
SWISS REVIEW OF INTERNATIONAL AND EUROPEAN LAW

Schweizerische Zeitschrift
für internationales und europäisches Recht
Revue suisse de droit international et européen

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The Jurisprudence of WTO Dispute Resolution (2019)

Matthias Oesch, Aliénor Nina Burghartz & Veena Manikulam*

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I. Introduction

This chronicle summarizes the jurisprudence of WTO dispute resolution in 2019. It comments on the two most relevant WTO panel and Appellate Body reports from a Swiss perspective.¹ One Appellate Body report, which was duly adopted by the WTO members in 2019, has attracted particular attention: the dispute in *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides* turned on various measures enacted by Korea subsequent to the accident at the Fukushima Daiichi nuclear power plant in 2011, such as import bans on certain food products and additional testing and certification requirements regarding the presence of certain radio-

* 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 1 April 2020.

1 Switzerland actively participated in WTO dispute resolution matters in 2019. A panel was established to examine the safeguard measures enacted by the United States to adjust imports of steel and aluminium products (*United States – Certain Measures on Steel and Aluminium Products*, WT/DS556). Moreover, Switzerland has been participating in various WTO disputes as a third party; these cases concern disputes between WTO members and the United States on the WTO law compatibility 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 two cases *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, WT/DS577, and *China – Certain Measures Concerning the Protection of Intellectual Property Rights*, WT/DS542.

nuclides; Japan argued that these measures violated the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). Furthermore, a panel report, which was not appealed and duly adopted by the WTO members in 2019, is of prime interest: in the *Russia – Measures Concerning Traffic in Transit* case, Ukraine challenged certain measures regarding alleged multiple restrictions on traffic in transit from Ukraine through Russia to third countries; Ukraine argued that the measures were inconsistent with the General Agreement on Tariffs and Trade (GATT) 1994 and Russia's Accession Protocol.² These two cases will each be dealt with in turn. Moreover, it is worthwhile mentioning that the Dispute Settlement Body (DSB) authorized the United States to take countermeasures against the European Union at a level of USD 7.5 billion annually; the United States successfully argued that the European Union had failed to comply with the panel and Appellate Body reports in the *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* case.³ This was by far the highest sum for which a complaining party in a WTO dispute has ever been authorized to suspend concessions or other obligations vis-à-vis another WTO member.

Overall, 2019 was again a busy year for the WTO dispute resolution mechanism with respect to both the number of new requests for consultations and the establishment of panels.⁴ There were 19 new consultation requests; this is a remarkably high number. The DSB established panels in 18 cases (counting disputes initiated by different WTO members against [a] specific measure[s] of another WTO member – such as the complaints of Turkey, Switzerland, Russia, Norway, the European Union, India, and China against the United States' measures on steel and aluminum – as one case). WTO dispute resolution on the level of consultations and panel proceedings seems to function well. The frequent recourse to these instruments by a wide variety of WTO members – including the United States – and the ongoing issuance of panel reports are proof of this. At the same time, the United States has continuously refused to agree to appoint new members and/or to appoint existing members for a second term of office after they completed their first term.⁵ 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

2 Protocol of the Accession of the Russian Federation, WT/MIN(11)/24, WT/L/839, 17 December 2011.

3 *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft, Recourse to Article 22.6 of the DSU by the EU, Decision of the Arbitrator*, WT/DS316/ARB; see, for an account of the original panel and Appellate Body reports, MATTHIAS OESCH, «The Jurisprudence of WTO Dispute Resolution (2011)», 1 *Swiss Rev. Int'l & Eur. L.* (2012), 161–188, at 176–188.

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

5 Cf. MICHAEL HAHN, «Challenges for the Rule of Law in the WTO», 22 *Zeitschrift für Europarechtliche Studien* (2019), 349–368, at 357–366; JENS LEHNE, *Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?*, Berlin 2019, *passim*.

Agreement».⁶ During 2019, the Appellate Body was able to issue various reports, although the reduced number of Appellate Body members led to delays in resolving disputes. Several Appellate Body proceedings were on hold. Those panel reports, which were appealed in 2019, could not be dealt with either. In these cases, the Appellate Body simply informed the 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, is, for the time being, *in limbo*.⁷ It is not possible for the DSB to duly adopt these reports.

The impasse in appointing new Appellate Body members was hotly debated in Geneva and elsewhere throughout 2019, without any success though. At the end of 2019, there was one single Appellate Body member left, namely Hong Zhao from China (whose term of office terminates on 30 November 2020); too few Appellate Body members to hear appeals for which a minimum number of three members is required (Article 17.1 of the Dispute Settlement Understanding [DSU]). The Appellate Body is no longer able to hear any new appeals, and all work on 10 of the 13 pending appeals has been suspended.⁸ The dispute resolution system – the «crown jewel» of the multilateral trading system, a term used by many advocates of a rules-based system – is severely jeopardized; it has been transformed «to a problem child in urgent need of reform».⁹ However, the United States so far has not engaged constructively in finding a solution. It rejected all proposals tabled by WTO members for solving the impasse in 2018 and 2019.¹⁰ Amongst others, the EU, together with twelve other WTO members (including Switzerland), proposed to amend certain

6 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>.

7 Cf. JOOST PAUWELYN, «WTO Dispute Settlement Post 2019: What to Expect?», 22 J. of Int'l Economic L. (2019), 297–321. – The United States itself did not refrain from appealing panel reports; for instance, in *United States – Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel Flat Products from India: Recourse to Article 21.5 of the DSU by India*, WT/DS436/RW, it filed an appeal against the panel report, but also informed the DSB that it «will confer with India so the parties may determine the way forward in this dispute, including whether the matters at issue may be resolved at this stage or to consider alternatives to the appellate process» (WT/DS436/21).

8 PETER VAN DEN BOSCHE, President's Corner, SIEL Newsletter, 30 January 2020, at 1; the appeals in *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, WT/DS499, and *United States – Countervailing Duty Measures on Supercalendered Paper from Canada*, WT/DS505, could be decided by the Appellate Body – acting based on Rule 15 (cf. HAHN, *supra*, n. 5, at 358) – at the beginning of 2020; it is expected that the appeal in *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS467, can also be brought to an end.

9 Launch of the Appellate Body Annual Report for 2018, Address by Ambassador Ujal Singh Bhatia, Chair of the Appellate Body, 28 May 2019, accessible at <www.wto.org/english/news_e/news19_e/ab_29may19_e.htm>.

10 Moreover, the United States was successful in cutting the funding for the Appellate Body members substantially when the membership adopted the WTO budget 2020; cf. Bloomberg, 5 December 2019,

provisions of the DSU; these proposals were made to address such concerns as the transitional rules for outgoing Appellate Body members, the 90-day timeframe for appellate proceedings, the status of municipal law, findings unnecessary for dispute resolution, and the issue of precedent.¹¹ They required an amendment of the DSU, i.e. the approval and ratification by all 164 WTO members. Taiwan submitted a document proposing to develop guidelines on the future functioning of the Appellate Body with the aim to clarify any explicit or implicit boundaries that the WTO members in the Uruguay Round have intended to impose on the Appellate Body.¹² It is suggested that such guidelines could have been implemented by an authoritative interpretation (cf. Article IX:2 of the WTO Agreement) or by a decision of the WTO General Council or the DSB; be that as it may, such action would still have needed the approval by all WTO members. Lastly, in December 2019, David Walker, who was appointed special facilitator to resolve the crisis, proposed to the General Council to approve of a decision on the functioning of the Appellate Body, also to no avail.¹³

The United States declined to present its own proposal 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.»¹⁴ 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:

Recently, some WTO Members have made proposals purportedly in response to these concerns and other concerns expressed by the United States. But there has been little dialogue about the causes of the Appellate Body's failings. Band-aid solutions will not work; Members must grapple with the underlying problems. It would be futile to agree to new rules – rules that could, them-

<<https://www.bloomberg.com/news/articles/2019-12-05/wto-members-agree-on-a-2020-budget-aver-ting-jan-1-shutdown>>.

11 Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, and Costa Rica to the General Council, dated 11 December 2018, WT/GC/W/752/Rev. 2; see, for an account of the Appellate Body crisis and the arguments of the United States, CAROLINE GLÖCKLE, «Die Appellate Body-Krise der WTO – eine Analyse der US-Kritikpunkte», *Eur. Zeitschrift für Wirtschaftsrecht* 2018, 976–982; TETYANA PAYOSOVA, GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, «The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures», Peterson Institute for International Economics Policy Brief no. 18–5 (2018); WEIHUAN ZHOU & HENRY GAO, ««Overreaching» or «Overreacting»?», *Reflections on the Judicial Function and Approaches of WTO Appellate Body*, 53 *Journal of World Trade* (2019), 951–978.

12 Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu to the General Council, dated 8 April 2019, WT/GC/W/763/Rev. 1.

13 WTO Doc. WT/GC/W/791, 28 November 2019.

14 US 2018 Trade Policy Agenda, *supra*, n. 6, at 22.

selves, be undermined by adjudicatory overreach – until there is clear understanding on why the original rules failed to constrain the Appellate Body.¹⁵

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. Irrespective of the rather dubious part played by the United States, it would be possible to appoint Appellate Body members not by consensus, as has traditionally been the case so far, but by voting (cf. Article 9 of the WTO Agreement); an audacious – and hardly promising – action in light of the fact that, by doing so, the United States would be boldly outvoted. Apparently, such action was never seriously considered by the rest of the WTO membership.

To ensure the functioning of the system irrespective of the ongoing impasse, several WTO members have begun to reflect on contingency measures to apply as long as the appointment of new Appellate Body members remains blocked. The European Union concluded «Interim Appeal Arbitration Arrangements» with Canada and Norway; these arrangements will maintain two-tier dispute settlement through arbitration proceedings based on Article 25 of the DSU, preventing disputes from becoming blocked.¹⁶ In order to render the appeal arbitration procedure operational in a particular dispute, these WTO members intend to enter into an arbitration agreement set out in the annexes to the respective communications, and to notify that agreement within 60 days after the establishment of the panel. 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.¹⁷ 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. At the World Economic Forum in Davos, Switzerland, in January 2020, 17 WTO members, including the EU, Brazil, China, and Switzerland, issued a joint statement on the WTO dispute settlement system, thereby recognizing that they consider a functioning dispute settlement system, including independent and impartial appellate review, to be essential for a rules-based multilateral trading system:

We, the Ministers of Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, European Union, Guatemala, Republic of Korea, Mexico, New Zealand, Norway, Panama, Singapore, Switzerland, Uruguay, remain committed to work with the whole WTO membership to find a lasting

15 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>.

16 Cf. for these arrangements <www.ec.europa.eu/trade/policy/accessing-markets> (click the link for dispute settlement).

17 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); see for such «non-appeal pacts» STEVE CHARNOVITZ, «The WTO Appellate Body Crisis: A Critique of the EU's Article 25 Proposal», International Economic Law and Policy Blog, posted on 2 June 2019, accessible at <<https://ielp.worldtradelaw.net>>.

improvement to the situation relating to the WTO Appellate Body. We believe that a functioning dispute settlement system of the WTO is of the utmost importance for a rules-based trading system, and that an independent and impartial appeal stage must continue to be one of its essential features.

Meanwhile, we will work towards putting in place contingency measures that would allow for appeals of WTO panel reports in disputes among ourselves, in the form of a multi-party interim appeal arrangement based on Article 25 of the WTO Dispute Settlement Understanding, and which would be in place only and until a reformed WTO Appellate Body becomes fully operational. This arrangement will be open to any WTO Member willing to join it.

We have instructed our officials to expeditiously finalise work on such an arrangement.

We have also taken proper note of the recent engagement of President Trump on WTO reform.¹⁸

These 17 WTO members agree that such an interim appeal arrangement is to provide the basis for the settlement of disputes until a truly multilateral solution will be found, which will be supported also by the United States.¹⁹ 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» and to preserve the «endangered species <Appellate Body>». ²⁰ By doing so, the international trade law community would still be endowed to celebrate the 25th anniversary of the coming into force of the WTO, which took place at the beginning of this year, condignly.

II. Korea – Import Bans, and Testing and Certification Requirements for Radionuclides

A. Introduction and Facts

The SPS Agreement grants WTO members the right to take sanitary and phytosanitary measures (SPS measures) to protect human, animal or plant life or health from risks arising from pests or diseases of plants or animal or from food safety risks. WTO members making use of this right are subject to a variety of disciplines contained in the SPS Agreement, including (i) the obligation to maintain SPS measures to the extent necessary for the protection of human, animal or plant life or health (Article 2.2), (ii) the obligation to maintain SPS measures based on scientific principles and on sufficient scientific evidence (Article 2.2), and (iii) the obligation not to

¹⁸ <www.wto.org> (click the link for WTO news/2020 news).

¹⁹ In the meantime, delegates of 16 WTO members carved out the envisaged arrangement, the so-called Multiparty Interim Appeal Arbitration Arrangement (MPIA), accessible at <<https://ec.europa.eu/commission/presscorner>> (click the link to WTO); it mirrors the usual WTO appeal rules, and now needs to be approved by the participating WTO members according to their internal procedures.

²⁰ НАНН, *supra*, n. 5, at 360.

adopt or maintain SPS measures that arbitrarily or unjustifiably discriminate or constitute a disguised restriction on international trade (Article 2.3).²¹ These disciplines are further specified in subsequent provisions, e.g. in Articles 5.6 and 5.7 of the SPS Agreement. Additionally, the SPS Agreement provides for provisions relating to, *inter alia*, SPS-related control, inspection, and approval procedures (Article 8 of and Annex C to the SPS Agreement).

Against this backdrop, the *Korea – Radionuclides (Japan)* dispute concerned the question whether a set of measures adopted by Korea on imports of certain food products from Japan amounted to violations of several of the aforementioned provisions in the SPS Agreement.²² In response to the accident at the Fukushima Daiichi nuclear power plant (FDNPP) on March 2011 and the subsequent release of radioactive materials into the environment, Korea had imposed product-specific and blanket import bans as well as additional testing requirements in an effort to protect human health from the adverse effects of certain radionuclides potentially present in Japanese food products.

Japan, the complainant in this dispute, challenged the consistency of these measures before the panel, arguing that they violated (i) Article 5.6 of the SPS Agreement for being more trade-restrictive than required, (ii) Article 2.3 of the SPS Agreement for arbitrarily or unjustifiably discriminating against Japanese food products and constituting a disguised restriction on international trade, and (iii) Article 7 of and paragraphs 1 and 3 of Annex B to the SPS Agreement, as Korea failed to comply with certain transparency requirements. Lastly, the complainant party claimed that the additional testing requirements were inconsistent with Article 8 of and specific paragraphs of Annex C to the SPS Agreement. Korea, the respondent party in this dispute, requested the panel to reject Japan's claims in their entirety.

In order to resolve the dispute, a panel was composed on 8 February 2016. It issued its final report on 22 February 2018.²³ On 9 April 2018, Korea notified the DSB of its decision to appeal certain issues of law and legal interpretations in the panel report to the Appellate Body, shortly after which Japan informed the DSB of its decision to cross-appeal. Brazil, the European Union, and the United States each filed an appellee's submission, whereas Canada, China, Guatemala, India, New Zealand, Norway, the Russian Federation, and Chinese Taipei notified their intention to appear at the hearing as third participants. The Appellate Body Report, reversing a majority of the panel's findings, was adopted by the DSB on 26 April 2019.²⁴

21 See PETER VAN DEN BOSSCHE & WERNER ZDOUC, *The Law and Policy of the World Trade Organization, Text, Cases and Materials*, 4th ed., Cambridge 2017, 990–991.

22 *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides*, adopted on 26 April 2019, WT/DS495.

23 Panel Report, circulated on 22 February 2018, WT/DS495/R.

24 Appellate Body Report, circulated on 11 April 2019, WT/DS495/AB.

B. Findings

The parties to the *Korea – Radionuclides (Japan)* dispute raised a series of issues before the panel and the Appellate Body. This discussion addresses only the issues raised under Articles 5.6, 2.3, 5.7, and 8 in conjunction with Annex (C)(1)(a) of the SPS Agreement.

1. SPS Measures Not More Trade-Restrictive than Required

Annex A(5) of the SPS Agreement defines the appropriate level of sanitary or phytosanitary protection (ALOP) as «the level of protection *deemed appropriate by the Member* establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory» (emphasis added), thus recognising the prerogative of each member to determine its own ALOP within its territory.²⁵ Nonetheless, Article 5.6 of the SPS Agreement stipulates that when establishing SPS measures to achieve such an ALOP, «Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility». The pertinent footnote clarifies that a measure is more trade-restrictive than required if there is an alternative measure, which (i) is reasonably available, taking into account technical and economic feasibility, (ii) achieves the regulating member's ALOP, and (iii) is significantly less trade-restrictive to trade than the SPS measure being applied.

Before the panel, Japan claimed that the adoption of blanket import bans and the additional testing requirements were inconsistent with Article 5.6 of the SPS Agreement as they were more trade-restrictive than required. In support of this claim, Japan proposed a single alternative to Korea's measures that would be capable of achieving Korea's ALOP. In assessing whether this proposed alternative would meet the three-tier test as set out above, the panel recalled that such an analysis entails the identification of the ALOP of the importing member, as well as the level of protection that would be achieved by the alternative measures proposed (para. 7.119).²⁶ Only if the level of protection achieved by the alternative measure meets or exceeds the ALOP of the importing member, would the panel consider the importing member's SPS measure to be more trade-restrictive than necessary and thus inconsistent with Article 5.6 of the SPS Agreement (para. 7.119).²⁷

²⁵ See Appellate Body Reports in *Australia – Salmon*, circulated on 20 October 1998, WT/DS18/AB/R, para. 199; *US/Canada – Continued Suspension*, circulated on 16 October 2008, WT/DS321/AB/R, para. 523.

²⁶ The panel referred to the Appellate Body Report in *Australia – Salmon*, supra, n. 25, para. 208.

²⁷ The panel referred to the Appellate Body Report in *Australia – Apples*, circulated on 29 November 2010, WT/DS367/AB/R, paras. 344 and 368.

The panel, consequently, identified the ALOP determined by Korea based on the formulation submitted by Korea in the following terms: «to maintain radioactivity levels in food consumed by Korean consumers at levels that exist in the ordinary environment – in the absence of radiation from a major nuclear accident – and thus maintain levels of radioactive contamination in food that are as low as reasonably available (ALARA), below the 1 mSv/year radiation dose limit» (para. 7.172).²⁸ The panel noted that Korea's ALOP is not quantified at 1 mSv/year, but is rather a qualitative ALOP that also reflects Korea's adherence to the ALARA principle and its desire to not increase radiation exposure beyond what is in the ordinary environment (para. 7.247). Yet, the panel reasoned that if Japan can demonstrate that its proposed alternative measure can achieve an ALOP that is below 1 mSv/year, it would have met its burden under the second element of Article 5.6 (para. 7.173). Thereafter, the panel discussed whether Japan's proposed alternative measure, consisting of testing in imports to verify that products' caesium content does not exceed Korea's tolerance level of 100 Bq/kg, would be sufficient to ensure that Korean consumers will be exposed to less than 1 mSv/year of radionuclides in food products. The panel found that the evidence supported the conclusion that testing for food with less than 100 Bq/kg of caesium would result in an effective dose below 1 mSv/year (para. 7.236), concluding that Korea's import bans and additional testing requirements were more trade-restrictive than required to achieve Korea's ALOP, as Japan had presented an alternative that would have achieved Korea's desired level of protection while being less trade-restrictive (paras. 7.253 and 7.255).

On appeal, Korea submitted that the panel erred in its application of Article 5.6 of the SPS Agreement as it effectively applied a solely *quantitative* standard as Korea's ALOP, and as a result compared Japan's proposed alternative measure against an incorrect ALOP.

At the outset of its analysis, the Appellate Body recalled that an examination of a claim under Article 5.6 of the SPS Agreement requires, *inter alia*, a panel to identify the level of protection of the member whose SPS measures are challenged based on the totality of the arguments and evidence available on the panel's record (para. 5.24).²⁹ The Appellate Body observed that the panel had accepted the relevant ALOP as it was articulated by Korea to consist of both qualitative *and* quantitative aspects, namely (i) the levels that exist in the ordinary environment, (ii) ALARA, and (iii) the quantitative dose of 1 mSv/year (para. 5.26). In identifying the ALOP in these terms, the Appellate Body noted that the panel did not subordinate any of the various aspects of this ALOP or clearly find that the qualitative elements of ALARA and levels that exist in the ordinary environment were necessarily compromised by the quanti-

28 The panel referred to Korea's opening statement at the second meeting of the panel, para 66.

29 The Appellate Body referred to the Appellate Body Reports in *India – Agricultural Products*, circulated on 4 June 2015, WT/DS430/AB/R, para. 5.221; *Australia – Salmon*, supra, n. 25, para. 207.

tative exposure limit of 1 mSv/year (paras. 5.29, 5.30 and 5.31). Rather, the Appellate Body underlined that by accepting the multi-faceted character of Korea's ALOP, the panel had also accepted that a proposed alternative measure would necessarily need to satisfy the qualitative *and* quantitative elements of Korea's ALOP (para. 5.31). Consequently, the Appellate Body confirmed Korea's argument on appeal that in assessing whether the alternative measure proposed would achieve Korea's ALOP, the panel failed to integrate the *qualitative* elements of Korea's ALOP, and focused its analysis on the *quantitative* element of exposure below 1 mSv/year, ultimately leaving it unclear whether the alternative measure satisfied all of the elements of Korea's ALOP (para. 5.36). The Appellate Body, therefore, held that the panel erred in its application of Article 5.6, and, consequently, reversed the panel's finding of inconsistency with Article 5.6 (para. 5.39).

2. Non-Discrimination

Under the first sentence of Article 2.3 of the SPS Agreement, a complainant must show that a measure arbitrarily or unjustifiably discriminates between members where identical or similar conditions prevail, including between their own territory and that of other members. In addressing the requirement of «identical or similar conditions» in Article 2.3, first sentence of the SPS Agreement, the panel discussed the specific *type* of «conditions» that could be of relevance for a comparison under Article 2.3, first sentence (para. 7.261). In this regard, the panel asserted that the phrase «including between their own territory and that of other Members» at the end of the first sentence of Article 2.3 identifies «territory» as an example of conditions that could be compared, not precluding that other conditions such as the risk present in products could also be relevant (para. 7.267). The panel, therefore, considered the relevant conditions to be compared under Article 2.3 of the SPS Agreement to be «whether *products* from Japan and the rest of the world have similar potential to be contaminated with caesium and other radionuclides (...) and whether the levels of contamination would be below Korea's tolerance levels» (para. 7.283, emphasis added). To apply this threshold, the panel compared test results of Japanese and non-Japanese products' actual contamination levels, concluding that food products from Japan and from other origins have similar potential for containing caesium and other radionuclides below the relevant tolerance levels (paras. 7.312 and 7.320). The panel consequently held that similar conditions existed in Japan and in other members with regard to the adoption of the additional testing requirements and the blanket import ban under Article 2.3, first sentence of the SPS Agreement (para. 7.360).

Korea, on appeal, challenged the panel's interpretation with respect to the scope of the «conditions» that must be compared under Article 2.3 of the SPS Agreement. The Appellate Body in a contextual approach referred to Article 5.2 of the SPS Agreement, requiring members to take into account «relevant ecological and envi-

ronmental conditions» in their risk assessments (para. 5.63). Based on this, the Appellate Body asserted that «when ecological or environmental conditions in the *territories* of different Members are relevant to the risk addressed by an SPS measure, they inform the scope of conditions to be compared under Article 2.3» (para. 5.63, emphasis added). Therefore, the Appellate Body rejected the panel's interpretation, which focused exclusively on the risk present in *products* as «*the relevant condition*», asserting that while the analysis under Article 2.3 of the SPS Agreement may include consideration of conditions present in the *products*, a proper interpretation of Article 2.3, first sentence includes the consideration of other relevant conditions, such as *territorial* conditions, to the extent that they have the potential to affect the products at issue (para. 5.64, emphasis added).

Turning to the concrete *application* of the relevant provision, Korea argued that the panel had focused almost exclusively on product test data, despite its finding that the relevant conditions to be compared are not only whether the levels of contamination would be below Korea's tolerance levels, but *also* whether products from Japan and the rest of the world have similar *potential* to be contaminated with certain radionuclides. The Appellate Body, in this regard, took note that the panel had recognised a greater potential for contamination near the source and that specific release events could result in an increase in the potential for contamination of food (para. 5.74). However, in finding that both Japanese and non-Japanese products have the potential to contain caesium in amounts below the 100 Bq/kg tolerance level, the panel did not address the relative degree of the potential for contamination depending on the territorial conditions of members (para. 5.75). Pointing out this «apparent gap» in the panel's reasoning, the Appellate Body found that by solely referring to actual product tests showing whether the caesium contamination would be below a given tolerance level of 100 Bq/kg, without otherwise accounting for the relevance of the difference of certain *territorial* conditions between Japan and other members, the panel erred in the application of Article 2.3 in finding that similar conditions prevail between Japan and other members within the meaning of Article 2.3, first sentence and reversed the panel's finding of inconsistency (paras. 5.85 and 5.91).

3. Terms of Reference of the Panel

In its rebuttal before the panel, Korea argued that «its measures were adopted provisionally pursuant to Article 5.7 of the SPS Agreement», and that «this affects the panel's analysis of the substantive elements of Japan's claims under other provisions of the SPS Agreement» (para. 7.67). The panel, despite Japan raising only claims of inconsistency under Articles 2.3, 5.6, 7 and 8 of the SPS Agreement as well as under paragraphs 1 and 3 of Annex B and specific paragraphs of Annex C to the SPS Agreement, first addressed whether Korea's measures fulfil the requirements of Article 5.7 of the SPS Agreement in order to then address whether such a finding might affect

its analysis of Japan's aforementioned claims. In analysing whether Korea's measures complied with the four requirements set out in Article 5.7 of the SPS Agreement, the panel found that none of Korea's measures fulfilled all the requirements of Article 5.7; Korea had failed to (i) establish that there was insufficient scientific evidence with respect to the product-specific import bans or the additional testing requirements, (ii) demonstrate that it had based the import ban or additional testing requirements on available pertinent information, and (iii) review any of its measures within a reasonable period of time (paras. 7.111 and 8.1).

The Appellate Body addressed Korea's argument on appeal that the panel's findings as to the consistency of Korea's measures with Article 5.7 of the SPS Agreement were outside the panel's terms of reference, and assessed whether the panel had thereby acted contrary to Articles 7 and 11 of the DSU. As such, the Appellate Body reiterated that a panel's mandate, as reflected in Articles 7.1 and 11 of the DSU, is to examine the «matter» before it in light of the relevant provisions of the covered agreements cited by the parties, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements (para. 5.113). While Article 7.2 of the DSU requires panels to address the relevant provisions in any covered agreement cited by the parties, the Appellate Body clarified that a panel's mandate does not extend to making findings as to the consistency of the measure at issue with a provision cited as mere interpretative context (para. 5.114).

Applying this reasoning to the dispute at hand, the Appellate Body reviewed the panel record in order to assess whether the panel was correct in making findings as to the consistency of Korea's measures with Article 5.7 of the SPS Agreement. The panel record demonstrated that Korea relied upon the provisional nature of its measures as factual background information in its first written submission, and that Korea contended that the insufficiency of the relevant scientific evidence provides for relevant context for the interpretation of Articles 2.3, 5.6, 7, and 8 of and Annexes B and C to the SPS Agreement. The Appellate Body noted that Korea did not allege that its measures would be justified or exempted from the obligations contained in Articles 2.3, 5.6, 7, and 8 of and Annexes B and C to the SPS Agreement by virtue of their provisional nature under Article 5.7 of the SPS Agreement (para. 5.117). Having reviewed the panel record and in light of the nature of Korea's reliance on Article 5.7 of the SPS Agreement, the Appellate Body held that rather than making a finding on the *consistency* with Article 5.7 of the SPS Agreement, the panel was called to explore the *relevance* of the alleged insufficiency of relevant scientific evidence in the interpretation of the specific provisions of the SPS Agreement, which were effectively subject to Japan's claims of inconsistency (para. 5.117). By making findings as to the *consistency* of Korea's measures with Article 5.7 of the SPS Agreement, the Appellate Body confirmed Korea's argument on appeal, and found the panel to have exceeded its mandate, thereby acting inconsistently with Articles 7.1 and 11 of the DSU. For this

reason, the Appellate Body declared the panel's findings under Article 5.7 of the SPS Agreement moot and of no legal effect (para. 5.118).

4. Likeness of Products in the SPS Agreement

Annex (C)(1)(a) to the SPS Agreement requires members to ensure, with respect to any procedure to check and ensure the fulfilment of SPS measures, that «such procedures and undertakings are completed without undue delay and in no less favourable manner for imported products than for like domestic products». In assessing whether Japanese imported products and Korean domestic products are «like» under the second clause of Annex (C)(1)(a), the panel recalled the Appellate Body's statement within the context of the General Agreement on Trade in Services (GATS) that likeness can be presumed provided a complainant makes a *prima facie* case that a measure draws a distinction based solely on origin (para. 7.394).³⁰ Turning to the facts at issue, the panel acknowledged that the additional testing requirements apply only to Japanese products, and that origin is a criterion that Korea uses to distinguish between domestic and Japanese products (para. 5.223). To the panel, however, the presumption approach must not necessarily be satisfied simply because origin is a criterion for distinguishing between products; in the panel's view, the parties' arguments with respect to whether the distinction is based on grounds in addition to origin must also be addressed (para. 7.397).³¹ In this regard, the panel observed that Korea closely monitors imports of food products from Ukraine, Belarus, and other neighbouring countries affected by the fallout following the Chernobyl nuclear accident. In the panel's view, Korea had thus «a varied regime that is not based only on origin, but takes into consideration the potential of contamination of food by radionuclides» (para. 7.400). The panel, therefore, rejected Japan's argument that Japanese imported products and Korean domestic products can be presumed to be «like» (para. 7.400). The panel further found that even if Japan had established a *prima facie* case that the presumption of likeness applies, Korea had succeeded in rebutting that presumption, as documents announcing additional testing requirements referred to health risks related to the contamination of Japanese food by radionuclides as the rationale for adopting the measures and, as such provide a basis for Korea's argument that public health concerns, and not solely origin, constituted one of the grounds for drawing a distinction between domestic and imported products (para. 7.401).

Japan's appeal to the Appellate Body focused on the panel's decision not to presume «likeness» of Japanese imported products and Korean domestic products for

30 The panel referred to the Appellate Body Report in *Argentina – Financial Services*, circulated on 14 April 2016, WT/DS453/AB/R, para. 6.42.

31 The panel referred to the Appellate Body Report in *Argentina – Financial Services*, supra, n. 30, paras. 6.60 and 6.61.

the purposes of Japan's claim of inconsistency under Annex (C)(1)(a). The Appellate Body reiterated previous jurisprudence that multiple panels had found, under the GATT 1994 and the GATS, that, when a measure draws a distinction between products based exclusively on the origin of the products, a complainant is not necessarily required to establish likeness based on the criteria traditionally employed as analytical tools for assessing likeness; instead, likeness can be presumed (para. 5.231).

Turning to the matter at hand, the Appellate Body observed that the panel appeared to have accepted that, in principle, likeness may be presumed for the purposes of Annex (C)(1)(a) if a procedure distinguishes between products based exclusively on their origin (para. 5.232). The Appellate Body, however, was not convinced that the panel could have done so under the SPS Agreement without further analysis (para. 5.233). In the Appellate Body's view, the definition of SPS measures in Annex A(1) to the SPS Agreement raises the question whether a procedure to check and ensure the fulfilment of SPS measures is at all capable of making a distinction based solely on their origin and, therefore, whether likeness may at all be presumed in the context of Annex (C)(1)(a) (para. 5.233). Although noting that the panel did not explore that question, and appeared to have assumed that likeness may be presumed under Annex (C)(1)(a), the Appellate Body considered it unnecessary to reach a conclusion regarding this specific issue as the panel, in any event, would not have been in a position to presume that Japanese and Korean products are «like» (para. 5.234). As such, the Appellate Body confirmed the panel's finding that the distinction of applying the additional testing requirements only to Japan cannot be separated «from the public health concern and the fact that it was Japan that experienced the FDNPP accident» (para. 5.236), and that the additional testing requirements did not distinguish between Japanese and Korean products solely based on origin (para. 5.236). The Appellate Body, therefore, found that the panel did not err in declining to presume that Japanese imported products and Korean domestic products are «like» for the purposes of Annex (C)(1)(a) to the SPS Agreement, and thus upheld the panel's finding under the relevant provision (para. 5.239).

C. Commentary

The *Korea – Radionuclides (Japan)* dispute is the most recent addition to a number of cases in which WTO members have been found to act inconsistently with their obligations under the SPS Agreement. As aforementioned, this dispute unfolded against the specific backdrop of the FDNPP accident in Japan. In response to this accident, fifty-four members of the WTO, including Switzerland, enacted restrictive measures on imports of certain Japanese food products, while twenty amongst these members, including China and the United States, imposed bans on imports of said

products.³² Given these facts, it is remarkable, from a *political* viewpoint, that Japan launched its complaint before the DSB solely against Korea.³³ Notwithstanding these circumstances, the case at hand also raised a variety of *legal* issues, specifically with regard to the interpretation and application of several substantive provisions of the SPS Agreement. Four aspects are particularly noteworthy.

First, the Appellate Body in this case reversed virtually all of the panel's findings with regard to the substantive claims that Korea's measures were inconsistent with the pertinent provisions of the SPS Agreement. Only Korea's failure to meet procedural transparency requirements under Article 7 of and Annex B (1) to the SPS Agreement remained upheld by the Appellate Body (para. 5.6.1.6). Such reversal of the panel's substantive conclusions was mainly due to several insufficiencies with regard to the panel's legal interpretation and application of the relevant provisions, rather than due to an examination of the panel's analysis of the factual matters of the dispute – an issue not appealed by the parties before the Appellate Body. Consequently, by reversing the panel's findings, yet not being able to reach an express conclusion on e.g. whether the testing requirement suggested by Japan of 100 Bq/kg caesium tolerance level for food consumption would effectively meet Korea's multi-faceted ALOP,³⁴ this dispute left it uncertain whether Korea's measures taken in response to the 2011 FDNPP accident in Japan were consistent with the law of the WTO.

It appears that it is precisely for this reason that the Japanese representative during the DSB meeting adopting the Appellate Body report noted that «the Appellate Body Report is not conducive to settlement of the dispute and contradicts the principle stated in the DSU that prompt settlement of disputes is essential to the effective functioning of the WTO».³⁵ In this sense, the Japanese representative expressed that «this unfortunate outcome also raises a systemic issue» that Japan would be keen to collectively discuss with other WTO members.³⁶ This statement appears to highlight, once again, a weakness in the current system of the DSU: the scope of appellate

32 See Ministry of Agriculture, Forestry and Fisheries (MAFF) Japan, Lifting and Relaxation of the Import Restriction on Japanese Foods Following the Accident of Fukushima Daiichi Nuclear Power Plant (54 Countries and Regions), March 2020, 8, available at <https://www.maff.go.jp/j/export/e_info/pdf/thrm_en.pdf>.

33 For a discussion of the potentially underlying reasons for this targeted complaint, see YAN CAI & EUNMI KIM, «Sustainable Development in World Trade Law: Application of the Precautionary Principle in Korea – Radionuclides», *Sustainability* 2019, 9–11, available at <<https://www.mdpi.com/2071-1050/11/7/1942/htm>>.

34 TARO HAMADA & YOSHIMICHI ISHIKAWA, «Are Korea's Import Bans on Japanese Foods Based on Scientific Principles?», *Comments on Reports of the Panel and the Appellate Body on Korean Import Bans and Testing and Certification Requirements for Radionuclides (WT/DS495/R)*, 11 *European Journal of Risk Regulation* (2020), 155–176, at 173.

35 Statement by Ambassador Junichi Ihara before the DSB of the WTO on 26 April 2019, para. 2, available at <<https://www.mofa.go.jp/files/000473398.pdf>>.

36 *Ibid.*, para. 3.

review is limited to only uphold, modify or reverse legal findings of the panel (Articles 17.12 and 17.13 of the DSU). In its current form, the Appellate Body's mandate does not, however, 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 undisputed between the parties.³⁷ The *Korea – Radionuclides (Japan)* dispute, leaving major issues without conclusive answers, reinforces the argument for including remand authority for the Appellate Body. During the Doha Round, several proposals to this effect have been introduced, and a majority of WTO members – including Switzerland – appears to favour the inclusion of remand authority in order to remedy this systemic issue.³⁸ However, in light of the ongoing deadlock of the Doha Round and given the current paralysis of the Appellate Body, it seems unlikely that even selective reforms of the DSU, and in particular the issue of remand authority, would attract greater attention among the WTO members in the foreseeable future.

Second, the *Korea – Radionuclides (Japan)* case was the first dispute to address the presumption of likeness within the context of the SPS Agreement. *Pro memoria*, the non-discrimination obligations in Articles 2.3 and 5.5 of the SPS Agreement notably do not refer to the likeness of *products*, but rather call for a comparison based on the similarity of *risks*. It is only in Annex (C)(1)(a) that the concept of likeness appears within the context of the SPS Agreement. The panel in the present case considered that the same likeness criteria as under Article III:4 of the GATT 1994 are appropriate for the analysis under the SPS Agreement, adding that likeness may also be presumed (para. 7.393). The panel did not further elaborate on why the presumption approach endorsed by the Appellate Body under Articles II:1 and XVII of the GATS and several panels under the GATT 1994 could also be applied analogously in the context of the SPS Agreement. Although taking note of this potential matter of contention in applying the presumption approach within the context of the SPS Agreement, the Appellate Body did not consider it necessary to elaborate on this question (para. 5.234), leaving it unclear whether the presumption approach could be adopted by a future panel in a dispute revolving around Article 8 of and Annex (C) (1)(a) to the SPS Agreement. Recalling the Appellate Body's statement in *Argentina – Financial Services* that in comparison to trade in goods, the scope of the pre-

37 HAMADA & ISHIKAWA, *supra*, n. 34, at 174–175.

38 See, e.g., JAEMIN LEE, «Remand to Fast-Track Prompt Implementation: A Critical Assessment of the <Double Adoption> Remand Proposal in Chair's Text and an Argument for a <Single Adoption> Alternative», 16 J. of Int'l Economic L. (2013), 635–667; MATTHIAS OESCH, «The Jurisprudence of WTO Dispute Resolution (2006)», 4 Swiss Rev. Int'l & Eur. L. (2006), 501–523, at 509–510; JOOST PAUWELYN, «Appeal Without Remand: A Design Flaw in the WTO Dispute Settlement and How To Fix It», ICTSD Dispute Settlement and Legal Aspects of International Trade Issue Paper No. 1 (2007), International Centre for Trade and Sustainable Development, Geneva, Switzerland; FERNANDO PIEROLA, «The Question of Remand Authority for the Appellate Body», in: Andrew D. Mitchell (ed.), *Challenges and Prospects for the WTO*, London 2005, 193–213.

sumption approach under the GATS would be more limited given greater complexities in the GATS,³⁹ and further in light of the SPS Agreement's nature as a highly specialised science-based system of law, it remains questionable whether the presumption approach can in fact be analogously applied in the context of the SPS Agreement. In particular, as implied by the Appellate Body, it seems unlikely that an SPS measure adopted to pursue one of the objectives set out in the subparagraphs of Annex A(1) to the SPS Agreement could at all make a distinction purely based on origin as required by the presumption approach (para. 5.233).

Third, it is worth highlighting that the *Korea – Radionuclides (Japan)* dispute did not address any of the scientific disciplines of the SPS Agreement, despite «science being the touchstone against which SPS measures are evaluated in the SPS Agreement».⁴⁰ While Japan raised claims under Articles 2.3, 5.6, 7, and 8 as well as under Annexes B and C to the SPS Agreement, it refrained from invoking Articles 2.2, 3.1, 3.2, and 5.1 of the SPS Agreement. Notably, Japan had claimed inconsistencies with the science-based provisions including Articles 2.2, 4, 5.1, 5.2, 5.5, 5.7, and 5.8 of the SPS Agreement only during the course of consultations between the parties.⁴¹ It remains unclear whether this decision was due to a deliberate choice not to question the right of WTO members to take necessary SPS measures to ensure food safety even when such measures are not (yet) based on scientific principles as required by the pertinent provisions of the SPS Agreement or whether this decision was based on a reaction to the circumstance that science-based provisions of the SPS Agreement have been subject to criticism in literature with regard to their lack of clarity.⁴² Nevertheless, it is remarkable that the *Korea – Radionuclides (Japan)* dispute ultimately left unsettled whether Korea's measures were consistent with the scientific disciplines of the SPS Agreement.

Finally, this case holds significance with regard to the panel's and the Appellate Body's analysis in relation to Article 5.7 of the SPS Agreement. This provision allows WTO members to adopt provisional SPS measures in circumstances where relevant scientific evidence is insufficient. It thus acts as a «*qualified exemption*» from the general obligation under Article 2.2 of the SPS Agreement not to maintain SPS measures without sufficient scientific evidence.⁴³ It is noteworthy that although Article 5.7 of the SPS Agreement explicitly provides a legal basis for provisional governmental action so as to avoid possible harm where there is a lack of sufficient scientific

39 See Appellate Body Report in *Argentina – Financial Services*, supra, n. 30, para. 6.38.

40 See VAN DEN BOSSCHE & ZDOUC, supra, n. 21, at 946.

41 See Request for Consultations by Japan on 1 June 2015 (WT/DS495/1), paras. 14–15.

42 Cf. HAMADA & ISHIKAWA, supra, n. 34, 165–167, with further references; for a critical account on the science-based provisions in the SPS Agreement, see, e.g., JACQUELINE PEEL, *Science and Risk Regulation in International Law*, Cambridge 2011, 181–185.

43 See Appellate Body Report in *Japan – Agricultural Products II*, circulated on 22 February 1999, WT/DS76/AB/R, para. 80.

evidence, no WTO member has ever been successful in arguing that a contested SPS measure is consistent with Article 5.7 before a panel and/or the Appellate Body. Rather, various panels and the Appellate Body in previous WTO disputes in what has been described as «rigorous examination»⁴⁴ held that at least one of the four cumulative requirements of Article 5.7 of the SPS Agreement was not satisfied and that, therefore, the respective members invoking Article 5.7 had consistently failed to base their measures on the said provision.⁴⁵ The *Korea – Radionuclides (Japan)* dispute does not constitute a departure from this line of jurisprudence: in its assessment of the Korean measures' inconsistency with Article 5.7 of the SPS Agreement, the panel held that none of the measures fulfilled all of the requirements in Article 5.7 (paras. 7.111 and 8.1). In light of this strict approach regarding the interpretation of Article 5.7 of the SPS Agreement, it seems scarcely surprising that Korea fiercely maintained before the Appellate Body that it did *not* invoke Article 5.7 as a basis for its measures and that the panel's assessment under Article 5.7 consequently fell outside the panel's terms of reference. As aforementioned, the Appellate Body concurred with Korea's argument. Therefore, the Appellate Body report did not shed further light to the still outstanding question – namely, in which circumstances WTO members might successfully adopt provisional measures in accordance with the requirements of Article 5.7 of the SPS Agreement. Thus, even if the Appellate Body in *US/Canada – Continued Suspension* held that Article 5.7 of the SPS Agreement «must be interpreted keeping in mind that the precautionary principle finds reflection in this provision»,⁴⁶ it remains fairly uncertain if at all and to what extent the precautionary principle holds effective significance in Article 5.7 of the SPS Agreement and within the context of the SPS Agreement at large.

III. Russia – Measures Concerning Traffic in Transit

A. Introduction and Facts

At the core of the panel report in *Russia – Measures Concerning Traffic in Transit*⁴⁷ lies the security exception of Article XXI of the GATT 1994 and, more specifically, Article XXI(b)(iii), which provides as follows:

44 Cf. CAI & KIM, *supra*, n. 33, at 13.

45 Article 5.7 of the SPS Agreement was (unsuccessfully) raised in the following disputes: *EC – Hormones* (WT/DS26/R); *Japan – Agricultural Products II* (WT/DS76/AB/R); *Japan – Apples* (WT/DS245/AB/R); *EC – Approval and Marketing of Biotech Products* (WT/DS291/R); *US/Canada – Continued Suspension* (WT/DS321/R); *US – Animals* (WT/DS447/R); and *Russia – Pigs* (WT/DS475/R).

46 See Appellate Body Report in *US/Canada – Continued Suspension*, circulated on 16 October 2008, WT/DS321/AB/R, para. 680.

47 *Russia – Measures Concerning Traffic in Transit*, adopted on 26 April 2019, WT/DS512/R.

Nothing in this agreement shall be construed [...]

(b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests [...]

(iii) taken in time of war or other emergency in international relations [...].

The *Russia – Measures Concerning Traffic in Transit* dispute presents a landmark case as it is the first instance in which a WTO panel has been called on to interpret Article XXI of the GATT 1994 and, more particularly, to decide on the issue of jurisdiction over a dispute in which a WTO member claimed that its measures were justified on national security grounds. It forms part of a series of rather explosive WTO disputes, which raise the question whether and, if so, to what extent the security exception is «self-judging».⁴⁸ This is a new development since – unlike the general exceptions contained in Article XX of the GATT 1994 – the security exception in the multilateral trade regime⁴⁹ has mostly slumbered during the last seventy years,⁵⁰ probably due to a combination of WTO member restraint (both from challenging security-based measures and from invoking the security exception as a defence) and rather coincidental circumstances.⁵¹

48 Cf. Qatar's request for the establishment of a panel, *United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WT/DS526/2, and the establishment of panels by the DSB in seven disputes relating to the United States' imposition of tariffs on steel and aluminium imports under Section 232 of the Trade Expansion Act of 1962 (see, for the dispute between the United States and Switzerland, *supra*, n. 1).

49 The security exception first appeared in the GATT 1947. Upon the creation of the WTO, it was incorporated in the GATT 1994. Equivalent provisions are enacted under Article XIV**bis** of the GATS and Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement).

50 Prior to the establishment of the WTO, the GATT's security exception was of relevance in the following disputes: *US – Issue of Export Licenses* (1949); *US – Suspension of Obligations between the US and Czechoslovakia* (1951) (*Czechoslovakia v. US*); *Peru – Prohibition of Czechoslovakian Imports* (1954); *EC, Australia, Canada – Trade Restriction Affecting Argentina Applied for Non-economic Reasons* (1982); *US – Imports of Sugar from Nicaragua* (1983) (*Nicaragua I*); *US – Trade Measures Affecting Nicaragua* (1985) (*Nicaragua II*); *EEC – Trade Measures Taken by the EC Against the Socialist Federal Republic of Yugoslavia* (1992) (*Yugoslavia v. EEC*); *US – The Cuban Liberty and Democratic Solidarity Act (Helms-Burton Act)* (1996); *Nicaragua – Measures Affecting Imports from Honduras and Colombia* (2000). The responding parties in these disputes invoked the security exception to justify their GATT-inconsistent measures, but only the (unadopted) panel report in *US – Trade Measures Affecting Nicaragua* addressed the security exception, albeit without answering the question regarding the exception's self-judging nature due to the panel's limited terms of reference (cf. *US – Trade Measures Affecting Nicaragua*, L/6053, 13 October 1986, para. 5.3); for an insightful discussion of the cases *Czechoslovakia v. US*, *Nicaragua I*, *Nicaragua II*, and *Yugoslavia v. EEC* with a particular focus on jurisdictional questions of the GATT's security exception, see HANNES L. SCHLOEMANN & STEFAN OHLHOF, «Constitutionalization» and Dispute Settlement in the WTO: National Security as an Issue of Competence», 93 *American Journal of Int'l L.* (1999), 424–451, at 432–438.

51 Cf. TANIA VOON, «The Security Exception in WTO Law: Entering a New Era», 113 *American Journal of Int'l L.* (2019), 45–50.

The dispute concerned Ukraine's challenges to restrictions and bans imposed by Russia between 2014 and 2018 on traffic in transit by road and rail, from Ukraine, across Russia, destined for Kazakhstan and the Kyrgyz Republic, as well as to the alleged *de facto* extension of these restrictions and bans to Ukrainian traffic in transit destined for Mongolia, Tajikistan, Turkmenistan, and Uzbekistan (panel report, para. 7.1). It arose in the context of the severe deterioration of (geo-)political relations between Ukraine and Russia, which occurred in the aftermath of a change in government in Ukraine in February 2014, which in turn was followed by the imposition of economic sanctions against Russian entities and persons by certain countries, including the United States (paras. 7.5-7.9). The complaining party, Ukraine, argued that the transit restrictions and bans were inconsistent with Russia's obligations under Article V (freedom of transit) and Article X (publication and administration of trade regulations) of the GATT 1994 and further with related commitments in Russia's Accession Protocol (para. 7.2). The responding party, Russia, did not specifically address either the factual evidence or the legal arguments adduced by Ukraine, as it asserted the following: «the measures are among those that Russia considers necessary for the protection of its essential security interests, which it took, [i]n response to the emergency in international relations that occurred in 2014 that presented threats to the Russian Federation's essential security interests» (para. 7.3). Russia thus invoked Article XXI(b)(iii) of the GATT 1994, and claimed that, based on its interpretation of this provision as being «self-judging»,⁵² the panel lacked jurisdiction to further address the matter. In contrast thereto, Ukraine interpreted Article XXI of the GATT 1994 as an «affirmative defence for measures that would otherwise be inconsistent with GATT obligations» (para.7.31).

The panel was composed on 7 June 2017. Australia, the Plurinational State of Bolivia, Brazil, Canada, Chile, China, the European Union, India, Japan, the Republic of Korea, the Republic of Moldova, Norway, Paraguay, the Kingdom of Saudi Arabia, Singapore, Turkey, and the United States reserved their rights to participate in the panel proceedings as third parties. Upon joint request of Australia, Canada, and the European Union, all third parties were granted enhanced third-party rights to the extent the panel considered it necessary to «enable the third parties to participate in the legal exchanges between the parties at the first substantive meeting regarding the interpretation of Article XXI(b)(iii) of the GATT 1994».⁵³ The panel report was delivered on 5 April 2019 and, as neither party chose to appeal it, was adopted on 26 April 2019.

52 See Russia's first written submission, paras. 5–6, 40–48.

53 *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, Addendum, Annex B-1, Enhanced Third-Party Rights Ruling, para. 1.14.

B. Findings

In summary, the panel found that WTO panels have jurisdiction to review a member's invocation of Article XXI(b)(iii) of the GATT 1994 (paras. 7.53-7.104), that Russia had met the requirements for invoking Article XXI(b)(iii) in relation to the measures at issue, and that thus Russia's transit restrictions and bans were covered by said provision (paras. 7.111-7.149). Central to these findings was the panel's understanding of both the security exception and the circumstances between Russia and Ukraine, which had surrounded the imposition of the challenged measures. Moreover, in the event that its jurisdictional findings had been reversed on appeal, the panel concluded that had Russia taken its measures in normal times (and not in an «emergency in international relations»), Ukraine would have made a *prima facie* case that the measures were inconsistent with the first and/or second sentence of Article V:2 of the GATT 1994 and related commitments under paragraph 1161 of Russia's Working Party Report as incorporated into Russia's Accession Protocol (paras. 7.166-7.184, 7.189-7.196, and 7.239-7.240).

1. The Panel's Jurisdiction

At the outset of its analysis, the panel recalled that, as an international adjudicative tribunal, it possesses «inherent jurisdiction» as a result of its «adjudicative function», which includes «the power to determine all matters arising in relation to the exercise of [its] own substantive jurisdiction» (para. 7.53), and further found Russia's invocation of Article XXI(b)(iii) of the GATT 1994 to be within its terms of reference, given that the DSU contains no special or additional rules applying to Article XXI disputes (para. 7.56).

In order to then assess Russia's jurisdictional claim that Article XXI(b)(iii) of the GATT 1994 carves out measures, which a member considers necessary to protect its essential security interests, from a panel's jurisdiction, the panel started its interpretation of Article XXI(b)(iii) by focusing on the meaning of the adjectival clause «which it considers» in the introductory chapeau of Article XXI(b). According to the panel, said clause can be interpreted in three different ways: (i) as qualifying only the word «necessary», i.e. the necessity of the measures taken to protect «essential security interests»; (ii) as qualifying also the determination of these «essential security interests»; or (iii) as qualifying «finally and maximally» the determination of the matters described in the three subparagraphs of Article XXI(b) (para. 7.63). The panel initially focused its analysis on the third possibility.

Based on the ordinary meaning and the context of Article XXI(b)(iii) as well as in light of the object and purpose of the GATT 1994 and the WTO Agreement, more generally, the panel found that «the three sets of circumstances under subparagraphs (i) to (iii) of Article XXI(b) operate as limitative qualifying clauses», which

restrict «the exercise of the discretion accorded to Members under the chapeau to these circumstances» (para. 7.65). More specifically with respect to subparagraph (iii), the panel determined that the phrases «taken in time of» and «existence of an emergency in international relations» are «objective fact(s), subject to objective determination» (para. 7.77), and found that «the adjectival clause <which it considers> in the chapeau of Article XXI(b) does not qualify the determination of the circumstances in subparagraph (iii)» (para. 7.82). The panel thus concluded that «for action to fall within the scope of Article XXI(b) it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision» (para. 7.82).

The panel then confirmed these findings based on the negotiating history of Article XXI of the GATT 1947 (paras. 7.83-7.100). In its analysis thereof, it particularly noted two different approaches existent in the United States' proposals: one providing for unlimited discretion of the parties to the International Trade Organization (ITO) Charter to rely on the security exception (para. 7.89); the other one favouring «that some elements of the security exceptions should be subject to review by the Organisation considered that the risk of abuse by some countries outweighed concerns regarding the scope of action left to the United States by the Charter» (para. 7.90). The panel observed that the latter approach, pursuant to which «the scope of unilateral action accorded to a Member invoking the security exceptions would be limited to the necessity of the measure and would not extend to the determination of the other elements of the provision», prevailed (para. 7.91).

In conclusion, the panel found that Article XXI(b) of the GATT 1994 vests in panels the power to assess, at a minimum, «whether the requirements of [one of] the enumerated subparagraphs are met», such that it «is not totally <self-judging> in the manner asserted by Russia» (para. 7.102),⁵⁴ nor that Russia's invocation of Article XXI(b)(iii) is «non-justiciable» as argued by the United States (para. 7.103).

2. Measures «Taken in Time of an Emergency in International Relations»

After clarifying the jurisdictional questions, the panel turned to a detailed interpretation of Article XXI(b)(iii) of the GATT 1994 by examining the following two steps in turn: (i) whether the Russian measures challenged by the Ukraine were «taken in time of war or other emergency in international relations»; and (ii) whether the conditions of the chapeau of Article XXI(b) of the GATT 1994 were satisfied. While this examination scheme is structurally similar to the one established under Article XX of the GATT 1994, it differs from the latter as, according to the panel, «an evaluation of whether measures are covered by Article XXI(b)(iii) (...) (unlike measures covered by the exceptions under Article XX) does not necessitate a

⁵⁴ For a general discussion of the security exception's self-judging nature, see ROGER P. ALFORD, «The Self-Judging WTO Security Exception», 3 Utah L. R. (2011), 697-759.

prior determination if they would be WTO-inconsistent in normal times» (para. 7.108). In contrast to Article XX of the GATT 1994, WTO law-consistency of the challenged measures is thus only examined if the relevant requirements of Article XXI(b) are not met.

In examining (i) whether the challenged measures were «taken in time of war or other emergency in international relations» within the meaning of Article XXI(b) (iii) of the GATT 1994, the panel defined an «emergency in international relations» as «a situation of armed conflict, or of latent armed conflict, or of heightened tensions or crisis, or of general instability engulfing or surrounding a state» (paras. 7.76 and 7.111), which goes «beyond political or economic differences» (para. 7.75), and gives rise to «defence or military interests, or maintenance of law and public order interests» (para. 7.76). Mainly based on a resolution of the UN General Assembly,⁵⁵ but also by taking into account the information contained in Ukraine's 2016 Trade Policy Review Report (paras. 7.115-7.119),⁵⁶ the panel found as follows: that at least from March 2014 until the end of 2016, the deterioration in relations between Ukraine and Russia was «a matter of concern to the international community»; that by December 2016, the UN General Assembly recognized the situation «as involving armed conflict»; and that, «since 2014, a number of countries (had) imposed sanctions against Russia in connection with this situation» (para. 7.122). It thus concluded that the situation between Ukraine and Russia constituted since 2014 an «emergency in international relations» within the meaning of Article XXI(b)(iii), and further that the challenged measures were «taken in time of» such emergency (paras. 7.124–7.125).

Having concluded that the requirements of subparagraph (iii) of Article XXI(b) of the GATT 1994 were met, the panel next had to determine (ii) whether Russia's invocation of the security exception satisfied the requirements of the chapeau of Article XXI(b), i.e. whether the challenged measures constitute action which Russia considered necessary to protect its essential security interests. In order to do so, the panel turned to the above-mentioned first and second way to interpret the adjectival clause «which it considers» in the introductory chapeau of Article XXI(b), that is, whether it «qualifies both the determination of the invoking member's essential security interest *and* the necessity of the measures to protect those interests, or simply the determination of their necessity» (para. 7.128). As for the discretion accorded to

55 UN General Assembly Resolution, No. 71/205, 19 December 2016. Despite taking into account this resolution, the panel avoided to explicitly refer to the prohibition of the use of force pursuant to Article 2(4) of the UN Charter or to the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts.

56 For a critique of the panel's fact finding (especially in light of Article 13 of the DSU (right to seek information)), see CAROLINE GLÖCKLE, «Nationale Sicherheitsinteressen in Russia-Traffic in Transit: Die erste Panel Entscheidung zu Art. XXI GATT», Eur. Zeitschrift für Wirtschaftsrecht (2019), 652–659, at 656–657.

members under the chapeau of Article XXI(b), the panel found «essential security interests» to be generally understood as referring to «those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally» (para. 7.130), and further that «it is left, in general, to every Member to define what it considers to be its essential security interests» (para. 7.131), but that by doing so, members must «interpret and apply Article XXI(b)(iii) (...) in good faith» (para. 7.132), and not use it «as a means to circumvent their obligations under the GATT 1994» (para. 7.133). The panel thus considered that it is for the invoking member to articulate these interests «sufficiently enough to demonstrate their veracity» (para. 7.134), and further that the obligation of good faith «also, and most importantly» applied to the connection of the essential security interests with the measures at issue, which must «meet a minimum requirement of plausibility in relation to the proffered essential security interests» (para. 7.138). The exact level of articulation and plausibility has not been specified by the panel, but rather kept variable, for prospective panels to adjust as appropriate in the circumstances. The panel thus found as follows:

What qualifies as a sufficient level of articulation will depend on the emergency in international relations at issue. In particular, the Panel considers that the less characteristic is the «emergency in international relations» invoked by the Member, i.e. the further it is removed from armed conflict, or a situation of breakdown of law and public order (whether in the invoking Member or in its immediate surroundings), the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise. In such cases, a Member would need to articulate its essential security interests with greater specificity than would be required when the emergency in international relations involved, for example, armed conflict. (para. 7.135)

Applying these findings to the case at hand, the panel determined that the essential security interests invoked by Russia could not be «considered obscure or indeterminate» (para. 7.137), and that the challenged measures «cannot be regarded as being so remote from, or unrelated to, the 2014 emergency, that it is implausible that Russia has implemented the measures for the protection of its essential security interests arising out of that emergency» (para. 7.145). As such, it was for Russia «to determine the <necessity> of the measures for the protection of its essential security interests» (para. 7.146) since the «necessity» element is the only element of the chapeau of the security exception to be determined entirely by the invoking member. Based on these findings, the panel concluded that Russia had met the requirements of the chapeau of Article XXI(b) (para. 7.148), and that the challenged measures were thus covered by Article XXI(b)(iii) (para. 7.149).

3. Freedom of Transit

Notwithstanding its conclusions with respect to the security exception of Article XXI(b)(iii) of the GATT 1994, the panel proceeded with an analysis of Ukraine's substantive claims as it was «mindful that, should the findings on Russia's invocation of Article XXI(b)(iii) be reversed in the event of an appeal, it may be necessary for the Appellate Body to complete the analysis» (para. 7.154).⁵⁷ The panel thus analysed those aspects of Ukraine's claims, which would have enabled the Appellate Body to complete the legal analysis – a pragmatic, but in light of especially Article 3.7 of the DSU questionable approach since, as the panel acknowledged itself, a panel should not consider or decide issues, which are not «absolutely necessary to dispose of the particular dispute» (para. 7.152, referring to Appellate Body jurisprudence).

Ukraine claimed that the Russian measures were inconsistent with Article V:2 of the GATT 1994 since they did not guarantee freedom of transit through the Russian territory for traffic in transit coming from Ukraine and going to Kazakhstan or the Kyrgyz Republic (para. 7.156). Article V:2 states:

There shall be freedom of transit through the territory of each Member, via the routes most convenient for international transit, for traffic in transit to or from the territory of other members. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or any circumstances relating to the ownership of goods, of vessels or of other means of transport.

Ukraine further made claims regarding other transit-related provisions in Articles V:3, V:4, and V:5 of the GATT 1994 (paras. 7.202, 7.209, and 7.211) as well as claims with respect to the publication and administration of the challenged measures pursuant to Article X of the GATT 1994 (para. 7.214). Finally, Ukraine claimed inconsistency with Russia's Accession Protocol based on the commitments contained in paragraphs 1161, 1426, 1427, and 1428 of Russia's Working Party Report⁵⁸ (para. 7.229). As mentioned in the introductory part above, Russia did not raise specific arguments in response to any of these claims, but instead maintained that the panel lacked jurisdiction due to Russia's invocation of the security exception of Article XXI(b)(iii).

In response to these complaints, the panel considered with regard to the first sentence of Article V:2 of the GATT 1994 that it entailed two separate obligations for each WTO member, namely «to guarantee freedom of transit through its territory

57 It is though quite likely that the Appellate Body would have taken issue with the panel's order of analysis if the report had been appealed. The Appellate Body has repeatedly criticised panels for adopting a particular order of analysis; see, e.g., the Appellate Body Report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, circulated on 12 October 1998, WT/DS58/AB/R, paras. 117–119, regarding the order of analysis under Article XX of the GATT 1994.

58 WTO, Report of the Working Party on the Accession of the Russian Federation to the WTO, WTO Docs. WT/ACC/RUS/70, WT/MIN(11)/2 (17 November 2011).

for traffic in transit *entering from* any other Member, and (...) to guarantee freedom of transit through its territory for traffic in transit *to exit* to any other Member» (para. 7.172). Since the obligations with respect to traffic in transit arise «only during the portion of the journey when such traffic passes through (the relevant) Member's territory» (para. 7.169), a measure is found to be inconsistent with the first sentence of Article V:2 if the complaining member demonstrates «either that a Member has precluded transit through its territory for traffic in transit entering its territory from any other Member, or exiting its territory to any other Member, via the routes most convenient for international transit» (para. 7.173), which includes measures prohibiting such traffic «at *all points* along a shared land border» (para. 7.174). Applying these considerations to the case at hand, the panel concluded that in the absence of an «emergency in international relations», Ukraine would have established a *prima facie* case that Russia's measures violated the first sentence of Article V:2 because they prohibited traffic in transit from entering Russia from Ukraine as well as traffic in transit from Ukraine from entering Russia from any member other than those specified in the relevant measure (para. 7.183).

With regard to the second sentence of Article V:2 of the GATT 1994, the panel similarly found that had Russia's measures not been taken during an «emergency in international relations», Ukraine would have made a *prima facie* case that the measures violated the second sentence of Article V:2 as they made various distinctions based on the place of departure (Ukraine), the place of origin (e.g. Ukraine), the place of destination (Kazakhstan and the Kyrgyz Republic), and the place of entry (e.g. Belarus) of the traffic in transit (para. 7.196). Moreover, the panel found that the measures would further have been *prima facie* inconsistent with paragraph 1161 of Russia's Working Party Report to the extent of their *prima facie* inconsistency with the first and/or the second sentence of Article V:2 of the GATT 1994 (paras. 7.240 and 7.257).

With regard to the claims under Articles V:3, V:4, and V:5 of the GATT 1994, the panel considered that they concern the same aspects of the measures already found in violation of Article V:2 of the GATT 1994. A further analysis of these claims would thus not have assisted the Appellate Body to complete the legal analysis or the DSB to make recommendations and rulings in the event that the Appellate Body found a violation of Article V:2 (para. 7.199). Similarly, with regard to the claims under Article X of the GATT 1994 as well as under paragraphs 1426, 1427, and 1428 of Russia's Working Party Report as incorporated into Russia's Accession Protocol, the panel noted that they all relate to the publication and administration of measures found *prima facie* inconsistent with Article V:2 of the GATT 1994, and held that «where a measure is found to be WTO-inconsistent, findings relating to the publication or administration of the same measure are unlikely to be necessary or useful in resolving the matter» (para. 7.200). Due to its findings of inconsistency with Article V:2 of the GATT 1994 as well as its conclusions regarding

the security exception, the Panel thus considered it unnecessary to further address Ukraine's claims under Articles V:3, V:4, V:5, X:1, X:2, and X:3(a) of the GATT 1994 as well as under paragraphs 1426, 1427, and 1428 of Russia's Working Party Report as incorporated into Russia's Accession Protocol (para. 7.201).

C. Commentary

As already mentioned in the introductory part above, the panel report in *Russia – Traffic in Transit* constitutes a landmark decision of the WTO dispute settlement system, which is located at a particularly sensitive interface between the multilateral trading order and competences that are reserved to nation-states.⁵⁹ The report will most likely have important implications for future WTO disputes, including the nine pending challenges to the United States' imposition of tariffs on steel and aluminium imports under Section 232 of the Trade Expansion Act of 1962. Switzerland (WT/DS556) as well as China (WT/DS544), India (WT/DS547), the European Union (WT/DS548), Canada (WT/DS550), Mexico (WT/DS551), Norway (WT/DS552), Russia (WT/DS554), and Turkey (WT/DS564) have all challenged this imposition as being inconsistent with United States' obligations under the GATT 1994 and the Agreement on Safeguards. The United States, however, had already invoked Article XXI in these disputes:

The [U.S.] President determined that tariffs were necessary to adjust the imports of steel and aluminium articles that threaten to impair the national security of the United States. Issues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement. Every Member of the WTO retains the authority to determine for itself those matters that it considers necessary to the protection of its essential security interests, as is reflected in the text of Article XXI of the GATT 1994.⁶⁰

In view of the panel report in *Russia – Traffic in Transit*, it is reasonable to assume that other WTO panels would also reject the arguments put forward by the United States, and would instead find it appropriate to review whether the Section 232 tariffs or any other measure at issue meet the requirements of Article XXI of the GATT 1994. The panel's interpretation of Article XXI further maintains the possibility to challenge the United States' invocation of national security as being contrary to good

59 Cf. GLÖCKLE, *supra*, n. 56, at 655; the dispute has sporadically even been characterised as a «constitutional» moment to the WTO, see, e.g., SUNGJOON CHO, «A WTO's <Kompetenz-Kompetenz> Moment», International Economic Law and Policy Blog, posted on 5 April 2019, accessible at <<https://worldtradelaw.typepad.com/ielpblog>>.

60 *United States – Certain Measures on Steel and Aluminium Products*, WT/DS556/4, Communication from the United States, 20 July 2018, at 1; such communication by the United States is present in all the above-mentioned disputes regarding the U.S. imposition of tariffs on steel and aluminium imports under Section 232 of the Trade Expansion Act of 1962.

faith.⁶¹ However, against the background of global trade tension, such security-related disputes, and especially those directly involving the United States, create highly delicate circumstances. It appears that the nine WTO complaints against the Section 232 tariffs have tried to mitigate some of this tension by qualifying the tariffs as safeguard measures, which allows them to impose retaliatory tariffs against United States imports pursuant to Article 8 of the Agreement on Safeguards. This approach could also be aimed at avoiding direct applicability of the security exception of Article XXI of the GATT 1994, albeit that exception might still be applicable to the Agreement on Safeguards.⁶² It has further been suggested that WTO members could pursue non-violation complaints under Article XXIII(1)(b) of the GATT 1994 instead of violation complaints under XXIII(1)(a) of the GATT 1994 in order to avoid the security exception's volatility.⁶³

The panel's interpretation of Article XXI(b) of the GATT 1994 developed in *Russia – Traffic in Transit* was mostly welcomed by the WTO membership.⁶⁴ It overall reflects a politically sensitive and flexible approach, which aims to balance the non-trade related objective of national security with the WTO's multilateral trade objectives by combining objective (and thus fully reviewable) and subjective elements.⁶⁵ The existence of a «war or other emergency in international relations» pursuant to subparagraph (iii) of Article XXI(b) is subject to objective determination (para. 7.77). The chapeau of Article XXI(b), however, is subject to a much more cautious review: the definition of what a WTO member considers to be its essential security interests is generally left to that member, provided that it interprets and applies its treaty obligations in good faith pursuant to Articles 26 and 31 of the Vienna Convention on the Law of Treaties (paras. 7.131–7.132); only the determination of the

61 For a general discussion of the principle of good faith in WTO dispute settlement, see MARION PANIZON, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement*, Oxford 2006, *passim*.

62 Cf. STEPHANIE HARTMANN, «Introductory Note to Russia – Measures Concerning Traffic in Transit (WTO)», 58 *International Legal Materials* (2019), 899–1027.

63 Cf., e.g., NICOLAS LAMP, «Why WTO Members Should Bring Pure Non-Violation Claims Against National Security Measures», *International Economic Law and Policy Blog*, posted on 15 October 2018, accessible at <<https://worldtradelaw.typepad.com/ielpblog>>.

64 Cf. Minutes of the meeting of the DSB, 26 April 2019, WT/DSB/M/428, at 19–25: Russia, Ukraine, the European Union, Canada, Turkey, Australia and Mexico generally welcomed the panel's interpretation of Article XXI(b) of the GATT 1994. China held that the panel «made an objective assessment» of the security exception's applicability, and that «(t)he Panel Report in this dispute had addressed certain systemic concerns of Members» (*ibid.*, at 23). However, the United States stressed that «the Panel had concluded that, despite the clear text of Article XXI, the Panel could review multiple aspects of a responding party's invocation of the essential security exception»; it found that «the panel's analysis (was) un-persuasive», and that the panel report was for various reasons «seriously flawed» (*ibid.*, at 24).

65 See also GLÖCKLE, *supra*, n. 56, *passim*; BEN HEATH, «Guest Post: Trade, Security and Stewardship (Part IV): A Variable Framework for Security Governance», *International Economic Law and Policy Blog*, posted on 8 May 2019, accessible at <<https://worldtradelaw.typepad.com/ielpblog>>.

«necessity» of the measures to protect such security interests is entirely left to the WTO member invoking the security, exception (para. 7.146). In particular, the panel's approach regarding the interpretation of the chapeau of Article XXI(b) shows that the panel intended to leave room for WTO members' essential security interests within the legal framework of the WTO, on the one hand, and at the same time to avoid regular circumvention of GATT/WTO obligations or even undermining the legal framework of the WTO, on the other hand.

The panel's attempt to both recognise WTO members' legitimate interests to secure their national security, and to ensure the proper functioning of the WTO's legal framework can be understood as a contribution to a less politicised way to deal with the national security exception of the GATT 1994, and to help finding a way out of the delicate circumstances created by the various pending security-related disputes. Notwithstanding the balanced interpretative approach developed by the panel in *Russia – Traffic in Transit*, the WTO will most likely have to make progress on other fronts – such as the Appellate Body crisis and the conflict between China and the United States – in order to return to a more stable equilibrium on the security exception in the multilateral trade regime.