



**Dispute Settlement Body
14 October 2016**

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 14 OCTOBER 2016

Chairman: Mr. Xavier Carim (South Africa)

Prior to the adoption of Agenda, the item concerning the adoption of the Panel Report in the dispute on "European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft: Recourse to Article 21.5 of the DSU by the United States" (DS316) was removed from the proposed Agenda following the European Union's decision to appeal the Report.

1 INDIA – CERTAIN MEASURES RELATING TO SOLAR CELLS AND SOLAR MODULES

A. Report of the Appellate Body (WT/DS456/AB/R and WT/DS456/AB/R/Add.1) and Report of the Panel (WT/DS456/R and WT/DS456/R/Add.1)

1.1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS456/12 transmitting the Appellate Body Report in the dispute: "India – Certain Measures Relating to Solar Cells and Solar Modules", which had been circulated on 16 September 2016, in document WT/DS456/AB/R and Add.1. The Chairman reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

1.2. The representative of the United States said his country was pleased to propose the adoption of the Panel and Appellate Body Reports in this dispute involving domestic content requirements for solar cells and modules under India's National Solar Mission. The United States thanked the Panel, the Appellate Body, and the Secretariat assisting them for their hard work in this dispute. The findings of inconsistency by the Panel, as upheld by the Appellate Body, and the recommendations that followed from those findings pursuant to Article 19.1 of the DSU, were the means by which panels and the Appellate Body assisted the DSB in making its recommendations and rulings. And it was those DSB recommendations and rulings that would assist the parties in achieving a positive solution to their dispute, through a mutually agreed solution or withdrawal of the measure, as envisioned in Article 3.7 of the DSU.

1.3. The United States emphasized that it strongly supported India's effort to promote the generation and use of solar power in India. The United States looked forward to a continued partnership with India in the global fight against climate change. However, as had been noted by the United States over the course of this dispute, discriminatory policies in the clean energy sector – such as India's domestic content requirements – undermined efforts to promote the generation of clean energy by requiring the use of more expensive and less efficient equipment.

1.4. The United States said that it would like to draw attention to several key findings included in these Reports. First, the Panel had found – and the Appellate Body had affirmed – that India's domestic content requirements were inconsistent with India's national treatment obligations under

Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. And the Panel and Appellate Body had rejected India's argument that its domestic content requirements could be justified under the government procurement exemption of Article III:8(a) of the GATT 1994. This finding made clear that Article III:8(a) did not apply when a Member purchased one product, but discriminated against another, wholly different product.

1.5. Second, the Panel had found, and the Appellate Body had upheld, that India had failed to establish that its domestic content requirements were justified under Article XX(j) of the GATT 1994, which permitted Members to adopt WTO-inconsistent measures that were "essential to the acquisition or distribution of products in general or local short supply". The Panel and Appellate Body had rejected India's argument that solar cells and modules were in "short supply" in India on account of India's lack of domestic manufacturing capacity for solar cells and modules. Rather, a product was in "short supply" under Article XX(j) when the quantity of available supply of a product, from all sources, did not meet demand in a relevant geographical area or market.

1.6. Third, the Panel had found, and the Appellate Body had upheld, that India had failed to demonstrate that its domestic content requirement measures were justified under Article XX(d) of the GATT 1994, which permitted Members to adopt WTO-inconsistent measures that were necessary to "secure compliance" with "laws or regulations" that were not themselves WTO-inconsistent. The Panel and Appellate Body had found that – with the exception of a single instrument – none of the domestic or international instruments identified by India constituted "laws or regulations" with which India had to "secure compliance" within the meaning of Article XX(d). The Panel and Appellate Body had also found that none of the domestic instruments identified by India set out a legal obligation to promote sustainable development.

1.7. Having upheld the Panel's findings under Article III:8(a), Article XX(j) and Article XX(d), the Appellate Body properly did "not consider it necessary" to examine India's claims under other legal elements under those provisions as reaching those issues was not necessary to resolve the dispute.¹

1.8. The United States also noted that the Report contained a separate opinion. In general, the United States considered it a positive step for the members of a Division to explore and explain where they had not been able to come to one view on a particular legal issue. In the case of this particular opinion, however, the United States did not see how it related to an issue raised in this appeal. Accordingly, the United States said that it would appear to be another example of *obiter dicta*, a problem to which the United States had drawn the attention of the DSB in the recent past. As the United States had also expressed in the past, particularly at a time when workload issues were increasingly affecting the time-table for the resolution of disputes, including appeals, a focus on those legal issues necessary to resolve the dispute would enhance the efficient functioning of the dispute settlement system. The United States thanked both the Panel and the Appellate Body for the legal findings in these Reports.

1.9. The representative of India said that his delegation wished to thank the Panel, the Appellate Body and their respective Secretariats for the considerable time and effort that they had devoted to this dispute. With respect to the Reports to be adopted at the present meeting, the United States had challenged the domestic content requirements in certain schemes of the National Solar Mission (Phase I, Batches 1 and 2, and Phase II, Batch 1) that had been undertaken by two Government agencies.

1.10. The dispute involved the scope of policy space available to WTO Members for undertaking government procurement as a derogation from the National Treatment Principle of the GATT 1994. The Appellate Body's ruling, confirming the Panel's ruling, was that, in order for Article III:8(a) of the GATT 1994 to apply, the foreign product discriminated against must necessarily be in a competitive relationship with the product purchased by way of procurement.²

1.11. In India's view, such a narrow interpretation of Article III:8(a) of the GATT 1994 meant that, in order to be able to potentially justify discrimination against imported solar cells and modules as "government procurement" under Article III:8(a) of the GATT 1994, a WTO Member would need to necessarily purchase those solar cells and modules. It could not simply purchase the

¹ Appellate Body Report, para. 5.155.

² "India – Solar Cells" (AB), paragraphs 5.24 and 5.36.

electricity generated from those products; even when those cells and modules were exclusively used for the electricity generated for supplies to the Government. India said it was deeply disappointed that the Appellate Body had chosen to simply reiterate its reasoning in the "Canada – Renewable Energy / Feed-in Tariff" dispute, without adequate consideration of the unique nature and role of solar cells and modules in solar power generation.

1.12. During its proceedings, the Appellate Body had engaged both the parties and other participants on various scenarios. These ranged from measures mandating the use of domestically manufactured ink in pens that were purchased by the Government, to domestically manufactured paper in notebooks that had been purchased by the Government, to domestically manufactured cloth in army uniforms that had been purchased by the Government. However, with the Appellate Body's reiteration of the Panel's ruling, it appeared that there was effectively no room for the government procurement exception under Article III:8(a) of the GATT 1994, unless there was a purchase by the Government, through procurement, of the very product that was discriminated against despite the uniqueness of the product.

1.13. India also noted that neither the Panel nor the Appellate Body had delved beyond this threshold issue of "competitive relationship", and had not decided on the remaining elements of Article III:8(a) of the GATT 1994, i.e. whether the procurement had been for government purposes and not with a view to commercial resale. However, India highlighted that the Panel had noted that it was undisputed that the government agencies – NVVN and SECI – administered schemes that were designed to enable the sale of electricity, at reduced cost, to downstream intermediaries and final consumers.

1.14. Apart from its arguments on the concept of government procurement, India had appealed against certain errors of law and legal interpretation developed in the Panel Report with respect to Article XX(j) and Article XX(d) of the GATT 1994. India said it would also like to make some general observations on the Panel's and Appellate Body's findings in relation to the interpretation of these provisions.

1.15. India noted that Article XX(j) of the GATT 1994 had been interpreted for the very first time in WTO jurisprudence. India acknowledged that each of the General Exceptions under Article XX of the GATT 1994 was meant to be used in clear and well-defined circumstances, and by carefully weighing and balancing the trade restrictiveness of a measure. India was disappointed however, that the Appellate Body's interpretation of the standards for applicability of Article XX(j) of the GATT 1994 effectively confined any meaningful use of this provision to export restraints and not import restraints.

1.16. The Appellate Body had acknowledged the distinction that India had pointed out between the text of Article XX(j) of the GATT 1994 and the text of Article XX(i) and Article XI:2(a) of the GATT 1994. The text of the latter two Articles both specifically referenced export restraints. However, the Appellate Body had concluded that these textual differences were not sufficient to justify the use of the provision for export or import restraints or both. The failure to specifically address the circumstances in which Article XX(j) of the GATT 1994 could be used as an effective and legitimate tool of import restraint would remain a significant limitation in any possible future use of the Article XX(j) exception.

1.17. India said it was disappointed that, like the Panel, the Appellate Body had not deemed it relevant to give meaning and effect to the terms "general" and "local" as qualifiers to the term "short supply" under Article XX(j) of the GATT 1994. Instead, the Appellate Body had concluded that the relevant test for applicability of Article XX(j) was whether the quantity of "available" supply from both domestic and international sources, in a relevant geographical market, was sufficient to meet the general or local "demand" in the market. The Panel's reasoning, as had been upheld by the Appellate Body, was that an assessment of whether there was a situation of "products in general or local short supply" should not focus exclusively on supply that was "general" or "local", but on the availability of a product to meet the "general" or "local" demand in a market.³

1.18. The Appellate Body appeared to have acknowledged that a lack of domestic production, especially in developing countries, could increase their vulnerability to supply disruptions, as

³ "India – Solar Cells" (AB), paragraphs 5.69 and 5.71.

compared to developed countries, and that such factors could be relevant in assessing the availability of a product when assessing whether a product was in "general or local short supply".⁴ However, the Appellate Body had subsequently recalled the Panel's finding that such vulnerability needed to be demonstrated through actual disruptions in the supply of imported cells and modules.⁵ This effectively meant that any policy measure under Article XX(j) of the GATT 1994 could only be an after-thought; and not one that could prevent the rise of situations of general or local short supply.

1.19. The other general exception invoked by India was Article XX(d) of the GATT 1994. While prior jurisprudence on Article XX(d) of the GATT 1994 existed, the Appellate Body had enunciated several tests that would be relevant for a panel to consider. But the enunciation of these principles, in India's view, was not without ambiguity. On the one hand, the Appellate Body had noted that it "does not consider that the scope of 'laws or regulations' is limited to instruments that are legally enforceable (including, e.g. before a court of law), or that they need to be accompanied by penalties and sanctions to be applied in situations of non-compliance".⁶ However, the Appellate Body had also noted, in the same paragraph, that a panel should consider the degree to which an instrument containing the alleged rule was normative in nature, and that therefore it was relevant "for a panel to examine whether a rule is legally enforceable, as this may demonstrate the extent to which it sets out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member. It also may be relevant for a panel to examine whether the instrument provides for penalties or sanctions to be applied in situations of non-compliance".

1.20. The Appellate Body, while laying down the six criteria for assessing applicability of Article XX(d) of the GATT 1994, had specified, in criteria (iii), the legal enforceability of a rule – for example before a court – in effect suggesting that non-binding soft law approaches could not be sufficient for establishing a defence under Article XX(d) of the GATT 1994.⁷

1.21. In the final analysis, the Appellate Body had stated that India's domestic content requirements (DCR) for solar cells and modules, as they were currently designed, were not compatible with WTO norms. But the Report had not questioned the relevance of having domestic manufacturing capacities for achieving India's policy objectives relating to climate change, energy security and sustainable development. India was therefore making a close assessment of the WTO ruling, and would ensure careful structuring of future measures in order to achieve its policy objectives in a WTO-compatible manner.

1.22. India said it would like to emphasize to the DSB a fact which it had been consistently highlighting throughout the dispute proceedings. That India saw the incentivization of imports of solar cells and modules and the development of domestic manufacturing capacities as two sides of the same coin. Both developments needed to occur in parallel. India was committed to achieving this in a manner that respected the rules of international trade. India's continued incentives for import of solar cells and modules, and the investment incentives for attracting foreign direct investment in this sector, were well-documented, and played a significant role in India's solar industry. Having ratified the Paris Climate Change Agreement, India had demonstrated its steadfast commitment to ensuring continued efforts to promote renewable energy. India looked forward to the cooperation of all WTO Members to ensure a sustainable way in which to achieve the targets that Members had all committed to.

1.23. To conclude, India was evaluating the Reports of the Panel and the Appellate Body carefully. India was committed to framing the future design of its solar mission schemes, relating to domestic content, consistently with the findings of the Panel and the Appellate Body. While it was obvious that India did not agree with all the findings and conclusions of the Appellate Body and the Panel, it acknowledged that the Reports would be adopted by the DSB at the present meeting. Pursuant to Article 21.3 of the DSU, India would, within the next 30 days, inform the DSB of its intentions with respect to implementation of the recommendations and rulings that the DSB would adopt at the present meeting.

⁴ "India – Solar Cells" (AB), paragraph 5.72.

⁵ "India – Solar Cells" (AB), paragraph 5.76.

⁶ "India – Solar Cells" (AB), paragraph 5.109.

⁷ "India – Solar Cells" (AB), paragraph 5.113.

1.24. The representative of the European Union said that his delegation welcomed the clarifications provided by the Appellate Body in its Report with respect to the interpretation of certain provisions of the GATT 1994, setting down disciplines on domestic content requirements. In particular, the EU welcomed the clarifications with regard to Article III:8(a) of the GATT 1994, Article XX(d) of the GATT 1994 and Article XX(j) of the GATT 1994. As per the comment made by the United States regarding separate opinions, the EU wished to underscore that the Appellate Body members had a right to issue separate opinions and noted that such opinions were anonymous. However, the EU did not share the concerns expressed by the United States with respect to the substance of the separate opinion.

1.25. The DSB took note of the statements and adopted the Appellate Body Report contained in document WT/DS456/AB/R and Add.1 and the Panel Report contained in document WT/DS456/R and Add.1, as modified by the Appellate Body Report.
