

THE INTERNATIONAL  
TRADE LAW  
REVIEW

FIFTH EDITION

**Editors**

Folkert Graafsma and Joris Cornelis

THE LAWREVIEWS

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TRADE LAW  
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This article was first published in September 2019  
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Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

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ISBN 978-1-83862-054-7

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

# ACKNOWLEDGEMENTS

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

ACTECON

ATSUMI & SAKAI

CROWELL & MORING LLP

DEMAREST ADVOGADOS

DUA ASSOCIATES

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# PREFACE

We vividly remember that when we were young(er), we were told that time would go faster as we got older. With the impetuosity of youth, we dismissed this as nonsense, but – like many things told when young – it has proven to be true. We say this because the five years during which we have been editors has really flown. Yet, in this short period, the dynamics of trade have fundamentally changed in a disturbing manner. By means of illustration, we look at three trade-shattering events, starting with a regional one and moving on to two more fundamental problems.

First, as also noted last year, the spectre of Brexit is looming ever closer. With the EU stepping up its preparations to confront a ‘hard’ Brexit, the United Kingdom appears to refuse to face that possibility and continues to sleepwalk into the abyss, at least that is, respectfully, our modest continental view.

Second, the dynamics of the interwoven jumbo economy of ‘Chimerica’ continue to be rewritten and deteriorate as we speak, with trade policies being abused as instruments to meet political goals.<sup>1</sup> And even if a ‘good, fair and “largest ever” deal’ were clinched, the painful repercussions of all unnecessary rhetoric and bellicose escalations may take years to normalise.

Third, and arguably even more fundamental, the asphyxiation of the Appellate Body slowly continues, despite multiple attempts by over 20 members to rewrite the Appellate Review process and find creative solutions. Unfortunately, the deadline of 10 December 2019 is, at the time of going to press, only three months away. After that day, members can no longer claim their ‘ticket’ for a proper traditional Appellate Review, thereby putting the continued existence of one of the best international dispute settlement systems in doubt. As Professor Van den Bossche rightly pointed out: ‘[H]istory will not judge kindly those responsible for the collapse of the WTO dispute settlement system.’<sup>2</sup>

In this regard we underline the desire that some have rightfully expressed: if only we could press a reset button so that 1995 could start again! The trade world at the time was full of desire to move from its power-oriented regime into a rules-based system. Hence, the leap from the GATT to the WTO was made, along with, most notably, the creation of the

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1 As one example, we recall record duties being unilaterally imposed, with no plausible *prima facie* legal justification – also setting a bad example to other members.

2 Farewell speech by Professor Peter Van den Bossche, former Presiding Member of the Appellate Body. See [www.wto.org/english/tratop\\_e/dispu\\_e/farwellspeech\\_peter\\_van\\_den\\_bossche\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm).

Appellate Body. Now, with that priceless institution on the brink, we continue to hope for a last-minute solution.<sup>3</sup>

In short and simplistic terms, trade law, born and grown after the Second World War, appears to be aging. While some might say that this is part of adolescence, others would argue that we are in the midst of a full-blown mid-life crisis. Whichever it is, we find ourselves in an undefined status, with increased decision-making, increased pressures and a search for a new self.

Returning to the specifics of this fifth edition, we wish to warmly thank our ever-faithful contributors. Once again, they have very nicely described, summarised and analysed all the main events in their respective key jurisdictions. Notably we wish to thank two new guest contributors, Michael-James Clifton and Pekka Pohjankoski, both from the bench, for opening up whole new perspectives and dynamics for *The International Trade Law Review*. And, on a closing note, as before, we wish to thank our publishers and, especially, our ever-growing and active audience who have supported us throughout this first lustrum.

Having said all that, we remain deeply committed to this publication in these challenging times and we wish you all happy reading.

**Folkert Graafsma and Joris Cornelis**

VVGB Advocaten

Brussels

August 2019

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3 The irony being that the people who are currently shutting down the system have an open nostalgia as well, except that they wish to time-travel back further, to the pre-1995 power-based system, convert the WTO into the GATT, and eliminate the Appellate Body.

# WORLD TRADE ORGANIZATION

*Philippe De Baere*<sup>1</sup>

## I INTRODUCTION

The World Trade Organization (WTO) provides a comprehensive set of rules that reflects a balance of rights and obligations carefully negotiated by the WTO members. While WTO members must honour their multilateral trade commitments, WTO rules recognise the right of each WTO member to pursue public policy objectives and adopt measures that may restrict trade, subject to a number of conditions laid down in the WTO agreements. 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 (GATT 1994).

The WTO agreements also contain a comprehensive set of rules related 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,<sup>2</sup> the Agreement on Subsidies and Countervailing Measures<sup>3</sup> 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 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 the WTO agreements have been clarified over the years by WTO panels and the Appellate Body. While WTO members have invoked general exceptions in many cases and disputes relating to trade remedies constitute over half of all disputes initiated since the establishment of the WTO in 1995,<sup>4</sup> until now, members have generally refrained from invoking the security exceptions in WTO disputes.

Section II of this chapter will discuss some of the key developments of WTO jurisprudence over the past year. Those developments include a landmark panel ruling on the justiciability of security exceptions and the standard of review under Article XXI of the GATT

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1 Philippe De Baere is a managing partner at Van Bael & Bellis. This chapter was written with the help of 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, 293 out of 573 disputes initiated between 1995 and 2018 involved claims under the AD Agreement, the SCM Agreement or the Agreement on Safeguards.

1994, the Appellate Body's approach to excess remissions arising from the duty drawback schemes for the purpose of imposing countervailing duties, as well as the panel's finding on permissibility of zeroing in targeted dumping investigations. Finally, Section III will then address recent proposals to deal with the WTO Appellate Body deadlock and introduce the EU proposal for an interim appeal arbitration. This chapter concludes with a discussion of the international reaction to the additional import duties imposed by the United States on steel and aluminium products under Section 232 of the Trade Expansion Act of 1962.

## II SIGNIFICANT LEGAL DEVELOPMENTS

### i Russia – Traffic in Transit

#### *Introduction*

On 26 April 2019, the WTO Dispute Settlement Body (DSB) adopted the Panel Report in *Russia – Traffic in Transit*, a landmark case dealing with the security exceptions under Article XXI of the GATT 1994. This is the first dispute in which the Panel has been asked to interpret Article XXI(b)(iii) of the GATT 1994 and, more importantly, to establish whether Article XXI is a completely 'self-judging' provision or whether there is room for an objective determination by WTO adjudicating bodies as to whether a WTO member has properly invoked the security exceptions.

In this dispute, Ukraine challenged a number of transit restrictions and bans, imposed by the Russian Federation since 2014, in connection with the transit of goods from Ukraine through the Russian territory to the territory of third countries, including Kazakhstan and the Kyrgyz Republic. Ukraine claimed that these measures were inconsistent, among others, with the obligations of the Russian Federation under Article V of the GATT 1994 and related commitments in Russia's Accession Protocol. Instead of addressing Ukraine's substantive claims, the Russian Federation invoked Article XXI(b)(iii) of the GATT 1994 and argued that its measures were necessary for the protection of its essential security interests. The Russian Federation further argued that Article XXI of the GATT 1994 is totally 'self-judging' and, consequently, the Panel lacked jurisdiction to address any of the substantive issues in that case.<sup>5</sup>

#### *Justiciability of security exceptions*

Article XXI of the GATT 1994 provides as follows:

*Nothing in this Agreement shall be construed*

*(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or*

*(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests*

*(i) relating to fissionable materials or the materials from which they are derived;*

*(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;*

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

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<sup>5</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.1-7.4, 7.23.

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Based on the language of Article XXI of the GATT 1994, the Russian Federation argued that ‘the explicit wording of Article XXI confers sole discretion on the member invoking this Article to determine the form, design and structure of the measures taken pursuant to Article XXI.’<sup>6</sup> Consequently, according to the Russian Federation ‘both the determination of a member’s essential security interests and the determination of whether any action is necessary for the protection of a member’s essential security interests are at the sole discretion of the member invoking the provision.’<sup>7</sup>

Ukraine argued that Article XXI of the GATT 1994 is ‘an affirmative defence for measures that would otherwise be inconsistent with GATT obligations’ and does not provide for an exception to the rules on jurisdiction. Ukraine also cautioned that if Article XXI of the GATT 1994 were to be considered non-justiciable and hence excluded from the jurisdiction of WTO panels and the Appellate Body, it would suffice for a WTO member to invoke the security exceptions and this would automatically decide the outcome of the dispute.<sup>8</sup> Hence, according to Ukraine, a Panel is called upon to make an objective assessment as to whether the actions were taken in time of war or other emergency in international relations under Article XXI(b)(iii) of the GATT 1994 and whether a member invoked Article XXI in good faith.<sup>9</sup>

All third parties, save the United States, supported the justiciability of Article XXI’s invocation.<sup>10</sup> Notably, the United States, while recognising that the Panel has jurisdiction within the meaning of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), argued that the dispute as such was ‘non-justiciable’. The United States based its position in particular on the language of Article XXI(b) of the GATT 1994, which refers to actions by a WTO member ‘which it considers necessary for the protection of its essential security interests’.<sup>11</sup>

The Panel agreed with Ukraine and found that Article XXI(b) is not ‘totally self-judging’ as asserted by the Russian Federation.<sup>12</sup> Based on textual and contextual interpretation, the Panel first found that Article XXI(b) of the GATT 1994 contains three alternative, rather than cumulative, clauses that limit the scope of paragraph (b). Namely, national security actions under this provision must relate to fissionable materials, or relate to traffic in arms or be taken in time of war or other emergency in international relations. As regards the subparagraph (iii) of Article XXI(b), the Panel further found that the temporal element of the action taken to protect essential security interests (i.e., ‘in time of war or other emergency in security relations’), as well as the factual circumstances that amount to a war or emergency in international relations are ‘amenable to objective determination’.<sup>13</sup> The Panel noted that ‘as the existence of an emergency in international relations is an objective state of affairs, the determination of whether the action was “taken in time of” an “emergency in international

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6 Panel Report, *Russia – Traffic in Transit*, para. 7.28.

7 Panel Report, *Russia – Traffic in Transit*, para. 7.27.

8 Panel Report, *Russia – Traffic in Transit*, para. 7.31.

9 Panel Report, *Russia – Traffic in Transit*, paras. 7.32-7.33.

10 Panel Report, *Russia – Traffic in Transit*, paras. 7.35-7.52.

11 Panel Report, *Russia – Traffic in Transit*, paras. 7.51-7.52.

12 Panel Report, *Russia – Traffic in Transit*, para. 7.102.

13 Panel Report, *Russia – Traffic in Transit*, paras. 7.68-7.71.

relations” under subparagraph (iii) of Article XXI(b) is that of an objective fact, subject to objective determination<sup>14</sup>. The Panel found further support for this interpretation in the object and purpose of the GATT 1994 and the WTO Agreement and the negotiating history of the GATT 1947.<sup>15</sup> The Panel additionally concluded that no subsequent practice by WTO members establishing an agreement between them regarding the interpretation of Article XXI, and in particular its interpretation as a ‘self-judging’ provision, has been developed.<sup>16</sup>

Importantly, the Panel defined ‘emergency in international relations’ as ‘a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state’, which gives rise to particular types of interests for the member invoking this defence, ‘i.e. defence or military interests, or maintenance of law and public order interests.’<sup>17</sup> This definition means that actions taken by WTO members for the protection of economic welfare of domestic industries, where no such ‘emergency of international relations’ exists, cannot benefit from the exception clause under Article XXI(b) (iii) of the GATT 1994.

Ultimately, the Panel concluded that because Article XXI(b) of the GATT 1994 is not totally self-judging, the Panel had jurisdiction to review the Russian Federation’s invocation of this provision. It also rejected the United States’ argument that the invocation of Article XXI(b)(iii) was ‘non-justiciable’.<sup>18</sup>

### ***Standard of review under the chapeau of Article XXI(b): deference subject to a good faith obligation***

Having established that Article XXI(b) is justiciable and that the requirements listed in subparagraphs (i) to (iii) are subject to an objective determination, the Panel turned to the analysis of the introductory clause of Article XXI(b) of the GATT 1994. In this regard, the Russian Federation argued that the clause ‘which it considers necessary’ refers to both the determination of the invoking member’s essential security interests, where WTO members enjoy wide discretion, and the necessity of the measure for the protection of those interests.<sup>19</sup>

The Panel determined that ‘essential security interests’ is a narrower concept as compared to ‘security interests’ and ‘may be generally understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally’.<sup>20</sup> While the Panel agreed that ‘it is left, in general, to every WTO member to define what it considers to be its essential security interests’, it also noted that WTO members are not free to elevate any concern to that of an ‘essential security interest’ and that this discretion is limited by a member’s obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith.<sup>21</sup> In particular, ‘[t]he obligation of good faith requires that members not use the exceptions in Article XXI as means to circumvent their obligations under the GATT 1994’

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14 Panel Report, *Russia – Traffic in Transit*, para. 7.77.

15 Panel Report, *Russia – Traffic in Transit*, paras. 7.78-7.79, 7.83-7.100.

16 Panel Report, *Russia – Traffic in Transit*, para. 7.80.

17 Panel Report, *Russia – Traffic in Transit*, para. 7.76.

18 Panel Report, *Russia – Traffic in Transit*, paras. 7.102-7.103.

19 Panel Report, *Russia – Traffic in Transit*, para. 7.128.

20 Panel Report, *Russia – Traffic in Transit*, para. 7.129.

21 Panel Report, *Russia – Traffic in Transit*, paras. 7.130-7.131.

and, for instance, a WTO member would not be allowed to re-label 'trade interests that it had agreed to protect and promote within the system, as "essential security interests" falling outside the reach of that system'.<sup>22</sup> Hence, in the language of the Panel, a member invoking Article XXI(b) of the GATT 1994 is required 'to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity'.<sup>23</sup>

As regards the second element of the chapeau of Article XXI(b) of the GATT 1994 (i.e., the necessity of the measure), the Panel found that the connection between the measure taken and the particular situation of emergency in international relations is also subject to an obligation of good faith. Hence, Article XXI(b) requires 'plausibility in relation to the proffered essential security interests, i.e. that [the member's actions] are not implausible as measures protective of these interests'.<sup>24</sup>

### ***Implications***

The Panel Report in *Russia – Traffic in Transit* is the first dispute in which the WTO adjudicators have addressed the question of the justiciability of Article XXI(b)(iii) of the GATT 1994 and interpreted that provision. The findings of the Panel have an important systemic role and are of particular importance for several pending cases, including the dispute between Qatar and Saudi Arabia on the alleged failure of Saudi Arabia to provide adequate protection to intellectual property rights held by or applied for entities based in Qatar (DS567) and several cases initiated against the United States as regards its Section 232 measures on steel and aluminium (see Section III(ii) below). Importantly, the Panel's interpretation, if followed by future panels and the Appellate Body, should prevent potential abuse of security exceptions by WTO members to justify protectionist measures under the guise of essential security interests.

## **ii EU – PET (Pakistan)**

### ***Introduction***

On 28 May 2018, the WTO DSB adopted the Panel and Appellate Body Reports in *EU – PET (Pakistan)* (DS486), a dispute concerning the imposition of countervailing duties targeting an import duty exemption on raw materials, a so-called 'duty drawback scheme', used by exporting producers of polyethylene terephthalate (PET) from Pakistan. Given the prevalence of these types of schemes among WTO members, the Appellate Body's confirmation of the Panel Report provides important guidance on the procedures in Annexes II and III of the SCM Agreement on how investigating authorities should calculate the potential excess remission arising from such schemes. In addition, the Appellate Body agreed with the Panel that even though the measure at issue had expired, the Panel was entitled to make findings regarding its conformity with the covered agreements.

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22 Panel Report, *Russia – Traffic in Transit*, para. 7.132.

23 Panel Report, *Russia – Traffic in Transit*, para. 7.134.

24 Panel Report, *Russia – Traffic in Transit*, para. 7.137.

### ***Adjudication of measures that have expired***

After the Panel had been established but before it began its work, the EU notified the Panel that the countervailing measures at issue in the dispute had expired and requested that the Panel cease its work. The Panel denied the EU's request on three grounds: (1) the measure expired only after the establishment of the Panel; (2) the complainant continued to request that findings be made; and (3) there was a 'reasonable possibility' that the EU would impose measures 'that may give rise to certain of the same, or materially similar, WTO inconsistencies that are alleged in this dispute.'<sup>25</sup>

On appeal, the European Union argued that by deciding to make findings after the measure at issue had expired, the Panel failed to comply with its function under Article 11 of the DSU. The latter provision requires a panel to make an objective assessment of the matter before it 'including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements'. The Appellate Body recalled that a panel has a margin of discretion in the exercise of its inherent adjudicative powers under Article 11 of the DSU and that within this margin of discretion, it is for a panel to decide how it takes into account subsequent modifications to, or expiry or repeal of, the measure at issue.<sup>26</sup> The Appellate Body stressed that the expiry of the measure 'while relevant, does not dispense with the "matter" that a panel is tasked with examining.'<sup>27</sup>

The Appellate Body then proceeded to analyse the Panel's use of its discretion under Article 11 and the three grounds that the Panel had put forward.<sup>28</sup> The Appellate Body concluded that 'the Panel in this dispute made an objective assessment that "the matter" before it still required to be examined because the parties continued to be in disagreement as to the "applicability of and conformity with the relevant covered agreements" with respect to the [investigating authority's] findings underpinning the expired measure at issue.'<sup>29</sup> However, one of the Appellate Body members issued a separate opinion disagreeing with the majority on this point.<sup>30</sup>

### ***Obligations to only countervail the 'excess remission' of duty drawback schemes***

As part of its investigation, the EU found that the manufacturing bond scheme (MBS) constituted a countervailable subsidy. As explained by the Appellate Body, '[s]ystems like the MBS are commonly referred to as duty drawback schemes', which 'permits the import of duty-free material on condition that it is used as an input in the manufacture of goods that are subsequently exported'.<sup>31</sup>

Under Article 1.1(a)(1)(ii) 'government revenue that is otherwise due is foregone or not collected' is recognised as a type of financial contribution by a government and can therefore be countervailed. However, the Agreement specifies in footnote 1 to Article 1.1(a)(1)(ii) that in accordance with 'the provisions of Annexes I through III of this Agreement, the exemption

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25 Panel Report, *EU – PET (Pakistan)*, para. 7.13.

26 Appellate Body Report, *EU – PET (Pakistan)*, para. 5.19.

27 Appellate Body Report, *EU – PET (Pakistan)*, para. 5.28.

28 Appellate Body Report, *EU – PET (Pakistan)*, paras. 5.38-5.50.

29 Appellate Body Report, *EU – PET (Pakistan)*, para. 5.51.

30 Appellate Body Report, *EU – PET (Pakistan)*, paras. 5.54-5.61.

31 Appellate Body Report, *EU – PET (Pakistan)*, para. 5.68.

of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy'. Annexes II and III contain detailed rules on how the investigating authority shall proceed to determine whether an excess remission has occurred, and therefore whether the duty drawback can be countervailed.

Under the MBS, the importer had to deposit with the Pakistan Customs Department the amount of the customs duty and sales tax that would normally be due on the imported inputs. At the time of exportation of the finished product, if it was found that the inputs had been used to manufacture the finished product, the deposit was released. However, the EU had found 'serious discrepancies and malfunctions' in how the system operated in practice,<sup>32</sup> and therefore considered that the system did not adhere to the rules in Annexes II and III. On that basis, the EU considered that the entire amount of the duty drawback granted to the exporting producers could be countervailed. The Panel disagreed, finding that even where the exporting country's system to assess the amount of the duty drawback did not adhere to Annexes II and III, the investigating authority could still only countervail the 'excess amount' of the duty drawback, in accordance with footnote 1 to Article 1.1(a)(1)(ii).<sup>33</sup>

On appeal, the EU challenged the Panel's interpretation of footnote 1 to Article 1.1(a)(1)(ii) and Annexes I to III. Annex II contains guidelines on the consumption of inputs in the production process and Annex III contains guidelines on the determination of substitution drawback schemes,<sup>34</sup> and the two annexes share the same structure. What the Appellate Body qualified as the 'heart' of the EU's argument concerned the procedure outlined in Annex II(II) and the consequences if this procedure is not adhered to.<sup>35</sup>

Annex II(II)(1) states that where it is alleged that a drawback scheme conveys a subsidy by reason of excess drawback of import charges on inputs, 'the investigating authorities should first determine whether the exporting member has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts'. Where such a system is found to exist, the investigating authorities should then examine the system to see whether 'it is reasonable, effective for the purposes intended, and based on generally accepted commercial practices in the country of export'. If the system is found not to live up to these standards, or if there is no such system at all, Annex II(II)2 specifies that 'a further examination by the exporting member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred'.

The Appellate Body first noted that '[s]hould an investigating authority determine that a "further examination" by the exporting member needs to be carried out . . . , it follows that the investigating authority has the responsibility of informing the exporting member of this need . . . in sufficient detail and in a timely manner'.<sup>36</sup> Doing so 'allows the exporting member, and indeed the investigated company, the opportunity to defend effectively their interests in the remaining stages of the countervailing duty investigation'.<sup>37</sup>

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32 Appellate Body Report, *EU – PET (Pakistan)*, para. 5.72.

33 Panel Report, *EU – PET (Pakistan)*, paras. 7.31-7.60.

34 Appellate Body Report, *EU – PET (Pakistan)*, para. 5.111.

35 Appellate Body Report, *EU – PET (Pakistan)*, para. 5.120.

36 Appellate Body Report, *EU – PET (Pakistan)*, para. 5.122.

37 Appellate Body Report, *EU – PET (Pakistan)*, para. 5.122.

Yet Annex II(II)(2) and the similarly worded Annex III(II)(2) do ‘not provide for specific procedural steps on what is to happen if no “further examination” by the exporting member is carried out, or if an investigating authority is still unsatisfied with the results of a “further examination”’.<sup>38</sup> The EU referred to ‘this absence of prescription as a “silence”, the consequence of which is that the remission of import duties no longer qualifies as a duty drawback scheme and the entire amount of duties refunded or not collected upon exportation can be countervailed by the investigating authority’.<sup>39</sup>

However, the Appellate Body noted that ‘this perceived “silence”’ did not pertain to the definition of the subsidy, and in particular, ‘to what constitutes the financial contribution element of the subsidy’.<sup>40</sup> Annex II(I)(2) is unambiguous in stating that ‘drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs’ and that this ‘echoes the limitation of the financial contribution to the excess amount of the remission, articulated in footnote 1 and Annex I(i)’.<sup>41</sup> Moreover, the Appellate Body did not consider the perceived ‘silence’ as ‘without cure in the SCM Agreement’.<sup>42</sup> If the ‘further examination’ required to be undertaken by the exporting member is not undertaken, or is unsatisfactory, the investigating authority may use ‘facts available’ pursuant to Article 12.7 of the SCM Agreement.

Finally, it should be noted that the Appellate Body observed that the designation of Annexes II and III as ‘Guidelines’ and the extensive use of the term ‘should’ suggest that ‘the content of Annexes II and III, while crucial to the understanding of duty drawback schemes and substitution drawback schemes, ought not to be interpreted as “rigid rules that purport to contemplate every conceivable factual circumstance” with respect to the assessment of such schemes.’<sup>43</sup>

### **Implications**

*EU – PET (Pakistan)* is the first dispute to interpret footnote 1 of the SCM Agreement and the extensive guidelines set out in Annexes II and III for assessing the amount of potential subsidies arising from tax exemption and duty drawback schemes. These types of schemes are in widespread use among WTO members and the EU’s narrow interpretation threatened to undermine the explicit exemption granted to such schemes. More importantly, the case confirms that the expiry of the measure at issue, in itself, does not mean that a panel is precluded from ruling on that measure.

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38 Appellate Body Report, *EU – PET (Pakistan)*, paras. 5.123, 5.120.

39 Appellate Body Report, *EU – PET (Pakistan)*, paras. 5.120, 5.124.

40 Appellate Body Report, *EU – PET (Pakistan)*, para. 5.127.

41 *ibid.* See also para. 5.131.

42 Appellate Body Report, *EU – PET (Pakistan)*, para. 5.127. See also para. 5.128.

43 Appellate Body Report, *EU – PET (Pakistan)*, para. 5.112, citing Appellate Body Reports, *US – Carbon Steel (India)*, para. 4.147 and *US – Softwood Lumber IV*, para. 92 (in the context of the use of the word ‘guidelines’ in Article 14 of the SCM Agreement).

### iii US – Differential Pricing Methodology

On 9 April 2019, the Panel circulated its report to the members of the WTO DSB in *US – Differential Pricing Methodology* (DS473), concerning anti-dumping duties applied to softwood lumber imports from Canada. The Panel Report is notable for ruling that the use of ‘zeroing’ is permitted in targeted dumping investigations, contrary to existing Appellate Body case law. The Panel Report was appealed by Canada on 4 June 2019.<sup>44</sup>

#### ***Zeroing permitted in targeted dumping investigations***

Article 2.4 of the AD Agreement governs the procedure for calculating the dumping margin by comparing the normal value with the export price of the exporting producers. Specifically, Article 2.4.2 states, in its first sentence, that the normal methodology is to calculate the dumping margin by comparing the weighted average export price with the weighted average normal value (the W-W methodology), or by comparing normal value and export prices on a transaction-to-transaction basis (the T-T methodology). However, the second sentence of Article 2.4.2 states that if two conditions are met, the investigating authorities may compare the weighted average normal value with individual export transactions (the W-T methodology) to address ‘targeted dumping’. These conditions are that (1) there is ‘a pattern of export prices which differ significantly among different purchasers, regions or time periods’ (the ‘pattern clause’), and (2) an explanation is provided as to why such differences cannot be taken into account using the W-W or T-T methodologies (the ‘explanation clause’).

In the case at hand, when the US Department of Commerce (USDOC) had found that both of these conditions were met, and the W-T methodology would therefore be applicable, the USDOC applied zeroing when calculating the dumping margin. That is, the United States aggregated the positive dumping amounts from those transactions whose export price was below the average weighted normal value, but treated as ‘zero’ the negative dumping amounts resulting from those transactions whose export price exceeded the weighted normal value. Consequently, the negative dumping amounts were not allowed to offset the positive dumping amounts.

In concluding that this approach was permissible under Article 2.4.2, the Panel’s analysis proceeded in several distinct steps. First, the Panel examined whether the USDOC had correctly identified ‘a pattern of export prices which differ significantly among different purchasers, regions or time periods’, in accordance with the pattern clause.<sup>45</sup> The USDOC had aggregated the findings found among different purchasers, regions and time periods when assessing whether such a pattern existed. The Panel disagreed with this approach and followed the reasoning of the Appellate Body in *US – Washing Machines*, holding that the text of Article 2.4.2 requires that a pattern must be identified when looking at the three categories separately. Moreover, when establishing a pattern, the USDOC had taken into account export transactions whose prices were both significantly higher and significantly lower relative to other transactions to other purchasers, regions or time periods. Here the

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44 Notification of an appeal by Canada under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review, WT/DS534/5, dated 4 June 2019.

45 Panel Report, *US – Differential Pricing Methodology*, paras. 7.42-7.49.

Panel agreed with the United States' approach and disagreed with previous findings of the Appellate Body in *US – Washing Machines*,<sup>46</sup> observing that nothing in the text of the pattern clause 'further qualif[ies] the export prices which "differ significantly"'.<sup>47</sup>

Second, the Panel looked at the negotiating history of Article 2.4.2 and found, consistent with previous panels and the Appellate Body, and contrary to the approach of the US, that the W-T methodology could only be applied to the identified pattern transactions, and not to all transactions.<sup>48</sup>

Third, the Panel turned to the actual dumping margin calculation. The question that arose was whether a so-called 'mixed methodology' applied by the USDOC when calculating the dumping margin was permissible.<sup>49</sup> That is, whether the standard W-W or T-T methodology could be applied only to non-pattern transactions, while the W-T methodology was applied only to the pattern transactions. The findings from both these methodologies and sets of transactions were aggregated by the USDOC and divided by the weighted average normal value to calculate the dumping margin.

The Appellate Body had previously found a mixed methodology approach to be prohibited.<sup>50</sup> According to the language of Article 2.4.2, the standard W-W and T-T methodologies had to be applied to 'all comparable export transactions', and not only to non-pattern transactions. Moreover, the Appellate Body had previously considered that including the results from the W-W or T-T methodologies applied to the non-pattern transactions when calculating the dumping margin risked 're-masking' the targeted dumping uncovered by applying the W-T methodology to only the pattern transactions. On this basis, the Appellate Body held that only the dumping found by applying the W-T methodology to the pattern transactions should be included in the dumping margin calculation. The Panel in *US – Differential Pricing Methodology* disagreed with the Appellate Body's textual interpretation and, moreover, considered that 'the purpose of the second sentence of Article 2.4.2 is to unmask targeted dumping through the application of the W-T methodology, and not by simply disregarding non-pattern transactions'.<sup>51</sup>

Fourth, having found that an investigating authority is permitted to apply the W-T methodology to the pattern transactions, but must apply the W-W or T-T to non-pattern transactions, and that the result of both comparisons should be aggregated, the Panel noted that the outcome of this analysis would always be 'mathematically equivalent to the dumping margin based on the application of the W-W methodology to all export transactions, provided the weighted average normal values used under the W-W and W-T methodologies are the same'.<sup>52</sup> On this basis, the Panel reasoned that considering that the 'raison d'être of the W-T methodology is to unmask targeted dumping, the inability of this methodology to do so will render this methodology inutile'.<sup>53</sup> Furthermore, the Panel found that the reference in the second sentence of Article 2.4.2 to a comparison between the average weighted

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46 Panel Report, *US – Differential Pricing Methodology*, paras. 7.50-7.66.

47 Panel Report, *US – Differential Pricing Methodology*, para. 7.58.

48 Panel Report, *US – Differential Pricing Methodology*, paras. 7.79-7.84.

49 Panel Report, *US – Differential Pricing Methodology*, paras. 7.85-7.87.

50 Appellate Body Reports, *US – Washing Machines*, paras. 5.118-5.124, and *US – Anti-Dumping Methodologies (China)*, paras. 5.102-5.108.

51 Panel Report, *US – Differential Pricing Methodology*, paras. 7.88-7.99.

52 Panel Report, *US – Differential Pricing Methodology*, para. 7.100. The Panel adopted the arguments made by the United States. See paras. 7.72, 7.74-7.75.

53 Panel Report, *US – Differential Pricing Methodology*, para. 7.106.

normal value and ‘individual’ export transactions suggested that ‘an investigating authority may distinguish those individual export transactions that mask other export transactions from those individual export transactions that are being masked’.<sup>54</sup> The Panel therefore concluded that ‘an investigating authority is permitted to use zeroing while applying the W-T methodology to the pattern transactions.’<sup>55</sup>

### **Implications**

*US – Differential Pricing Methodologies* is the second time that a panel has decided to explicitly depart from the case law of the Appellate Body, and may mark a greater willingness to do so in the future. The Appellate Body has held that a panel may only depart from previous rulings if it has ‘cogent reasons’ to do so.<sup>56</sup> The Panel in *US – Differential Pricing Methodologies* invoked this test, but did not extend its reasoning beyond a single paragraph nor engage with Canada’s arguments that no such cogent reasons existed in the present case.<sup>57</sup> In its appeal, Canada has asked the Appellate Body to ‘find that the Panel acted inconsistently with the function of panels under Article 11 of the DSU’.<sup>58</sup>

The findings of the Panel will likely encourage the US to continue to use zeroing in anti-dumping proceedings concerning targeted dumping. Indeed, it appears that the US in any event had already decided to continue to use zeroing in targeted dumping investigations and not to implement the findings of the two previous Appellate Body Reports, *US – Washing Machines*<sup>59</sup> and *US – Anti-Dumping Methodologies (China)*,<sup>60</sup> which prohibited it. However, the Panel did not appear to question the prohibition on zeroing in standard dumping investigations that do not concern targeted dumping.<sup>61</sup>

## **III OUTLOOK**

### **i The European Union’s proposal for an interim appeal arbitration at the WTO**

The WTO dispute settlement system is going through a major crisis because of the United States’ continuing resistance to the appointment of WTO Appellate Body members. Pursuant to Article 17 of the DSU, the Appellate Body shall be composed of seven members, who are appointed by the WTO DSB. Three is the minimum number of members required to serve on any appeal. At the time of writing, the Appellate Body is left with only three members –

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54 Panel Report, *US – Differential Pricing Methodology*, para. 7.103.

55 Panel Report, *US – Differential Pricing Methodology*, para. 7.106.

56 Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160.

57 Panel Report, *US – Differential Pricing Methodology*, para. 7.107. Canada’s arguments are summarised in Annexes B-1 and B-2 of the Report.

58 Notification of an appeal by Canada under Article 16.4 and Article 17 of the DSU, and under Rule 20(1) of the Working Procedures for Appellate Review, WT/DS534/5, dated 4 June 2019.

59 See Arbitrator Report, *US – Washing Machines* (Article 22.6), circulated on 8 February 2019; although on 29 March 2019 the US revoked the measures at issue in an expiry review due to a lack of likelihood of injury, see Status Report Regarding Implementation, *US – Washing Machines*, WT/DS464/17/Add.16, dated 16 April 2019.

60 See Note by the Secretariat, *US – Anti-Dumping Methodologies (China)*, WT/DS471/20, dated 5 October 2018, referring China’s request to suspend concessions under Article 22.6 to the original Panel.

61 Panel Report, *US – Differential Pricing Methodology*, para. 7.83, where the Panel noted that ‘[p]ermitting an investigating authority to “unmask non-pattern transactions would undermine the prohibition on zeroing under the W-W or T-T methodology”’.

Ujal Singh Bhatia and Thomas R Graham will complete their terms on 10 December 2019, while Hong Zhao's term expires on 30 November 2020. Hence, if the deadlock persists, the Appellate Body will become inoperative on 11 December 2019.

The stakes are high not only because the system may lose an appellate stage of review, but also because a dysfunctional Appellate Body may paralyse the dispute settlement mechanism as a whole. This is because Panel reports cannot be adopted by the DSB and become binding on the parties if any of the parties notifies its decision to appeal pursuant to Article 16.4 of the DSU. If no appeal is possible, a party to a dispute could easily block the adoption of an unfavourable decision by the panel.

The United States has voiced several concerns of a technical and systemic nature related to the functioning of the Appellate Body<sup>62</sup> and has pledged to continue to block the appointment process of WTO Appellate Body members unless these concerns are duly addressed. Since DSB decisions are taken by consensus, the formal objection by any WTO member, in this case by the United States, is sufficient to effectively prevent the appointment or reappointment of an Appellate Body member.

### ***Official proposals by WTO members to address the WTO Appellate Body deadlock***

In an attempt to address the United States' concerns, WTO members – individually and jointly – submitted a number of proposals to the WTO General Council. Some of these proposals are more far-reaching and call for an amendment of the DSU, whereas other proposals suggest the adoption of soft law instruments instead of a formal revision of the WTO rulebook.

In particular, the European Union, along with a group of like-minded WTO members, has submitted two proposals. The first EU proposal – submitted jointly with China, Canada, India, Norway, New Zealand, Switzerland, Australia, Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro – aims to address most of the issues raised by the United States, including a transitional rule for the outgoing Appellate Body members, the rules on extension of the 90-day time frame allocated for an appeal, clarification on the review of municipal laws on appeal, and rules to avoid *obiter dicta*. This proposal also suggests that an annual meeting of WTO members with the Appellate Body should ensure a regular channel of communication on systemic issues or general trends in WTO jurisprudence.<sup>63</sup> The second EU proposal – submitted together with China, India and Montenegro – addresses only a subset of issues and arguably would require a more controversial revision of the DSU, including extending the term of service of the Appellate Body members.<sup>64</sup>

Furthermore, several WTO members have called for identifying options for binding or non-binding guidance to be provided to adjudicative bodies on specific issues, including through the adoption of 'authoritative interpretations'.<sup>65</sup> Honduras prepared three

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62 The concerns raised by the United States were addressed in Chapter XX of the *International Trade Law Review 2018*.

63 Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro to the General Council, Revision, WT/GC/W/752/Rev.2, 11 December 2018.

64 Communication from the European Union, China, India and Montenegro to the General Council, Revision, WT/GC/W/753/Rev.1, 11 December 2018.

65 Communication from Australia, Singapore, Costa Rica, Canada and Switzerland to the General Council, Adjudicative bodies: Adding to or diminishing rights or obligations under the WTO Agreement, WT/GC/W/754/Rev. 2, 11 December 2019.

communications to foster a discussion on the functioning of the Appellate Body, addressing the issue of timelines, alleged judicial activism and precedent.<sup>66</sup> Brazil proposed that the General Council should adopt 'Guidelines for the Work of Panels and the Appellate Body'<sup>67</sup> and, along the same lines, Thailand proposed a General Council decision on the dispute settlement system of the WTO.<sup>68</sup> Finally, Japan, Australia and Chile proposed a DSB decision affirming and clarifying the existing provisions of the DSU as the most practical, feasible and expeditious solution.<sup>69</sup>

Unfortunately, so far the United States has not expressed its views on any of the proposals put forward by other WTO members. The United States has also refrained from proposing any solutions of its own and limited its statements at the DSB meetings to reiteration of its concerns and conclusion that these systemic concerns remain unaddressed.<sup>70</sup>

Since none of the proposals seems to please the United States and the pressure is accumulating, WTO members are now looking for alternative solutions to maintain the dispute resolution function in the likely event that no Appellate Body members are appointed by 10 December 2019.

### *The interim appeal arbitration under Article 25 of the DSU*

In view of the above-mentioned circumstances, in May 2019, the European Union submitted a proposal for an interim appeal arbitration pursuant to Article 25 of the DSU. In essence, the proposed interim appeal arbitration shall replicate, to the extent possible, the rules and procedures as set out in the DSU and the Appellate Body Working Procedures governing the appellate review. To implement this solution, the European Union would seek to reach an agreement with other like-minded WTO members that would introduce a framework for submitting future cases to an interim appeal arbitration.<sup>71</sup> This framework agreement would also provide that parties will not pursue appeals under Articles 16.4 and 17 of the DSU. As the name of the mechanism suggests and as should be reflected in the mutually agreed solution, the interim appeal arbitration will apply only if and when the Appellate Body will not be able to hear appeals from panel cases due to an insufficient number of its members.

When a dispute arises and enters the stage of panel review, the European Union and the other party would need to indicate their intention to conclude an arbitration agreement

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66 Communication from Honduras, Fostering a discussion on the functioning of the Appellate Body, WT/GC/W/758, 21 January 2019; Communication from Honduras, Fostering a discussion on the functioning of the Appellate Body: Addressing the issue of alleged judicial activism by the Appellate Body, WT/GC/W/760, 29 January 2019; Communication from Honduras, Fostering a discussion on the functioning of the Appellate Body: Addressing the issue of precedent, WT/GC/W/761, 4 February 2019.

67 Communication from Brazil, Guidelines for the work of panels and the Appellate Body, 28 March 2019, WT/GC/W/767.

68 Communication from Thailand, General Council Decision on the Dispute Settlement System of WTO, WT/GC/W/769, 26 April 2019.

69 Communication from Japan, Australia and Chile, Informal process on matters related to the functioning of the Appellate Body, Revision, WT/GC/W/768/Rev.1, 26 April 2019.

70 Statements by the United States at the Meeting of the WTO Dispute Settlement Body, 28 May 2019, p. 16, available at: [https://geneva.usmission.gov/wp-content/uploads/sites/290/May28.DSB\\_Stmt\\_as-deliv.fin\\_public-1.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/May28.DSB_Stmt_as-deliv.fin_public-1.pdf).

71 Such first agreement was reached between the European Union and Canada on 25 July 2019. See: Interim Appeal Arbitration Pursuant to Article 25 of the DSU, available at: [trade.ec.europa.eu/doclib/docs/2019/july/tradoc\\_158273.pdf](https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158273.pdf).

in that particular case and notify this agreement pursuant to Article 25.2 of the DSU to the DSB, normally within 60 days after the date of the establishment of the panel. The proposed agreed procedures for arbitration under Article 25 of the DSU provide that as soon as the panel report is issued to the parties and 10 days preceding the anticipated date of circulation of the panel report, any party may request the panel to suspend the panel proceedings with a view to initiating the arbitration under these agreed procedures. That request would be considered to constitute a joint request by the parties for suspension of the panel proceedings for 12 months under Article 12.12 of the DSU. The party would then file a Notice of Appeal with the WTO Secretariat, as soon as the suspension of the panel proceedings takes effect. The appeals would be heard by three former Appellate Body members, selected by the WTO Director General and serving pursuant to Article 25 of the DSU, with an appropriate legal and administrative support from the Appellate Body Secretariat. As noted above, the interim arbitration appeal will largely follow the existing appellate procedure, with only a few deviations that would be necessary because of the special nature of the interim mechanism.

The arbitration award would be binding on the parties by virtue of the arbitration agreement. After the conclusion of the appeal arbitration proceedings, the arbitration award including the panel report, as may be modified by the award, would be notified to the DSB and the relevant Council or Committees pursuant to Article 25.3 of the DSU. Articles 21 and 22 of the DSU will apply *mutatis mutandis* to arbitration awards pursuant to Article 25.4 of the DSU and the arbitration agreement.

One clear advantage of this solution is that the proposed appeal arbitration is based on the existing rule in the DSU, namely Article 25. Some elements of the proposed mechanism, however, may need to be further revised and improved to ensure that the mechanism is fully operational by December 2019. For instance, it remains unclear whether the WTO Appellate Body Secretariat would be available to assist the arbitrators and whether a solution with former Appellate Body members serving as arbitrators would suffice.

### ***Alternatives to the interim appeal arbitration: agreements ‘not to appeal’***

While the EU proposal for an interim appeal arbitration may be a viable option for some WTO members, others might follow a different approach that is based on an agreement to waive the right to appeal. The first precedent was set by Indonesia and Vietnam within the framework of a compliance review in Indonesia – Safeguard on Certain Iron or Steel Products (DS496). In particular, as part of their bilateral understanding on the sequencing of proceedings, Vietnam and Indonesia agreed that ‘if, on the date of the circulation of the panel report under Article 21.5 of the DSU, the Appellate Body is composed of fewer than three members available to serve on a division in an appeal in [that] proceedings, they will not appeal that report under Articles 16.4 and 17 of the DSU’.<sup>72</sup>

### ***Practical consequences for pending and future appeals***

As explained above, if at least two vacancies of WTO Appellate Body members are not filled by 10 December 2019, the Appellate Body will become inoperative and will stop accepting new appeals. As far as the pending appeals are concerned, Rule 15 of the WTO Appellate

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<sup>72</sup> Understanding between Indonesia and Vietnam regarding procedures under Articles 21 and 22 of the DSU, *Indonesia – Safeguard on Certain Iron and Steel Products*, WT/DS496/14, 27 March 2019, para. 7.

Body Working Procedure should allow, upon a notification to the DSB, that two outgoing Appellate Body members complete the disposition of all appeals to which they will have been assigned as of 10 December 2019.

The coming months will be decisive for WTO members in attempting to find solutions to keep a functioning WTO dispute settlement mechanism, be it through an interim appeal arbitration, an agreement 'not to appeal' or any other viable solutions. The long-term systemic implications of either of these interim solutions for the WTO dispute settlement mechanism, and in particular its appeal function, are, however, difficult to predict.

## **ii International reactions to Section 232 measures on steel and aluminium**

### ***Introduction***

In March 2018, President Trump imposed additional duties of 25 per cent and 15 per cent respectively on imports of steel and aluminium products into the United States. The duties were imposed following investigations of the USDOC conducted under Section 232 of the Trade Expansion Act of 1962 (Section 232). The latter allows the US authorities to impose import restrictions based on the finding of a threat of impairment to the national security of the United States.

The imposition of additional import duties on steel and aluminium triggered severe reactions from other WTO members. Nine WTO members – including the European Union, China and India – initiated WTO proceedings against the United States.<sup>73</sup> As a response to the US measures, the European Union, China, Turkey and Russia have also adopted rebalancing measures pursuant to Article 8 of the Agreement on Safeguards in the form of additional duties on imports originating in the United States. These rebalancing measures were in turn challenged before a WTO panel by the United States.<sup>74</sup> In addition, to protect its domestic market from a potential trade diversion caused by the US measures, the European Union imposed its own protective duties on imports of steel products.<sup>75</sup>

### ***Overview of the offensive and defensive cases***

The complainants in the offensive cases brought against the US measures argue that the additional import duties on steel and aluminium constitute safeguard measures inconsistent with Article XIX of the GATT 1994 and the Agreement on Safeguards. The complainants also make several claims under the GATT 1994.

The defensive cases initiated by the United States against the European Union, China, Turkey and Russia relate to the additional duties imposed by those countries on imports from the United States under Article 8 of the Agreement on Safeguards. The latter provision allows WTO members affected by the safeguard measures to suspend the application of

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73 China (DS544), India (DS547), the European Union (DS548), Canada (DS550), Mexico (DS551), Norway (DS552), Russia (DS554), Switzerland (DS556) and Turkey (DS564). Following a mutually agreed solution with the United States, Canada and Mexico have withdrawn their cases against the United States.

74 China (DS558), the European Union (DS559), Turkey (DS561) and Russia (DS566).

75 In February 2019, the European Union imposed definitive safeguard measures on imports of certain steel products. See Regulation (EU) 2019/159 of 31 January 2019 imposing definitive safeguard measures against imports of certain steel products, 2019 O.J. (L 31) 27.

substantially equivalent concessions or other obligations under the GATT 1994 with regard to the member imposing those safeguard measures. The United States argues that those measures are inconsistent with Articles I and II of the GATT 1994.

Both the offensive and the defensive cases raise several interesting questions with implications going far beyond those specific disputes. First, are the additional duties imposed by the United States on imports of steel and aluminium products safeguard measures? Second, can those measures – whether considered as safeguards or not – be justified under the security exceptions of Article XXI of the GATT 1994?

### ***Are Section 232 measures disguised safeguard measures?***

The additional duties on imports of steel and aluminium products have been imposed pursuant to Section 232 and not pursuant to the US safeguard legislation. The complainants argue, however, that those duties de facto constitute safeguard measures inconsistent with Article XIX of the GATT 1994 and several provisions of the Agreement on Safeguards. Such qualification of the US measures is particularly crucial for those WTO members that adopted rebalancing measures pursuant to Article 8 of the Agreement on Safeguards, as otherwise their rebalancing measures will necessarily be WTO-inconsistent.

The Agreement on Safeguards does not provide a definition of a safeguard measure. The question of what constitutes a safeguard measure was, however, recently addressed by the Panel and the Appellate Body in *Indonesia – Iron or Steel Products*. According to the Appellate Body, to qualify as a safeguard measure, a measure must present two constituent features. First, it must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the member's domestic industry caused or threatened by increased imports of the subject product.<sup>76</sup> Importantly, whether a certain measure constitutes a safeguard measure is an objective question that must be assessed by the Panel as part of its objective assessment of the matter pursuant to Article 11 of the DSU. To make such an assessment, the Panel must examine the design, structure and expected operation of the measure as a whole.<sup>77</sup> The Panel must identify all the aspects of the measure that may have a bearing on its legal characterisation and recognise which of those aspects are the most central to that measure. The Appellate Body also explained that as part of its determination, a Panel should evaluate and give due consideration to all relevant factors, including the manner in which the measure is characterised under the domestic law of the member concerned, the domestic procedures that led to its adoption and any relevant notifications to the WTO Committee on Safeguards. None of these factors, however, is in and of itself dispositive of the question of whether the measure constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.

The additional duties on imports of steel and aluminium products are not labelled by the United States as safeguard measures. However, looking at the features of the US measures and applying the test developed in *Indonesia – Iron or Steel Products*, those measures appear to fall within the category of safeguard measures. Indeed, by going beyond the bound rates provided for in the US Schedule of Concessions, the measures suspend at least one GATT obligation or withdraw or modify at least one GATT concession. It could also be argued

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76 Appellate Body, *Indonesia – Iron or Steel Products*, para. 5.60.

77 *ibid.*

that although officially those measures aim to prevent a threat of impairment to the national security of the United States, in practice, the purpose of those measures is to protect the domestic steel and aluminium industries from injury caused by competition with imports.

***Can Section 232 measures be justified under Article XXI of the GATT 1994?***

Section 232 allows the US President to take action to adjust imports when it is determined that such imports threaten to impair the national security of the United States. Section 232 provides for a number of factors that should be taken into account in making such a determination. The current US administration adopted an extremely broad interpretation of national security, covering not only national defence, but also the overall commercial welfare of individual domestic industries. This broad interpretation of national security allows the US President to adopt measures that shield declining domestic industries from foreign competition.

The United States argues that the additional import duties on steel and aluminium products imposed pursuant to Section 232 are a matter of national security and cannot be reviewed by a WTO panel. The United States relies in that regard on the security exceptions in Article XXI of the GATT 1994, which allow WTO members to take otherwise GATT-inconsistent measures considered necessary for the protection of their essential security interests.

Historically, WTO members refrained from relying on Article XXI as a justification. Recently, however, the security exception has been invoked by several countries to justify politically motivated trade restrictions. Notably, Article XXI was invoked by the Russian Federation to justify certain transit restrictions imposed with respect to imports coming from Ukraine (see Section II.i above). In a report adopted on 26 April 2019, the Panel found that it had jurisdiction to determine whether the requirements of Article XXI(b)(iii) – raised by the Russian Federation – were satisfied<sup>78</sup> and explicitly rejected the United States' argument that the invocation of Article XXI(b)(iii) is 'non-justiciable'.<sup>79</sup> In addition, the Panel made a number of observations that appear to be relevant for the ongoing disputes against the US Section 232 measures.

As explained in Section II.i above, the Panel made it clear that protectionist measures aiming to safeguard economic interests of a WTO member would not fall within the scope of security exceptions under Article XXI of the GATT 1994. Among other reasons, the Panel stressed that the obligation of good faith requires that members not use the Article XXI security exceptions as a means to circumvent their obligations under the GATT 1994 by relabelling trade interests as 'essential security interests'.<sup>80</sup> The Panel also found that political or economic differences between members are not sufficient, of themselves, to constitute an emergency in international relations for the purpose of Article XXI(b)(iii). This kind of situation will only amount to 'emergency in international relations' if it gives rise to defence and military interests, or maintenance of law and public order interests.<sup>81</sup>

Should the Panel in the ongoing cases follow the approach of the Panel in DS512 and find that the invocation of Article XXI by the United States is subject to its review, the Panel will be faced with the difficult task of assessing the limits of 'essential security interests' and,

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78 Panel Report, *Russia – Traffic in Transit*, para. 7.104.

79 Panel Report, *Russia – Traffic in Transit*, para. 7.103.

80 Panel Report, *Russia – Traffic in Transit*, para. 7.133.

81 *ibid.*

particularly, whether those cover 'economic security'. The findings of the Panel in DS512 appear not to support such a broad interpretation. The Presidential Proclamations imposing the additional import duties and the statements made by various US officials leave no doubt that the sole objective of those measures is to support and revive the US steel and aluminium industries.

### ***What's next?***

The findings in the ongoing cases relating to the US Section 232 measures on steel and aluminium products will have important implications for other measures currently considered by President Trump with respect to imports of autos and auto parts, uranium, and titanium sponge. They will also provide further clarifications with respect to the security exceptions under Article XXI of the GATT 1994. Last but not least, the findings in those cases may reaffirm the safeguard measure test recently developed in the context of other disputes.

## **IV CONCLUSIONS**

The recent developments in the case law confirm that the WTO dispute settlement mechanism not only helps to clarify the existing provisions of the WTO agreements, but also assists WTO members in maintaining the proper balance between their WTO rights and obligations, thereby enhancing the security and predictability of the multilateral trading system.

The clarifications brought about by the panels and the Appellate Body in the disputes discussed in Section II are likely to have significant systemic implications. This is particularly true for the Panel's finding in *Russia – Traffic in Transit* on the justiciability of security exceptions under Article XXI of the GATT 1994. The Panel's ruling is particularly timely given the recent surge of protectionist measures that WTO members may attempt to justify under the guise of national security concerns. Furthermore, the Appellate Body's findings in *EU – PET (Pakistan)* addressed another important systemic issue in concluding that the expiry of the measures at issue is not dispositive as to whether a panel may consider the measures' conformity with the covered agreements, therefore ensuring the effectiveness of the dispute settlement mechanism. Moreover, given the prevalence of duty drawback schemes among WTO members, the clarifications offered regarding such schemes will likely bring significant relief to exporting producers in future anti-subsidy investigations. Finally, the Panel's findings on the admissibility of zeroing in targeted dumping investigations in *US – Differential Pricing Methodology* marks a significant departure from the Appellate Body's established approach.

The continuing deadlock of the WTO Appellate Body remains at the top of the WTO agenda. Despite multiple efforts by WTO members and the WTO Secretariat, the Appellate Body is likely to become dysfunctional as of 11 December 2019, unless the United States changes its current position. Given the reluctance of the United States to engage in fruitful discussions with a view to unblocking the appointment of the Appellate Body members, WTO members will likely focus on finding alternative solutions so as to maintain a functioning WTO dispute settlement mechanism, with or without an appellate review. The EU proposal on an interim appeal arbitration offers a solution for those members that want to retain the possibility of appellate review. Apart from short-term practical implications,

this WTO Appellate Body crisis may have serious consequences for the future architecture of WTO dispute settlement, which constitutes the only effective means of resolving trade grievances for many WTO members.

Finally, several pending cases, including disputes relating to the WTO legality of the US Section 232 measures on steel and aluminium products, will provide additional clarifications on the interpretation and scope of the security exceptions under Article XXI, which will be of particular importance in view of rising trade protectionism.

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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 sanctions.

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 EU General Court, the EU Court of Justice (formerly the European Court of Justice), 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 *Russia – Traffic in Transit* (DS512) 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 on EU Trade Law at the College of Europe, at the Carlos III University of Madrid (UC3M) and the University of Leuven (KUL).

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ISBN 978-1-83862-054-7