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Judicial Review in Pakistan: Trade Remedy Measures

Pakistan

Pakistan: an evolving judicial review system[1]

Introduction

Even though legislation authorising anti-dumping and countervail action has been on Pakistan's statute books since 1983,[1] Pakistan's experience with the use of trade defence instruments is a fairly recent one, going back no further than 2002. When viewed from the perspective of domestic judicial review, this experience is nonetheless an eventful one. And it is this very experience that is the subject of the present chapter.

The discussion begins with this introductory section, which explains the background to the promulgation of Pakistan's trade defence laws and the mechanism for the administration of these laws. The next section explores the experience with the domestic judicial review process, describing the Appellate Tribunal constituted for the purpose of adjudicating trade remedy cases, its limited availability and, in the absence of the Tribunal, the interventions by the superior courts in response to petitions by the aggrieved party as a part of the country's normal judicial process.[2] A concluding section draws applicable lessons from the experience with the domestic judicial review process.

Background to The Promulgation of Pakistan's Trade Defence Laws

Sustained moves over the late 1990s to liberalise trade had exposed the domestic industry to enhanced levels of international competition. A new consciousness for the need and usefulness of applying the WTO trade defence agreements in Pakistan developed as a result.[3] The implementation of these WTO agreements in Pakistan could be expected to provide the affected domestic industry with a well-defined recourse to legal action to defend itself against potentially "unfair" developments in its international trade. The domestic industry recognised the need for these instruments to enable it to function effectively in the new trading environment that was a characteristic of the increasingly globalised world economy. Pakistan's 1983 Anti-Dumping Law, having been promulgated some 11 years before the counterpart WTO Anti-Dumping Agreement (hereinafter "AD Agreement")

[1] This Pakistan law was the Import of Goods (Anti-Dumping and Countervailing Duties) Ordinance, 1983 (III of 1983), which was repealed in 2000 on the promulgation of Pakistan Anti-Dumping Duties Ordinance 2000; see Section 76 of the latter Ordinance. Rules to aid in the implementation of the 1983 Law were never made and the Law was never used.

[2] For an explanation on "superior courts", see section 0 below.

[3] WTO trade defence agreements in the present context refer to the following three treaties: WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Agreement on Subsidies and Countervailing Measures and Agreement on Safeguards. See World Trade Organization, The legal texts (Cambridge, Cambridge University Press, 1999).

came into existence, naturally could not be expected to reflect the provisions of the cited AD Agreement, much less be consistent with it. This 1983 Law had never been put to use and tested. The 1983 Anti-Dumping and Countervail Law clearly did not meet the needs of the domestic industry in a fast changing international trade environment.

Pakistan's legal system does not recognise international treaty obligations unless the provisions of any such international treaty are first enacted as a law in Pakistan, or incorporated into the existing laws of the country.[4] Even though the Government of Pakistan was a signatory to the Uruguay Round agreements in Marrakesh, thereby making Pakistan a founder member of the WTO, for the WTO trade defence agreements to have legal force in Pakistan it was necessary that laws which mirror the provisions of these agreements be enacted in Pakistan. For this reason, only new domestic legislation could give legal force to the provisions of the WTO trade defence agreements.

A three-year trade liberalisation programme initiated by the government in 1999, to bring the country's trade regulation and tariffs more closely in line with both a global trade regime that was liberalising fast, as well as with the requirements of the structural change in Pakistan's economy, also provided an opportunity to also develop new domestic legislation that would fully reflect and be consistent with the WTO trade defence agreements. Thus Pakistan's trade remedy laws, covering anti-dumping, countervailing and safeguards actions, were promulgated between 2000-2002 and the respective rules to help implement these laws were made over 2001-2003. These instruments provided a trade defence mechanism, consonant with the country's WTO obligations, as part of a larger trade liberalisation programme that sharply reduced customs tariffs and also simplified customs and other procedures for international trade.

The new trade defence laws were to be administered by an existing organization, namely Pakistan's National Tariff Commission (hereinafter "Commission"). This Commission had been set up in 1990 to consider likely assistance to the domestic industry so as to enhance the latter's competitiveness. The Commission was to achieve its objective chiefly through examining options for limited protection for a specific industry so as to help the latter achieve competitiveness and viability. Possibilities for protection lay mainly in appropriate adjustments in customs tariffs for a limited period of time to enable the affected industry to establish or re-establish itself. In those cases, where the Commission was satisfied that grounds for the provision of such assistance existed, it was to recommend specific measures to the government.

The Commission functioned as an autonomous, quasi-judicial organisation under a special law, the National Tariff Commission Act of 1990 (hereinafter "NTC Act"). The Commission consisted of three members, of which the Chairman was to be of a rank not less than a permanent secretary to the federal government. This NTC Act laid out, *inter alia*, the constitution of the Commission, its scope of work, the due process it was mandated to apply, and its powers.[5] The Commission was specifically granted the powers of a civil court in matters of calling for evidence and enforcing attendance of witnesses. The NTC Act also provides for transparency in its due process in arriving at its findings or recommendations. The Commission's approach to its task was to consider all points of view, invariably by inviting all those having an interest in the matter to a hearing, and also by inviting them to make submissions in support of thereof.

The Commission's functions under the NTC Act also specifically included advising the government on "measures to counter dumping and other unfair measures adopted in respect of import and sale of foreign goods in Pakistan"[6]. Rules that would enable the application and implementation of this provision were never made, much as had been the case with the 1983 Anti-dumping and Countervail Law. An explanation for the dormant nature of these provisions may well lie in the fact that, with the high tariff regimes of the 1980s and early 1990s, the industry did not particularly seem to need recourse to any anti-dumping action, and thus the Commission never had the occasion to proceed under these anti-dumping provisions. In any event, with the coming into force of

[4] See Société Générale de Surveillance SA v Pakistan (2002 SCMR 1694). Also, Article 175(2) of the Constitution of the Islamic Republic of Pakistan (hereinafter "Constitution of Pakistan") specifies that a court has no jurisdiction unless conferred by or under any law or by the Constitution itself.

[5] See NTC Act, various sections.

[6] See NTC Act, s. 4 (ii).

the WTO-consistent Pakistan Anti-Dumping Duties Ordinance 2000 (hereinafter "AD Ordinance 2000"), this particular provision became redundant and was repealed.[7]

The standard laid down in the NTC Act, in the context of the Commission's original mandate to enhance competitiveness of Pakistan's industry, and applied by the Commission in making its findings and recommendations in that regard, was a three-fold one. It required that the Commission satisfy itself: first, that the product to be protected was a quality product, second, that the protection recommended was needed only for a limited period of time, and third, that the additional cost to the consumer as a result of any protection that was being recommended not be "excessive". Arguably, the standard could be read as including a public interest element.

Pakistan's new trade defence laws brought about important changes in the Commission's role, adding to its responsibilities the task of administering this set of freshly promulgated legislation.[8] Apart from striving for consistency with the WTO agreements, the new laws changed the character of the Commission from a body that made recommendations to the government to one that was now empowered to decide on trade defence measures with finality. Thus the Commission now had the authority to make determinations and decide on the imposition of anti-dumping and countervailing duties, and whether or not to accept undertakings.[9] In the matter of safeguard actions though, the Commission's role was to be an advisory one because any imposition of safeguard measures would likely involve discussions and negotiations with foreign governments, and perhaps for this reason the decisions regarding safeguard measures were left to the government. The due process for trade defence cases was elaborately set out in the new laws, as were the rights of the parties and the schedule for investigations, all closely reflecting the practice contained in or implied by the WTO trade defence agreements.

The trade defence work that built up following the enactment of the new trade defence legislation was in response to the inquiries and applications relating almost entirely to instances of alleged dumping into Pakistan. The first anti-dumping investigation was initiated by the Commission on 26 February 2002, and the provisional determination in this case was made on 22 July 2002. By 23 February 2011, the Commission had initiated sixty-eight investigations and thirty-one of these had been concluded by way of either final determinations or price undertakings, a few having been terminated without measures.[10] Of the sixty-eight investigations, sixty-seven related to anti-dumping, and the sole remaining one was a safeguard case where the investigation was terminated without measures.

Judicial Review of Commission's Actions

The Appellate Tribunal

Pakistan's anti-dumping law[11] provides for a three-member Appellate Tribunal (hereinafter "Tribunal") and largely replicates the provisions of Article 13 of the AD Agreement, albeit with some additions. The qualifications of the three members are specified in law, respectively as a judge, retired after serving his/her term on the bench in the Supreme Court of Pakistan, who is also to chair the Tribunal,[12] and two other members, who are to be subject experts. One of the subject experts is required to be a person known

[7] See AD Ordinance 2000, s. 76. Though the preferred terminology of a law that conforms to WTO agreements is to use the double negative and say that "the law is not inconsistent with WTO agreements", the simpler formulation of "consistent with" is used here instead.

[8] The trade defence laws of Pakistan comprise the following three laws: AD Ordinance 2000, Countervailing Duties Ordinance 2001 (hereinafter "CVD Ordinance 2001") and Safeguards Measures Ordinance 2002 as well as rules made in pursuance of these laws.

[9] Price undertakings in anti-dumping and countervailing duty investigations come from foreign exporters subject to the investigation and involve an increase in the export price. Further, in countervailing duty investigations, the government of the exporting country may make an undertaking to eliminate or limit the subsidy subject to the investigation or to take other measures concerning its effects.

[10] See http://www.ntc.gov.pk. The number of investigations is counted by the number of countries included in a particular application. Thus for example if only one country is mentioned in an application that counts as one investigation, but if the application mentions three countries it would imply three investigations.

[11] See AD Ordinance 2000, s. 64. Also, CVD Ordinance 2001, s. 62 makes a reference to the Tribunal as defined in the AD Ordinance 2000.

[12] The Supreme Court is the highest judicial body in Pakistan, as is clarified in the discussion below.

for his/her "integrity, expertise and experience in economics with particular reference to international trade related issues", whilst the other is to be a person known for his/her expertise, etc., "in matters related to customs law and practice".[13] It would appear that keeping in view Pakistan's international treaty obligations relating to trade defence matters, as well as the somewhat technical nature of the trade defence work, the legislature had devised a Tribunal that would have a senior judge with an established record supported by recognised subject experts. The law provides for this Tribunal's rulings to be final, and there is to be "no further appeal". Parties may, however, seek "clarification of any of the issues raised by the Appellate Tribunal in its decision", by filing an application within thirty days of the Tribunal's decision.[14] Nonetheless, the fact that there is no further appeal against the Tribunal's rulings would not by itself serve to bar the writ jurisdiction of the superior courts discussed below.[15]

The scope of the Tribunal's work relates to an appeal by any "interested party" against "an affirmative or a negative final determination made by the Commission", and "any final determination pursuant to a review" made by the Commission.[16] The appeal must be filed within forty-five days of the final determination made by the Commission. The Tribunal is charged with deciding an appeal "as expeditiously as possible but not later than ninety days from the date of receipt" of that appeal.[17] The opportunity of being heard is to be provided by the Tribunal both to the appellant and to the Commission.[18] The Tribunal has the powers of a civil court, chiefly regarding the examination of such evidence (including an examination of the veracity of evidence) as was used by the Commission in making its determination or has a bearing on the final determination, and in enforcing attendance of witnesses.

In its examination of an appeal, the Tribunal is required to determine "whether the establishment of facts by the Commission was proper and whether the Commission's evaluation of those facts was unbiased and objective".[19] The standard here appears to closely track the wordings of Article 17.6 (i) of the AD Agreement. In determining as to whether the establishment and evaluation of the facts by the Commission was, respectively, proper, and unbiased and objective, the Tribunal is required to do so on the basis of the official record maintained by the Commission or any other documents relied upon by the Commission in reaching the determination under appeal.[20] The Tribunal has to next satisfy itself that "in reaching the impugned determination, the Commission complied with the relevant provisions" of the respective law. These above principles arguably constitute the standard of review for the Tribunal.[21]

There appears to be some ambiguity as to whether a party may approach the Tribunal before the Commission has made a final determination though. The relevant law in this regard reads:

> *"Any interested party may prefer an appeal to the Appellate Tribunal against* **–** *(i) an affirmative or a negative final determination by the Commission; and (ii) any final determination pursuant to a review."*[22]

The above provision may arguably be read as stating that the Tribunal may not admit an appeal unless the appeal relates to a final determination that has taken place. On this reading of the law, procedural matters in the course of an investigation and before the Commission has made a final determination in the case, cannot be subjected to an appeal before the Tribunal. In support of this reading of the law is the argument that interventions in the course of initiation and investigation may very easily lead to delays in the investigation schedule and the Commission may therefore be put in a situation where it is in violation of the timeline laid down for the initiation, investigation and determination procedures in the law. This is an

[13] See AD Ordinance 2000, s. 64 (3).

[14] See AD Ordinance 2000, s. 64 (11).

[15] See discussion in see section 0 below.

[16] See AD Ordinance 2000.

[17] See AD Ordinance 2000, s. 64 (5) 64 (7)

[18] See AD Ordinance 2000, s. 64 (6).

[19] See AD Ordinance 2000, s. 64 (6).

[20] See AD Ordinance 2000, s. 64 (6).

[21] AD Ordinance 2000, s. 64 (12) reads as follows: "The Appellate Tribunal shall perform its functions under this Ordinance in accordance with such procedures as may be prescribed." The procedures had not been prescribed by August 2011, when this text was finalised.

[22] See AD Ordinance 2000, s. 64 (2).

important consideration, and no doubt in due course the Tribunal could be expected to clarify the matter.

The Tribunal's standard of review as well as its procedure has yet to be put to the test though.[23] The first Tribunal was appointed for six months beginning with 5 March, 2003. The Tribunal comprised of a retired judge of the Supreme Court, a retired Permanent Secretary who had dealt with GATT matters in Geneva for several years, and another serving officer of the rank of Permanent Secretary to the Government, who had long experience of Customs administration. Six months was clearly too short a period for the Tribunal to receive an appeal because the time frame for an investigation runs into almost as many months, and, as noted earlier, the Tribunal may only be approached after the Commission has made a final determination. This first Tribunal ceased to exist on 5 September, 2003, without receiving any application during its brief life. The chair of the Tribunal felt that he was not in a position to continue, and the Tribunal's life was not extended. It is important to point out that the Tribunal's three members were serving in an honorary capacity, and the matter of their remuneration was to be reconsidered by the government as the work built up.

It is difficult to understand the reasoning behind the government's decision to restrict the life of the first Tribunal to six months, but one might speculate that the government was perhaps gauging the volume of the work that the Tribunal would be handling in order to make a more informed decision about the size and permanence of a new institution. Following the end of the first Tribunal, the government made efforts to change the respective provisions of the law to enable one of the existing tribunals, such as the one for the settlement of Customs-related disputes, to handle any appeals against the actions of the Commission in trade defence matters, but the legislature did not oblige on this count.

A second Tribunal was appointed on 17 March, 2010. Again a retired judge of the Supreme Court was appointed as the chair, whilst the other two members were, respectively, another retired judge of the Supreme Court and a practising lawyer chosen from the legal profession. The appointment of the chair met the qualification prescribed in the law, but the appointment of the other two members seemed to fall short of the requirement laid down in the law, because these two members did not appear to have the *known* expertise in economics and international trade and in customs matters, respectively, that is prescribed in the law. Indeed, this appointment of the two members, who appear not to meet the criteria for the required expertise, seemed to create the potential for throwing open the composition of the second Tribunal to the possibility of a challenge in the superior courts. This second Tribunal has received its first and only reference to date, which it is in the process of considering.[24]

Between 5 September, 2003, the date when the life of the first Tribunal ended, and until the appointment of second one on 17 March, 2010, a Tribunal did not exist. This lack of a Tribunal caused the parties dissatisfied with the Commission's processing of anti-dumping applications to seek remedies from the courts, and this aspect is considered below.

<u>The Role of the Superior Courts in Trade Remedy Determinations: Review of Due Process</u>

In the absence of the Tribunal prescribed under the anti-dumping law, parties who were dissatisfied with the procedures adopted and/or decisions reached by the Commission in its handling of their applications, and in undertaking anti-dumping investigations and making determinations, sought relief from the superior courts invoking the applicable provisions of the Constitution of Pakistan. Superior courts comprise the Supreme Court of Pakistan, being the highest court in the country, and the provincial High Courts, of which there is one in each province, being the next tier of courts. The Supreme Court hears appeals against the decisions of the High Courts and also has review powers regarding its own decisions.

The Constitution of Pakistan empowers the superior courts, that is the Supreme Court and the high courts, to restrain such person or persons who are performing functions in connection with "affairs of the Federation, province or a local authority", from acts that the law does not authorise them to do, and to declare any such actions to be without legal effect. Equally, the superior courts may direct a person or persons who are performing functions in connection with "affairs of the Federation, province or a local authority" to do such acts as the law required of them where the needful had

[23] See footnote 20 above.

[24] Termination of investigation against alleged dumping of hot rolled coil from Belgium, Japan, Russia, Ukraine and the United States.

not been done.[25] This in the case of a High Court is commonly referred to as the *writ jurisdiction* of the superior courts, and petitions seeking redress under this jurisdiction are frequently referred to as *writ petitions*. Ordinarily a writ petition may only be filed after the plaintiff has exhausted all other efficacious remedies available in law.

Actions relating to various laws are taken under this legal principle, and those relating to trade defence mattes are discussed below. But there are two points of note. Firstly, in considering the admissibility of a writ petition the court would importantly take into account whether the petitioner had exhausted all efficacious remedies available, such as with the Appellate Tribunal in cases pertaining to trade defence laws. As the Appellate tribunal did not exist when the writ petitions were filed, the courts found this aspect to be reasonably addressed. Secondly, if the court's decision, which would also be binding on the Commission, were to be challenged at the World Trade Organization Dispute Settlement Body (DSB) and if the DSB's findings were in conflict with or modified that decision, there is no provision in Pakistan's trade defence laws, or indeed in any Pakistan law, to implement such DSB findings. Clearly, in such an eventuality, Pakistan would require new legislation to implement the findings of the DSB.

It is pertinent to point out here that strict time constraints under the trade defence laws do not in any way bind the superior courts to dispose of a writ petition in adherence to the investigation schedule. The courts may decide the matter immediately, or may take years, but past experience and precedents suggest that generally it takes anything ranging from a minimum of three months to a maximum of thirty-six months to conclude proceedings resulting from a petition. The courts take up a matter when it is brought before them, but proceed with it in accordance with the backlog and quantum of pending cases before a particular court. There have been cases wherein a stay of proceedings has been granted, *ex-parte*, leading to a delay in the conclusion of an investigation by the Commission. Such delay is detrimental to the investigation being conducted by the Commission and could potentially result in a pre-mature termination of the investigation based on change in circumstances of the market. Notwithstanding the fact that the Commission may not be at fault, a delay on account of pending court proceedings *prima facie* reflects negatively on the performance of the Commission.[26]

Writ petitions were filed in fair numbers at all stages of the process of an anti-dumping case. The writ petitions discussed here are those which had been filed till the end of 2008, which totalled fifty-nine.[27] With regard to the particular stage of an investigation, twenty of the fifty-nine writ petitions were filed before initiation or on the initiation of the investigation, six between initiation of investigation and preliminary determination, fifteen related to preliminary determination, one questioned the imposition of provisional anti-dumping duty on certain goods, and ten questioned the final determination. Five petitions related to price undertakings. Finally, two related to the initiation of a review.[28]

Eight of the twenty petitions filed before or on the initiation of the investigation raised the issue that the party had been prejudiced because the Commission had not informed the party of the receipt of the application. The courts ruled that no prejudice had been caused, as the law provided that the receipt of an application not be publicised.[29] The Commission therefore was not required to publicise it, and for these reasons the court dismissed the petitions. In twelve

[25] See Articles 184(3) and 199 of the Constitution of Pakistan.

[26] In a couple of instances, the questions about the delay in the investigations conducted by Commissions were also raised in the meetings of the WTO Committee on Anti-Dumping Practices. See, for example, Minutes of the WTO Anti-Dumping Committee's Regular Meeting held on 26-27 October 2010. WTO document G/ADP/M/39, dated 17 December 2010, paragraphs 67-72.

[27] A systematic record of petitions filed after 2008 is not available, but would need to be compiled from court records. There has been no change in the writ petition process or in the approach of the superior courts in dealing with such petitions. As the purpose here is to use the experience with writ petitions to illustrate the process of judicial review by the superior courts, the explanation and the argument do not suffer by limiting the discussion chiefly to the experience with petitions filed up to 2008.

[28] It needs saying that a writ petition may cover more than one aspect of a determination. Therefore, the classification of writ petitions by the nature of plea and relief sought that is done here can only be approximate. The discussion in this section may be read as illustrative rather than a precise rendering.

[29] See Rule 4 of the Anti-Dumping Duties Rules, 2001. Anti-Dumping Rules were published shortly after the promulgation of the AD Ordinance 2000. See section 0 above.

cases the parties raised the issue that the Commission while initiating the investigation had not disclosed injury. Of these twelve petitions, one was filed before the Federal Tax Ombudsman pleading that the Tax Ombudsman had jurisdiction because the imposition of a "tax" was involved; the petitioner interpreting the anti-dumping duty as a "tax". After duly examining the case under the Federal Tax Ombudsman Ordinance 2000 the Tax Ombudsman declined jurisdiction. In this regard it may be noted that the functions of the Federal Tax Ombudsman laid down in the preamble of the respective law are "to diagnose, investigate, redress and rectify any injustice done to a person through maladministration by functionaries administering tax laws",[30] and the Federal Tax Ombudsman's office further narrows down these tasks to the "Disposal of complaints of tax maladministration promptly, justly, fairly, independently investigated, and to rectify any injustice done to a taxpayer by actions of the tax employees of Federal Board of Revenue (FBR)/Revenue Division, Government of Pakistan."[31] Any duties imposed under the trade defence laws would be trade contingency measures and not a tax, and thus would not fall within the purview of the Federal Tax Ombudsman. In its decision the Federal Tax Ombudsman advised "… the Learned Counsel for the complainants to approach the court of law, the NTC itself or the Ministry of Commerce because the complaint is not maintainable before this office".[32] The remaining eleven petitions were filed before the high courts. These petitions were disposed of with the ruling that no prejudice had been caused as such disclosure was not required under the law; however, the court's ruling also required of the Commission that it share the non-confidential version of the application, the Commission's own examination of the accuracy and adequacy of dumping and injury, including the evidence, with the parties to the extent mandated by law.

As noted, six petitions were filed between the initiation of an investigation by the Commission and the Commission reaching a preliminary determination. Three of these six petitions sought that the Commission be directed to conduct verification visits and also to determine individual dumping margins for the respective exporters. The court ruled that the law did not require verification visits in every case and therefore such visits were not mandatory. Separately, the Commission undertook to determine individual dumping margins in all those cases in which the information to enable it to do so had been supplied by the respective exporters. Three petitions pointed out that in situations where the court had granted a stay order, that is to say, the court had directed the Commission not to pass or issue an adverse order, the Commission had nonetheless carried on with internal examination of the case. The court ruled that the Commission had not violated the court's orders, as the Commission had not taken any step(s) that could be recognised in law as making of an adverse order, after the court had passed its stay order.

In all, fifteen petitions filed in the course of preliminary determinations pleaded that the initiation had not met the standards laid down in law because of procedural shortcomings in the determination of domestic industry by the Commission, and also because the evidence used by the Commission was flawed. The court while admitting the petitions did not stay the Commission proceedings and, as a result, the Commission kept working as per its earlier published investigation schedule. In these cases, the Commission was able to arrive at the final determination in due course. The affected parties then moved to file writ petitions challenging the final determinations as well. The court disposed of the petitions against preliminary determination process with the remarks that in view of the fact that the final determinations were now being challenged before the same court, the earlier petitions had become redundant. One particular petition challenged the imposition of provisional anti-dumping duties on goods that were lying with customs authorities at the time the Commission made the preliminary determination. The court ruled that this petition's pertinent aspect was two definitions: how to read "entered into commerce" and "consumption". The court followed a principle established through case law pertaining to customs related matters and restrained the Commission from imposition of anti-dumping duties on products already lying with customs. The matter was thereafter challenged before

[30] See the Preamble to the Federal Tax Ombudsman Ordinance 2000, Ordinance XXXV of 2000.

[31] See "Charter and Functions" given at http://www.fto.gov.pk/aboutfto.php (visited on 8 December 2011).

[32] Findings/Decision of the Federal Tax Ombudsman in Complaint no C-215-K/2007, dated 14 April, 2007.

a larger bench of the High Court, and the decision by this bench is still pending.

Of the ten petitions relating to the final determination, in one case of alleged *coram non judice*, the High Court decided in favour of the Commission. The Supreme Court reversed this decision, finding instead that the Commission was not properly constituted in law when it made the determinations. The Supreme Court observed that the Commission was a member short, and it also did not have a Chairman of the status of not less than a Permanent Secretary as laid down in the law.[33] As a result of this Supreme Court verdict another four cases before the High Court, where the issue was similar and the decisions were pending, got similarly decided.

In three of the remaining five cases, the initiation was challenged on the grounds that the determination of domestic industry by the Commission was not in accordance with the law, and that the evidence of dumping and injury before the Commission was also flawed. The grounds for petitioning varied between the remaining two of the five petitions. One petition pointed out that the duty imposed on non-cooperating exporters was equal to the highest duty imposed among the cooperating exporters, and the issue placed before the court in this case was why were the non-cooperating exporters not being treated "less favourably". The court withheld its decision in this case. Finally, in one case, the petition argued that the imported product was "tax-exempt" under a different law, and hence anti-dumping duty could not be applied. The court also withheld its decision in this case. Three petitions also sought the setting up of the Appellate Tribunal as provided for under the anti-dumping law, and the court directed the government to do so immediately. One petitioner claimed that in addition to the anti-dumping duties the customs authorities had also fixed an import price for purposes of applying the import tariff, regardless of the invoice value, because the customs authorities suspected under-invoicing by the exporter. The petitioner argued that in such a case the imposition of anti-dumping duties on the goods which had already been subjected to a fixed import price applied unilaterally by Customs authorities amounted to an instance of "double taxation". The court ruled that the two measures were separately founded in law and therefore the simultaneous application of fixing an import value as well as imposition of an anti-dumping duty did not amount to "double taxation".

In the five instances where the Commission had not accepted price undertakings on the grounds that customs authorities were not prepared to monitor such undertakings, writ petitions were filed. The Commission had consulted with the Customs authorities, as the price undertakings would have to be monitored by them, but the Customs authorities were of the considered view that it was not administratively feasible to do this. The court was petitioned with the plea that the Commission be asked to accept these price undertakings. Furthermore, the parties also pleaded that the Customs authorities had not afforded them an opportunity of being heard. The court asked the Customs authorities to explain their claimed limitations. The court's decision remains to be announced.

In two of the cases, the plaintiff challenged the non-initiation of a review. The Commission explained to the High Court that because its composition had been judged as flawed by the Supreme Court on account of *coram non judice*, it could not initiate the subject review. The court disposed of the petitions in question.

As one may see, the writ petitions were chiefly about due process, and the courts upheld the procedures, derived from the Pakistan's anti-dumping law and the rules made thereunder, that were applied by the Commission. Where the court ordered that Commission proceedings be stayed, the Commission was permitted to carry on with its internal work as long as it did not take any further action under the law. Finally, the court set aside the Commission's actions where it felt that the Commission was not properly constituted in law.

Intervention by Superior Courts in Trade Remedy Determinations: Constitution of The Commission

Writ petitions filed on the grounds *coram non judice* were discussed above. A final determination involving the imposition of anti-dumping duties was challenged by an affected importer in the High Court in 2010 in context of Section 5 of the NTC Act, which deals with the number and status of the members of the Commission, and in the context of Section 7 of the NTC Act, which deals with transaction of business by the Commission, authorising the Chairman to delegate work between members. The petitioner argued that

[33] See our explanations in section 0 above.

the full Commission had not authorised the order, as the full Commission of three members had not signed the initiation, the preliminary and final determination. It had been signed by only two of the three Commission members. The High Court upheld the Commission's point of view that the order of the Commission signed by two of the three members in the case under review was valid in law. The importer proceeded to file an appeal against this order before the Supreme Court. Between the judgment of the High Court and the hearing of the case by the Supreme Court there occurred a vacancy in the Commission and it was functioning with only two of its prescribed three members. The Supreme Court, after briefly hearing the appeal and the Commission not being able to present an appropriate and robust defence on the day (chiefly the authorisation for the delegation and distribution of functions between members), ordered that no further action be taken until the Commission was duly constituted with its full membership and remanded the case back to the Commission. The Supreme Court's decision rendered the Commission inactive until it had been duly constituted. The Commission also faced a problematic situation of how to deal with the case remanded by the Supreme Court's order, keeping in view its functions and the procedures specified in the trade defence laws, as and when it would be duly constituted. Neither the NTC Act nor the trade defence laws provided for a situation of a case being remanded to the Commission by the superior courts.

Conclusion

Even though Pakistan's experience with a WTO-consistent set of trade defence laws spans a short period of a few years, the above account shows that the judicial review of the work of the Commission has nonetheless been quite eventful. The first Tribunal had a rather brief life and its existence was limited to six months. As Pakistan trade defence laws were new and investigations were being initiated, cause for making references to the first Tribunal did not perhaps exist. And by the time a party needed to resort to a Tribunal, the first Tribunal was past its rather short lease of life. Between the date when the first Tribunal ceased to exist and until the appointment of the second Tribunal, that is between 4 September, 2003, and 17 March, 2010, the Tribunal prescribed in law did not exist, but there was much in way of demand for one by the affected parties. All the final determinations by the Commission save two took place in a period when a Tribunal was not in place.[34] Parties which were dissatisfied with the Commission's anti-dumping work, sought redress, as needed, through the writ jurisdiction of the superior courts.

One might infer that the appointment of the second Tribunal may have been a result of court decisions pursuant to petitions filed before the superior courts by the parties to proceedings before the Commission, some of whom sought, successfully as it turned out, that the court directs the government to constitute the Tribunal required in law.

A point of note is that the larger number of the cases that came up before the superior courts related to due process in course of an investigation, before a final determination had been made. Ostensibly, these cases came up before the courts because the Tribunal did not exist, but the question may well be asked whether the Tribunal could have admitted such appeals, if it were in place at the time, because as may be recalled the law arguably allows an appeal to the Tribunal only after the Commission has made a final determination.[35]

Indeed, if the Tribunal were to interpret the law as permitting it to admit appeals in the course of an investigation without awaiting the Commission's final determination, then it may be prudent for the legislature to suitably amend the law to provide for such intervention.[36] Narrow limits may need to be specified in terms of the time that the Tribunal may take to decide on interventions in course of an initiation or investigation. Setting such limits helps to preserve the scheduled timeline of an investigation suggested by the underlying law. For the moment and until the law is amended, if the Tribunal were to find such appeals inadmissible, then an aggrieved party may continue the existing practice of approaching the superior courts, and invoking their writ jurisdiction.

[34] During the existence of the Tribunal two final determinations, namely, Hydrogen Peroxide from Belgium, China, Indonesia, South Korea, Taiwan, Thailand and Turkey on July 06, 2011, and Phthalic Anhydride from Brazil, China, Indonesia, South Korea and Taiwan on September 30, 2010 were made. However, during the Tribunal's existence, one investigation was terminated on February 25, 2011 (Hot Rolled Coil from Belgium, Japan, Russia, Ukraine and the United States), and one review was concluded on September 30, 2010 (PVC Resin (suspension grade) from the Republic of Korea and the Islamic Republic of Iran).

[35] See AD Ordinance 2000, s. 64 (2).

[36] The Turkish law appears to specifically include the possibility of a review before a final determination. See, the chapter on the Turkish judicial review system.

The presumed plea in such a writ petition before the court would be that the existing law did not offer a remedy in course of an investigation (that is prior to the final determination).

In the absence of the Tribunal, the national judicial system working through the writ jurisdiction of the superior courts did, however, provide relief. In their rulings the judges by and large upheld the due process applied by the Commission, thus reinforcing the Commission's interpretation of the law and the rules. In a few cases the courts ordered a "stay" in the Commission's proceedings, which is to say that the Commission was directed by the courts not to proceed any further in those cases pending the outcome of the courts' proceedings. A more recent development, noted above, is that some of the Commission's determinations have been remanded back by the superior courts because the constitution of the Commission itself under the NTC Act has come under judicial scrutiny and has been found wanting. This issue would appear to be outside the Tribunal's purview, and only the courts are in a position to provide relief under their writ jurisdiction.

It is reasonable to conclude that though a Tribunal was not in place until very recently, and therefore for almost the entire period since the new trade defence laws were enacted, legal processes for the judicial review of the Commission's work were very much available through the well-tested writ jurisdiction of the superior courts. These procedures did provide, *inter alia*, for the review of administrative actions relating to final determinations and reviews of determinations independent of the authorities responsible for the determination or review in question, as intended in Article 13 of the AD Agreement. One might be tempted to argue that easy recourse to superior courts via the writ jurisdiction process may negate the need for a special Tribunal. Should the composition of the Tribunal be challenged before the superior courts as defective in law, this issue could well surface for the government.

There seem to be chiefly two complicating factors with regard to resort to the courts. Firstly, the courts are not bound by the schedule of investigation in considering writ petitions and may take considerably longer to decide than the investigation schedule permits. Secondly, a mechanism for implementation of DSB findings seems to be lacking, should the matter be disputed at the DSB and should its findings differ from those of the court.