

necessary in order to facilitate the prompt settlement and effective resolution of the dispute, it will explain this in its report.⁴¹³

5.161. This brings me to Article 3.2 of the DSU, which provides that the "dispute settlement system of the WTO ... serves ... to clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law". As the Appellate Body has noted, there is nothing in Article 3.2 that would encourage "the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute."⁴¹⁴ The Appellate Body cannot be expected to offer interpretative guidance regarding provisions of the covered agreements in an abstract manner beyond the scope of what is required in a particular dispute. To do so would go beyond the Appellate Body's adjudicatory function as contemplated under the DSU.

5.162. At the same time, WTO Members including the third parties to a dispute have a systemic interest in receiving an Appellate Body report that properly clarifies the existing provisions of the covered agreements.⁴¹⁵ Moreover, an Appellate Body report that appropriately disposes of the matter at issue, which ultimately serves to clarify the relevant provisions of the covered agreement, is not only required under the DSU, it is also important in that it allows the DSB to make sufficiently precise recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members".⁴¹⁶

5.163. Through this separate opinion, I hope to be able to shed light on how I view the Appellate Body's function, as well as its limits, both in the context of the present appeal, as well as others on which I have been working with my distinguished colleagues at the Appellate Body.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.

6.1 Article III:8(a) of the GATT 1994

6.2. With respect to the Panel's finding under Article III:8(a) of the GATT 1994, we consider that, under Article III:8(a) the product purchased by way of procurement must necessarily be "like", or "directly competitive" with or "substitutable" for – in other words, in a "competitive relationship" with – the foreign product subject to discrimination. Although a consideration of inputs and processes of production may *inform* the question of whether the product purchased is in a competitive relationship with the product being discriminated against, it does not *displace* the competitive relationship standard. The question of whether the cover of Article III:8(a) may also extend to discrimination relating to inputs and processes of production used in respect of products purchased arises only after the product purchased has been found to be in a competitive relationship with the product subject to discrimination. Based on our review of the Panel's analysis and approach:

- a. We find that the Panel was properly guided by the Appellate Body report in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* in finding that the DCR measures are not covered by the derogation under Article III:8(a).
- b. We reject India's claim that the Panel acted inconsistently with Article 11 of the DSU in assessing India's arguments regarding the scope of application of Article III:8(a) of the GATT 1994.

⁴¹³ See e.g. Appellate Body Reports, *Australia – Salmon*, paras. 117-118; *US – Wheat Gluten*, paras. 80-92; and *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 43-52. In addition, if the Appellate Body considers that it is not in a position to complete the legal analysis as requested by a party on appeal, for instance, due to a lack of sufficient factual findings by a panel, it will state this reason in its Report.

⁴¹⁴ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, p. 323 at 340.

⁴¹⁵ The Appellate Body has explained, "[w]hile the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case." Appellate Body report, *US – Stainless Steel (Mexico)*, para. 160.

⁴¹⁶ Article 21.1 of the DSU.

- c. Consequently, we uphold the Panel's findings, in paragraphs 7.135 and 7.187 of the Panel Report that the DCR measures are not covered by the derogation under Article III:8(a) of the GATT 1994 and that, therefore, the DCR measures are inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994.

6.3. India's request for completion of the legal analysis is premised on the condition that we reverse the Panel's finding that the DCR measures are not covered by the derogation under Article III:8(a) of the GATT 1994. Having upheld this finding by the Panel, we need not, and do not, address India's further claims and related arguments regarding the remaining elements under Article III:8(a). We therefore express no view on the Panel's reasoning and analysis in this regard.

6.2 Article XX(j) of the GATT 1994

6.4. With respect to the Panel's findings under Article XX(j) of the GATT 1994, we consider that, in assessing whether products are "in general or local short supply" within the meaning of Article XX(j), a panel should examine the extent to which a particular product is "available" for purchase in a particular geographical area or market, and whether this is sufficient to meet demand in the relevant area or market. This analysis may, in appropriate cases, take into account not only the level of domestic production of a particular product and the nature of the products that are alleged to be "in general or local short supply", but also such factors as the relevant product and geographic market, potential price fluctuations in the relevant market, the purchasing power of foreign and domestic consumers, and the role that foreign and domestic producers play in a particular market, including the extent to which domestic producers sell their production abroad. Due regard should be given to the total quantity of imports that may be "available" to meet demand in a particular geographical area or market. It may thus be relevant to consider the extent to which international supply of a product is stable and accessible, including by examining factors such as the distance between a particular geographical area or market and production sites, as well as the reliability of local or transnational supply chains. Whether and which factors are relevant will necessarily depend on the particularities of each case. Just as there may be factors that have a bearing on "availability" of imports in a particular case, it is also possible that, despite the existence of manufacturing capacity, domestic products are not "available" in all parts of a particular country, or are not "available" in sufficient quantities to meet demand. In all cases, the responding party has the burden of demonstrating that the quantity of "available" supply from both domestic and international sources in the relevant geographical market is insufficient to meet demand.

- a. We therefore disagree with India to the extent that it argues that "short supply" can be determined without regard to whether supply from all sources is sufficient to meet demand in the relevant market.
- b. We reject India's claim that the Panel acted inconsistently with Article 11 of the DSU. As we see it, India's claim under Article 11 of the DSU relies for its validity on India's reading of Article XX(j), and in particular India's contention that the existence of a situation of "short supply" within the meaning of Article XX(j) is to be determined exclusively by reference to whether there is "sufficient" domestic manufacturing of a given product. The fact that India does not agree with the conclusion the Panel reached does not mean that the Panel committed an error amounting to a violation of Article 11 of the DSU.
- c. Consequently, we uphold the Panel's finding, in paragraph 7.265 of the Panel Report, that solar cells and modules are not "products in general or local short supply" in India within the meaning of Article XX(j) of the GATT 1994, and the Panel's ultimate finding, in paragraph 8.2.b of its Report, that the DCR measures are not justified under Article XX(j) of the GATT 1994.

6.5. Having upheld the Panel's finding, in paragraph 7.265 of the Panel Report, that solar cells and modules are not "products in local or general short supply" in India, within the meaning of Article XX(j), we do not consider it necessary further to examine India's claims on appeal pertaining to the Panel's "limited review and analysis" of whether India's DCR measures are "essential" to the acquisition of solar cells and modules for the purpose of Article XX(j). Nor do we

consider it necessary to examine India's arguments as they relate to the requirements of the chapeau of Article XX of the GATT 1994.

6.3 Article XX(d) of the GATT 1994

6.6. With respect to the Panel's findings under Article XX(d) of the GATT 1994, we consider that, in determining whether a responding party has identified a rule that falls within the scope of "laws or regulations" under Article XX(d) of the GATT 1994, a panel should evaluate and give due consideration to all the characteristics of the relevant instrument(s) and should avoid focusing exclusively or unduly on any single characteristic. In particular, it may be relevant for a panel to consider, among others: (i) the degree of normativity of the instrument and the extent to which the instrument operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member; (ii) the degree of specificity of the relevant rule; (iii) whether the rule is legally enforceable, including, e.g. before a court of law; (iv) whether the rule has been adopted or recognized by a competent authority possessing the necessary powers under the domestic legal system of a Member; (v) the form and title given to any instrument or instruments containing the rule under the domestic legal system of a Member; and (vi) the penalties or sanctions that may accompany the relevant rule. Importantly, this assessment must always be carried out on a case-by-case basis, in light of the specific characteristics and features of the instruments at issue, the rule alleged to exist, as well as the domestic legal system of the Member concerned.

- a. We therefore find that India has not demonstrated that the passages and provisions of the domestic instruments identified by India, when read together, set out the rule "to ensure ecologically sustainable growth while addressing India's energy security challenge, and ensuring compliance with its obligations relating to climate change", as alleged by India.
- b. We find that that the Panel did not err in finding that India failed to demonstrate that the international instruments it identified fall within the scope of "laws or regulations" under Article XX(d) in the present dispute.
- c. Consequently, we uphold the Panel's finding, in paragraph 7.333 of the Panel Report, that India has not demonstrated that the DCR measures are measures "to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT 1994]", and the Panel's ultimate finding, in paragraph 8.2.b of the Panel Report, that the DCR measures are not justified under Article XX(d) of the GATT 1994.

6.7. Having upheld the Panel's finding, in paragraph 7.333 of the Panel Report, that India did not demonstrate that the DCR measures are measures "to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT 1994]", we do not consider it necessary further to examine India's claims on appeal pertaining to the Panel's "limited review and analysis" of whether the DCR measures are "necessary" within the meaning of Article XX(d). Nor do we consider it necessary to examine India's arguments as they relate to the requirements of the chapeau of Article XX of the GATT 1994.

6.8. The Appellate Body recommends that the DSB request India to bring its measures, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the TRIMs Agreement and the GATT 1994, into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 22nd day of August 2016 by:

Peter Van den Bossche
Presiding Member

Seung Wha Chang
Member

Thomas Graham
Member