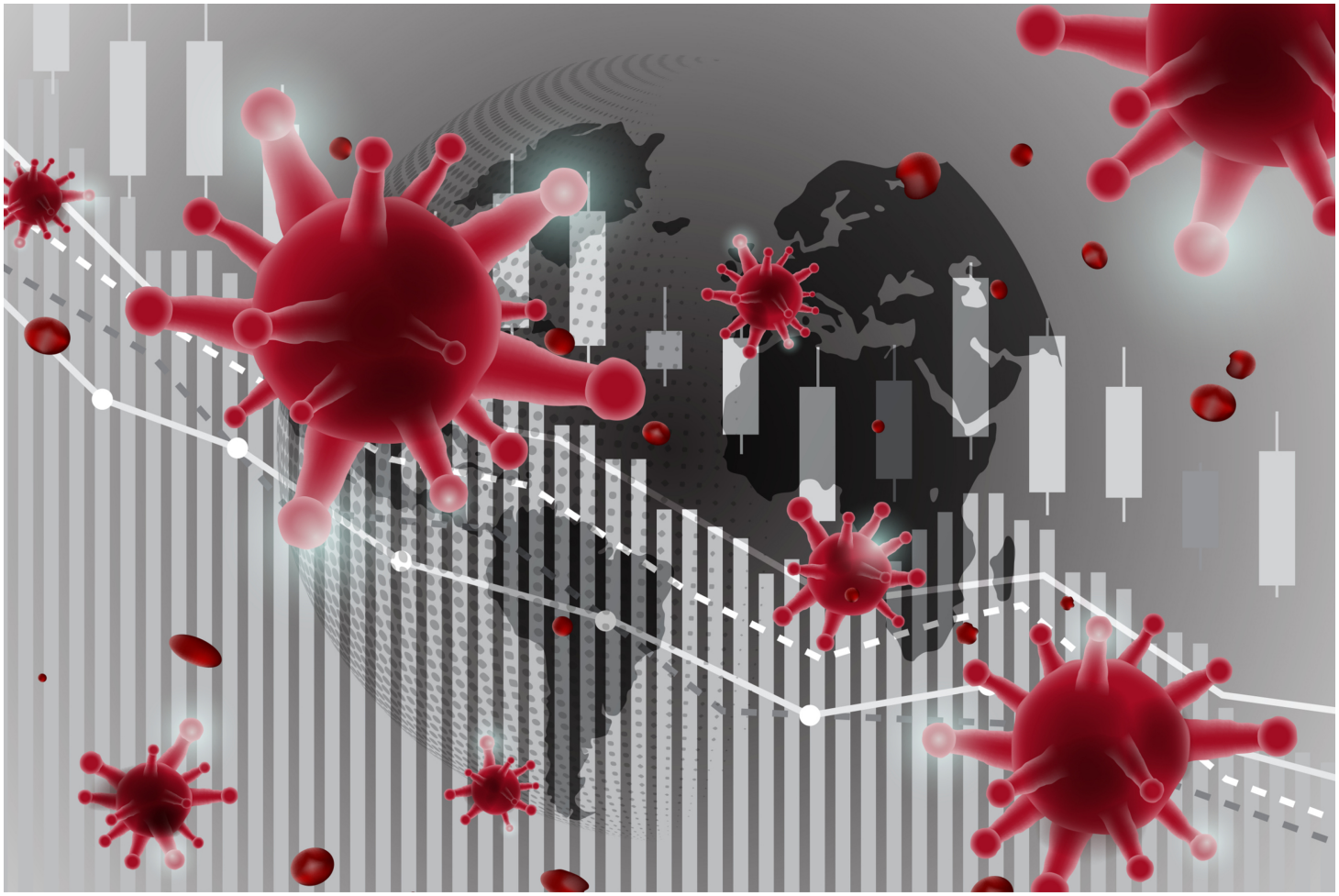


World Trade Organization arbitrator finds that Covid-19 measures justify delay in compliance with WTO obligations

July 6, 2020

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By: Valerie Hughes

A World Trade Organization (WTO) arbitrator has ruled that Ukraine can have extra time to bring its illegal anti-dumping measures into compliance with WTO obligations because Ukraine's measures addressing the COVID-19 pandemic may affect the conduct of its anti-dumping investigations (Award of the Arbitrator, Ukraine--Ammonium Nitrate). Although this is the first time COVID-19 has been used by a WTO member to justify maintaining a WTO-inconsistent measure, it is unlikely to be the last.

Under the circumstances, it will be important going forward that, despite the enormous impact of the pandemic and the requirement for governments to take unprecedented measures to address it, WTO adjudicators apply the requisite rigour to COVID-19 “defences” to ensure that WTO Members do not unjustifiably act inconsistently with their WTO obligations.

Russia Succeeded in Challenging Anti-dumping Duties Imposed by Ukraine

The “COVID-19 ruling”, issued on April 8, 2020, was made in the context of an arbitration to determine the reasonable period of time for Ukraine to come into compliance with its WTO obligations after a finding of violation of the WTO Anti-Dumping Agreement. The finding was the result of Russia’s challenge of Ukraine’s dumping and likelihood-of-dumping determinations for ammonium nitrate from Russia, injury-related aspects of those determinations, and the decision to include within the scope of the review determination a Russian producer that had a *de minimis* dumping margin in the original investigation phase.

What Should Be the “Reasonable Period of Time” to Comply with the Ruling?

WTO rules require prompt compliance with rulings but “if it is impracticable to comply immediately”, members are permitted a “reasonable period of time” (RPT) to comply. (Article 21, WTO Dispute Settlement Understanding) The RPT can be determined through agreement between the disputing parties or through binding arbitration. Ukraine and Russia were unable to agree on the time period, so Russia requested arbitration. Former WTO Appellate Body Member Ricardo Ramirez from Mexico was selected to serve as arbitrator.

According to the guideline set forth in the rules, the RPT “should not exceed” 15 months from the date the ruling was adopted, although it can be shorter or longer, depending upon the “particular circumstances” of the case. (Article 21, WTO Dispute Settlement Understanding)

Ukraine argued that it would need 27 months to implement the ruling. Noting that it was the first time its anti-dumping measures had been found to be inconsistent with WTO rules, Ukraine said it needed time to adopt a legislative framework to allow its authorities to initiate and conduct review investigations and subsequently conduct an administrative review to amend the antidumping measures at issue. It also asserted that given the “emergency in international relations" (Award of the Arbitrator, Ukraine--Ammonium Nitrate, para. 3.42) that it was facing with Russia, it would take longer than usual to carry out necessary compliance procedures. Specifically, Ukraine requested an extra six months be added to the RPT that would otherwise be determined in order to take this “emergency” into account. Finally, Ukraine said that measures it had taken to address the COVID-19 pandemic affected the conduct of trade defence investigations and that this should be taken into account in determining the RPT. However, Ukraine did not propose a specific time period to be added in the light of this consideration.

Russia contended that Ukraine should have only two months to come into compliance. Russia questioned the need for legislative changes and did not agree that it was necessary to conduct an

administrative review. For Russia, all that was necessary was for Ukraine's Intergovernmental Commission on International Trade (ICIT) to issue a summary decision on the application of anti-dumping measures and impose duties if appropriate. Russia dismissed as incorrect and irrelevant Ukraine's argument about an "emergency in international relations", arguing that anti-dumping investigations had been proceeding and had even increased during the period Ukraine claimed its was hampered by the political situation with Russia. Regarding Ukraine's COVID-19 argument, although Russia "expressed its solidarity" with the countries affected by COVID-19, it said it was unclear how Ukraine's COVID-19 measures would affect the government's ability to conduct administrative reviews in short time frames. For Russia, the COVID-19 pandemic was not "an overwhelming excuse for failures to comply with the WTO obligations" (Award of the Arbitrator, Ukraine--Ammonium Nitrate, para. 3.42).

Arbitrator's Analysis: COVID-19 Measures Affect the Time Needed To Comply

The arbitrator was not convinced by Russia's argument that implementation could be achieved through a decision of the ICIT. Nor did Ramirez consider that it was necessary for Ukraine to develop a new legislative framework to enable it to implement the ruling. He concluded that existing Ukrainian law was sufficient to provide a legal basis for Ukrainian investigating authorities to initiate and conduct an administrative review of the impugned anti-dumping measures. Under the circumstances, Ramirez determined that the RPT did not need to include time for adopting new legislation.

Turning to the administrative part of the implementation process, Ramirez observed that the redetermination for the purpose of implementing the ruling would be limited in scope, involving fewer steps than a full-fledged review. This was because one of the two main investigated producers would be excluded from the review, so the redetermination would essentially focus on calculating normal value for the remaining investigated Russian producers, for which some data were already available. Moreover, there would be no need to make a new injury determination, recalculate the export price, or deal with public interest concerns.

Ramirez did not allow any extra time for compliance in connection with Ukraine's claim regarding the "emergency in international relations" because, he said, Ukraine did not provide evidence in support of its allegation that the "emergency" situation would result in delays in the conduct of anti-dumping investigations (Award of the Arbitrator, Ukraine--Ammonium Nitrate, para. 3.45). Ramirez did, however, take into account the COVID-19 measures in determining the RPT, despite acknowledging that Ukraine had "not explained in detail" how the measures affected its investigating authorities' ability to review the anti-dumping measures in question (Award of the Arbitrator, Ukraine--Ammonium Nitrate, para. 3.41) . Ramirez said that the measures put on record by Russia confirmed that trade-defence investigations had been affected, noting in particular that the measures:

"affect the ability of interested parties to access materials of investigations, and that the Ministry has thus introduced remote access to certain information. The Ministry is also organizing hearings remotely, instead of holding face-to-face meetings. Moreover … on-site verifications are cancelled,

which may lead to extending the deadlines for interested parties to provide answers to questionnaires. (Award of the Arbitrator, Ukraine--Ammonium Nitrate, para. 3.41)"

Ramirez concluded that:

"… in my determination of the reasonable period of time in this dispute, [I cannot] turn a blind eye to the recent developments in Ukraine and the rest of the world relating to the COVID-19 pandemic that affect the work of Ukrainian investigating authorities. (Award of the Arbitrator, Ukraine--Ammonium Nitrate, para. 3.41)"

Ramirez determined that the RPT would be 11 months and 15 days. Arbitrators do not generally specify how much time they allocate for each of the various steps involved in the implementation and Ramirez did not do so here. Nor did he quantify the extra time he afforded Ukraine to implement the ruling in the light of its COVID-19 measures.

What are the Implications of the Award?

In the 38 RPT awards issued to date, the shortest RPT was 6 months, while the longest was 15 months and 1 week. (WTO Analytical Index) Most hover around just over 11 months, meaning that the Ramirez award is consistent with the average. Although WTO rules do not require arbitrators to provide written reasons for their awards, a practice has developed of doing so, with the result that a number of common themes have emerged. Thus, in determining an RPT:

- the mandate of the arbitrator is limited to determining the time frame for compliance, while the particular method of implementation is left to the discretion of the implementing member;

- the discretion of the implementing member in selecting the means of implementation is not unfettered in that the member cannot choose a method that needlessly extends the time needed for implementation;

- the RPT should be the shortest period possible within the legal system of the member to implement the ruling.

As mentioned above, WTO rules specify that "particular circumstances" of a case can be taken into account in determining whether the RPT should be shorter or longer than the guideline of 15 months. In previous arbitrations, arbitrators have declined to consider the contentiousness or political sensitivity of a measure to be implemented (Award of the Arbitrator, EC--Export Subsidies on Sugar, para. 90), the structural adjustment of a member's affected industries (Award of the Arbitrator, Indonesia--Autos, para. 23), the urgency to avoid more economic harm for foreign exporters (Award of the Arbitrator, US--Byrd Amendment, para. 80), or the workload of the implementing authority (Award of the Arbitrator, US--Countervailing Measures (China), para. 3.49), as arguing in favour of a shorter or longer implementation period. Arbitrators have, however, pointed to the need to prevent and mitigate the effects of a natural disaster (El Niño) (Award of the Arbitrator, Peru--Agricultural Products,

para. 3.45), the complexity of the proposed implementation (Award of the Arbitrator, Canada--Pharmaceutical Patents, para. 50), the fundamental integration of the measure into the domestic policies of the implementing member (Award of the Arbitrator, Chile--Price Band System, para. 48), and the dire economic and financial situation of a developing country (Award of the Arbitrator, Indonesia--Autos, para. 24) as "particular circumstances" affecting the period of time for implementation.

In this case, while the arbitrator rejected Ukraine's argument that its political situation with Russia constituted a "particular circumstance" that justified an extra six months in the RPT, Ramirez agreed with Ukraine that its COVID-19 measures should be taken into account in determining the RPT.

What are the implications of the award beyond prescribing how much time Ukraine has to bring its anti-dumping measure into conformity with WTO rules? On the one hand, one might say the implications are minimal because RPT awards have no precedential value in general and the facts of every implementation are unique so this case will stand on its own. Moreover, Ramirez's award did not extend beyond the guideline of 15 months and even coincided with the average time afforded to implementing parties under RPTs. Finally, the likelihood that another RPT arbitration will take place during a period when COVID-19 measures will be in place in the relevant implementing country is slim. On the other hand, the arbitrator in this case required little or no proof from Ukraine that its measures would affect the timeline of implementation – which is the only relevant inquiry in RPT awards – and seemed to simply accept that the COVID-19 measures in and of themselves constituted special circumstances that needed to be taken into account. As Ramirez put it, he could not "turn a blind eye to the recent developments in Ukraine and the rest of the world relating to the COVID-19 pandemic" (Award of the Arbitrator, Ukraine--Ammonium Nitrate, para. 3.41). Indeed, given the timing of his decision, it might have appeared unseemly if he had done so in the face of the horrific human suffering and immeasurable economic harm being felt around the world.

It will be important going forward, though, to guard against giving COVID-19 measures a 'bye' in WTO dispute settlement more generally, such that invocation of the pandemic is assumed to mean that all manner of WTO-inconsistent measures will be justified. In many cases, inconsistent measures will be justifiably excused as, for example, necessary to protect human life or health. (Measures "necessary to protect human life or health" falls under the General Exceptions found in Article XX of the GATT 1994.) But it will be important for WTO adjudicators to ensure that they conduct a proper analysis of impugned measures, subjecting them to the appropriate rigours required by the rules in determining whether they offend the rules, as well as whether they meet the requirements of any invoked defence.

Addressing the COVID-19 pandemic has required governments to take unprecedented measures to ensure the health of their citizens and to support their economies. This is expected and appropriate. Flouting trade rules in doing so, however, is not.

This article could be cited as Valerie Hughes, "World Trade Organization arbitrator finds that Covid-19 measures justify delay in compliance with WTO obligations" (2020), 4 PKI Global Justice Journal 25.

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