THE INTERNATIONAL TRADE LAW REVIEW

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Editors
Folkert Graafsma, Joris Cornelis and Drew Sundberg

THE LAWREVIEWS

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Editors
Folkert Graafsma, Joris Cornelis and Drew Sundberg

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PREFACE

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

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

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

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

1 Franklin D Roosevelt.

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

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

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

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

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

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

2 DS516, document WT/DS516/1.

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

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

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

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

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

Folkert Graafsma, Joris Cornelis and Drew Sundberg
August 2018

Chapter 1

WORLD TRADE ORGANIZATION

Philippe De Baere[1]

I INTRODUCTION

The World Trade Organization (WTO) provides a comprehensive set of rules relating to the use of trade remedies. 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 Measures[3] and the Agreement on Safeguards, addressing respectively the issues of dumping, subsidies and safeguards, were adopted during the Uruguay Round. WTO members wishing to apply 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 such legislation complies with the applicable WTO provisions.

The rules contained in those agreements have been clarified over the years by WTO panels and the Appellate Body. Indeed, disputes relating to trade remedies constitute over half of all disputes initiated since the establishment of the WTO in 1995.[4] Section II discusses some of the key developments that have occurred in WTO case law relating to trade remedies over the past year. Those developments include recent decisions on the notion of a 'safeguard measure', the use of cost adjustments and the need to calculate a profit cap when constructing the normal value, as well as the definition of the domestic industry in the context of anti-dumping investigations and the requirement of a fair comparison between export price and normal value. Section III will then discuss the controversies surrounding the appointment of new Appellate Body members and the developments and expectations with regard to China's challenge to the European Union's (EU's) previous non-market economy methodology.

1 Philippe De Baere is a managing partner at Van Bael & Bellis. This chapter was written with the help of Sidonie Descheemaeker, Victor Crochet 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, 264 out of 551 disputes initiated to date involved claims under the AD Agreement, the SCM Agreement or the Agreement on Safeguards.

II SIGNIFICANT LEGAL DEVELOPMENTS

i Indonesia – Iron or Steel Products (DS490/DS496): the notion of a 'safeguard measure'

Introduction

On 18 August 2017, the WTO Secretariat circulated the Panel Report in *Indonesia – Iron or Steel Products* (DS490/DS496), a dispute initiated by Viet Nam and Chinese Taipei against safeguard measures imposed by Indonesia on imports of certain flat-rolled iron or steel products. This dispute is of particular importance as it raises the issue of the scope of application and the nature of Article XIX of the General Agreement on Tariffs and Trade (GATT) 1994 and the Agreement on Safeguards. While the Panel Report is currently under appeal, the Panel's findings concerning the definition of a safeguard measure deserve closer analysis.

The notion of a 'safeguard measure'

The dispute concerns the specific duty applied by Indonesia on imports of galvalume following an investigation initiated and conducted under Indonesia's domestic safeguard legislation. Indonesia has no binding tariff obligation with respect to galvalume in its Schedule of Concessions, and the specific duty was imposed in addition to the applied most favoured nation (MFN) and also exceeded the preferential duty rates under Indonesia's regional trade agreements.

Although all parties to the dispute agreed that the challenged measure was a safeguard measure subject to the disciplines of Article XIX of the GATT 1994 and the Agreement on Safeguards, the Panel decided to examine – on its own motion – what it described as a fundamental question, namely whether the specific duty applied by Indonesia and challenged by the complainants was a 'safeguard measure' within the meaning of Article 1 of the Agreement on Safeguards.[5]

In ascertaining the meaning of a 'safeguard measure', the Panel took as a starting point the text of Article 1 of the Agreement on Safeguards, which determines the scope of application of that agreement and which refers to the text of Article XIX of the GATT 1994. Looking at the text of the latter provision, the Panel held that the 'measures provided for' in Article XIX of the GATT 1994, namely, safeguard measures, are measures that suspend a GATT obligation or withdraw or modify a GATT concession and that these measures must be taken for a particular purpose, namely to prevent or remedy serious injury to the domestic industry.[6] The Panel concluded that:

> *one of the defining features of a safeguard measure is the suspension, withdrawal, or modification of a GATT obligation or concession that precludes a Member from imposing a measure to the extent necessary to prevent or remedy serious injury, in a situation where all of the conditions for the imposition of a safeguard measure are satisfied.*[7]

5 Panel Report, *Indonesia – Iron or Steel Products*, paragraph 7.10.
6 Panel Report, *Indonesia – Iron or Steel Products*, paragraph 7.13.
7 Panel Report, *Indonesia – Iron or Steel Products*, paragraph 7.17.

The Panel found that the specific duty at issue did not qualify as a 'safeguard measure' because it did not suspend, withdraw or modify a relevant GATT obligation for the purpose of remedying or preventing serious injury.

In that regard, the Panel first held that since Indonesia has no binding tariff obligation with respect to the product at issue in its WTO Schedule of Concessions, Article II of the GATT 1994 did not preclude the application of the specific duty on imports of galvalume, meaning that the specific duty did not suspend, withdraw or modify Indonesia's obligations under Article II of the GATT 1994.[8]

Second, the Panel rejected Indonesia's argument that the GATT obligation being suspended was the exception under Article XXIV of the GATT 1994. The Panel explained that Article XXIV of the GATT 1994 is a permissive provision allowing WTO members to depart from their obligations in order to establish a customs union or a free trade area (FTA). That provision, however, does not impose a positive obligation either to enter into an FTA or to provide a certain level of market access to FTA partners. In that sense, Article XXIV of the GATT 1994 did not preclude Indonesia from raising tariffs on imports of galvalume above the preferential duty rate contained in its free trade agreements and thus, the specific duty did not 'suspend' the GATT exception under Article XXIV for the purpose of Article XIX:1(a) of the GATT 1994.[9]

Finally, the Panel found that the exclusion of developing countries by virtue of Article 9.1 of the Agreement on Safeguards did not result in the suspension of the MFN obligation under Article I:1 of the GATT 1994, for the purpose of Article XIX:1(a) of the GATT 1994. The Panel reached that conclusion on the basis of two arguments. First, according to the Panel, the discrimination that is called for by Article 9.1 is not intended to prevent or remedy serious injury.[10] The Panel decided to look separately at the different components of the measure at issue, namely, the increase in the duty rate and the discriminatory application of this increase in duty. After analysing the objective of the exclusion of the developing countries from the application of the specific duty imposed by Indonesia, the Panel concluded that such exclusion was not intended to prevent or remedy serious injury and thus the specific duty could not be properly characterised as a 'safeguard measure'.[11] Second, the Panel considered that by virtue of the General Interpretative Note to Annex 1A of the WTO Agreement, Article 9.1 of the Agreement on Safeguards prevails over the MFN obligation imposed by Article I:1 of the GATT 1994. As a result, the question of 'suspension' does not arise when a member excludes from the scope of application of a safeguard measure imports from developing countries pursuant to Article 9.1.[12] The Panel recognised that its position departs from the decision of the panel in *Dominican Republic – Safeguard Measures*, which found that the discriminatory application of a safeguard measure in accordance with Article 9.1 of the Agreement on Safeguards resulted in the suspension of the MFN obligation under Article I:1 of the GATT 1994.[13]

In its analysis, the Panel accorded very little importance to the fact that the specific duty at issue was imposed as a result of an investigation initiated by Indonesia's authority in

8 Panel Report, *Indonesia – Iron or Steel Products*, paragraph 7.18.
9 Panel Report, *Indonesia – Iron or Steel Products*, paragraph 7.20.
10 Panel Report, *Indonesia – Iron or Steel Products*, paragraph 7.28.
11 Panel Report, *Indonesia – Iron or Steel Products*, paragraph 7.32.
12 Panel Report, *Indonesia – Iron or Steel Products*, paragraph 7.29.
13 Panel Report, *Indonesia – Iron or Steel Products*, paragraph 7.30.

charge of the imposition of safeguard measures, which was conducted pursuant to Indonesia's domestic safeguard legislation and which was notified to the WTO Committee on Safeguards. According to the Panel, the fact that the specific duty was described as a safeguard measure in the implementing regulation and imposed following an investigation conducted pursuant to Indonesia's domestic safeguards legislation, with a view to complying with the disciplines of the Agreement on Safeguards (including notification requirements), does not render the specific duty a 'safeguard measure' within the meaning of Article 1 of the Agreement on Safeguards.[14]

Implications

The Panel Report in *Indonesia – Iron or Steel Products* was the first occasion that a WTO adjudicator attempted to provide a comprehensive definition of a 'safeguard measure'. According to the Panel, a safeguard measure should be understood as:

> *a measure that suspends, withdraws, or modifies a GATT obligation or concession that precludes a Member from imposing a measure to the extent necessary to prevent or remedy serious injury, in a situation where all of the conditions for the imposition of a safeguard measure are satisfied.*

The Panel's findings are currently under appeal and a report of the Appellate Body is expected later in 2018. The ultimate outcome of this dispute is of the utmost importance for all future safeguard cases, as the Appellate Body's decision to uphold the definition provided by the Panel would significantly narrow the scope of application of the Agreement on Safeguards.

ii EU – Biodiesel (Indonesia) (DS480): cost adjustments and calculation of profit margin

Introduction

On 28 February 2018, the WTO Dispute Settlement Body (DSB) adopted the Panel Report in *EU – Biodiesel (Indonesia)* (DS480). The Panel Report in that case constitutes a third decision, following the Panel and the Appellate Body Reports in *EU – Biodiesel (Argentina)* (DS473), concerning EU anti-dumping duties on imports of biodiesel. Given the similar facts in both cases, the latest Panel Report largely relies on the findings in the Argentinean case and confirms the interpretation of Article 2.2.1.1 of the Anti-dumping (AD) Agreement in relation to the EU practice of cost adjustments. The Panel Report also provides important clarifications relating to the calculation of a profit margin under 'any other reasonable method' pursuant to Article 2.2.2(iii) of the AD Agreement.

Cost adjustments

The EU's methodology to disregard the exporters' data as included in their records has raised serious concerns as to its compatibility with the AD Agreement and Article VI of the GATT 1994. In recent years, this methodology has been challenged by various WTO members. In *EU – Biodiesel (Argentina)*, the Panel and the Appellate Body made findings on the issue for the first time. The Panel's decision in *EU – Biodiesel (Indonesia)* follows the reasoning

14 Panel Report, *Indonesia – Iron or Steel Products*, paragraphs 7.34–7.40.

of the Panel and the Appellate Body in the Argentinean case and clearly confirms that an investigating authority is not allowed to 'adjust' the costs included in the exporters' records simply because it considers them to be distorted by state intervention.

Article 2.2.1.1 of the AD Agreement provides that when the normal value has to be constructed on the basis of the cost of production plus a reasonable amount for administrative, selling and general (SG&A) costs and for profits:

> *[C]osts 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.*

In *EU – Biodiesel (Indonesia)*, the Panel confirmed that – in accordance with Article 2.2.1.1. – an investigating authority, as a rule, needs to use the records of the investigated producer for the determination of the cost of production and that there are only two circumstances in which an investigating authority can decide not to follow that general rule: first, when those records are inconsistent with the generally accepted accounting principles of the exporting country and, second, when those records do not reasonably reflect the costs associated with the production and sale of the product under investigation.[15]

With regard to the question of whether the records reasonably reflect the costs associated with the production and sale of the product under consideration, the Panel confirmed that it relates to whether the records suitably and sufficiently correspond to or reproduce the costs incurred by the investigated exporter that have a 'genuine relationship' with the production and sale of the specific product under consideration. It does not relate, however, to whether the records reflect some hypothetical costs that might have been incurred under a different set of conditions or circumstances.[16]

In the context of the anti-dumping investigation on biodiesel from Indonesia, the European Commission applied the same rationale as in the case of Argentina for deciding not to use the recorded cost of the main raw material to establish the cost of production of biodiesel, namely that the differential export tax (DET) system depressed the domestic prices of the main raw material to an artificially low level. On that basis, the European Commission held that the costs of crude palm oil (CPO) were not reasonably reflected in the records of the Indonesian producers and thus decided to replace the actual purchase price of CPO as reflected in the producers' records with an international reference price published by the Indonesian authorities.

Like the Panel in *EU – Biodiesel (Argentina)*, the Panel in *EU – Biodiesel (Indonesia)* found that the fact that the DET system allegedly depressed the domestic prices of the main raw material was not a legally sufficient basis for concluding that the Indonesian producers' records did not reasonably reflect the costs associated with the production and sale of biodiesel. On that basis, the Panel upheld Indonesia's claim that the EU acted inconsistently with Article 2.2.1.1 of the AD Agreement by failing to calculate the cost of production of the producers under investigation on the basis of the records kept by the producers.[17]

15 Panel Report, *EU – Biodiesel (Indonesia)*, paragraph 7.20.

16 Panel Report, *EU – Biodiesel (Indonesia)*, paragraphs 7.21–7.22.

17 Panel Report, *EU – Biodiesel (Indonesia)*, paragraphs 7.26–7.27.

The Panel in *EU – Biodiesel (Indonesia)* also confirmed the Panel and the Appellate Body findings in the Argentinean case regarding the requirement under Article 2.2 of the AD Agreement to construct the normal value on the basis of 'the cost of production in the country of origin'. The Panel held that, as was the case in the investigation on imports of biodiesel from Argentina, the European Commission selected a reference price specifically to remove the perceived distortion caused by the Indonesian DET system. Accordingly, in line with the reasoning of the Panel and the Appellate Body in *EU – Biodiesel (Argentina)*, the Panel in the Indonesian case found that the cost of CPO used by the EU authorities was not a cost 'in the country of origin' and thereby that the EU acted inconsistently with Article 2.2 of the AD Agreement and Article VI:1(b)(ii) of the GATT 1994.

Calculation of profit margin

In the context of the anti-dumping investigation into biodiesel from Indonesia, the Commission determined that the amount of profit could not be based on actual data from the sampled companies given that the domestic sales were not considered as being made in the ordinary course of trade. Accordingly, the amount for profit used when constructing the normal value was determined on the basis of 'any other reasonable method' pursuant to Article 2(6)(c) of the Basic Regulation. The Commission determined that 'the reasonable amount of profit that a young and innovative capital intensive industry of this type under normal conditions of competition in a free and open market could achieve' was 15 per cent based on turnover.[18]

Article 2(6)(c) of the Basic Regulation provides that when the amounts for SG&A and for profits to be used in the construction of the normal value cannot be determined on the basis of actual data pertaining to the production and sale, in the ordinary course of trade, of the like product by the exporter or producer under investigation, they can be determined on the basis of 'any other reasonable method', 'provided that the amount for profit so established shall not exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin'. Article 2(6)(c) of the Basic Regulation essentially mirrors the language of Article 2.2.2(iii) of the WTO AD Agreement.

The Panel in *EU – Biodiesel (Indonesia)* found that the EU acted inconsistently with Article 2.2.2(iii) of the AD Agreement because in determining the amount for profits for the Indonesian producers, it failed to determine the profit cap, in other words, 'the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin'.[19] The Panel emphasised that Article 2.2.2(iii) establishes a positive obligation to calculate a profit cap and that an investigating authority may not be excused from that obligation based on the argument that data is not available.[20] The Panel stressed that the obligation to calculate the cap and to further provide details on the cap in the determination is fundamental as without such information interested parties would be unaware of whether the determined amount for profit exceeds the cap or not. According to the Panel, this lack of information would improperly place the burden on interested parties to then try to demonstrate that the chosen amount for profit is in excess of

18 Commission Regulation (EU) No. 490/2013 imposing a provisional anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia, recital 65.

19 Panel Report, *EU – Biodiesel (Indonesia)*, paragraph 7.73.

20 Panel Report, *EU – Biodiesel (Indonesia)*, paragraph 7.51.

the cap as well as on a WTO member representing the exporting producers. The Panel also agreed with Indonesia that in the absence of a firm obligation, the investigating authorities would be incentivised to adopt a passive approach to establishing a profit cap as a way to lessen their obligation under Article 2.2.2(iii) of the AD Agreement.[21]

Importantly, the Panel found that in determining the profit cap, the investigating authority is not allowed to disregard sales considered as not being made in the ordinary course of trade. That is because, according to the Panel, the term 'the profit normally realised' in Article 2.2.2(iii) refers to profits that are regularly or usually realised and does not allow the investigating authorities to enquire into the commercial conditions surrounding the sales.[22] For that reason, the Panel rejected the EU's argument that the term 'normally' means that an investigator may disregard the profit realised on sales that are considered not compatible with normal commercial practice.

The Panel also provided useful clarifications regarding the determination of the same general category of products for the purpose of determining 'the profit normally realised'. The Panel first recognised that Article 2.2.2(iii) does not impose a particular requirement on an investigating authority as to how to define what products fall within 'the same general category'. The Panel then noted that given the aim of Article 2.2.2 to approximate the price of the like product, a reasonable and objective investigating authority may define the same general category of products in a narrow manner. Referring to the panel's findings in *Thailand – H-Beams*, the Panel observed that the use of a broader category of products when defining the same general category of products means that more products other than the like product will be included, which in turn may result in constructed normal value that is less representative of the price of the like product.[23]

Although the Panel did not take issue with the manner in which the European Commission defined the same general category of products in the biodiesel investigation, it found that there were sales of products in the same general category that could have provided a basis to calculate a profit cap. The Panel ultimately concluded that since the EU authorities did not establish, or even attempt to establish the profit cap, the EU acted inconsistently with Article 2.2.2(iii) of the WTO AD Agreement.

Implications

The Panel's findings in *EU – Biodiesel (Indonesia)* are significant for two reasons. First, they confirm the interpretation developed by the Panel and the Appellate Body in *EU – Biodiesel (Argentina)*, namely that the EU's practice of cost adjustments is inconsistent with Article 2.2.1.1 (and Article 2.2) of the AD Agreement. The reasonable period of time for the EU to implement the DSB's recommendations and rulings in that case expires on 28 October 2018. In that context, it should be noted that on 28 May 2018, the European Commission decided to re-open the anti-dumping investigation concerning imports of biodiesel from Indonesia (and Argentina) in order to bring its measures into compliance with the DSB's rulings as well as the 2016 judgments of the General Court. While the European Commission is obliged to drop the cost adjustments in the case of biodiesel, it remains to be seen whether it will use

21 Panel Report, *EU – Biodiesel (Indonesia)*, paragraph 7.51.

22 Panel Report, *EU – Biodiesel (Indonesia)*, paragraphs 7.65 and 7.71.

23 Panel Report, *EU – Biodiesel (Indonesia)*, paragraph 7.62 referring to the Panel Report, *Thailand – H-Beams*, paragraph 7.115.

that methodology in other anti-dumping investigations given that the new EU anti-dumping rules, adopted in December 2017, specifically provide for a possibility to reject the domestic prices and costs in case of 'significant distortions'.[24]

Second, the Panel's findings provide important clarifications with regard to the calculation of a profit margin in the context of constructed normal value. Following the Panel's reasoning, in each case in which an investigating authority decides to determine the profit amount on the basis of any other reasonable method, it needs to calculate a profit cap, understood as 'the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin' and ensure that the amount of profit established in the given investigation does not exceed that cap. The Panel Report appears to suggest that there are no exceptions to that requirement and, in particular, that the investigating authority cannot be excused from the obligation to calculate the profit cap based on the argument that data is not available. The Panel's findings should bring more legal certainty for the investigated producers in the investigations in which a profit margin is established on the basis of 'any other reasonable method'.

iii Russia – Commercial Vehicles (DS479): Definition of the domestic industry and the major proportion method

Introduction

On 9 April 2018, the WTO DSB adopted both the Panel and Appellate Body Reports in *Russia – Commercial Vehicles* (DS479), a dispute concerning the imposition of anti-dumping duties on light commercial vehicles from Germany and Italy by Russia pursuant to Decision No. 113 of 14 May 2013 of the College of the Eurasian Economic Commission (EEC). The Panel Report, which was confirmed on appeal, provides useful clarifications concerning the definition of the domestic industry pursuant to the major proportion method set forth in Article 4.1 of the AD Agreement.

Major proportion method for defining the domestic industry

Pursuant to Article 4.1 of the AD Agreement, the term 'domestic industry' shall be interpreted as 'referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products'. In this sense, an investigating authority can choose between two methods to define the 'domestic industry' in the course of an investigation. It can either take into account the domestic producers as a whole or the domestic producers whose collective output constitutes a major proportion of the total domestic production of those products.

In the present case, the Department for Internal Market Defence of the EEC (DIMD) determined the domestic industry by means of the second method, the 'major proportion' method. When doing so, the DIMD relied on data from only one domestic producer, which represented 87.9 per cent of total production of the like domestic products, because of an alleged lack of correct and verifiable information regarding the second domestic producer.

24 Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union.

The EU argued that the DIMD's method of defining the domestic industry was inconsistent with Articles 3.1 and 4.1 of the AD Agreement, because the exclusion of the second domestic producer led to a risk of materially distorting the injury analysis.[25]

The Panel started its analysis by recalling a member's obligation under Article 4.1 of the AD Agreement. It first highlighted that Article 4.1 of the AD Agreement does not establish a hierarchy between the two different methods for defining the domestic industry.[26] With regard to the 'major proportion' method, the Panel recalled that a 'major proportion' is one that is 'important, serious or significant', but that may be less than 50 per cent of the total domestic production.[27] In addition, the Panel noted that producers may not be left out of the definition of domestic industry on the basis of considerations or selection methods that, by their nature, are likely to distort the subsequent injury determination.[28]

The Panel then moved on to examine the particular circumstances of the case. The Panel first decided that it was not necessary to determine precisely what percentage constitutes 'a major proportion' to satisfy the quantitative element, as this must be decided on the facts of each specific case. In the present case, the Panel concluded that 87.9 per cent share of total production fell well within the quantitative element of a 'major proportion'.[29] However, the Panel recalled that the definition of the domestic industry has both a quantitative and a qualitative aspect. As a result, the quantitative threshold is a necessary but not sufficient condition to define a 'major proportion' of the domestic industry.[30] Under the qualitative element, the methodology of the investigating authority for selecting the domestic industry should not create a risk of material distortion for the injury determination.[31]

According to the Panel, the methodology used by the DIMD raised three concerns:

a the DIMD decided to exclude the second producer after having reviewed that producer's data, which gave an appearance of selecting domestic producers to be included in the definition of the domestic industry so as to ensure a particular outcome;

b the reasons for excluding the second producer were not set out in the investigation report; and

c nothing in Article 4.1 of the AD Agreement suggests that a member may ignore a domestic producer in defining the domestic industry because of alleged 'gaps' in the information provided by that producer to the investigating authority.[32]

For these reasons, the Panel found that Russia had acted inconsistently with Article 4.1 of the AD Agreement and, as a consequence, with Article 3.1 of the AD Agreement.

The Panel nonetheless decided to continue its analysis noting that a more comprehensive set of findings may facilitate implementation in the event its findings are adopted by the DSB. The Panel then addressed what it considered to be an alternative argument put forth by Russia that the DIMD had initially defined the domestic industry as comprising both producers, but subsequently redefined it as comprising only one producer after having

25 Panel Report, *Russia – Commercial Vehicles*, paragraphs 7.4–7.5.
26 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.9.
27 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.11.
28 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.11.
29 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.13.
30 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.15.
31 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.15.
32 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.15.

reviewed the data provided by the excluded producer.[33] In this sense, Russia argued that the 'positive evidence' requirement of Article 3.1 of the AD Agreement constituted another exception to the domestic industry definition set out in Article 4.1, which would allow the investigating authority to exclude a producer from the domestic industry if the data of that producer would allegedly be insufficient.[34] The Panel rejected this interpretation because of the fact that such exception is not expressly provided in Article 4.1 and that nothing else would suggest that Article 3.1 could create an additional exception to Article 4.1. The Panel also noted that nothing in Article 4.1 conditions the definition of the domestic industry on an assessment of the quality of the data provided and that doing so would give rise to a risk of material distortion in the injury analysis.[35] Although the Panel did not find it necessary to make a definitive finding in respect of the possibility or modalities of 'redefinition' of domestic industry under Article 4.1 of the AD Agreement, it did note that nothing in Article 4.1 justifies the use of data problems of the kind identified by Russia to redefine the domestic industry.[36]

Russia subsequently appealed the Panel's findings with regard to the definition of the domestic industry, arguing that an injury determination would be inconsistent with Article 3.1 of the AD Agreement if an investigating authority were to rely on deficient information. The Appellate Body decided that Article 3.1 neither permits nor obliges an investigating authority to leave out producers that provided allegedly deficient data.[37] Indeed, the Appellate Body noted that Article 6 of the AD Agreement provides tools for the investigating authority to seek and obtain additional information from the domestic producers that have provided allegedly deficient information.[38] Thus, the deficiency of information need not have a bearing on whether a domestic producer can be included in the definition of the domestic industry, or on whether the requirements of Article 3.1 have been met. Hence, the requirement in Article 3.1 that an investigating authority must conduct an 'objective examination' does not support the proposition that domestic producers providing allegedly deficient information may be left out of the definition of domestic industry. Instead, the Appellate Body, relying on Article 3.1, explained that an investigating authority must not act so as to give rise to a material risk of distortion in the injury analysis when defining the domestic industry.[39]

Finally, Russia took issue with the Panel's statement that defining the domestic industry only after having examined the information submitted by the domestic producers would result in an appearance of selecting which domestic producers form the domestic industry based on the information they provided to the investigating authority.[40] The Appellate Body decided that Articles 3.1 and 4.1 of the AD Agreement do not prevent an investigating authority from initially examining the information submitted by the domestic producers before defining the domestic industry, to the extent that the information submitted or collected is pertinent to defining the domestic industry.[41] However, as the Panel's reasoning

33 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.18.
34 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.21.
35 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.21.
36 Panel Report, *Russia – Commercial Vehicles*, paragraph 7.26.
37 Appellate Body Report, *Russia – Commercial Vehicles*, paragraph 5.21.
38 Appellate Body Report, *Russia – Commercial Vehicles*, paragraph 5.22.
39 Appellate Body Report, *Russia – Commercial Vehicles*, paragraph 5.23.
40 Appellate Body Report, *Russia – Commercial Vehicles*, paragraph 5.30.
41 Appellate Body Report, *Russia – Commercial Vehicles*, paragraph 5.34.

was, according to the Appellate Body, more nuanced than what Russia argued, the Appellate Body did not find any error in the Panel's interpretation and application of Articles 3.1 and 4.1 of the AD Agreement.[42]

Implications

The Panel and Appellate Body's findings in *Russia – Commercial Vehicles* further clarify the WTO disciplines concerning the definition of the 'domestic industry' and, more precisely, the 'major proportion' method set out in Article 4.1 of the AD Agreement. By upholding the Panel's finding that the domestic industry's definition was inconsistent with Article 4.1 of the AD Agreement, even though the producer included in the domestic industry represented 87.9 per cent share of total domestic production, the Appellate Body reaffirmed the importance of the qualitative aspect of the 'major proportion' requirement, showing that even if the producers included in the domestic industry represent a very large share of the total domestic production, the domestic industry's determination may still be found to be inconsistent with the requirements of the AD Agreement. It is also interesting to note that, according to the Appellate Body, the qualitative aspect of the 'major proportion' method is concerned with ensuring that the domestic producers of the like product that are included in the domestic industry are representative of the total domestic production.[43] In that sense, the Appellate Body appears to have gone a step further than in *EC – Fasteners*, a previous dispute dealing at length with the definition of domestic industry pursuant to Article 4.1, in which the Appellate Body held that 'a major proportion' should be properly understood as a relatively high proportion of the total domestic production that substantially reflects the total domestic production.[44]

The findings in *Russia – Commercial Vehicles* are also relevant as they clarify that an investigating authority is not allowed to exclude domestic producers from the definition of the domestic industry on the ground that they have provided allegedly deficient or insufficient information. The reason for this is that such exclusions would create a material risk of distortion in the injury analysis. Indeed, the non-inclusion of this category of producers could make the domestic industry definition no longer representative of the total domestic production, thereby undermining the accuracy of the injury analysis.

iv EU — Fatty Alcohols (Indonesia) (DS442): fair comparison between the normal value and the export price

Introduction

On 16 December 2016, the WTO DSB adopted the Panel Report in *EU — Fatty Alcohols (Indonesia)* (DS442), a dispute concerning the anti-dumping measures imposed by the EU on imports of Indonesian fatty alcohols. The Panel Report, the findings of which were subsequently confirmed on appeal, contains several important findings with implications going beyond this specific dispute. In particular, the Report provides useful clarifications concerning the treatment of transactions between closely-related companies in conducting a fair comparison between the normal value and the export price under Article 2.4 of the AD Agreement.

42 Appellate Body Report, *Russia – Commercial Vehicles*, paragraph 5.36.

43 Appellate Body Report, *Russia – Commercial Vehicles*, paragraph 5.27.

44 Appellate Body Report, *EC – Fasteners* (China), paragraphs 412 and 419.

Fair comparison between the normal value and the export price

Pursuant to Article 2.4 of the AD Agreement, an investigating authority must conduct a fair comparison between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Article 2.4 further provides that in order to make a fair comparison, the investigating authority shall make due allowances for differences affecting price comparability. The question before the Panel in *EU – Fatty Alcohols (Indonesia)* was whether a price mark-up between closely-related companies can affect price comparability and can, thus, require an adjustment.

In the present case, the EU authorities had determined that a mark-up received by a related trader based in Singapore on sales to the EU was a difference affecting prices and price comparability of the product under investigation. The EU authorities had therefore made a downward adjustment to the export price charged by the trader before comparing the export price with the normal value to establish the dumping margin.

Indonesia argued that an internal allocation of funds within a 'single economic entity' that does not reflect an actual expense and is not reflected in the producer's pricing decision cannot be a difference that affects price comparability within the meaning of Article 2.4 of the AD Agreement.[45] Accordingly, for Indonesia, the mark-up received by the Singapore-based trader was not a difference affecting price comparability but merely a way of allocating profits within a single economic entity. Indonesia asserted that the dividing line between an actual expense that affects price comparability and an internal shifting of funds is whether the transaction took place within a single economic entity.[46]

The Panel was not convinced that the existence of a 'single economic entity' could be dispositive in and of itself of whether a mark-up qualifies as a difference that affects price comparability under Article 2.4 of the AD Agreement. In that regard, the Panel noted that two entities can still transact at arm's-length regardless of their close relationship and that, even for non-arm's-length transactions, expenses incurred need to be recovered through pricing and can thus affect price comparability.[47]

In this case, the Panel understood that the mark-up paid was intended to compensate the trader for the expenses it incurred for its involvement in the relevant sales. Hence, the Panel reached the conclusion that these transactions between these two closely-related companies did constitute an actual expense.[48]

Similarly, the Panel concluded that a payment cannot be considered as not constituting a difference that affects price comparability simply because the economic benefit of the sale accrues to the single economic entity as a whole. According to the Panel, the fact that the benefit might accrue to an overall entity does not negate the possibility that a given expense that is tied only to export or domestic sales (or to both in different amounts) could be incurred within that entity, with the potential to affect price comparability.[49]

Based on the text of Article 2.4 of the AD Agreement, which refers to due allowances being made in 'each case on its merits', the Panel concluded that the difference between:

45 Panel Report, *EU – Fatty Alcohols (Indonesia)*, paragraph 7.99.
46 Panel Report, *EU – Fatty Alcohols (Indonesia)*, paragraph 7.100.
47 Panel Report, *EU – Fatty Alcohols (Indonesia)*, paragraph 7.103.
48 Panel Report, *EU – Fatty Alcohols (Indonesia)*, paragraph 7.104.
49 Panel Report, *EU – Fatty Alcohols (Indonesia)*, paragraph 7.105.

> *(a) an internal allocation of funds within a single economic entity which is not reflected in the producer's pricing decision; and (b) an expense that is linked to either the export side or the domestic side or to both sides but with different amounts such that price comparability is affected, is dependent on the particular situation and evidence before an investigating authority in a given case where the proper characterization of the payment in question is at issue.*[50]

Thus, a reference to the concept of a 'single economic entity' as the determinative factor was not warranted.

The Panel then moved on to consider whether the EU authorities erred in their determination based on the above test. The Panel concluded that the evidence put before the EU authorities was not conclusive that the mark-up was an internal allocation of funds within a single economic entity that is not reflected in the producer's pricing decision. Therefore, it rejected Indonesia's claim that the EU authorities acted inconsistently with Article 2.4 of the AD Agreement.[51]

These findings were later confirmed by the Appellate Body. Before the Appellate Body, Indonesia argued that the Panel erred in its interpretation of Article 2.4 of the AD Agreement because the legal standard it articulated did not contain a reference to the concept of a 'single economic entity'.[52] Relying on the text of Article 2.4, the Appellate Body rejected this line of argument[53] and confirmed that the existence of a close relationship between companies would be pertinent to the extent that it affects the relevant transactions in such a way as to affect the comparability of the export price and the normal value.[54]

Implications

The Panel and Appellate Body's findings in *EU – Fatty Alcohols (Indonesia)* further clarify the WTO disciplines concerning the requirement of 'fair comparison' between the normal value and the export price and the circumstances in which an investigating authority is required to make adjustments for differences affecting price comparability. In particular it has been clarified that the existence of a 'single economic entity' does not automatically mean that price comparability between export price and normal value cannot be affected and that adjustments are therefore unwarranted. These findings, while made with regard to the specific measures imposed by the EU, are likely to also have an impact on the practice of other WTO members in anti-dumping investigations.

III OUTLOOK

i Challenges faced by the WTO Appellate Body

The WTO Appellate Body is facing the risk of no longer being able to 'promptly' settle the disputes brought before it. While the challenges facing the Appellate Body are partially linked to the increasing number and complexity of the appeals brought by the WTO members, the root cause of the current crisis is the United States' decision to block the appointment of new Appellate Body members.

50 Panel Report, *EU – Fatty Alcohols (Indonesia)*, paragraphs 7.106–7.107.

51 Panel Report, *EU – Fatty Alcohols (Indonesia)*, paragraphs 7.108–7.111.

52 Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, paragraph 5.26.

53 Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, paragraphs 5.26–5.34.

54 Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, paragraphs 5.33 and 5.44–5.45.

Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) provides that the Appellate Body shall be composed of seven members, which are appointed by the WTO DSB. Each member is appointed for a term of four years, with the possibility of an extension for one further four-year term. As DSB decisions are taken by consensus, the formal objection by any WTO member can prevent the (re-)appointment of an Appellate Body member.

The United States' refusal to support the appointment of new Appellate Body members is based on two main grounds, which, according to the United States, put into question the legitimacy of the Appellate Body.

Rule 15 of the Working Procedures for Appellate Review

First, the United States argues that departing Appellate Body members should, once their mandate expires, no longer be allowed to complete the work on pending appeals.

While the DSB nominates the seven Appellate Body members, it is the Appellate Body itself that has the discretion to extend – pursuant to Rule 15 of the Working Procedures for Appellate Review – the mandate of a person who ceases to be an Appellate Body member in order to 'complete the disposition of any appeal to which that person was assigned while a member'. When doing so, the Appellate Body merely has to notify the DSB of such an extension.

Taking into account the increasing caseload before the Appellate Body and the benefits of efficiency and continuity that arise from Rule 15, these extensions were – in the past – usually granted without comment or controversy in the DSB. Recently, however, the time needed to finalise appeals has increased considerably. As a result, the extensions granted to former Appellate Body members pursuant to Rule 15 are now longer than was usual in the past.

According to the United States, the DSB has a responsibility under the DSU to decide whether a person whose mandate has expired should continue serving on the Appellate Body, and should exercise greater control in this regard. The United States argues that the fact that Rule 15 is not comprised in the text of any of the WTO covered agreements indicates that such rule has not been agreed upon by all WTO members. While the United States considers that members need to resolve this issue before being able to move forward, several other members (including the EU) are of the opinion that the resolution of the United States' concerns should not be linked to launching the selection process for the appointment of new Appellate Body members.

Judicial activism

Second, the United States denounces the independence that the Appellate Body has gradually acquired, taking issue with the alleged 'judicial activism' of the Appellate Body.

The United States accuses the Appellate Body of going far beyond the limits of its mandate by, among other matters:

a creating new WTO obligations through its interpretation of the WTO covered agreements;

b issuing findings on matters that have not been raised by the parties to the dispute or that are not essential to the resolution of the dispute; and

c excessively relying on the Appellate Body Secretariat, owing to the alleged lack of legal expertise of some of the Appellate Body members.

According to the US Trade Representative, Robert Lighthizer:

> *[T]he WTO is losing its essential focus on negotiation and becoming a litigation-centered organisation. Too often members seem to believe they can gain concessions through lawsuits that they could never get at the negotiating table.*[55]

Consequences of the current deadlock

If the current deadlock continues, the security and predictability of the multilateral trading system are bound to be jeopardised. Indeed, the United States' decision to block (re-) appointments has left the Appellate Body with only four members[56] to deal with the growing number of appeals. Mr Hyun Chong Kim (Korea) resigned from the Appellate Body on 1 August 2017, while Mr Ricardo Ramírez Hernández (Mexico) and Mr Peter Van den Bossche (Belgium) completed their second terms of office on, respectively, 30 June 2017 and 11 December 2017.[57] Mr Shree Baboo Chekitan Servansing's mandate is due to end on 30 September 2018 while the terms of the remaining three Appellate Body members will expire on 10 December 2019 (Mr Bhatia and Mr Graham) and 30 November 2020 (Mrs Zhao).

At the time of writing, over 10 attempts by the DSB to fill these three vacancies have failed. Moreover, unless the United States reconsiders its resistance to new appointments by September 2018, the number of members will be further reduced to three. This lack of members logically affects the functioning of the (normally seven-membered) Appellate Body, rendering the WTO dispute settlement mechanism increasingly inoperable. Indeed, once the Appellate Body has only three members, the legal parameters within which an appeal may be treated will become highly uncertain. For example, although a division could still be assigned to hear the appeal, it will no longer be possible to organise an exchange of views, as provided for by the Working Procedures for Appellate Review, with other Appellate Body members or to ensure rotation among Appellate Body members, as required by Article 17.1 of the DSU.

Options for breaking the current deadlock

Despite informal consultations on the launch of selection processes for new Appellate Body members, which are ongoing at both the political and the technical level, there are no obvious signs of progress among the WTO members. The United States continues to block the appointment process and has not yet submitted a formal proposal on what steps, from its perspective, are needed to allow the process to move forward.

55 See the 'Opening Plenary Statement of USTR Robert Lighthizer at the WTO Ministerial Conference', available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/opening-plenary-statement-ustr.

56 The four current Appellate Body members are: Mr Ujal Singh Bhatia (India, 2011–2019); Mr Thomas R Graham (United States, 2011–2019); Mr Shree Baboo Chekitan Servansing (Mauritius, 2014–2018); and Ms Hong Zhao (China, 2016–2020).

57 In line with Rule 15 of the Working Procedures for Appellate Review, Mr Ricardo Ramírez Hernández and Mr Peter Van den Bossche continued to complete the appeals they were assigned while they were still members of the Appellate Body once their mandate had expired.

The latest proposal, introduced by Mexico on behalf of 65 WTO members, refers to 'the urgency and importance of filling the vacancies in the Appellate Body'.[58] To enable the Appellate Body to properly carry out its functions, the WTO members propose that the DSB:

a launches three selection processes to fill the three current vacancies;

b establishes a Selection Committee, composed of the Director-General and the Chairpersons of the General Council, the Goods Council, the Services Council, the TRIPS Council and the DSB, to be Chaired by the DSB Chair;

c sets a deadline of a 30-day period after the date of its decision, for members to submit nominations of candidates; and

d requests the Selection Committee to carry out its work in order to make recommendations to the DSB within 60 days of the deadline for submitting nominations of candidates. However, the United States does not support this proposal.

Taking into account the lack of progress, several options for breaking the current deadlock have been circulated. These have included proposals:

a to directly appoint the new Appellate Body members using majority voting, either in the DSB or in the General Council;

b to establish a new agreement on dispute settlement outside the WTO, negotiated by a coalition of willing states;

c to modify the procedural rules of the Appellate Body, by denying new appeals if the terms of three or more Appellate Body members have expired or by prohibiting Appellate Body members from sitting on new appeals after the expiry of their mandate; or

d to use the arbitration process under Article 25 of the DSU as a temporary solution to enable appeals of panel reports.

However, the likelihood of any of these options materialising in the near future appears to be slim. In addition, it remains to be seen whether the United States' decision to block new Appellate Body appointments is an isolated event, or whether the United States is laying the groundwork for a more fundamental attack on the WTO's dispute settlement system.

ii EU – Price Comparison Methodologies (DS516): China's 'as such' challenge against the EU's previous anti-dumping legislation

Section 15(a)(ii) of China's WTO Accession Protocol

Upon its accession to the WTO in 2001, China agreed to be bound by a number of obligations in addition to those applicable to all WTO members. Key among these obligations, which were included in China's WTO Accession Protocol, was the possibility for other WTO members to disregard domestic prices and costs in China for the determination of the normal value in the context of anti-dumping investigations for a transitional period of 15 years from the date of China's accession, namely, until 11 December 2016.

Section 15(a)(ii) of China's WTO Accession Protocol indeed provides that '[t]he importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly

58 See WTO, Dispute Settlement Body, 'Appellate Body Appointments', 16 February 2018 (WT/DSB/W/609/Rev.2).

show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product', and Section 15(d) of the Accession Protocol clarifies that '[i]n any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession'.

Pursuant to Section 15(d) of the Accession Protocol, the alternative methodologies contained in Section 15(a)(ii) automatically expired on 11 December 2016 and, thus, that the EU was under the obligation to modify its anti-dumping legislation in order to reflect the changed legal framework resulting from the expiry of part of China's WTO Accession Protocol by 11 December 2016 at the very latest.

China's 'as such' challenge on 12 December 2016

On 12 December 2016, owing to the EU's failure to modify its domestic legislation so as to reflect the change in China's market economy status in a timely manner, China launched an 'as such' challenge against the EU's Basic Anti-Dumping Regulation that was applicable at that moment in time (Regulation (EU) 2016/1036[59]). In essence, China is arguing that the treatment that the EU continues to afford to Chinese imports under Article 2(7) of Regulation (EU) 2016/1036 (i.e., the continued application of alternative normal value methodologies) is inconsistent with the WTO covered agreements as of 12 December 2016.[60]

More precisely, China argues that Articles 2(1) to 2(7) of Regulation (EU) 2016/1036[61] are inconsistent with the principle of most-favoured nation treatment contained in Article I:1 of the GATT 1994, as these provisions provide for differential treatment of Chinese imports as compared to imports from other WTO members. In addition, China argues that Article 2(7) of Regulation (EU) 2016/1036 is – as such – inconsistent with Articles 2.1 and 2.2 of the AD Agreement. Article 2(7) expressly required the EU investigating authority to reject Chinese market prices and costs when calculating normal value in favour of third country prices and costs, unless the Chinese exporter can demonstrate that it operates under market economy conditions.

New EU anti-dumping methodology: Regulation (EU) 2017/2321

Subsequent to China's panel request, the EU published its new anti-dumping methodology (Regulation (EU) 2017/2321[62]) in the Official Journal on 19 December 2017. The purpose of this amendment was precisely to bring the EU's Basic Anti-Dumping Regulation in line with the changes resulting from China's WTO Accession Protocol. Through the addition of a new

59 Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (codification).

60 See DS516, *EU – Price Comparison Methodologies*, document WT/DS516/1.

61 Articles 2(1) to 2(6) of Regulation (EU) 2016/1036 set forth the standard rules in EU law for calculating normal value in anti-dumping proceedings. In contrast, Article 2(7) of Regulation (EU) 2016/1036 sets out a different regime applicable to the calculation of normal value for imports from 'non-market economy' countries. Article 2(7)(b), which expressly names China, provided that the rules set forth in Articles 2(1) to 2(6) shall only apply if the concerned producer is able to substantiate that 'market economy' conditions prevail in respect of the manufacture and sale by that producer of the like product concerned. To do so, the producer must establish that it meets the criteria set out in Article 2(7)(c).

62 Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union.

Paragraph 6a to Article 2 of the Basic Anti-Dumping Regulation, the EU introduced a new methodology for establishing normal value in case of 'significant distortions' in the market of the exporting country, which render the use of domestic prices and costs in that country inappropriate. Formally, the new EU methodology thus provides for a country-neutral approach, abolishing the former distinction between market and non-market economies. Instead, the new methodology now applies to all countries where 'significant distortions' are deemed to exist.

While China, in its request for consultations and its panel request, attempted to include the new EU anti-dumping methodology within the terms of reference of the Panel,[63] the EU argues that the Panel cannot issue findings with respect to those new rules.

As this case is still ongoing, one can currently merely speculate about the Panel's findings. While China appears to have strong arguments regarding the WTO inconsistency of the old EU anti-dumping methodology (Regulation (EU) 2016/1036), it appears rather unlikely that the Panel in DS516 will find that the new EU anti-dumping methodology (Regulation (EU) 2017/2321) falls within its terms of reference. If the new methodology is not properly within the Panel's terms of reference, a victory for China would, to a large extent, be a political one. While findings of inconsistency of the old EU methodology could have an impact on other WTO members, which have not yet amended their domestic legislation so as to reflect the change in China's market economy status[64], China would have to initiate a separate challenge against the new EU anti-dumping legislation in order to obtain findings with regard to its WTO consistency. The Panel report in DS516 is expected to be issued by the end of 2018.

IV CONCLUSIONS

As the developments in the case law confirm, overall the WTO dispute settlement mechanism continues to fulfil its role of enhancing the security and predictability of the multilateral trading system. This is particularly true in the domain of trade defence measures, which constitute by far the most litigated subject before panels and the Appellate Body.

The clarifications brought about by the panels and Appellate Body in the disputes discussed in Section II are likely to have significant implications for the practice of WTO members in trade defence investigations. In particular, the findings concerning cost adjustments, calculation of a profit margin and determination of domestic industry are likely to circumscribe the discretion that investigating authorities currently enjoy in the

63 In its request for consultations and panel request, China mentioned that its challenge 'also concerns any modification, replacement or amendment to [EU anti-dumping legislation], and any closely connected, subsequent measures'. China explicitly notes that it was aware of the EU's on-going legislative processes implicating potential changes to relevant provisions of the Basic Anti-Dumping Regulation and stated that its complaint 'includes any changes made to the Basic Regulation pursuant to the legislative processes initiated by [the proposals of the European Commission]'.

64 See, for example, the United States. While China, on 12 December 2016, also filed a request for consultations targeting the US' anti-dumping legislation, China has – to date – not yet filed a panel request in the US case. China appears to be prioritising its challenge to the EU's anti-dumping legislation, potentially because an easier victory against the EU could set a favourable precedent for a tougher case against the United States.

context of anti-dumping investigations. Furthermore, the findings regarding the notion of 'safeguard measures', if confirmed by the Appellate Body, will significantly narrow the scope of application of the Agreement on Safeguards.

The current crisis relating to the appointment of new Appellate Body members puts at risk the future development of WTO case law and the role of the dispute settlement system once described as the jewel in the crown of the WTO. If the members do not find a solution for filling the vacancies in the coming months, the handling of current and future appeals will be seriously disturbed. This, in turn, might have serious consequences for trade relations between WTO members and the credibility of the WTO dispute settlement mechanism.

Finally, the end of 2018 may bring the much needed clarifications regarding the concrete implications of the expiry of Section 15(a)(ii) of China's Accession Protocol. Although the outcome of the dispute between China and the EU will have a mostly political significance, given that the EU has in the meanwhile amended its anti-dumping rules, the victory would help China to challenge the measures of other WTO members that continue to treat it as a non-market economy. It may also further exacerbate the already negative attitude of the US towards the WTO dispute settlement system.

ABOUT THE AUTHORS

PHILIPPE DE BAERE

Van Bael & Bellis

Philippe De Baere has been a partner in Van Bael & Bellis' Brussels office since 1992. His practice focuses on EU and WTO trade law as well as EU customs law and export controls.

He has been involved in most major EU anti-dumping, anti-circumvention and anti-subsidy proceedings since 1990. In this field, he has represented numerous clients before the European Commission, the European Court of Justice (now the Court of Justice of the European Union), WTO Panels and the WTO Appellate Body.

In the field of international trade law, he has assisted WTO members in numerous WTO dispute settlement proceedings, including *Ukraine – Definitive Safeguard Measures on certain Passenger Cars* (DS468) and *EC – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* (DS397). In this latter dispute, he obtained an unprecedented finding that the EU's Basic Anti-dumping Regulation was 'as such' incompatible with the EU's WTO obligations.

Philippe De Baere regularly lectures at the Carlos III University of Madrid (UC3M) and the University of Leuven (KUL).

VAN BAEL & BELLIS

Chaussée de la Hulpe, 166
1170 Brussels
Belgium
Tel: +32 2 647 73 50
Fax: +32 2 640 64 99
phdebaere@vbb.com
www.vbb.com

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