Recognizing the Significance of the World Trade Organization Panel Report in *India — Certain Measures Relating to Solar Cells and Solar Modules*

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I. INTRODUCTION

Evoking memories of the 1999 Seattle Protest, the India — Certain Measures Relating to Solar Cells and Solar Modules (Panel Report) [1]

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1. Panel Report, *India — Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/R (Feb. 24, 2016) [hereinafter Panel Report].

illustrates the uneasy relationship between trade liberalization and environmental protection. With the World Trade Organization (WTO) carrying the flag of trade liberalization and dominating the relationship, it appears to treat the environment as a subservient concern. This claim was at the heart of the critique passionately voiced out against the WTO in Seattle, Washington. It has been muted recently, however. With the release of the Panel Report, the criticisms may potentially be reanimated.[2]

The seemingly inopportune time when it was released also does not help the WTO's image. Circulated on 24 February 2016, the Panel Report came two months after the historic adoption of the Paris Agreement,[3] which reflected the heightened global concern on climate change.[4] The world is still beaming from its achievement, but the Panel Report threatens to eclipse it.

The measure in question extends from India's National Solar Mission, a policy that is claimed to result from the 1992 United Nations Framework Convention on Climate Change (UNFCCC).[5] Hence, it is understandable why it is depicted as a symbol of the WTO's callousness towards the environment. It is therefore important to analyze the social value provided by the Panel Report.

The Panel Report also discusses several interesting issues under the General Agreement on Tariffs and Trade (GATT).[6] To this end, the Author shall discuss the jurisprudential value of the discussions on the procedural issue relating to preliminary rulings as well as the substantive issues dealing with national treatment under Article III, Paragraph 4,[7] the general exceptions under Article XX (d) on the compliance with laws or

2. *See* Ben Peachy & Ilana Solomon, The WTO Just Ruled Against India's Booming Solar Program, *available at* http://www.huffingtonpost.com/ben-beachy/the-wto-just-ruled-agains_b_9307884.html (last accessed Aug. 31, 2018).

3. Paris Agreement, *opened for signature* Apr. 22, 2016, 55 I.L.M. 740.

4. Panel Report, *supra* note 1.

5. United Nations Framework Convention on Climate Change, *opened for signature* June 4, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

6. *See* Panel Report, *supra* note 1 (citing General Agreement on Tariffs and Trade 1994, *opened for signature* Apr. 15, 1994, 1867 U.N.T.S. 187 [hereinafter GATT]).

7. GATT, *supra* note 6, art. III, ¶ 4.

regulations,[8] as well as Article XX (j) on the essential need to acquire or distribute products in general or local short of supply.[9]

In this Article, the Author will argue that the Panel Report has significant jurisprudential and social values. Under Part II, the Author will build on such argument by providing a brief summary of the claim, by laying out the respective profiles of India (the respondent in this claim) and the United States of America (US) (the complainant), and by explaining the probable reasons that led to the filing of the claim. Under this portion of the Article, the Author will highlight the two-level game theory employed under the WTO.

In Part III, the Author will provide a brief survey of the facts and the legal arguments of the parties. The Author will then analyze the Panel's response in relation to the issues and explain its legal ramifications.

In Part IV, the Author shall move beyond the ambit of the legal framework of the WTO and argue the social significance of the Panel Report by highlighting its consequence on the organization's legitimacy as well as the effect on the relationship between trade liberalization and the environment. The Author will also propose the potential WTO Climate Change Code to address the criticisms levied against the body.

II. BACKGROUND

A. The Claim

The US filed a claim against India in relation to the domestic content requirement (DCR measures) that was required under the umbrella policy known as the Jawaharlal Nehru National Solar Mission (Solar Mission).[10] The Solar Mission was launched in 2010 and envisioned the growth of the country's solar power generation in the succeeding decade.[11] It addresses three interrelated goals: energy security, sustainable development, and climate change prevention.[12]

The Indian Government imposes the DCR measures when it contracts with solar power developers (SPDs) through a long-term power purchase

8. *Id.* art. XX (d).

9. *Id.* art. XX (j).

10. Panel Report, *supra* note 1, ¶ 2.1.

11. *Id.* ¶ 7.1.

12. *Id.* ¶ 7.189.

agreement (PPA).[13] Not all SPDs are required to follow the DCR measures and not all components are covered as well because the prohibition applies only under particular phases and batches.[14] As a result of these variances, 33 out of the 55 PPAs in India made use of foreign solar cells and modules.[15]

B. The Parties

1. United States of America

The US is the largest economy in the world based on its nominal gross domestic product (GDP).[16] In 2017, its economy is said to amount to $19.42 trillion or 25% of the gross world product.[17] Considering its population, the GDP per capita of the US is at $59,609.[18]

The US has a big solar energy industry that resulted from its huge domestic installation, which amounts to four gigawatts as of 2011.[19] The US is ranked as the fourth highest solar power generator in the world (tied with Spain).[20] It is also ranked as number one in the Ernst & Young (EY) Solar Attractiveness Index,[21] an index that is part of the renewable energy country attractiveness index, which ranks countries based on the desirability of their renewable energy investment and operational prospects.[22]

In addition to this, the US also plays a key role in the international solar power market as it exports over $5.6 billion worth of solar products.[23] This is significantly higher than its solar power imports, which amounts to $3.7

13. *Id.* ¶ 7.2.

14. *Id.* ¶ 7.12.

15. *Id.* ¶ 7.14.

16. Prableen Bajpai, The World's Top 10 Economies, *available at* http://www.investopedia.com/articles/investing/022415/worlds-top-10-economies.asp (last accessed Aug. 31, 2018).

17. *Id.*

18. *Id.*

19. PHILIP G. JORDAN, SOLAR ENERGY MARKETS: AN ANALYSIS OF THE GLOBAL SOLAR INDUSTRY 2 (2013 ed.).

20. *Id.*

21. *Id.* at 132.

22. Ernst & Young, RECAI Methodology, *available at* https://www.ey.com/gl/en/industries/power---utilities/ey-renewable-energy-country-attractiveness-index-methodology-2018 (last accessed Aug. 31, 2018).

23. JORDAN, *supra* note 19, at 2.

billion.[24] Hence, the net export surplus amount to a little less than $2 billion.[25]

The growth of the solar power industry resulted in the increase of employment in the industry.[26] It was estimated that the solar power industry employs approximately 120,000 workers across the US.[27] From 2011 to 2012, it has grown by 13.2%.[28] This is a significant rise, given that the US national employment growth over the same period was only 3.2%.[29] By 2014, the US employment figure for solar power has increased to 174,000.[30]

2. India

India is the sixth largest economy in the world based on its nominal GDP, which is pegged at $2.61 trillion.[31] India's GDP per capita, however, is weighed down by its huge population, which is set at $1,850.[32]

India remains to be a developing country as exemplified by its energy deficiency. From 2014 to 2015, it was determined that the energy deficiency in the country has ranged from 2.6% up to 4.3%.[33] This amounts to over 300 million people with no electricity.[34] This deficit is more pronounced in some states more than others. For example, as of 2015, the State of Jammu and Kashmir experienced an energy deficit that peaked to 14.7%, with an average deficit of 13%.[35] The deficit is projected to widen in the coming

24. *Id.*

25. *Id.*

26. *Id.* at 112.

27. *Id.*

28. *Id.*

29. JORDAN, *supra* note 19, at 112.

30. Subhojit Dawn, et al., *Recent Developments of Solar Energy in India: Perspectives, Strategies and Future Goals*, 62 RENEWABLE & SUSTAINABLE ENERGY REV. 215, 218 (2016).

31. Bajpai, *supra* note 16.

32. *Id.*

33. Dawn, et al., *supra* note 30, at 219.

34. Center for Climate and Energy Solutions, India's Climate and Energy Policies at 1, *available at* https://archive.nyu.edu/jspui/bitstream/2451/40701/2/india%27s%20climate%20and%20energy%20policies.pdf (last accessed Aug. 31, 2018).

35. Dawn, et al., *supra* note 30, at 219.

years as the power demand for the country is predicted to reach 400,000 megawatts (MW).[36]

As of the moment, India is heavily reliant on coal, with 43.5% of its total energy supply coming from it.[37] This results in huge greenhouse gas (GHG) emissions.[38] India is now the fourth largest GHG emitter in the world, contributing 5.8% of global emissions.[39]

To address this, India has been investing in the solar market in the recent past. Buoyed by its strategic geographical location that allows it to experience over 300 days' worth of sunshine in a year in most parts of the country, India aims to harness this potential.[40] From 2007 up to 2012, the country invested around $1.4 billion in the solar power industry.[41] In 2012, the private investment in the industry has amounted to $340 million.[42] The National Solar Mission has been a significant boost for the industry as it provided niche development through market support, research and development, and resources development.[43] These reasons explain the country's rank in the EY Solar Attractiveness Index, which places India at number two.[44] Corollary to the investment growth is the rise in employment figures. It was reported that the solar power industry in India employs over 200,000 workers as of 2014.[45]

C. Analysis

A reading of the profiles of the conflicting parties reveals the realpolitik behind the claim. The US pursued its claim because India has a significantly huge solar power market that is currently being facilitated by its government. The national goals of India to achieve energy security, to

36. *Id.*

37. Center for Climate and Energy Solutions, *supra* note 34, at 1.

38. *Id.*

39. *Id.*

40. Atul Sharma, *A Comprehensive Study of Solar Power in India and World*, 15 RENEWABLE & SUSTAINABLE ENERGY REV. 1767, 1772-73 (2011).

41. JORDAN, *supra* note 19, at 40.

42. *Id.* at 40-41.

43. Rainer Quitzow, *Assessing Policy Strategies for the Promotion of Environmental Technologies: A Review of India's National Solar Mission*, 44 RESEARCH POL'Y 233, 237 (2015).

44. JORDAN, *supra* note 19, at 132.

45. Dawn, et al., *supra* note 30, at 218.

sustainably develop, and to protect the environment actually fuel this growth. Nonetheless, the DCR measures prevent total market penetration. Hence, to pry it open and potentially impede transfer to alternative energy, the US challenged India to be able to compete fully in its market.

There are benefits in the Indian solar power market. Among these is its insulation from other energy markets.[46] India, through its National Solar Mission, has created a niche market that does not have to compete with other traditional sources of energy (e.g., coal).[47] Hence, a segment of the energy market focuses solely on solar energy. This creates a committed solar power market which assures that there is demand for solar cells and modules.

India's global energy demand appears to remain strong in the foreseeable future. India, along with China and Brazil, are projected to be the main driving forces of residential energy consumption.[48] Coupled with strong government support (under the National Solar Mission) and the rising awareness on the harms of coal energy (resulting from climate change advocacies), market behavior is seen to remain favorable for solar energy investments.[49]

The US would also want to ensure its sustained employment growth.[50] The US workforce in the solar power industry has been growing in a pace faster than the average employment growth rate.[51] It is, therefore, necessary to ensure that there is a steady demand for solar energy components to ensure its continuous growth. Losing on a market as big as India shall dampen this growth.

Overall, this situation is reflective of the WTO's two-level game theory. Domestically, the US benefits a lot from an open and accessible Indian solar

46. Solar Power and India's Energy Future, *available at* https://www.atkearney.com/energy/article?/a/solar-power-and-india-s-energy-future (last accessed Aug. 31, 2018).

47. National Solar Mission, Jawaharlal Nehru national Solar mission targets 20,000MW by 2022, *available at* http://indianpowersector.com/electricity-regulation/national-solar-mission/ (last accessed Aug. 31, 2018).

48. JORDAN, *supra* note 19, at 128.

49. *See* National Solar Mission, *supra* note 47.

50. *See* Jennifer Runyon, US Solar Jobs Growing Ten Times Faster than National Average Employment Growth, *available at* https://www.renewableenergyworld.com/articles/2014/01/solar-jobs-growing-ten-times-faster-than-national-average-employment-growth.html (last accessed Aug. 31, 2018).

51. Runyon, *supra* note 50.

market, as reflected by its solar industry's support for the government's action to hail India in the WTO.[52] India's vehement opposition is also understandable. Aside from its desire to be more energy secure, it also has its own domestic solar energy industry that shall benefit from a partially-limited market that does not have to compete with foreign products. This apparent clash of interests gave rise to the dispute.

III. JURISPRUDENTIAL VALUE

Several legal issues were raised in this claim. However, for brevity, the Author shall focus on three integral issues. The first issue is on the procedural aspect — whether the preliminary ruling should be granted to India in relation to the scope of the terms of reference of the claim. The second issue touches on the substantive aspect — whether the DCR measures provide less favorable treatment to like products in violation of Article III, Paragraph 4 of the GATT. The last issue is also substantive — whether the DCR measures are justified under Articles XX (d) and (j) of the GATT.

A. Preliminary Ruling

1. Facts

In the course of the proceedings, India requested the Panel to provide a preliminary ruling reiterating the scope of the terms of reference of the Panel.[53] India expressed fear that, since the US' claim is ambiguous and vague, the Panel had to provide a ruling on the scope of the claim.[54] The US responded to this request and explicitly stated that, consistent with the terms of reference, the claim does not put into question the whole National Solar Mission policy, rather it is limited to the DCR implemented under the first and second batches of Phase 1, as well as the first batch of Phase 2.[55]

The Panel deferred its ruling on the matter given the clarifications provided by the US.[56] It then insisted that it shall only decide on measures that are already covered in the terms of reference, without prejudice to a

52. Doug Palmer, U.S. Challenges India's Solar Program Restrictions at WTO, *available at* https://www.reuters.com/article/usa-india-solar-wto-idINDEE9150E520130206 (last accessed Aug. 31, 2018).

53. Panel Report, *supra* note 1, ¶ 7.20.

54. *Id.* ¶ 7.22.

55. *Id.*

56. *Id.*

ruling in the future, if additional challenges are raised by the US under the terms of reference.[57] Also, since no additional matters were raised for preliminary ruling, the Panel did not issue any further ruling.[58]

2. Analysis

It should be noted that a request for preliminary ruling is not explicitly provided under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[59] Yet, despite its absence, it still found its way in numerous Panel procedures as an extension of Article 6, Paragraph 2[60] of the DSU.[61] The purpose of the preliminary ruling is to provide an initial determination of matter relating to procedural and jurisdictional infirmities.[62] Its value is explained in the *European Communities — Regime for the Importation, Sale and Distribution of Bananas*,[63] where the Appellate Body stated that some issues may simply be decided early on.[64]

Despite its value, working procedures dealing with procedural aspects, such as the procedures on preliminary rulings, are widely derided. There is a perception that these types of options are used by Parties to dissuade the Panel from addressing the substantive issues of a claim.[65] Furthermore, it is deemed as a non-transparent procedure because the rulings are mostly limited to the parties and do not reach the other Members of the WTO

57. *Id.*

58. *Id.*

59. Understanding on Rules and Procedures Governing the Settlement of Disputes, *adopted* Apr. 15, 1994, 1869 U.N.T.S. 401 (entered into force Jan. 1, 1995) [hereinafter DSU].

60. *Id.* art. 6, ¶ 2.

61. Shahid Bashir, *WTO Dispute Settlement Body Developments in 2012*, Address at the World Trade Organization Dispute Settlement Body Meeting (Feb. 27, 2013) (transcript *available at* https://www.wto.org/english/tratop_e/dispu_e/bashir_13_e.htm (last accessed Aug. 31, 2018)).

62. *Id.*

63. Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sep. 25, 1997).

64. *Id.* ¶ 144.

65. Jacques H.J. Bourgeois, *Some Reflections on the WTO Dispute Settlement on the WTO Dispute Settlement System From a Practitioner's Perspective*, 4 J. INT'L ECON. L. 145, 149 (2001).

until the final panel report is circulated.[66] The response of the Panel reflects these concerns.

In this claim, India was able to assure itself of the limits of the action against and was also able to get the Panel's commitment to address additional matters that may potentially be raised in the course of the proceedings.[67] The Panel did not treat India's request with benign neglect and has ensured that India's request shall be properly addressed.[68] This could be gleaned from the Panel's response throughout the proceedings.[69] After India's first submission, which included the request for preliminary ruling, the Panel immediately sought the response of the US. Subsequently, when it was again raised by India in the first substantive meeting with the Panel, it again immediately sought the response of the US.[70] Hence, showing the Panel's earnest efforts to provide an appropriate response to the request.

The Panel's response to the request is also notably flexible as it granted to itself sufficient wiggle room for *ex post* actions by the US. Hence, while being able to assure India of the scope of the claim, it was also able to guarantee that if necessary, it will still act on India's request provided that the US seeks additional findings outside of the terms of reference. Consequently, the Panel was able to not only crystallize the coverage of the claim, but it was also able to provide guarantees that if there will be potential alterations to the terms brought about by the US, it will exercise its power to rule on it.

For matters such as those provided in the claim, the flexibility of the Panel is important. As it deals with measures involving various stages and transactions, it is necessary to achieve certainty of the scope of the claim while being able to also address additional findings that may be clandestinely included. Hence, prudence is necessary. The Panel report reflects this.

The Report is also more or less transparent. The Panel was able to provide the parties, including third parties, copies of its decision.[71] And while it did not communicate its response to other Members, it should be noted that the decision of the Panel was actually to defer its ruling on the request, hence, the lack of communication to other Members is justified

66. Bashir, *supra* note 61.

67. Panel Report, *supra* note 1, ¶ 7.23.

68. *See* Panel Report, *supra* note 1.

69. *Id.*

70. *Id.* ¶ 7.20-7.22.

71. *Id.*

because there is no ruling to speak of.[72] Nevertheless, the results of the request for preliminary ruling have been included in the final Panel Report.[73]

B. Violation of Article III, Paragraph 4 of the GATT

1. Facts

The Panel found the DCR measures to be inconsistent with Article III, Paragraph 4,[74] since it is embraced under Paragraph 1 (a) of the Agreement on Trade-Related Investment Measures [75] (TRIMs Agreement). [76] Nevertheless, it also analyzed the existence of a violation directly under Article III, Paragraph 4 in order to further ground its conclusion.[77]

The elements to determine a violation under Article III, Paragraph 4 are: first, that the imported and domestic products in question are "like products;"[78] second, "that the measure at issue is a 'law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use;'" [79] and lastly, "that the imported products are accorded 'less favorable' treatment compared to like ... products."[80]

The first element was easily disposed of in the affirmative because India admitted that the solar cells and modules produced in India and those imported from the US are like products.[81] The second element was also easily disposed of because India did not contest that there are laws, regulations, or requirements affecting the internal sale, purchase, or use of the solar cells and modules from the US.[82]

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72. *Id.*

73. *See* Panel Report, *supra* note 1.

74. GATT, *supra* note 6, art. III, ¶ 4.

75. Agreement on Trade-Related Investment Measures, *adopted* Apr. 15, 1994, 1868 U.N.T.S. 186 (entered into force Jan. 1, 1995).

76. Panel Report, *supra* note 1, ¶ 7.74.

77. *Id.*

78. *Id.* ¶ 7.80.

79. *Id.*

80. *Id.*

81. *Id.* ¶ 7.82.

82. Panel Report, *supra* note 1, ¶¶ 7.85-7.86.

The bone of contention of India centered on the third element on less favorable treatment. In its response, India argued that the DCR does not apply to all batches; that all SPDs, irrespective of their use of foreign or local solar cells and modules; and that foreign solar cells and modules cover most of the Indian market.[83]

The Panel had previously disposed of the arguments by citing the *United States — Tax Treatment for "Foreign Sales Corporations"* Article 21.5 ruling (US — FSC Article 21.5 ruling).[84] It explained that the disincentive to use an imported product does not need to happen in all cases, so long as the disincentive exist, there is less favorable treatment.[85] Furthermore, it was also noted that the participation of SPDs does not sanitize the less favorable treatment because what is in question are the products that are prohibited because of their origin.[86] Finally, the Panel also clarified that Article III, Paragraph 4 does not provide any additional standards such as the suggested *de minimis* or market access.[87] It was therefore ruled that there was less favorable treatment of imported solar cells and modules.[88] Additionally, given the existence of all the elements, it was decided that India violated Article III, Paragraph 4 of the GATT.[89]

2. Analysis

a. Comprehensiveness

The Panel, in its discussion, provided a comprehensive determination of the violation of Article III, Paragraph 4. Despite already concluding that the questioned DCR measures are inconsistent with Article III, Paragraph 4 because it is covered under paragraph 1 (a) of the Illustrative List of the

83. *Id.* ¶ 7.90.

84. *Id.* ¶ 7.95 (citing Appellate Body Report, *United States — Tax Treatment for "Foreign Sales Corporations" — Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW (Jan. 14, 2002) [hereinafter *Report on US Tax Treatment*]).

85. Panel Report, *supra* note 1, ¶ 7.95.

86. *Id.* ¶ 7.96.

87. *Id.* ¶ 7.97.

88. *Id.* ¶ 7.99.

89. *Id.*

TRIMs Agreement,[90] the Panel still looked at Article III, Paragraph 4 separately.

The comprehensiveness of the discussion and analysis of the Panel is valuable since the report is still appealable to the Appellate Body.[91] While the Appellate Body may decide to either uphold, modify, or reverse the ruling of the Panel, a complete reversal is less likely; the Panel was able to exhaustively rationalize its ruling under various justifications. Hence, the Panel provided for a plethora of reasons to rule against the DCR measures.

If the Panel ended its discussion after reaching its first conclusion (that the questioned measure was covered under the Illustrative List of the TRIMs Agreement) and the Appellate Body subsequently reversed it, then the latter would simply conclude that there is no violation of Article III, Paragraph 4. However, since the Panel added a discussion of Article III, Paragraph 4, then India would also have to overturn this conclusion, and the Appellate Body would have to admit it.

Furthermore, it is also significant given that a comprehensive discussion of the issue allows for the presentation of more facts. The Appellate Body lacks remand powers under the DSU.[92] Hence, it is limited to the determination of facts provided before it. Due to the comprehensiveness of the decision stated in the Panel Report, there are sufficient facts for the Appellate Body to base its decision on.

b. Legal Interpretation

Another notable feature of the Panel Report is the variance of the method of legal interpretation. In its response to India's claim that the DCR does not extend to all solar cells and modules, the Panel applied the US — FSC Article 21.5 ruling[93] albeit the recognition that the DCR measure in the claim is not squarely similar to those that are presented by India.[94] On the other hand, when it dealt with the majority share argument, the Panel strictly applied the text of Article III, Paragraph 4 and noted that it did not include any qualifications, either of a *de minimis* standard or market access measure, thus it is not an additional exception.[95]

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90. *Id.*

91. Panel Report, *supra* note 1, ¶ 7.137.

92. *See* DSU, *supra* note 59.

93. *Report on US Tax Treatment*, *supra* note 84.

94. Panel Report, *supra* note 1, ¶ 7.95.

95. *Id.* ¶ 7.97.

From these facts, it appears that the Panel streamlines its manner of legal interpretation depending on the legal source used and its application. It could be deduced that a conservative tack is adopted when dealing with the text of the agreement, while a liberal approach is used when the Appellate Body or Panel Reports are used. Furthermore, in application, it would seem that when the analysis is used to simply provide an example (i.e., "What are the examples?"), the Panel takes the liberty to insert more or less "similar" rulings, but if it applies the analysis to determine the existence of a qualification (i.e. "What is/are the right/s or obligation/s?"), a conservative approach is employed. The jurisprudential value of these nuances is helpful when arguing before the Panel or Appellate Body.

c. Less Favorable Treatment Interpretation

A jurisprudential gem may also be picked up from the Panel on the lack of qualification under Article III, Paragraph 4. In its ruling, the Panel maintained that Article III, Paragraph 4 is not qualified by any *de minim*is standard or opportunities for alternative market access.[96] There is therefore no threshold for the less favorable treatment against a foreign product. So long as the equality of opportunities to compete with like products is affected, it is deemed as less favorable. No maximum or minimum quantification shall be permitted nor shall any alternative be recognized to change the conclusion once the condition of less favorable treatment is determined.

C. Articles XX (j) and (d) of the GATT — General Exceptions

1. The Facts

India argued that the DCR measures are justified under the GATT because they fall under the general exceptions provided under Articles XX (j) and XX (d).[97] The overarching argument of India is that, as a State, it has the obligation to ensure that it is able to achieve energy security and sustainable development, while being able to address the threats posed by climate change.[98] India argues that to achieve this, it should be able to provide cheap and clean electricity from solar power.[99] This then may be assured only if

96. *Id.*

97. *Id.* ¶ 7.188.

98. *Id.* ¶ 7.189.

99. *Id.*

the supply of cheap and clean energy is not disrupted as a consequence of its dependence on foreign solar cells and modules.[100]

a. Article XX (j) — Essential to the Acquisition or Distribution of Products in General or Local Short Supply

The Panel dismissed India's argument that the DCR measures prevent the shortage of solar cells and modules.[101] It pointed out that the absence of domestic manufacturing capacity in India is not embraced by the terms "products in general or local short supply."[102] Instead, the Panel noted that what India should argue is that there is a shortage in all sources, both internationally and domestically, and that the shortage results in the inability to meet the demands within the geographical area or market.[103] India failed to do so.

In relation to the risk to the supply of solar cells and modules, the Panel explained that a product at risk of becoming in short supply is not covered by the provision.[104] The provision is notably devoid of any statement in relation to risk, thus, it may not be considered.

The Panel then extended its analysis and exercised prudence given the novelty of the argument. It extensively determined the meaning and application of risk in international trade.[105] It liberally interpreted the provision by concluding that the only allowable extension of local or short supply would be in cases when there is an "imminent" shortage.[106] The Panel noted that even with this mild relaxation of the conditions, India was not able to show any disruptions that will give rise to the imminent shortage.[107] Hence, the Panel concluded that the DCR measures are not embraced by Article XX (j).[108]

100. Panel Report, *supra* note 1, ¶ 7.189.

101. *Id.* ¶ 7.236.

102. *Id.*

103. *Id.*

104. *Id.* ¶ 7.250.

105. *Id.* ¶¶ 7.255-7.257.

106. Panel Report, *supra* note 1, ¶ 7.260.

107. *Id.* ¶ 7.263.

108. *Id.* ¶ 7.265.

b. Article XX (d)

India also argued that the DCR measures are meant to secure India's compliance with several law or regulations.[109] The laws and regulations cited by India include the following international legal instruments: the preamble of the WTO Agreement,[110] the UNFCCC,[111] the Rio Declaration on Environment and Development,[112] and the United Nations General Assembly Resolutions adopting the Rio+20 Document — *The Future We Want*,[113] as well as domestic measures such as the Electricity Act, 2003,[114] National Electricity Policy,[115] National Action Plan on Climate Change,[116] and the National Electricity Plan.[117]

The Panel dealt with this issue by first classifying the laws or regulations embraced by Article XX (d). It noted that the provision only applies to

109. *Id.* ¶ 7.269.

110. Marrakesh Agreement Establishing the World Trade Organization pmbl., *opened for signature* Apr. 15, 1994, 1867 U.N.T.S. 154 (entered into force Jan. 1, 1995).

111. UNFCCC, *supra* note 5.

112. U.N. Conference on Environment and Development, Rio de Janeiro, Brazil, June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (vol. I) (Aug. 12, 1992).

113. The Future We Want, G.A. Res. 66/288, U.N. Doc. A/RES/66/288 (July 27, 2012).

114. An Act to Consolidate the Laws Relating to Generation, Transmission, Distribution, Trading and Use of Electricity and Generally for Taking Measures Conducive to Development of Electricity Industry, Promoting Competition Therein, Protecting Interest of Consumers and Supply of Electricity to All Areas, Rationalization of Electricity Tariff, Ensuring Transparent Policies Regarding Subsidies, Promotion of Efficient and Environmentally Benign Policies, Constitution of Central Electricity Authority, Regulatory Commissions and Establishment of Appellate Tribunal and for Matters Connected Therewith or Incidental Thereto [Electricity Act, 2003], Act No. 36 (2003) (India).

115. Ministry of Power, National Electricity Policy, Resolution No. 23/40/2004-R&R (vol. II) (Feb. 12, 2005) (India).

116. Prime Minister's Council on Climate Change, National Action Plan on Climate Change, *available at* http://www.moef.nic.in/downloads/home/Pg01-52.pdf (last accessed Aug. 31, 2018).

117. Ministry of Power, Central Electricity Authority, National Electricity Plan, U/S 3 (4) of Electricity Act, 2003 (Jan. 2012).

"rules that form part of the domestic legal system of a WTO Member."[118] Nevertheless, international agreements may still be recognized if they are incorporated in the domestic legal system and they have a direct effect within the legal system of the Member invoking it.[119] India failed to establish this fact. Hence, the Panel deemed that the international laws provided by India, are not those embraced under Article XX (d).[120]

In relation to the domestic measures provided by India, the Panel explained that this should be legally enforceable.[121] Mere general objectives embraced under the laws or regulations are not covered. As such, it was determined that only one of the provided measures fulfills this criterion, which is the Electricity Act, 2003.[122] Yet, even if it was a valid law under Article XX (d), the Panel determined that the relevant provision under the Electricity Act, 2003 — Section 3 [123] — merely provides that the

118. Panel Report, *supra* note 1, ¶ 7.289 (citing Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (Mar. 6, 2006)).

119. Panel Report, *supra* note 1, ¶ 7.291.

120. *Id.* ¶ 7.290.

121. *Id.* ¶ 7.309.

122. *Id.* ¶ 7.319.

123. Section 3 of the Electricity Act, 2003 provides that,

> Section 3. (National Electricity Policy and Plan) —
>
> (1) The Central Government shall, from time to time, prepare the National Electricity Policy and tariff policy, in consultation with the State Governments and the Authority for development of the power system based on optimal [utilization] of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy.
> (2) The Central Government shall publish National Electricity Policy and tariff policy from time to time.
> (3) The Central Government may, from time to time, in consultation with the State Governments and the Authority, review or revise, the National Electricity Policy and tariff policy referred to in sub-section (1).
> (4) The Authority shall prepare a National Electricity Plan in accordance with the National Electricity Policy and notify such plan once in five years:
>
> Provided that the Authority while preparing the National Electricity Plan shall publish the draft National Electricity Plan and invite suggestions and objections thereon from licensees, generating companies[,] and the public within such time as may be prescribed:

government should create a National Electricity Policy and National Electricity Plan.[124] The role of the DCR measures does not relate to the fulfillment or enforcement of the obligations under the Act.[125] Hence, the DCR measures are not justified under Article XX (d) as well.[126]

c. Additional Discussion on Whether the DCR measures are Necessary and Essential and the Chapeau

The Panel decided to provide a review as to whether the DCR measures are necessary and essential.[127] To this end, it was able to make use of several alternatives that India may adopt in lieu of the DCR measures.[128] The Panel also discussed the Chapeau of Article XX by providing the various stances of the parties.[129] In both instances, the Panel limited itself to providing facts and prior rulings in relation to the issue. It did not decide on the matters.

2. Analysis

a. Comprehensive

In the issues mentioned, the Panel yet again showed its desire to provide a comprehensive analysis of the issues involved and exhaustively provided the positions of all the parties. In the interest of brevity, the Panel had the option to end its discussion on matters that it ruled were sufficient to point that India failed to show that the DCR measures are covered by the general exceptions under Articles XX (j) and (d). Nonetheless, it provided an exhaustive analysis extending to an analysis of the DCR measures being

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Provided further that the Authority shall —

(a) notify the plan after obtaining the approval of the Central Government;

(b) revise the plan incorporating therein the directions, if any, given by the Central Government while granting approval under clause (a).

(5) The Authority may review or revise the National Electricity Plan in accordance with the National Electricity Policy.

Electricity Act, 2003, § 3.

124. Panel Report, *supra* note 1, ¶ 7.332.

125. *Id.*

126. *Id.*

127. *Id.* ¶ 7.337.

128. *Id.* ¶¶ 7.370 & 7.372-7.377.

129. *Id.* ¶¶ 7.383-7.390.

essential and necessary. Furthermore, it was also able to provide a policy assessment of the effectiveness of the DCR measures to achieve the objective of ensuring their domestic supply of solar cells and modules.

The comprehensiveness of the Panel shows its sensitivity to the demands of the case. It explained that the decision to discuss these additional matters was in consideration of the novelty of the arguments raised by India. It noted that Article XX (j) has never been raised before the DSU. In some literature, a discussion on Article XX (j) is omitted because it is deemed to be of less importance in international trade law and practice.[130] Hence, the Panel, in this unique instance, was able to add to the jurisprudence on what was thought to be an archaic exception.

The Panel was also cognizant of the possible appeal of its report. It therefore presented all the facts, potential analysis, and justifications to not only support its position but to help the Appellate Body too. Similar to the analysis raised in the preceding section on Article III, Paragraph 4, the Panel is able to present as much facts as possible. This is significant given that the Appellate Body may not remand the case nor may it investigate and decide on facts. This analysis is consistent with Article 17, Paragraph 6 of the DSU[131] and the interpretation provided under the Appellate Body Report of the *European Communities — Hormones*.[132]

b. Rebalancing

The discussion on the alternative measures to the DCR is also commendable. While the Panel did not decide on the matter, this exploration is important given that the parties may still settle the matter in a non-judicial method, highlighting the extra-judicial value of the Panel Report. Currently, India and the US are in talks to settle the matter outside of the Dispute Settlement Body (DSB).[133] India is also considering adopting

130. PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 617 (2008 ed.).

131. DSU, *supra* note 59, art. 17, ¶ 6.

132. Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, ¶ 132, WT/DS26/AB/R & WT/DS48/AB/R (Jan. 16, 1998).

133. David Lawder, U.S., India in Talks to Settle Solar Power Trade Dispute, *available at* https://www.reuters.com/article/india-usa-solar-idUSKCN0VE2LZ (last accessed Aug. 31, 2018).

some of the alternatives raised before the Panel,[134] including the use of direct subsidies.[135]

c. Undue Criticism — Anti-Environment

It should be noted that the Panel persistently reiterated the position that it was not deciding on whether the objective of India — to address climate change, ensure energy security, and achieve sustainable development — is valid.[136] It continuously explains that the measure is about the DCR measures and whether it is consistent with the rules of the WTO.[137] This is reminiscent of the position provided in the conclusion of the *Appellate Body Report, United States — Import Prohibition of Certain Shrimp and Shrimp Products* (*AB Report, US-Shrimp*),[138] where it was underscored that the ruling was not focusing on the protection and preservation of the environment and whether it is significant to the Members of the WTO, rather, the Appellate Body simply addresses whether the questioned measure is legitimate under Article XX (g) of the GATT and whether it is not arbitrary or unjustifiable discriminatory.[139] The Panel's reiteration in the Report is important to ensure that the WTO is not unfairly judged to be banning efforts to address environmental concerns. A contrary result shall be damaging to the WTO as its legitimacy would once again be questioned.

d. Absence of the General Exceptions on the Protection of Human, Animal or Plant Life, or Health and the Conservation of Natural Resources

The submission of India is also worth noting given the very curious absence of the general exceptions under Article XX (b) and (g). Article XX (b) relates to measures necessary to protect human, animal, or plant life or health,[140] while Article XX (g) pertains to the conservation of natural

134. Panel Report, *supra* note 1, ¶ 7.375.

135. Twesh Mishra, India to Consider Direct Subsidy to Solar Panel Manufacturers, *available at* http://www.thequint.com/business/2016/05/20/india-to-consider-direct-subsidy-to-solar-panel-manufacturers-piyush-goyal-power-ministry (last accessed Aug. 31, 2018).

136. *See generally* Panel Report, *supra* note 1, ¶¶ 2.1 & 7.1.

137. *Id.* ¶ 7.1.

138. Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 185-186, WT/DS58/AB/R (Nov. 6, 1998).

139. *Id.* ¶¶ 185-186.

140. GATT, *supra* note 6, art. XX (b).

resources.[141] For while India has anchored the DCR measures on climate change, and even used the UNFCCC,[142] what appears to be obvious justifications were not raised. Both appear to be the obvious exceptions, given that there is a global consensus that climate change affects human, animal, and plant life and health, while at the same time, also speeding up the exhaustion of natural resources. It is unfortunate that these matters were not discussed because these may have allowed the Panel to provide a validation on the deleterious effects of climate change and its effect on the environment.

IV. SOCIAL SIGNIFICANCE

A. Legitimacy

The WTO does not work in a vacuum. It functions within a global system that is affected by a plethora of issues that go beyond international trade. Consequently, it must operate in consideration of the surrounding concerns facing the globe. Failing to do so would run the risk of putting into question its legitimacy and this will consequently lead to the failure to garner global support and acceptance.

Legitimacy ensures public acceptance of the authority and decision of a particular body,[143] and losing it is detrimental, because it allows States to simply ignore their policies and decisions. This was felt after the 1999 Seattle Protests, when the WTO's legitimacy was put into question,[144] resulting to waning public acceptance and the consequent undermining of policies and decisions.[145]

The WTO reformed itself, exemplified by measures to allow greater participation of non-State actors under the DSU, the Ministerial Conferences, and its committees.[146] Nevertheless, it is still criticized for

141. *Id.* art. XX (g).

142. Panel Report, *supra* note 1, ¶ 7.269.

143. Daniel C. Esty, *The World Trade Organization's Legitimacy Crisis*, 1 WORLD TRADE REV. 7, 7-8 (2002).

144. *See* Anne Reiff, *How to Solve a Crisis of Legitimacy?: Empirical Insights Into the WTO Public Forum*, 23 POLITIKON 133, 133 (2014); Esty, *supra* note 143, at 7; & Saif Al-Islam Alqadhafi, Reforming the WTO: Toward More Democratic Governance and Decision-Making, *available at* https://www.wto.org/english/forums_e/ngo_e/posp67_gaddafi_found_e.pdf (last accessed Aug. 31, 2018).

145. Esty, *supra* note 143, at 9.

146. Reiff, *supra* note 144, at 135.

being unable to respond to concerns beyond international trade, such as human rights and the environment.[147] It is not sufficient for it to rely on Article XX in the GATT to show that societal concerns and interests of States are given primacy over trade liberalization in some instances.[148]

Responding to the surrounding issues, however, do not entail letting go of the basic principles of economic liberalism and embedded liberalism. It also does not mean that trade liberalization is not the foremost ideal of the organization. Rather, a balance should be met. If that is not possible, then at least clear streamlining of the conflict should be made. The Panel Report highlights these.

From the onset and all throughout the report, the Panel made it clear that the crux of the case is about the DCR measures. It explained that the claim was not going to provide a judgment on the validity of India's objective to address climate change, achieve energy security, and sustainable development. The determination is therefore limited to one aspect of the overarching climate change and electricity policy of India.

The extended discussion to determine the possible alternatives to the DCR measures — even if it was not necessary — also supports the claim of the Panel that the objectives sought by India are valid and these are not sought to be altered. Hence, the ruling of the Panel affirms India's desire to address climate change, achieve energy security, and sustainably develop — just not through DCR measures.

The failure to provide a clear depiction of the issue shall be highly detrimental for the WTO because the issue may easily be manifested as a simple binary between environmental protection and business as usual. As such, it invites several protests from environmental activists who have painted a picture of the WTO as an insensitive anti-environment institution. Similar to what happened in Seattle, this will be a huge blow to the WTO's legitimacy. The lack of legitimacy constrains the compulsion of Member-parties to respect the policies raised in the WTO and the enforcement of the DSB's rulings.

B. Skirting the Conflict — Proposal

The Panel Report shows shades of the *AB Report, US-Shrimp*,[149] as it provides a limitation of the overarching issue to deal solely with a question

147. Esty, *supra* note 143, at 19.

148. VAN DEN BOSSCHE, *supra* note 130, at 616.

149. Appellate Body Report, *supra* note 139, ¶¶ 185-86.

on the consistency of a measure to the rights and obligations of the WTO members. Despite this, the Panel Report does not rebalance the clash between trade liberalization and environmental protection; rather, it skirts through the apparent conflict.

The WTO remains committed to principle of trade liberalization. Hence, for the WTO, environmental concerns take a backseat to its ultimate goal. Its decision-making and rulings only allow the superseding of any of its agreements if a measure is embraced under the exceptions provided in Article XX of the GATT[150] and Article XIV of the General Agreement on Trade in Services.[151] These are, however, narrowly construed.

The Panel is justified in doing so. A Panel or an Appellate Body is usually faced with a catch-22 situation when dealing with controversial matters, such as climate change.[152] If a Panel or Appellate Body, on the one hand, provides a ruling that severely curtails measures addressing climate change, the DSU shall invite severe criticisms for its insensitivity. On the other hand, an indulgent ruling may lead to exploitation and protectionism.[153] The Panel chose to balance this by acknowledging climate change efforts while skirting the clash by explaining the limitations of the ruling. It, however, does not solve the WTO's conundrum.

To address this problem, it is proposed that a Climate Change Code be created as a Plurilateral Agreement.[154] Hence, since it is embedded within the WTO, parties may raise it and Panels or the Appellate Body may consider it. It shall highlight the sensitivity of the WTO to climate change concerns and bump up the WTO's legitimacy. This shows willingness to adapt to a significant global concern. While the chances of it happening may be nil, it is a valid proposal. As the world continuously experiences the grave consequences of climate change, the chances of the consideration of a WTO instrument on climate change and its relationship to trade increase. Hopefully, it will come sooner rather than later.

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150. GATT, *supra* note 6, art. XX.

151. General Agreement on Trade in Services art. XIV, *opened for signature* Apr. 15, 1994, 1869 U.N.T.S. 183.

152. Meera Fickling & Gary Hufbauer, *Trade and the Environment*, *in* THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION 733 (Amrita Narlikar, et al. eds., 2012).

153. *Id.*

154. *Id.* at 733-34.

IV. CONCLUSION

It is recognized that the claim has not yet reached finality and that the Appellate Body may adopt, alter, or modify the Panel's ruling. Nonetheless, the Panel Report remains to be jurisprudentially and socially significant as it reflects the situation and travails faced by the WTO. The Panel had to deal with the claim with utmost care as the matter risked dealing a severe blow to the WTO and the DSB's legitimacy. Yet, even with its clear and comprehensive handling of the claim, it was still undeniable that the environment, particularly climate change concerns, remains subservient to trade liberalization. Hence, it was suggested that a WTO Plurilateral Agreement be created to ensure that climate change becomes an ingrained consideration under the WTO. Through this, the WTO would not be deemed as a callous institution devoid of any social conscience and a Seattle redux would be averted.