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978-1-107-02223-2 - Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members

Edited by Müslüm Yılmaz

Excerpt

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## 1

## Introduction

MÜSLÜM YILMAZ\*

This book represents a research project on the judicial review of trade remedy determinations by the competent tribunals of the members of the World Trade Organization (hereinafter WTO) which are the most active users of trade remedies. The main objective of this project is to shed light on how judicial review of trade remedy determinations is conducted by WTO members. In terms of its substantive scope, the book covers the judicial review of the determinations made in the three trade remedy proceedings: anti-dumping, countervail and safeguards.

In terms of the selection of countries, we generally looked at the level of trade remedies activity in order to cover countries that are active users of these measures. However, in order to observe a certain geographical balance, we have also covered countries such as Japan that are not very active users. Thus, our list contains countries from North America (Canada, Mexico and the United States), Latin America (Argentina, Brazil, Colombia, Peru), Europe (European Union, Turkey), Middle East (Israel), Africa (South Africa), Asia (China, India, Indonesia, Japan, Korea, Malaysia, Pakistan, Thailand) and Oceania (Australia and New Zealand). We have also covered not only developed countries that are traditional users of trade remedies and which also have well-established judicial review systems, but also developing countries that started using trade remedies relatively late, but which quickly became active users of such measures. The authors have been selected from among the top practitioners, government officials or academics who are trade remedies experts in their respective jurisdictions. This has contributed significantly to the depth of the analysis provided in the chapters.

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In this book, we use the term “trade remedies” when referring to anti-dumping, countervailing and global safeguard measures. The General Agreement on Tariffs and Trade (GATT) has always contained specific provisions (Article VI for anti-dumping and countervail and Article XIX for safeguards) allowing these measures, and thus rendering them consistent with its principles. In addition to the GATT provisions that authorize the use of trade remedies, today there are also three agreements attached to the WTO Agreement, each elaborating the rules that apply to the investigative processes which lead to the imposition of a specific trade remedy measure. These are the Agreement on Implementation of Article VI of the GATT 1994 (dealing with anti-dumping measures, hereinafter AD Agreement), the Agreement on Subsidies and Countervailing Measures (hereinafter SCM Agreement) and the Agreement on Safeguards (hereinafter SG Agreement).

Much has been said about the impact of trade remedies on international trade. Many consider these measures to fly in the face of the principles of free trade and efficient allocation of resources at the global level.<sup>1</sup> Others take the view that trade remedies ensure a level playing field by protecting domestic industries against unfair practices in international trade and that, by functioning as a safety valve, they actually encourage countries to engage in trade liberalization.<sup>2</sup> We will not revisit this long-standing debate here. Our starting point in this regard is a pragmatic one: no matter what effect trade remedies have on international trade, the reality is that WTO members use these measures, provided that certain conditions are met. What matters is whether trade remedy measures are applied in a WTO-consistent fashion. Taking this for granted, we look into the domestic

<sup>1</sup> See, for instance, Claude Barfield, “Anti-dumping Reform: Time to Go Back to Basics” 28 (2005) *The World Economy*, 720; Bernard M. Hoekman and Michael P. Leidy, “Dumping, Antidumping and Emergency Protection” 23(5) (1989) *Journal of World Trade* 27; Bernard Hoekman and Petros C. Mavroidis, “Dumping, Antidumping and Antitrust”, 30(1) (1996) *Journal of World Trade* 49.

<sup>2</sup> For the positive economic effects of trade remedies, in particular anti-dumping, see Terry Collins-Williams, “The Evolution of Anti-dumping in a Globalizing Economy”, in Terence P. Stewart (ed.), *Opportunities and Obligations: New Perspectives on Global and US Trade Policy* (Kluwer Law International, 2009), p. 119; Thomas R. Howell, “The Trade Remedies: A U.S. Perspective”, in Geza Feketekuty and Bruce Stokes (eds), *Trade Strategies for a New Era* (Brookings Institute, 1998), p. 299; Dan Ciuriak, “Anti-dumping at 100 Years and Counting: A Canadian Perspective” 28 (2005) *The World Economy* 644–9; Jorge Miranda, “Should Antidumping Laws Be Dumped?” 28 (1996) *Law and Policy in International Business* 255.

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judicial review of the determinations made in the course of trade remedy proceedings.

Regardless of the point of view taken with respect to the utility of trade remedies, all academics, experts and stakeholders in trade remedy proceedings would certainly support the idea of promoting effective judicial review of the investigating authorities' determinations made in the course of such proceedings. After all, effective judicial review is a cornerstone of good governance<sup>3</sup> and is therefore to be promoted. Together with transparency, effective judicial review is probably the most important tool in ensuring the rule of law in the conduct of trade remedy investigations. It aims to ensure that the rules of the game are observed. In today's highly complex trading environment, judicial review of trade remedy determinations is conducted at three different levels: multi-lateral, regional and domestic.

At the multilateral level, there is the WTO dispute settlement mechanism.<sup>4</sup> As an inter-governmental organization, the WTO allows its members to challenge the measures taken by other members if the complaining member is of the view that such measures violate the obligations assumed under the WTO Agreement. If the complaining member prevails in the dispute settlement process, the non-compliant member will have no option but to bring its measure into compliance with its WTO obligations or to negotiate compensation with the complaining member, failing which the latter can suspend an equivalent level of concessions against the non-compliant member.

WTO dispute settlement differs from other international dispute settlement systems in that its panels and the Appellate Body have compulsory jurisdiction. Much has been written on the functioning of WTO dispute settlement, as well as on panel or Appellate Body reports

<sup>3</sup> Christopher Forsyth et al., *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, 2010).

<sup>4</sup> The title of this book was determined through the collective thinking of all of the authors. However, it must be underlined that considerably diverging views were expressed in this process. The most important issue was the use of the concept of "judicial review". Certain authors expressed the view that the title "domestic *judicial* review of trade remedy determinations" would give the wrong impression that we see WTO dispute settlement as also being a judicial review mechanism and that the only difference between these two types of judicial review was the kinds of tribunals conducting the review. Ultimately, however, it was decided to go ahead with this title, mainly because it gives the reader the intended impression that the book concerns the review conducted by the courts of the WTO members examined. This, of course, is without prejudice to the authors' views on whether WTO dispute settlement is also of a judicial nature.

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resolving individual disputes. These reports usually attract considerable attention from academics, government officials and legal practitioners. This area is also taught academically at many universities across the globe. Whatever its shortcomings, WTO dispute settlement has been described as “the most successful system for international dispute settlement in the history of the world”<sup>5</sup> and is one of the most commonly used international dispute resolution mechanisms.<sup>6</sup>

It has been generally observed that the WTO dispute settlement mechanism aims to establish the rule of law in the functioning of the organization in the exercise of the rights and the enforcement of the obligations set forth in the WTO Agreement.<sup>7</sup> One area in which WTO dispute settlement has contributed significantly to the strengthening of the rule of law is the application of trade remedy measures. Since 1995, this system has been used frequently with respect to trade remedy measures imposed by various WTO members. In fact, trade remedies top the list in terms of the distribution of WTO disputes on the basis of their subject matter. Between 1995 and 2011, around 40 per cent<sup>8</sup> of all disputes initiated in the WTO concerned trade remedies, with anti-dumping being the most frequent, followed by safeguards and counter-vailing measures.

Judicial review at the regional level takes place under the rules agreed in the regional trade agreements signed between two or more countries. Many of these agreements incorporate a dispute settlement mechanism; yet not all of these mechanisms are used very frequently. Perhaps the most important example of judicial review at the regional level is the mechanism contained in Chapter 19<sup>9</sup> of the North American Free Trade Agreement (hereinafter NAFTA). NAFTA dispute settlement has been

<sup>5</sup> James Bacchus, “Open Doors for Open Trade: Shining Light on WTO Dispute Settlement”, 2004, available at [www.worldtradelaw.net/articles/bacchusopendoors.pdf](http://www.worldtradelaw.net/articles/bacchusopendoors.pdf) (last visited 15.3.2012).

<sup>6</sup> Jeffrey L. Dunoff, “The WTO’s Legitimacy Crisis: Reflections on the Law and Politics of WTO Dispute Resolution” 13 (2002) *American Review of International Arbitration* 197.

<sup>7</sup> Bacchus, “Groping Toward Grotius: The WTO and the International Rule of Law”, 2002, available at [www.worldtradelaw.net/articles/bacchusgrotius.pdf](http://www.worldtradelaw.net/articles/bacchusgrotius.pdf) (last visited 15.3.2012), p. 9; Amin Alavi, “African Countries and the WTO’s Dispute Settlement Mechanism” 25(1) (2007) *Development Policy Review*, 25; Swedish International Development Co-operation Agency, “The WTO Dispute Settlement”, April 2004, available at [www9.georgetown.edu/faculty/mlb66/SIDA.pdf](http://www9.georgetown.edu/faculty/mlb66/SIDA.pdf) (last visited 15.3.2012), p. 1.

<sup>8</sup> This percentage is based on the number of disputes examined by panels; it excludes disputes that were resolved through consultations.

<sup>9</sup> Chapter 19 of the NAFTA covers the determinations made in anti-dumping and counter-vailing duty investigations, but not safeguards.

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used frequently between Mexico, Canada and the United States, the three NAFTA parties. Similar to the WTO, trade remedies figure high on the list of substantive issues that have given rise to NAFTA disputes.<sup>10</sup> Given its importance and the frequent use made by the NAFTA parties, a considerable body of academic literature has evolved over the years which analyses different aspects of NAFTA dispute settlement.

Finally, there is judicial review at the domestic level, which is the subject matter of this book. Unlike WTO and regional judicial review systems such as NAFTA, domestic judicial review of trade remedy determinations has not attracted much academic attention thus far except, of course, in countries like the United States, Canada and Australia, where judicial review has been used frequently and is a traditional component of the trade remedies system.

There is no doubt that domestic judicial review supplements WTO dispute settlement and any other regional dispute settlement mechanisms in terms of the objective to ensure the rule of law in the application of trade remedy measures. Typically, the tribunals conducting domestic judicial review apply their domestic trade remedies legislation<sup>11</sup> in resolving the disputes brought before them. However, the provisions in domestic trade remedies laws and regulations by and large mirror the provisions of the relevant WTO agreement. Hence, domestic judicial review and WTO dispute settlement are clearly supplementary. It is therefore important to study domestic judicial review systems of the active users of trade remedies, identify any potential problems and discuss how such problems may be addressed.

We started this research project with the assumption that domestic judicial review had certain advantages compared to WTO dispute settlement, and that providing in-depth analysis of it would therefore help further the observance of the rule of law in the implementation of the WTO agreements on trade remedies.

<sup>10</sup> See the list of cases on NAFTA's website, [www.nafta-sec-alena.org/en/DecisionsAndReports.aspx?x=312](http://www.nafta-sec-alena.org/en/DecisionsAndReports.aspx?x=312) (last visited 15.3.2012).

<sup>11</sup> Strictly speaking, the AD and SCM Agreements do not require WTO members to enact national laws in order to conduct investigations and impose measures. Interestingly, the SG Agreement provides, in its Article 3.1, that members willing to conduct safeguard investigations first have to establish procedures and make such procedures public. However, in order to establish fully operational investigative systems, members do need to have laws and regulations on all three trade remedies, because the WTO agreements on trade remedies do not address all issues that pertain to trade remedy investigations.

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The first and perhaps most important difference between domestic judicial review and WTO dispute settlement pertains to standing. Unlike WTO dispute settlement, which is an inter-governmental mechanism,<sup>12</sup> domestic judicial review is typically available to private entities which are affected by trade remedy measures. Whereas governments set the rules of international trade, trade takes place between companies. Naturally, these companies, which are direct stakeholders in trade remedy investigations, follow the conduct of the investigations much more closely and carefully than foreign governments whose commercial interests are affected. Importantly, domestic judicial review is also open to domestic producers who seek the imposition of measures. Foreign exporters at least have the opportunity to try to convince their governments to file a WTO dispute settlement proceeding against the country imposing the measures. Obviously, domestic producers have no such option. Thus, the quality of domestic judicial review is particularly important for domestic producers in the importing country.

The second difference is that the number of judicial review cases with respect to trade remedy determinations filed before domestic tribunals is considerably higher than the number of trade remedies-related disputes brought before the WTO. Thus, we considered that any improvements to domestic judicial review systems of WTO members could bring about significant benefits to the international trading system.

The third difference is the wider scope of requests that can be directed to domestic tribunals, and the greater powers that these tribunals have. Unlike WTO panels and the Appellate Body, domestic tribunals generally have powers that go further than a declaration that the challenged measure is inconsistent with the applicable rules. Typically, domestic tribunals have the power to annul the determinations that they find to be inconsistent with them. In addition, in some countries, these tribunals have the authority to order the compensation of damage caused by legal flaws in the conduct of trade remedy investigations and to suspend the implementation of the challenged measure pending the judicial review proceedings.

<sup>12</sup> A WTO member initiating a dispute settlement proceeding against another member acts in order to protect the economic interests of its producers/exporters and *vis-à-vis* the producers/exporters of the defendant member. Thus, in reality, WTO dispute settlement also protects the rights of private entities, but it does so in an indirect fashion, with the involvement of governments.

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Each chapter in this book provides a concise description of the judicial review of trade remedy determinations in the relevant country. Each describes: (a) the scope of determinations subject to judicial review, (b) the tribunal(s) responsible for judicial review, (c) parties that have standing to bring a case, (d) the main procedural steps involved in a judicial review proceeding, (e) appeals, and (f) powers of the tribunals. After describing the judicial review of trade remedy determinations in a given country, each chapter also identifies problems encountered in that system and, in its concluding part, suggests ways to address such problems.

We hope this book will be useful to a wide audience. The country chapters are intended as guides for parties affected by the determinations made in trade remedy proceedings. It is intended that exporters whose products are subjected to trade remedy measures will use the book to make an informed decision as to the feasibility of bringing a case before the national tribunals of the importing country in order to challenge the imposition of such measures. It will also be useful for governments to acquaint themselves with the judicial review systems of other countries and, in case of a legal conflict, decide whether it would be feasible to pursue a domestic judicial review proceeding in the importing country.

In addition to depicting the judicial review of trade remedy determinations in a given country, most chapters in the book also generally describe the judicial review of administrative actions in that country. In this sense, the book offers a comparative analysis of administrative judicial review in 21 jurisdictions, which scholars specializing in administrative law may find interesting. Although the structure and operation of domestic judicial review varies from one country to another in certain regards, each system must comply with the minimum requirements set forth in the WTO agreements on trade remedies. It is therefore useful to highlight these requirements before proceeding to the country chapters.

Generally speaking, WTO members are under an international obligation to maintain a judicial review system for their investigating authorities' determinations made in the course of trade remedy proceedings. However, each of the three WTO agreements on trade remedies contains different provisions regarding this issue. At the outset, it should be noted that only the AD and SCM agreements explicitly address judicial review, whereas the SG Agreement is silent on this matter.

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Article 13 of the AD Agreement reads:

*Judicial Review*

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

Thus, the AD Agreement imposes an obligation to maintain a judicial review system for the review of the determinations made by the investigating authorities of an importing WTO member in the course of an anti-dumping investigation or review. However, Article 13 limits that obligation in certain regards. First, the obligation applies only to members who have anti-dumping legislation. Second, the scope of judicial review is limited to administrative actions relating to final determinations and reviews of determinations. Consequently, other determinations, such as decisions to initiate or not to initiate an investigation or review, as well as the imposition of provisional measures and acceptance or rejection of undertakings, are not required to be subject to judicial review. With respect to reviews, Article 13 references Article 11; therefore determinations undertaken in all reviews addressed under Article 11 are also required to be subject to judicial review.

With regard to institutional aspects of judicial review, the AD Agreement recognizes that members may have different institutional schemes and legal traditions. Under Article 13, the body that conducts judicial review may be a judicial, arbitral or administrative tribunal. Thus, domestic judicial review does not necessarily have to be conducted by courts; tribunals of different nature may also undertake this function. Naturally, the agreement requires that the bodies responsible for judicial review be independent of the investigating authorities or other decision-making bodies in the context of investigations or reviews. Finally, it is important to note that Article 13 provides that judicial review has to be prompt.

Judicial review in the context of countervailing duty investigations is addressed in Article 23 of the SCM Agreement. This provision reads:

*Judicial Review*

Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of



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determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, *and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review* (emphasis added).

Article 23 contains provisions identical to those of Article 13 of the AD Agreement with respect to judicial review. Therefore, our explanations with respect to Article 13 of the AD Agreement also apply here. However, unlike Article 13 of the AD Agreement, Article 23 of the SCM Agreement also contains an extra phrase that addresses the issue of standing in judicial review proceedings with respect to countervailing duty determinations. It provides that in the context of a countervailing duty investigation or review, WTO members are required to make judicial review available only to interested parties who participated in the relevant investigation or review and who are directly and individually affected by the challenged administrative action. This could mean, for instance, that interested parties such as foreign exporters or domestic producers who do not cooperate with the investigating authority during the relevant investigation or review cannot challenge the authority's determinations because of non-participation.<sup>13</sup>

Depending on the interpretative approach taken, Article 23 of the SCM Agreement may be construed as allowing WTO members to deny standing to importers that are not related to foreign exporters or producers subject to the relevant countervailing duty proceeding. This is because, unlike importers that are related to foreign producers subject to the same proceeding, unrelated importers may be seen as not being directly and individually affected by countervailing duty proceedings.<sup>14</sup>

The negotiating history of the SCM and AD Agreements does not clarify why this additional text on standing was incorporated in the former but not in the latter. It should be noted, however, that both the AD Agreement and

<sup>13</sup> This does not necessarily imply that under the AD Agreement WTO members are required to provide non-cooperating interested parties with standing to initiate a judicial review proceeding. As noted above, Article 13 of the AD Agreement does not specifically address the issue of standing.

<sup>14</sup> We note that the European Union's law on judicial review also stipulates that parties which initiate a judicial review proceeding are required to show that the challenged act is of direct and individual concern to them. The chapter on the European Union explains that, pursuant to this provision, the Court of Justice of the European Union (formerly known as the European Court of Justice) has generally denied standing to unrelated importers, while also noting that there have been some exceptions to this.

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the SCM Agreement set the minimum requirements with respect to judicial review. WTO members are free to adopt rules that go beyond the requirements set forth in these agreements. For instance, members may subject the imposition of provisional measures to judicial review. Or, in the case of countervailing duty investigations, they may omit the extra phrase in Article 23 of the SCM Agreement and allow all interested parties in an investigation or review to resort to judicial review.

As for the judicial review of determinations made in safeguard investigations, it is interesting to note that, contrary to the AD and SCM Agreements, the SG Agreement does not contain any provision on judicial review. It would not be unreasonable, therefore, to argue that WTO members do not have an international obligation to provide for the judicial review of determinations made in the course of safeguard investigations.<sup>15</sup> However, no WTO panel or Appellate Body has yet addressed this issue.

The negotiating history of the SG Agreement does not reveal any reason why negotiators in the Uruguay Round did not consider adopting a provision similar to Article 13 of the AD Agreement or Article 23 of the SCM Agreement. Two possible explanations suggest themselves. First, the provisions of the SG Agreement explaining the procedural aspects of investigations are much more general in nature compared with the AD and SCM Agreements. Given this, it may be argued that members simply omitted the inclusion of a provision on the judicial review of safeguard determinations. Alternatively, one could argue that this was not a simple omission and that negotiators willingly chose not to include a judicial review provision in the SG Agreement because of the political nature of safeguard measures.

As we noted with respect to the AD and SCM Agreements, however, it should be recalled that the SG Agreement contains the minimum requirements with respect to the conduct of safeguard investigations. WTO members are free to go beyond such requirements and subject their investigating authorities' determinations in safeguard investigations to judicial review. In fact, as explained in various chapters of this book, there are a number of members who have followed this approach.

<sup>15</sup> Our observation here is without prejudice to Article X.3(b) of the GATT 1994, which requires the institution of "judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters". Thus, any customs matter that arises from a trade remedy proceeding would fall within the scope of the obligation set forth in this provision, and WTO members would be required to provide for the judicial review of such matter.