Tribunal Rules

Implementing part 1 of the Tribunals, Courts and Enforcement Act 2007

Responses to the consultation on possible changes to the Upper Tribunal Rules 2008 arising from trade remedies appeals

(19 October to 14 December 2018)

Reply from the Tribunal Procedure Committee

May 2019

Introduction

1. The Tribunal Procedure Committee ("the TPC") is established under section 22 of, and Schedule 5 to, the Tribunals, Courts and Enforcement Act 2007 ("the TCEA"), with the function of making Tribunal Procedure Rules for the First-tier Tribunal and the Upper Tribunal.

2. Under section 22(4) of the TCEA, power to make Tribunal Procedure Rules is to be exercised with a view to securing that:
   (a) in proceedings before the First–tier Tribunal and Upper Tribunal, justice is done;
   (b) the tribunal system is accessible and fair;
   (c) proceedings before the First–tier Tribunal or Upper Tribunal are handled quickly and efficiently;
   (d) the rules are both simple and simply expressed; and
   (e) the rules where appropriate confer on members of the First–tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.

3. In pursuing these aims the TPC seeks, among other things, to:
   (a) make the rules as simple and streamlined as possible;
   (b) avoid unnecessarily technical language;
   (c) enable tribunals to continue to operate tried and tested procedures which have been shown to work well; and
   (d) adopt common rules across tribunals wherever possible.

4. The TPC also has due regard to the public sector equality duty contained in section 149 of the Equality Act 2010 when making rules. Further information on the TPC can be found at our website: www.gov.uk/government/organisations/tribunal-procedure-committee

5. One of the Chambers of the Upper Tribunal ("the UT") is the Tax and Chancery Chamber (the "UT(TCC)"), and the Rules which apply there are the Upper Tribunal Rules 2008 (the "UT Rules"). These Rules can be found in the "Publications" section of our website: /www.gov.uk/government/organisations/tribunal-procedure-committee

The Consultation Process

6. A consultation (the "Consultation") ran over the period October to December 2018, its purpose being to seek views as to possible changes to the UT Rules in relation to the proposed allocation of appellate jurisdiction in what are termed "trade remedies" cases to the UT(TCC). The need for provision to be made for appeals in these cases arises on the basis of the United Kingdom (the "UK") leaving the European Union (the "EU") this year.

7. Trade remedies cases exist by reference to relevant World Trade Organisation ("WTO") Agreements, and (presently) relevant EU Regulations. Both the EU and the individual EU countries (hence, the UK) are members of the WTO. The European Commission ("the Commission") is currently responsible for investigating complaints in trade remedies cases concerned with exports into the EU, with appeals in such cases being heard by the EU General Court ("the General Court").

8. The Consultation was on the basis that the UK would leave the EU on 29 March 2019, with the UK then becoming responsible for its own trade policy, and a new trade remedies system needing to come into being. The Department for International Trade had to plan for there to be such a system in place before then. After exit from the EU, the relevant EU Regulations would no longer apply, and the trade remedies framework being developed by the UK government was intended to meet the UK's WTO obligations. The Trade Remedies Authority ("TRA") would undertake an equivalent role to that of the Commission, but by reference to the relevant WTO Agreements and statutory instruments to be made under the Taxation (Cross-border Trade) Act 2018 ("the Act"), rather than the EU Regulations.

9. An important aspect of the new trade remedies system would be the scope for a determination or recommendation by the TRA to be "reconsidered" by the TRA, following an application properly made for that purpose. It was intended that Trade Remedies (Reconsideration and Appeals) Regulations would be made, containing provisions relating to the process of reconsideration, and appeal rights to the UT following a reconsidered decision being made. These Regulations would also provide for the TRA to have the ability to decide, in appropriate cases, to refer a case to the UT(TCC) where an application for reconsideration relates to a dispute on a point of law. Following a decision

on such a point, the TRA would conclude its reconsideration. The Regulations are now to be entitled the Trade Remedies (Reconsideration and Appeals) (EU Exit) Regulations 2019. We shall refer to these below as the "Reconsideration and Appeals Regulations".

10. The Consultation was not concerned with the policies behind or concerning the proposed new trade remedies system; it was only concerned with possible changes to the UT Rules so as to cater for these trade remedies cases in the UT(TCC).

11. It was unusual for the TPC to consult on possible changes to rules before relevant legislation has been enacted, and particularly so when the relevant statutory instruments have not yet been laid before Parliament. Further, it was to be borne in mind that details described in the Consultation of the proposed new trade remedies system were a reflection of the government's preparedness planning, and that its final form may be subject to change. However, the TPC proceeded on the basis that there would be a new trade remedies system in operation from 29 March 2019, broadly in line with that described in the Consultation, and the TPC sought views as to possible rule changes to ensure that appropriate UT Rules would be in place to enable these cases to be dealt with by the UT(TCC).

12. In the Consultation, further information was provided on the following:
    - trade remedies cases
    - proposed arrangements for a new trade remedies system
    - the proposed appeals process
    - possible amendment of the UT Rules
    - the consultation questions
    - how to respond and by when.

13. Possible changes to the UT Rules were discussed in detail in the Consultation by reference to the following topics and the rules which the TPC considered most relevant:
    (i) Definitions (UT rule 1);
    (ii) Procedural steps and time limits (UT rules 23, 24, 26 and 26A);
    (iii) Costs (UT rule 10);
    (iv) Confidentiality of information (UT rule 14); and
    (v) Hardship applications (UT rule 23).

Responses to specific consultation questions, and Conclusions

14. There were 2 responses to the Consultation – see Annex A. One respondent stated that its members supported the new UK trade remedies system aligning itself as much as possible with EU practice, and considered that most of the questions raised related to the law and procedures of the UT rather than trade remedy policy issues. As such, this respondent focused solely on Question 4 (see below).

15. In what follows, it is considered appropriate to group the Consultation questions together, where the responses given are linked. The responses are then set out, with the conclusions of the TPC (in light of the responses) then stated.

Definitions

16. The TPC had considered that some changes would be necessary to UT rule 1 (definitions). In the Consultation, indicative drafting was as follows:

    (i) insertion of a definition of a "*trade remedies case*" as "*an appeal pursuant to the Trade Remedies (Reconsideration and Appeals) Regulations [ ] against a decision made by the Trade Remedies Authority or the Secretary of State*"; and

    (ii) addition of a further definition of "*interested party*", to mean also "(*d) in a trade remedies case, any person other than the appellant who could have appealed the case to the Upper Tribunal and who has been added or substituted as an interested party under rule 9 (addition, substitution and removal of parties)*"

17. The Questions raised were as follows.

    Question 1: Do you agree with the possible changes to the definitions? If not, why not?

    Question 2: Should any further changes be made to the definitions in the UT Rules? If so, what changes and why?

18. One respondent answered these questions. There was agreement with the possible changes to the definitions.

19. However, this respondent expressed concern that the definition of "interested party" was too broad, and that therefore the category of persons who have standing to appeal to the UT was too broad.

20. It was said that in the EU system there is a difference between interested parties who are involved in the investigation as direct parties (sampled exporters, domestic producers and importers) and those who may submit comments (trade associations representing importers or consumers).

21. Complainants, exporters and producers identified in a trade remedy determination, or who were party to, or concerned by, the administrative investigation are considered to be individually concerned, and therefore have standing to appeal the trade defence measures. For example, importers whose resale prices have been used in the investigation to calculate the dumping margin are directly and individually concerned.

22. However, it was described as 'rather exceptional' for other importers to have the right to appeal directly to the General Court. Only those who correspond to the EU requirement of having direct concern (being part of the administrative procedure) should be given the right of appeal against a decision to impose measures. Opening up the appeal to parties who have not participated in the investigation, and have no access to the detailed considerations on which a decision is based, would be 'problematic'.

23. It was said that unrelated importers without standing before the General Court may challenge trade remedy measures before national courts, who may refer the validity of the measures to the General Court for a preliminary ruling. It was suggested that UK legislation could provide for something similar, allowing such matters to be ruled upon, for example, by the UT.

24. In summary, if the category of interested party was to be broadly defined then the kind of appeal that can be mounted by the various types of party should be specified/limited, taking into account the EU practice in the area.

Conclusion

25. It is to be noted that the TRA will undertake its role by reference to the relevant WTO Agreements and statutory instruments to be made under the Act, rather than the EU Regulations. Further, Article 263 of the Treaty on the Functioning of the European Union, which provides for a right of appeal to the General Court in specific defined circumstances, will have no application. That Article provides that "*Any natural or legal person may, …., institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures*." The terms of that Article

(and its forerunner prior to the Treaty of Lisbon) have been extensively considered in EU jurisprudence as to standing before the General Court, which the TPC understood to be reflected in the points as made by the respondent.

26. Again, Article 267 permits the EU Court of Justice to have jurisdiction to give "*preliminary rulings concerning the validity and interpretation of acts of the institutions, bodies, offices or agencies of the EU*" and that "*where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon*." That was understood by the TPC to underlie the point made in paragraph 23 above.

27. However, all this will change under the new trade remedies system. As stated in paragraphs 30 and 31 of the Consultation, only "interested parties" will be able to participate (as parties) in a dumping, subsidisation or safeguarding investigation or review by the TRA. An "interested party" will be:

    (i) an overseas exporter or the importer of the goods concerned;

    (ii) a trade or business association of producers, exporters or importers of the goods concerned or goods subject to review;

    (iii) the government of the exporting country or territory;

    (iv) a producer of the like goods in the UK; or

    (v) a trade or business association of producers of the like goods.

    In each case, an interested party must have an interest in the investigation or review in question. These "interested parties" reflect similar definitions in the WTO Anti-Dumping Agreement and the WTO Agreement on Subsidies and Countervailing Measures. It is anticipated that this definition of "interested parties" will appear in the finalised content of the Reconsideration and Appeals Regulations.

28. Which parties may have standing to appeal to the UT is a matter for the Department for International Trade in its consideration of the finalised content of the Reconsideration and Appeals Regulations. The TPC understands present policy to be that generally, those who will be defined in these Regulations as "interested parties" may appeal (see paragraph 47 of the Consultation). Those interested parties will be those who have an interest in an investigation or review to which the original decision (as opposed to a reconsidered decision) by the TRA relates. It is emphasised that it is not a matter for the TPC as to what types of persons may have standing to appeal to the UT.

29. As for joinder as an “interested party” under the UT Rules, applications for joinder are possible across many English jurisdictions, including in the tribunal system. They are permitted in the High Court, for example, by reference to Civil Procedure Rules (“CPR”) 19.2(2). In *The Welsh Ministers v Haydn Price, The Registrar of Companies* [2017] EWCA Civ 1768, Sir Terence Etherton MR stated (para 60): “*In considering whether or not it is desirable to add a new party pursuant to [that provision] two lodestars are the policy objective of enabling parties to be heard if their rights may be affected by a decision in the case and the Overriding Objective in CPR Part 1*.”

30. The CPR do not apply in the UT, of course, and the facts of the case cited above were far removed from trade remedies. However, what was stated by the Master of the Rolls seems useful in understanding why in an appropriate case a joinder may be justified, having regard always to the overriding objective (as reflected in UT rule 2).

31. Chapter 14 of the General Court Rules deals with “intervention” in appeals. An application to intervene must include (Article 143) a statement of the circumstances establishing the right to intervene, where the application is submitted pursuant to the second paragraph of Article 40 of the Protocol on the Statute of the Court of Justice of the EU, namely that the right to intervene is open to the bodies, offices and agencies of the Union and to “*any other person which can establish an interest in the result of a case*” submitted to the Court. Thus, the General Court Rules provide an illustration of a pre-qualification being imposed upon an applicant for joinder.

32. The proposal made in the Consultation for a definition of “interested party” likewise imposes a pre-qualification. If any person wishes to become an “interested party” to a trade remedies appeal, then it must apply to the UT for joinder as a party to the appeal, and satisfy the UT that it is also an “interested party” within the meaning of the Reconsideration and Appeals Regulations and hence a person who could have appealed. It appears to the TPC that such a pre-qualification is appropriate given the ‘standing’ provisions which will be in the Reconsideration and Appeals Regulations.

33. The proposal in the Consultation (paragraph 122) for amendment of UT rule 14 would permit the UT to consider restricting access to documents or information in appropriate circumstances where confidentiality has been, or will be, engaged. In that way, the TPC considers that were an interested party to be joined who had not had access to the detailed considerations on which a decision had been based, and those had arisen from confidential material, the conduct of the appeal ought not to be materially ‘problematic’ (see paragraph 22 above).

34. It may also be noted that Article 144 of the General Court Rules provides that "*Where the application [to intervene] is submitted pursuant to the first paragraph of Article 40 of the Protocol on the Statute of the Court of Justice of the EU and the main parties have not identified information in the file in the case that is confidential and which they claim would be prejudicial to them if communicated to the intervener, the intervention shall be allowed by decision of the President*" and that "*In any other case* [i.e. pursuant to the second paragraph of Article 40 of the Protocol: see paragraph 31 above] *the President shall decide on the application to intervene as soon as possible, by order, and, where applicable, on the communication to the intervener of information which it is claimed is confidential*." Thus, in the context of an application for joinder as an "interested party" under the UT Rules, the proposal for amendment of UT rule 14 is consistent with the approach signalled in the General Court Rules for preservation of confidentiality against an 'intervener' in the General Court. The TPC is not aware that the application of this Article has led to materially 'problematic' conduct of appeals in the General Court.

35. For the reasons set out above, the TPC is satisfied that only the changes to the definitions as suggested (by indicative drafting) in the Consultation should be made, but as slightly refined. The Reconsideration and Appeals Regulations will distinguish between decisions made by the TRA and determinations made by the Secretary of State. As such, the definition of a 'trade remedy case' will reflect these matters.

Procedural steps and time limits

36. Part 3 of the UT Rules provides procedures for appellate cases. The relevant rules as regards initiation of an appeal, and steps following, were set out in the Consultation, with emphasis added as regards existing time limits. In summary, in the UT Rules:

    (i) generally, there is a time limit of one month to initiate an appeal;

    (ii) there is then a time limit of one month to submit a response to the notice of appeal (if one is to be provided); and

    (iii) there is an option to submit a reply to a response, but again the time limit is one month.

37. UT rule 23 provides for initiation of an appeal. Thereafter, UT rules 24 and 25 provide for service of a response to the notice of appeal, and a reply to such a response. Under the UT Rules, following provision of the above documents (or expiry of time limits to provide them), directions may then be given by the UT.

38. The Consultation had stated that the TPC was not aware of any circumstances in which these rules do not currently work satisfactorily, and that it considered that limited changes to these rules were necessary to accommodate the rights of appeal in trade remedies cases. The TPC considered that it would be appropriate for an appeal to be initiated by a notice of appeal as provided for in UT rule 23, subject to considering appropriate time limits, not least in cases where a decision was promulgated not by sending it to the appellant but by publication of a notice.

39. The TPC had noted in the Consultation that appeals against decisions of the TRA would only arise following the process of reconsideration; and that all types of appeal will fall to be decided by the UT on the principles of judicial review. That had suggested to the TPC that the process of reconsideration might be expected to bring focus to any appeal points arising following such reconsideration, thus concentrating only on those that will properly be arguable (rather than a wide-ranging disagreement with the decision sought to be impugned). There would already have been a time limit of one month (to be provided for in the Reconsideration and Appeals Regulations) to apply for reconsideration. It had appeared to the TPC that a time limit based on one month to commence an appeal in all these cases would be appropriate (and would be consistent with time limits for appeals in other types of cases which come to the UT(TCC)).

40. If time limits based on a period of one month were thought appropriate, then indicative drafting of a possible change to UT rule 23 was suggested as follows.

(2) The appellant must provide a notice of appeal to the Upper Tribunal so that it is received within 1 month after—

(a)…; or

(b) if permission to appeal is not required, the date on which notice of decision to which the appeal relates—

(i) was sent to the appellant; or

(ii) in a quality contracts scheme case, if the notice was not sent to the appellant, the date on which the notice was published in a newspaper in accordance with the requirement of section 125 (notice and consultation requirements) of the Transport Act 2000.

(iii) *in a trade remedies case*

a. *the date on which the notice published in accordance with the requirements of the Trade Remedies (Reconsideration and Appeals) Regulations [ ] comes into effect; or*

b. *where the appeal is against a decision of the Trade Remedies Authority and no notice is required to be published in accordance with the requirements of the Trade Remedies (Reconsideration and Appeals) Regulations [ ], the date on which notice of the decision was sent to the appellant.*

[insertion underlined]

41. As for a statement in response, the Consultation had noted that the respondent would be the TRA or the Secretary of State (as the case may be), and that both would already be well acquainted with the case. Given that the standard will be that of judicial review, the TPC had considered in the Consultation that preparation of a statement in response ought not to take more than a month from the Tribunal sending the notice of appeal. Similarly, the TPC had considered that preparation of a statement of reply (if any) ought not to take more than a month from the Tribunal sending the statement of response.

42. The TPC had therefore considered that UT rules 24 and 25 would work appropriately as regards the response (if any) and reply (if any).

43. In connection with all the above proposed time limits, it was to be borne in mind that the UT may extend time in appropriate circumstances (under UT rule 5(3)(a)).

44. The questions raised by the analysis above (as set out in the Consultation) were as follows.

Question 3: Is it appropriate that an appeal be initiated via UT rule 23? If not, why not?

Question 4: Should the time limit for initiating an appeal be (i) in the case of a decision required to be published by notice, within one month of the coming into effect of the notice; and (ii) in the case of a decision that is not required to be published, within one month of the TRA sending its decision? In either case, if not, why not?

Question 5: If UT rule 23 is to govern the making of an appeal, should the time limit for a response be as provided for in UT rule 24? If not, why not?

Question 6: If UT rule 23 is to govern the making of an appeal, should the time limit for a reply to a response be as provided for in UT rule 25? If not, why not?

45. One respondent agreed that it was appropriate that an appeal be initiated via UT rule 23.

46. Both respondents considered that the time limit for initiating an appeal should be 2 months. One respondent reasoned that it was ‘a rather complex procedure’; the other respondent suggested that the time limit should be aligned with current EU practice.

47. One respondent further suggested that the time limit for a response should again be 2 months, again since it was a rather complex procedure, and that the UT should set the time for a reply to a response, depending on the ‘specificities of the case’, which in any case should not be shorter than 1 month.

Conclusion

48. Notwithstanding the views of the respondents, the TPC is unpersuaded that time limits other than those already provided for by the UT Rules are appropriate for these cases.

49. It was accepted that issues raised by trade remedies cases might themselves be complex. However, such issues would be expected to be canvassed and considered in full during the reconsideration stage, prior to consideration of whether an appeal should be brought following a reconsidered decision. Further, if an application for reconsideration raises a dispute on a point of law, there is scope for a decision on the point to be sought from the UT(TCC) prior to the reconsideration being concluded. Since an appeal will fall to be resolved on judicial review principles, it would be anticipated that there would be inherently less complexity in the points capable of being successfully advanced on appeal.

50. As to whether the UT procedure itself may be seen as ‘rather complex’, the TPC disagrees. Initiation of an appeal via UT rule 23 will require provision of the information set out in UT rule 21(4) (a) to (e), and the only information which is likely to be material to a time limit is provision of “*the grounds on which the appellant relies*”. Given the points made in paragraph 39 above, the TPC considers that such information ought to be capable of being provided within one month of a reconsidered decision.

51. As for provision of a statement of response by the TRA or the Secretary of State (as the case may be), the TPC is not aware of any difficulties being anticipated by the Department for International Trade in such a statement being provided within one month of the Notice of Appeal. Again, the only information relevant to a time limit under UT rule 24 is provision of “*the grounds on which the respondent relies*”. Given that a respondent will already be well acquainted with the case and that the standard on appeal will be that

of judicial review, again the TPC considers that such information ought to be capable of being provided within one month after a copy of the notice of appeal was sent.

52. The suggestion made that the UT should set the time for a reply to a response, depending on the 'specificities of the case' was understood by the TPC to presuppose that the UT would be invited to (or would on its own initiative) make a direction to that effect, after sight of the notice of appeal and statement of response. It is always a matter for the UT as to what directions it might consider giving, and when, during the appellate process. This is recognised in UT rule 26(1). However, the structure and content of UT rules 23, 24 and 26 set out a 'default' position of the parties choosing what information successively to provide (but in accordance with the terms of those rules), if it is to be provided. It is always open for a party to apply for an extension of time to provide the information, under UT rule 5(3)(a). The 'specificities of the case' may be thought to be best assessed after the appellant has had the opportunity to reply to the statement of response, rather than before. Again, the TPC considers that any reply ought to be capable of being provided within one month after a copy of the response was sent.

53. In light of the above points, the TPC is not persuaded that time limits should be aligned with current EU practice, not least since current EU practice provides for appeals without there having been a 'reconsideration' stage.

54. Further, as noted in paragraph 89 of the Consultation, as a general rule, tribunals are intended to provide users with speedy and inexpensive access to justice. As stated in paragraphs 2 and 3 above, the TPC must exercise its powers with a view to (amongst other things) securing that proceedings before the UT are handled quickly and efficiently, and the TPC seeks to make rules that enable tribunals to continue to operate tried and tested procedures which have been shown to work well.

55. The TPC considers that the time limits presently contained in UT rules 23, 24 and 26 represent tried and tested procedures which work well, and lead to swift and efficient handling of appeals. The outcomes of appeals in trade remedies cases will be capable of affecting the interests of many persons, and the TPC considered that the operation of rules to lead to early outcomes in such cases (consistent always with fairness and justice) was an important objective.

56. Other regulations will be part of the new trade remedies system: regulations specifically concerned with dumping or subsidisation investigations or reviews, and likewise regulations specifically concerned with safeguards investigations or reviews. These are

the Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019, and the Trade Remedies (Increase in Imports Causing Serious Injury to UK Producers) (EU Exit) Regulations 2019. Respectively, they will be defined in the Reconsideration and Appeals Regulations as the "Dumping and Subsidisation Regulations", and the "Safeguards Regulations" (and these abbreviations will be used below).

57. The requirements concerning publication of relevant notices (leading to rights of appeal) are contained in the Act itself, the Dumping and Subsidisation Regulations, the Safeguards Regulations, and will be contained in the Reconsideration and Appeals Regulations. Notice of a 'reconsidered decision' (of the TRA) will be provided for only in the Reconsideration and Appeals Regulations.

58. To accommodate the various statutory sources of a published notice, after inclusion in the UT Rules of a definition of "TRA" as the Trade Remedies Authority, the drafting of UT rule 23(2)(iii) will become:

(iii) in a trade remedies case—

(a) where the appeal is against a decision made by the TRA and notice is required to be published in accordance with the Trade Remedies (Reconsideration and Appeals) (EU Exit) Regulations 2019, the date of such publication or (if later) when the notice comes into effect;

(b) where the appeal is against a decision made by the TRA and no notice is required to be published in accordance with the Trade Remedies (Reconsideration and Appeals) (EU Exit) Regulations 2019, the date on which the appellant is notified of the decision, or

(c) where the appeal is against a determination of the Secretary of State under the Taxation (Cross-border Trade) Act 2018, the Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019, the Trade Remedies (Increase in Imports Causing Serious Injury to UK Producers) (EU Exit) Regulations 2019 or the Trade Remedies (Reconsideration and Appeals) (EU Exit) Regulations 2019 (as the case may be), the date on which the notice is published in accordance with the relevant provision or (if later) when the notice comes into effect;

Referrals to the UT

59. As for the TRA referring a question of law to the UT during the course of a reconsideration, it had appeared to the TPC in the Consultation that the appropriate procedure would already fall within UT rule 26A. The TRA would make an application to

the UT, and it would then be for the UT to give directions. The TPC had anticipated that the UT would at that stage deal with (for example) who the parties to the application should be and what further steps should be taken.

60. The question raised by the above was as follows.

    Question 7: Should a referral by the TRA to the UT(TCC) be made via UT rule 26A? If not, why not?

61. One respondent agreed that a referral by the TRA to the UT(TCC) should be made via UT rule 26A, but referred also to its comment under Question 13 (see below), namely that the reconsideration procedure should not be seen as a replacement of the judicial review and (by reference to the relevant WTO Agreements) that the tribunal and its procedures must be independent of the authority investigating the alleged dumping or subsidisation.

Conclusion

62. The TPC is satisfied that a referral by the TRA to the UT(TCC) should be made via UT rule 26A.

63. The TPC would not view a reference to the UT(TCC) for a decision on a question of law, during the process of reconsideration, as inconsistent with the need for (and availability of) effective 'judicial review'. The TPC would anticipate that the UT, consistent with the overriding objective, would facilitate the advancement of arguments as to the question of law from those appropriate to advance them, before reaching its decision. The TPC understands that the Reconsideration and Appeals Regulations will provide that in respect of the original decision:

    (i) where it was published by the TRA in a notice, a further notice would be published setting out the details of the matter referred to the UT; and

    (ii) where it was not one that the TRA was required to publish, the applicant would be notified by the TRA that the matter has been referred to the UT.

64. The right to appeal against a reconsidered decision would remain. At all times the UT and its procedures would be independent from the TRA. The TRA, following the making of a referral to the UT, would likely become a party to the UT proceedings; and the UT would have no role in the reconsideration of the original decision by the TRA (such

reconsideration to be concluded by the TRA after the making of the UT's decision on the question of law).

Costs

65. As the Consultation stated, under the UT Rules, there is no scope for costs recovery (winner obtaining costs from the loser) save in respect of specified jurisdictions, or as wasted costs or due to what may be termed "unreasonable conduct". A costs regime under which no party may recover its costs from its opponent is termed "no costs shifting".

66. Certain factors as outlined in the Consultation might have suggested that a general costs regime allowing the winner to obtain costs from the loser (termed "costs shifting") would be inappropriate for trade remedies appeals. However, potential liability for costs in a financial services case or a wholesale energy case (see UT rule 10) may be noted. The Consultation had noted that the UT would only set aside a determination/recommendation if it considered that the decision made was unreasonable (upon application of the principles of judicial review). Hence, it might be thought that there was a reasoned argument in favour of the decision maker being potentially liable for costs (but not the appellant): termed "one - way costs shifting".

67. The following question was raised, by reference to possibilities of no costs shifting, full costs shifting, one-way costs shifting, or any other regime for costs.

    Question 8: What should be the costs regime for these appeals, by reference to (i) no costs shifting; (ii) full costs shifting; (iii) one-way costs shifting; or (iv) any other regime for costs? Please provide your reasoning.

68. One respondent stated that there should be no costs shifting except where appropriate to dissuade vexatious proceedings.

Conclusion

69. In the absence of any other arguments being advanced, the TPC is content that no costs shifting will be the costs regime for these appeals. Under UT rule 10(3)(d), the UT may make an order for costs if it considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings. Thus, UT rule 10 is capable of operating to 'dissuade' the pursuit of proceedings, if in so doing the party (or its representative) would be considered by the UT to be acting unreasonably.

Confidentiality of information

70. The Consultation had noted that the need to protect the confidentiality of information provided to any agency undertaking a trade remedies investigation or review was enshrined in the relevant WTO Agreements, and also followed through in the EU trade defence instruments.

71. The Consultation had also set out that it was intended that the new trade remedies system will provide for a similar regime of respecting the confidentiality of information as provided to the TRA, utilising the same principles, and to be provided by statutory instrument. The intention was that a specific regulation within the Reconsideration and Appeals Regulations would cater for this. For the purposes of the Consultation, this was termed "regulation [x]".

72. The Consultation stated that under the new trade remedies system, the UT will be under an obligation to treat as confidential any information which the TRA is treating as confidential. This had raised the prospect that there will or may be "closed material", in the sense that the TRA (and the Secretary of State) have access to confidential information, and such information may (legitimately) have played its part in the determination or recommendation under appeal. Thus, in its consideration of the appeal, the Consultation had noted that it may conceivably become the case that the UT too may have access to such information, and it may (legitimately) play a part in its disposal of the appeal.

73. Under the UT Rules, rule 14 provides for confidentiality in certain limited circumstances. The TPC had considered that UT rule 14(8) was engaged, as permitting (in general terms) a closed material procedure ("CMP") in trade remedies cases.

74. The TPC had considered it appropriate that there be revision to UT rule 14 to cater expressly for the maintenance of confidentiality, in the context of a possible CMP. The TPC had also considered that it would be prudent to acknowledge in the UT Rules that in trade remedies cases the UT is not precluded from having regard to such confidential information in making a decision (if it considers it appropriate so to do).

75. A possibility for amendment of UT rule 14 was therefore as follows (through indicative drafting, as underlined), with "regulation [x]" being the regulation referred to in paragraph 71 above.

14 –

……

(8) The Upper Tribunal may, on its own initiative or on the application of a party, give a direction that certain documents or information must or may be disclosed to the Upper Tribunal on the basis that the Upper Tribunal will not disclose such documents or information to other persons, or specified other persons.

(8A) In a trade remedies case, the Upper Tribunal may give a direction under paragraph (8) if the Upper Tribunal is satisfied that-

(i) where such documents or information have been supplied to the Trade Remedies Authority, that Authority is treating such documents or information as confidential in accordance with regulation [x] of the Trade Remedies (Reconsideration and Appeals) Regulations [ ]; or

(ii) where such documents or information have not been supplied to the Trade Remedies Authority, if such documents or information were to be supplied to that Authority in accordance with regulation [x] of the Trade Remedies (Reconsideration and Appeals) Regulations [ ], that Authority would be entitled to treat such documents or information as confidential in accordance with that regulation,

and the Upper Tribunal is not precluded from considering such documents or information in making its decision in the case.

(9) A party making an application for a direction under paragraph (8) may withhold the relevant documents or information from other parties until the Upper Tribunal has granted or refused the application.

(10) In a case involving matters relating to national security, the Upper Tribunal must ensure that information is not disclosed contrary to the interests of national security.

(11) The Upper Tribunal must conduct proceedings and record its decision and reasons appropriately so as not to undermine the effect of an order made under paragraph (1), a direction given under paragraph (2), or (8) or the duty imposed by paragraph (10).

76. The questions raised were as follows.

Question 9: Do you agree that it is appropriate to reflect the process of the UT respecting the confidentiality approach of the TRA by amendment to UT rule 14? If not, why not?

Question 10: Do you agree that the correct approach is to consider UT rule 14(8) rather than UT rule 14(2)? If not, why not?

Question 11: Do you have any comments on the indicative drafting proposal?

77. One respondent agreed that it was appropriate to reflect the process of the UT respecting the confidentiality approach of the TRA by amendment to UT rule 14, and that the correct approach was to consider UT rule 14(8) rather than UT rule 14(2). This respondent had no comments on the drafting proposal.

Conclusion

78. The regime of respecting confidentiality of information provided to the TRA (see paragraph 71 above) is also reflected in provisions for that purpose in the Dumping and Subsidisation Regulations and the Safeguards Regulations.

79. As such, the TPC considers that, consistent with the overall approach of respecting confidentiality of information provided to the TRA, the UT Rules ought to recognise the various stages at which such information might be provided to the TRA: in connection with (i) an initial investigation or review, (ii) a reconsideration, and (iii) an appeal to the UT.

80. The TPC is satisfied that the proposed amendment to UT rule 14 would have been appropriate as regards the stages of reconsideration and appeal (as dealt with by the Reconsideration and Appeals Regulations). However, since the 'first stage' (of initial investigation or review) will not be dealt with in the Regulations but in the Dumping and Subsidisation Regulations and the Safeguards Regulations, an amendment to UT rule 14(8) should also include reference to the confidentiality provisions in those regulations. These are regulation 45 of the Dumping and Subsidisation Regulations, and regulation 16 of the Safeguards Regulations.

81. Therefore, the amendment to UT rule 14 should be (through indicative drafting) insertion of paragraph (8A) as follows (with additional provisions underlined).

(8A) In a trade remedies case, the Upper Tribunal may give a direction under paragraph (8) if the Upper Tribunal is satisfied that-

(a) where such documents or information have been supplied to the TRA, the TRA is treating such documents or information as confidential in accordance with -

(i) <u>regulation 45 of the Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019; or</u>

(ii) <u>regulation 16 of the Trade Remedies (Increase in Imports Causing Serious Injury to UK Producers) (EU Exit) Regulations 2019; or</u>

(iii) regulation [x] of the Trade Remedies (Reconsideration and Appeals) (EU Exit) Regulations 2019; or

(b) where such documents or information have not been supplied to the TRA, if such documents or information were to be supplied to the TRA in accordance with regulation [x] of the Trade Remedies (Reconsideration and Appeals) (EU Exit) Regulations 2019, the TRA would be entitled to treat such documents or information as confidential in accordance with that regulation,

and the Upper Tribunal is not precluded from considering such documents or information in making its decision in the case.

Hardship applications

82. The Consultation stated that it was intended that one provision in the new trade remedies system will be equivalent to section 16(3) of the Finance Act 1994:

An appeal which relates to, or to any decision on a review of, any decision falling within any of paragraphs (a) to (c) of section 14(1) above shall not be entertained if any amount is outstanding from the appellant in respect of any liability of the appellant to pay any relevant duty to the Commissioners (including an amount of any such duty which would be so outstanding if the appeal had already been decided in favour of the Commissioners) unless—

(a) the Commissioners have, on the application of the appellant, issued a certificate stating either—

(i) that such security as appears to them to be adequate has been given to them for the payment of that amount; or

(ii) that, on the grounds of the hardship that would otherwise be suffered by the appellant, they either do not require the giving of security for the payment of that amount or have accepted such lesser security as they consider appropriate;

or

(b) the tribunal to which the appeal is made decide that the Commissioners should not have refused to issue a certificate under paragraph (a) above and are satisfied that such security (if any) as it would have been reasonable for the Commissioners to accept in the circumstances has been given to the Commissioners.

83. It had therefore been considered by the TPC to be necessary for there to be provision in the UT Rules for a 'hardship application' to be made by an appellant, and it had appeared that the correct respondent to such an application would be HMRC.

84. A possible amendment was included in the Consultation: insertion of a new paragraph (3A) in UT rule 23, as follows (by indicative drafting).

(3A) In a trade remedies case,

(a) the notice of appeal must include the following in or with the notice of appeal—

(i) a statement as to whether the appellant has paid to HMRC the amount in dispute;

(ii) if the appellant has not paid the amount in dispute, a statement as to the status or outcome of any application to HMRC for consent to the appeal proceeding; and

(iii) if HMRC have refused such an application, an application to the Upper Tribunal for consent to the appeal proceeding which must include the grounds on which the appellant relies, a list of any documents the appellant intends to rely upon in support of that application, and whether the appellant wants the application to be dealt with at a hearing.

(b) if an application is made under (a)(iii), the Tribunal must give directions for determination of the application and stay the proceedings until it has been determined.

85. The question raised was as follows.

Question 12: Do you agree with the proposal for an amendment to UT rule 23? If not, why not?

86. One respondent agreed with the proposal for an amendment to UT rule 23.

Conclusion

87. The TPC is satisfied that the proposed amendment to UT rule 23 would in principle have been appropriate, but it understands that the Department for International Trade is further considering in which legislation (in connection with the new trade remedies system) a 'hardship provision' might be catered for. That will be a matter for the Department and HMRC, not the TPC. As such, the Reconsideration and Appeals Regulations will not deal with this, and no amendment to UT rule 23 may be considered until such time as the legislative source of a hardship provision has been determined.

Generally

Question 13: Do you have any further comments?

88. One respondent commented that the reconsideration procedure should not be seen as a replacement of the judicial review, since reconsideration would be by the same body that took the decision in the first place. Reference was made to the requirements of relevant WTO Agreements as regards the need for the tribunal and procedures to be independent of the investigating authority.

Conclusion

89. The TPC well understood the comment made. Rights of appeal to the UT will exist in the circumstances described in the Consultation, and these will be the independent, judicial procedures required by the WTO Anti-Dumping Agreement and the WTO Agreement on Subsidies and Countervailing Measures (see paragraph 24 of the Consultation). Although the WTO Agreement on Safeguards does not require there to be an appeals process, the new trade remedies system includes one for safeguards cases too.

90. The concept of an application being made to an appropriate authority to review its decision, with the appeal right arising following the decision on review, is not unique to trade remedies cases (see for example regulations 22 to 24 of the Riot Compensation Regulations 2017; with appeals being made to the UT).

91. The TPC agrees that the reconsideration procedure is not to be regarded as a 'replacement' of the requirements imposed by the relevant WTO Agreements. Rather, the TPC would understand the reconsideration process to be an opportunity to 'look again' at the decision made, upon a reconsideration application being properly made, with a view to the TRA examining any errors said to have occurred. Correction of significant factual errors or failures in analysis at the reconsideration stage should be considered a worthwhile endeavour. Once a decision has been reconsidered, with whatever outcome, it may be appealed to the (independent) UT.

Transitional provision

92. Finally, the TRA will only be established when the Trade Bill 2017-19 receives Royal Assent. Until that time, the intended duties of the TRA will be undertaken by the Secretary of State. The Reconsideration and Appeals Regulations will have transitional provisions, namely to reflect that all decisions or determinations will be by the Secretary of State. In particular, 'recommendations' (as to be made by the TRA when established) will, under the transitional arrangements, be 'preliminary decisions' by the Secretary of State, and will be subject to the reconsideration process.

93. As such, it will also be necessary to have transitional provisions as regards the relevant UT Rules, namely that they have effect subject to certain modifications. Again, these will reflect that until the TRA is established, all decisions or determinations will be by the Secretary of State.

94. The TPC has had due regard to the public sector equality duty in reaching all its conclusions as set out above.

Keeping the Rules under review

95. The TPC wishes to thank those who contributed to the Consultation process. The TPC has benefited from the responses.

96. The remit of the TPC is to keep rules under review.

Contact details

Please send any suggestions for further amendments to Rules to:

TPC Secretariat
Post point 10.18
102 Petty France
London SW1H 9AJ

Email: **tpcsecretariat@justice.gsi.gov.uk**

Further copies of this Reply can be obtained from the Secretariat. The Consultation paper, this Reply and the Rules are available on the Secretariat's website:
www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee.htm

Annex A – List of respondents to Consultation

1. Manufacturing Trade Remedies Alliance
2. Saint-Gobain Construction Products Ltd., trading as UK Saint-Gobain PAM UK