ARB-2019-1

Arbitration
under Article 21.3(c) of the
Understanding on Rules and Procedures
Governing the Settlement of Disputes

As of 13 April

	Award of the Arbitrator,

1.6. On 16 December 2019, I invited Russia to comment on Ukraine's letter. On 17 December 2019, Russia sent a letter stating that the reasons given by Ukraine did not justify the requested extension. Nevertheless, given the winter holidays and for the purposes of constructive engagement in this arbitration, Russia indicated that it would agree that the date for Ukraine's written submission be moved to 23 January 2020, the date for Russia's written submission be moved to 6 February 2020, and the date of the hearing be moved to 27 or 28 February 2020.

1.7. Having taken account of Ukraine's request and Russia's comments, on 18 December 2019, I sent a revised Working Schedule to the parties. In accordance with this revised Working Schedule, Ukraine filed its written submission on 23 January 2020, Russia filed its written submission on 6 February 2020[9], and the hearing was held on 20 February 2020.

1.8. By letter dated 25 March 2020, I informed the parties that the award would be circulated no later than 31 March 2020. I also informed the parties that,

to do so." Where the reasonable period of time is determined through binding arbitration pursuant to Article 21.3(c), that provision stipulates that:

> [A] guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may

paragraphs 8.2, 8.3, and 8.5 of the Panel Report and paragraphs 7.1 through 7.8 of the Appellate Body Report.[28]

3.13. Ukraine considers that I should determine that 27 months is a reasonable period of time for Ukraine to implement the recommendations and rulings of the DSB in this dispute.[37] Ukraine argues that this period is necessary given that implementation requires Ukraine to: (i) adopt first a "general legislative framework" to allow Ukrainian investigating authorities[38] to initiate and conduct review investigations for the purpose of complying with recommendations and rulings of the DSB; and (ii) subsequently conduct an administrative review to amend the anti-dumping measures at issue.[39] Ukraine also argues that it is currently facing a situation of "emergency in international relations" and that this is a relevant particular circumstance "affect[ing] daily life, disturb[ing] the economy and [leading] to extraordinary and unexpected delays in what normally should be straightforward actions".[40]

3.14. Russia objects to Ukraine's proposal for a reasonable period of time of 27 months, stating that it "exceeds the standard of 'prompt compliance'" embodied in Article 21.1 of the DSU.[41] Specifically, Russia questions the need to make legislative changes or conduct an administrative review to address the recommendations and rulings of the DSB in this dispute.[42] Russia contends that no reasonable period of time should be granted to implement the recommendations and rulings of the DSB pertaining to Article 5.8 of the Anti-Dumping Agreement, and that Ukraine should have been reasonably able to implement the remaining recommendations and rulings of the DSB through a decision by ICIT within two months.[43] Even if legislative changes and/or an administrative review were necessary to implement the recommendations and rulings of the DSB ( ), Russia maintains that Ukraine has failed to meet its burden of proof in requesting a reasonable period of time of 27 months.[44]

3.15. At the outset, I observe that Russia distinguishes between: (i) the recommendations and rulings of the DSB pertaining to Article 5.8; and (ii) the remaining recommendations and rulings of the DSB.[45] With respect to Ukraine's implementation obligations under Article 5.8, Russia stated at the hearing that immediate compliance is not "impracticable" within the meaning of Article 21.3 of the DSU, and Ukraine should therefore not be granted a reasonable period of time for this aspect of its implementation obligations. Russia also emphasized that the second sentence of Article 5.8 requires the termination of an investigation.[46]

3.16. As indicated above, pursuant to Article 21.3(c) of the DSU, my mandate in this arbitration is to determine the reasonable period of time within which Ukraine must comply with the recommendations and rulings of the DSB in this dispute.[47] In my view, my mandate does not extend to determining whether "it is impracticable to comply immediately with the recommendations and rulings" under the second sentence of Article 21.3 of the DSU. Moreover, in singling out the recommendations and rulings of the DSB pertaining to Article 5.8, Russia is essentially requesting me to consider separately what might be the reasonable period of time for Ukraine's remaining implementation obligations. In , the arbitrator suggested that he might not be limited, under Article 21.3(c) to determining one reasonable period of time, but had difficulty accepting that it may be possible to determine two separate reasonable periods of time with respect to the same measure.[48] In the current dispute, all of Ukraine's implementation obligations pertain to a single set of measures forming part of the same anti-dumping proceeding, namely, the 2008 amended decision, the 2010 amendment, and the 2014 extension decision. In particular, the 2014 extension decision is at the heart of all the recommendations and rulings of the DSB.[49] I have difficulty accepting that I should distinguish between the various recommendations and rulings of the

[49] Ukraine's submission, paras.

[37] Ukraine's submission, paras. 3 and 177.

[38] In this Award, I use the term "Ukrainian investigatin5869 0-3(58as)-4(u-21(th)-2oh)-8(riti(e)-8(s61(")4( )-11(o,)-10reg

make such decisions; such steps and other requirements are set out in various other provisions of the Law against Dumped Imports. I therefore consider Article 5.6 of the Law against Dumped Imports, on its own, to be of limited guidance in determining whether the anti-dumping measures at issue could be amended simply through a decision by ICIT or whether an administrative review is warranted for the purpose of implementation in this dispute.

3.22. Moreover, the ICIT decisions on which Russia relies do not appear to be relevant to this dispute. First, Russia refers to a decision of 2015 made by ICIT under the Law of Ukraine on the application of safeguard measures on imports to Ukraine (Ukrainian Safeguard Law) to implement the recommendations and rulings of the DSB in .[57] As Ukraine explained, that decision was based on a specific provision of Ukraine's Safeguard Law, which empowers ICIT to repeal or review safeguard measures if certain circumstances are met.[58] While Russia states that the Ukrainian Safeguard Law and the Law against Dumped Imports bear certain similarities[59], Russia has not pointed to a corresponding provision in the Law against Dumped Imports that would allow ICIT to amend the anti-dumping measures at issue in this dispute without conducting an administrative review. In this respect, I am mindful of the fact that, as acknowledged by the parties at the hearing, implementing the recommendations and rulings of the DSB will require excluding EuroChem from the scope of the anti-dumping measures, calculating dumping margins, and complying with certain disclosure obligations.[60] Second, Russia refers to two decisions of 2017, whereby ICIT suspended and subsequently resumed anti-dumping measures.[61] Those decisions were based on Article 28.3 of the Law against Dumped Imports[62], which deals with the collection of anti-dumping duties and sets out the circumstances in which anti-dumping measures may be suspended and resumed by a decision of ICIT.[63]

anti-dumping duty to 0% for EuroChem could be achieved through an ICIT decision.[66] Russia did not offer a response or point to a similar provision concerning the recommendations and rulings of the DSB. For all these reasons, I am not convinced by Russia's argument that implementation in this dispute can be achieved through a decision by ICIT, without Ukrainian investigating authorities conducting an interim review.

3.23. Now, I turn to Ukraine's allegation that there is no legal basis for Ukrainian investigating

implement recommendations and rulings of the DSB, before reviewing the anti-dumping measures at issue.[79] Since Ukrainian legislation does not set out a procedure aimed specifically at bringing anti-dumping measures into conformity with recommendations and rulings of the DSB, drawing on the processes for implementation in , Ukraine contends that its general legislative framework has to be amended before it can initiate an administrative review.[80] Ukraine stresses that, like the European Union in , this is the first time its anti-dumping measures have been found to be inconsistent with the Anti-Dumping Agreement.[81] I observe that the recommendations and rulings of the DSB in that dispute did not apply to Ukraine. Rather, they concerned a measure taken by another WTO Member, and implementation was undertaken in a different legal system. Crucially, the reasonable period of time in that dispute was agreed upon by the parties and the means for implementation and the associated timeframes for implementation were not considered by an arbitrator under Article 21.3(c) of the DSU. Therefore, I am of the view that the means for implementation adopted by the European Union in that dispute are of limited relevance to my determination in this arbitration.

3.29. For these reasons, I consider that my determination of the reasonable period of time should not account for the legislative changes that Ukraine proposes to undertake. In these circumstances, I turn to the period of time within which Ukraine's administrative process for implementation must be completed.

3.35. Yet, I am not convinced by Russia's argument that Ukraine simply needs to reconsider existing evidence on the investigation record for the purpose of recalculating normal value, and thus does not need to complete all of the usual steps of an administrative review.[99] According to Russia, to implement the recommendations and rulings of the DSB, Ukraine is, , required to construct normal value using the production costs of the investigated Russian producers as reported in their records, instead of using a surrogate cost for gas. Russia emphasized that these reported costs are already on the investigation record.[100] Ukraine in turn pointed to paragraph 7.90 of the Panel Report and footnote 159 thereto, as providing room for Ukraine to consider additional information and evidence, instead of engaging in a mathematical exercise of constructing normal value using production costs as reported in the records of the investigated Russian producers.[101]

3.36. As the Appellate Body observed, in paragraph 7.90 of the Panel Report and footnote 159 thereto, the Panel made several important factual findings underpinning its analysis under Article 2 of the Anti-Dumping Agreement. While Ukrainian investigating authorities had found that JSC Gazprom (Gazprom), a Russian supplier of gas, sells gas in the domestic Russian market below cost, the Panel found that no determination was made that Gazprom was the gas supplier of the investigated Russian producers or that Gazprom's prices affected other gas suppliers' prices.[102] In light of these findings, the Appellate Body

and giving public notices of final determinations detailing the "findings and conclusions reached on all issues of fact and law considered material".[104] I see some merit in these arguments advanced by Ukraine. Indeed, even if some steps and time periods are not required by law, they may nonetheless be useful in ensuring that implementation is effected in a transparent and efficient manner, fully respecting due process for all parties involved.[105] At the same time, I consider that due process concerns must be balanced with the principle of prompt compliance reflected in Article 21.1 of the DSU.[106] To that end, all flexibilities within the legal system of an implementing Member must be employed in the implementation process.[107] In this case, while it has referred to due process obligations, Ukraine has not explained how the timeframes associated with the various steps of its proposed administrative review reflect the use of flexibilities within its legal system. It seems to me that, given the limited scope of the administrative review at issue, Ukraine has available to it a considerable degree of flexibility to conduct that administrative review in a shorter period of time than it proposes, as evidenced by the absence of mandatory timeframes in relation to the majority of the component steps of Ukraine's proposed review.

3.39. In light of all of the considerations above, Ukraine has not satisfied its burden of proving that 12 months is the shortest period of time possible within its legal system to complete the administrative review at issue. I am of the view that Ukraine could complete this administrative review in reasonably less time. Relevant considerations include the required immediate exclusion of EuroChem and the fact that this administrative review will essentially focus on calculating normal value for the remaining investigated Russian producers and ensuring that certain disclosure obligations are met.[108] Given the limited scope of the administrative review at issue, I am not convinced that conducting it in a shorter period of time than Ukraine proposes would, in the circumstances of this dispute, infringe upon due process rights. At the same time, I believe that the review to be undertaken in this dispute will require more than the two months proposed by Russia. I indeed find it highly doubtful that a period of two months would allow Ukrainian investigating authorities to complete all the necessary steps for an administrative review. In that regard, I note that the component steps of Ukraine's proposed administrative review would seem to be sequential steps that cannot be conducted in parallel.[109]

3.40. A few days before the circulation of this Award, by letter dated 26 March 2020, Ukraine requested me to take into account Ukraine's recent measures in response to the COVID-19 virus, as they may significantly affect implementation in this dispute. Ukraine referred to the 30-day emergency situation regime introduced across Ukraine on 25 March 2020, specifically pointing to quarantine measures, the suspension of all commercial international passenger services to and from Ukraine, the closing of all non-essential services, and the ban on gatherings of more than 10 individuals. Ukraine indicated that, depending on how the situation evolves, these measures might be prolonged beyond 30 days.[110] By letter dated 30 March 2020, Russia expressed its solidarity with the countries affected by the COVID-19 virus. Russia stated, however, that it was unclear how Ukraine's recent measures would affect the Ministry's ability to conduct administrative reviews in short timeframes. Russia emphasized that, as per the Ministry itself, investigations would not be terminated or suspended. Russia also emphasized that, while the Ministry introduced certain mitigating measures dealing with on-site verifications and interactions with interested parties in

[104] Ukraine's submission, para. 168 (quoting Articles 6.2, 6.4, and 12 of the Anti-Dumping Agreement).

[105] In that regard, I observe that Ukraine was found to have acted inconsistently with Article 6.9 of the Anti-Dumping Agreement in the interim and expiry reviews leading up to the 2014 extension decision because Ukrainian investigating authorities had failed to give interested parties sufficient time to comment on its disclosure.

[106] In determining that balance, the arbitrator in noted that considerable opportunity had already been afforded to interested parties to participate in the original investigation. The arbitrator thus considered it appropriate to provide a shorter time to such interested parties in the context of an investigation that was far more limited in scope and had been initiated to implement the recommendations and rulings of the DSB. (Award of the Arbitrator,

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response to the recent developments in Ukraine pertaining to the COVID-19 virus, investigations were otherwise to be conducted "as usual".[111]

3.41. Ukraine has not explained in detail the extent to which its recent measures to address the COVID-19 virus affect its investigating authorities' ability to review the anti-dumping measures at issue in this dispute. At the same time, I am aware of the seriousness of Ukraine's recent measures, which were put in place as part of an emergency situation regime in response to a pandemic. The types of measures described by Ukraine may affect many aspects of a country's operation. Although investigations are not suspended, the documents put on the record by Russia confirm that Ukraine's recent measures affect the conduct of trade-defence investigations and that certain necessary adjustments are being made by the Ministry. For example, I understand that Ukraine's measures to prevent the spread of the COVID-19 virus 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, as a result of the COVID-19 virus, on-site verifications are cancelled, which may lead to extending the deadlines for interested parties to provide answers to questionnaires.[112] While I see merit in Russia's argument that the COVID-19 pandemic is not "an overwhelming excuse for failures to comply with the WTO obligations"[113], I cannot, in my determination of the reasonable period of time in this dispute, 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.[114] My determination also needs to take into account the recent developments in Ukraine relating to the COVID-19 pandemic.

3.42. Ukraine submits that, as recognized by the Panel in , it is currently in a situation of "emergency in international relations", which constitutes a particular circumstance that I should take into account in determining the reasonable period of time.[115] According to Ukraine, this situation has existed since 2014.[116] Since then, Ukraine has been prioritizing urgent legislative and regulatory actions to protect its territory and population, and maintain its law and public order internally, resulting in other initiatives experiencing significant delays.[117] Ukraine emphasizes that this particular circumstance "affects daily life, disturbs the economy and continues to lead to extraordinary and unexpected delays in what normally should be straightforward actions".[118] Consequently, Ukraine requests me to determine that a period of six months be added to the reasonable period of time that I would otherwise determine.[119] This additional time is to be allocated

[111] Letter from Russia dated 30

conduct of anti-dumping investigations. At the hearing, Ukraine merely asserted, without more, that the Ministry has to devote manpower to urgent border issues, and therefore cannot focus on anti-dumping proceedings.[132] The exhibits relied on by Ukraine in the context of its "particular circumstances" arguments comprise: (i) a 2019 news item by the United Nations (UN); (ii) a 2019 report by the UN Office of the High Commissioner for Human Rights; (iii) UN General Assembly Resolution 74/17 of 9 December 2019; and (iv) a table listing 16 laws adopted in 2019 by Ukraine's Parliament.[133] None of these exhibits speaks to the alleged delays in anti-dumping investigations.[134]

3.46. For these reasons, I do not consider that there is a particular circumstance relevant to my determination of the reasonable period of time for implementation in this dispute.

3.47. In

the GATT.[1] According to the Panel in that case, such a situation allows WTO Members to "
" [2]

12. This particular circumstance affects daily life, disturbs the economy and continues to lead to extraordinary and unexpected delays in what normally should be straightforward actions. Concretely, the above-specified actions and time frames are those that operate as a rule in a 'normal' situation, i.e. under ordinary conditions. Because, however, life is no longer normal since the uninvited disruptions started, this continuing emergency should be taken into account when determining a realistic time frame under surreal circumstances.

13. More specifically, since Ukraine needs to focus on issuing emergency laws and regulations to respond to the situation of " " that currently exists in its territory, other regulatory or legislative initiatives will experience significant delays. Consequently, a specific flexibility of at least six months should be added the reasonable period of time that would otherwise be determined, absent these crippling and highly particular circumstances from which Ukraine has been severely suffering during the last years.

14. In summary, in order to implement the DSB's recommendations and rulings, the two following steps will have to be completed:

> First, the Draft Law against Dumped Imports will need to be adopted in order to enable a review of anti-dumping measures to be initiated on the basis of the DSB's recommendations and rulings; and
>
> Secondly, a review of the anti-dumping duties will have to be conducted in accordance with domestic mandatory procedure and taking into account the ruling of the Panel and the Appellate Body in this case.

15. Ukraine's reasonable and realistic estimate is that it will take no less than 9 months to adopt the Draft Law against Dumped Imports and that it will t l"

EXECUTIVE SUMMARY OF RUSSIA'S SUBMISSION

1. On 30 September 2019, the DSB adopted its recommendations and rulings to bring Ukraine's anti-dumping measures on Russian ammonium nitrate in conformity with the ADA.[1] While Ukraine announced its intention to comply with these recommendations and rulings, the Russian Federation considers that the timetable it proposed to do so cannot be considered as representative of a RPT within the meaning of Article 21.3 of the DSU.

2. In particular, the Russian Federation considers that (i) Ukraine unduly seeks to limit the role of the arbitrator, (ii) no RPT should be afforded to implement the DSB's recommendations and rulings relating to Article 5.8 of the ADA, (iii) the DSB's recommendations and rulings can be implemented in a shorter period of time, without legislative changes or review and (iv) no particular

from the scope of any subsequent review. It is established in the WTO jurisprudence and undisputed by Ukraine that there is no other way to comply with Article 5.8 of the ADA. There is no other permissible range of actions that can be taken in order to implement the DSB recommendations and rulings and immediate compliance is practicable.

9. The exclusion of EuroChem from the scope of the anti-dumping measures and from the scope of any subsequent review only requires a decision by ICIT, pursuant to Article 5(6) of the Ukrainian Dumping Law. Ukraine should therefore immediately comply with the DSB's recommendations and rulings relating to Article 5.8 of the ADA.

10.

17. Ukraine wrongfully attempts to refer to the "emergency in international relations" identified in the Panel Report in (DS 512). In referring to this dispute, Ukraine errs