

THE INTERNATIONAL  
TRADE LAW  
REVIEW

SEVENTH EDITION

Editors

Folkert Graafsma and Joris Cornelis

THE LAWREVIEWS

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TRADE LAW  
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This article was first published in September 2021  
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Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

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ISBN 978-1-83862-795-9

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ACTECON

AKIN GUMP STRAUSS HAUER & FELD LLP

BAKER MCKENZIE SAS

CHINA TRADE MONITOR

DUA ASSOCIATES

EUROPEAN CENTRE FOR INTERNATIONAL POLITICAL ECONOMY

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# PREFACE

## **I TRADE IN THE TIME OF COVID-19**

Covid-19 has become the defining event of our time. For many years to come, this invisible but virulent pestilence will remain branded on our memories; and when we look back to the first decades of the twenty-first century, perhaps no other event would be found to have caused such turmoil and misery. The long-term and structural ramifications emanating from the pandemic are hard to predict, but some significant short-term effects have already surfaced: international travel has virtually halted, working from home has become the new normal and social distancing has emerged.

Changes brought about by the pandemic have also had an immense impact on the world of international trade and novel trade issues are being discussed – from covid passports to personal protective equipment to the global and equitable roll-out of vaccines, to name just a few. In order to go deeply into these issues, we have dedicated special attention in this edition to cover a number of relevant topics related to the pandemic.

In this endeavour, we are delighted to have received special contributions from a number of prominent authors in the field for this seventh edition: Simon Lester and Huan Zhu from China Trade Monitor, Virginia; Simon J Evenett from the University of St Gallen, Switzerland; and Hosuk Lee-Makiyama from the European Centre for International Political Economy, Brussels. These authors, drawing upon their experiences in both practice and academia, provide us with much needed legal, political and economic considerations, which may help to develop the debates at hand. For this, we thank these authors wholeheartedly.

## **II CAN WE BE CAUTIOUSLY OPTIMISTIC ABOUT THE WTO?**

Several issues continue to fester within the multilateral trading system – particularly concerning the World Trade Organization (WTO). However, there is cause for cautious optimism.<sup>1</sup> WTO Members have recently elected a charismatic new Director-General – Dr. Ngozi Okonjo-Iweala, a Nigerian economist, who is the first woman and first African national to occupy the position. Her appointment is seen by some as particularly crucial at a time of immense health-related suffering, given that her most recent engagement was chair of the board of Gavi, the Vaccine Alliance. Now, all eyes are fixed on the Twelfth WTO Ministerial Conference (MC12), currently scheduled to take place in late 2021.

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1 The expression ‘cautiously optimistic’ was popularised by Ronald Reagan in 1982.

In this regard, proposals from Members have focused on three important issues: an agreement to curb harmful fisheries subsidies; outcomes on agriculture, with a particular focus on food security; and a framework to better equip WTO Members in responding to the covid-19 pandemic. Discussions are also ongoing with a view to achieve results regarding trade and environmental sustainability, the ‘joint-statement initiatives’ (particularly relating to investment facilitation, e-commerce and micro, small and medium-sized enterprises) and dispute settlement, in particular, to resolve the impasse over the Appellate Body.<sup>2</sup>

At this point, WTO reform is crucial, particularly given the rise of promising regional endeavours such as the Regional Comprehensive Economic Partnership<sup>3</sup> and the African Continental Free Trade Agreement.<sup>4</sup> That being said, activity at the WTO has not ceased: dispute settlement, for example, despite being particularly challenging in this period, has produced important panel reports, which have in turn developed jurisprudence on a number of significant issues. These reports are analysed in detail in the WTO chapter.<sup>5</sup>

### III DEVELOPMENTS IN THE EUROPEAN UNION

As one of the most important players in the field of international trade, the European Union (EU) has recently undertaken a flurry of initiatives<sup>6</sup> as part of what it calls ‘open strategic autonomy’.<sup>7</sup> The initiatives are varied in nature, as demonstrated below.

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2 With the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) in operation since last year, five disputes, as at July 2021, have submitted to deploying their appeal procedures should the need or desire arise after the panel stage: *Canada – Measures Governing the Sale of Wine* (DS537); *Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico* (DS524); *Canada – Measures Concerning Trade in Commercial Aircraft* (DS522); *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands* (DS591); and *Australia – Anti-Dumping Measures on A4 Copy Paper* (DS529). However, a panel report has not yet been released in three of these disputes (DS524, DS591, DS522), while one dispute has been resolved through a mutually agreed solution (DS537) and one panel report has been adopted without appeal (DS529). The MPIA is therefore still waiting for its first real test.

3 The largest multilateral trading pact in terms of combined output (US\$26.2 trillion).

4 The largest free trade agreement, measured by number of participating countries (54 signatories).

5 See further: Chapter 1 on the WTO by Philippe De Baere.

6 See further: Chapter 13 on the EU by Nicolaj Kuplewatzky and Nia Bagaturiya.

7 European Commission, ‘Commission sets course for an open, sustainable and assertive EU trade policy’, Press Release, 18 February 2021, available at: <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_644](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_644)>.



**i Transnational subsidies**

By creatively using the WTO Agreement on Subsidies and Countervailing Measures (the SCM Agreement), the EU has started to countervail subsidies that are indirect or ‘transnational’ in nature – in other words, where more than one country was involved in providing the financial contribution.<sup>8</sup> Unsurprisingly, this has led to much debate over the proper understanding of legal issues, most notably attribution.<sup>9</sup>

**ii Enforcement officer and enforcement regulation**

Faced with an increase in non-compliance with international trade rules, the EU has created the position of Chief Trade Enforcement Officer, a role that appears to emulate that of the United States Trade Representative. The position is currently held by Mr Denis Redonnet.<sup>10</sup> Almost simultaneously, the EU armed itself with a new Enforcement Regulation, which allows it to take countermeasures if it wins a dispute at the WTO and the losing party fails to cooperate in the resolution of the matter.<sup>11</sup>

**iii Foreign investment screening mechanism**

In October 2020, the EU’s foreign investment screening mechanism came into force,<sup>12</sup> and as at 14 July 2021, 18 Member States have notified the details of their national screening mechanisms to the European Commission.<sup>13</sup>

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8 See: Commission implementing Regulation (EU) 2020/776 of 12 June 2020 imposing definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People’s Republic of China and Egypt and amending Commission Implementing Regulation (EU) 2020/492 imposing definitive anti-dumping duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People’s Republic of China and Egypt; and Commission implementing Regulation (EU) 2020/870 of 25 June 2020 imposing a definitive countervailing duty and definitively collecting the provisional countervailing duty imposed on imports of continuous filament glass fibre products originating in Egypt, and levying the definitive countervailing duty on the registered imports of continuous filament glass fibre products originating in Egypt.

9 See: Victor Crochet and Vineet Hegde, ‘China’s ‘Going Global’ Policy: Transnational Production Subsidies Under the WTO SCM Agreement’ (2020), *Journal of International Economic Law*, Volume 23, Issue 4, at 10–11, 19–20.

10 <https://ec.europa.eu/trade/trade-policy-and-you/contacts/chief-trade-enforcement-officer/>.

11 Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union’s rights for the application and enforcement of international trade rules. See: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32021R0167>.

12 Regulation 2019/452 establishing a framework for screening of foreign direct investments into the European Union.

13 List of screening mechanisms notified by Member States, available at: <[https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc\\_157946.pdf](https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf)> (last updated: 28 May 2021).

#### **iv Comprehensive Investment Agreement with China**

In January 2021, amid much fanfare, the EU finalised an ‘in principle’ agreement with China called the Comprehensive Investment Agreement, which contained some unique obligations on notification of (services) subsidies. However, in May 2021, the European Parliament froze efforts to ratify the agreement.<sup>14</sup>

#### **v Anti-coercion instrument**

The EU is designing an anti-coercion instrument, in response to attempts by ‘foreign countries seeking to influence the decisions or behaviour of the EU or EU Member States in the area of trade and investment policy’.<sup>15</sup> This would allow the EU to take countermeasures against such actions,<sup>16</sup> which could include import tariffs and restrictions in the areas of investment, services, public procurement access and intellectual property rights.

#### **vi Other ongoing initiatives**

A number of other projects exist, such as the EU and its Member States being actively involved in the process of modernising the Energy Charter Treaty.

#### **vii Carbon border adjustment mechanism**

On 14 July 2021, the European Commission’s proposal for a carbon border adjustment mechanism (CBAM) was finally published. It reflects the EU’s desire to prevent carbon leakage, inter alia, by requiring the purchase of carbon-emission certificates. The prices of these certificates will be based on the average closing prices of all Emissions Trading System permits in the previous week. The CBAM will apply to imports of cement, electricity, fertilisers, iron, steel and aluminium. The intention is to have the system up and running, in a simplified form, by 2023, with full implementation in 2026.

#### **viii United Kingdom**

For its part, the newly ‘independent’ United Kingdom (UK), breaking away from the EU fold, is making moves of its own. It has signed several free trade agreements, most recently concluding substantial negotiations with Iceland, Liechtenstein and Norway (part of the European Economic Area and European Free Trade Association), and Australia. Further, the country now has an official and operational Trade Remedies Authority, which made its first determination in an anti-dumping transitional review investigation in July 2021.<sup>17</sup> It has also extended EU safeguard measures on certain steel products for a period of three years to protect the UK industry.

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14 European Parliament resolution of 20 May 2021 on Chinese countersanctions on EU entities and MEPs and MPs, available at: <[https://www.europarl.europa.eu/doceo/document/TA-9-2021-0255\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0255_EN.html)>.

15 European Commission, ‘Strengthening the EU’s autonomy – Commission seeks input on a new anti-coercion instrument’, 23 March 2021, available at: <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_1325](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1325)>.

16 See: Joint Declaration of the Commission, the Council and the European Parliament on an instrument to deter and counteract coercive actions by third countries, 2021/C 49/01, 12 February 2021.

17 TD0001: *Welded Tubes and Pipes from Belarus, China and Russia*.

## IV HOW ABOUT THE UNITED STATES?

The EU position – and its eventual impact on international trade governance – is best understood when juxtaposed with its geo-economic and geo-strategic ally and competitor, the United States (US). The new US administration has shed some of its predecessor's proclivity towards generating trade turbulence – under President Biden, the US seems to be returning to its leadership role in trade governance and, with the help of a congressional majority, the US is seeking to reaffirm its commitment to, and deepen its engagement with, the multilateral agenda.

### i The good

Among recent developments, of particular note is the (largely unexpected) push by the US in support of a proposal by India and South Africa to waive the protections for covid-19 vaccines under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>18</sup>

Prior to this, the US and the EU announced a suspension of tariffs in the long-standing *Boeing-Airbus* dispute for a period of four months to allow for negotiations. On 15 June 2021, following a visit by President Biden to Brussels, the two sides announced the 'Understanding on a cooperative framework for Large Civil Aircraft'.<sup>19</sup> They agreed to suspend tariffs for five years,<sup>20</sup> increase transparency of research and development funding<sup>21</sup> and cooperate on competition coming from non-market economies.<sup>22</sup> A complete resolution of the *Boeing-Airbus* dispute would no doubt help both sides rid themselves of an albatross – notably, one that has stalled (the much needed) renegotiation of the SCM Agreement, as far back as in the Doha Round of trade negotiations among WTO Members.<sup>23</sup>

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- 18 United States Trade Representative (USTR), 'Statement from Ambassador Katherine Tai on the Covid-19 Trips Waiver', available at: <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/statement-ambassador-katherine-tai-covid-19-trips-waiver>>. More recently, however, the EU has failed to get on board with the idea of a 'broad TRIPS waiver'. See: <[https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_21\\_2802](https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_2802)>. Instead, it has put forward an alternative proposal at the WTO, based largely on existing flexibilities in the WTO framework. See: WTO General Council 'Urgent Trade Policy Responses to the COVID-19 Crisis: Communication from the European Union to the WTO General Council', WT/GC/231, 4 June 2021. At the time of writing, WTO Members have agreed to move to 'text-based' negotiations with an aim to reach an agreement in the second half of 2021. See: Borderlex, 'TRIPS Waiver: WTO Members move to text-based negotiations', 9 June 2021. For in-depth legal analysis, see: Chapter 3 on the TRIPS waiver and covid-19 vaccine production (Lester and Zhu).
- 19 'Understanding on a cooperative framework for Large Civil Aircraft', available at: <[https://trade.ec.europa.eu/doclib/docs/2021/june/tradoc\\_159645.pdf](https://trade.ec.europa.eu/doclib/docs/2021/june/tradoc_159645.pdf)>.
- 20 *ibid.*, Para. 7.
- 21 *ibid.*, Para 4. The two sides also intend to ensure that 'R&D funding or other support . . . is [not] specific, to its LCA producer in a way that would cause negative effects to the other side'. This language is reminiscent of the US–Japan semiconductor agreement of 1986.
- 22 *ibid.*, Para. 6 and also attached Annex, the latter of which foresees information sharing, investment screening and joint analysis on non-market economy practices.
- 23 See comments of Pascal Lamy in: Bruegel, 'China and the WTO: (How) can they live together?', 28 April 2021, recording available at: <<https://www.bruegel.org/events/china-and-the-wto-how-can-they-live-together/>>.

**ii The bad**

Relations are not entirely good between the two partners: in June 2021, the US announced that it would take (unilateral) action, under Section 301 of its Trade Act, against Austria, Italy and Spain, among others, for their digital services taxes (DST) within six months if a multilateral agreement on the issue was not finalised by then.<sup>24</sup> And given that the EU is considering an EU-wide DST, trade friction between the US and EU could deepen over the issue in the future.

Further, the Biden administration has chosen to retain the unilateral tariffs on steel and aluminium inherited from the previous administration, and has designed a ‘buy American’ policy, which seeks to leverage government purchasing power to counter the economic influence of rivals. Both these actions, while perhaps of strategic importance to the US, contravene both the letter and the spirit of the WTO agreements.

**iii The ugly?**

In May 2021, the US Department of Commerce (USDOC) drew inspiration from new regulations,<sup>25</sup> and in an investigation into imports of tyres from Vietnam found that currency devaluation by the Vietnamese government constituted a countervailable subsidy.<sup>26</sup> Further, in December 2020, the US Treasury (the body entrusted to make determinations about the existence of currency undervaluation) branded Vietnam and Switzerland currency manipulators, and has placed China, Japan, Korea, Germany, Italy, Singapore, Malaysia, Taiwan, Thailand and India on a ‘monitoring list’.<sup>27</sup>

The US has also insisted upon the inclusion of currency provisions in the United States–Mexico–Canada Agreement and the US–China Phase One deal. Thus, it is likely that the USDOC will expand its new practice of countervailing goods from a range of WTO Members in the future. However, in light of issues such as specificity and financial contribution, the consistency of the USDOC’s approach with the WTO is not a given, and opening this Pandora’s box may well lead to other WTO Members developing their own versions of this trade tool.

**V ‘EAST’ AND ‘WEST’: FUNDAMENTALLY INCOMPATIBLE?**

And what about the elephant in the room? Today, one cannot talk about trade without talking about China. Take fisheries subsidies, for example. Fairly recently, China overtook the US and Japan, and is now at the helm of the largest fishing fleet in the world. As a

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24 USTR, ‘USTR Announces, and Immediately Suspends, Tariffs in Section 301 Digital Services Taxes Investigations’, 2 June 2021, available at: <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/june/ustr-announces-and-immediately-suspends-tariffs-section-301-digital-services-taxes-investigations>>.

25 Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings, 85 Fed. Reg. 6031 (Department of Commerce Feb. 4, 2020).

26 *Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination*, 86 Fed. Reg. 28566 (Department of Commerce May 27, 2021), and accompanying Issues and Decision Memorandum.

27 See <https://home.treasury.gov/system/files/206/December-2020-FX-Report-FINAL.pdf>, page 67.

result, an argument has broken out over which rules should apply to China: should it still be granted 'special and differential treatment' (S&DT) or should it be forced to acknowledge its economic weight and be made to play on equal terms with developed nations?

As such, the growing fissure between economic liberalisation and state capitalism is becoming increasingly apparent, particularly in the field of trade remedies. This has led the US – and, increasingly, Belgium – to stretch existing trade remedies agreements, arguably beyond their initial purpose. The examples and initiatives mentioned in Sections III and IV in the US and the EU bear witness to this observation. Accordingly, the debate over the purpose, effectiveness and continued relevance of S&DT continues, and will also form an important part of MC12 discussions.

## VI TRADE REMEDIES

This brings us, finally, to our 'beloved' trade defence instruments (TDI). Even though the possibility of travel for persons is non-existent, the same is not true for the movement of goods, let alone for the number of trade remedy investigations trying to restrict this movement. Both new cases, as well as reviews, have continued unfettered, with authorities worldwide requesting questionnaire responses to be supplied as if everything was business as usual. Yet, some noticeable differences with pre-pandemic times have emerged worldwide. For one, using EU terminology as a shorthand, remote cross-checks (RCCs) have replaced on-site inspection visits. RCCs have exponentially increased the workload for respondents (at least in the EU), with massive homework assignments being imposed for every next day of the RCC. This workload is then compounded with the fact that inspections are, on average, taking twice as long as traditional on-site inspection visits.

In the TDI context, court cases in various jurisdictions and WTO panel reports have continued unabated. At the WTO level, one of the more eye-catching reports was that of the panel in *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia – (Second complaint)* (DS494). While, in a sense, the case was a simple continuation in the line of *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate* and *Australia – Anti-Dumping Measures on A4 Copy Paper*,<sup>28</sup> the panel nonetheless took an important step and established the existence of the EU's Cost Adjustment Methodology as a 'measure of general and prospective application attributable to the European Union'.<sup>29</sup> Accordingly, the panel found a number of the EU's anti-dumping measures to be inconsistent with several provisions of the WTO Anti-Dumping Agreement – for example, its measures on Russian ammonium nitrate and Russian welded pipes and tubes.<sup>30</sup> In the wake of this report, despite the EU's repeated offers to litigate the case on appeal, Russia refused to participate in the Multi-Party Interim Appeal Arbitration Arrangement, even on an ad hoc basis. The EU has serious qualms about the panel report, as evidenced by its lengthy and detailed notice of appeal.<sup>31</sup> Other noteworthy panel reports in the TDI context have been those in *Pakistan –*

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28 For further details see: chapter on the WTO in the sixth edition of *The International Trade Law Review*.

29 Panel Report, *European Union – Cost Adjustment Methodologies II (Russia)* (DS494), Para. 8.1 (a) (i).

30 *ibid.*, Para. 8.1 (a) (f) and (g).

31 WTO, *European Union – Cost Adjustment Methodologies II (Russia)* – Notification of an Appeal by the EU under Articles 16.4 and 17.1 of the DSU and Rule 20(1) of the Working Procedures for Appellate Review, WT/DS494/7, 1 September 2020.

*Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates (DS538), Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars (DS553) and United States – Anti-Dumping and Countervailing Duties on Certain Products and the Use of Facts Available (DS539).*

These significant TDI developments, at the national level and the multilateral level, are described in the country chapters and the WTO chapter, respectively.

## VII IN SUM

So much has happened over the past year (and still is happening) that we had to cut this preface in half from its original draft to avoid it being too lengthy. Thankfully, however, our faithful contributors make up for our omissions and oversights; their comprehensive overviews are precisely what makes this volume of *The International Trade Law Review* a particularly valuable and fascinating read. Therefore, as always, we extend our sincere thanks to our ever-expanding group of faithful contributors: Philippe De Baere at Van Bael & Bellis for the WTO chapter; Matthew Weiniger QC and Alex Fawke at Linklaters for the chapter on UK customs and trade; Simon Lester and Huan Zhu at China Trade Monitor for the chapter on the TRIPS waiver and covid-19 vaccine production; Simon J Evenett at the University of St Gallen for the chapter on whether an effective activist state must harm trading partners; Hosuk Lee-Makiyama at the European Centre for International Political Economy for the chapter on laws of vaccine nationalism; Alfredo A Bisero Paratz at Wiener Soto Caparrós for the Argentina chapter; Mauro Berenholc, René Medrado, Carol Sayeg and Cora Mendes at Pinheiro Neto Advogados for the Brazil chapter; Peter Jarosz and Chris Scheitterlein at McMillan LLP for the Canada chapter; Ignacio García at Porzio Ríos García for the Chile chapter; David Tang, Jessica Cai, Yong Zhou and Jin Wang at JunHe LLP for the China chapter; Juan David López at Baker McKenzie SAS for the Colombia chapter; Sergey Lakhno at International Law Firm Integrites for the Eurasian Economic Union chapter; Nicolaj Kuplewatzky at the Court of Justice of the European Union and Nia Bagaturiya at V V G B for the EU chapter; Shiraz Rajiv Patodia and Mayank Singhal at Dua Associates for the India chapter; Lim Koon Huan and Manshan Singh at Skrine for the Malaysia chapter; Saifullah Khan at S.U.Khan Associates, Corporate & Legal Consultants for the Pakistan chapter; Apisith John Sutham and Chalermwut Nilratsirikulat at Weerawong, Chinnavat & Partners Ltd for the Thailand chapter; M Fevzi Toksoy, Ertuğrul Canbolat and E Kutay Çelebi at Actecon for the Turkey chapter; and Matthew R Nicely, Devin S Sikes, Julia K Eppard and Brandon J Custard at Akin Gump Strauss Hauer & Feld LLP for the US chapter. Finally, we also wish to thank Oscar Beghin and Akhil Raina at V V G B for their most kind and invaluable assistance.

We wish you, as ever, an enjoyable reading experience. We hope that you are keeping safe and healthy, and that you share our cautious optimism about the future of international trade.

**Folkert Graafma and Joris Cornelis**

V V G B

Brussels

August 2021

# PAKISTAN

*Saifullah Khan*<sup>1</sup>

## I OVERVIEW OF TRADE REMEDIES

As a member of the World Trade Organization (WTO) and a signatory to the General Agreement on Tariffs and Trade 1994 (GATT), Pakistan must ensure that its trade remedy framework complies with the WTO agreements. Its trade remedy mechanism is derived from internationally agreed rules and procedures under the auspices of the WTO. The National Tariff Commission (NTC), an autonomous government agency, is entrusted to conduct trade remedy investigations. The governing laws in Pakistan that deal with trade remedy measures came into force in 2001. The first anti-dumping investigation by the NTC was initiated in 2002 against the dumped imports of tinsplate from South Africa and, since then, it has initiated 146<sup>2</sup> anti-dumping investigations and imposed 91 measures involving all the major industries, including iron and steel, chemicals, paper and paper board, textiles, petrochemicals, tiles and sanitary ware, packaging and automotive parts.

In past years, Pakistan's economic growth has been slow and its export performance has been weak. This was the result of diminishing export competitiveness, which remains a barrier to exports. In addition, Pakistan has a declining exports–gross domestic product (GDP) ratio, a limited export basket and a stagnant imports–GDP ratio. On the composition side, Pakistan's reliance on exports has been concentrated in the same few industries over the past 20 years. Textiles remains the dominant exporting industry, though its export value fell from 68 per cent<sup>3</sup> in 2001 to 55 per cent<sup>4</sup> in 2020.

The economic growth of Pakistan is highly dependent on its exports as by earning foreign exchange it will be able to finance its imports, stabilise its currency devaluation, service its debts and resolve the issue of balance of payment deficit. However, the trade imbalance that has continued for decades cannot be reduced without having an effective import substitution strategy. To encourage import substitution, the government announced its 'Make in Pakistan' import substitution policy in August 2020. The objectives of Make in Pakistan are to create jobs, generate value-added exports and encourage import substitution.

As the industrial sector is still underdeveloped, the market is dominated by imports in various sectors. As a result, any new investment in an industrial product faces immense competition from imports that are mostly dumped. In such a case, the only remedy available to the new industry is filing an anti-dumping application. There are many success stories, with the new industry not only flourishing after the imposition of an anti-dumping duty

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2 [www.ntc.gov.pk](http://www.ntc.gov.pk).

3 [https://www.sbp.org.pk/events/2006/idrees\\_ahmed.pdf](https://www.sbp.org.pk/events/2006/idrees_ahmed.pdf).

4 <https://trendeconomy.com/data/h2/Pakistan/TOTAL>.

but being able to expand its capacity further, resulting in fulfilment of domestic demand and creating exportable surplus. For example, the hydrogen peroxide industry was continuously incurring losses after its inception in 2008 because of dumped imports from multiple sources. The NTC conducted an investigation and levied anti-dumping duties, which levelled the playing field and allowed the industry to serve domestic demand and start exporting to other countries. With the expansion in domestic demand, local players also enhanced their capacity and new players entered the industry.

This was also the case with the flat steel industry. A major portion of this industry is made up of cold-rolled coils, galvanised coils and colour-coated coils. After the downfall of Pakistan Steel Mills, the private sector began setting up manufacturing units for flat steel products in Pakistan. The industry started its production in 2011 and was under severe pressure from dumped imports, which prompted it to file various anti-dumping applications against dumped imports of cold-rolled coils, galvanised coils and colour-coated coils. The NTC concluded anti-dumping investigations and imposed anti-dumping duties. After levying anti-dumping duties, the performance of the industry began to improve. Its capacity enhanced from 500,000MT to 1.7 million MT per annum. Now, in addition to catering for domestic demand, Pakistan's steel industry is competing in export markets with quality products.

Industries are increasingly becoming aware of their rights under trade defence laws. The NTC has conducted awareness sessions in various cities to let people know what trade remedies are available to them and how the process works. Gradually, more cases and investigations are being opened concerning trade remedies, mostly related to anti-dumping. To date, Pakistan has not initiated any safeguard investigations. Only one application was filed under the Safeguard Measures Ordinance 2002 in July 2015 by the producer of soap noodles, which was not initiated by the NTC because there was a lack of 'sufficient evidence of serious injury to the domestic industry' and no 'surge of imports'. Further, only two anti-subsidy and countervailing applications have been filed by industries and initiated by the NTC, as outlined below.

The first was filed in October 2011 along with an anti-dumping application against alleged subsidised and dumped imports of certain writing and printing paper into Pakistan, which originated in and was exported from Indonesia and Thailand. After the investigation was initiated, certain legal and jurisdictional issues were raised in the judicial courts of Pakistan resulting in injunction orders that held the NTC's investigation proceedings in abeyance. Indonesia subsequently challenged the investigation under Article 5.10 of the WTO's Anti-Dumping Agreement (ADA) and Article 11.11 of the Agreement on Subsidies and Countervailing Measures (ASCM), claiming that these articles provide that any anti-dumping or countervailing duty investigation has to be terminated after 18 months from the date the investigation is initiated. In this case, Pakistan initiated the investigations in November 2011 and they were still pending in November 2013. After attempts to resolve the dispute failed, on 12 May 2014 Indonesia requested that the Dispute Settlement Body (DSB) establish a panel to examine the matter. However, Pakistan notified the DSB of its concerns over this request, stating that 'no provisional or definitive anti-dumping or countervailing duties had been imposed by Pakistan on the products in question' and Indonesia's share of the import market had grown since the initiation of the investigations by Pakistan, which meant the investigations did not have any economic impact on Indonesia. On 23 May 2014, pursuant to Pakistan's request, the DSB deferred the establishment of the panel. Pakistan terminated its countervailing investigation in June 2014.



The second countervailing application was filed in April 2016 against subsidised imports of fine cotton yarn from India. After a thorough investigation, the NTC determined subsidy margins and imposed provisional countervailing duties for four months. However, as the domestic industry filed both anti-dumping and countervailing applications simultaneously, the NTC decided to impose definitive anti-dumping duties in the final determination and countervailing duties were not imposed.

## **II LEGAL FRAMEWORK**

Pakistan is a signatory to the Uruguay Round agreements, thereby making it a founding member of the WTO. For the WTO trade defence agreements to have legal force in Pakistan it was necessary for laws to be enacted in Pakistan that mirrored the provisions of these agreements. Hence, to give effect in Pakistan to the provisions of Article VI of the GATT and to the Agreement on Implementation of the GATT, and to consolidate the laws relating to anti-dumping duties to offset dumping, to provide a framework for investigation and determination of dumping and injury in respect of goods imported into Pakistan and for matters ancillary thereto or connected therewith, the Anti-Dumping Duties Act 2015 (XIV of 2015), which reformed and repealed the Anti-Dumping Duties Ordinance 2000 (LXV of 2000) is in place.

Similarly, to give effect to the provisions of Article VI and XVI of the GATT and to the ASCM, and to further strengthen the law relating to imposition of countervailing duties to offset such subsidies, to provide a framework for investigation and determination of such subsidies and injury in respect of goods imported into Pakistan and for matters ancillary thereto or connected therewith, the Countervailing Duties Act 2015 (XIII of 2015), which reformed and repealed the Countervailing Duties Ordinance 2001 (I of 2001), is in place.

Finally, to give effect to the provisions of Article XIX of the GATT and to the Agreement on Safeguards to provide for the imposition of safeguard measures in accordance therewith, to provide a framework for investigation and determination of serious injury caused by products imported into Pakistan and for matters ancillary thereto or connected therewith, the Safeguard Measures Act 2015 (II of 2015), which repealed and replaced the Safeguard Ordinance 2002 (XXXI of 2002), is in place.

To enforce these laws, the government established the NTC through the National Tariff Commission Act 1990. This Act was revised through the National Tariff Commission Act 2015 (XII of 2015) on 10 September 2015.

In addition to the above-mentioned Acts and Ordinances, the following rules were promulgated to establish the process of investigations: the Anti-Dumping Duties Rules 2001, the Countervailing Duties Rules 2001 and the Safeguard Measures Rules 2001.

## **III TREATY FRAMEWORK**

Pakistan has a free trade agreement (FTA) with Sri Lanka (2005), preferential trade arrangements (PTAs) with Iran (2004), Mauritius (2007) and Indonesia (2012), and FTAs in goods and investments with China (2005) and Malaysia (2007). It is part of the Economic Cooperation Organization Trade Agreement and the South Asian Free Trade Agreement. It is in various stages of talks, or preparations for talks, with Thailand, Turkey, Uzbekistan and Iran for bilateral FTAs, and with Afghanistan for a PTA.

The government of Pakistan strongly believes in free trade regimes and has always supported efforts aimed at promoting free trade and open market policies. However, statistics in recent years have revealed that Pakistan has been unable to boost its international trade performance despite seeking to implement various trade liberalisation policies. The bilateral trade with its FTA partners has also been running into a continuous deficit, indicating that it has not been able to take advantage of the free trade agreements. However, the recent renegotiation of Pakistan's FTA with China is a step in the right direction by incorporating China's preferences when considering relevant exportable products in Pakistan. The renegotiated agreement reflects, to some extent, Pakistan's economic priorities. It adopts strong commitments in areas where the agreement obligations are in line with its growth strategy.

Pakistan has approved its first-ever National Tariff Policy 2019–2024 (NTP). The NTP recognises the importance of using import tariffs for industrial development and export growth. It is based on the principles of:

- a* employing tariffs as an instrument of trade policy rather than revenue generation;
- b* maintaining vertical consistency through cascading tariff structures (increasing tariff with stages of processing of a product);
- c* providing time-bound 'strategic protection' to the domestic industry during the infancy phase; and
- d* promoting competitive import substitution through time-bound protection, which will be phased out to make the industry eventually competitive for export-oriented production.

In accordance with these principles, any protection given to the domestic industry will be limited to a certain specified time and will be gradually withdrawn to promote free trade. Even in the latest budget (2021–22) a large number of tariff lines for raw materials have been exempted from import duties and there are certain other tariff lines where import duties have been reduced. This demonstrates Pakistan's commitment to free trade.

#### **IV RECENT CHANGES TO THE REGIME**

The NTC has faced certain limitations and problems in past years in relation to protecting the domestic industry after the WTO was established and using trade remedy measures. As a result, the government revised the NTC Act 1990 and the Anti-Dumping Duties Ordinance 2000, the Countervailing Duties Ordinance 2001 and the Safeguard Measures Ordinance 2002. New legislation was promulgated on 26 February 2015.

The revised National Tariff Commission Act 2015 is a more expansive piece of legislation compared with the repealed NTC Act 1990, with a few additional provisions and detailed explanation of old provisions. The absence of provisions relating to the quorum of the NTC in the previous legislation to take valid decisions was a major obstacle in the way of providing protection to the domestic industry from foreign exporters' unfair trade practices. This issue is addressed in the new legislation along with providing qualification and experience criteria for members of the NTC. The constitution of the NTC was revised and the number of members was raised from three to five to ensure that, with expanding trade ties, there are enough members to serve industries in a timely manner. A provision on the qualification and eligibility of members was added to make sure that members are capable of understanding the sensitive issues relating to tariff protection and trade defence laws, among other things.

Further, in the revised legislation, it was ensured that no act, proceeding or decision of the NTC can be held invalid by reason only of the existence of a vacancy or defect in the Constitution of the NTC. Under the previous legislation, many investigations were deemed invalid because of a defect in the quorum. This provision enables the decisions of the NTC to remain valid. The amended text extends the terms of the members to five years, because it takes significant time for members to become fully aware of the substantive and procedural mischiefs of the trade defence laws, including the need to fully apprehend the economic and cost accountancy issues. It also ensures that, in the absence of a notification by the government, automatic procedures will ensure that NTC members continue to perform their functions for another period of one year.

Major changes made to anti-dumping and countervailing laws are as follows.

- a* A new Subsection was added to the revised laws, which states that termination of an investigation or conclusion of an investigation without imposition of measures shall not be a bar to filing a *de novo* application for a new investigation immediately after the termination or conclusion of the investigation. The NTC shall treat the application in accordance with provisions of these laws.
- b* A lesser duty rule was introduced in the revised anti-dumping law, which was not present in the earlier laws. The lesser duty rule is not mandatory; the NTC has the discretion of whether to apply the rule in an investigation.
- c* A provision was added to strengthen export-oriented industries, which stated that anti-dumping duties, whether provisional or definitive, imposed under these laws shall not be levied on imports that are to be used as inputs in products destined solely for export.
- d* Clarification of what may constitute circumvention has been added to the provision relating to anti-circumvention measures to ensure conformity with the latest developments in anti-circumvention practices. The remedial measures applicable in the event that the NTC determines circumvention have also been clearly stated. Further, a Subsection was added concerning *suo moto* actions of the NTC, describing the timeline of anti-circumvention investigations.
- e* A Section has been added on monitoring, evaluation, qualification and disqualification criteria as well as clear and effective working procedures for the functioning of the Anti-Dumping Appellate Tribunal covering the matter of the quorum and discipline.

Certain additional amendments to anti-dumping and countervailing laws are currently being discussed. The domestic industry has made various proposals to remove the provisions relating to the lesser duty rule and the exemption of anti-dumping and countervailing duties for export-oriented industries and to reinstate earlier versions of the laws.

## V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

A major development in trade remedy measures in recent years was the change of circumstances review investigations initiated and concluded by the NTC. Until the end of 2019 (after a period of 18 years since trade remedy laws were promulgated), the domestic industry had never invoked the provision of a change of circumstances review (Article 11.2, ADA). The NTC had also never conducted a change of circumstances review investigation. When duties were levied, they remained applicable for the entire period for which they were levied initially and at the same rate determined in the final determination of the investigation.

During December 2019, the first-ever application for a change of circumstances review of anti-dumping duties was filed with the NTC. This application was filed by the domestic hydrogen peroxide industry against imports from Bangladesh. The industry alleged that the circumstances that were prevalent during the period of the investigation had changed significantly, leading to a situation where the existing anti-dumping duties were no longer effective and the quantum of the anti-dumping duty rates in force had to be increased. On 26 August 2020, the NTC concluded its review and definitive anti-dumping duties were imposed on dumped imports of hydrogen peroxide imported from Bangladesh. The original range of 10.67 per cent to 12.14 per cent was revised to 15.38 per cent to 16.10 per cent, effective from 26 August 2020.

Following this, the domestic industry producing Sorbitol Solution filed for a change of circumstances review along with a sunset review of anti-dumping duties levied on dumped imports of Sorbitol 70% Solution (Sorbitol) into Pakistan originating in or exporting from India, or both. The industry alleged that the Indian exporters had absorbed the anti-dumping duties and, therefore, imports of Sorbitol from India had continued after the imposition of anti-dumping duties at dumped prices. The review investigation is in process and will be concluded before August 2021.

The initiation of these reviews and their positive outcomes have laid the foundation for interim reviews for the domestic industry before the expiry of anti-dumping duties, and for increased anti-dumping duties in expiry reviews.

Another important issue is the filing of writ petitions before judicial courts (high courts) against the decisions and determinations of the NTC. The high courts used to grant stay or injunction orders that restricted the NTC from proceeding further in investigations, or made anti-dumping duties not applicable or prevented them from being collected for a certain period of time. Due to these stay orders, industries often did not experience the benefits of anti-dumping duties being levied. In *Tameer Steel Zone v. Government of Pakistan & Others*,<sup>5</sup> the NTC raised a preliminary objection about maintainability of the writ petitions on the ground that petitioners have an alternate remedy available under Section 70 of the Anti-Dumping Duties Act 2015 – the Anti-Dumping Appellate Tribunal – and therefore these Writ Petitions are not maintainable. In this case, the high court observed that:

*There is no dispute regarding the fact that an alternate remedy is now available to petitioners. We have been informed that the appellate tribunal stood fully constituted according to the composition provided in section 64 of the Act. The appellate tribunal is by now fully functional, having lawful authority to consider pleas of the petitioners and grant the appropriate relief, if the petitioners were found entitled thereto. The petitioners can therefore have recourse to the remedy provided by section 70 of the Act. A remedy of further appeal before the High Court has also been provided under sub-section (13) of section 70 of the Act. Thus a robust and full-fledged mechanism for dispute resolution has been provided under the Act.*

The high court relied upon many cases in this judgment, including *Collector of Customs Lahore and others v. University Gateway Trading Corporation and another*,<sup>6</sup> in which the Supreme Court observed the following:

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5 In the matter of NTC Notices of Final Determination dated 19 January 2017, 8 February 2017 and 13 June 2018 in respect of cold-rolled coils, galvanised steel sheets and colour-coated steel sheets.

6 Reported as 2005 SCMR 37.

*it hardly needs any elaboration that where a particular statute provides a self-contained mechanism for the determination of questions arising under the statute where law provides a remedy by appeal or revision to another Tribunal fully competent to give any relief, any indulgence to the contrary by the High Court is bound to produce a sense of distrust in-statutory Tribunals. Petitioner without exhausting his remedy provided by the statute filed Constitutional petition. Constitutional petition, in circumstances, was not maintainable.*

Accordingly, the court in *Tameer Steel Zone v. Government of Pakistan & Others* ordered that all the writ petitions should be converted into appeals and shall be deemed to have been filed before the Tribunal on the dates they are filed before the high court. All the records were directed to be transmitted to the Tribunal and the petitioners were directed to appear before the Tribunal on 28 December 2020.

The court further directed that consignments, already cleared on receipt of post-dated cheques or bank guarantees without payment of anti-dumping duties in pursuance of interim orders of the court, will be subject to a final determination of the Tribunal in the respective converted appeals. Until then, neither the post-dated cheques nor bank guarantees can be cashed.

Hence, it was established by this judgment that if an alternate remedy is available under the law, a direct writ petition before a high court is not maintainable.

## **VI TRADE DISPUTES**

Concerning trade remedies, Pakistan has been party to eight WTO disputes, five as complainant against the United States (two cases), the European Union, South Africa and Egypt, and three as respondent against Indonesia, the United Arab Emirates (UAE) and the European Communities (EC). Four of these cases are summarised below.

### **i DS107: Pakistan — Export Measures Affecting Hides and Skins**

On 7 November 1997, the EC requested consultations with Pakistan in respect of a Notification enacted by the Ministry of Commerce of Pakistan prohibiting the export of, among other things, hides and skins, and wet blue leather made from cow hides and cow calf hides. The EC contended that this measure limited the access of EC industries to competitive sourcing of raw and semi-finished materials. The matter was resolved through a mutually agreed settlement between the EU and Pakistan.

### **ii DS470: Pakistan — Anti-Dumping and Countervailing Duty Investigations on Certain Paper Products from Indonesia**

On 27 November 2013, Indonesia requested consultations with Pakistan relating to the continuation of, and failure to terminate in a timely manner, certain anti-dumping and countervailing duty investigations on certain paper products from Indonesia. In 2014, Indonesia requested the creation of a panel but it was deferred. The NTC subsequently terminated the investigations.

**iii DS500: South Africa — Provisional Anti-Dumping Duties on Portland Cement from Pakistan**

This case relates to the imposition of provisional anti-dumping measures by South Africa on the import of Portland cement products from Pakistan. On 10 November 2015, Pakistan requested consultations with South Africa but the dispute did not settle or move forward. South Africa imposed final anti-dumping duties and an expiry review was initiated in December 2020, which will be concluded within 18 months.

**iv DS538: Pakistan — Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates**

On 24 January 2018, the UAE requested consultations with Pakistan concerning Pakistan's anti-dumping measures on imports of biaxially oriented polypropylene film from the UAE. A panel was established and composed on 7 May 2019. On 18 January 2021, the panel report was circulated to members. On 22 February 2021, Pakistan filed an appeal before the Appellate Body on certain issues of law and legal interpretations in the panel report.

## VII OUTLOOK

From mid-2018 to mid-2019, Pakistan's economy experienced a downturn and GDP grew by only 2.08 per cent in the fiscal year 2018–2019 as compared with GDP growth of 5.53 per cent in 2017–2018,<sup>7</sup> which was the highest in that decade. The economy showed some signs of recovery in the second half of 2019, as the government made efforts to provide a conducive environment for trade and business by reducing account deficits and creating a positive balance of payments. As a result, Pakistan rose 28 places in the World Bank's Ease of Doing Business index in its 2020 report, and was ranked among the world's top 10 countries with the most improved business climate.<sup>8</sup> The overvaluation of the rupee was reduced, making the exchange rate less volatile, and the China–Pakistan FTA became operational on 1 December 2019, which grants Pakistan similar access to the Chinese market as China has accorded to countries in the Association of Southeast Asian Nations. There was also evidence of increased foreign direct investment, particularly from Chinese textiles companies. However, the outbreak of covid-19 in 2020 brought widespread lockdowns and transport restrictions, and social distancing halted supply chains and created devastating consequences for business activities.

After the end of the first wave of the pandemic and with the relaxing of strict lockdowns, the economic indicators showed positive signs that Pakistan's economy is on the path to recovery. The earlier trend of falling imports was also reversed. This is because the government reduced the import tariffs on industrial raw materials to achieve its objectives in the National Tariff Policy (2019–2024) to enhance competitiveness among local industries. The overall recovery is attributed to two main factors: the national strategy implemented to handle the pandemic and the timely and well-calibrated support measures of the government and the State Bank of Pakistan.

The government had projected that the GDP growth would remain at around 2.1 per cent; however, strong recovery from the large-scale manufacturing sector with a growth rate

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7 [https://www.pbs.gov.pk/sites/default/files//tables/rename-as-per-table-type/Table\\_6.pdf](https://www.pbs.gov.pk/sites/default/files//tables/rename-as-per-table-type/Table_6.pdf)

8 [https://www.finance.gov.pk/survey/chapter\\_20/PES\\_2019\\_20.pdf](https://www.finance.gov.pk/survey/chapter_20/PES_2019_20.pdf)

of 9.29 per cent and from the small-scale manufacturing sector with growth of 8.31 per cent means GDP growth has been revised to 3.94 per cent for the fiscal year 2020–2021. The economy has recovered more rapidly than was projected by the International Monetary Fund (IMF) and the World Bank.<sup>9</sup>

In accordance with the Pakistan Economic Survey 2020–2021, the current account balance remained in surplus during the first 10 months of the fiscal year 2020–2021 for the first time in 17 years due to strong growth in remittances and an ongoing rise in exports.<sup>10</sup> Efforts under the Pakistan Remittances Initiative and the gradual reopening of businesses in major host countries such as the Middle East, the United Kingdom and the United States also boosted remittances. In addition, timely resumption of economic activities helped the export sector perform better than other emerging economies, which led to an improvement in the external sector. Under the IMF's US\$6 billion loan programme for Pakistan<sup>11</sup> there are better prospects for the external sector, which ensures that external financing needs will be comfortably met.

The above indicates that Pakistan's economy will continue to improve in the post-covid-19 era. The country's vaccination programme has raised hopes that there will be a turnaround in the pandemic later this year, though the fourth wave with new variants of the virus has caused concern. Nevertheless, the government is vigilant and responding efficiently to the situation, including developing social protection systems to support vulnerable segments of the population. Business confidence has returned and economic activity is slowly getting back to normal. It is expected that macroeconomic stabilisation measures and structural reforms supported by international development partners will help the economy follow a sustainable growth trajectory.

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9 <https://www.dawn.com/news/1624995>.

10 [https://www.finance.gov.pk/survey/chapters\\_21/Overview.pdf](https://www.finance.gov.pk/survey/chapters_21/Overview.pdf).

11 *ibid.*

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Saifullah Khan is an international trade, IT and policy lawyer, with 20 years' experience in international trade policy and legal advisory services, serving a large client base in the domestic and international market. He is a very successful and renowned anti-dumping lawyer not only in Pakistan but in various jurisdictions because of his rich experience and expertise in WTO trade defence laws. He has been engaged in more than 85 per cent of the anti-dumping investigations initiated by the National Tariff Commission of the Ministry of Commerce (Pakistan) to date and has been providing trade remedial consultancy services to the domestic industry in Pakistan, as well as a large number of foreign producers and exporters in various countries. Mr Khan has been writing and presenting papers on subjects relating to international trade law, competition law, dispute settlement, preferential trade agreements, data protection and e-commerce, and trade in services, among others. To stay abreast of developments in trade and other related policies, Mr Khan attended an executive education programme on mastering trade policy from Harvard Kennedy School, Boston, United States. He is an Advocate of the High Court, a member of the Institute of Cost and Management Accountants of Pakistan and a member of the Chartered Institute of Arbitrators.

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ISBN 978-1-83862-795-9