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EIGHTH EDITION

Editors
Folkert Graafsma and Joris Cornelis

THE LAWREVIEWS

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PREFACE

I LIVING IN A POST-PANDEMIC TRADE WORLD

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

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

1 United Nations News, 'Ukraine conflict putting global trade recovery at risk: WTO' (2022), available at <https://news.un.org/en/story/2022/04/1116052>, last accessed on 13 June 2022. While a 'grain corridor' deal has been recently reached, the security and robustness of this corridor is not guaranteed. See: BBC, 'Food crisis: Ukraine grain export deal reached with Russia, says Turkey' (22 July 2022), available at: https://www.bbc.com/news/world-europe-62254597 (last accessed 2 August 2022).

2 In fact, in trying to avert the worst, India banned exports of wheat, Turkey banned the exports of beans, lentils and seed and olive oil, Serbia banned exports of vegetables oil, maize and wheat, Indonesia banned exports of Cooking oil and its raw materials – to name a few.

3 Regulation (EU) 2022/870 of the European Parliament and of the Council of 30 May 2022 on temporary trade-liberalisation measures supplementing trade concessions applicable to Ukrainian products under the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part [2022] OJ L152/103.

4 The reason for Russia's growing export surplus is that Western sanctions imports are working either directly (i.e., by cutting Russia's imports) or indirectly (i.e., by causing capital flight). According to Mark Harrison, history teaches that, in wartime, export surplus is an indicator of a weaker, not stronger,

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

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

II REBUILDING TRUST AT THE WTO

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

i Covid-19 vaccines

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

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

5 World Trade Organization, 'The crisis in Ukraine: implications of the war for global trade and development' (2022), available at <www.wto.org/english/res_e/booksp_e/imparctukraine422_e.pdf>, last accessed on 13 June 2022.

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

7 Director General Ngozi Okonjo-Iweala, 12MC Closing Speech, available at <www.wto.org/english/news_e/spno_e/spno27_e.htm>, last accessed on 17 June 2022.

8 Deputy Director-General Anabel Gonzalez, speech of 29 October 2021, transcript available at <www.wto.org/english/news_e/news21_e/ddgag_29oct21_e.htm>, last accessed on 14 July 2022.

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

ii Food security and agriculture

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

iii Fisheries

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

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

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

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

13 Statement by Philip Chou, senior director of global policy with the Washington-based conservation group Oceana. Reported by Paul Withers in 'WTO agreement to curb fishing subsidies is "meagre," says expert Social Sharing' (17 June 2022), available at <www.cbc.ca/news/canada/nova-scotia/wto-agreement-curb-subsidies-prevent-overfishing-1.6492624>, last accessed on 17 June 2022.

14 Director General Ngozi Okonjo-Iweala, 12MC Closing Speech, available at <www.wto.org/english/news_e/spno_e/spno27_e.htm>, last accessed on 17 June 2022.

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

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

iv E-commerce

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

v WTO reform

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

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miraculous-catch-or-struggling-to-staying-afloat-early-thoughts-on-the-wtos-12th-ministerial-conference/?utm_source=rss&utm_medium=rss&utm_campaign=miraculous-catch-or-struggling-to-staying-afloat-early-thoughts-on-the-wtos-12th-ministerial-conference>, last accessed on 18 June 2022.

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

17 Comments made during the webinar: SIEL Conversations: The Outcomes of MC12 and the Future of the Multilateral Trading System, held on 27 June 2022, accessible at https://www.youtube.com/watch?v=hI9i7onD34k; participants included Anabel González, Bernard Hoekman, Victor do Prado, Peter Ungphakorn and Iryna Polovets.

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

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

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

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

III NEW TRENDS IN THE OLD CONTINENT

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

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

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

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

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

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

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

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

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

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25 At the time of writing, this marks the fourth time the UK government has delayed the implementation of sanitary and phytosanitary checks on EU imports.

26 BBC News, 'EU set to take legal action against UK over post-Brexit deal changes' (15 June 2022), available at <www.bbc.com/news/uk-politics-61795553>, last accessed on 18 June 2022.

27 AD0012: Aluminium Extrusions from China; AD0020: Ironing Boards from Turkey; AD0021: Optical Fibres from China; and AS0022: Optical Fibres from China. For updates, see: UK TRA, 'Investigations currently in progress', available at <www.trade-remedies.service.gov.uk/public/cases/>, last accessed on 15 June 2022

28 See: Commission Implementing Regulation (EU) 2022/72 of 18 January 2022 imposing definitive countervailing duties on imports of optical fibre cables originating in the People's Republic of China and amending Implementing Regulation (EU) 2021/2011 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China [2022] OJ L12/34.

29 Emilio Casalicchio, 'Meet the Trade Remedies Authority, the UK watchdog in a political storm' (9 June 2022), available at <www.politico.eu/author/emilio-casalicchio/>, last accessed on 18 June 2022.

30 UK Department for International Trade, 'UK-India Free Trade Agreement: the UK's strategy', available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1046839/uk-india-free-trade-agreement-the-uks-strategic-approach.pdf>, last accessed on 13 June 2022.

31 See: Dharshini David, 'Whisky and visas could be part of a UK-India trade deal' (22 April 2022), available at <www.bbc.com/news/business-61180390>, last accessed on 15 June 2022, who writes: 'No other nation

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

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

i Draft regulation on foreign subsidies

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

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

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

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

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

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

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

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

ii Revised enforcement regulation

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

iii Anti-coercion instrument

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

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

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

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

iv Carbon border adjustment mechanism

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

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

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

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

41 Frederik Erixon, Oscar Guinea, Vanika Sharma and Renata Zilli Montero, 'The new wave of defensive trade policy measures in the European Union: design, structure and trade effects' (2022), p. 50, available at <https://ecipe.org/publications/new-wave-of-defensive-trade-policy-measures-in-eu?mc_cid=f536ecdc53&mc_eid=eae92434a4>, last accessed on 14 June 2022.

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

v Continued bilateral dispute settlement activity

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

IV IS THE UNITED STATES CHANGING ITS ATTITUDE TOO?

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

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

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

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

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

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

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

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

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

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

V AND WHAT ABOUT CHINA?

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

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

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

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

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

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

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

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

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

VI AFRICA: A NEW BIG TRADE PLAYER ON THE HORIZON

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

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

54 WTO, Draft Ministerial Decision on the TRIPS Agreement of 17 June 2022, WT/MIN(22)/W/15/Rev.2, available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W15R2.pdf&Open=True, last accessed on 17 June 2022.

55 For example, by interpreting the WTO rules in 'creative' ways so as to target Chinese State-owned enterprises, as explained by Simon J. Evenett, Juhi Dion Sud and Edwin Vermulst in 'The European Union's New Move Against China: Countervailing Chinese Outward Foreign Direct Investment' (2020), 15(9) KLI BV 413.

56 Henry Gao, 'China's Changing Perspective on the WTO: From Aspiration, Assimilation to Alienation' (8 November 2021), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3958510#:~:text=The%20paper%20argues%20that%20the,the%20core%20values%20of%20WTO>, last accessed on 18 June 2022.

57 As of June 2022, only 43 of the 54 signatories have ratified the AfCFTA and deposited their instruments of ratification of the Agreement with the AfCFTA Secretariat.

58 Webber Wentzel in alliance with Linklaters, 'AfCFTA Insights Series' (2020), p. 6, available at <www.webberwentzel.com/News/Documents/2021/africa-legal-webber-wentzel-2020-review.pdf>, last accessed on 13 June 2022.

59 UN Economic Commission for Africa (UNECA), 'The AfCFTA Country Business Index (ACBI) Report' (2022), available at <https://repository.uneca.org/bitstream/handle/10855/47595/b12003657.pdf?sequence=1&isAllowed=y>, last accessed on 13 June 2022.

60 The World Bank, 'The African Continental Free Trade Area' (2020), available at <www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area>, last accessed on 13 June 2022.

61 Virusha Subban, 'China's trade ties with Africa continue to strengthen' (2022), Namibia Economist, available at <https://economist.com.na/70954/special-focus/chinas-trade-ties-with-africa-continue-to-strengthen/>, last accessed on 18 June 2022.

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

VII LAST BUT NOT LEAST: TRADE REMEDIES

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

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

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

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

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

64 Or some would say: copied from the US.

65 Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members fo the European Union [2016] OJ L176/21, Article 2(6)(a). For a recent application of the methodology under Article 2(6)(a), see: Commission Implementing Regulation (EU) 2022/469 of 23 March 2022 correcting Implementing Regulation (EU) 2022/72 imposing definitive countervailing duties on imports of optical fibre cables originating in the People's Republic of China and amending Implementing Regulation (EU) 2021/2011 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China [2022] OJ L96/36, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R0469>, last accessed on 19 June 2022.

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

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

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

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

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

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

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

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

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

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

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

VIII SUMMARY

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

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

Folkert Graafsma and Joris Cornelis
VVGB Advocaten | Avocats
Brussels, August 2022

Chapter 1

WORLD TRADE ORGANIZATION

Tetyana Payosova and Joanna Redelbach[1]

I INTRODUCTION

The World Trade Organization (WTO) provides for a comprehensive set of rules that reflects a carefully negotiated balance of rights and obligations of WTO Members. While WTO Members must honour their multilateral trade commitments, WTO rules also recognise the right of each WTO Member to pursue non-trade-related public policy objectives and to adopt trade-restrictive measures in the pursuit of certain of these objectives. In the area of trade in goods, this balance is primarily reflected in the general and security exceptions laid down respectively in Articles XX and XXI of the General Agreement on Tariffs and Trade 1994 (the GATT 1994).

The WTO agreements also contain a comprehensive set of rules related to the use of trade remedies, which allow WTO Members to counter unfair trade practices adopted by other members or to impose temporary import restrictions to shield a domestic industry from a sudden surge in imports. Apart from the general provisions contained in the GATT 1994 (Articles VI, XVI and XIX), three specific agreements, namely the Anti-Dumping Agreement (the AD Agreement),[2] the Agreement on Subsidies and Countervailing Measures (the SCM Agreement) and the Agreement on Safeguards, addressing respectively the imposition of anti-dumping, anti-subsidy and safeguard measures, were adopted during the Uruguay Round. WTO Members wishing to apply these trade defence instruments must ensure that their domestic legislation is 'as such' consistent with the relevant WTO rules. They must equally make sure that each instance of application of such legislation complies with the applicable WTO provisions. Since the establishment of the WTO in 1995, disputes relating to trade remedies constitute half of all disputes initiated.[3]

Section II of this chapter discusses some of the key developments of WTO jurisprudence in the past year. Those developments include the panels' rulings in relation to *de jure* specificity and the pass-through analysis under the SCM Agreement as well as the interpretation and application of certain requirements of the Agreement on Safeguards, in particular in respect of the product scope for the purposes of the investigation, the subsequent application of the safeguard measures and the requirement of unforeseen developments. Section III addresses the Appellate Body impasse and the alternative means of dispute resolution, such as the Multi-party Interim Appeal-Arbitration Arrangement (MPIA) and the latest recourse to

1 Tetyana Payosova and Joanna Redelbach are senior associates at Van Bael & Bellis. This chapter was written with the help of Elyse Kneller, Isabella Omrod Bufill and Nicole Sunderlin.

2 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

3 According to data provided on the WTO website, 312 out of 612 disputes initiated between 1995 and June 2022 involved claims under the AD Agreement, the SCM Agreement or the Agreement on Safeguards.

arbitration under Article 25 of the Dispute Settlement Understanding (DSU) for the purpose of appeal proceedings. Section IV concludes by providing the likely practical and systemic implications of the clarifications brought about by the outcomes of the disputes discussed in Section II.

II SIGNIFICANT LEGAL DEVELOPMENTS

i US – Ripe Olives from Spain (DS577)

Introduction

On 20 December 2021, the WTO Dispute Settlement Body (DSB) adopted the panel report in *US – Ripe Olives from Spain* (DS577).[4] This dispute concerns a European Union's challenge to the United States' application of countervailing and anti-dumping duties on ripe olives from Spain in 2018 and certain administrative acts and legislation on which these duties were based. The countervailing duty investigation addressed subsidies provided to raw olive growers under the EU's Common Agricultural Policy (CAP).

The EU challenged the US Department of Commerce's (USDOC) *de jure* specificity determination in the countervailing duty investigation, alleging a violation of the US' obligations under the SCM Agreement.[5] It also claimed that the USDOC failed to carry out a pass-through analysis and challenged 'as such' Section 771B of the US Tariff Act of 1930, alleging inconsistencies with the SCM Agreement and Article VI:3 of the GATT 1994.[6] In addition, the EU claimed that the US International Trade Commission's (USITC) injury determination violated several provisions of the SCM Agreement and the AD Agreement[7] and that the USDOC's calculation of the final subsidy margin and countervailing duty rate for a Spanish ripe olive producer, Aceitunas Guadalquivir, violated the SCM Agreement and Article VI:3 of the GATT 1994.[8]

De jure specificity

The USDOC based its *de jure* specificity determination on the understanding that the subsidy calculation rules under the CAP's Basic Payment Scheme – Direct Payment (BPS) were based on, and expressly referred to, criteria of the Single Payment Scheme (SPS) programme which, in turn, were based on the Common Organization of Markets in Oils and Fats (COMOF) programme, the latter of which was considered to have provided crop-specific subsidies to olive growers.[9] In view of this direct relationship, the USDOC determined that the annual grant amounts provided to olive growers under the BPS and Basic Payment Scheme – Greening (GP) continued to retain the *de jure* specificity of the grants provided to olive growers under the COMOF programme.[10]

4 Panel Report, *United States — Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, WT/DS577/R and Add.1, adopted on 20 December 2021 (hereafter Panel Report, *US – Ripe Olives from Spain*).

5 id., at paragraph 3.2.

6 id., at paragraph 3.3.

7 id., at paragraph 3.4.

8 id., at paragraph 3.5.

9 id., at paragraph 7.34.

10 id., at paragraph 7.35.

At the outset of its analysis, the panel held that a finding of *de jure* specificity may be based on the rules governing the amount of subsidy rather than the criteria defining eligibility for a subsidy, as argued by the EU.[11] The panel found on several grounds that the USDOC incorrectly determined, contrary to Articles 2.1, 2.1(a) and 2.4 of the SCM Agreement, that the assistance provided under the BPS and GP to olive growers were *de jure* specific.[12] In particular, the panel determined that the USDOC did not properly examine and account for the rules governing the allocation and valuation of BPS entitlements with respect to new farmers, farmers holding entitlements transferred under the SPS programme and farmers no longer growing olives.[13] The panel reached a similar finding for the rules governing the allocation and valuation of SPS entitlements with respect to farmers with SPS entitlements obtained via transfer and farmers holding COMOF programme-based entitlements no longer producing olives.[14] As such, the USDOC's explanation as to how access to the BPS and SPS subsidies was explicitly limited to olive growers was considered by the panel to be neither reasoned nor adequate.[15] Moreover, according to the panel, the USDOC was incorrect in finding that a 'regional rate' under the BPS, as implemented by Spain, was to be used to determine the intrinsic value of a farmer's entitlements.[16] Rather, the facts on file showed that it was applied to allocate a farmer's total eligible payments between the different regions in which it held land, based on objective and non-discriminatory criteria.[17]

The panel further found that the USDOC's determination of *de jure* specificity with respect to the SPS, BPS and GP programmes was inconsistent with Article 2.4 of the SCM Agreement because it was factually inaccurate for the USDOC to find that '[o]nce the value per hectare was determined [under the COMOF programme] a farmer would apply for an aid equal to the number of hectares multiplied by the value of each hectare'.[18] In this regard, the relevant rule on the record of the USDOC's investigation prescribed that the amount of COMOF programme assistance was to be calculated on the basis of production quantities.[19]

'As such' challenge and pass-through analysis

The EU argued that Section 771B of the US Tariff Act of 1930[20] is 'as such' inconsistent with Article VI:3 of the GATT 1994 and various provisions of the SCM Agreement because the USDOC is required to 'impermissibly presume that where a subsidy is conferred on an upstream agricultural product in arm's length transactions between unrelated entities a

11 id., at paragraph 7.33.

12 id., at paragraph 7.127.

13 id., at paragraphs 7.66 and 7.67.

14 id., at paragraph 7.115.

15 id., at paragraph 7.127.

16 id., at paragraphs 7.89 and 7.93.

17 id., at paragraph 7.89.

18 id., at paragraph 7.125.

19 id., at paragraph 7.126.

20 Section 771B of the Tariff Act of 1930 provides as follows: 'In the case of an agricultural product processed from a raw agricultural product in which – (1) the demand for the prior stage product is substantially dependent on the demand for the latter stage product, and (2) the processing operation adds only limited value to the raw commodity, countervailable subsidies found to be provided to either producers or processors of the product shall be deemed to be provided with respect to the manufacture, production, or exportation of the processed product.'

benefit will also have been conferred indirectly to a downstream processor'.[21] In other words, according to the EU, it improperly mandates an approach by the USDOC with respect to benefit that excludes the carrying out of a proper pass-through analysis. In addition, the EU challenged the USDOC's application of Section 771B to attribute the benefit arising from subsidies granted to raw olive growers to three investigated exporting Spanish ripe olive producers in the full amount of the financial contribution made to the growers.

While the EU acknowledged that Article VI:3 of the GATT 1994 and the SCM Agreement do not set out a specific methodology for conducting a pass-through analysis, it considered that an examination of a decrease in the level of prices for the input product resulting from any subsidy granted to the input producers is 'the only appropriate method for the analysis'.[22] The US contended that the EU erred by insisting that a pass-through analysis must involve an analysis of price differentiation.[23] It also claimed that Section 771B provides an appropriate alternative method in the context of raw agricultural commodities in light of the fact that raw agricultural markets can be systematically characterised by 'perfect competition' (i.e., producers of the raw products have no choice but to accept the prevailing market price, rendering them 'price takers' who are unable to charge a price higher than the price a processor could obtain from another homogeneous producer).[24]

The panel agreed with past panel and Appellate Body reports that, in order for an 'as such' challenge against a provision of domestic legislation to succeed, the complaining Member must establish that the relevant provision of domestic law requires the responding Member to violate its obligations under the relevant covered agreement or otherwise restricts, in a material way, the responding Member's discretion to act in a manner that is consistent with those obligations.[25] The panel also explained that while WTO Members are entitled to offset indirect subsidies by imposing duties on imported products that benefit from subsidies conferred on upstream companies and products, they are not entitled to simply presume that a subsidy bestowed on an input product passes through, in total or in part, to the processed imported product. 'Rather, an investigating authority must work out, as accurately as possible, how much of the subsidy has flowed indirectly from an input product to the downstream product, to ensure that any countervailing duty imposed on the downstream product is not in excess of the total amount of subsidies bestowed on the investigated product.'[26]

Importantly, although the investigating authorities have a certain amount of discretion in carrying out their pass-through analyses, given that neither Article VI:3 of the GATT 1994 nor the SCM Agreement prescribe any specific pass-through methodology,[27] this discretion is not 'unfettered' (i.e., not 'so wide as to permit it to exclude any consideration of facts and circumstances that may be relevant to the very analysis that it must perform').[28] An investigating authority must provide an analytical basis for its findings of the existence and extent of pass-through that takes into account facts and circumstances that are relevant to the exercise and that are directed at ensuring that any countervailing duty imposed on the downstream product is not in excess of the total amount of subsidies conferred on the

21 id., at paragraph 7.139.
22 id., at paragraph 7.142.
23 id., at paragraph 7.144.
24 id., at paragraph 7.163.
25 id., at paragraph 7.146.
26 id., at paragraph 7.150.
27 id., at paragraph 7.151.
28 id., at paragraph 7.154.

investigated product.[29] In this regard, the panel was not convinced that input producers always will be 'price takers' in all markets for all raw agricultural products falling within the scope of Section 771B, and that while the circumstances in Section 771B may be relevant to an examination of whether a subsidy tied to a raw agricultural product has passed through to a processed agricultural product, the 'probative value of those factors will . . . depend upon the specific facts of the situation in question, including the nature of the specific market for the input product at issue and all of the conditions of competition in that market.'[30]

On this basis, the panel determined that Section 771B 'does not leave open the possibility for the USDOC to consider factors that may be affecting the market for the investigated product other than those Section 771B lists explicitly' (such as the degree to which raw input sellers face pricing pressure).[31] On the contrary, the panel concluded that 'not only does Section 771B require the USDOC to presume the existence of pass-through when the two designated factual circumstances are present, it also effectively requires the USDOC to treat the full amount of any countervailable subsidy provided to a raw agricultural input as if it had passed-through to the investigated processed product'.[32]

The panel therefore found Section 771B to be 'as such' inconsistent with the US' obligations under Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement.[33]

Implications

The panel in *US – Ripe Olives from Spain* found that the US infringed its WTO obligations by applying countervailing duties on ripe olives from Spain and that its application of anti-dumping duties on this product was in accordance with these obligations. The panel's ruling that Section 771B of the US Tariff Act of 1930 is 'as such' inconsistent with the GATT 1994 and the SCM Agreement is notable given that it requires the US' legislative framework to be changed and brought into compliance with its obligations under these agreements. The panel's findings relating to Section 771B are also relevant because they confirm the need for a pass-through analysis in case of indirect subsidies where the recipient of a subsidy is not the same as the recipient of a benefit resulting from that subsidy. A subsidy granted to an upstream product cannot simply be presumed to have passed through, in total or in part, to the downstream processed product. Furthermore, while WTO Members may decide which pass-through methodology they want to use, they must ensure that it takes into account all relevant facts and circumstances.

The panel's recommendations and rulings are significant given the US' decision to allow the panel report to be adopted rather than appealing it into the void. In January 2022 the US informed the DSB of its intention to bring its measures into conformity with its WTO obligations.[34] In addition, the recommendations and rulings are highly significant for the EU as they avert systemic implications for its contentious CAP. A ruling in which the US'

29 id., at paragraph 7.154.

30 id., at paragraph 7.166.

31 id., at paragraph 7.167.

32 id., at paragraph 7.168.

33 id., at paragraph 7.170.

34 *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, Communication from the United States, 24 January 2022, WT/DS577/10.

countervailing measures were found to be consistent with WTO rules could have led other trade partners to adopt unilateral measures on agricultural imports from the EU that benefit from similar subsidies under the CAP.

ii EU – Safeguard Measures on Steel (Turkey) (DS595)

Introduction

On 31 May 2022, the WTO DSB adopted the panel report in *EU – Safeguard Measures on Steel (Turkey)* (DS595),[35] a case dealing with the safeguard measures on certain steel products imposed by the EU.

In this dispute, Turkey challenged the provisional and definitive safeguard measures imposed by the EU on certain steel products, arguing that these measures are inconsistent with several provisions of the GATT 1994 and the Agreement on Safeguards. The panel ultimately held that the definitive safeguard measures are inconsistent with Article XIX:1(a) of the GATT 1994 and Article 4.1(b) of the Agreement on Safeguards, but also made some interesting findings in respect of the alleged mismatch between the product scope of the investigation and the resulting safeguard measures, as well as the application of the concept of unforeseen developments and the necessary link with the increase in imports.

Inconsistencies regarding the product scope

Under Article XIX:1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards, a Member may apply a safeguard measure to a product only if it has verified the existence of the required circumstances and conditions for that product.

In this case, Turkey took issue with the fact that (1) the European Commission applied 26 distinct definitive safeguards (and not a single safeguard) on 26 products, but did not examine whether conditions for imposing safeguard measures existed for each of the products individually; and (2) the European Commission's approach to the product scope suffered from internal inconsistencies, which are inconsistent with a number of WTO obligations related to the application of safeguard measures.[36]

In assessing Turkey's arguments, at the outset, the panel noted that neither Article XIX:1(a) of the GATT 1994, nor Articles 2.1, 3.1, 4.1(c), 4.2(a)-(c) of the Agreement on Safeguards, discipline the choice of the product under investigation as such. The panel also endorsed the findings of previous panels that the WTO safeguard disciplines do not restrict the product under investigation solely to those products that are like or directly competitive.[37]

Based on the evidence on record, the panel concluded that the EU applied a single definitive safeguard measure on 26 steel products (product categories), taken together, despite the fact that the size of the tariff rate quota was calculated at the level of each product category, and for two product categories, even at the level of further subsets of products.[38] Consequently, the panel also concluded that the European Commission examined, for the 26 product categories taken together, whether the conditions for imposing safeguard measures were met. The panel noted that, as long as the authority ascertains that the conditions exist

35 Panel Report, *European Union – Safeguard Measures on Certain Steel Products*, WT/DS595/R, adopted on 31 May 2022 (hereafter Panel Report, *EU – Safeguard Measures on Steel (Turkey)*).

36 id, at paragraph 7.36.

37 id, at paragraph 7.34.

38 id, at paragraphs 7.55-7.59.

for the product under investigation as a whole, it is not barred from examining some or all conditions also for the segments of that product.[39] As a result, it found that there was no mismatch in the European Commission's approach because the examination of the required circumstances and conditions and the definitive safeguard measures applied concerned the 26 product categories taken together.[40]

Turning to Turkey's arguments about the European Commission's inconsistent approach as regards the product scope, the panel held that the mere fact that the European Commission conducted both a global analysis, and in some instances, additionally, a more disaggregated analysis, does not mean that the EU acted inconsistently with Articles 3.1, 4.2(a) and (c) of the Agreement on Safeguards.[41] Yet, the panel found that 'modifying the scope of a safeguard investigation to remove product categories that do not, individually, meet certain conditions, could lead to a biased outcome in certain cases'.[42] In the present case, the panel concluded that Turkey did not establish such bias.

Unforeseen developments

Article XIX:1(a) of the GATT 1994 requires that the injurious increase in imports results from two elements, namely unforeseen developments and 'the effect of the obligations incurred' under the GATT 1994. The panel recalled that the point in time at which a development must have been 'unforeseen' is when the relevant obligations were incurred, 'because the Member concerned would not have undertaken the obligation had it foreseen a development that would result in an injurious increase in imports'.[43]

In the present case, the EU argued that the unforeseen developments comprise: (1) global steel overcapacity; (2) increase in trade defence measures on steel products; (3) trade restrictive measures on steel products; and (4) the US Section 232 measures on steel.

In respect of the global steel overcapacity, despite the fact that Turkey and several third parties questioned that it was 'unforeseen', the panel found that a 'development that was unforeseen at the time of contracting an obligation can evolve from a situation that was known at that time'.[44] The panel thus was satisfied with the EU's explanation that what was unexpected was that overcapacity would continue to increase, reaching 'unprecedented' levels, contrary to economic logic and efforts to contain the increase.[45]

Similarly, the panel found that the increase in trade defence measures, together with other developments, was unforeseen.[46] Whereas Turkey and several third parties cautioned that making a finding that trade defence measures, which are an integral part of the WTO system, may amount to unforeseen developments would lead to an escalation in trade barriers, the panel concluded that 'the fact that the WTO Agreement may contemplate particular events or circumstances [does not establish] that they cannot constitute an unforeseen development'.[47] By way of illustration, the panel referred to Article XXI of the GATT 1994 which refers to

39 id, at paragraphs 7.60-7.65.
40 id, at paragraph 7.66.
41 id, at paragraphs 7.69-7.72.
42 id, at paragraph 7.73.
43 id, at paragraph 7.82.
44 id, at paragraph 7.101.
45 id.
46 id, at paragraphs 7.102-7.112.
47 id, at paragraph 7.108.

'actions . . . taken in time of war' and that it would not necessarily preclude such actions from constituting an unforeseen development.[48] The panel reached similar conclusions in respect of trade restrictive measures on steel products taken by several countries in the context of other circumstances identified by the EU as unforeseen developments, despite the arguments of several third parties that the adoption of government restrictions is common in the steel sector and thus may hardly constitute an 'unforeseen' development.[49]

Finally, the panel also concluded that the fact that the US Section 232 measures on steel were adopted in line with long-standing US legislation does not establish that the European Commission erred in considering those specific measures as unforeseen developments.[50]

The required connection between unforeseen developments and the increase in imports

Article XIX:1(a) of the GATT 1994 provides that a WTO Member may adopt a safeguard measure where, among others, a product is being imported in increased quantities 'as a result of' unforeseen developments and the effect of GATT obligations.[51]

The panel recalled that the phrase 'as a result of' does not establish a causation requirement, as confirmed in previous panel and Appellate Body reports, and can be described as a 'logical connection' between the unforeseen developments and the injurious increase in imports.[52] The panel noted that an 'investigating authority need not provide the same quantum of reasoning and evidence to substantiate the "logical connection" between unforeseen developments and the increase in imports' as it would need to under the causation requirement and that what precisely is required to establish the necessary link will depend on the nature of the facts in a given case.

Turning to the analysis of the facts of the case, the panel found that the European Commission's determination failed to provide evidence that would support the reasoning on the connection between the four factors identified as unforeseen developments and the increase in imports.[53] Among other things, the panel noted that while demonstrating a coincidence in time between certain unforeseen developments and an increase in imports and explaining their connection might be sufficient to establish their logical connection, as was the case in *US – Safeguard Measure on PV Products (China)*, in the present case the link between the global overcapacity in steel in general and an increase in imports in general is not sufficiently close.[54]

Implications

The panel report in *EU – Safeguard Measures on Steel (Turkey)* provides important insights into what could be considered a permissible approach to the product scope in the safeguard investigations and the subsequent application of the safeguard measures. It also suggests that essentially any circumstances, including trade defence measures taken under the WTO Agreement or trade restrictive measures taken in line with national legislation, may amount to unforeseen developments. Yet, the panel confirmed that it is not sufficient for the

48 id.
49 id, at paragraph 7.113.
50 id, at paragraph 7.116.
51 id, at paragraph 7.127.
52 id, at paragraph 7.84.
53 id, at paragraphs 7.122–7.148.
54 id, at paragraph 7.133.

investigating authority to merely identify the unforeseen developments without explaining, based on evidence, their connection with the increase in imports, even where such a connection may seem obvious. Overall, the panel's assessment of several claims appeared to be deferential to the findings of the investigating authority and the panel exercised judicial economy on a number of Turkey's claims, including under Articles 2.1 and 4.2(b) of the Agreement on Safeguards.

III OUTLOOK

i The WTO Appellate Body impasse, the MPIA and the appeal arbitration under Article 25 of the DSU

Despite repeated commitment to engage in discussions on reforming the WTO dispute settlement system,[55] as of the time of writing, WTO Members are still far from finding a solution to the Appellate Body impasse.

In the absence of the functioning Appellate Body, an overwhelming majority of panel reports issued since December 2019 have been appealed into the void by either respondents or both parties, meaning that, as a matter of law, there are no binding findings on the WTO consistency of the measures at issue or recommendations on bringing WTO-inconsistent measures into compliance. A review of the filed appeals into the void shows two different strategies. The first, followed by most WTO Members, is to submit a regular fully fledged notice of appeal, sometimes accompanied by an appellant submission. The second, followed by the US and China, is to submit a very short pro forma notice of appeal, merely notifying the decision to appeal without providing any further details as to the claims on appeal or the errors allegedly committed by the panel. In both cases, the appeals are in limbo, waiting to be treated by the Appellate Body once it is operational again.

While appealing into the void is an effective tool for blocking the adoption of an unfavourable panel report, it also entails certain risks including a risk of retaliation by other WTO Members. Most notably, based on its revised Trade Enforcement Regulation, the EU is empowered to adopt retaliatory measures in the event a WTO panel report, which finds in favour of the EU as a complainant, is appealed into the void by the respondent.[56] Such retaliatory measures may be quite broad and may consist of tariff measures, quantitative restrictions, restrictive measures relating to trade in services, intellectual property rights under the TRIPS Agreement and measures in the area of public procurement. So far, the EU has not used its enforcement power, and the WTO-consistency of any such retaliatory measures remain highly questionable.

55 See, for instance, WTO Dispute Settlement Body, summary of the meetings of 27 April and 31 May 2022, available at https://www.wto.org/english/news_e/news22_e/dsb_27apr22_e.htm and https://www.wto.org/english/news_e/news22_e/dsb_31may22_e.htm.

56 Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32021R0167. A similar mechanism is also in place in Brazil, see https://www.gov.br/mre/en/contact-us/press-area/press-releases/joint-press-release-by-the-ministry-of-foreign-affairs-the-ministry-of-economy-and-the-ministry-of-agriculture-livestock-and-supply-2013-provisional-measure-brazil-to-suspend-concessions-to-wto-members-filing-an-2018empty-appeal2019.

Given the uncertainty as to whether and when the Appellate Body may become functioning again, some WTO Members have turned to alternative means of appeal review.

ii The Multiparty Interim Appeal-Arbitration Arrangement (MPIA)

The MPIA, agreed upon by some WTO Members as a temporary replacement for the Appellate Body, has been in effect since 30 April 2020 and became operational on 31 July 2020 with the appointment of the 10 MPIA arbitrators.[57] The MPIA appeals will be heard by three arbitrators selected from that pool of arbitrators.

While the MPIA is open to all WTO Members, only 25 have currently joined the MPIA.[58] Some of the frequent users of the WTO dispute settlement system, including the US, India, Indonesia, Japan, Korea and Turkey, are currently not participating in the MPIA. So far, no dispute has been appealed under the MPIA rules and thus the effectiveness of that system is yet to be tested. There are currently several ongoing disputes in which both parties have joined the MPIA, including some where the parties have already submitted a notification expressing their willingness to resort to the MPIA for the purpose of any potential appeal.[59] The case to watch is DS591 dealing with the European Union's challenge of Colombia's anti-dumping duties on frozen fries, in which the panel report is expected in the course of 2022.

iii Appeal arbitration under Article 25 of the DSU

Some WTO Members have opted for alternative solutions to the MPIA. Most notably, Turkey and the European Union have recently agreed to pursue an ad hoc arbitration under Article 25 of the DSU for the purpose of an appeal in *Turkey – Pharmaceutical Products (EU)* (DS583).[60] In that dispute, which deals with the European Union's challenge of certain measures affecting the production, importation and marketing of pharmaceutical products in Turkey, the parties requested the panel, after they received the panel's final report but before its circulation to other WTO Members, to suspend its work in line with Article 12.12 of the DSU.[61] The parties subsequently notified the panel of their Agreed Procedures for Arbitration under Article 25 of the DSU (the Arbitration Agreement).[62] The appeal arbitration was

57 Multi-party Interim Appeal Arbitration Arrangement pursuant to Article 25 of the DSU, JOB/DSB/1/Add.12/Suppl.5, 31 July 2021.

58 In addition to the original participating members, Benin, Ecuador, Macau, Montenegro, Nicaragua and Peru have endorsed the MPIA. The original MPIA participating members are Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, the European Union, Guatemala, Hong Kong, Iceland, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Ukraine and Uruguay.

59 DS589, DS591, DS598 and DS602. In the following cases both parties have joined the MPIA but no notification has yet been submitted: DS603, DS607, DS610 and DS611. In addition, in DS522 the complaint was withdrawn, in DS537 the parties settled the dispute, and in DS524 the panel report was adopted.

60 Turkey and the European Union reached similar agreement in the context of a parallel dispute *EU - Safeguard Measures on Steel (Turkey)* (DS595). In that case, however, the parties decided not to file any appeal. The panel report in DS595 was adopted on 31 May 2022.

61 *Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, Suspension of Panel Work, WT/DS583/11, 25 March 2022.

62 *Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, Agreed Procedures for Arbitration under Article 25 of the DSU, WT/DS583/10, 25 March 2022.

initiated by the Notice of Appeal filed by Turkey on 25 April 2022.[63] The notice includes the full text of the report transmitted by the panel to the parties, which is thereby made public even though it has not been circulated by the panel for the purposes of Article 16 of the DSU. In its appeal, Turkey challenged the panel's finding that its localisation measure, whereby certain pharmaceutical products need to be produced in Turkey in order to be covered by the public healthcare system, does not fall within the scope of the government procurement derogation in Article III:8(a) of the GATT 1994 and is inconsistent with the national treatment obligation in Article III:4. Turkey also appealed the panel's findings that the measure is not justified under Articles XX(b) or XX(d) of the GATT 1994.

Pursuant to Article 25.2 of the DSU, 'resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed'. Article 25 of the DSU does not provide any additional guidance on the content of such procedures. The Arbitration Agreement between Turkey and the European Union is largely based of the provisions of the DSU relating to appeals and the practice of the Appellate Body. In fact, paragraph 11 of the Arbitration Agreement provides that '[u]nless otherwise provided for in these agreed procedures, the arbitration shall be governed, *mutatis mutandis*, by the provisions of the DSU and other rules and procedures applicable to Appellate Review. This includes in particular the Working Procedures for Appellate Review and the timetable for appeals provided for therein as well as the Rules of Conduct.' Few modifications relate to the mandate of the arbitrators who are asked to address only those issues that are necessary for the resolution of the dispute. In contrast, Article 17.12 of the DSU requires the Appellate Body to address each of the issues raised during the appellate proceeding. The Arbitration Agreement also empowers the arbitrators to take appropriate organisational and substantive measures in order to meet the 90-day deadline for issuing the award. The organisational measures may include decisions on page limits, time limits for the oral statements and deadlines as well as on the length and number of hearings required. An example of a substantive measure that may be proposed by the arbitrators is the exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU. While organisational measures may be decided by the arbitrators alone, the adoption of substantive measures requires the agreement of the parties. It is worth noting that the possibility of adopting these types of measures (both organisational and substantive) is also provided for under the MPIA. More generally, the Arbitration Agreement is quite similar to the rules agreed under the MPIA.

The arbitrators may uphold, modify or reverse the legal findings and conclusions of the panel. They may also issue recommendations, as envisaged in Article 19 of the DSU. The findings of the panel which have not been appealed will form an integral part of the arbitration award together with the arbitrators' own findings. The award must be issued within the 90 days following the filing of the Notice of Appeal, unless the parties agree to extend that deadline. Importantly, the award will be final and binding upon the parties. In line with Article 25.4 of the DSU, Articles 21 and 22 of the DSU shall apply *mutatis mutandis* to the arbitration award providing for the possibility of challenging any compliance measures that may be taken by Turkey following the arbitration award.

63 *Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, Notification of an Appeal by Turkey under Article 25 of the DSU, under Paragraph 5 of the Agreed Procedures for Arbitration under Article 25 of the DSU (the Arbitration Agreement), and under Rule 20 of the Working Procedures for Appellate Review, WT/DS583/12, 28 April 2022.

In addition to the procedural rules agreed between Turkey and the European Union, which as mentioned above largely resemble the rules followed by the Appellate Body, an interesting aspect of this first ever appeal arbitration under Article 25 of the DSU is the selection of the arbitrators. Pursuant to Paragraph 7 of the Arbitration Agreement, the arbitrators must be three persons randomly selected from a combined list of former Appellate Body members and the MPIA arbitrators. The random selection is made by the WTO Secretariat in the presence of the parties immediately after the filing of a notice of appeal and must ensure that the arbitrators include at least one former Appellate Body member and one MPIA arbitrator.[64] In this case, the arbitrators are Mr Seung Wha Chang (former Appellate Body member from South Korea), Mr Mateo Diego-Fernández Andrade (MPIA arbitrator from Mexico) and Mr Guohua Yang (MPIA arbitrator from China).[65] The inclusion of the MPIA arbitrators in the pool appears to be an appeasement to the European Union, which agreed to an ad hoc arbitration instead of using the MPIA (to which Turkey is not a party).

The appeal arbitration in DS583 is currently ongoing with the arbitration award expected to be issued by the end of July 2022. If successful, these proceedings could provide a blueprint for settling appeals in other cases in which the parties have not joined the MPIA. This could, at least provisionally, fill the loophole created by the absence of the functioning Appellate Body and avoid appeals into the void. Whether it will also provide an incentive for the Appellate Body reform remains to be seen.

IV CONCLUSIONS

The clarifications brought about by the panels in the disputes discussed in Section II are likely to have important practical and systemic implications.

First, the panel report in *US – Ripe Olives from Spain* provides useful guidance regarding the standard of *de jure* specificity and the requirement to conduct a pass-through analysis of the benefit in case of input subsidies under the SCM Agreement.

Second, the panel report in *EU – Safeguard Measures on Steel (Turkey)* provides important clarifications on the permissible approach to the product scope in the safeguard investigations and the subsequent application of the safeguard measures, as well as useful guidance on unforeseen developments and the required connection between the unforeseen developments and the increase in imports.

Finally, while the Appellate Body remains inoperative and most panel reports are being appealed into the void, the first ever recourse to arbitration under Article 25 of the DSU for the purpose of an appeal in DS583 is a sign of hope that WTO Members can preserve an effective two-stage dispute settlement system. The arbitration procedures agreed between Turkey and the European Union in that case largely follow the DSU rules applicable to appeal proceedings as well as the MPIA and may become a blueprint for future appeals until the WTO Members agree on any permanent Appellate Body reform. Given that an arbitration award must be issued within 90 days, the arbitration under Article 25 of the DSU

64 The rule would be slightly different in case of a parallel appeal in DS595. In that scenario, the random selection would need to ensure that one appeal is heard by two former Appellate Body members and one MPIA arbitrator whilst the appeal in the other dispute is heard by one former Appellate Body member and two MPIA arbitrators. In the absence of appeal in DS595 this rule did not apply.

65 *Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, Recourse to Article 25 of the DSU, Constitution of the Arbitrator, WT/DS583/13, 4 May 2022.

may prove to be an efficient procedure for handling appeals. The impact of this development on the MPIA is not yet clear but it cannot be excluded that some WTO Members, which are not yet parties to that mechanism, will be less inclined to join the MPIA and will rather rely on an ad hoc application of Article 25 of the DSU following the example of DS583.

Appendix 1

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