

The Jurisprudence of WTO Dispute Resolution (2020)

Matthias Oesch, Aliénor Nina Burghartz & Veena Manikulam*

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I. Introduction

This chronicle summarizes the jurisprudence of WTO dispute resolution in 2020. It comments on two specifically relevant WTO panel and Appellate Body reports from a Swiss perspective.¹ The possibly last report, which was issued by the Appellate Body and duly adopted by the WTO members for some time to come, has attracted particular attention: The dispute in *Australia – Tobacco Plain Packaging* turned on the question whether Australia's adoption of plain packaging measures applicable to all

* Professor and Research and Teaching Fellows, respectively, University of Zurich. All WTO panel and Appellate Body reports are accessible at <www.wto.org> (click the link for disputes). The websites, which are referred to hereafter, were accessed last on 28 February 2021.

1 Switzerland actively participated in WTO dispute resolution matters in 2020. In the ongoing panel proceedings concerning the examination of the safeguard measures enacted by the United States to adjust imports of steel and aluminium products, Switzerland has been acting as complaining party (*United States – Certain Measures on Steel and Aluminium Products*, WT/DS556). Moreover, Switzerland has been participating in various disputes as a third party; these cases concern disputes between WTO members and the United States on the legality of additional duties imposed by the United States on various products, *i.e.* the cases parallel to the one in which Switzerland acts as complaining party, cases of the United States against other WTO members on the legality of rebalancing measures, and the cases *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, WT/DS577, *China – Certain Measures Concerning the Protection of Intellectual Property Rights*, WT/DS542, *Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, WT/DS583, and *European Union – Safeguard Measures on Certain Steel Products*, WT/DS595.

tobacco products violated the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Furthermore, the Appellate Body report in *Russia – Railway Equipment* is of interest: In this case, Ukraine challenged the application of Russia's conformity assessment procedures for railway products to Ukrainian suppliers as being inconsistent with various provisions of the TBT Agreement. These two cases will each be dealt with in turn. Three panel and Appellate Body reports on trade remedy matters were issued in 2020; these cases are not discussed here.² Various panel reports, which were issued in 2020, were appealed.³ However, in these cases, the Appellate Body simply informed the Dispute Settlement Body (DSB) that it would communicate appropriately with participants and DSB members as soon as it knows more precisely when it can schedule the hearing on an appeal. Thus, the legal fate of these panel reports, which have been appealed «into the void», so to speak, still is, for the time being, *in limbo*.⁴ It is not possible for the DSB to duly adopt these reports, and, consequently, it is not possible for complaining parties to take recourse to retaliatory measures.⁵ These panel reports are not dealt with either in this chronicle. In addition to the dispute settlement activities before panels and the Appellate Body, it is worthwhile reporting that the DSB authorised the EU to take countermeasures against the United States at a level of USD 4 billion annually.⁶ The EU successfully argued that the United States had failed to comply with the panel and Appellate Body reports in the *United States – Measures Affecting Trade in Large Civil Aircraft – Second Complaint* case; in these reports, the panel and the Appellate Body had concluded that subsidies granted to Boeing were not compatible with the Agreement on

2 *Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey*, WT/DS513/AB/R (the appeal was withdrawn prior to the oral hearing); *United States – Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/AB/R; *Australia – Anti-Dumping Measures on A4 Copy Paper*, WT/DS529/R.

3 *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R; *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia* (Second Complaint), WT/DS494/R; *United States – Countervailing Measures on Softwood Lumber from Canada*, WT/DS533/R; *United States – Tariff Measures on Certain Goods from China*, WT/DS543/R; *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products*, WT/DS484/R.

4 Cf. JOOST PAUWELYN, «WTO Dispute Settlement Post 2019: What to Expect?», 22 JIEL (2019), 297–321.

5 In the EU, it is planned to amend Regulation 654/2014 concerning the exercise of the EU's rights for the application and enforcement of international trade rules. The objective of the amendment is to protect the EU's interests under international trade agreements in situations when third countries adopt illegal measures and simultaneously block a dispute settlement process, as it is the case with respect to the US blockade to appoint new members of the WTO Appellate Body, see Proposal of the European Commission, 12 December 2019, COM (2019) 623 final.

6 *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, *Recourse to Article 22.6 of the DSU by the EU, Decision of the Arbitrator*, WT/DS353/ARB.

Subsidies and Countervailing Measures (SCM Agreement).⁷ Immediately after the publication of the authorization by the DSB, the EU enacted countermeasures. This action was, at least partly, a response to the countermeasures, which the United States was authorised to enact against the EU in 2019 on the grounds that the latter had violated the SCM Agreement by granting subsidies to Airbus.⁸

Overall, 2020 was a remarkably quiet year for the WTO dispute resolution mechanism with respect to both the number of new requests for consultations and the establishment of panels.⁹ There were five new consultation requests; only in one of these cases, the DSB established a panel after the complaining party requested it to do so (in addition to the establishment of nine panels in cases for which consultations had begun in previous years). These are historically low numbers. However, the global pandemic, which represents an unprecedented disruption to the global economy and world trade, is undoubtedly a major concern for the WTO and challenges the multilateral trading system, as the numerous notifications and the different proposals related to COVID-19 submitted by various WTO members¹⁰ and especially also the highly controversial discussions concerning a temporary waiver of certain TRIPS obligations in response to the pandemic make clear. Moreover, the WTO dispute settlement system continues to experience an existential crisis. The United States has continuously refused to agree to appoint new members of the Appellate Body and/or to appoint existing members for a second term of office after they completed their first term. Therewith, the United States expresses its criticism of the Appellate Body's performance over the last two and a half decades; it alleges that the Appellate Body has usurped powers not attributed to it, by «adding to or diminishing rights and obligations under the WTO Agreement».¹¹ Eventually, on 30 November 2020, the term of office of the only remaining Appellate Body member, Hong Zhao from China, came to an end with the effect that there are no Appellate Body members left to hear cases at all. However, the United States so far has not engaged constructively in finding a solution. Not only did it reject all proposals tabled by WTO members for solving the impasse during the last years, but it also declined to present its own pro-

7 See, for an account of the original panel and Appellate Body reports, THOMAS COTTIER et al., «The Jurisprudence of the World Trade Organisation in 2012», 23 *Swiss Rev. Int'l & Eur. L.* (SZIER/RSDIE) (2013), 505–540, at 527–534.

8 Cf. MATTHIAS OESCH, ALIÉNOR NINA BURGHARTZ & VEENA MANIKULAM, «The Jurisprudence of WTO Dispute Resolution (2019)», 30 *Swiss Rev. Int'l & Eur. L.* (2020), 124–293, at 266.

9 Cf. the statistics at <www.wto.org> (click the link for disputes) and <www.worldtradelaw.net> (click the link for WTO cases & legal texts).

10 See WTO members' proposals on COVID-19 and WTO members' notifications on COVID-19, available online at <https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm>.

11 Office of the United States Trade Representative, 2018 Trade Policy Agenda and 2017 Annual Report, at 22, accessible at <www.ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2018>; see also SIMON LESTER, «Can Interim Appeal Arbitration Preserve the WTO Dispute System?», *Free Trade Bulletin*, CATO Institute, September 1, 2020, No. 77, at 2–3.

posal as it «considers that, when the WTO dispute settlement system functions according to the rules as agreed by the United States and other WTO Members, it provides a vital body to enforce WTO rights and uphold a rules based trading system.»¹² In February 2020, it tabled a comprehensive report on the Appellate Body; therein, it «highlights several examples of how the Appellate Body has altered Members' rights and obligations through erroneous interpretations of WTO agreements», and also comments on proposals tabled by other WTO members.¹³ For the time being, it remains a mystery as to what action on the part of the WTO membership might be necessary for the United States to agree to appoint Appellate Body members anew. It is not clear whether the new US administration under President Joe Biden will fundamentally change the US stance on this matter. At least, it is to be hoped that the US representatives will be ready to constructively participate in discussing the impasse with the other WTO members again.

To ensure the functioning of the system irrespective of the ongoing impasse, several WTO members have begun to take contingency measures to apply as long as the appointment of new Appellate Body members remains blocked. Some WTO members signed «non-appeal pacts» so as to agree reciprocally not to appeal WTO panel reports; by doing so, they waive the right to appeal a panel report *ex ante*, so to speak.¹⁴ However, from a legal viewpoint, the enforceability of such a non-appeal pact is uncertain should a party change its mind after a panel report has been issued. In April 2020, 19 WTO members decided to set up an interim appeals procedure, the so-called multi-party interim appeal arbitration arrangement (MPIA). Its purpose is to establish an interim procedure that allows participating members to appeal panel decisions on WTO matters by means of an existing arbitration procedure based on Article 25 of the Dispute Settlement Understanding (DSU).¹⁵ It is based on the substantive and procedural aspects of appellate review pursuant to Article 17 of the DSU, in order to keep its core features, including independence and impartiality, while enhancing the procedural efficiency of appeal proceedings (§ 3 of the MPIA).¹⁶ The MPIA applies to any future dispute between any two or more participating

12 US 2018 Trade Policy Agenda, supra n. 11, at 22; cf., for an overview on the proposals, OESCH, BURGHARTZ & MANIKULAM, supra n. 8, 267–268.

13 Office of the United States Trade Representative Ambassador Robert E. Lighthizer, Report on the Appellate Body of the World Trade Organisation, February 2020, Introduction, 14, accessible at <www.ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2020>.

14 This has been done by, e.g., Viet Nam and Indonesia in the case *Indonesia – Safeguard on Certain Iron or Steel Products*, WT/DS496, with respect to procedures under Articles 21 and 22 of the DSU (WTO Doc. WT/DS496/14, para. 7).

15 See, for the text of the MPIA, Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, 30 April 2020, WTO Doc. JOB/DSB/1/Add.12.

16 Cf. also European Commission, «Interim appeal arrangement for WTO disputes becomes effective», 30 April 2020, accessible at <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143>>.

WTO members, including the compliance stage of such disputes, as well as to any such dispute pending on the date of the coming into force of the MPIA (§ 9 of the MPIA). In order to render the appeal arbitration procedure operational in particular disputes, the participating WTO members indicate their intention to enter into the arbitration agreement, the so-called appeal arbitration agreement, and to notify that agreement pursuant to Article 25.2 of the DSU within 60 days after the date of the establishment of the panel (§ 10 of the MPIA).¹⁷ Various parties to the MPIA, which are parties to pending disputes, have begun to sign such appeal arbitration agreements.¹⁸ In July 2020, the parties to the MPIA notified the WTO of the ten arbitrators who will hear appeals of panel reports under the MPIA; all of these arbitrators have extensive experience working on WTO disputes, either having served as panelists or arbitrators or having been employed in the WTO Secretariat divisions that deal with panel and the Appellate Body matters.¹⁹ Currently, the following 23 WTO members are part of this initiative: Australia, Benin, Brazil, Chile, China, Costa Rica, the EU, Ecuador, Guatemala, Iceland, Canada, Columbia, Hongkong, Mexico, Montenegro, Nicaragua, New Zealand, Norway, Pakistan, Singapore, Switzerland, the Ukraine, and Uruguay. Any other WTO member is welcome to join the MPIA at any time, by notification to the DSB that it endorses the arrangement. It is to be expected that the arbitrators will be handed the first appeal to hear in early 2021.²⁰ The multi-party interim appeal arbitration arrangement is to provide the basis for the settlement of disputes only until a truly multilateral solution, which will be supported also by the United States, will be found.²¹ Irrespective of this commendable initiative, it remains to be hoped that the WTO membership as a whole commits itself to a truly rules-based system and finds common ground to revitalize the Appellate Body from «the U.S.-induced coma».²² Thereby, it is a positive signal delivered by the WTO membership that the appointment process for the next Director-General could successfully be finalised in due course. In February 2021, Ngozi Okonjo-Iweala of Nigeria was elected to become the 7th Director-General of the WTO,

17 The format for the appeal arbitration agreement is contained in Annex 1 to the MPIA.

18 See, e.g., *Canada – Measures Governing the Sale of Wine*, Agreed Procedures for Arbitration under Article 25 of the DSU, 3 June 2020, WTO Doc. WT/DS537/13; *Costa Rica – Measures Concerning the Importation of Fresh Avocados from Mexico*, Agreed Procedures for Arbitration under Article 25 of the DSU, 3 June 2020, WTO Doc. WT/DS524/5.

19 WTO DSB, «Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes», Supplement, WTO Doc. JOB/DSB/1/Add.12/Suppl. 5; LESTER, supra n. 11, at 3.

20 See, for the first pending cases in which the parties have agreed to take recourse, in the case of an appeal, to arbitration as foreseen under the MPIA, supra n. 18.

21 Cf. PETER VAN DEN BOSSCHE, «President's Corner», SIEL Newsletter, No. 46, Autumn 2020, at 2, with respect to the strong opposition of the United States also against the MPIA which it considers establishing «an «ersatz» Appellate Body, which would be even worse than the original».

22 MICHAEL HAHN, «Challenges for the Rule of Law in the WTO», 22 ZeuS (2019), 349–368, at 360.

being both the first woman and the first person from an African state appointed to this prestigious and crucial position. It is to be hoped that the new Director-General will be willing to forcefully orchestrate the reconstitution of the two-stage dispute settlement mechanism, consisting of panels and the Appellate Body.²³

II. Australia – Tobacco Plain Packaging

A. Introduction and Facts

The TBT Agreement applies to WTO members' technical regulations, standards, and related conformity assessment procedures. It aims to ensure that technical regulations (mandatory requirements), standards (voluntary requirements), and conformity assessment procedures are non-discriminatory and do not create unnecessary obstacles to trade, while recognizing the WTO members' right to implement measures to achieve legitimate policy objectives, such as the protection of human, animal, or plant life or health or the protection of the environment. As such, the TBT Agreement mandates, *inter alia*, that technical barriers to trade must not create unnecessary obstacles to international trade (Article 2.2).

The TRIPS Agreement imposes obligations to ensure a minimum level of protection and enforcement of intellectual property (IP) rights in WTO members' territories.²⁴ In its Section 2 of Part II, the TRIPS Agreement contains standards specifically concerning the category of trademarks; in this regard, Article 20 of the TRIPS Agreement prohibits unjustifiable encumbrances on trademarks by means of special requirements such as in a special form or manner that is detrimental to its capability to distinguish the goods of one undertaking from those of another.

Against this backdrop, the *Australia – Tobacco Plain Packaging* dispute concerned the question whether measures adopted by Australia on trademarks, geographical indications (GIs), and other plain packaging requirements applicable to all tobacco products sold, offered, or otherwise supplied in Australia amounted to violations of the afore-mentioned provisions of the TBT Agreement and the TRIPS Agreement.²⁵ Australia – in an effort to discourage the use of tobacco products and thus improve public health – had introduced a series of comprehensive tobacco-control-related measures, of which the Tobacco Plain Packaging Act 2011 and associated regulations thereto, collectively referred to as «the TPP measures», were at

23 See, for the WTO Director-General selection process, <www.wto.org> (click the link for director-general selection).

24 See PETER VAN DEN BOSSCHE & WERNER ZDOUC, *The Law and Policy of the World Trade Organization*, Text, Cases and Materials, 4th ed., Cambridge 2017, 994.

25 *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, adopted on 29 June 2020, WT/DS435/AB/R/WT/DS441/AB/R.

issue in this dispute. In a nutshell, the TPP measures regulated the overall appearance of the retail packaging of tobacco products, stipulating the acceptable colour, texture, and the manner in which trademarks may appear on retail packaging of tobacco products, as well as the prescribed elements affecting the appearance of tobacco products themselves (Appellate Body report, paras. 5.7-5.13). Notably, Australia was the first WTO Member to implement such tobacco plain packaging requirements.

Cuba, the Dominican Republic, Honduras, Indonesia, and Ukraine, the complainants in the dispute before the panel, challenged the consistency of Australia's measures, arguing that the TPP measures violated Article 2.2 of the TBT Agreement, Articles 15.4, 16.1, 16.3, 20, 22.2 (b), and 24.3 of the TRIPS Agreement, Article IX:4 of the GATT 1994, and lastly Articles 6^{quinquies} and 10^{bis} of the Paris Convention. Australia, the respondent party in this dispute, requested the panel to reject the complainants' claims in their entirety.

In order to resolve the dispute, five separate panels were composed on 5 May 2014 to address the complaints brought forward by each of the five initial complainants, with the same persons serving as panellists on each of the five separate panels, rendering the same report as regards the content (hereafter «the panel»). Notably, a total of no less than 85 *amici curiae* submissions from diverse actors were presented to the panel (panel report, paras. 1.46–1.50).²⁶ The panel issued its final report on 28 June 2018, finding that the complainants had failed to demonstrate that Australia's measures were inconsistent with the afore-mentioned provisions of the WTO Agreements.

On 19 July and 23 August 2018, Honduras and the Dominican Republic, respectively, notified the DSB to appeal certain issues of law and legal interpretations in the panel report. Cuba and Indonesia chose to not appeal the panel's finding, while Ukraine had withdrawn its complaint, before the panel had issued its report «with a view to finding a mutually agreed solution» (para. 1.51). Australia responded by filing its appellee's submission on 2 October 2018. A total of 19 WTO members each filed third participant's submissions, whereas another 16 WTO members notified their intention to appear at the oral hearing as third participants. The Appellate Body report, confirming the panel's findings that the complainants had failed to establish the inconsistency of the TPP measures with relevant provision of the WTO Agreements, was circulated to the members of the WTO on 9 June 2020 and adopted by the DSB on 29 June 2020, finally laying this eight-year long WTO dispute to rest.

26 *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, adopted on 29 June 2020, WT/DS425/R/WT/DS441/R WT/DS458, WT/DS467/R.

B. Findings

The parties to this dispute raised relevant issues under the TBT Agreement and the TRIPS Agreement, of which only a selection shall be addressed in the following passages. Specifically, this discussion turns on identified matters raised before the panel and the Appellate Body under Article 2.2 of the TBT Agreement and Article 20 of the TRIPS Agreement, before briefly commenting on the said issues in the final part of this discussion.

1. The Complainants' Claims Under Article 2.2 of the TBT Agreement

Article 2.2 of the TBT Agreement prescribes that WTO members' technical regulations must not create unnecessary obstacles to international trade. For the purpose of establishing that a measure is inconsistent with Article 2.2 of the TBT Agreement, the complainant must demonstrate that (i) the measure at issue is a «technical regulation» within the meaning of Annex 1.1 to the TBT Agreement; (ii) the measure is «trade-restrictive»; (iii) the measure fulfils a legitimate objective; and (iv) the measure is «more trade-restrictive than necessary» to fulfil a legitimate objective, taking account of the risks non-fulfilment would create (Appellate Body report, para. 6.3).

With regard to the last element of the test of inconsistency, the Appellate Body had clarified that in assessing whether a technical regulation is «more trade-restrictive than necessary», a panel should, *first*, undertake a «relational analysis», i.e. consider factors that include (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the member through the measure.²⁷ *Second*, a panel should engage in a «comparative analysis», i.e. compare the challenged measure with possible alternative measures, considering (i) whether the proposed alternative measure is less trade-restrictive; (ii) whether it would make an equivalent contribution to the legitimate objective, taking account of the risks non-fulfilment would create; and (iii) whether it is reasonably available.²⁸

The panel found that the TPP measures constituted «technical regulations» within the meaning of Annex 1.1 to the TBT Agreement, and qualified the objectives pursued by Australia's measures («to improve public health by reducing the use of, and exposure to, tobacco products») as legitimate objectives (para. 7.182); these findings remained unchallenged. Rather, the complainants' contention under Article 2.2 of the TBT Agreement centred on the last element of the afore-mentioned test

²⁷ *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, adopted on 13 June 2012, WT/DS381/AB/R, para. 322.

²⁸ *Ibid.*

of consistency: based on its relational and comparative analysis, the panel had concluded that the complainants had failed to demonstrate that the TPP measures were «more trade-restrictive than necessary» to fulfil a legitimate objective (para. 7.1732).

On appeal, Honduras and the Dominican Republic requested the Appellate Body to reverse the panel's conclusion with regard to the last element of analysis under Article 2.2 of the TBT Agreement; the appellants claimed that the panel had erred with regard to (i) the degree of contribution of the TPP measures to Australia's legitimate objective; (ii) the trade-restrictive nature of the TPP measures; and (iii) the availability of less trade-restrictive alternative measures that provide an equivalent contribution to Australia's legitimate objective (Appellate Body report, para. 6.11). Additionally, the appellants submitted that the panel had failed to make an objective assessment of the matter as required under Article 11 of the DSU (para. 6.11). Selected aspects of each of these grounds shall be dealt with in turn in the following sections.

- a) The «contribution» of the TPP measures to Australia's objectives (with a special focus on Article 11 of the DSU)

Firstly, the appellants challenged the panel's intermediate conclusion that «the complainants have not demonstrated that the TPP measures are not apt to make a contribution to Australia's objective of improving public health [...]» and that «the evidence before us, taken in its totality, supports the view that the TPP measures [...] are apt to, and do, make a meaningful contribution to Australia's objective of reducing the use of, and exposure to, tobacco products» (panel report, paras. 7.1025 and 7.1043). In particular, the appellants challenged the panel's objectivity in assessing the facts of the case with regard to its analysis of the degree of contribution of the TPP measures to Australia's objectives; the appellants argued that the panel had failed in its duty under Article 11 of the DSU to make an objective assessment of the matter before it.

To substantiate this claim, Honduras claimed that the panel had, *inter alia*, «failed to provide a reasoned and adequate explanation of how the facts supported the determination that the TPP measures resulted in a reduction of smoking prevalence and in consumption of tobacco products; disregarded, misrepresented, and distorted material pieces of Honduras' evidence» (Honduras appellant's submission, para. 696). According to Honduras, «these failures of the Panel [...] are of such a nature and magnitude as to cast serious doubt on the required <objective assessment> of the Panel in the context of this dispute [...]» (Honduras, appellant's submission, para. 697). The Dominican Republic, in a similar vein, contended that the panel had committed errors, including of the following nature; «that the Panel made the case for Australia; that the Panel made findings that lack a basis in the evidence contained on the Panel record and that the Panel failed to engage in evidence from the Domin-

ican Republic that was material to the case» (Dominican Republic appellant's submission, para. 34). Collectively, the sheer volume of the appellants' claims under Article 11 of the DSU, in the Appellate Body's words, were of «unprecedented» nature (para. 6.48). Australia, on its part, requested the Appellate Body to reject all of the appellants' claims under Article 11 of the DSU, characterising them as «[an] unprecedented assault on a panel's performance of its fact-finding function» (Australia's appellee's submission, para. 424).

At the outset of its analysis, the Appellate Body recalled that a claim that a panel had failed to engage in an objective assessment was a «very serious allegation» (para. 6.48).²⁹ The Appellate Body, furthermore, noted that «not every error by a panel amounts to a failure by the panel to comply with its duties under Article 11, only those which [...], undermine the objectivity of the panel's assessment of the matter before it» (para. 6.48). The panel had conducted its analysis of the degree of contribution of the TPP measures to Australia's objective in several steps: it examined the pre-implementation evidence concerning the design, architecture, and intended operation of the TPP measures; it reviewed the impact of the measures based on post-implementation evidence relating to the measures' actual application (panel report, para. 7.518–7.986). To do so, the panel had assessed the measures' impact on non-behavioural or proximal outcomes, distal outcomes and smoking behaviour (i.e. prevalence and consumption) (Appellate Body report, para. 6.351). Lastly, the panel scrutinised the impact of the TPP measures on illicit trade (paras. 7.987–7.1023).

Turning to the appellants' challenge with regard to the panel's approach, the Appellate Body rejected the vast majority of the appellants' submissions in an extensive, 103-page long review of the panel's consideration of the evidence relating to pre-and post-implementation evidence pertaining to the TPP measures. Yet, the Appellate Body found two errors in the panel's assessment of the post-implementation evidence: the *first* concerning the panel's reliance on the statistical concepts of non-stationarity and multicollinearity while assessing the parties' econometric evidence suggesting that the TPP measures contributed to the reduction of overall smoking prevalence, and the *second* relating to the panel's failure to address the Dominican Republic's arguments regarding Australia's cigarette consumption model (paras. 6.257 and 6.362). While the former error, according to the Appellate Body, had no impact on the panel's intermediate conclusion that there was evidence suggesting that the TPP measures contributed to the overall smoking prevalence in Australia, the latter error, in the Appellate Body's view, constituted an «error that fatally undermines the panel's determination that Australia's evidence was more credible than the complain-

29 *Peru – Additional Duty on Imports of Certain Agricultural Products*, adopted on 31 July 2012, WT/DS457/AB/R, para. 5.66 (quoting *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, adopted on 29 August 2014, WT/DS431/AB/R WT/DS432/AB/R WT/DS433/AB/R, para. 5.227).

ant's evidence» (para. 6.362). Accordingly, the Appellate Body, in a next step, addressed whether the panel's second error undermined the objectivity of the panel's assessment such that the panel's factual intermediate conclusion no longer had a sufficient evidentiary and objective basis (para. 6.364). Revisiting the totality of evidence taken into account by the panel, the Appellate Body concluded that the circumstance that the panel had erred with respect to only one of the several different aspects of the panel's evidentiary analysis did not amount to an undermining of the panel's intermediate conclusion with regard to the contribution of the TPP measures to Australia's objectives (paras. 6.366 and 6.367).

b) The «trade-restrictiveness» of the TPP measures

Secondly, the appellants also challenged the panel's intermediate finding under Article 2.2 of the TBT Agreement with regard to the interpretation and application of «trade-restrictiveness». The panel had articulated the *legal standard* by which to assess «trade-restrictiveness» as follows: «A technical regulation is <trade-restrictive> [...] when it has a limiting effect on international trade». The appellants took the view that a demonstration of a «modification of the conditions of competition» in a particular market or «a limitation on competitive opportunities» of products suffices to demonstrate the trade-restrictiveness of a measure (Appellate Body report, para. 6.382). The Appellate Body, however, confirmed the panel's approach that a mere non-discriminatory modification of the competitive opportunities for all tobacco products in the entire market as opposed to a reduction in the competitive opportunities of imported products vis-à-vis domestic products would not necessarily suffice to demonstrate trade-restrictiveness; the Appellate Body recalled that a determination of trade-restrictiveness requires a panel to assess the degree to which the measure causes a limiting effect on *international* trade (para. 6.389).

With regard to the *application* of Article 2.2 of the TBT Agreement, both appellants claimed, *inter alia*, that the panel had erred in the application of the provision by failing to find that rather than the reduced *volume* of imported tobacco products on the Australian market, a reduction in the *opportunity* for products to differentiate on the basis of brands sufficed to demonstrate the trade-restrictiveness of the TPP measures (panel report, para. 7.1196). The Appellate Body, while confirming that «to the extent that they restrict the use of branding features on tobacco products and their retail packaging, the TPP measures reduce opportunities for producers to differentiate their products» (para. 7.1214), upheld the panel's finding that the non-discriminatory impact of the TPP measures on merely reducing the *opportunity* for producers to differentiate between different products on the basis of brands did not in itself necessarily amount to a limiting effect on international trade. The Appellate Body reasoned that «while a reduction in the opportunity to differentiate might

harm the competitive opportunities of some products, it would necessarily seem to improve the competitive opportunities of other competing products» (para. 6.408).

c) «Alternative Measures» to the TPP measures

Thirdly, the appellants' final challenge under Article 2.2 of the TBT Agreement concerned the availability of less trade-restrictive alternative measures that would provide an equivalent contribution to Australia's objective. In this regard, the appellants challenged two of the alternative measures examined and rejected by the panel: an increase of the minimum legal purchase age (MLPA) for tobacco products from 18 to 21 years of age; and an increase of taxation of tobacco products in Australia.

The panel had found that neither of the two alternative measures would be less trade-restrictive than the TPP measures, and that neither of the alternative measures would make a contribution to Australia's objective equivalent to that of the TPP measures (panel report, paras. 7.1472, 7.1546, and 7.1625–7.1627). To recall, the panel determined that the objective of the TPP measures was «to improve public health by reducing the use of, and exposure to, tobacco products» (para. 7.232). The panel rejected that the objective *also* encompassed reducing the appeal of tobacco products, increasing the effectiveness of GHWs, and reducing the ability of packages to mislead consumers about the harms of smoking, arguing that these «specific objectives are more properly described as the means, or <mechanisms> by which the measures are intended to achieve Australia's objective of improving public health» (para. 7.227).

In assessing the degree of contribution that the TPP measures and the two alternative measures made to the above described objective, the panel qualified each measure's contribution by using the same adjective, namely «meaningful» (title of section 7.2.5.3.8). The Appellate Body noted, *inter alia*, that there remained ambiguity as to precisely how the contribution of each alternative measure, which had in all instances been described as «meaningful» could not be considered «equivalent» to that of the TPP measures, which the panel had also described as «meaningful» (Appellate Body report, para. 6.489). In light of this, the Appellate Body did not see a clear indication in the panel's analysis that the degree of reduction in the use of, and exposure to, tobacco products achieved by each alternative measure would be materially smaller than the one achieved by the TPP measures (para. 6.495). In particular, the Appellate Body rejected the panel's consideration that the two alternative measures' contribution would fall short of being equivalent as they do not address the design features of tobacco packaging (para. 6.496). The Appellate Body reiterated the objective of the TPP measures and expressly rejected the proposition that the relevant objective entails the three abovementioned «mechanisms» of the TPP measures (para. 6.498). The Appellate Body, consequently, disagreed with the panel's intermediate finding

that the proposed alternatives would not make an *equivalent* contribution to that of the TPP measures.

Nevertheless, the Appellate Body found that the panel did not err in finding that the complainants failed to demonstrate that these two alternative measures were *less trade-restrictive* than the TPP measures (para. 6.521). The appellants' key contention was that because the TPP measures reduced the competitive opportunities arising from brand differentiation, these measures were, by design, trade-restrictive and, therefore, alternative measures would be inherently less trade-restrictive. The Appellate Body reiterated its previous findings that the reduction in brand differentiation in and of itself did not suffice to establish the requisite limiting effect on international trade (para. 6.476). Consequently, although the Appellate Body found that the panel had erred in its application of Article 2.2 of the TBT Agreement with respect to the *equivalence* of the contribution of each alternative measures, it upheld the panel's findings that the complainants had failed to demonstrate that the alternative measures would each be *less trade-restrictive alternatives* to the TPP measures to fulfil Australia's legitimate objective (para. 6.516). Ultimately, the Appellate Body upheld the panel's finding that the complainants had failed to demonstrate that the TPP measures were inconsistent with Article 2.2 of the TBT Agreement.

2. The Complainants' Claims Under Article 20 of the TRIPS Agreement

The *Australia – Tobacco Plain Packaging* dispute also gave rise to claims under the TRIPS Agreement. The following section shall discuss the panel's and Appellate Body's findings specifically with regard to the interpretation and application of Article 20 of the TRIPS Agreement. Article 20 of the TRIPS Agreement, in its relevant parts, provides as follows:

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods [...] of one undertaking from those of other undertakings.

In addressing the complainants' claim that the TPP measures were inconsistent with Article 20 of the TRIPS Agreement, the panel examined whether (i) the TPP measures involve «special requirements»; (ii) the special requirements imposed by the TPP measures «encumber» «[t]he use of a trademark in the course of trade»; and (iii) the TPP measures encumber the use of trademarks in the course of trade «unjustifiably» (panel report, para. 7.2156, emphasis added). On appeal, the appellants' challenges focused on the panel's interpretation of the term «unjustifiably» and the application of Article 20 of the TRIPS to the facts of the dispute.

The panel in its analysis of the term «unjustifiably» had started its assessment by elucidating the ordinary meaning of the term «unjustifiably» (para. 7.2392), determining that the term «connotes a situation where the use of a trademark is encum-

bered by special requirements in a manner that lacks justification or reason that is sufficient to support the resulting encumbrance» (para. 7.2395), while noting that «there may be circumstances in which good reasons exist that sufficiently support the application of encumbrances on the use of a trademark in a reasonable manner» (para. 7.2396). In order to distinguish such «good reasons», the panel turned to the context provided by other provisions of the TRIPS Agreement, in particular the first recital of the preamble to the TRIPS Agreement, as well as Article 7 («Objectives») and Article 8 («Principles») of the TRIPS Agreement. The panel noted that such a contextual approach was further underscored by paragraph 5 (a) of the Doha Declaration on the TRIPS Agreement and Public Health (hereafter «Doha Declaration»), which the panel deemed as a «subsequent agreement» within the meaning of Article 31(1)(a) of the Vienna Convention on the Law of Treaties («VCLT»; para. 7.2409). Ultimately, the panel was of the view that «public health» expressly mentioned in Article 8.1 of the TRIPS Agreement was «unquestionably» among interests that may constitute a basis for justifiability (para. 7.2406).

The panel, furthermore, stated that the term «unjustifiably» as used in Article 20 of the TRIPS Agreement should not be equated with the meaning of the term «unjustifiable» as used in the chapeau of Article XX of the GATT 1994 (para. 7.2420). Rather than only requiring the existence of some rational connection between encumbrances imposed on the use of a trademark and the reason for which they are imposed, as per the panel's view in the context of the TRIPS Agreement, due account must also be taken of the action that is to be justified, i.e. the encumbrances resulting from special requirements (para. 7.2423). Based on this, the panel concluded that a determination of «unjustifiably» involved a consideration of the following factors: (i) the nature and extent of the encumbrance resulting from the special requirements, bearing in mind the legitimate interest of the trademark owner in using its trademark in the course of trade and thereby allowing the trademark to fulfil its intended function; (ii) the reasons for which the special requirements are applied, including any societal interests they are intended to safeguard; and (iii) whether these reasons provide sufficient support for the resulting encumbrance (para. 7.2430).

Honduras appealed this legal standard set by the panel's interpretation in a two-fold manner: *First*, Honduras put forward that the panel had erred in setting out the factors that should be considered in determining whether the use of a trademark is being «unjustifiably» encumbered by special circumstances. *Second*, Honduras submitted that, should the panel's interpretation be correct, the panel had erred by not considering it necessary for a member to adopt less trademark-encumbering special requirements (Honduras' appellant's submission, paras. 52 and 54).

The Appellate Body addressed Honduras' appeal by revisiting the ordinary meaning of the term «unjustifiable», holding that something is «unjustifiable» «when there is no fair reason for it and when it cannot be reasonably explained» (Appellate Body report, para. 6.645). The Appellate Body then rejected Honduras' argument

that the term «unjustifiable» must be read in its proper trademark context, i.e. that only concerns directly linked to the *trademark* could trigger a justifiable encumbrance on the trademark's use (Honduras' appellant submission, paras. 105 and 108, substantiating that Article 20 is silent as to the specific reasons for which special requirements may be imposed (para. 6.649)). Rather, measures to protect public health are in fact specifically contemplated in Articles 8.1, 30, 31, and 39.9 of the TRIPS Agreement leading the Appellate Body to agree with the panel «that the encumbrance on the use of trademarks by special requirements under Article 20 may also be imposed in pursuit of public health objectives» (para. 6.649).

The Appellate Body also rejected Honduras' complaint that the panel had erred by not considering it necessary for a Member to opt for a less trademark-encumbering special requirement if such was available and provided an equivalent contribution. The Appellate Body, conversely, held that including an examination of alternative measures as a requirement under Article 20 of the TRIPS Agreement, «would equate the concept of justifiability reflected in Article 20 of the TRIPS Agreement with the concept of necessity, within the meaning of Article 2.2 of the TBT Agreement and Article XX of the GATT 1994», disregarding the «drafters» intention to provide greater latitude to Members by using the term «unjustifiably» as opposed to a term reflecting the notion of «necessity» (para. 6.55). In the Appellate Body's view, the term «unjustifiably» reflected «the degree of regulatory autonomy that Members enjoy in imposing encumbrances on the use of trademarks through special requirements» (para. 6.647).

Honduras also challenged the panel's *application* of Article 20 of the TRIPS Agreement to the facts of the dispute at hand. The appellant contested, *inter alia*, the panel's assessment whether the reasons for special requirements provided sufficient support for the resulting encumbrances. In this respect Honduras took issue with the panel's finding that it was not always necessary to examine the availability of less trademark-encumbering alternative measures. In response to this argument, the Appellate Body reiterated its previous finding under Article 2.2 of the TBT Agreement that the panel had committed an error in finding that the complainants had failed to demonstrate that the two alternative measures would be apt to make a contribution equivalent to that of the TPP measures (para. 6.694). However, the Appellate Body continued to state the following:

[W]hile it may be possible that [...] an alternative measure that would lead to at least an equivalent contribution could call into question whether the reasons for the adoption of the special requirements sufficiently support the resulting encumbrances on the use of trademark, such an examination is not a necessary inquiry under Article 20. (para. 6.695)

Therefore, the Appellate Body upheld the panel's conclusions that the complainants had failed to demonstrate that the trademark-related requirements of the TPP measures unjustifiably encumber the use of trademarks despite the panel's error in its analysis of the alternative measures (para. 6.697). In light of the contribution to Aus-

tralia's objective, the Appellate Body found that the public health reasons for the adoption of the TPP measures sufficiently supported the far-reaching encumbrances on the use of trademarks resulting from the trademark requirements of the TPP measures (para. 6.697).

C. Commentary

The *Australia – Tobacco Plain Packaging* dispute, presumably the last Appellate Body report to be adopted by the DSB for the foreseeable future, raised several issues with regard to substantive provisions of the TBT Agreement and the TRIPS Agreement. The following four aspects of this dispute are particularly noteworthy:

Firstly, the dispute marked the first instance in which a WTO panel and the Appellate Body have addressed the term «unjustifiably» in Article 20 of the TRIPS Agreement. In interpreting the term, the panel and the Appellate Body followed the classic interpretative approach prescribed by the customary principles of treaty interpretation as enshrined in Article 31(1) of the VCLT: the panel and the Appellate Body considered the ordinary meaning of the term «unjustifiably» and referred to the relevant context of the provision in order to elucidate the specific interests that may ground «justifiable» encumbrances. Interestingly, while the panel considered this contextual approach to be further underscored by virtue of paragraph 5(a) of the Doha Declaration, which the panel qualified as «subsequent agreement between the parties» within the meaning of Article 31(3)(a) of the VCLT, the Appellate Body notably chose to *refrain* from making such a finding, stating that the contextual relevance of the said provisions would stand regardless of the contextual approach also encouraged by the Doha Declaration (Appellate Body report, para. 6.657). The precise legal status of the Doha Declarations, therefore, remains unclear.

Turning to the actual *substance* of the Appellate Body's interpretation of the term «unjustifiably», this dispute is of particular relevance as it provided an opportunity for the Appellate Body to shed light on the nature of the nexus required between the encumbrance on the use of the trademark and its legitimate objective. *Pro memoria*, while the appellants argued for a narrow reading of the term «unjustifiably» as including considerations of whether the measure contributed to its stated objective, and whether the objective could be achieved through less trade-restrictive means, Australia claimed that the relevant test was whether there was a rational or reasonable connection – a test that would arguably grant broad scope for the pursuance of sovereign regulatory objectives provided there is evidence of a reasonable or rational connection between the measure and the legitimate objective.³⁰

30 ALICE MAXWELL, «Plainly Justifiable? The World Trade Organization's Ruling on the Validity of Australia's 'Plain Packaging' Under Article 20 of the TRIPS Agreement», 14 *Asian Journal of WTO & International Health Law and Policy* (2019), 115–145, at 130.

In this regard, the Appellate Body rejected both competing interpretations, instead confirming the panel's own distinct approach to the question of «justifiability». The Appellate Body held that the consideration of «justifiability» *can* involve a consideration of the nature and extent of the encumbrances resulting from the special requirements, the reasons for which the special requirements are applied and whether these reasons provide for sufficient support for the resulting encumbrance (Appellate Body report, para. 6.659). In doing so, the degree of connection between the encumbrance on the use of a trademark and the objective pursued seems to fall somewhere in-between the proposed interpretation of the parties and appears to resemble the notion of a proportionality analysis; while such a standard for assessing «justifiability» would allow for flexibility, it is questionable to what extent the benchmark formulated by the panel and confirmed by the Appellate Body achieved to offer legal certainty to predict which future regulatory interference would be deemed as «unjustifiable».³¹

Secondly, the dispute at hand is remarkable as the majority of the complainants' challenges before the Appellate Body contended that the findings of fact by the panel were on several occasions made in the absence of an objective assessment when assessing the complainant's claim under Article 2.2 of the TBT Agreement. At the outset of its assessment, the Appellate Body reminded that Members to the WTO should carefully consider «when and to what extent to challenge the panel's assessment of a matter pursuant to Article 11» of the DSU (Appellate Body report, para. 6.48). The Appellate Body emphasised that it would «not <interfere lightly> with the panel's fact-finding authority», that it would not «second-guess the [p]anel in appreciating either the evidentiary value of (...) studies or the consequences, if any, of alleged defects in [the evidence] », and that it would not reach a finding of inconsistency under Article 11 simply on the conclusion that it might have reached a differing factual finding from the one the panel reached (para. 6.50). Yet, the bulk of the Appellate Body's report in the dispute at hand centred on the discussion of the claims under Article 11 of the DSU, potentially raising the argument that the Appellate Body has exceeded its scope of appellate review, which by virtue of Article 17.6 of the DSU remains limited to reviewing legal issues and interpretations of the panels. In fact, the role of the Appellate Body and the limited circumstances in which a challenge to the Panel's assessment of the facts are appropriate have been among the concerns of the United States that have ultimately led to the previously mentioned «coma» of the Appellate Body.³² Tellingly, the United States, third party to this dispute, emphasised in its written comments the need for the Appellate Body not to permit Article 11 of the DSU to be used for a review of factual findings, stating the following:

31 Cf. MAXWELL, *supra* n. 30, at 134–138.

32 See *supra* n. 22.

The US disagrees with these attempts to re-litigate dozens of unfavourable factual determinations by the panel through claims of breach of Article 11 of the DSU. The Appellate Body has an opportunity in this appeal to reconsider how its originally limited approach to review the <objective assessment> of a panel has been seized by appellants to cover practically all factual determinations by a panel.³³

While the extensive length and depth of the Appellate Body's review of the panel's factual assessment is striking, that in itself would not provide proof for the Appellate Body exceeding its scope of appellate review. Conversely, it appears that the Appellate Body *has* limited its scope of review in the dispute by virtue of analysing whether errors detected in the panel's analysis would also be of such a material nature to undermine the objectivity of the panel's assessment and constitute a violation of Article 11 of the DSU. The Appellate Body rejected all of the complainants' arguments in this regard, prompting the Appellate Body to ultimately affirm the following:

[The Appellate Body] rejects the attempts by the appellants to resubmit their factual arguments under the guise of challenging the objectivity of the Panel's assessment of the facts of the case. [...] [I]f the Appellate Body were to entertain such factual arguments, this would undermine the Panel in its role as the trier of facts and the adjudicator of first instance in WTO dispute settlement. (para. 6.293)

Arguably, the *Australia – Tobacco Plain Packaging* dispute has reinforced that the threshold for a violation of Article 11 of DSU remains high.

Thirdly, this Appellate Body report provided for a procedural peculiarity in that it contained a separate opinion of one of the three Division Members regarding the complainants' claim under Article 2.2 of the TBT Agreement. While concurring with the final conclusion, one Division Member expressly disagreed with respect to the claim that the panel had failed to make an objective assessment of the facts of the case pursuant to Article 11 of the DSU. Rather, this Member expressed that they found it unnecessary to examine in detail the appellants' claims in this regard, and that the panel's treatment of and reliance on multicollinearity and non-stationarity did not constitute an error under Article 11 of the DSU (para. 6.525).

The Working Procedures for Appellate Review, supplementing the DSU pursuant to Article 17.9 of the DSU, provide for the possibility of separate opinions by one or more of the three persons constituting a panel or an Appellate Body division. Such separate opinions are anonymous (Article 17.11 DSU) and have been relatively rare in GATT and WTO litigation given the WTO's implicit tradition of prioritizing

33 Executive Summary of the United States' third participant's submission in *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, adopted on 29 June 2020, WT/DS435AB/R/Add.1, Annex C-17, at 92–93 and WT/DS441/AB/R/Add.1, Annex C-17, at 92–93.

unanimous decisions.³⁴ Mindful of the comments above, the question arises if the purpose of the separate opinion was also to address the concern raised against the Appellate Body in exercising its authority over matters that do not fall within its appellate review. Tellingly, the Member of the Division in the separate opinion stated that had the Appellate Body not engaged in such thorough examination of the claims under Article 11 of the DSU «this could have been a much shorter report [...]».

Lastly, it is worth mentioning that this dispute joined a series of legal disputes that have addressed the adoption of tobacco-related legislation. Namely, Philip Morris in 2016 had already brought an unsuccessful claim before an arbitral investment tribunal against *Uruguay*, which had enacted anti-smoking legislation similar to Australia's adoption of the TPP measures.³⁵ This investment tribunal addressed legal questions similar to the ones discussed by the panel and the WTO in the dispute at hand, albeit under the realm of investment law. Specifically, the investment tribunal found that there was sufficient evidence of effectiveness and a reasonable connection between the objectives pursued and the utility of the chosen measures, thereby concluding that the challenged measures did not violate the standard of fair and equitable treatment.³⁶ The tribunal also discussed the question whether a trademark confers a right to use or only a right to protect against the use by other, similar to the issue raised under Article 16 of the TRIPS Agreement of this dispute.³⁷ Remarkably, despite the circumstance that the arbitral investment tribunal and the panel and the Appellate Body discussed related legal questions *and* came to the same conclusion within the respective realms of law, neither the panel report nor the Appellate Body report referred to the considerations under the arbitral investment award.

With regard to the framework of measures adopted by *Australia* specifically, the *Australia – Tobacco Plain Packaging dispute* joined the third legal advance raised against Australia's TPP measures; in 2012, the High Court of Australia rejected a challenge to the legislation initiated by four tobacco companies who argued that the plain packaging requirements amounted to the removal of their IP rights in a manner contrary to the Australian Constitution.³⁸ In 2015, an arbitral tribunal dismissed a challenge raised by Philip Morris Asia under the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments based on procedural grounds; Philip Morris Asia contended that

34 MEREDITH KOLSKY LEWIS, «The Lack of Dissent in WTO Dispute Settlement», 9 *Journal of International Economic Law* (2006), 895–931, at 895.

35 ICSID, *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7) from 8 July 2016.

36 ICSID, *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7) from 8 July 2016, at 111–123.

37 ICSID, *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7) from 8 July 2016, at 65–76.

38 High Court of Australia, *British American Tobacco Australasia & Ors v The Commonwealth of Australia* (S389/2011) from 5 October 2012.

Australia had violated its obligations under the said treaty by expropriating its IP rights through the TPP Act and claiming compensation for the damages suffered.³⁹ By dismissing such claims against tobacco-control-related measures also in the realm of the WTO, the Appellate Body presumably ends the legal challenges to Australia's TPP measures, both in domestic and international *fora*, confirming that plain packaging laws can be consistent with domestic law, as well as with international trade and investment obligations.

Consequently, from a broader policy-perspective, this dispute will be of particular relevance for other WTO Members concerned with the introduction of plain packaging requirements similar to the ones enacted by the Australian government and their consistency with Members' obligations under WTO law. Notably, Switzerland is currently deliberating a new federal law (*«Tabakproduktegesetz»*) aimed at regulating and reducing the consumption of tobacco products. In this regard, the *«Eidgenössische Kommission für Fragen zu Sucht und Prävention nichtübertragbarer Krankheiten (EKSN)»* – an advisory body to the Swiss Federal Council – in its position paper dating from 21 September 2020 announced that it demanded, *inter alia*, the introduction of national plain packaging requirements.⁴⁰ In this context, the Appellate Body's report in the dispute at hand affirms WTO members that rules of international trade law as mandated by the WTO and public health objectives are not necessarily mutually exclusive interests – quite a telling observation especially during the times of a global pandemic. It remains to be seen whether and how this seeming potential for compatibility between the concerns of IP rights' holders and the interests of public health extends beyond the facts of tobacco-related cases and will find a reflection in the pressing debate for a TRIPS waiver for COVID vaccines.

III. Russia – Railway Equipment

A. Introduction and Facts

In order to facilitate trade and to create a predictable trading environment, the TBT Agreement encourages WTO members to base their measures on international standards and stipulates transparency requirements (notifications, establishment of

39 Permanent Court of Arbitration, *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No. 2012–12) from 17 December 2015 (Award on Jurisdiction and Admissibility); Agreement Between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments (1993), accessible at <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/152/download>>.

40 EKSN, Entwurf des Bundesgesetzes über Tabakprodukte und elektronische Zigaretten (Tabakproduktegesetz, TabPG), 21 September 2020, accessible at <<https://www.bag.admin.ch/bag/de/home/das-bag/organisation/ausserparlamentarische-kommissionen/eidgenoessische-kommission-sucht-praevention-ncd-eksn.html> – 1294130637>.

enquiry points, and publication criteria). Annex 1.3 to the TBT Agreement defines conformity assessment procedures as «[a]ny procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled». They include, *inter alia*, procedures for sampling, testing, and inspection; evaluation, verification, and assurance of conformity; registration, accreditation, and approval as well as their combinations.⁴¹

The *Russia – Railway Equipment* case concerns a set of measures imposed by Russia regarding conformity assessment procedures for railway products, produced in Ukraine and exported to Russia.⁴² In a nutshell, Ukraine claimed that Russia's inspection system was discriminatory against Ukrainian products compared with like products from Russia, the European Union (EU), and Kazakhstan. More specifically, Ukraine challenged the application of Russia's conformity assessment procedures for railway products to suppliers from Ukraine of rolling stock, railroad switches, and other railroad equipment. It thus raised claims against the following three categories of Russian measures under different provisions of the TBT Agreement (esp. Article 5.1) and the GATT 1994: (i) 14 instructions through which Russia's certification body suspended conformity certificates issued to suppliers of Ukrainian railway products prior to the entry into force of the Customs Union of Belarus, Kazakhstan, and the Russian Federation (CU), due to the alleged impossibility of carrying out the required yearly inspection of the suppliers given the security situation in Ukraine; and three decisions through which Russia's certification body rejected applications for new certificates submitted by Ukrainian suppliers pursuant to CU Technical Regulations 001/2011 and 003/2011 (rejection decisions), due to the alleged impossibility to carry out inspections in Ukraine or incomplete applications; (ii) the requirement applied by certain Russian authorities not to recognise the validity of conformity certificates issued by other CU countries pursuant to CU Technical Regulation 001/2011 for railway products produced in non-CU countries (non-recognition requirement, referred to as the third measure); and (iii) the alleged systematic prevention of imports of Ukrainian railway products into Russia by way of suspending valid conformity certificates held by suppliers, rejecting applications for new certificates by Ukrainian suppliers, and not recognising the validity in Russia of certificates issued by another CU country if the certificates covered products not produced in a CU country.⁴³

The panel was composed on 2 March 2017. Its report was delivered on 30 July 2018. In September 2018, Canada, the EU, Japan, China, Singapore, and the United States reserved their rights to participate in the proceedings for appellate review as

41 Cf. Explanatory Note to Annex 1.3 to the TBT Agreement.

42 *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, adopted on 5 March 2020, WT/DS499/AB/R.

43 *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, circulated on 20 July 2018, WT/DS499/R, paras. 7.232–7.239, 7.592–7.598, 7.810–7.862, and 7.944–7.993.

third parties. The Appellate Body report, only partly confirming the panel's findings, was issued on 4 February 2020; it was adopted on 5 March 2020.

B. Findings

1. The Panel's Preliminary Ruling under Article 6.2 of the DSU

Russia requested a preliminary ruling from the panel alleging that Ukraine's panel request was inconsistent with Article 6.2 of the DSU as it failed to identify a link between the measures challenged by Ukraine and the WTO obligations allegedly breached and to properly identify the third measure at issue, i.e. the non-recognition of certificates issued in CU countries other than Russia (panel report, paras. 7.2, 7.11–7.12, and 7.87). In Ukraine's view, its panel request plainly connected the measures at issue and the relevant WTO obligations and clearly identified the third measure as required under Article 6.2 (Ukraine's appellee's submission, paras. 28 and 47). The panel issued its conclusions on Russia's preliminary ruling request to the parties and the third participants on 17 July 2017 (panel report, para. 1.11). The reasons supporting its conclusions form an integral part of its report (section 7.1.1).

In its report, the panel recalled that, according to the Appellate Body, Article 6.2 of the DSU requires sufficient clarity with regard to the legal basis of the complaint since «a defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin to prepare its defence» (para. 7.22, with reference to Appellate Body reports *Thailand – H-Beams*, para. 88 and *EC – Selected Customs Matters*, para. 168). It further recalled that, «in order to <present the problem clearly>, within the meaning of Article 6.2, a panel request must <plainly connect> the challenged measure(s) with the provision(s) claimed to have been infringed so that a respondent can <know what case it has to answer, and ... begin preparing its defense>» (para. 7.22, quoting, *inter alia*, Appellate Body report, *Argentina – Import Measures*, para. 5.39). The panel continued to examine in detail all four sections of Ukraine's panel request (paras. 7.23–7.42), and then considered that «Ukraine's panel request, when read as whole, provides sufficient clarity as to plainly connect the WTO provisions allegedly infringed with the measures at issue» (para. 7.43). With respect to Russia's claim that Ukraine's panel request was inconsistent with Article 6.2 of the DSU since it lacked a proper identification of the third measure, the panel recalled, *inter alia*, that «the measures at issue must be identified with sufficient precision so that what is referred to adjudication may be discerned from the panel request» (para. 7.91, quoting Appellate Body report, *US – Continued Zeroing*, para. 168), and ultimately concluded that Ukraine's panel request identified also the third measure in a manner compliant with Article 6.2 of the DSU (para. 7.104). The panel thus rejected Russia's request to find otherwise.

On appeal, Russia submitted that the panel had erred both in its finding that Ukraine's panel request properly linked the measures at issue with the legal basis of its complaint as well as in its finding that the request properly identified the third measure at issue (Russia's other appellant's submission, paras. 12–43). In addressing Russia's submission, the Appellate Body first recalled that «Article 6.2 of the DSU sets out two principal requirements, namely, the identification of the specific measures at issue and the provision of a brief summary of the legal basis of the complaint sufficient to present the problem clearly» (para. 5.26), and further that «[these] requirements are significant because, pursuant to Article 7 of the DSU, a panel's terms of reference are governed by the request for establishment of a panel» (para. 5.27, with reference to Appellate Body report, *US – Carbon Steel*, para. 124). Moreover, the Appellate Body considered that «[a]t the same time, the requirement to present the problem clearly does not entail an obligation for the complainant to provide arguments in support of its claim» (para. 5.238, with reference to Appellate Body report, *Korea – Pneumatic Valves (Japan)*, para. 5.31), and further that «in order to determine whether a panel request complies with Article 6.2, a panel must carefully scrutinize the request, read as a whole, and on the basis of the language used therein» (para. 5.29, with reference to, *inter alia*, Appellate Body report, *EC – Bananas III*, para. 142). The Appellate Body then turned to review the panel's analysis in its preliminary ruling regarding Article 6.2 of the DSU (paras. 5.30–5.48), and finally concluded that Russia had not established that the panel erred in its determination of the scope of its terms of reference in this dispute (para. 5.49).

2. Ukraine's Claims Under Article 5.1.1 of the TBT Agreement

The *Russia – Railway Equipment* dispute is the first case in which a WTO panel and the Appellate Body dealt with the interpretation and application of Article 5.1.1 of the TBT Agreement, which establishes a non-discrimination obligation regarding procedures for the assessment of conformity of a product with a technical regulation. Article 5.1 of the TBT Agreement provides, in its relevant part, as follows:

5.1 Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members:

5.1.1 conformity assessment procedures are prepared, adopted and applied so as to grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation; access entails suppliers' right to an assessment of conformity under the rules of the procedure, including, when foreseen by this procedure, the possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system;

[...].

Article 5.1.1 consists of two clauses: the first clause establishes a national treatment obligation and a most-favoured nation treatment obligation regarding the conditions of access to a conformity assessment to suppliers of like products; in turn, the second clause defines «access» for purposes of the obligations under Article 5.1.1. According to the Appellate Body in *Russia – Railway Equipment*, these obligations – unlike other non-discrimination obligations, such as Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement – «attach to the *suppliers* of products as opposed to the product itself» (para. 5.122, emphasis in the original). Their focus «is on the *conditions for access* to a conformity assessment granted to suppliers, i.e. on the factors or circumstances under which the opportunity to benefit from conformity assessment is accorded to those suppliers» (para. 5.123, emphasis in the original). Importantly, the national treatment and most-favoured nation treatment obligations under Article 5.1.1 are qualified by the phrase «in a comparable situation» (para. 5.125). The Appellate Body held that «the assessment [...] should focus on factors with a bearing on the conditions for granting access to conformity assessment in that specific case and the ability of the regulating Member to ensure compliance with the requirements in the underlying technical regulation or standard» (para. 5.128). It further clarified that although «country-wide factors may be relevant in determining the existence of a <comparable situation>» (para. 5.127), such factors need to apply to specific suppliers which seek access to conformity assessment procedures. Since the panel set out essentially the same interpretative framework of Article 5.1.1, the Appellate Body concluded that it did not err in its interpretation of said provision (paras. 5.129–5.136).

As to the panel's interpretation of Article 5.1.1 (panel report, paras. 7.244–7.285), two aspects are particularly noteworthy: First, regarding the assessment of «likeness» of the products, the panel found, without any further elaboration, that «the same criteria that are applied for determining whether products are <like> in the context of Article 2.1 of the TBT Agreement are applicable in the context of Article 5.1.1» (panel report, para. 7.254). Second, with respect to «treatment no less favourable», the panel rejected to import the test developed by the Appellate Body under Article 2.1 of the TBT Agreement, according to which a detrimental impact may not constitute less favourable treatment where it stems exclusively from a legitimate regulatory distinction, into Article 5.1.1. It did so by considering, in particular, that the text of Article 5.1.1, unlike Article 2.1, qualifies the non-discrimination obligations under the former provision by including the phrase «in a comparable situation», which «preserves a degree of flexibility for the importing Member to design and apply its conformity assessment procedures in a situation-appropriate manner» (para. 7.272).

With respect to the application of Article 5.1.1 to the case at hand, the panel and the Appellate Body did not come to the same conclusion: Based on an overall assessment of the evidence on record, the panel found that the security situation in Ukraine

was, in particular due to risks to life or health of Russian inspectors, not comparable to other countries, and thus concluded «that, between April 2014 and December 2016, Ukrainian suppliers of railway products were denied no less favourable access in a situation that was not comparable to the situation in which Russia granted access to suppliers of Russian railway products and suppliers of railway products from other countries» (paras. 7.387). On appeal, Ukraine claimed, *inter alia*, that the panel erred in its application of Article 5.1.1 since it «relied on general considerations regarding the political or internal security situation in Ukraine that had no bearing on the situation of the relevant suppliers whose certificates were suspended or rejected» (Ukraine's appellant's submission, paras. 247–248 and 255). The Appellate Body agreed with Ukraine and found that the panel did not «sufficiently [consider] the situation of the specific suppliers at issue or the regions where the relevant suppliers were located or provided an explanation as to how the evidence on the record concerning the existence of security concerns and anti-Russian sentiment in Ukraine in general related to these regions and suppliers» (para. 5.141). Moreover, the Appellate Body held that «the Panel's conclusion that there was a need to <weigh and balance> the market access interests of suppliers of products originating in the territories of other Members against the interest of safeguarding the life and health of governmental employees» was not appropriate for the purposes of Article 5.1.1, unlike under Article 2.2 of the TBT Agreement where an analysis of the restrictiveness of the measure may be required (para. 5.145). Finally, the Appellate Body found that the panel erred in examining the existence of a comparable situation as it did so «not through the perspective of the suppliers of Ukrainian railway products but through that of the Russian government» and thus «failed to examine the existence of a <comparable situation> on the basis of objective evidence that sufficiently pertained to the specific suppliers at issue», but rather «relied on general <uncertainty> about the security situation of Russian citizens in Ukraine» (para. 5.147). For all these reasons, the Appellate Body concluded that the panel erred in its application of Article 5.1.1 to the dispute at issue «in finding that, between April 2014 and December 2016, Ukrainian suppliers of railway products were denied no less favourable access in a situation that was not comparable to the situation in which Russia granted access to suppliers of Russian railway products and suppliers of railway products from other countries» (para. 5.149). Although the Appellate Body reversed the panel's finding, it was not able to complete the analysis due to (alleged) insufficient factual findings on the record as to how the security situation in Ukraine affected the specific suppliers at issue (para. 5.151).

3. Ukraine's Claims Under Article 5.1.2 of the TBT Agreement

Article 5.1.2 of the TBT Agreement stipulates, in its first sentence, a general obligation not to prepare, adopt, or apply conformity assessment procedures «with a view

to or with the effect of creating *unnecessary* obstacles to international trade» (emphasis added). The second sentence of Article 5.1.2 sets out an example of a situation in which an inconsistency with that general obligation would arise and specifies that conformity assessment procedures «shall not be more strict or be applied more strictly than is *necessary* to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards» (emphasis added). Hence, both sentences of Article 5.1.2 refer to the notion of «necessity». According to the Appellate Body, «the word <necessary> refers to a range of degrees of necessity, depending on the connection in which it is used», which is why «necessity» in both sentences of Article 5.1.2 «has to be determined in the specific context of this provision» (para. 5.183). In the panel proceedings, both parties and the panel held that Article 2.2 of the TBT Agreement provided relevant context for the interpretation of Article 5.1.2 (panel report, paras. 7.406–7.413). The Appellate Body noted both similarities and differences in the language of Articles 2.2 and 5.1.2 (para. 5.185), and held that the existence of «unnecessary obstacles to international trade» under the first and second sentences of Article 5.1.2, read together, may be ascertained based on a comparative analysis of the following factors: «(i) whether the conformity assessment procedure provides adequate confidence of conformity with the underlying technical regulation or standard; (ii) the strictness of the conformity assessment procedure or of the way in which it is applied; and (iii) the nature of the risks and the gravity of the consequences that would arise from non-conformity with the technical regulation or standard» (para. 5.186). It concluded that «[t]his analysis ultimately involves a holistic weighing and balancing of all relevant factors with respect to the challenged conformity assessment procedure and in comparison with proposed alternative measures» (para. 5.186).

With regard to the burden of proof in establishing the existence of «unnecessary obstacles to international trade» under Article 5.1.2, the Appellate Body recalled that «as a general matter the burden of proof rests upon the party, whether complaining or defending, that asserts the affirmative of a particular claim or defence» (para. 5.187), and further considered that, similarly to Article 2.2, «once a complainant has established *prima facie* that a proposed alternative is reasonably available, it would then be for the respondent to adduce specific evidence as to why the implementation of this alternative would be actually impracticable» (para. 5.189). Alternative measures are of course hypothetical in nature, which is why, according to the Appellate Body, a complaining party cannot be expected to provide complete and exhaustive descriptions of the alternative measures they propose (para. 5.189). With these considerations in mind, the Appellate Body turned to Ukraine's claim, according to which the panel faulted in making an objective assessment of the subject matter pursuant to Article 11 of the DSU in concluding that there were no less trade-restrictive alternatives available to Russia and that Ukraine had failed to establish that Russia acted in breach with its obligations under Article 5.2.1 (Ukraine's appellant's sub-

mission, para. 176). Before the panel, Ukraine had put forward the following four alternative measures: (i) additional communications with the relevant Ukrainian producers; (ii) entrusting on-site inspections in Ukraine to the competent authorities from Kazakhstan and Belarus; (iii) accrediting non-Russian inspectors to conduct inspections in Ukraine; and (iv) off-site inspections (panel report, para. 7.459). After an examination of the panel's allocation of the burden of proof under Article 5.1.2 (paras. 5.191–5.199), the Appellate Body concluded that the panel erred in said allocation since it required Ukraine to provide evidence that the requirements of one specific provision under Russian law were fulfilled in order to demonstrate that its proposed less trade restrictive alternative measure (conduct of off-site inspections (iv)) was reasonable available. More particularly, the Appellate Body did not agree with the panel that it was for Ukraine to prove that there had not been any non-conformities or consumer complaints in relation to the products at issue (paras. 5.200 and 5.210). In light of the reversal of the panel's finding, the Appellate Body further considered that it «cannot rely on the Panel's weighing and balancing analysis», and thus concluded (again) that, given the absence of sufficient factual findings by the panel, it cannot overall assess whether Russia applied its conformity assessment procedure more strictly than necessary within the meaning of Article 5.1.2 (para. 5.205). It thus reversed the panel's finding that Ukraine failed to establish, with respect to each of the 14 instructions suspending certificates, that Russia had acted inconsistently with its obligations under Article 5.1.2, first and second sentences, of the TBT Agreement (para. 5.211). However, as to the other three alternatives proposed by Ukraine ((i)-(iii)), the Appellate Body found that Ukraine failed to establish that the panel erred in making an objective assessment of the subject matter pursuant to Article 11 of the DSU in finding that Ukraine failed to establish that they were reasonable available (paras. 5.206–5.209).

4. Ukraine's Allegation Regarding the Existence of Systematic Import Prevention Under Article 11 of the DSU

Before the panel, Ukraine alleged that Russia maintained a measure that consists of the systematic prevention of Ukrainian railway products from being imported into Russia by means of (i) suspending valid certificates held by Ukrainian producers, (ii) refusing to issue new certificates, and (iii) not recognizing certificates issued by other CU countries. Ukraine claimed that this measure was in breach with Russia's obligations under Articles I:1, XI:1, and XIII:1 of the GATT 1994 (panel report, para. 7.941). The panel recalled that «to establish the existence of an unwritten measure, a complaining party must provide evidence demonstrating: (i) that the measure is attributable to the responding party; (ii) the precise content of the measure; and (iii) other elements arising from the manner in which the complaining party described or characterised the measure» (para. 7.946). It further noted, in particular,

that a complaining party may «have to demonstrate how the different components of the measure operate together as part of a single measure and how such single measure exists as distinct from its components» (para. 7.946), that «the evidentiary threshold for providing the existence of an unwritten measure is high» (para. 7.946), and that «a complaining party seeking to demonstrate *the systematic nature of a measure* must demonstrate that such measure is aimed at achieving a particular policy or result and is done according to a system, plan, or organized method or effort» (para. 7.947, emphasis added). Based on its examination of evidence of the measure's existence, the panel overall concluded, with respect to the components of the measure and its systematic nature, that the evidence put forward by Ukraine «did not establish that the three elements have been designed, structured, or operated in combination so as to constitute a separate measure with the aim of systematic prevention» (para. 7.990) nor that «those elements form part of a plan or coordinated effort directed at attaining the aim of preventing the importation of Ukrainian railway products into Russia» (para. 7.991).

On appeal, Ukraine took issue with the panel's allocation of the burden of proof and its assessment of evidence when examining the existence and systematic nature of the alleged unwritten measure (Ukraine's appellant's submission, paras. 34–40 and 48–55). The Appellate Body first recalled «that, in principle, any act or omission attributable to a WTO Member can be challenged as a measure under the WTO dispute settlement system», but also «that <a panel must not lightly assume the existence of a <rule or norm> constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document>» (Appellate Body report, para. 5.232, with reference to Appellate Body report, *US-Zeroing (EC)*, para. 196). After an in-depth review of the panel's analysis regarding the existence of the alleged unwritten measure at issue (paras. 5.237–5.249), the Appellate Body concluded that «the Panel properly considered whether the individual components of the alleged unwritten measure form part of a common plan to prevent imports of Ukrainian products into Russia [...] and did not err in taking into consideration the rationale underlying these individual suspensions and rejections» (para. 5.250). The Appellate Body thus rejected Ukraine's allegation that the panel had failed to make an objective assessment of the subject matter under Article 11 of the DSU in finding that Ukraine had failed to establish that Russia systematically prevented the importation of Ukrainian railway products into Russia (para. 5.251).

C. Commentary

The Appellate Body report in the dispute *Russia – Railway Equipment*, which was adopted on 5 March 2020, forms the latest development in a series of WTO disputes between Russia and Ukraine. It presents the first case in which a WTO panel and the

Appellate Body dealt with the interpretation and application of Article 5.1.1 of the TBT Agreement.

The reports of the panel and the Appellate Body in this dispute thus provide important clarifications on the interpretation and application of the non-discrimination obligations regarding access to conformity assessment procedures under Article 5.1.1: In contrast to other non-discrimination obligations under the TBT Agreement, the obligations under Article 5.1.1 attach to *suppliers* of products as opposed to the product itself. While it is the suppliers that should be granted access to conformity assessment, the «likeness» requirement in Article 5.1.1 relates to the products. Similarly to Article 2.1 of the TBT Agreement, it is the products at issue which must be in a competitive relationship in the marketplace. Moreover, the examination of whether access is granted under conditions no less favourable «in a comparable situation» should focus on factors having a bearing on the conditions for granting access to conformity assessment in the specific case, namely on the basis of objective evidence that sufficiently pertains to the specific suppliers at issue. Given that conformity assessment forms an important market access tool, the clarifications on the interpretation and application of Article 5.1.1 of the TBT Agreement provided by both the panel and the Appellate Body in *Russia – Railway Equipment* give important guidance to WTO members in adopting their own conformity assessment procedures in a manner consistent with WTO law, on the one hand, and grants greater legal certainty to suppliers of products from WTO members seeking access to markets of other WTO members that require compliance with conformity assessment procedures, on the other hand.⁴⁴

However, while the Appellate Body confirmed in this dispute that there are specific legal disciplines relating to the application of WTO Members' conformity assessment procedures, it reversed the panel's findings that Ukraine failed to establish violations of Articles 5.1.1 and 5.1.2 of the TBT Agreement based on the latter's failure to properly apply these disciplines, but not on an assessment of whether Russia was right in preventing imports of railway equipment from Ukrainian suppliers.⁴⁵ Since the Appellate Body was twice unable to complete the legal analysis, the question as to whether Russian conformity assessment measures were consistent with WTO law was left unanswered. The *Russia – Railway Equipment* dispute thus underlines a weakness in the current system of the DSU: the fact that the Appellate Body's mandate, in its current form, does not include the ability to complete legal analysis in accordance with proper interpretation modified by the Appellate Body when the factual findings of the panel are insufficient and/or facts remain undis-

44 PHILIPPE DE BAERE, «World Trade Organization», in: Folkert Graafsma & Joris Cornelis (eds.): *The International Trade Law Review*, 6th ed., London 2020, 1–14, at 6.

45 Cf. also MARCUS SOHLBERG, «Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof, DS 499», 19(3) *World Trade Review* (2020), 476–478, at 478.

puted between the parties (cf. Articles 17.12 and 17.13 of the DSU).⁴⁶ This systemic deficiency is unsatisfactory both for the parties involved *in casu* (especially the complaining party, Ukraine) as well as for parties of WTO disputes and the development of WTO law more generally.

46 Cf. MATTHIAS OESCH, ALIÉNOR NINA BURGHARTZ & VEENA MANIKULAM, «The Jurisprudence of WTO Dispute Resolution (2019)», 30 *Swiss Rev. Int'l & Eur. L.* (2020), 265–293, at 279–280.