what it identifies as a lack of reciprocity between the US approach to imports and those of certain trading partners. Increasingly, the Administration is identifying higher foreign duties (as compared to US duty rates) as a barrier to US exports. The WTO MFN obligations and US bound tariff rates are seen as restricting the negotiating power of the US.

In an effort to gain leverage in trade negotiations, the US has looked to domestic legislation, such as Section 301 and Section 232, as a legal mechanism (under US law) to impose tariffs on trading partners.

The US, Mexico, and Canada have signed the USMCA, which will replace NAFTA if enacted by all three countries. The conclusion of the 'new NAFTA' could result in increased focus on other trade concerns, such as rebalancing trade with China.

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