# THE INTERNATIONAL TRADE LAW REVIEW

Fourth Edition

**Editors**
Folkert Graafsma, Joris Cornelis and Drew Sundberg

THE LAWREVIEWS

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This article was first published in August 2018
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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk



ISBN 978-1-912228-53-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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# ACKNOWLEDGEMENTS

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

ACTECON

ATSUMI & SAKAI

CROWELL & MORING LLP

DEMAREST ADVOGADOS

INTERNATIONAL LAW FIRM INTEGRITES

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# PREFACE

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

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

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

*a* agreeing on a 'backstop' to prevent a 'hard border' between Northern Ireland and Ireland;

1 Franklin D Roosevelt.

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

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

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

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

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

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

2 DS516, document WT/DS516/1.

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

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

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

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

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

**Folkert Graafsma, Joris Cornelis and Drew Sundberg**
August 2018

**Chapter 12**

# MALAYSIA

*Lim Koon Huan and Manshan Singh*[1]

## I OVERVIEW OF TRADE REMEDIES

Trade remedies have historically been a relatively underutilised and underdeveloped area of trade law in Malaysia.

Malaysia achieved its independence on 31 August 1957, and by 24 October 1957 Malaysia was already a signatory to the General Agreement on Tariffs and Trade (GATT).

In response to Article VI of GATT, by virtue of the Customs (Dumping and Subsidies) Ordinance 1959 – which was largely modelled after the Customs Duties (Dumping and Subsidies) Act 1957 from the United Kingdom – a law to prevent dumping was introduced in Malaysia for the first time.

As history would show, this ordinance was never implemented as there were issues with its enforceability.[2] First, this was attributed to the fact that there was no specific provision on the causal link between dumping and injury brought upon the domestic industry.[3] This was contrary to Article VI of GATT in which causality was a condition. Secondly, the Ministry of Finance was the relevant authority to determine and collect anti-dumping duties under the ordinance.[4] Due to the complex procedures, the ministry was not well equipped to administer the law on anti-dumping.

Simultaneously, the Kennedy Round (1964–1967) followed by the Tokyo Round (1973–1979) and subsequently the Uruguay Round (1986–1994) brought significant changes to laws on anti-dumping under GATT. These changes, along with the fact that Malaysia created its anti-dumping law very early on, left regulators in the lurch as the ordinance was rapidly losing its relevance and was not up to the standards of the time.

The government instead preferred the approach of imposing import duties across the board.[5] However, this was an inefficient technique – one that led to some unintended consequences. First, it went against the policy of the government at the time, which was to reduce protectionist measures in order to create a competitive domestic industry.[6] Second, this led to inflation.[7]

Therefore, in light of Malaysia's commitment under GATT as well as its new-found commitment as a member of the Association of South East Asian Nations (ASEAN) under

1 Lim Koon Huan is a partner and Manshan Singh is an associate at Skrine.
2 Malaysian Parliament Hansard Report dated 20 May 1993 at page 3,370.
3 Ibid.
4 Ibid at 3,372.
5 Ibid at 3,370.
6 Ibid.
7 Ibid.

the ASEAN Free Trade Area, the Countervailing and Anti-Dumping Duties Act 1993 (CADDA) was enacted to address the pitfalls of the previous ordinance. One of the primary changes under CADDA was that a specialised division under the Ministry of International Trade and Industry (MITI) was tasked to administer Malaysia's anti-dumping law.

Again, however, as CADDA was implemented before the conclusion of the Uruguay Round, substantial changes had to be made in order for the law to be in compliance with the Agreement on Implementation of Article VI. Thus, by virtue of the Countervailing and Anti-Dumping Duties (Amendment) Act 1998, CADDA underwent some substantial changes primarily with regard to definitions, basic principles and investigative procedures to reach its current form.

With regard to safeguards measures, Malaysia enacted the Safeguards Act 2006 (SA) to fulfil its obligations as a World Trade Organization (WTO) member. The SA is in direct conformity with the WTO Agreement on Safeguards.

As detailed above, Malaysia underwent several setbacks in its journey to implement its laws on trade remedies. This was the reason trade remedies were an underutilised and underdeveloped area of trade law in Malaysia. This was certainly propounded by the fact that most industries in Malaysia were undergoing their developmental phases – as is the case with most developing nations, and as such did not have sufficient initiative to seek such remedies.

Be that as it may, the tide has rapidly turned as the rapid economic development has brought upon with it an appetite to seek trade remedies by local industries in Malaysia as evidenced by the increase in number of initiated investigations in recent years.

As it stands, CADDA and the SA are the relevant legislation that provide for trade remedies in Malaysia – both of which are administered by MITI. They are both also in line with WTO standards and obligations.

## II LEGAL FRAMEWORK

### i Anti-dumping measures

CADDA is the primary law that provides for trade remedies in Malaysia. It is also the most widely used. Approximately 70 anti-dumping investigations have been initiated by Malaysia[8] over the past 20 years. Although this is a small number in comparison with other jurisdictions, there has been an increase in investigations in recent years, with over 30 initiations alone from 2011 to 2017.

CADDA provides for the investigation, the determination of dumping and the imposition of anti-dumping duties. Dumping is defined as the importation of merchandise into Malaysia at less than its normal value as sold in the domestic market of the exporting country.[9]

Under CADDA, normal value means the comparable price actually paid or payable in the ordinary course of trade for the like product sold for consumption in the domestic market of the exporting country.[10] CADDA defines exporting country to mean the country of export of the subject merchandise. In instances where the subject merchandise is not exported

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

9 Section 2(1) of CADDA.

10 Section 16(1) of CADDA.

directly to Malaysia but transhipped through an intermediate country, the intermediate country would be considered to be the exporting country if the subject merchandise is substantially transformed in that country.[11]

In the event there are no sales in the domestic market of the exporting country or when sales do not permit a proper comparison, the normal value can be determined by two methods. The first is by comparing the comparable price of the like product when exported to an appropriate third country.[12] In the event there are reasonable grounds for believing or suspecting that a sale of the like product is at a price below unit production costs in the exporting country, the sale may be treated as not having been made in the ordinary course of trade by reason of price and may be disregarded in determining normal value.[13]

The second method of determining normal value is by constructing the value of the subject merchandise by adding the cost of production plus a reasonable amount of selling, administrative and other general expenses and for profits.[14] The amount of selling, administrative and other general expenses and profits shall be based on actual information pertaining to production and sales in the ordinary course of trade.[15]

In relation to export price, CADDA defines it to mean the price actually paid or payable for the subject merchandise.[16] In instances where there is no export price, or if the exporter and importer or a third party are related, or there is a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the subject merchandise is first resold to an independent buyer or if it is not resold – on any reasonable basis.[17]

With regard to comparison of normal value and export price, CADDA provides for a fair comparison to be made. The comparison shall be made at the same level of trade and in respect of sales made – as close as possible to at the same time. Other differences that affect price comparability shall be given due account.[18] In cases where the subject merchandise is not imported directly from the country of origin but is exported from an intermediate country, the price at which the subject merchandise is sold from the exporting country to Malaysia shall be compared.[19]

CADDA defines injury to mean material injury or threat of material injury to the domestic industry or material retardation of the establishment of such an industry.[20] A determination of injury for the purpose of an anti-dumping duty investigation shall involve an objective examination of both the volume of imports of the subject merchandise and the effect of the subject merchandise on prices in the domestic market for like products and the consequential impact of the imports on the domestic producers.[21]

11 Section 2(1) of CADDA.
12 Section 16(2)(a) of CADDA.
13 Section 16(3) of CADDA.
14 Section 16(2)(b) of CADDA.
15 Section 16(5) of CADDA.
16 Section 17(1) of CADDA.
17 Section 17(2) of CADDA.
18 Section 18(2) of CADDA.
19 Section 18(5) of CADDA.
20 Section 2(1) of CADDA.
21 Section 22a(1) of CADDA.

Lastly, it must be demonstrated that the subject merchandise, through the effects of dumping, is causing injury to the domestic industry.[22] In doing so, an examination must take place based on all relevant evidence available together with any other known factors that show the subject merchandise may be causing injury to the domestic industry.[23]

With regard to procedure, an anti-dumping investigation can be initiated through the filing of a petition, containing sufficient evidence of dumping and injury along with a causal link between the imports of the subject merchandise and injury, made to the government by or on behalf of the domestic industry.[24] In addition, the government can, in special circumstances, initiate an anti-dumping investigation on its own volition.[25]

Upon receiving the petition, the government of the exporting country targeted in the petition[26] will be notified. Then, an investigation will be conducted to ascertain whether there is sufficient evidence to justify an investigation, whether there is a sufficient degree of support or if the investigation is in the interest of the public.[27] Upon doing so, the government can reject the petition. If the petition is rejected, the petitioner will be notified.[28]

In the event the government decides to initiate an investigation, the appropriate interested parties[29] will be notified and a notice of initiation will be published.[30] Parties can then choose to make their views known and relevant parties can respond to the government's questionnaire, which is a means of gathering information to make a decision as set out in the Countervailing and Anti-Dumping Duties Regulation 1994 (CADDR).[31]

Thereafter, within 120 days of the date of publication of the notice of initiation of investigation, which may be extended by an additional 30 days, the government will make a preliminary determination.[32] The preliminary determination can either be in the form of a negative preliminary determination or an affirmative preliminary determination. If a negative preliminary determination is made and it is satisfied that all necessary elements for the imposition of anti-dumping duties are not found, then the investigation will cease.[33]

In the event of an affirmative preliminary determination, provisional safeguard measures may be imposed. A final determination shall then be made within 120 days of the date of the publication of the notice of the affirmative preliminary determination.[34] The final

22 Section 22a(2) of CADDA.

23 Section 22a(3) and 22a(4) of CADDA.

24 Section 20(1) and 20(2) of CADDA.

25 Section 20(7) of CADDA.

26 Section 20(3) of CADDA.

27 Section 20(4) of CADDA.

28 Section 20(6) of CADDA.

29 Section 2(1) of CADDA defines an interested party to mean a producer, exporter or importer of the subject merchandise; a trade or business association a majority of whose members are producers, exporters or importers of the subject merchandise; the government of a country in which the subject merchandise is produced or from which it is exported; a producer of the like product in Malaysia; a trade or business association a majority of whose members produce a like product in Malaysia; or any other party considered appropriate by the government.

30 Section 20(8) of CADDA.

31 Regulations 8 and 9 of CADDR.

32 Regulation 9 of CADDR.

33 Regulation 11 of CADDR.

34 Regulation 15(1) of CADDR.

determination will be required to state, *inter alia*, the names of the exporters and producers of the subject merchandise, a description of the subject merchandise, factors that led to injury and any other reasons.[35]

Finally, it is important to note that CADDA provides for a judicial review mechanism for any party who is not satisfied or who is aggrieved by the decision of the government's final determination.[36]

Out of the approximately 70 anti-dumping investigations initiated in Malaysia from 1995 to the end of 2014, 38 have resulted in the imposition of anti-dumping measures.[37]

### ii Subsidies and countervailing measures

Like anti-dumping measures, countervailing measures are provided for in CADDA. However, in contrast with anti-dumping, there has been very minimal activity in this area. To date there have been no countervailing investigations initiated by Malaysia reported to the WTO.[38]

An actionable subsidy that causes adverse effects to the domestic interest such as causing injury to the domestic industry shall be subject to countervailing measures.[39]

Much like an anti-dumping investigation, an initiation of investigation of countervailing duties can be made on behalf of the domestic industry[40] or by the government in special circumstances.[41] One of the distinguishing factors in the procedure under CADDA between the investigation for countervailing measures and anti-dumping measures is that, for countervailing measures, there is a requirement to have a consultation with the interested foreign governments with the prospect of arriving at a mutually agreed solution.[42]

In the event a mutually agreed solution is not reached, injury and causal link would have to be established before an affirmative decision can be made. The procedural requirements for countervailing measures resemble those for anti-dumping as both these trade remedies are regulated under the same statutory regime under CADDA and CADDR.

### iii Safeguard measures

Out of all the trade remedies available in Malaysia, safeguard measures perhaps may be the most popular at present. The SA came into force on 22 November 2007. Despite receiving a lukewarm response in the beginning, with the first petition submitted to the government four years later, on 1 April 2011, since then Malaysia has seen two other safeguard investigations with an addition of two other petitions in 2016, bringing the total to five.

From a legislative perspective, the SA is a reflection of the WTO's Agreement on Safeguards. A petition can be initiated either by the domestic industry or by the government

35 Regulation 15(2) of CADDR.

36 Section 34a(1) of CADDA.

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

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

39 Section 2c of CADDA.

40 Section 4(1) of CADDA.

41 Section 4(6) of CADDA.

42 Section 5(1) of CADDA.

on its own initiative.[43] To fulfil the requirements for a safeguard measure, a surge in imports must be established. Then, it must be shown that the imports caused serious injury[44] or carry the threat of serious injury to the domestic industry.[45]

In the event factors other than increased imports of the product under investigation are at the same time causing or threatening to cause injury to the domestic industry, such injury shall not be attributed to the increased imports.[46]

When the government has determined that there is sufficient evidence of serious injury or threat of serious injury, an investigation will be initiated.[47] This is effected by the publication of the notice of initiation.[48] Interested parties such as foreign exporters and producers of the product under investigation, importers of the product under investigation, governments of exporting countries, domestic producers and relevant trade and business associations within Malaysia may participate in the investigation.[49]

All interested parties will have the opportunity to present their views and evidence at a public hearing. In addition, interested parties will also be given the opportunity to respond to all written and oral presentations of other interested parties, and to comment on whether or not the safeguard measure would be in the interest of the public.[50]

Thereafter, the government will make a preliminary determination on whether the product under investigation is being imported into Malaysia in such increased quantities and whether the conditions for a safeguard measure have been met.[51]

In the event a negative preliminary determination is made, the investigation can either be terminated or further investigated.[52] Either way, a preliminary determination would need to be given within 90 days, with an additional 30 days granted upon extension.[53] In the event an affirmative preliminary determination is made, a provisional safeguard measure will be applicable.[54] A provisional safeguard measure imposed shall not exceed 200 days.[55] This timeline of 200 days coincides with the requirement under the Safeguards Regulations 2007 (SR) for a final determination to be issued under 200 days as well.

The government can impose a negative final determination or an affirmative final determination. An affirmative final determination shall include, *inter alia*, a complete description of the product under investigation, the factors that led to serious injury, the duration of the safeguard measure, the timeline for progressive liberalisation and a list of developing countries exempted.[56]

43 Section 10 of the SA.
44 Section 8(1) of the SA.
45 Section 9(1) of the SA.
46 Section 8(3) of the SA.
47 Section 14(1) of the SA.
48 Section 16 of the SA.
49 Section 2(1) of the SA.
50 Section 18(1) of the SA.
51 Section 20(1) of the SA.
52 Section 20(2) of the SA.
53 Regulation 9 of the SR.
54 Section 20(3) of the SA.
55 Section 22(3) of the SA.
56 Regulation 14 of the SR.

Although not expressly provided for under the SA, a preliminary determination or final determination can be open to judicial review in the Malaysian High Court on the grounds that the investigative authority made a decision tainted with illegality, irrationality or procedural impropriety.

To date, there have been three safeguard measures imposed upon a final determination. The said measures are currently in force.

## III TREATY FRAMEWORK

Malaysia has been active in its involvement in international trade and has become one of the major trading nations in the world. International trade is a key contributor to Malaysia's economic growth and development. Malaysia's main exports include electrical and electronics products, chemicals, machinery, appliances and manufactured metals.[57] In terms of natural resources, Malaysia exports crude oil, liquefied natural gas, palm oil and natural rubber. In return, the country imports mainly electronics, machinery, petroleum products, plastics, vehicles, iron and steel products and chemicals. Malaysia's top export and import partners are Singapore, China, the United States and Japan.[58]

As a trading nation, Malaysia has shown a high commitment towards building regional and bilateral trade ties through arrangements with individual regional groupings and countries. Malaysia's trade policy has been to pursue efforts in creating a more liberalised and fair global trading environment while according a high priority to the WTO system.

Malaysia currently has bilateral free trade agreements (FTAs) with Japan, Pakistan, New Zealand, India, Chile, Australia and Turkey, while negotiations are still under way with the European Union.

Virtually all the bilateral FTAs have specific chapters on trade remedies – most of which reflect the regime under WTO, namely the Agreement on Implementation of Article VI on Anti-Dumping, the Agreement on Safeguards and the Agreement on Subsidies and Countervailing Measures.

In relation to safeguard measures, the bilateral FTA between Malaysia and New Zealand contains an interesting *de minimis* provision, which states that the originating product from a party may be excluded if it does not cause serious injury or a threat of serious injury.[59]

This departs from the wording under the WTO Agreement on Safeguards and the SA in which its *de minimis* provisions are restricted to apply only to imports from developing country members with less than 3 per cent of total imports while other developing country members with less than 3 per cent total imports amount to less than 9 per cent total imports.[60]

The difference mainly lies in the fact that New Zealand may not be considered a developing country member under the WTO – although there is no definitive list in this

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

58 Ibid.

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

60 Article 9.1 of the WTO Agreement on Safeguards.

regard, and the term 'not a cause of serious injury of threat thereof'[61] could plausibly apply to instances in which one of the parties have more than a 3 per cent share of total imports.[62] Essentially, this widens the scope of the *de minimis* provision for imports.

At the regional level, Malaysia is part of the ASEAN Free Trade Area (AFTA) together with other ASEAN Member States such as Brunei, Cambodia, Indonesia, Laos, Myanmar, the Philippines, Singapore, Thailand and Vietnam, which creates a complete free trade area among them. ASEAN presently has AFTA FTAs with China, Japan, South Korea, India, Australia and New Zealand, while negotiations are still under way with Hong Kong.

Through AFTA, Malaysia has also entered into the ASEAN Trade in Goods Agreement and, together with Brunei, Singapore and Thailand, has embarked on a self-certification pilot project since 1 November 2010 that is aimed at facilitating an enhanced environment for trade.

Malaysia has also developed significant relations economically and politically with the Gulf Cooperation Council (GCC) and is keen to have strong bilateral trade ties with the GCC through future FTAs. As a member of the Organisation of the Islamic Conference (OIC), Malaysia has actively supported and promoted intra-OIC trade and has ratified the Framework Agreement on Trade Preferential System among the OIC countries.

Malaysia signed the Trans-Pacific Partnership (TPP) Agreement, an FTA initiative with Australia, Brunei, Canada, Chile, Japan, Mexico, New Zealand, Peru, Singapore, Vietnam and the United States. Although the United States subsequently withdrew from the TPP under the Trump administration, the other members of the TPP have agreed to pursue the trade deal without the United States. In November 2017, the TPP was renamed as the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP) and was signed by the remaining 11 member countries on 9 March 2018 after eight rounds of negotiations. However, with the installation of the new Malaysian government following national elections on 9 May 2018, it remains to be seen whether the new trade minister (yet to be appointed at the point of writing) will pursue the CPTPP agenda.

Another interesting development in relation to Malaysia's treaty framework is its involvement in the Regional Comprehensive Economic Partnership (RCEP). RCEP is a proposed FTA between the 10 Member States of ASEAN and the six existing states that ASEAN currently has FTAs with. RCEP is viewed by many as the alternative to the presently suspended Trans-Pacific Partnership Agreement, with China as a key partner. RCEP would potentially include up to three billion people, constituting almost half of the world's population. RCEP is currently being negotiated, with the most recent round held in Singapore in March 2018.

In the past Malaysia has favoured the trend of entering into multilateral FTAs. This is evidenced by its keen involvement in the multilateral FTAs such as RCEP, illustrating its desire to parlay on its central geographic location to drive its developing export-orientated economy.

61 See footnote 58.

62 Section 40A of the SA provides that a safeguard measure can be applied in accordance with the terms and conditions agreed upon in a trade agreement.

## IV RECENT CHANGES TO THE REGIME

On a general level there have not been many developments to the laws regulating trade remedies in Malaysia. The significant changes from a Malaysian perspective occurred in 1998 with the amendment to CADDA and thereafter the introduction of the SA, which came into force in 2007.

That being said, there have been some interesting minor changes to the legislative regime. The Safeguards (Amendment) Act 2012 came into force on 1 September 2013. The amendment allows Malaysia to conduct a safeguard investigation and impose safeguard measures on specific countries in accordance with the terms and conditions agreed upon in a trade agreement entered into by the government.[63] Prior to the amendment, all investigations and safeguard duties would have to be imposed on a global basis irrespective of the source.

## V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

In relation to the anti-dumping investigations initiated from 1995 to 2003, 13 out of 22 were connected with subject merchandise based on pulp of wood or other fibrous cellulosic material, paper newsprint and paperboard-based materials and recovered paper materials,[64] targeting nations such as Thailand, Indonesia and South Korea.

There were no anti-dumping investigations initiated from 2007 to 2011. However, since 2011, over 30 anti-dumping investigations have been initiated – a sharp increase from the years before.[65] Interestingly, with the exception of one investigation on polyethylene terephthalate, all investigations have been targeting steel or steel-related subject merchandise such as steel wire rods, steel reinforcing concrete bars, hot rolled coils and cold rolled stainless steel in coils from nations such as China, Vietnam, South Korea and Japan.

The current trend in Malaysia is that most, if not all, initiations of investigations for trade remedy measures are intrinsically intertwined with the steel industry; therefore, any discussion on trade remedies in Malaysia must involve a discussion on the steel industry.

Until 2002, the steel industry suffered from low prices and surpluses of capacity. From 2003 onwards, during the 'long boom' that occurred in the regional steel industry, China's rapid growth and expansion resulted in an escalation in the demand for steel.[66]

By 2008, China consumed 35 per cent of the world's steel as compared to 13 per cent in 1995. During the 'long boom' most steel companies, Malaysian steel producers included, underwent massive expansion.[67] However, in August 2008, steel prices tumbled on the back of the global financial crisis. By the middle of 2009, however, as a response to stimulus packages in various countries, the demand for building materials began to increase and by 2012 consumption of steel had surpassed the 2008 levels.[68] Malaysia's construction industry at that time underwent massive growth and expansion on the back of the government's economic transformation programme.

63 Section 40A of the SA.

64 Provided by the WTO.

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

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

67 Ibid.

68 Ibid.

During this period China continued to increase its steelmaking capacity and produced at a high level, resulting in high quantities of steel being available for low prices.[69] In addition, China benefited from stimulus measures implemented by its government in 2013, which took the form of tax cuts for small and medium-sized enterprises and streamlined customs regulations to facilitate exports and reforms in value added tax.[70]

This resulted in the suppression of steel prices in the domestic market. As such, a number of investigations have been initiated against exporters.

While steel products still constitute a large number of investigations conducted, there has also been a shift to other types of products such as chemicals in recent years.

From a legal perspective, we observed the beginning of judicial reviews under Section 34a of CADDA against decisions made by MITI.[71] In a reported case, an applicant was successful in reviewing and quashing the decision of the government of Malaysia made under CADDA.[72]

On the safeguard front, there has been an increase in cases under the SA. To date, all the investigations under the SA have been in relation to steel-related products.

In July 2015, upon a final determination, the government of Malaysia imposed the first ever safeguard measure by imposing safeguard duties starting at 17.4 per cent on imports of the hot rolled steel plates. The duties would apply for three years and would gradually reduce to 10.4 per cent in the final year. Exemptions were given for products whose grade and quality the domestic producers could not manufacture.

In April 2016, the first ever judicial review of a preliminary determination under the SA was brought before the Malaysian High Court. Judicial review is a remedy available in Malaysia against decisions made in the exercise of a public duty or function. At the time of writing, the Malaysian High Court has granted leave or permission to the applicant, who was the petitioner for the safeguard investigation, to review the decision. This confirms for the first time that decisions made under the SA are amenable to review by the courts, although this is not expressly provided by statute.

In May 2016, the government initiated two simultaneous investigations on steel wire rods and deformed bar-in-coil, and steel concrete reinforcing bars, which is an unprecedented move based on petitions initiated by local steel mills. In April 2017 upon a final determination, the government of Malaysia imposed the second and third ever safeguard measure by respectively imposing safeguard duties starting at 13.9 per cent on imports of steel wire rods and deformed bar in coils and 13.42 per cent on imports of steel concrete reinforcing bars.

Further, in June 2017, the government initiated an anti-dumping investigation on imports of cold-rolled stainless steel originating from China, South Korea, Chinese Taipei and Thailand. In February 2018, anti-dumping duties were imposed on imports from China, South Korea, Chinese Taipei and Thailand. The duties will be inforce until 2023.

## VI TRADE DISPUTES

At the WTO level, there has been very little activity in relation to trade disputes involving Malaysia. In 1995, Malaysia was a respondent in a request for consultation made by

69 Ibid at 38.

70 Ibid.

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

72 Ibid.

Singapore, which was later withdrawn. In 1997, Malaysia was a complainant and requested for consultation in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*. The decision of the panel was later reversed by the Appellate Body in 1998.

More recently Malaysia's role in WTO disputes has been confined to that of a third party. Some of the more recent WTO disputes in which Malaysia was involved as a third party are *European Union – Anti-Dumping Measures on Biodiesel from Argentina; India – Certain Measures Relating to Solar Cells and Solar Modules*; and *Australia – Certain Measures Concerning Trademarks, Geographic Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*.[73]

## VII OUTLOOK

Malaysia is unique in the sense that the use of trade remedies is still in its infancy. From a trade practitioner's perspective, these are interesting formative times.

While Malaysia's manufacturing sector is largely open to foreign investment and international competition, there are policies in place to protect certain key industries. There are various requirements to obtain approval permits to import certain goods into the country. In addition, there are tariffs imposed on certain products and non-tariff barriers to trade. This, alongside with government policies to stimulate growth in local industries by providing various incentives, has accorded protection to the developing local industries.

As a consequence, the Malaysian government is seen to have been taking a proactive role in protecting its key local industries, which it considers are essential for the nation's growth. This is likely to be the reason why trade remedies are still an underutilised means of recourse in Malaysia as the policy is to take pre-emptive protectionist measures to protect the local industries from harm, as opposed to reactionist measures such as anti-dumping and safeguard measures. This is one of the primary reasons why the use of trade remedies in Malaysia is not as common as in other jurisdictions.

More interestingly, on 9 May 2018, Malaysia had its 14th General Election. The election was tightly contested and resulted in the victory of the opposition coalition – Pakatan Harapan. This was the first time in 60 years that the ruling Barisan Nasional coalition had lost an election. Although it is too early to tell, the new government has been taking contrarian views with regard to matters relating to international trade and foreign policy. As of the date of writing, no Minister of International Trade and Industry has been appointed. Thus the future of international trade in Malaysia seems to be somewhat uncertain.

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

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

**Appendix 1**

# ABOUT THE AUTHORS

**LIM KOON HUAN**

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Lim Koon Huan graduated from the University of Melbourne with a Bachelor of Commerce and LLB (Hons). She was admitted to the Malaysian Bar in 1995 and commenced her legal practice with Skrine.

She has experience in a wide range of civil litigation and arbitration work in the High Court, Court of Appeal and the Federal Court. She co-heads the competition practice group and leads the trade remedies practice group.

She also advises and acts for various local and foreign banks and financial institutions, securities firms, oil and gas multinationals, construction and property development companies in relation procedures, requirements and compliance with Malaysian laws, including trade remedies, competition and anti-corruption practices.

She has authored numerous articles and chapters on Malaysian issues as well as delivering presentations for various seminars and talks to clients on Malaysian law and legal issues of interest. She is listed in *Who's Who Legal: Trade & Customs* and has been a contributing author for the Malaysian chapters of several international publications.

**MANSHAN SINGH**

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Manshan Singh graduated from the University of Leeds, United Kingdom and subsequently completed his master's degree following a programme of advanced study in the field of international corporate law at the same university.

Upon returning to Malaysia, he obtained certain capital markets services representative's licences and underwent training at the Securities Commission of Malaysia. Thereafter, Manshan obtained his certificate in legal practice and commenced his pupillage at Skrine.

Manshan was subsequently admitted as an advocate and solicitor of the High Court of Malaya and has since been a part of Skrine's dispute resolution division. His areas of practice include trade remedies, competition law, corporate and commercial disputes as well as general litigation.

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ISBN 978-1-912228-53-9