

THE INTERNATIONAL
TRADE LAW
REVIEW

SIXTH EDITION

Editors

Folkert Graafsma and Joris Cornelis

THE LAWREVIEWS

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PREFACE

May you live in interesting times! This ancient curse of apocryphal origin could perhaps summarise the recent turmoil and economic disasters our planet has not seen since the Great Depression. Superficially *Jaws in Space*, we endure allegories of the Ancient Plagues. The Appellate Body has vaporised, Brexit did materialise and, to make matters worse, an invisible lethal pathogen has entered the scene. The latter, of course, also has consequences well beyond trade, exceeding the realm of this book.

Staying with trade, not only has the Appellate Body ceased to function, certain WTO Members seem to dismiss the binding nature of its rulings altogether.¹ There are worrying tendencies by some Members to shift from a multilateral to a regional or bilateral trading system – not to speak of unilateral measures. While such systems are usually referred to as ‘free trade agreements’, they have not always managed to live up to this expectation. Undoubtedly, Members may have some reasons for such policy shifts, but if all start to propagate these types of agreements, we could find ourselves back in the 1920s before too long.

In this light, it is imperative to strengthen the arbiter when the ‘soccer (or rugby) game of international trade’ may slowly be spinning out of control. When the game is rough, the referee must be tough. Although the Multiparty Interim Appeal Arbitration Agreement (MPIA) (the stopgap Appellate Body) is a good start (see below), some other fixes are also needed. Members *will* need to partially update the rule book, partially rectify a few selected rulings, and look for an improved implementation and enforcement mechanism.

Even the European Union (EU), with ‘multilateralism written in its DNA’,² seems to have caught some early symptoms of unilateralism by formulating responses to some perceived WTO failures outside the multilateral framework. For example, although this is not really new, a few years ago the EU revamped part of its normal value determination by modernising and neutralising its old analogue country methodology.³ More recently, however, the EU has also started acting against transnational subsidies – something not traditionally understood to be included in the Marrakesh rule book. Indeed, apart from targeting transnational subsidies through its regular Anti-subsidy Regulation,⁴ the EU is now also in the process of designing

1 Communication from the United States in *US – Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/12. In the past such decisions were not announced *expressis verbis*.

2 Speech by EU Trade Commissioner Phil Hogan at Dublin business event, 6 December 2019, at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2088>.

3 See Regulation 2017/2321 published in OJ L338/1 dated 19 December 2017.

4 See, for example, Commission Implementing Regulation (EU) 2020/776, published in OJ L189/1 dated 15 June 2020.

a completely new and all-encompassing legal instrument⁵ addressing the distortive effect of foreign subsidies in the fields of competition, public procurement, takeovers, investment, etc. If enacted, this powerful and broadly scoped new tool, potentially capable of decapitating any nine-headed water serpent, is something about which we will undoubtedly hear much more in the years to come. Finally, the Chief Trade Enforcement Officer is also new and is designed to increase monitoring and enforcement of environmental and labour obligations under EU trade agreements; while laudable *in se*, it also confirms a shift away from multilateralism.

On the upside, however, some other recent developments illustrate that the EU is simultaneously attempting to uphold the banner of free trade and promote multilateralism. Under an EU initiative, an unprecedented interim appeal arrangement for WTO disputes has become effective (the MPIA), with currently some 20 plus participating Members pledging their commitment to a rules-based trading system. This agreement addresses some efficiency concerns that were raised with respect to the Appellate Body, such as only allowing arbitrators to address issues that are necessary to resolve the dispute, and limiting possibilities to extend the 90-day time limit. This innovative and interesting stopgap agreement also raises important questions for the future of international trade dispute settlement in the post-MPIA era. Importantly, what will be the relevance of MPIA decisions in a future if and when the Appellate Body were to resurrect? How will the dispute settlement system function with fractured jurisprudence? These early questions have recently been addressed in an excellent blog.⁶

Another promising silver lining is the continuing negotiations on fisheries subsidies. Although it has proven extremely difficult to make unanimous decisions with 164 WTO Members, fish are not known to respect national borders and therefore the only possible and effective response to the rapidly depleting global fish stocks is multilateral. These negotiations are a good opportunity, therefore, for the WTO to demonstrate its effectiveness, its capabilities as a rule-making organisation, and its ability to adapt to changing times.

Similarly, the recent announcement of the WTO Director General to step down before the end of his term should be used as an opportunity to usher in some new energy to the organisation. Let us share the hope expressed by the Director General that him stepping down does not mean that ‘the ship is . . . going down’ but that command will simply be transferred to someone else who will ‘hopefully . . . inject precisely that kind of energy and stamina that . . . is badly needed’.⁷

Let us, therefore, not lose all faith in the future of the multilateral trading system. *May we live in hopeful times.* With this in mind, we are deeply grateful for the continued support of our faithful contributors: Charlotte Morgan and Samuel Coldicutt at Linklaters for the Brexit chapter (A New Framework for UK Customs and Trade); Michael-James Clifton at EFTA and Pekka Pohjankoski of the University of Helsinki for the EU Courts chapter; Philippe De Baere at Van Bael & Bellis for the WTO chapter; Alfredo A Bisero Paratz at Wiener•Soto•Caparrós for the Argentina chapter; Mauro Berenholz and René Medrado at

5 See the recent ‘White paper on levelling the playing field as regards foreign subsidies COM(2020) 253 final’, dated 17 June 2020. This latter concept-law is still in its initial ‘blueprinting stage’ and has not yet formally translated into a new law.

6 See <https://ielp.worldtradelaw.net/2020/01/guest-post-update-from-the-void-questions-for-the-new-interim-appeal-agreement-iaaa.html>.

7 Bloomberg interview with WTO Director General Roberto Azevedo, at <https://www.bloomberg.com/news/articles/2020-05-14/wto-chief-citing-chaos-says-he-s-not-the-right-man-for-the-job>.

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Finally, as ever, we wish you enjoyable reading during these challenging times.

Folkert Graafsma and Joris Cornelis

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WORLD TRADE ORGANIZATION

*Philippe De Baere*¹

I INTRODUCTION

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

The WTO agreements also contain a comprehensive set of rules relating to the use of trade remedies, which allow WTO members to counter unfair trade practices adopted by other members or to impose temporary import restrictions to shield a domestic industry from a sudden surge in imports. Apart from the general provisions contained in the GATT 1994 (Articles VI, XVI and XIX), three specific agreements, namely the Anti-Dumping Agreement,² the Agreement on Subsidies and Countervailing Measures³ and the Agreement on Safeguards, addressing respectively the imposition of anti-dumping, anti-subsidy and safeguards measures, were adopted during the Uruguay Round. WTO members wishing to apply these trade defence instruments must ensure that their domestic legislation is ‘as such’ consistent with the relevant WTO rules. They must equally make sure that each instance of application of this legislation complies with the applicable WTO provisions.

Since the establishment of the WTO in 1995, WTO members have invoked general exceptions in many cases, and disputes relating to trade remedies constitute more than half of all disputes initiated.⁴ However, until recently, WTO members have generally refrained from invoking the security exceptions in WTO disputes.

In Section II of this chapter, some of the key developments of WTO jurisprudence during the past year are discussed. These developments include a panel ruling on the interpretation and application of security exceptions in the context of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), the Appellate

1 Philippe De Baere is the managing partner at Van Bael & Bellis. This chapter was written with the help of Victor Crochet, Marcus Gustafsson, Tetyana Payosova and Joanna Redelbach.

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

3 Agreement on Subsidies and Countervailing Measures [the SCM Agreement].

4 According to data provided on the WTO website, 302 of the 593 disputes initiated between 1995 and 2019 involved claims under the AD Agreement, the SCM Agreement or the Agreement on Safeguards.

Body's approach to the interpretation and application of non-discrimination disciplines with respect to conformity assessment procedures, and the approach of WTO adjudicating bodies to the use of external benchmarks by investigating authorities in anti-subsidy and anti-dumping investigations. Finally, Section III addresses the Multiparty Interim Appeal Arbitration Agreement (MPIA) that was agreed between the European Union and like-minded WTO members as a means of preserving the appeal stage of the WTO dispute settlement in the absence of a functioning WTO Appellate Body.

II SIGNIFICANT LEGAL DEVELOPMENTS

i DS567: Saudi Arabia – Protection of Intellectual Property Rights: further guidance on the application of security exceptions

Introduction

On 16 June 2020, the WTO circulated the panel report on DS567: *Saudi Arabia – Protection of Intellectual Property Rights*,⁵ the second report in the history of the WTO, after *Russia – Traffic in Transit*, dealing with the security exceptions under WTO law.⁶ This Report further clarifies the standard of review applicable to the security exceptions.

In this dispute, Qatar challenged a number of restrictions, imposed by Saudi Arabia, relating to the protection of intellectual property rights of Qatari nationals in Saudi Arabia.⁷ In particular, Qatar claimed that the restrictions were inconsistent with several provisions of the TRIPS Agreement. In response, Saudi Arabia invoked the security exception in Article 73(b)(iii) of the TRIPS Agreement, which is identical to Article XXI(b)(iii) of the GATT 1994.⁸

Standard of review and burden of proof under Article 73 of the TRIPS Agreement

Article 73 of the TRIPS Agreement, in the relevant part, provides as follows:

Nothing in this Agreement shall be construed:

...

(b) to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests;

...

(iii) taken in time of war or other emergency in international relations

Given the identical wording of Article 73(b)(iii) of the TRIPS Agreement and Article XXI(b)(iii) of the GATT 1994 and the views expressed by Saudi Arabia, Qatar and

5 Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* [*Protection of IPR*], WT/DS567/R and Add.1, circulated to WTO Members 16 June 2020 [adoption/appeal pending].

6 See Philippe De Baere, 'World Trade Organization' in *The International Trade Law Review*, 5th edition (Folkert Graafsma and Joris Cornelis, editors, The Law Reviews, 2019), at <https://thelawreviews.co.uk/edition/the-international-trade-law-review-edition-5/1197812/world-trade-organization> (accessed 25 June 2020).

7 Panel Report, *Saudi Arabia – Protection of IPR*, Paras. 2.46 to 2.48.

8 id., at Paras. 7.229 to 7.230.

multiple third parties⁹ agreeing with the general interpretation and analytical framework adopted by the panel in *Russia – Traffic in Transit*, the panel decided to follow the same analytical framework in this case.¹⁰

In line with that analytical framework, the panel first assessed whether the existence of a ‘war or other emergency in international relations’ had been established in the sense of Article 73(b)(iii) of the TRIPS Agreement. The panel found that “a situation . . . of heightened tension or crisis” exists in the circumstances in this dispute, and is related to Saudi Arabia’s “defence or military interests, or maintenance of law and public order interests” (i.e., essential security interests).¹¹ In reaching that conclusion, the panel recalled that, in June 2017, ‘Saudi Arabia “severed diplomatic and consular relations with [Qatar], and imposed comprehensive measures, putting an end to all economic and trade relations between [itself and Qatar]”’.¹² The panel noted that severance of all diplomatic, consular and economic ties, when viewed in the context of similar actions taken by other countries, falls within the category of ‘circumstances that can be characterised as an exceptional and serious crisis in the relations between two or more states’.¹³ The fact that the two countries still maintain some forms of cooperation in some forums does not affect that conclusion.¹⁴ The panel also recalled the allegations made by Saudi Arabia with respect to Qatar and noted that ‘when a group of States repeatedly accuses another of supporting terrorism and extremism . . . that in and of itself reflects and contributes to a “situation . . . of heightened tension or crisis” between them that relates to their security interests’.¹⁵ The panel also found that Saudi Arabia’s restrictions at issue were ‘taken in time of’ that emergency in international relations.¹⁶

The panel then proceeded to assess whether Saudi Arabia had sufficiently articulated its ‘essential security interests’. Saudi Arabia argued that its essential security interests at issue were ‘protecting itself “from the dangers of terrorism and extremism”’.¹⁷ The panel found that this was a sufficient articulation and contrasted this express articulation with that in *Russia – Traffic in Transit*, in which Russia did not expressly articulate its essential security interests.¹⁸ The panel also recalled that Article 73(b) of the TRIPS Agreement does not require a greater level of precision in the formulation of essential security interests. Rather the articulation must be sufficient to enable an assessment of whether the challenged measures are related to those essential security interests. The panel further noted that a limited review of the articulation of essential security interests is appropriate, because, among other reasons, a panel is not well-positioned to assess what constitutes ‘essential’ security interests.¹⁹

9 Only Bahrain and the United States, as third parties in the dispute, considered that Article 73 is a self-judging provision, in particular, because the words ‘which it considers necessary’ in the chapeau, according to their interpretation, apply to subparagraphs (i) to (iii). Panel Report, *Saudi Arabia – Protection of IPR*, Para. 7.238.

10 Panel Report, *Saudi Arabia – Protection of IPR*, Paras. 7.241, 7.243 to 7.255.

11 *id.*, at Para. 7.257 (footnotes omitted).

12 *id.*, at Para. 7.258 (footnotes omitted).

13 *id.*, at Para. 7.262.

14 *id.*, at Para. 7.266.

15 *id.*, at Para. 7.263 (footnotes omitted).

16 *id.*, at Paras. 7.269 to 7.270.

17 *id.*, at Para. 7.280.

18 *id.*, at Para. 7.280, referring to the Panel Report, *Russia – Traffic in Transit*, Para. 7.136.

19 *id.*, at Para. 7.281 and n. 826.

Finally, the panel turned to the assessment of the connection between the restrictions imposed by Saudi Arabia and its essential security interests. The panel noted that Saudi Arabia's measures aimed at denying Qatari nationals access to remedies through the civil courts may be viewed as an aspect of Saudi Arabia's general policy of ending and preventing any form of interaction between Saudi and Qatari nationals. The panel thus concluded that it was not implausible that, as part of Saudi Arabia's general policy towards Qatar, this restriction was implemented to protect Saudi Arabia and its citizens 'from the dangers of terrorism and extremism'.²⁰ However, the panel found that the non-application of criminal procedures and penalties by Saudi authorities to instances of piracy on a commercial scale, of copyrighted material owned by, or licensed to, Qatari nationals, affects not only Qatari nationals but also third-party rights holders. Having considered the evidence on record, the panel concluded that the non-application of criminal procedures and penalties had no relationship to Saudi Arabia's policy of ending or preventing interaction with Qatari nationals. As a result, the panel held that these restrictions cannot be justified under Article 73(b)(iii) of the TRIPS Agreement.

Implications

The Report of the Panel in *Saudi Arabia – Protection of Intellectual Property Rights* is the second in which the WTO adjudicators addressed the interpretation and application of the security exceptions under WTO law. The findings of the panel are systemically important and relevant to several pending disputes. These include disputes initiated against the United States as regards its Section 232 measures on steel and aluminium and the disputes between Qatar and United Arab Emirates (DS526) and Bahrain (DS527). First, and importantly, the panel confirmed the interpretation of security exceptions provided by the panel in *Russia – Traffic in Transit*, thus reaffirming that WTO adjudicating bodies can review whether measures that are found to be otherwise inconsistent with WTO agreements meet the conditions of security exceptions. Second, the panel further clarified the standard of review, and in particular the burden of proof, with respect to the required articulation of essential security interests and the connection between the challenged measures and those interests. Third, it is the first case in which the panel found that the conditions of the security exceptions had not been met with respect to some measures, thus confirming that the scope of the security exceptions cannot be used to shield disguised restrictions on trade from scrutiny by WTO adjudicating bodies.

ii DS499: Russia – Importation of Railway Equipment: non-discrimination in conditions for access to conformity assessment procedures

Introduction

On 5 March 2020, the WTO Dispute Settlement Body (DSB) adopted the Report of the Appellate Body in DS499: *Russia – Importation of Railway Equipment*,²¹ which concerned certain measures adopted by the Russian Federation that, among other matters, suspended valid certificates of conformity of Ukrainian railway products with the relevant technical regulations applicable in the Russian Federation and did not grant suppliers of those products access to inspection control, which was part of the conformity assessment and was available

20 id., at Paras. 7.286 to 7.289.

21 Appellate Body Report, *Russia – Measures Affecting the Importation of Railway Equipment and Parts thereof*, WT/DS499/AB/R and Add.1, adopted 5 March 2020.

to suppliers of Russian and European products.²² This is the first dispute in which the panel and the Appellate Body dealt with the interpretation and application of Article 5.1.1 of the TBT Agreement.

Non-discrimination obligation under the Technical Barriers to Trade Agreement

Article 5.1.1 of the Technical Barriers to Trade (TBT) Agreement establishes a non-discrimination obligation with respect to procedures for the assessment of conformity of a product with a technical regulation. Article 5.1 of the Agreement provides in the relevant part:

5.1 Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members:

5.1.1 conformity assessment procedures are prepared, adopted and applied so as to grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation; access entails suppliers' right to an assessment of conformity under the rules of the procedure, including, when foreseen by this procedure, the possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system

The Appellate Body in *Russia – Railway Equipment* held that, unlike other non-discrimination obligations, such as Article 2.1 of the TBT Agreement, the obligation under Article 5.1.1 attaches to the suppliers of products and not to the products.²³ The focus of that obligation is ‘on the conditions for access to a conformity assessment granted to suppliers, i.e. on the factors or circumstances under which the opportunity to benefit from conformity assessment is accorded to those suppliers’.²⁴ Importantly, the obligation under Article 5.1.1 (i.e., the entire requirement to grant access to suppliers of like products under no less favourable conditions) is qualified by the phrase ‘in a comparable situation’.²⁵

The Appellate Body further clarified that whether situations are comparable in a specific case has to be assessed by reference to the ‘suppliers’, meaning that the conditions of access to conformity assessment may vary within a country.²⁶ This means that although country-wide factors can be relevant, they need to apply to specific suppliers that seek access to conformity assessment procedures.²⁷ Moreover, the relevant factors are those that have a bearing on the conditions for granting access to conformity assessment in a particular case and the ability of the regulating WTO member to ensure compliance with the requirements in the underlying technical regulation or standard.²⁸ The Appellate Body found that the panel set out essentially the same interpretative framework and hence did not err in its interpretation of Article 5.1.1.²⁹

22 Appellate Body Report, *Russia – Importation of Railway Equipment*, Paras. 1.2 and 5.113.

23 *id.*, at Para. 5.122.

24 *id.*, at Para. 5.123.

25 *id.*, at Para. 5.125.

26 *id.*, at Para. 5.126.

27 *id.*, at Para. 5.127.

28 *id.*, at Para. 5.128.

29 *id.*, at Paras. 5.129 to 5.136.

On appeal, Ukraine argued, among other matters, that the panel erred in its application of Article 5.1.1 of the TBT Agreement, because it ‘relied on general considerations regarding the political or internal security situation in Ukraine that had no bearing on the situation of the relevant suppliers whose [conformity] certificates were suspended or rejected’.³⁰ The Appellate Body agreed with Ukraine, finding that the panel had not sufficiently considered ‘the situation of the specific suppliers . . . or the regions where the relevant suppliers were located or provided an explanation as to how the evidence on the record concerning the existence of security concerns and anti-Russian sentiment in Ukraine in general related to these regions and suppliers’.³¹ The Appellate Body also faulted the panel for examining the existence of a comparable situation from the perspective of the Russian government, rather than from the suppliers’ perspective, in particular with respect to the perceived risks (of the Russian government), of sending government officials to Ukraine.³² Finally, according to the Appellate Body, the panel’s conclusion that it was necessary to weigh and balance the product suppliers’ market access interests against the interest of safeguarding the life and health of government employees in charge of conformity assessment procedures, was not appropriate for the purposes of Article 5.1.1. An analysis of the restrictiveness of the measure, unlike under Article 2.2, is not required under Article 5.1.1 of the TBT Agreement.³³

Implications

The panel and the Appellate Body in *Russia – Railway Equipment* provide important clarifications on the meaning of the non-discrimination obligation with respect to the access to conformity assessment procedures. Given that conformity assessment is an important market access tool, a clear interpretation of Article 5.1.1 of the TBT Agreement provides guidance to WTO members in adopting their own conformity assessment procedures in a WTO-consistent manner, and grants more legal certainty to suppliers of products from WTO members that seek access to markets of other WTO members requiring compliance with conformity assessment procedures.

iii DS437: US – Countervailing Measures (China) (Article 21.5 – China): restrictions on the use of external benchmarks

On 15 August 2019, the DSB adopted the Appellate Body report in DS437: *US – Countervailing Measures (China)* (Article 21.5 – China),³⁴ which concerned the United States’ compliance with the DSB ruling in the original proceeding that countervailing duty orders imposed by the US Department of Commerce on a range of Chinese products were inconsistent with the Agreement on Subsidies and Countervailing Measures (the SCM Agreement). In the compliance proceedings, the Appellate Body further clarified the scope and use of external benchmarks when calculating the alleged benefit derived from a subsidy scheme pursuant to Article 14(d) of the SCM Agreement.

30 id., at Para. 5.137.

31 id., at Para. 5.141.

32 id., at Para. 5.147.

33 id., at Para. 5.145.

34 Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the Dispute Settlement Understanding [DSU] by China*, WT/DS437/AB/RW and Add. 1, adopted 15 August 2019.

Use of external benchmarks to calculate the benefit under Article 14(d) of the SCM Agreement

If a government is alleged to have provided goods or services at below market rates to an exporting producer, or to have made purchases at above market rates, Article 14(d) of the SCM Agreement states that the amount of the benefit that has thereby been conferred on the exporting producer ‘shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase’. In the anti-subsidy investigations at issue, the United States had relied on out-of-country benchmarks, arguing that the prices on the Chinese market were distorted because of state intervention.

In *US – Countervailing Measures (China)* (Article 21.5 – China), the Appellate Body explained that although previous Appellate Body reports had recognised that out-of-country benchmarks could be used under Article 14(d), the Appellate Body had said in *US – Softwood Lumber IV* that the possibility of doing so was ‘very limited’.³⁵ In particular, the Appellate Body found that previous cases had established that the investigating authority must determine that the ‘government intervention results in price distortion’ such that in-country prices are no longer ‘market-determined’.³⁶ On this basis, the Appellate Body added that this must be demonstrated ‘case by case and based on the relevant evidence’, and ‘the investigating authority must provide a reasoned and adequate explanation of the basis for its conclusions in its determination’.³⁷ Only once the investigating authority ‘has properly established and explained why in-country prices are distorted is it warranted to have recourse to an alternative benchmark’.³⁸ It further added that there may be ‘different ways to demonstrate that prices are actually distorted, such as a quantitative assessment, price comparison methodology, or a counterfactual analysis’ or via ‘a quantitative analysis’ if ‘adequately explained’.³⁹ However, although the ‘impact of government intervention on prices need not necessarily be direct, . . . investigating authorities must establish . . . how price distortion actually results from government intervention in the market’.⁴⁰ In the present case, the panel had found that the evidence presented by the United States merely focused on government intervention in the Chinese economy as a whole and on the steel and polysilicon sectors generally, but not on prices or markets of the specific products at issue.⁴¹ On this basis, the Appellate Body agreed with the panel’s finding that the US Department of Commerce had ‘failed to explain how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market-determined price’.⁴²

Implications

The Appellate Body’s ruling is important in emphasising that it is not sufficient for an investigating authority wishing to have recourse to external benchmarks merely to demonstrate government intervention at a sector- or country-wide level, without also showing that the

35 *id.*, at Para. 5.137, citing Appellate Body Report, *US – Softwood Lumber IV*, Para. 102.

36 Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5 – China), Para. 5.141 (emphasis omitted).

37 *id.*

38 *id.*

39 *id.*, at Para. 5.154.

40 *id.*, at Para. 5.161.

41 *id.*, at Paras. 5.168 and 5.169.

42 *id.*, at Para. 5.192 (original emphasis); see also Paras. 5.166 to 5.174.

resulting price distortions affected the specific product at issue. In other words, there must be a clear causal link between the alleged market intervention by a government and the resulting price distortion, and this price distortion must be linked to the specific product at issue.

The attempt of the Appellate Body to limit investigating authorities' liberal use of external benchmarks in anti-subsidy investigations is in line with earlier decisions rejecting the use of external benchmarks to determine prices and costs under Article 2.5 of the Anti-Dumping Agreement.⁴³ In this regard, under its recently revised anti-dumping regulation, the European Union has relied on a China Country Report⁴⁴ to argue that the Chinese economy is distorted. The Report covers the Chinese economy as a whole, as well as a series of industrial sectors that are often targeted in trade defence investigations. This Report thus appears to be similar to the memoranda and type of evidence relied on by the United States in the present dispute.⁴⁵

iv Exporting producers' records as the basis for establishing costs in anti-dumping investigations

Introduction

On 30 September 2019, the WTO DSB adopted the panel and Appellate Body Reports in *Ukraine – Ammonium Nitrate*,⁴⁶ a dispute concerning an anti-dumping investigation conducted by the Ukrainian investigating authority, the Ministry of Economy (MEDT), on imports of ammonium nitrate from Russia. In that investigation, the MEDT disregarded the Russian producers' actual costs for gas after comparing it with the export price of gas from Russia. On 27 January 2020, the WTO DSB adopted the Report of the Panel in *Australia – Anti-Dumping Measures on A4 Copy Paper*,⁴⁷ a dispute concerning an anti-dumping investigation conducted by the Australian investigating authority, the Australian Anti-dumping Commission (ADC), on imports of A4 copy paper from Indonesia. In that investigation, the ADC disregarded the Indonesian producers' actual costs for pulp after concluding that the actual costs did not reasonably reflect competitive market costs.

These two cases concern the interpretation of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, which provides:

For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

43 However, compare the discussion in Section IV, below.

44 See 'Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations', SWD(2017) 483 final/2, 20 December 2017, at https://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156474.pdf (accessed 25 June 2020).

45 As evidence of distortions in the Chinese economy, the United States had, among other matters, relied on a 'Benchmark Memorandum' and 'Supporting Benchmark Memorandum'. See Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5 – China), Paras. 5.167 to 5.169.

46 Appellate Body Report, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate*, WT/DS493/AB/R/Add.1 and Panel Report, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate*, WT/DS493/R/Add.1, adopted 30 September 2019.

47 Panel Report, *Australia – Anti-Dumping Measures A4 Copy Paper*, WT/DS529/AB/R/Add.1, adopted 27 January 2020.

Both cases are relevant examples of the increasing trend among investigating authorities to disregard costs in exporting producers' records in anti-dumping investigations based on this Article. While this trend has already led to several WTO disputes (DS473: *EU – Biodiesel (Argentina)*, DS480: *EU – Biodiesel (Indonesia)*, and DS488: *US – OCTG (Korea)*), the question of when an investigating authority is allowed to disregard the exporting producers' records as the basis for establishing costs continues to be debated. The reports discussed in this section clarify certain issues, while introducing new uncertainties in other areas.

Ukraine – Ammonium Nitrate

In the underlying investigation, the MEDT found that gas prices in the Russian market were artificially lower than the export price of gas from Russia and world gas prices, and presumed the domestic prices to be below the cost of production. The MEDT concluded that this was due to state intervention on the Russian domestic gas market.⁴⁸ As a result, the MEDT used the export price of gas in Russia, rather than the reported gas cost, to identify sales not being made in the ordinary course of trade within the meaning of Article 2.2.1 of the Anti-Dumping Agreement.⁴⁹ The MEDT attempted to justify its approach by relying on the panel's findings in *EU – Biodiesel (Argentina)* that, under the second condition in the first sentence of Article 2.2.1.1 ('provided that such records . . . reasonably reflect the costs associated with the production and sale of the product under consideration'), investigating authorities are free to 'examine non-arm's-length transactions or other practices which may affect the reliability of the reported costs' to decide whether the exporting producer's records reasonably reflect the costs associated with the production and sale of the product under consideration.⁵⁰

Although the panel in *Ukraine – Ammonium Nitrate* acknowledged that the MEDT was free to examine the reliability and accuracy of the costs provided in the records of the investigated producers, it clarified that it did not consider that the panel or the Appellate Body in *EU – Biodiesel (Argentina)* had carved out an open-ended exception for non-arm's-length transactions or 'other practices'. The panel emphasised that the relevant question under this condition is whether the records of the exporters reasonably reflect the costs associated with the production and sale of the product under consideration.⁵¹ Thus, according to the panel, the MEDT's inquiry was incorrect as it focused on whether the cost of gas incurred by the Russian producers was reasonable by comparing it to the export price of gas from Russia.⁵² Consequently, the panel concluded that the MEDT's finding was inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement and that the MEDT should have relied on the exporting producers' records to establish the costs.⁵³

On appeal, the Appellate Body upheld the panel's conclusions, recalling its findings in *EU – Biodiesel (Argentina)* that there is no standard of reasonableness of costs that would allow investigating authorities to disregard input prices when those prices are lower than

48 Panel Report, *Ukraine – Ammonium Nitrate*, Paras. 7.73 and 7.88.

49 *id.*, at Para. 7.114.

50 *id.*, at Para. 7.84 (quoting Panel Report, *EU – Biodiesel (Argentina)*, n. 400 to Para. 7.92).

51 *id.*, at Para. 7.85.

52 *id.*, at Para. 7.89.

53 *id.*, at Paras. 7.90 to 7.92.

other prices internationally.⁵⁴ The Appellate Body added that it did not decide in that case that the second condition in the first sentence of Article 2.2.1.1 contains an open-ended ‘non-arm’s-length transactions’ or ‘other practice exceptions’. Instead, it simply intended to provide examples of circumstances in which records may be found not to reasonably reflect the costs associated with the production and sale of the product under consideration.⁵⁵

The Appellate Body also noted that the use of the term ‘normally’ in the first sentence of Article 2.2.1.1 indicates that there might be circumstances, other than those in the two conditions in that sentence, in which an investigating authority might not be obliged to base the calculation of costs on the basis of the exporter’s records.⁵⁶ This reasoning was also followed by the panel in *Australia – Anti-Dumping Measures on A4 Copy Paper*.

Australia – Anti-Dumping Measures on A4 Copy Paper

In the underlying investigation, the ADC found a ‘particular market situation’ to exist in accordance with Article 2.2 of the Anti-Dumping Agreement in the Indonesian A4 copy paper market. The ADC therefore rejected the use of domestic market prices and proceeded to construct the Indonesian producers’ normal value on the basis of their cost of production. In doing so, the ADC decided to disregard the actual costs of the producers’ pulp, one of the main components of copy paper, that were recorded in the exporters’ records because the costs recorded were substantially below a competitive benchmark because of the Indonesian government’s significant influence over the pulp industry.⁵⁷ Despite the underlying facts of this case being similar to those in *Ukraine – Ammonium Nitrate*, the panel found that the ADC was not prevented from assessing the reasonableness of the costs in the exporting producers’ records.

During the panel proceedings, Australia argued that the ADC’s analysis was not conducted under the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement but under a different rationale based on the term ‘normally’ in the first sentence of Article 2.2.1.1.⁵⁸ Following Australia’s argument, the panel decided to start its analysis by assessing ‘the factual question of whether the ADC rejected recorded hardwood pulp costs because they did not reasonably reflect the costs associated with the production and sale of A4 copy paper, as Indonesia argues, or whether the ADC disregarded those costs on the basis of a different rationale’.⁵⁹

Australia based its argument on the fact that the ADC had rejected the amounts for pulp in the records of the Indonesian producers because they did not ‘reasonably reflect competitive market costs’, within the meaning of Australian law, as they reflected a ‘particular market situation’ that was not akin to ‘normal and ordinary circumstances’, and not because the records did not reasonably reflect the costs associated with the production and sale of the product under consideration.⁶⁰ Notwithstanding some similarities between the wording of the relevant provision in Australian law, which was used by the ADC to explain its findings,

54 Appellate Body Report, *Ukraine – Ammonium Nitrate*, Para. 6.88; Panel Report, *EU – Biodiesel (Argentina)*, Paras. 6.37 and 6.56.

55 Appellate Body Report, *Ukraine – Ammonium Nitrate*, Para. 6.97.

56 id., at Paras. 6.87 and 6.105.

57 Panel Report, *Australia – Anti-Dumping Measures on A4 Copy Paper*, Paras. 7.92 and 7.105.

58 id., at Paras. 7.93 to 7.94.

59 id., at Para. 7.94.

60 id., at Paras. 7.93 and 7.97.

and the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, the panel concluded that since the ADC's determination was not focused on whether the records reasonably reflect the costs associated with production and sales, 'the ADC engaged in an analysis that was different from that required under the second condition of Article 2.2.1.1 first sentence'.⁶¹

The panel then assessed whether the term 'normally' in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement provides a separate basis for disregarding an exporter's records as the basis for establishing costs.⁶² The panel concluded that, to give meaning to the term 'normally', there must be 'circumstances in which the authority may depart from its obligation to use those records',⁶³ even when the two conditions in the first sentence are fulfilled. As a result, the panel determined that 'the investigating authority has to consider whether the records satisfy the two explicit conditions and establish that, although the records are in accordance with GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration, it nonetheless finds a compelling reason, distinct from the two explicit conditions, to disregard them'.⁶⁴ As the ADC had not expressly established that the Indonesian producers' records met the two conditions of the first sentence of Article 2.2.1.1 before rejecting the costs in those records 'for other reasons', the panel found that the ADC's reliance on the term 'normally' was inconsistent with Article 2.2.1.1 as it did not give effect to the entirety of this provision.⁶⁵

Implications

The Appellate Body's clarification in *Ukraine – Ammonium Nitrate* that Article 2.2.1.1 of the Anti-Dumping Agreement does not contain an open-ended exception for 'non-arm's-length transactions' is welcomed, as it appears to shut the door to the practice of investigating authorities disregarding exporting producers' costs by simply invoking the argument that the purchase price between entities is allegedly not at arm's length.⁶⁶

However, the reading given to the term 'normally' by the panel in *Australia – Anti-Dumping Measures on A4 Copy Paper* and the Appellate Body in *Ukraine – Ammonium Nitrate* that an investigating authority may depart from its obligation to use those records, even when the two conditions of the first sentence of Article 2.2.1.1 are fulfilled, raises serious concerns. This reading appears overly formalistic as it allows investigating authorities to disregard exporting producers' recorded costs based on the conclusion that the circumstances are not normal, as long as it formally checks that the two conditions of Article 2.2.1.1 are met. This is particularly questionable as it could be used by investigating authorities to do exactly what the Appellate Body had condemned in *EU – Biodiesel (Argentina)*, namely to assess the reasonableness of the costs incurred by an exporting producer against an international benchmark.⁶⁷

61 *id.*, at Paras. 7.103 to 7.104.

62 *id.*, at Para. 7.109.

63 *id.*, at Para. 7.115.

64 *id.*, at Para. 7.117.

65 *id.*, at Para. 7.124.

66 For a discussion of this issue, see Panel Report, *US – OCTG (Korea)*, Para. 7.197.

67 Appellate Body Report, *EU – Biodiesel (Argentina)*, Para. 6.56.

III OUTLOOK

New era of WTO dispute settlement: Multiparty Interim Appeal-Arbitration Arrangement Introduction

The date 11 December 2019 marked the end of WTO dispute settlement as we know it, with two of the three remaining Appellate Body members completing their terms.⁶⁸ With only one member left, the Appellate Body became inoperative. Indeed, in accordance with Article 17 of the Dispute Settlement Understanding (DSU), an appeal must be heard by three Appellate Body members.

To preserve a two-stage dispute settlement system, the European Union, and a number of like-minded WTO members, put forward a proposal for an interim appeal arbitration proceedings based on Article 25 of the DSU,⁶⁹ which would temporarily replace the Appellate Body. The Multi-party Interim Appeal-Arbitration Arrangement (MPIA) was notified to the WTO on 30 April 2020 and since then applies to disputes between the MPIA parties.⁷⁰ It constitutes an interim solution and will remain in force only until the Appellate Body is once again fully functional, as explicitly mentioned in the MPIA.

Main elements of the MPIA

The MPIA is largely based on procedures set out in Article 17 of the DSU and in the Working Procedures for Appellate Review. It may apply to any future dispute between the MPIA parties, including compliance proceedings, and to pending disputes provided that the interim panel report has not yet been issued.

To use the appeal arbitration proceedings in a particular case, the parties must notify the appeal arbitration agreement to all WTO members within 60 days of the date of the establishment of the panel. This agreement gives the parties the possibility, but does not require them, to resort to the appeal arbitration if any of them disagrees with the panel's findings.

An appeal arbitration may not be initiated unless the panel proceedings have been suspended. More specifically, after the issuance of the final panel report to the parties, but no later than 10 days before the anticipated date of circulation of the report to the rest of the membership, any party may request that the panel suspend its proceedings under Article 12 of the DSU with a view to initiating the appeal arbitration. Such a request by any party to the dispute is deemed to constitute a joint request.

The appeal itself is initiated by filing a Notice of Appeal with the WTO Secretariat within 20 days of the suspension of panel proceedings. The Notice of Appeal must include the final panel report. An appeal must be limited to issues of law and legal interpretation, and the arbitrators are only called to address those issues that are necessary for the resolution

68 Ujur Singh Bhatia and Thomas R Graham completed their terms on 10 December 2019. Hong Zhao's term expires on 30 November 2020.

69 Article 25 of the DSU recognises that '[e]xpeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties'.

70 Multi-party Interim Appeal Arbitration Arrangement [MPIA] pursuant to Article 25 of the DSU, JOB/DSB/1/Add.12, 30 April 2020. Twenty-one WTO members are currently parties to the MPIA: Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, Ecuador, the European Union, Guatemala, Hong Kong, Iceland, Mexico, New Zealand, Nicaragua, Norway, Pakistan, Singapore, Switzerland, Ukraine and Uruguay. Any WTO member is welcome to join the MPIA at any time, by notification to the Dispute Settlement Body.

of the dispute. The appeals will be heard by three appeal arbitrators selected from the pool of 10 standing appeal arbitrators composed by the MPIA parties. The selection process is currently under way, with the aim of having the pool of arbitrators to be agreed by consensus between the parties by the end of July 2020.

The arbitration awards are final and must be notified to, but not adopted by, the DSB and the relevant council or committee. The arbitration award may uphold, modify or reverse the legal findings and conclusions of the panel. The findings of the panel that have not been appealed form an integral part of the arbitration award alongside the arbitrators' own findings. If no party to a dispute resorts to the appeal arbitration procedure, the panel report will be circulated for adoption. In that sense, the MPIA precludes pursuing appeals into a void under Articles 16.4 and 17 of the DSU. Articles 21 and 22 of the DSU apply *mutatis mutandis* to the arbitration award, meaning that in the event of non-compliance, MPIA parties may initiate compliance proceedings, negotiate compensation or request the DSB's authorisation to suspend concessions or other obligations in respect of the non-complying member.

Although to a large extent the MPIA replicates the appeal process before the Appellate Body, it also provides for some novel elements to enhance procedural efficiency. In particular, it allows the arbitrators to take certain organisational and substantive measures to meet the 90-day deadline for issuing the award.⁷¹ The first type of measures may include decisions on page limits, time limits and deadlines, and on the length and number of hearings. As a substantive measure, the arbitrators may propose to exclude certain claims from the appeal, in particular those based on the alleged lack of an objective assessment of the facts under Article 11 of the DSU. This could effectively accelerate the examination of the appeals and is a substantial departure from the practice of the Appellate Body. It remains to be seen, however, to what extent the arbitrators and the parties will be willing to use it.

What's next?

At the time of writing, one of the key outstanding issues is the role of the WTO Secretariat in the implementation of the MPIA. The MPIA parties have requested the WTO Director General to ensure that the appeal arbitrators receive 'appropriate administrative and legal support' that is entirely separate from the WTO Secretariat staff supporting the panels, and answerable only to the arbitrators. Although some have suggested that this support should be modelled after the (now inoperative) Appellate Body Secretariat, others voiced their preference for alternative solutions, including providing individual assistants to specific arbitrators. Regardless of the form the support would take, a more controversial question relates to how it should be financed. Notably, the United States objects to the use of the WTO budget, and the allocation of WTO staff, for the MPIA support structure.⁷²

The MPIA parties agreed to review the MPIA one year after its entry into force (i.e., in April 2021). They have also committed to continue their efforts to resolve the impasse of the Appellate Body appointments and to agree on necessary reforms. This may be a difficult task given the unconstructive position taken by the United States.

71 Under the MPIA, the 90-day deadline may be extended only with the parties' agreement.

72 See Letter from US Ambassador Dennis C Shea to the WTO Director General, 5 June 2020.

IV CONCLUSIONS

The clarifications brought about by the panels and the Appellate Body in the disputes discussed in Section II are likely to have important practical and systemic implications. First, the Report of the Panel in *Saudi Arabia – Protection of IPR* confirmed that although WTO members enjoy discretion with respect to determining what their essential security interests are and what actions are necessary for the protection of those interests, that discretion is not unfettered and is subject to review by a panel. More importantly, the panel further clarified the standard of review and the burden of proof regarding security exceptions, as articulated for the first time in the Report of the Panel in *Russia – Traffic in Transit*. Second, the panel and the Appellate Body in *Russia – Railway Equipment* addressed for the first time the non-discrimination obligation under Article 5.1.1 of the TBT Agreement and provided useful guidance with respect to the exact scope of that obligation. Third, although the Report of the Panel in *US – Countervailing Measures (China)* (Article 21.5 – China) aims to limit the liberal use of external benchmarks in anti-subsidy investigations by investigating authorities, the Report of the Panel in *Australia – Anti-Dumping Measures on A4 Copy Paper* seems to backtrack on previous Appellate Body decisions and risks reopening the door to such a practice in anti-dumping investigations. This may have a significant effect on current trade defence investigation practices in several jurisdictions.

Finally, December 2019 marked a major change in the WTO dispute settlement system. Since the Appellate Body became dysfunctional, only the panel stage remains available for adjudication of disputes between WTO members. The MPIA agreed by several major WTO members, including the European Union, China and Canada, is a temporary solution that preserves the appeal stage of WTO dispute settlement. These proceedings are based on Article 25 of the DSU and largely replicate the appeal proceedings of the Appellate Body, with several modifications to accelerate the appeal process. Although the MPIA is an important tool to avoid a total collapse of the WTO dispute settlement system, it remains a temporary solution and thus members will have to continue to search for a way to resolve the Appellate Body crisis.

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