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Silence for "Silence"?—Reflections on the Interpretation of GATT III:8(a) in DS583

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Abstract

DS583, as the first arbitration with appealing nature under the WTO system, with no doubt made a huge step in seeking for the alternative method during the paralysis of Appellate body. Nevertheless, it never means the award is impeccable especially for treaty interpretation. The most controversial issue the tribunal confronted but failed to offer a convincing analysis is the entity of the purchase, which is silent in the treaty. Against this background, the article firstly revealed the deficiencies concerning treaty interpretation, including the vague application of VCLT and over-simplified deduction. The crux is how to interpret "silence" appropriately. The article suggests it is necessary to make reference to previous cases of WTO and extract the common methodology and technique to assist the interpretation. In this vein, to make some complement and correction, the article re-interprets the purview of the entities of "products purchased" and finally provides some suggestions for both DSB and disputing parties under Article 25 arbitration.

Keywords

DS583, Government Procurement, Silence, Treaty Interpretation

1. Introduction

After a long-time slumber of the Appellate body and repeating occurrence of the "void appeal" (International Economic Law and Policy Blog, 2022), the appealing review system to some extent finally awakes with the advancement of the first appeal arbitration case, which indicates another option for the reform of WTO dispute settlement. The award fully demonstrates the hybrid nature of the way of dispute settlement under Article 25. For one, under the framework of DSU, it behooves tribunal to render the award in line with the rules of WTO legal system, along with the agreements (Dispute Settlement Understanding, Ar-

ticle 3.2); for another, it is undisputed that the remit of the function of tribunal shall be strictly restrained to the mutual consent between the claimant and respondent, thus the procedure agreement from two parties is also the unignorable part to be considered during the adjudication (Dispute Settlement Understanding, Article 25.3). Consequently, although the dispute settlement is not operated under the MPIA with wide expectation, it is still no less significant no matter for the interpretation of related agreement of WTO or the development of DSM especially during the ongoing negotiation of the reformation of WTO.

Profound as it is, the award seems not sufficiently reasonable for the part of legal analysis with treaty interpretation being the most typical embodiment (Julia, 2022). Even if Turkey has announced her willingness to enforce the award ultimately (World Trade Organization, 2022), it is still worthy to ripple the smooth pool, unravelling and discussing the unchallenged but meanwhile unreasonable analysis in the process of interpretation. Above all, the article did not aim at opposing the conclusion the tribunal made through the treaty interpretation. We demonstrated here is that arbitral tribunal shall function in a more active form instead of over restrained. In other words, the arbitral tribunal, except for clarifying the legal issue to make the appropriate conclusion, still is incumbent on providing the convincing reasons to draw that conclusion relied on the methodology and technique of Vienna Convention on the Law of Treaties ("VCLT" hereafter) then applied VCLT in a holistic approach (United States Continued Existence and Application of Zeroing Methodology, 2009). Since procedure and route matter the same way as the consequence. Section I mainly introduces the factual background and legal issues involved in the award combining with the panel report and the memorial from two parties; Section II recognizes some flaws and deficiencies concerning the treaty interpretation of GATT III:8(a), including the vague application of VCLT as well as the cursory deduction. Section III offers some possible complementary and correction, surrounding the methods extracted from the previous case of WTO regarding the interpretation of "silence", Sections IV summaries the arguments above and makes some suggestions and puts forward vision of development of WTO in future.

2. Background and Legal Issues in the Award Concerning GATT III:8(a)

2.1. Relevant Factual Background in the Award

The dispute arises between European Union and Turkey based on the objections of legal issues and treaty interpretation developed in Panel report with regard to the "localization requirement" of Turkey, which is directly associated with the reimbursement preference.

To begin with the reimbursement, the pharmaceutical product to be reimbursed shall primarily be included in the Annex 4/A list, which was determined by Turkey's Social Security Institution (SSI). Then Pharmaceutical products are

prescribed by medical doctors and distributed to outpatients by retail pharmacies, which are private entities. During this process, the retail pharmacies could sign the contracts with SSI, then SSI will reimburse the certain price based on the invoices from pharmacies through "Medula system", which "enables the registration, tracking and invoicing of medicines that are obtained from pharmacies through a single application".

The localization requirements mainly refer to the measure that Turkey requires foreign producers to see commit to localize in Turkey their production of certain pharmaceutical products, otherwise products are no longer reimbursed. More concretely speaking, the localization process starts with the identification of the relevant products by the Turkish authorities. The pharmaceutical companies then enter into discussions with the competent authorities, if a company does not submit a localization commitment, the relevant products are no longer reimbursed by the SSI. This is also the case if a commitment is considered not to be appropriate, or if a company does not fulfil its commitment.

2.2. Legal Issues in the Award Concerning

To justify the localization requirement mentioned above, Turkey mainly resort to two routes. Firstly, Turkey argued all the measures shall fall into Article III:8(a) of GATT 1994. Alternatively, localization requirement can meet the requirement of Article XX(b) of the GATT 1994. The article will mainly focus on the analysis and conclusion for the first issue.

The panel separates Article III:8(a) into four elements, 1) the challenged measure must qualify as "laws, regulations, or requirements governing…procurement"; 2) the challenged measure "must involve a 'purchase' of products by a 'governmental agency'"; 3) the products must be purchased "for governmental purposes"; and 4) "the products must not be purchased" with a view to commercial resale or with a view to use in the production of goods for commercial sale (Turkey—Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products, 2022). As a matter of fact, the panel only assesses the second element. It construed the term "products purchased" as requiring a governmental agency to acquire ownership of the products at issue, which concomitantly settles two thresholds. Namely, the entity who purchased the products shall be the governmental agency or on behalf of governmental agency and the requirement of the transaction to be identified as "purchase" is the acquirement of the ownership. Pursuant to the fact-finding, the Panel did not see anything to suggest that the SSI acquired "any right of possession, any right of control, any right of exclusion, any right to derive income, or any right to freely dispose of the pharmaceutical products" (Turkey—Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products, 2022). Consequently, there exists no sufficient indicator to recognize the entitlement of the ownership of the products of SSI. Moreover, in accordance with the panel report, the pharmacies purchased the products independently from the govern-

ment, thus it is not reasonable to hold retail pharmacies as the governmental agency or act on behalf of governmental agency.

Arbitral tribunal confirm the conclusion of Turkey's failure to satisfy the requirements of Article III:8(a), nonetheless it reverses the requisite that the entity for the purchase shall exclusively be the governmental agency or on behalf of governmental agency. On the contrary, the tribunal is of the view there is no limitation over the entity of purchase as the text suggests. Thus it will be inappropriate to add the conditions which the members have never intended. Furthermore, the tribunal did not give any review towards the standard of "purchase" challenged by Turkey in the appeal, but directly headed for the assessment of the elements of "procurement". After determining the metric to assess the "procurement" is a certain level of control over the products through the comparison of different authentic languages and the subject of the procurement is the governmental agency, the tribunal draws the same conclusion with the panel.

Generally speaking, it is exceedingly worthwhile to applaud for the final award, since with the "shackle" on the function of the tribunal, still the tribunal made a consistent and comparatively reasonable conclusion. However, the detailed analyses of the interpretation of the "procurement" are in stark contrast with the rough and perfunctory one of the entity of the purchase. And the following section will try to reveal some parts improvable then offers some possible solution to make the interpretation more trustworthy.

3. Deficiencies Concerning the Treaty Interpretation of GATT III:8(a)

3.1. The Vague Application of VCLT

To seek for the purview of the entities concerning the purchase of the products under GATT III:8(a), the arbitral tribunal recognized the issue as the consequence of the treaty interpretation. Primarily, the tribunal started its analysis with the ordinary meaning of "products purchased", then it reviewed the context elements mentioned above, and finally, the tribunal stressed that this deduction did not transgress the perimeter of the object and purpose of the treaty. At the first sight, the tribunal has mentioned all the primary methods in the article 31 of VCLT. However, that is exactly where the problem lies. In other words, the tribunal applied them in a quite obscure and overly simplified way, which means the logic of the analysis seems not that reasonable and the bafflement still haunts over. To explain the problem in details, at least two parts are necessary to put forward. Firstly, in accordance with the award, the conclusion was drawn with the combination of the study of the text and the context. The description of the context analysis is "contextual elements discussed above". What makes it confusing is that the elements of the other part of the provision, for instance, "procurement" or "for governmental purpose" in fact cannot assist much in terms of the regulation of the entity since they solely concentrate on the usage of the products, the segment after the purchase (Canada—Certain Measures Affecting

the Renewable Energy Generation Sector, 2013). Additionally, even if the elements of consumption and direction of procurement can to some extent reflect part of scenarios of purchase, the reference nonetheless is not necessary to lead to the definite and single conclusion. In more straight words, if the contextual interpretation is applied, some connections and linkages shall exist (Canada—Certain Measures Affecting the Renewable Energy Generation Sector, 2013). The assertion that the end of the products is not restricted to the governmental agency cannot preclude the possibility that the subject to purchase the products could only be the governmental agency. Thus, the contextual interpretation in the award seems not contributory to the conclusion. Furthermore, the context under article 31(2) include more than the immediate text of the provision (Richard, 2015), so why the tribunal only discussed such little portion of context?

Secondly, when it comes to the interpretation with the consideration of purpose and object, the tribunal refers to that of Article III, but not that of III:8(a) per se. In EC—Chicken Cuts, the appellate body admonished that the starting point for ascertaining "object and purpose" under article 31 of VCLT is the treaty itself, in its entirety (European Communities—Customs Classification of Frozen Boneless Chicken Cuts, 2005). But it still recognized that Article 31(1) does not exclude taking into account the object and purpose of particular treaty terms, if doing so assists the interpreter in determining the treaty's object and purpose on the whole (European Communities—Customs Classification of Frozen Boneless Chicken Cuts, 2005). Although there may be some overlap much or little between the two, however, the purpose defined in the award as "to avoid the protectionism" is somewhat general and broad. Plus, with the negative description, it is tantamount to setting an extremely low threshold, which could lead to the predicament that no matter restrictive or expansive interpretation of the range of the subjects of products purchased the requirements could be met in the vast majority of cases, nullifying the value of this step.

Moreover, as advanced in US—Import Prohibition of Certain Shrimp and Shrimp Products (1998), it is very common every provision has its own unique object or purpose. As a result, only taking the purpose and object of Article III into account regardless of the distinctness of Article III:8(a) is inconsistent with the rules of treaty interpretation.

3.2. Jump Too Fast to the Conclusion

Except for the vague application of VCLT, the other controversial problem is, though it made the correct adjudication in the end, the tribunal failed to provide a concrete and convincing procedure in construing the Article III:8(a) as well, especially for the part of the entity of products purchased. To be clearer, it is necessary to review the deduction of the award. The tribunal characterized the absence of a clear expression about the entity of purchase as an "omission" or "silence" (Turkey—Certain Measures concerning the Production, 2022), which

seems to be the pillar in the whole mechanism the tribunal established in construing the phrase "products purchased". In other words, it is not difficult to find it is the core of all the analysis, in fact, the conclusion was made based on the ground that "silence means liberty". Since there is no restriction in terms of the text, the tribunal believed that is equal to limitless. The following part of the award including the contextual interpretation and purposive interpretation is more of the auxiliary arguments than the main body. Nevertheless, it is inconsistent with the rules of treaty interpretation as well as the strategy and technique adopted in the previous case. Dating back to Japan, Taxes on Alcoholic Beverages case, the Appellate body has held that "omission must have some meaning", which shall be achieved through treaty interpretation. Later, As pointed out explicitly in Appellate Body report of Canada—Certain Measures Affecting the Automotive Industry (2000), "omissions in different contexts may have different meanings, and omission, in and of itself, is not necessarily dispositive". The ensuing United States—Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (2002) also confirmed that standpoint. Additionally, the academic literature suggested the same standard concerning the interpretation of the silence of a treaty (Gabrielle, 2022). Consequently, the "silence" or "omission" *per se* is not determinative and by extension cannot directly lead to the conclusion that there is no restriction.

4. The Complementary and Correction of Interpretation

In accordance with the agreed procedure of this case, the tribunal is obliged to uphold, modify or reverse the legal findings and conclusions of the panel through treaty interpretation (Agreed procedures, 2022). Moreover, both parties have agreed the arbitration shall be governed, *mutatis mutandis*, by the provisions of the DSU and other rules and procedures applicable to Appellate Review (Agreed procedures, 2022). With regards to treaty interpretation, Article 3.2 of DSU explicitly stipulates that the dispute settlement mechanism under WTO is settled to "provide security and predictability to the multilateral trading system" and "clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". Hence, the tribunal also shall take over the responsibility above. To interpret the treaty with reasonable and appropriate application of VCLT is doubtless the essential part of the function of the tribunal (Isabelle, 2010). And this section will provide some suggestions to correct and complement the interpretation of the entity of products purchased in the award.

4.1. Methodology and Technique Pertaining to the Interpretation of "Silence" in Precedents of WTO

As a matter of fact, it is not the first time as mentioned before the panel or the appellate body was request to clarify the omission and explain the real intentions of drafters. Since *US—Underwear* case for the first time confronted the interpretation of silence in the covered agreements of WTO, a serious of disputes also

face the same complicated problem (Isabelle, 2008). Thus, the methodology and technique in previous cases could offer some assistance to the current situation. The writer here is not arguing that the methods taken in previous cases of WTO are binding and thus shall be absolutely and completely recognized and applied herein. Instead, it is well recognized that there is no unified standard of treaty interpretation (Asif, 2015), in other words, VCLT only provides the basic tools, the specific analysis shall be made case by case. However, to realize the stability and predictability of WTO system, it is of paramount significance to make some reference to the reports adopted before. The appellate body report in United States—Final Anti-dumping Measures on Stainless Steel from Mexico (2008) explicitly pointed out to keep "security and predictability", "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case." Furthermore, since the appellate body has coped the "silence" issue in a more detailed and systematic way, there is no reason the arbitral tribunal shall adopt less clear standard. Consequently, this sector will provide some techniques applied in previous cases.

1) Common sense and general practice

Since occasionally the silence in the treaty could cause more practical issues than theoretical ones and in effect the essential or core issue the panel or Appellate body needs to solve. Thus, against the background, the panel or Appellate body always tackles the conundrum with the common sense of the function logic of the treaty as well as the general practice in the world trade area.

For instance, in United States—Anti-dumping and Countervailing Duties on Ripe Olives from Spain (2021), United States argues that Article VI:3 of the GATT 1994 and the SCM Agreement are silent as regards the methodology for evaluating indirect subsidization, which means an investigating authority has discretion to decide how it should conduct a pass-through analysis in a particular factual circumstance. The panel finds it unpersuaded, however, without rigorously relying on VCLT, but resorting to the common sense that "the discretion afforded to an investigating authority under Article VI:3 for the purpose of establishing the pass-through of subsidies is not unfettered." (United States—Anti-dumping and Countervailing Duties on Ripe Olives from Spain, 2021), hence, this means that an investigating authority must provide an analytical basis for its findings of the existence and extent of pass-through. Additionally, in US—Countervailing Measures on Certain EC (2002) case, In interpreting this silence, the Appellate Body did not apply any of the VCLT principles of interpretation but turned to the basic knowledge of privatization in market economies and the role of governments in market transaction which means "governments may choose to impose economic or other policies that, albeit respectful of the market's inherent functioning, are intended to induce certain results from the market.", overturning the presumption of the panel.

Except for the common sense, the general practice also plays a significant role. A typical example is the panel report of Mexico—Measures Affecting Telecom-

munications Services (2004). Because of the silence in Article I:1(a) GATS as regards the supplier of the service, the panel predominately relied on the scheduling practice of WTO Members. *Inter alia*, it makes reference to 1991 UN Provisional Central Product Classification including most members' basic telecommunications services.

2) Comparison and cross-reference

The second technique widely adopted is to compare current text with that of the related provisions and make cross-reference with the interpretation of them. It functions under the situation where in a specific treaty provision, one paragraph might remain silent on a requirement, while another paragraph does not (Isabelle, 2008).

As a matter of fact, Comparison and cross-reference is the most prevalent method to interpret silence applied WTO case law. In US—Anti-Dumping Measures on Oil Country Tubular Goods (2005), the appellate body recognized that Article 11.3 of Anti-Dumping Agreement is silent as to whether investigating authorities are required to establish the existence of a "causal link" between likely dumping and likely injury. Then, it chose to make the comparison with the other provisions of the Anti-Dumping Agreement and Article VI of GATT 1994.

In recent circulated panel report of US—Safeguards on Washers (2022), United states advocated that "pertinent issues of fact and law" in Article 3.1 of the Agreement on Safeguards shall be restrictively interpreted as "conditions" that Articles 2.1 and 3.1 charge the competent authorities to investigate on the ground that the "conditions" for the imposition of a safeguard measure are clarified in Articles 2, 3, and 4 of the Agreement on Safeguards, the Agreement on Safeguards does not refer to the "circumstances" set forth in the first clause of Article XIX(1)(a). However, the panel felt it unpersuaded, holding that the omission is not dispositive and Article XIX:1(a) and the Agreement on Safeguards shall be applied cumulatively.

3) The principle of Effectiveness

The appellate body in Korea—Dairy defined the principle of effectiveness as the duty of any treaty interpreter to "read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously" (Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products, 1999). DSB sometimes clarifies the content of the silence with the principle of effectiveness as well. Such as the appellate body report of Argentina—Footwear (EC) (Argentina—Safeguard Measures on Imports of Footwear, 1999). In that case, the appellate body was requested to review the conclusion in panel report regarding the relationship between the Agreement on Safeguards and Article XIX of the GATT 1994. The Appellate Body was of the view that it shall "read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously", which brought the result that such harmonious interpretation excluded the intent to subsume the requirements of Article XIX GATT 1994 within the Agree-

ment on Safeguards and thus to render those requirements no longer applicable.

4) Summary

Some scholars also list the "object and purpose" as a unique sort of technique applied to construe the silence (Isabelle, 2008). However, for one thing, the article is of the view that there is no apparent boundary of different techniques mentioned before, it is very common DSB simultaneously adopted mixed approach to interpret the silence, the application of cross-reference never precludes the principle of effectiveness; For another, it needs to be emphasized here that the techniques extracted above does not exclude the application of VCLT. Namely, they just work as the auxiliary method, by no means supplanting the well-rounded application of VCLT. On this point, the article supports the integration method carried in US—Carbon Steel (2002) case. In its report, the appellate body started with the specific terms of Article 21.3 of SCM agreement, then it compared the silence link between Article 21.3 reviews and the de minimis standard set forth in Article 11.9, based on the cross-reference relationship of the other provisions, indicating "when the negotiators of the SCM Agreement intended that the disciplines set forth in one provision be applied in another context, they did so expressly." After that, the immediate context of the provision including the other three paragraphs of article 21, was also taken into consideration. "Looking beyond the context", the appellate body also turned to the object and purpose of the SCM Agreement, assessing whether the sunset review is necessary. Finally, it resorted to the *Travaux préparatoires*—a 1987 Note prepared by the Secretariat for the Uruguay Round Negotiating Group on Subsidies and Countervailing Measures. Consequently, when encountering the request to interpret the silence, all of the specific techniques are more of the tools in the box which serve as the auxiliary means to assist the application of VCLT.

4.2. Re-Interpret of Article III:8(a) Concerning the Entity of Purchase

1) Text of the Article III:8(a)

It is undisputed that the text will always be the inception for the treaty interpretation (European Communities—Measures Concerning Meat and Meat Products, 1998). Insofar as the certain terms are applied in the provision, it is necessary to make the full assessment of every word relevant to the interpretation.

The most debatable part in the expression in the English Version of the Article III:8(a) will definitely be "procurement by governmental agencies of products purchased". To parse the phrase. Since "by governmental agencies" as adverbial could be comprehended to complement both "procurement" and "governmental agencies". That's where the controversies derive. However, it seems the tribunal did not confront the issue straightly, but rather chose to evade deeper analysis and steered towards the omission.

Here, this article is of the view that the tribunal could have gone a little further, which means, like the interpretation of the word "procurement", to make

reference to the French version of GATT 1994. The transcription goes "… prescriptions régissant l'acquisition, par des organes gouvernementaux, de produits achetés pour les besoins des pouvoirs publics…", it is obvious that the counterpart of "by governemtnal agencies" in French version, i.e. "par des organes gouvernementaux" functions as parenthesis, the same grammer structrure is also applied in Spanish version as "…la adquisición, por organismos gubernamentales, de productos…" The parenthesis could be positioned wherever. Consequently, it could be safe to conclude the reason why the phrase as a parenthesis was put just before "l' acquisition" and "la adquisición" is to stress the real intention of the drafters that the phrase "by governmental agencies" was connected to "procurement" but not "products purchased". More convincingly, a comparison could be made. Article II(4) shares the similar structure with Article III:8(a), which reads "The provisions of this paragraph shall not limit the use by contracting parties of any form of assistance to domestic producers permitted by other provisions of this Agreement." The grammar structure won't cause the obstacles of comprehension in this article since the assistance definitely comes for the "contracting parties". Thus, under such circumstance where there is no need to make any distinguish of different subjects, the French version and Spanish version changed the expression without applying the parenthesis into "…le recours des parties contractantes à toute forme d'assistance…" and "no limitarán la facultad de las partes contratantes de recurrir a cualquier forma de ayuda". The contrast could well demonstrate and prove that "by governmental agencies" only restricts the subjects of "procurement" but not "products purchased." As a result, just for the supplementary textual interpretation, there is no explicit restriction over the nature of the entities.

2) The broader context of the Article III:8(a)

In terms of the context, except for immediate context, the tribunal could also rely on the other section of the same provision. For instance, in the Appellate body report of Japan—Alcoholic Beverages II (1996), the silence the appellate body met was the Article III:1 of GATT 1994 did not mention "so as to afford protection". To interpret the omission appropriately, the appellate body takes into account Article III:1 in interpreting Article III:2 and finally proves the presumption that "the presence of a protective application need not be established separately from the specific requirements that are included in the first sentence." Hence, the article here believes the same technique could be transposed into the analysis. Still, it is not imperative that the tribunal, the criterion to choose the context is whether it is sufficiently relevant and could assist the tribunal to make further interpretation. Article III:8(b) also regulates the domestic transaction with one of the parties being governmental agency or on behalf of governmental agency. Above all, the expression "governmental purchase" was used, which is of great relevance with problem discussed here for the subject of the "products purchased" overlap to a large extent with that of "governmental purchase". In other words, there is no reason to challenge the purview and the standard of as

two sections of the same provision regulating the identical legal relationship. In accordance with the Analytical Index of GATT from WTO, the committee of preparatory work of Article III:8(a) always described the procedure of transaction as "governmental purchase". It is sufficiently relevant and reasonable to make reference to the interpretation of it.

The problem seems a little intractable since the contour of the "governmental purchase" is out of reach just for the first glance. It is arguing that a lucid conclusion will be gained after resorting to the French version and Spanish version of GATT 1994 again. The counterpart of "governmental purchase" in French version and Spanish version are "la forme d'achat de produits nationaux par les pouvoirs publics ou pour leur compte" and "en forma de compra de productos nacionales por los poderes públicos o por su cuenta", respectively. Focus on the expression of governmental, namely, "par les pouvoirs publics ou pour leur compte" and "por los poderes públicos o por su cuenta, it is obvious that entity who is eligible to fall into the range of the "governmental purchase" is defined with two separate forms. For one, the products could be purchases "par les pouvoirs public" or "por los poderes públicos", that is to say "by governmental agency"; For the other, the motivation is " pour leur compte" or "por los poderes públicos", "for the interest(use) of government" in English. These two phrases were connected with the conjunction "ou" or "o", i.e. "or" in English, which means the two sorts are exclusive and independent with each other.

Thus, as a matter of fact, under Article III:8, the subjects for purchase was originally designed to be two different types with respective criterion, which means the "identity" and the "purpose". If the government agency itself or the other agency on behalf of the government directly purchases the product, definitely the requirement is satisfied. Besides, if the specific identity does not exist, the non-governmental agency still could operate the governmental purchase provided it did so with the aim of governmental use. And such interpretation could find the support from the Appellate report of Canada—Certain Measures Affecting the Renewable Energy Generation Sector (2013). It is of view that "governmental agencies by their very nature pursue governmental aims or objectives." Thus, it could be deduced that the dualism concerning the "identity" and "purpose" is confirmed. Since the identity of governmental agency itself could represent the aim of the governmental purpose, and the other category, namely "pour leur compte" must refer to those non-governmental parties with governmental purpose.

3) Object and purpose of Article III:8(a)

As mentioned in Japan—Alcoholic Beverages II (1996), the broad purpose of Article III of avoiding protectionism must be remembered when considering the relationship between Article III and other provisions of the WTO Agreement, thus it is not appropriate to interpret Article III:8(a) solely under the framework of Article III as a whole. Indeed, Article III:8(a) as a derogation does not immune the member states of all the obligations under GATT, to avoid protection-

ism as the pillar principle of WTO legal system could never be casually circumscribed just in name of government procurement. Nevertheless, it is not to say Article III:8(a) was designed to reiterate the basic credo.

Quite on the contrary, the draft history suggests its unique purpose is to grant protection or give more favorable treatment, in governmental procurement field, to domestic as opposed to foreign products because of the particularity of the products for governmental use. In accordance with the appellate body report of EC—Chicken Cuts (2005), the object and purpose shall be interpreted combining overall and specific ones. Thus, the assessment ought to be operated with dual layers, which means the positive side and negative side, namely it is necessary to take into consideration both the entitlement and restriction. Turning back to Article III:8(a), to decide the entities from the perspective of object and purpose, the award, except for the existing analysis concerning the conformity of "protectionism", could offer more evaluation around the positive right of Article III:8(a). Concretely speaking, it is more tenable to argue that a more inclusive interpretation towards the entities of purchase, that is to say to include the non-governmental agency, could be more consistent with the aim of offering more favorable treatment to domestic products for governmental procurement.

4) Travaux préparatoires of Article III: 8(a)

Government procurement as the derogation of national treatment under the framework of was preliminarily proposed in the Suggested Charter for an international trade organization, article 9 provides that "…including laws and regulations governing the procurement **by governmental agencies of supplies for public use** other than by or for the military establishment…" (Suggested Charter for an international trade organization, 1946) It can be deduced from the original version that the conclusion of the panel and arbitral tribunal that the entity of procurement was doubtlessly the agency was confirmed again. However, what's more noteworthy is the initial expression of the products transacted during the procedure was "supplies" but not "products purchased" in contemporary provision. Consequently, the reason for the revision of the draft will be indispensable to seek for the most reasonable interpretation towards the purview concerning the subjects of "products purchased".

As a matter of fact, the expression remained unchanged in the subsequent drafts and proposals although the other parts were fine tuned to some extent. For instance, in Tentative and Non-Committal Draft Suggested by the Delegation of the United States, "or for the production of the goods for sale" was deleted (United Nations Economic and Social Council Drafting Committee, 1947). Also, the later official New York draft kept the same sentence. However, the watershed appears in the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment when the delegates of United States submit the amendment of New York draft, where the prototype of contemporary Article III:8(a) was born. It reads "The provisions of this

Article shall not apply to the procurement by governmental agencies of [supplies] products purchased for governmental [use] purposes and not for commercial purposes such as resale [nor for] or use in the production of goods for sale" (United Nations Economic and Social Council Drafting Committee, 1947a). It can be seen the controversial expression "products purchases", as a matter of fact, was applied to supersede the word "supplies". The radical revision also occurs in other parts, including the replacement of "use" with "purposes"

The ensuing second report of the Charter Steering Committee explicitly expressed that "The Working Party on Technical Articles at its last meeting on May 20 decided not to deal with Article 15 and the proposed new Article 15 A", (United Nations Economic and Social Council Drafting Committee, 1947b) which is, no matter for what reasons, tantamount to endorsing the proposal from United states. Indeed, since then, the provision has remained the same without substantial modification.

Thus, the *raison d'etre* of the revision is exceedingly important to understand the silence. Regrettably, the further explanation of the proposal of the redraft was absent. Only several clues in pieces could be found to extrapolate the real intention for that change. For the first one, in the Summary Record of the Forty-First Meeting of the third committee, the delegate of Cuba pointed out the "The paragraph had been redrafted by the Sub-Committee specifically to cover purchases made originally for governmental purposes and not with a view to commercial resale, which might nevertheless later be sold" (United Nations Conference on Trade and Employment Third Committee, 1948), later the delegate of United States made the complementary, adding that "the Sub-Committee had considered that the language of paragraph 8 would except from the scope of Article l8 and hence from Article 16, laws, regulations and requirements governing purchases effected for governmental purposes where resale was only incidental." Towards the perusal of these two excerpts of official discussion, it seems that the drafters changed from "supplies" into "products purchased" not aiming at adjusting the ambit of the entities, which could also reflect from the expression "**purchases effected** for governmental purposes", indicating the focus is the "effect of purchase" rather the "entity of purchase". The next possible relevant document is Verbatim Report of the Seventh Meeting of the Procedures Sub-Committee of Committee II Held at Church House, the rapporteur primely characterized Article III: 8(a) (Article 9 then) relating to the matter of. public works and governmental purchased for public use, the subsequent discussion and debate also mainly concentrate on the revision of "use" and "purpose" (United Nations Economic and Social Council Preparatory Committee, 1946). Though the reason of modification remains still unknown, however, at least it can be deduced from the documents above that the member states when drafting the text of government procurement never intended to impose any restrictions on the range of entities of purchase.

5. Conclusion

The United States in the 2018 Trade Policy Agenda and 2017 Annual Report denunciated the WTO Appellate Body mainly for six reasons, including "over-reach of Appellate", "the distinction between factual issue and legal issues", "the applicability of stare decisis principle" etc. (United States Trade Policy Agenda, 2018). Since then, the legality of WTO DSM has always been on the limelight, which seems causing the chilling effect. It could be seen in the award the tribunal constantly underscores its legitimacy and highlights its function as legal review but not fact-finding. Meanwhile, compared with previous adjudications of the Appellate body, the arbitrators, especially for treaty interpretation, behave over-cautiously and too cringed to provide convincing analysis. It is well comprehensible that the arbitrators have taken into consideration the critics and proposals for reformation of WTO DSM, thus attempting to respond through the award as well as encourage the member states to resort more to the alternative dispute settlement mechanism under Article 25 of DSU in order to avoid the frequent occurrence of the "void appeal". It nonetheless excuses the liability the arbitrators are obliged to shoulder, that is to say to clarify the covered agreement concerned and keep the security, consistency and predictability. Conversely, only precise assessment and disciplined interpretation towards the issues of dispute could reignite the declining confidence and dispel increasing doubt of WTO.

Additionally, to appease the harm chilling effect, the member states could also make their own contribution. Obviously, the authorization clause in arbitration agreement in DS583 is not sufficiently unambiguous, which may also be a factor restraining the arbitrators. Thus, it is suggested the disputing parties, to take more advantage of arbitration system as well as achieve better result, could be more open to the arbitration and confer more discretion upon the arbitrators. Meanwhile, in the DSB meeting held recently, the United States welcomed the outcome of Turke-Pharmaceuticals and averted that "If any Member considers that use of the arbitration provision may assist it in securing a positive solution, then the United States in principle supports such efforts" (Statement of the United States at the Meeting of the WTO Dispute Settlement Body, 2022). Furthermore, "If a Member supports dispute settlement reform, then a bilateral arrangement presents a unique opportunity to explore alternative approaches". These public statements demonstrate that even the biggest challenger, as a matter of fact, still prefers resolving the trade disputes under the framework of WTO rather than radically reversing the current DSM. Thus, for the members' state of WTO, to re-glitter the "jewel on the crown", it is necessary to avoid unilateral solution but dedicate to the bilateral or multilateral route to settle the dispute.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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