INDIA — CERTAIN MEASURES RELATING TO SOLAR CELLS AND SOLAR MODULES

(DS456 / AB-2016-3)

APPELLEE SUBMISSION
OF THE UNITED STATES OF AMERICA

May 10, 2016

TABLE OF CONTENTS

SERVICE LIST

Participant

H.E. Ms. Anjali Prasad, Permanent Mission of India

Third Parties

H.E. Mr. Marcos Galvão, Permanent Mission of Brazil

H.E. Mr. Jonathan Fried, Permanent Mission of Canada

H.E. Mr. Yu Jianhua, Permanent Mission of China

H.E. Mr. Juan Falconi Puig, Permanent Mission of Ecuador

H.E. Mr. Marc Vanheukelen, Permanent Mission of the European Union

H.E. Mr. Junichi Ihara, Permanent Mission of Japan

H.E. Mr. Choi Kyong-lim, Permanent Mission of Korea

H.E. Ms. Mariam Md. Salleh, Permanent Mission of Malaysia

H.E. Mr. Harald Neple, Permanent Mission of Norway

H.E. Mr. Gennady Ovechko, Permanent Mission of the Russian Federation

H.E. Dr. Abdolazeez S. Al-Otaibi, Permanent Mission of Saudi Arabia

Dr. Shin-Yuan Lai, Permanent Mission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

H.E. Mr. Mehmet Haluk Ilicak, Permanent Mission of Turkey

Table of Reports

SHORT TITLE	FULL CITATION
Australia – Salmon (AB)	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007
Canada – Renewable Energy / Feed-In Tariff Program ("Canada – FIT")	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, *Canada – Measures Relating to the Feed-In Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013
Canada – Wheat Exports and Grain Imports	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004
China – Publications and Audiovisual Products	Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr. 1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R, adopted 2 September 2014
China Rare Earths (AB)	Appellate Body Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R, adopted 2 September 2014
EC – Asbestos (AB)	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R, adopted 5 April 2001
EC – Bed Linen (Article 21.5 – India) (AB)	Appellate Body Report, *European Communities – Anti Dumping Duties on Imports of Cotton Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965

EC – Fasteners (China) (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
EC – Hormones (AB)	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EEC – Parts and Components	GATT Panel Report, *European Economic Community – Regulation on Imports of Parts and Components*, L/6657, adopted 16 May 1990
EC – Selected Customs Matters (AB)	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998
EC – Sardines (AB)	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002
EC – Seal Products	Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, adopted 18 June 2014
EC – Tube or Pipe Fittings	Appellate Body Report, European Communities – Anti Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, WT/DS219/AB/R, adopted 18 August 2003
Japan – Agricultural Products II (AB)	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999
Japan – Apples (AB)	Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003
Korea – Alcoholic Beverages (AB)	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999
Korea – Dairy (AB)	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
Mexico – Soft Drinks	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006
US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion Resistant Carbon Steel Flat Products from*

	Germany, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Countervailing and Anti-Dumping Measures (China)	Panel Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/R, adopted 22 July 2014
US – Gambling (AB)	Appellate Body Report, *United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
US – Oil Country Tubular Goods Sunset Reviews (AB)	Appellate Body Report, *United States – Anti Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005
US – Shrimp (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998
US – Shrimp (Thailand)	Panel Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/R, adopted 1 August 2008, as modified by Appellate Body Report
US—Stainless Steel (AB)	Appellate Body Report, *United States – Final Anti Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008
US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997

I. INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. India does not appeal the Panel's finding in *India – Solar Cells* that the requirement under the Jawaharlal Nehru National Solar Mission ("JNNSM") that certain suppliers of electricity use Indian solar cells and modules (the "DCR measures") are *prima facie* inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. Its appeal is limited to the Panel's rejection of various defenses that India raised under Article III:8(a), Article XX(j), and Article XX(d) of the GATT 1994.

2. The Panel correctly rejected India's efforts to defend the WTO inconsistency. First, India asserted that the DCR measures were laws, regulations, or requirements governing the procurement by governmental agencies of products purchased for governmental purposes, and that Article III:8(a) took them outside the scope of Article III. The Panel found, however, that because India procured *electricity* under the DCR measures, the exemption under Article III:8(a) did not apply to India's discrimination against a different product, solar cells and modules.

3. Second, India sought refuge in the Article XX(j) exception for measures essential to the acquisition of products in general or local short supply. The Panel rejected this argument because it concluded that Indian solar power developers' ("SPDs") ready access to imported solar cells meant there was no general or local short supply that would justify resort to Article XX(j).

4. Third, India argued that the DCR measures qualified for the Article XX(d) exception because they were necessary to secure compliance with various Indian obligations under international agreements related to ecologically sustainable growth and sustainable development. The Panel rejected this argument because Article XX(d) applies to measures to secure compliance with a Member's *domestic* laws and regulations, and India had not established that these international commitments had direct application in India's domestic legal system.

5. India asserts on appeal both that the Panel made legal errors in its evaluation of India's defenses and that it failed to carry out its duties under Article 11 of the DSU. As general matter, India's Article 11 appeals rely on allegations that the Panel failed to "consider" certain evidence or arguments proffered by India. The fact that a panel does not address every piece of evidence presented by a party does not give rise to a claim of error under Article 11.[2] Nor does Article 11 impose an obligation on a panel to address in its report every argument raised by a party. For these reasons, India has not identified any way in which the Panel failed to make an objective assessment of the matter before it. There is accordingly no basis to reverse the Panel's findings under Article 11.

6. India's legal arguments fare no better. The Panel found that India's discrimination against imported solar cells and modules cannot be justified under Article III:8(a) of GATT 1994

---

[1] Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 2,146 words (including footnotes), and this U.S. appellee submission (not including the text of the executive summary) contains 21,480 words (including footnotes).

[2] *China Rare Earths* (AB), para. 5.178.

because solar cells and modules are not among the "products purchased" by India under the DCR measures at issue in this dispute. The Panel's finding follows the reasoning laid out by the Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program* when it found that Article III:8(a) does not apply when a Member procures one product, but discriminates against a different product.[3] Specifically, the Panel found that (1) the "product purchased" by the government under the DCR measures is electricity, whereas the products facing discrimination under those measures are generation equipment, namely solar cells and modules; and (2) electricity and solar cells and modules are not in a competitive relationship. India acknowledged that the government does not actually purchase, physically acquire, or take title or custody of any solar cells or modules under its DCR measures. Thus, the governmental procured of electricity did not excuse India from its national treatment obligations under Article III with respect to solar cells and modules.

7. On appeal, India asserts that the Panel failed to consider its argument that electricity is indistinguishable from solar cells and modules. The Panel, however, explicitly addressed that argument, and found it inapposite in light of the broader conclusion that India could not be understood to have procured solar cells and modules for purposes of Article III:8(a) when it never actually purchased, acquired, or had possession of them.

8. India also asserts that the Panel failed to consider its related argument that solar cells and modules are inputs into the electricity procured by India, and that this relationship makes Article III:8(a) applicable to discrimination against the cells and modules. Again, the Panel explicitly considered this argument. But it found that India's DCR measures were indistinguishable "in any relevant respect" from the DCRs that the Appellate Body found to fall outside the coverage of Article III:8(a) in *Canada – Renewable Energy / Feed-In Tariff Program*. The Panel thus discerned no reason why the Appellate Body's interpretation of Article III:8(a), as developed and articulated in *Canada – Renewable Energy / Feed-In Tariff Program*, should not guide the Panel's examination of India's DCR Measures.

9. In light of these findings, the Panel found it unnecessary to assess India's DCR measures under the remaining elements of Article III:8(a). India requests that if the Appellate Body reverses the Panel on the threshold question, it complete the Panel's analysis with respect to these issues.

10. However, the findings of the Panel and undisputed facts cited by India do not support the conclusions it advocates. The procurement of electricity does not satisfy the "governmental purpose" criterion of Article III:8(a) because government agencies are only incidental users of the electricity purchased, and India has provided no basis to conclude that the sale to commercial entities and private households is a governmental purpose. In addition, the direct purchasers of the power are profit-making entities, and they resell the electricity to consumers seeking to maximize their own interest, precluding a conclusion that the government purchases are "not with a view to commercial resale."

[3] *See Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.63.

11. The Panel also rejected India's arguments with respect to Article XX(j) of the GATT 1994, which provides that nothing in the GATT 1994 shall be construed to prevent the adoption or enforcement by any Member of measures "essential to the acquisition or distribution of products in general or local short supply." The Panel correctly found that, in light of India's ready access to imported solar cells and modules, India could not defend its DCR measures under Article XX(j) of the GATT 1994 as "essential" for the "acquisition of products in short supply."

12. India argued that solar cell and modules are in "local short supply" in India because it "lack[s] manufacturing capacity of solar cells and modules." The Panel concluded that the phrase "products in general or local short supply" refers to a situation in which the quantity of available supply of a product, from all sources, does not meet demand in a relevant geographical area or market." It observed that India did not dispute that there was a sufficient quantity of solar cells and modules available in India from all sources (*i.e.*, imported and domestically manufactured) to meet the demand of India consumers.

13. On appeal, India alleges that the Panel erred by finding that a product cannot be in "general or local short supply" for a Member if its consumers can acquire the product through importation. However, Article XX(j), by its terms, is concerned solely with situations involving the ability to acquire the product in purported short supply. It does not differentiate between domestic production and importation for determining whether supply is "short". Thus, where the consumers of a Member are satisfying demand for a product through importation or through a combination of importation and local production, that product cannot be in "general or local short supply" within the meaning of Article XX(j). The Panel was therefore correct to conclude that solar cells and modules are not "products in general or local short supply" in India

14. India also asserts that the Panel made several legal errors in its "limited analysis" of whether India's DCR measures are "essential" within the meaning of Article XX(j). The Panel observed that "the relevant question under Article XX(j) is whether [India's] DCR measures are "essential to the acquisition" of products in short supply, [] not whether the acquisition of those products is in turn essential for the achievement of some wider policy objective." On appeal, India argues that this issue must "be seen in the context of the policy objectives of such acquisition." India's assertion is without merit because Article XX(j), by its terms, is concerned with whether the measure at issue is "essential *to the acquisition*" of a product, not whether the product itself – or even acquisition of the product – is essential.

15. Finally, the Panel also rejected India's arguments regarding Article XX(d), which provides that nothing in the Agreement shall be construed to prevent the adoption or enforcement by any Member of measures "necessary ... to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement." India cited several international and domestic instruments as "laws or regulations" for purposes of Article XX(d). The Panel correctly found that none of these instruments (with the exception of Section 3 of India's Electricity Act) were "laws or regulations" within the meaning of Article XX(d). With respect to Section 3 of the Electricity Act, the Panel found that India had failed to demonstrate that its DCR measures were measures to "secure compliance" with legal provisions of that Act. In light

of these findings, the Panel found it unnecessary to examine whether the India's DCR measures were "necessary" within the meaning of Article XX(d).

16. On appeal, India contends that the Panel erred in finding that the international instruments cited by India do not have direct effect in India, and that the domestic instruments cited by India do not constitute "laws and regulations" within the meaning of Article XX(d). India's assertions are without merit.

17. India does not dispute that the executive branch in India must take certain "implementing" actions before international law obligations enter into legal effect in India, but argues that the international instruments do have "direct effect" because "the legislature is not required to legislate on a domestic law incorporating the international law into domestic law." However, the Appellate Body's findings in *Mexico – Soft Drinks* clarify that where a "regulatory act" is necessary for an international obligation to have domestic effect, that obligation is not in and of itself part of a Member's laws and regulations for purposes of Article XX(d). As that is the case with India's executive "implementing" measures, India's argument presents no basis to reverse the Panel's finding.

18. The Panel found that the domestic law instruments cited by India, with one exception,– are not "law and regulations" for purposes of Article XX(d) because India cited only "hortatory, aspirational and declaratory language" that is not "legally enforceable."[4] India argues on appeal that the Panel erred because these measures, while non-binding are nonetheless part of India's legal system, and that although they do not prescribe specific action, they do "mandate achieving ecologically sustainable growth," which is more than a mere "objective."[5] These assertions do not undermine the Panel's conclusions. Panels have consistently found that "to secure compliance," within the meaning of Article XX(d), means to *enforce* obligations under laws and regulations," not "to ensure the attainment of the *objectives* of the laws and regulations."[6] The most India shows in its appeal is that these domestic measures lay out important, and even critical, objectives. That does not make them the type of laws and regulations to which Article XX(d) applies.

19. The Panel found India's reference to Section 3 of the Electricity Act unavailing because that provision requires the government to prepare a National Electrical Policy and tariff policy, and the DCRs do nothing to enforce this legal requirement.[7] India states on appeal that it did not mean to cite this law on its own, but as one element of legislative scheme encompassing the other cited measures that collectively "mandate" action to achieve "ecologically sustainable growth."[8] Thus, India does not directly appeal the Panel's findings with regard to Section 3.

20. In the event the Appellate Body reverses the Panel's "law or regulations" finding, India has requested the Appellate Body to complete the Panel's analysis with respect to whether India's DCRs measures are "necessary" within the meaning of Article XX(d). India, however,

[4] *India – Solar Cells (Panel)*, para. 7.313
[5] India's appellant submission, para. 174-175.
[6] *Canada – Wheat Exports and Grain Imports (Panel)*, para. 6.248.
[7] *India – Solar Cells (Panel)*, para. 7.330.
[8] *India – Solar Cells (Panel)*, para. 7.173.

has failed to establish that its DCR measures even "contribute to" India's "compliance" with any of the legal instruments that it identifies, much less that the DCRs measures are "necessary" to secure compliance. Therefore, it has failed to identify any basis for the Appellate Body to find the DCR measures to be "necessary."

II. INDIA DOES NOT DISPUTE THAT THE CHALLENGED DCRS ARE INCONSISTENT WITH ARTICLE III:4 OF THE GATT 1994 AND TRIMS ARTICLE 2.1

21. India has limited its appeal to the Panel's rejection of various defenses India raised and does not appeal the Panel's finding that India's DCR measure are inconsistent with Article III:4 of the GATT 1994[9] and Article 2.1 of the TRIMs Agreement.[10] As that conclusion is the starting point for the findings that India has appealed, it is useful to recall the Panel's reasoning.

22. Under the DCR measures at issue in this dispute, India provides certain benefits to solar power developers that use solar cells and modules made in India. These benefits include opportunities to bid for long-term contracts to supply electricity at guaranteed rates under India's JNNSM and receipt of large capital grants from the Indian government. A solar power developer that opts to use imported solar cells and/or modules, however, is not eligible to participate in that portion of the JNNSM subject to the DCR measures, or receive any other benefits under that portion of the Programme.

23. The Panel concluded that the "unambiguous wording" of Article 2 and the Illustrative List of the TRIMs Agreement[11] indicated that measures described at paragraph 1(a) of the TRIMs Illustrative List are "necessarily" inconsistent with Article III:4 of the GATT 1994. The Panel also found support for this finding in the Appellate Body's observation that "[b]y its terms, a measure that falls within the coverage of paragraph 1(a) of the Illustrative List is 'inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of the GATT 1994.'"[12] The Panel thus concluded that if a measure falls under paragraph 1(a) of the Illustrative List, there is no "need for a separate and additional examination of the legal elements of Article III:4 of the GATT 1994."[13]

24. The Panel found that that the United States had made out a *prima facie* case that India's DCR measures were covered by paragraph 1(a) of the Illustrative List, and noted that India had not raised any specific counterarguments to dispute such a finding. On that basis, the Panel found that India's DCR measures are inconsistent with Article 2.1 of the TRIMs Agreement, and thereby also inconsistent with Article III:4 of the GATT 1994. The Panel determined that it was thus unnecessary undertake a "separate and additional examination of whether the DCRs

[9] *General Agreement on Tariffs and Trade 1994* ("GATT 1994").
[10] *Agreement on Trade-Related Investment Measures* ("TRIMs Agreement").
[11] *India – Solar Cells (Panel)*, para 7.47
[12] *India – Solar Cells (Panel)*, para 7.47 (citing Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.24).
[13] *India – Solar Cells (Panel)*, para 7.54.

measures satisfy the legal elements of Article III:4 of the GATT *without* reference to the TRIMs Agreement."[14]

25. Nevertheless, the Panel evaluated the parties' arguments relating to the legal elements of Article III:4 of the GATT 1994, emphasizing that it did so only to assist the Appellate Body's review in the event of appeal. First, the Panel noted that the parties agreed that imported solar cells and modules and cells and modules made in India were "like products" within the meaning of Article III:4 of the GATT 1994.[15] Second, the panel observed that India did not dispute that its DCR Measures were "laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use" of solar cells and modules for purposes of Article III:4.[16] Third, the panel determined that India's DCR measures accord less favorable treatment to imported solar cells and modules by "prohibit[ing] the use of certain types of foreign cells and modules, without establishing any similar restriction on domestic cells and modules."[17] Fourth, the Panel rejected India's various argument(s) that the DCR measures did not accord less favorable treatment to imported solar cells and modules.

26. Regarding India's argument that the DCR Measures did not apply to all types of cells and modules, the Panel noted that this did not negate the existence of less favorable treatment where the DCRs measures *did* apply.[18] India argued that SPDs that used imported cells and modules could – in some cases – obtain the same benefits and advantages available to developers that used domestic equipment. The Panel found that this did not negate "the less favorable treatment accorded" to imported products "whose use *is* prohibited under the applicable DCR Measures."[19] Lastly, the Panel found immaterial India's argument that the DCR Measures did not significantly impede overall access to India's market for solar cells and modules. Here, the Panel observed that it saw "no basis in the text of Article III:4 of the GATT or related jurisprudence" to support the view that "less favorable treatment is negated when imported products might still have opportunities for market access through alternative channels."[20]

III. THE STANDARD TO BE APPLIED IN ASSESSING CLAIMS OF ERROR UNDER ARTICLE 11 OF THE DSU

27. India alleges both that the Panel made legal errors and that it failed to carry out its duties under Article 11 of the DSU. Sometimes it demarcates these different arguments clearly, and at other time it intermingles them, tacitly asking the Appellate Body to discern which analytical framework to use. As this issue arises with regard to many of India's substantive arguments, the United States considers it useful to provide a general overview of the framework the Appellate Body has applied to evaluate appeals arising under Article 11.

[14] *India – Solar Cells (Panel)*, para 7.74. (emphasis added)
[15] *See India – Solar Cells (Panel)*, para 7.81.
[16] *See India – Solar Cells (Panel)*, para 7.86.
[17] *India – Solar Cells (Panel)*, para 7.94.
[18] *See India – Solar Cells (Panel)*, para 7.94.
[19] *See India – Solar Cells (Panel)*, para 7.96.
[20] *India – Solar Cells (Panel)*, para 7.97.

28. Article 11 of the DSU provides:

> The functioning of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.[21]

29. As the Appellate Body has observed, Article 11 counsels a panel to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence."[22] The Appellate Body has found that a panel may not "make affirmative findings that lack a basis in the evidence contained in the panel record" but that, within these parameters, "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings."[23]

30. Panels have a wide breadth of discretion in weighing both the evidence and arguments presented by the parties. As explained by the Appellate Body:

> [The Appellate Body] will not "interfere lightly" with a panel's fact-finding authority. Rather, for a claim under Article 11 to succeed, the Appellate Body "must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts." In other words, "not every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU", but only those that are so material that, "taken together or singly", they undermine the objectivity of the panel's assessment of the matter before it.[24]

31. Article 11 challenges should thus not be taken lightly or raised merely as a claim in the alternative to other substantive appeals, which the United States notes India has done extensively. An allegation by a party that a panel has failed to make an objective assessment of a matter before it is, in fact, "very serious."[25] As such, the Appellate Body has held parties alleging such violations to a high standard. Article 11 challenges must be clearly articulated and substantiated with specific arguments, including an explanation of why the alleged error has a bearing on the objectivity of the panel's assessment. An appeal premised primarily on a party's

---

[21] Article 11 of the DSU.
[22] *China Rare Earths* (AB), para. 5.178 (citing to *Brazil – Retreaded Tyres*, para. 185 (referring to Appellate Body Report, *EC – Hormones*, paras. 132 and 133). See also Appellate Body Reports, *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141 and 142; *Korea – Alcoholic Beverages*, paras. 161 and 162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; and *EC – Selected Customs Matters*, para. 258.).
[23] *EC – Hormones (AB)*, para. 135; *China Rare Earths* (AB), para. 5.178.
[24] *China Rare Earths* (AB), para. 5.79 (citations omitted).
[25] *China Rare Earths* (AB), para. 5.203.

disagreement with the Panel's reasoning and weighing of evidence, for example, does not suffice to establish that a panel acted inconsistently with Article 11 of the DSU.[26]

32. Moreover, the fact that a Panel does not refer to specific evidence presented by a party in its report also is not sufficient to establish a Panel's failure to undertake an objective assessment of that evidence.[27] Very likely, such omissions indicate that the Panel did not consider it relevant to the specific issue before it, or did not attribute to it the weight or significance that a party considers it should have.[28] Where evidence that a party considers to be relevant is not addressed in a panel's report, the Appellate Body has found that an appellant must explain why such evidence is so material to its case that the panel's failure to explicitly address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment.[29]

33. Similarly, the fact that a panel does not address an argument presented by a party also does not rise to the level of an Article 11 violation.[30] As the Appellate Body has consistently held, a panel has no obligation under Article 11 to address in its report every argument raised by a party.[31]

34. Finally, the Appellate Body has considered it unacceptable for an appellant to simply recast factual arguments that it made before the panel in the guise of an appeal under Article 11. Instead, an appellant must identify specific errors regarding the objectivity of the panel's assessment.[32] As the Appellate Body has explained, it is incumbent on a participant raising a claim under Article 11 on appeal to explain why the alleged error meets the standard of review under that provision.[33]

35. As general matter, nearly all of India's Article 11 claims involve allegations that the Panel failed to "consider" certain evidence or arguments proffered by India. As noted above, however, the fact that a panel does not address every piece of evidence presented by a party does not give rise to a claim of error under Article 11. Nor does Article 11 impose an obligation on a panel to address in its report every argument raised by a party. At any rate, the Panel did, in fact, engage all of the evidence and arguments advanced by India. That the Panel may not have accorded such evidence the weight India thought it should have, or found such argumentation less persuasive than India did, again, does not give rise to a claim under Article 11.

IV. ISSUES RELATED TO THE GOVERNMENT PROCUREMENT DEROGATION CONTAINED IN ARTICLE III:8(A) THE GATT 1994

[26] *China Rare Earths* (AB), para. 5.203.
[27] *China Rare Earths* (AB), para. 5.178; *EC – Fasteners* (AB), paras. 441-442; *Brazil – Retreaded Tyres*, para. 202.
[28] *China Rare Earths* (AB), para. 5.221.
[29] *China Rare Earths* (AB), para. 5.178; *EC – Fasteners* (AB), para. 442.
[30] *China Rare Earths* (AB), para. 5.224.
[31] *China Rare Earths* (AB), para. 5.224.
[32] *EC – Fasteners (China)* (AB), para. 442; *China Rare Earths* (AB), para. 5.178.
[33] *China Rare Earths* (AB), para. 5.178 (quoting *EC – Fasteners (China*) (AB), para. 442 (emphasis original)).

36. Article III:8(a) of the GATT 1994 provides an exemption from the national treatment obligations of Article III. It provides:

> The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of *products purchased* for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale. (emphasis added)

The Panel correctly found that India's discrimination against imported solar cells and modules cannot be justified under Article III:8(a) because solar cells and modules are not among the "products purchased" by India under the DCR measures at issues in this dispute.[34] Article III:8(a), by its terms, does not apply when a Member purchases one product but discriminates against a different product. Moreover, India does not dispute that under its DCR measures, India purchases electricity but discriminates against solar cells and modules by affecting the purchasing decisions of solar power developers.[35] India further acknowledges that it does not acquire or otherwise take title or custody of any solar cells or modules under its DCR measures.[36] On these facts, the panel correctly found India's DCRs measures do *not* govern the "procurement" of "products purchased" by the government within the meaning of Article III:8(a).

37. On appeal, India has articulated no credible reason for the Appellate Body to reverse the Panel's finding that India's discrimination against imported solar cells and modules cannot be justified under Article III:8(a).

A. Article III:8(a) of the GATT 1994 Applies Only Where the "Product Purchased" by a Government and the Imported Product Being Discriminated Against are *Identical* Products, *"Like"* Products, or Products that are otherwise *Directly Competitive or Substitutable*

38. The Panel concluded that India's DCR measures are not covered by Article III:8(a) because the "products purchased" by India are electricity, and not solar cells or modules, under its DCR measures.[37] The Panel found support for this finding in *Canada – Renewable Energy / Feed-In Tariff Program.* The Appellate Body found that Article III:8(a) would permit a government to discriminate against imported products only to the extent the imported product subject to discrimination is (i) *identical* to the domestic product *purchased* by the government, or (ii) otherwise in a "*competitive relationship*" with the domestic product purchased by the government. That is, the Appellate Body has found that Article III:8(a) does not apply when a Member purchases one product, but discriminates against another, different product.

39. The Appellate Body reasoned that this interpretation flowed from the text of Article III:8(a) and its interplay with other paragraphs of Article III of the GATT 1994. It began with

---

[34] *See India – Solar Cells (Panel)*, para 7.135-7.136.
[35] *See* India's First Written Submission, para. 114.
[36] *See* India's First Written Submission, para. 114.
[37] *India – Solar Cells (Panel)*, para 7.135-7.136.

the phrase "procurement by governmental agencies of products purchased" in Article III:8(a), observing that:

(1) The subject matter of the term "procurement" is a "product." [38]

(2) A "governmental agency" (*i.e.*, the government) is procuring the product. [39]

(3) The word "procurement" refers "to the process pursuant to which a government acquires products."[40]

(4) The word "purchased" refers to the type of transaction used to put into effect that procurement. [41]

40. Thus, Article III:8(a) applies when a government procures products by *purchasing* them. Conversely, it does not cover situations where a government procures (or acquires) products through a mechanism other than by purchasing them; nor does it apply to purchases made outside of the procurement process.

41. The Appellate Body next examined the text of Article III:8(a) in the context of the rest of Article III of the GATT 1994. It observed a relationship between (a) the imported products against which a Member may discriminate and (b) the products that a governmental agency may purchase:

> The scope of the terms "products purchased" in Article III:8(a) is informed by the scope of "products" referred to in the obligations set out in other paragraphs of Article III. Article III:8(a) thus concerns, in the first instance, *the product that is subject to the discrimination*. The coverage of Article III:8 extends not only to products that are identical to *the product that is purchased*, but also to "like" products. In accordance with the Ad Note to Article III:2, it also extends to products that are directly competitive to or substitutable with the product purchased under the challenged measure.[42] (emphasis added)

42. Thus, Article III:8(a), as read in junction with the other paragraphs of Article III, establishes that if a Member seeks to discriminate permissibly against an imported product in the context of its procurement process, the product "subject to discrimination" and the "product that is purchased" by the government must be (1) identical products; (2) "like" products; or (3)

---

[38] *See Canada – Renewable Energy / Feed-In Tariff Program* (AB), para. 5.60. ("Article III:8 further specifies what is procured and by whom. The subject matter of the procurement is a 'product', and it is being procured by a 'governmental agency'")
[39] *See Canada – Renewable Energy / Feed-In Tariff Program* (AB), para. 5.60. ("Article III:8 further specifies what is procured and by whom. The subject matter of the procurement is a 'product', and it is being procured by a 'governmental agency'")
[40] *See Canada – Renewable Energy / Feed-In Tariff Program* (AB), para. 5.59.(" We therefore understand the word 'procurement' to refer to the process pursuant to which a government acquires products.")
[41] *See Canada – Renewable Energy / Feed-In Tariff Program* (AB), para. 5.59. ("The word "purchased" is used to describe the type of transaction used to put into effect that procurement.")
[42] *Canada – Renewable Energy / Feed-In Tariff Program (AB)*, para. 5.63.

products that are directly competitive or substitutable. As further noted by the Appellate Body "this range of products can be described as products that are in a competitive relationship."[43]

43. Based on this reasoning, the Appellate Body found that the domestic content requirements (DCRs) at issue in *Canada – Renewable Energy / Feed-In Tariff Program*, were *not* covered by Article III:8(a) because the "product purchased" by the Government of Ontario was electricity and the "product subject to discrimination" under the DCRs was renewable energy equipment, which were "not in a competitive relationship" – that is, they were not identical, "like", or otherwise directly competitive or substitutable. Specifically, the Appellate Body explained that

> We have found above that the conditions for derogation under Article III:8(a) must be understood in relation to the obligations stipulated in the other paragraphs of Article III. *This means that the product of foreign origin allegedly being discriminated against must be in a competitive relationship with the product purchased*. In the case before us, the product being procured is electricity, whereas the product discriminated against for reason of its origin is generation equipment. These two products are not in a competitive relationship. None of the participants has suggested otherwise, much less offered evidence to substantiate such proposition. Accordingly, the discrimination relating to generation equipment contained in the FIT Programme and Contracts is not covered by the derogation of Article III:8(a) of the GATT 1994.[44]

B. The Panel Did not Err in Finding That India's DCR Measures are Not Covered by the Government Procurement Derogation of Article III:8(a) of the GATT 1994 Because the "Product Purchased" Under the DCR Measures is Electricity, While the Products Discriminated Against are Solar Cells and Modules

44. The Panel's finding in the instant dispute follows the reasoning laid out by the Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program*. Specifically, the Panel found that India's DCR measures are *not* covered by Article III:8(a) because (1) the "product purchased" by the government under the DCR measures is electricity, whereas the products facing discrimination under those measures are generation equipment, namely solar cells and modules; and (2) electricity and solar cells and modules are not in a competitive relationship. At no point did India dispute these facts. Indeed, India, acknowledged that the government does not actually purchase any solar cells or modules under India's DCR Measures.[45] India further acknowledged that the government does not otherwise physically acquire – or take title or custody of – any solar cells or modules under its DCR measures.[46]

[43] *Canada – Renewable Energy / Feed-In Tariff Program (AB)*, para. 5.63.
[44] *Canada – Renewable Energy / Feed-In Tariff Program (AB)*, para. 5.79. (emphasis added)
[45] *See* India's First Written Submission, para. 114.
[46] *See* India's First Written Submission, para. 114.

45. The Panel rejected India's attempts to distinguish its DCR Measures from those at issue in *Canada – Renewable Energy / Feed-In Tariff Program.*[47] The Panel noted that both disputes involved measures under which the government purchased electricity, but discriminated against [renewable energy] generation equipment. [48] The Panel examined all relevant aspect of the measures and concluded that India's DCR Measures were therefore indistinguishable "in any relevant respect" from the DCRs that the Appellate Body found to fall outside the coverage of Article III:8(a) in *Canada – Renewable Energy / Feed-In Tariff Program.*[49] The Panel thus discerned no reason why the Appellate Body's interpretation and application of Article III:8(a), as developed and articulated in the context of in *Canada – Renewable Energy / Feed-In Tariff Program*, should not similarly guide the Panel's examination of India's DCR Measures.[50]

46. In light of the Panel's finding on this "threshold legal element", it found it unnecessary to assess India's DCR measures under the remaining elements of Article III:8(a), *i.e.*, "governmental purpose" and "commercial resale". [51] India asserts that the Panel, in reaching this finding, failed to make an "objective assessment" of certain evidence and arguments advanced by India and requests that the Appellate Body therefore find that the Panel acted inconsistently with Article 11 of the DSU.[52] India also requests that the Panel reverse the Panel's finding that India's discrimination against solar cells and modules is not covered by Article III:8(a) "since what [India] purchases is electricity" rather than solar cells and modules.[53]

47. All of India's assertions under Article 11 are without merit, because as reflected in its report, the Panel thoroughly engaged all of the evidence and arguments advanced by India. As noted, that the Panel may not have accorded such evidence the weight India thought it should have, or found such argumentation less persuasive than India did, does not give rise to a claim under Article 11.

1. The Panel Did Not Fail to Consider India's Argument that Solar Cells and Modules are Indistinguishable from Solar Power Generation

48. India alleges that the Panel failed to consider India's argument that solar cells and modules "cannot be treated as distinct from solar power" and argues that "the Panel's failure to

[47] *See India – Solar Cells (Panel)*, para 7.135.
[48] *See India – Solar Cells (Panel)*, para 7.120.
[49] *India – Solar Cells (Panel)*, para 7.120.
[50] In particular, the Panel found India's argumentation relating to the "effective procurement" of solar cells and modules and characterization of solar cells and modules as "integral inputs" of solar power to be "incompatible" with the Appellate Body's interpretation of Article III:8(a) in *Canada – Renewable Energy / Feed-In Tariff Program. See India – Solar Cells (Panel)*, para 7.120; *see also* para. 7.128.
[51] *India – Solar Cells (Panel)*, para7.136. ("We have found that the "product purchased" under the DCR measures is electricity and that the discrimination relating to solar cells and modules under the DCR measures is not covered by the derogation of Article III:8(a). This is a threshold legal element that must be satisfied in order to find that a measure is covered by the derogation in Article III:8(a), and the DCR measures fail to meet this threshold. Accordingly, it is not necessary for us to conduct any further assessment of the remaining legal elements of Article III:8(a) to determine the applicability of this derogation.")
[52] India's Appellant Submission, para. 35(b).
[53] India's Appellant Submission, para. 35(a).

do so constitutes a violation of Article 11 of the DSU."[54] India's allegations are without merit because the Panel, in fact, thoroughly evaluated India's argument that solar cells and modules are indistinguishable from solar power.

49. First, the Panel explicitly considered India's argument that solar cells and modules are indistinguishable from solar power,[55] but rejected that argument in light of other factual and legal findings.[56] The United States recalls that India advanced this argument to support India's broader contention that the Indian government "effectively procures" solar cells and modules when it purchases solar power from SPDs:

> Solar cells and modules are *intrinsic* to solar power. Likewise, solar power cannot be generated except from solar cells and modules. Solar cells and modules are therefore *integral* to the generation of solar power, and *cannot be treated as distinct from the generation of solar power*. The focus of the domestic content requirements … is on generation of solar power from Indian manufactured solar cells and modules. *The requirements governing the procurement effectively seek to procure solar cells and modules that result in solar power generation*. (emphasis added)[57]

50. Thus, the argument that "solar cells and modules cannot be treated as distinct from the generation of solar power" was part and parcel of India's argument that Indian government "effectively" or "effectively seeks" to procure solar cells and modules through its purchases of solar power from SPDs under the JNNSM. The panel did not fail to consider this argument. It posed several written questions to India regarding its theory of "effective procurement"[58] and devoted significant discussion and analysis to India's argumentation on this score in the panel report.[59]

---

[54] India's Appellant Submission, paras. 3–8.

[55] *See, e.g., India – Solar Cells (Panel)*, para7.128. ("We therefore reject India's argument that under Article III:8(a) that solar cells and modules "cannot be treated as distinct from solar power" and "by purchasing electricity generated from such cells and modules, [India] is effectively procuring the cells and modules."

[56] *See, e.g., India – Solar Cells (Panel)*, para 7.109.

[57] India's First Written Submission, paras. 111-112. *See also* India's Opening State at the First Meeting of the Panel, paras. 27. ("India's fundamental point [is]that the relationship of solar cells and modules is so intrinsic to the generation of solar electricity, that the actions of the Government in purchasing electricity can be characterized as effectively procuring those cells and modules.")

[58] *See e.g.* Panel Question No. 23(a)-(b) ("In paragraph 28 of its opening statement, India argues that "by purchasing electricity generated from [solar] cells and modules, it is effectively procuring the cells and modules".
Is the Panel correct in its understanding that the government of India does not "purchase" solar cells and modules, but rather only purchases electricity); Is the Panel correct in its understanding that it is SPDs that pay for and take custody of solar cells and modules?); Is India arguing that it "effectively procures" only solar cells and modules, or also electricity?)

[59] *See India – Solar Cells (Panel)*, para. 7.109 ("India contrasts the focus of the DCR measures at issue in the present dispute with the factual context of *Canada – Renewable Energy / Feed-In Tariff Program* on the grounds that "[s]olar cells and modules do not have any purpose other than generating solar power [and] are intrinsic to solar power" and thus "cannot be treated as distinct from the generation of solar power".); para. 114 ("India's argument that it is "effectively procuring" solar cells and modules through the DCR measures rests on what it considers to be a "key factual distinction" with *Canada – Renewable Energy / Feed-In Tariff Program* involving "the nature of the products in question."); paras 7.128 -7.133.

51. Importantly, while attempting to argue that the Indian government "effectively procured" solar cells and modules, India *acknowledged* that the Indian government does *not* purchase,[60] acquire, or otherwise take title or custody of any solar cells or modules under the JNNSM.[61] It was against this factual backdrop that the Panel determined that however India conceived of the government "effectively procuring" solar cells and modules, it was not an understanding of "procurement" that comported with text of Article III:8(a) or the Appellate Body's interpretation of the provision.[62]

52. Having rejected the proposition that India could be understood to "procure" solar cells and modules *without* actually purchasing, acquiring, or otherwise taking custody of any solar cells and modules, it was unnecessary for the Panel to consider or resolve the theoretical question of whether solar cells and modules can be distinguished from solar power generation. Thus, even if the Panel had erred by failing to consider or address whether solar cells and modules are indistinguishable, it would *not* be the sort of "material" error that gives rise to a claim of error under Article 11 of the DSU.[63]

53. Second, even if the Panel had not considered this particular factual assertion, the Appellate Body has recognized that a panel has no obligation under Article 11 to address in its report every argument raised by a party. India's claim of error under Article 11, however, is based entirely on the allegation that the Panel failed to "consider" India's argument that "solar cells and modules are indistinguishable from solar power generation." The Appellate Body should therefore reject India's request for a finding that the Panel acted inconsistently with Article 11 of the DSU because India has failed to even make an allegation that gives rise to a claim of error under Article 11.

2. The Panel Did Not Err by Finding that it was Unnecessary to Make a Finding as to Whether Solar Cells and Modules Qualify as "Inputs" into Solar Power

54. India alleges that the Panel failed to consider India's argument that solar cells and modules are "inputs" of solar power.[64] India's allegation is without merit because the Panel did consider and assess these arguments.

55. Simply put, there is no basis to India's allegation that the Panel found it "unnecessary" to consider India's argument that solar cells and modules can be considered "inputs" of solar

---

[60] *See* India's Response to Panel Question No. 23(a) (Question: *Is the Panel correct in its understanding that the government of India does not "purchase" solar cells and modules, but rather only purchases electricity*? Response: *As explained in India's response to Question 19, solar cells and modules are integral inputs that generate solar power, and cannot be treated as distinct from solar power*.")

[61] *See* India's First Written Submission, para. 114 ("[T] the Government does not physically acquire or take custody of the solar cells and modules, and instead chooses to buy the solar power generated from such cells and modules); *see also* India's Opening State at the First Meeting of the Panel, para. 28 ("Instead, the essence of India's argument is that even though the Government does not take title or custody of solar cells and modules, by purchasing electricity generated from such cells and modules, it is effectively procuring the cells and modules"); *see also*

[62] *See India – Solar Cells (Panel)*, para. 7.133. ("Thus, we do not find support for India's broad interpretation of "procurement" in the Appellate Body's reasoning in *Canada – Renewable Energy / Feed-In Tariff Program*.").

[63] *See China Rare Earths (AB)*, para. 5.79 (citations omitted).

[64] *See* India's Appellant Submission, para. 9-17.

power. Indeed, as India notes, "the Panel engaged the parties in detailed questioning on the issue of 'inputs.'"[65] The Panel also devoted significant discussion and analysis to the issue of inputs in the panel report. This demonstrates that the Panel did, in fact, grapple with the parties' argumentation on the matter of inputs.

56. It would be more accurate to say that after considering India's arguments, the Panel found it unnecessary to make findings as to whether (1) solar cells and modules can be considered inputs of solar power; and (2) Article III:8(a) extends to discrimination relating to inputs. This conclusion flowed from the Panel's *factual finding* that India's DCR measures were not "distinguishable in any relevant respect" from the measures examined by the Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program*, and the Panel's observation that in that dispute the Appellate Body found it unnecessary to resolve "whether the derogation in Article III:8(a) can extend also to discrimination [relating to inputs]."[66]

57. As noted, Panels have significant discretion in making factual findings. To the extent India seeks a finding that the Panel failed to make an "objective assessment" of the facts for purposes of a claim under Article 11 of the DSU, India must establish that the Panel somehow "exceeded the bounds of this discretion."[67] India, however, has not even alleged – much less – established that the Panel ignored, misunderstood, or misconstrued any of the relevant facts pertaining to the scope or operation of India's DCR measures as compared to the measures at issue in *Canada – Renewable Energy / Feed-In Tariff Program.*

58. India argues that the Panel should have disregarded the Appellate Body's findings because the alleged lack of distinction between solar electricity and solar cells and modules "was not submitted by any of the parties to that dispute."[68] India is quibbling. The parties to *Canada – Renewable Energy / Feed-In Tariff Program* debated the nature of the "relationship" between solar power generation equipment and solar electricity, and whether it was "close."[69] The Appellate Body examined whether the two were in a "competitive relationship" and found that they were not.[70] India's assertion that solar cells and modules are inputs into solar-generated electricity is simply another way of framing an issue that the Appellate Body, the panel, and the parties analyzed. India presented the Panel no basis to reach a different conclusion, and on appeal provides no basis to conclude that the Panel erred in reaching the same conclusion on the issues addressed in *Canada – Renewable Energy / Feed-In Tariff Program.*

---

[65] India's Appellant Submission, para. 9.
[66] *See India – Solar Cells (Panel)*, para. 7.120, citing Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.63 ("In its rebuttal of Canada's claim under Article III:8(a), the European Union acknowledges that the cover of Article III:8(a) may also extend to discrimination relating to inputs and processes of production used in respect of products purchased by way of procurement.[66] Whether the derogation in Article III:8(a) can extend also to discrimination of the kind referred to by the European Union is a matter we do not decide in this case.")
[67] *China Rare Earths (AB)*, para. 5.79 (citations omitted).
[68] India's Appellant Submission, para. 17.
[69] *See generally , Canada – Renewable Energy / Feed-In Tariff Program (AB)*, paras. 2.122, 2.216, 5.40, and 5.63
[70] *Canada – Renewable Energy / Feed-In Tariff Program (AB)*, para. 5.79.

3. The Panel Did Not Err by Equating India's Arguments Regarding Solar Cells and Modules as "Inputs" of Solar Power with the "Close Relationship" Standard That Was Rejected by the Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program*

59. India alleges that the Panel further erred by "equating" India's argumentation regarding solar cells and modules as "inputs" of solar power, with the "close relationship" standard that the Appellate Body rejected[71] in *Canada – Renewable Energy / Feed-In Tariff Program*.[72] India's allegation is without merit because India's argument relating to "inputs" was, in fact, for all intents and purposes, the same as the "close relationship" standard considered in *Canada – Renewable Energy / Feed-In Tariff Program*.

60. In *Canada – Renewable Energy / Feed-In Tariff Program* the panel concluded that there was a "close relationship" between the products affected by the DCRs at issue (generation equipment) and the products procured (electricity) by the government Ontario, because "the generation equipment was "needed and used" to produce the electricity."[73] India, in describing solar cells and modules as "inputs" for solar power generation in the context of this dispute, similarly observed that "no solar electricity can be generated without solar cells and modules"[74] and further emphasized that

> It is this fundamental characteristic of solar cells and modules - *i.e.*, their inherent and intrinsic property of being able to absorb light energy and convert it to electrons, and thereby *generate electricity*, which defines them as *inputs* that are integral for solar power generation.[75]

61. Put another way, solar cells and modules are "needed and used" to produce solar-generated electricity. Thus, while India may have sought put a different gloss on the "close relationship" standard by describing the relationship between solar cells and modules and electricity as one between "inputs" and "outputs," the substance of India's argument was not different in any substantive or fundamental sense. The Panel was therefore correct in observing that "India's argument regarding the indispensable nature of 'integral inputs' might also have been made with respect to generation equipment at issue in *Canada – Renewable Energy / Feed-In Tariff Program*."[76] Simply put, there was no error in the Panel's reasoning on this score.

---

[71] *See Canada – Renewable Energy / Feed-In Tariff Program (AB)*, para. 5.76. ("We observe that the Panel noted the difference between the product subject to the Minimum Required Domestic Content Levels and the product subject of procurement.[71] However, the Panel found that, in the present case, purchases of electricity nonetheless fall within the scope of the derogation of Article III:8(a), because the generation equipment "is needed and used" to produce the electricity, and therefore there is a "close relationship" between the products affected by the domestic content requirements (generation equipment) and the product procured (electricity).")
[72] *See* India's Appellant Submission, paras. 18-20.
[73] *Canada – Renewable Energy / Feed-In Tariff Program (AB)*, 5.76. (emphasis added)
[74] India's Second Written Submission, para. 21.
[75] India's Second Written Submission, para. 22.
[76] *India – Solar Cells (Panel)*, 7.127.

4. The Panel Did Not Err by Dismissing India's Argument that "Sole Reliance" on the "Competitive Relationship" Would Be an "Unduly Restrictive" Interpretation of Article III:8(a).

62. The Panel properly interpreted Article III:8(a), in accordance with the ordinary meaning of its terms, in their context and in light of the object of purpose of GATT 1994, as exempting from Article III only procurements of products directly competitive with the import subject to discrimination. It took account of India's argument that this interpretation could result in certain procurement-related measures with laudable goals being subject to the national treatment disciplines, and concluded that this outcome was consistent with the Appellate Body's findings in *Canada – Renewable Energy / Feed-In Tariff Program*.

63. India argues on appeal that this interpretation imposes "unnecessary fetters" on Members' discretion to use discriminatory procurement measures to achieve legitimate government objectives and "would inadvertently narrow the scope and intent of Article III:8(a)."[77] This argument fails to recognize that Article III of GATT 1994 represents a balance between competing interests: assuring imported goods treatment no less favorable than like domestic goods and protecting Members' policy discretion in certain defined areas. Thus, the scope of Article III:8(a) *is* limited, and the disciplines of Article III reflect Members' agreement that certain restrictions on their discretion to take discriminatory measures are appropriate, but others are not.

64. India criticizes the Panel's observation that India's DCR measures are in no way distinguishable from those that the Appellate Body found in *Canada – Renewable Energy / Feed-In Tariff Program* not to be covered by Article III:8(a), arguing that the *Canada – Renewable Energy / Feed-In Tariff Program* findings did not address certain legal arguments India made in this dispute.[78] India misunderstands. The Panel simply observed that the policy concerns reflected in India's "consequentialist arguments" did not distinguish its DCRs from those at issue in *Canada – Renewable Energy / Feed-In Tariff Program*.[79] In other words, the government of Ontario also considered its DCRs appropriate to achieve its policy objectives, but the Appellate Body nevertheless found them to be outside the scope of Article III:8(a). The fact that the policy consideration underlying the Ontario measures did not justify a broader reading of Article III:8(a) in *Canada – Renewable Energy / Feed-In Tariff Program*, suggests that, similarly, India's policy consideration do not justify a broader reading in this dispute.

65. India also challenges the objectivity of the Panel's rejection of two examples that, in India's view, illustrate the way that the "directly competitive" analysis would have negative implications for Member's ability to achieve policy objectives.[80] Again, India errs. The Panel found that it was "by no means evident" that the two "scenarios" would satisfy the other criteria to invoke Article III:8(a).[81] In other words, if the measures in question would not otherwise

[77] India's appellant submission, paras. 21 and 22.
[78] India's appellant submission, para. 24.
[79] *India – Solar Cells* para. 7.134.
[80] India's appellant submission, para. 23.
[81] *India – Solar Cells (Panel)*, para. 7.132.

satisfy Article III:8(a), the fact that they also fail the "directly competitive" analysis does not impose any additional limitation on Members' policy flexibility.

5. Consistent with Article 11 of the DSU, The Panel Made an Objective Assessment of All the Issues, Evidence, and Argumentation Relating to the Examination of India's DCR Measures under Article III:8(a)

66. As noted, the Panel found that India's DCR measures are not covered by Article III:8(a) because (1) the "product purchased" by the government under the DCR measures is electricity, whereas the products facing discrimination under those measures are generation equipment, namely solar cells and modules; and (2) electricity and solar cells and modules are not in a competitive relationship. The Panel found support for this finding in *Canada – Renewable Energy / Feed-In Tariff Program*, where the Appellate Body articulated that Article III:8(a) permits a government to discriminate against imported products only to the extent the imported product subject to discrimination is in a "competitive relationship" with the domestic product purchased by the government. The Panel analyzed and rejected India's attempts to distinguish its DCR Measures from those at issue in *Canada – Renewable Energy / Feed-In Tariff Program*.[82] Specifically, the Panel noted that both disputes involved measures under which the government purchased electricity, but discriminated against [renewable energy] generation equipment[83] and concluded that India's DCR Measures were therefore indistinguishable "in any relevant respect" from the DCRs that the Appellate Body found to fall outside the coverage of Article III:8(a) in *Canada – Renewable Energy / Feed-In Tariff Program*.[84]

67. In addition to the assertions, addressed above, that *Canada – Renewable Energy / Feed-In Tariff Program* does not, as legal mater, support the Panel's conclusions, India also argues that the Panel's reliance on the Appellate Body's reasoning was inconsistent with Article 11 of the DSU. Specifically, India asserts:

> [T]he Panel in this dispute declined to consider India's arguments simply because the Appellate Body in *Canada-Renewable Energy/ Feed-in Tariff Program* has not considered these arguments.[85]

India further asserts:

> [T]he Panel seems to have simply taken shelter under the Appellate Body's ruling in *Canada-Renewable Energy/ Feed-in Tariff Program*, and wherever it could not find an answer for a specific issue or argument within the Appellate Body's reasoning in that dispute, it simply dismissed it as a matter that the Appellate Body has not considered important, and for that reason alone, it too will not consider the argument itself.[86]

68. India's allegation of error is without merit because the Panel fully considered India's argumentation. The Panel was guided by the Appellate Body's findings in *Canada-Renewable*

[82] *See India – Solar Cells (Panel)*, para 7.135.
[83] *See India – Solar Cells (Panel)*, para 7.120.
[84] *India – Solar Cells (Panel)*, para 7.120.
[85] India's Appellant Submission, para. 26.
[86] India's Appellant Submission, para. 27.

Energy/ Feed-in Tariff Program only where the Panel considered that they applied to the particular factual and legal issues before it. As explained in section IV.B.1, the Panel considered India's argument that solar cells and modules are indistinguishable from solar power,[87] but rejected that argument in light of other factual and legal findings.[88] As explained in sections IV.B.2 and IV.B.3, the Panel devoted significant discussion and analysis to India's argument solar cells and can be considered inputs of solar power generation, and the related legal question of whether Article III:8(a) extends to discrimination against inputs. And as detailed in section IV.B.4, the Panel took full account of India's argument that an "unduly restrictive" interpretation of Article III:8(a) would impose "unnecessary fetters" on Members' ability to pursue legitimate policy objectives. The Panel generally found India's argumentation less persuasive that than India did, but that does not give rise to a claim under Article 11.

69. When it comes to the Panel's reliance on the findings in *Canada – Renewable Energy / Feed-In Tariff Program*, the United States agrees that it would have been improper for the Panel to blindly or "mechanically"[89] apply the findings in that dispute to the facts of this dispute. However, to the extent the Panel was guided by the legal interpretations and reasoning developed by the Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program*, it did so on the basis of the Panel's factual finding that India's DCR measures were functionally equivalent to DCRs examined by the Appellate Body in" *Canada – Renewable Energy / Feed-In Tariff Program*."[90] While India may dispute the Panel's factual finding on this score, this is not grounds for a finding of error under Article 11 because, as noted, panels have a wide breadth of discretion in weighing both the evidence and arguments presented by the parties. India has not demonstrated that the Panel has "exceeded the bounds of its discretion, as the trier of facts."[91]

70. At any rate, as the Appellate Body observed in *Japan – Alcoholic Beverages II*, "Adopted panel reports are an important part of the GATT *acquis*….They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."[92] The same would apply to adopted panel and Appellate Body reports in the WTO. While pursuant to DSU Article 3.9 such reports do not constitute an "authoritative interpretation" of the covered agreements – an authority reserved exclusively to the Ministerial Conference or General Council acting pursuant to WTO Agreement Article IX:2 – a subsequent panel or Appellate Body Division would appropriately seek to examine and engage with the interpretations reached in previous reports in order to develop its interpretation and application of a provision of the covered agreements. Therefore, in light of the Panel's finding that India's DCR measures are "not "distinguishable in any relevant respect" from the DCR measures examined by the Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program*",[93] it

[87] *See, e.g., India – Solar Cells (Panel)*, para7.128. ("We therefore reject India's argument that under Article III:8(a) that solar cells and modules "cannot be treated as distinct from solar power" and "by purchasing electricity generated from such cells and modules, [India] is effectively procuring the cells and modules."
[88] *See, e.g., India – Solar Cells (Panel)*, para 7.109.
[89] *See* India's Appellant Submission, para. 33.
[90] *See India – Solar Cells (Panel)*, para. 7.135. (emphasis added)
[91] *China Rare Earths (AB)*, para. 5.79 (citations omitted).
[92] *Japan – Alcoholic Beverages II (AB)*, p. 14, DSR 1996:I, 97, at 108.
[93] *See India – Solar Cells (Panel)*, para. 7.135. (emphasis added)

was appropriate for the Panel to be guided by the legal interpretations articulated by the Appellate Body in that dispute in making findings on the facts of the instant dispute.

C. The Remaining Elements of Article III:8(a) of the GATT 1994

71. In light of the Panel's threshold finding that India's DCR measures are not covered by Article III:8(a) because India's purchases electricity, while discriminating against solar cells and modules, the Panel found it unnecessary to assess India's DCR measures under the other elements of Article III:8(a) or make any legal findings with respect to those elements.[94] Likewise, if the Appellate Body upholds the this finding that would be unnecessary to examine India's appeals regarding the remaining elements of Article III:8(a).

72. In the event the Appellate Body reverses the Panel's "products purchased" finding, India has requested the Appellate Body to complete the Panel's analysis with respect to the remaining elements of Article III:8(a) and find that India's DCR measures are outside the scope of Article III. The United States does not dispute that that the Panel made the factual findings on which India bases its request. However, these findings do not support the legal assertions India makes.

73. First, India's procurement of solar power electricity is not for a "governmental purpose" because the Indian government is, at most, an incidental consumer of the electricity generated under India's DCR measures, and India has failed to identify a valid governmental purpose for its procurement under its DCR measures. Second, India's procurement of electricity is "with a view to commercial resale" because the electricity procured under the DCR measures is sold to downstream household, retail, and commercial consumers over India's national power grid by distribution companies that that make profits from such sales.

1. India's Procurement of Electricity Under its DCR Measures is Not for a "Governmental Purpose" within the Meaning of Article III:8(a)

74. The Appellate Body has observed that "the phrase 'products purchased for governmental purposes'" in Article III:8(a) refers to (1) what is consumed by government or (2) what is provided by government to recipients in the discharge of its public functions.[95] India's procurement of electricity under its DCR measures does not meet either of these criteria. The Indian government is, at most, an incidental consumer of the electricity purchased, and the policy goals behind India's procurement of electricity are not "public functions" of the Indian government.

---

[94] *India – Solar Cells (Panel)*, para7.136. ("We have found that the "product purchased" under the DCR measures is electricity and that the discrimination relating to solar cells and modules under the DCR measures is not covered by the derogation of Article III:8(a). This is a threshold legal element that must be satisfied in order to find that a measure is covered by the derogation in Article III:8(a), and the DCR measures fail to meet this threshold. Accordingly, it is not necessary for us to conduct any further assessment of the remaining legal elements of Article III:8(a) to determine the applicability of this derogation.")

[95] *Canada – Renewable Energy / Feed-In Tariff Program (AB)*, para. 5.68.

75. First, the Indian government does not consume the electricity generated under its DCR measures. Rather, the electricity generated under India's DCR measures is sold through India's national power grid, which serves primarily private household and commercial consumers.[96] The United States understands that Indian governmental agencies may be "incidental" purchasers of the electricity generated under India's DCR measures.[97] Such incidental consumption, however, is insufficient to establish purchase "for a governmental purpose" within the meaning of Article III:8(a). Specifically, the United States observes the definition of "purpose" includes "a thing to be done; an object to be attained, and intention, an aim."[98] Thus, the phrase "purchased for governmental purposes" in Article III:8(a) means that the act of purchasing must have a governmental objective, intention, or aim. It is difficult to see how an incidental use by the government would meet this standard.

76. Second, India has failed establish that it is providing electricity in the discharge of a "public function" or other "governmental purpose." The Appellate Body has observed that a "governmental purpose" – within the meaning of Article III:8(a) – is something *more* than "a governmental aim or objective" since "governmental agencies *by their very nature* pursue governmental aims or objectives."[99] India cites (1) "promoting ecologically sustainable growth" and (2) "addressing India's energy security challenge" as the relevant "governmental purposes" behind its procurement of solar power. India characterizes the relevant "public function" as "ensuring sustainable solar power development and enabling affordable access to solar power."[100] While all of these may be laudable policy goals, India has failed to explain why these qualify as "governmental purposes," rather than "aims and objectives" that the Appellate Body's has found insufficient to satisfy Article III:8(a).

2. India's Procurement of Products Under its DCR Measures is Taken with "a View To Commercial Resale" within the Meaning of Article III:8(a)

77. The facts cited by India also fail to satisfy the "not with a view to commercial resale" criterion of Article III:8(a). The electricity procured by governmental entities under India's DCR measures is sold to distribution companies that make profits by selling electricity to downstream household, retail, and commercial consumers. It is hard to see the Indian Government's purchase of solar power with this express purpose as anything other than "with a view to commercial resale."

78. India correctly notes that the United States does not dispute that India's bundling and VGF schemes are geared towards enabling the sale of solar power to Discoms (and eventually

---

[96] *See* India's Response to Panel Question 45, para. 16.
[97] *See* India's Response to Panel Question 45, para. 16 ("The government is a consumer of the solar power to the extent that the supply from the grid caters to the requirements of the government (government offices, schools, hospitals, roads, railways, etc.).[97] *However, the purchase of electricity is not limited to the use by the government as a consumer* (government offices, schools, hospitals, roads, railways, etc)." (emphasis added)
[98] *New Short Oxford English Dictionary*, p. 2421 (1993).
[99] *Canada – Renewable Energy / Feed-In Tariff Program (AB)*, para. 5.66. (emphasis added)
[100] *See* India's Appellant Submission, para. 39; *see also* India's First Written Submission, para. 143.

consumers) at a lower cost.[101] India, however, is incorrect in arguing that this establishes that the government's resales of electricity to Discoms are therefore not "commercial" in nature. Specifically, India maintains that "neither NVVN nor SECI" can be understood to engage in commercial sales *because* the bundling and VGF schemes ensure that "the price of sale of solar power to Discoms [is] at a level that would enable distribution to consumers at an affordable price."[102]

79. Such facts, however, do not rebut the conclusion that India's procurement of electricity is undertaken "with a view to commercial resale." To the contrary, India's statements demonstrate that its bundling and VGF schemes are designed to make the purchase of electricity viable as a *commercial proposition* for Discoms. They further demonstrate that when the government purchases electricity from SPDs it does so with the aim and intent of ensuring that the electricity is competitively priced and thus marketable by Discoms to consumers – that is, "with a view to commercial resale." India's statement that absent the bundling and VGF schemes, it would have been "unviable for Discoms to purchase [the electricity], or for consumers to pay for the same"[103] shows further the commercial nature of the ultimate transactions.

80. It is also significant that Article III:8(a) covers government procurement "with a *view* to commercial resale." This phrase suggests an understanding that there will be one or more transactions beyond the original procurement. Any and all subsequent transactions envisaged by the government are relevant for assessing whether the "view" at the time of procurement was "commercial resale" within the meaning of Article III:8(a). Thus, even if NVVN and SECI themselves do not engage in commercial resales of electricity, their procurement of electricity is nonetheless undertaken with a "view to [the] commercial resale" that Discoms engage in with respect to the downstream sales to commercial consumers and private households.

81. The Appellate Body has stated that "commercial resale" is evident where "the buyer seeks to maximize his or her own interest."[104] In this regard, the United States notes the uncontested fact that the Discoms that buy electricity from NVVN and SECI under the JNNSM are corporatized entities with a fiduciary duty to maximize profits or returns for shareholder.[105] This further demonstrates that India's (re)sales of electricity to Discoms are properly viewed as "commercial resale[s]" within the meaning of Article III:8(a).

82. In its appellant submission, India argues that Discoms cannot be regarded as "profit-oriented" or "profit-seeking" because they "can sell electricity only at tariffs" set by India's

---

[101] *See* India's Appellant Submission, para. 43.
[102] India's First Written Submission, para. 160 ("Neither NVVN nor SECI therefore engaged in commercial resale of the solar power procured; rather through the bundling scheme implemented under Phase I (Batch I and Batch II), and VGF under Phase II (Batch I), the Government ensured that the price of sale of solar power to Discoms was at a level that would enable distribution to consumers at an affordable price.").
[103] India's Second Written Submission, para. 34 ("As explained by India, the intervention by the Government in designing the procurement programmes incorporating bundling and VGF, therefore, essentially ensured that the sale of solar power is not linked to the costs of generation of such power, since that would have essentially made it unviable for Discoms to purchase it, or for consumers to pay for the same.)
[104] *Canada – Renewable Energy / Canada – Feed-in Tariff (AB)*, para 5.71.
[105] *See Private Distribution Companies in India* (Exhibit US-36).

electricity regulatory commissions"[106] and are thus "not free to determine the price of sale to their consumers."[107] The United States considers that India's argument on this score proves too much, as it suggests actors in regulated markets cannot be profit driven. Moreover, the United States observes that while India argues that Discoms are not 'profit-driven" or "profit-seeking", at no point has India disputed that Discoms seek to generate profits from their downstream sales of electricity, and in fact do so. In any event, India has presented no evidence to suggest that the ultimate buyers, commercial users, and private households are not seeking to maximize their self-interest.

83. For these reasons, the United States submits that the Appellate Body should reject India's request that the Appellate Body find that the procurement and purchase of products under India's DCR measures is not with a view to commercial resale within the meaning of Article III:8(a) of the GATT 1994.

V. ISSUES RELATED TO ARTICLE XX(J) OF THE GATT 1994

84. The Panel also rejected India's arguments with respect to Article XX(j) of the GATT 1994, which provides that nothing in the GATT 1994 shall be construed to prevent the adoption or enforcement by any Member of measures "essential to the acquisition or distribution of products in general or local short supply." The Panel correctly found that, in light of India's ready access to imported solar cells and modules, India could not defend its DCR measures under Article XX(j) of the GATT 1994 as "essential" for the "acquisition of products in short supply."[108] India argued that solar cell and modules are in "local short supply" in India because India "lack[s] manufacturing capacity of solar cells and modules."[109] The Panel, however, concluded that the phrase "products in general or local short supply" refers to a situation in which the quantity of available supply of a product, from *all sources*, does not meet demand in a relevant geographical area or market."[110] It observed that as India did not dispute that there was a sufficient quantity of solar cells and modules available in the country *from all sources* (*i.e.*, imported and domestically manufactured) to meet the demand of consumers, India's Article XX(j) defense fails.[111]

85. On appeal, India alleges that the Panel erred by finding that a product cannot be in "general or local short supply" for a Member if it is able to acquire the product through importation.[112] This assertion is without merit because Article XX(j), by its terms, is concerned with whether a Member has the ability to *acquire* the product in purported short supply ("essential to the acquisition … of products" in short supply). Thus, where consumers can acquire the product at issue through importation, there is no basis to invoke Article XX(j). By

[106] India's Appellant Submission, para. 51.
[107] India's Appellant Submission, para. 56.
[108] *See India – Solar Cells (Panel)*, para. 7.236.
[109] India's first written submission, para. 213.
[110] *India* – India – Solar Cells *(Panel)*, 7.234.
[111] *See India – Solar Cells (Panel)*, para. 7.236.
[112] *See generally* India's first written submission, paras. 64-65.

the same reasoning, where the consumers of a Member are currently satisfying demand for a product through importation or through a combination of importation and local production the product, necessarily, cannot be in "general or local short supply" within the meaning of Article XX(j). The Panel was therefore correct to conclude that solar cells and modules are not "products in general or local short supply" in India given that "India ha[d] not argued that the quantity of solar cells and modules available from all sources, *i.e.* both international and domestic, is inadequate to meet the demand of Indian SPDs or other purchasers."[113]

86. India also alleges that the Panel made several legal errors in its "limited analysis" of whether India's DCR measures are "essential" within the meaning of Article XX(j). The Panel observed that "the relevant question under Article XX(j) is whether [India's] DCR measures are "essential to the acquisition" of products in short supply, [] not whether the acquisition of those products is in turn essential for the achievement of some wider policy objective."[114] On appeal, India argues that the "issue of whether the acquisition of solar cells is essential under Article XX(j) has to be seen in the context of the policy objectives of such acquisition."[115] India's assertion is without merit because Article XX(j), by its terms, is concerned with whether the *measure* at issue is "essential" to acquiring a product, not whether the product itself – or even acquisition of the product – is essential.

87. India's also alleges that the Panel, in several respects, acted inconsistently with Article 11 of the DSU by failing to adequately consider certain evidence and argumentation proffered by India pertaining to the examination of India's DCR measures under Article XX(j). As the United States will explain below, India's allegations are universally without merit, either because they are simply inaccurate, do not give rise to claims of error under Article 11 in any event, or both.

A. The Panel Did Not Err In Its Interpretation of the Terms "General or Local Short Supply" as Used in Article XX(j)

88. The Panel correctly found that a product is in "in general or local short supply," within the meaning of Article XX(j), "when the quantity of available supply of that product, *from all sources*, does not meet demand in [a] relevant geographical area or market."[116] This interpretation comports with the ordinary meaning of the terms "in general or local short supply" in their context and in light of their object and purpose and is further supported by the drafting history of Article XX(j) of the GATT 1994.

1. The Panel's Approach to Interpreting the Terms "General or Local Short Supply" Was Consistent with Established Principles of Treaty Interpretation

89. As noted, the Panel concluded that phrase "products in general or local short supply" refers to a situation in which the quantity of available supply of a product, from *all sources*, does

[113] *India – Solar Cells (Panel)*, para. 7.236.
[114] *India – Solar Cells (Panel)*, para. 7.340.
[115] India's Appellant Submission, para. 116.
[116] *India – Solar Cells (Panel)*, 7.234. (emphasis added)

not meet demand in a relevant geographical area or market."[117] India asserts that the Panel, in reaching this interpretation, failed to apply "settled principles of treaty interpretation"[118] and "imparted an altogether new meaning to Article XX(j)"[119] that "has no textual basis."[120] India's assertion is without merit because the Panel's interpretation reflects the ordinary meaning of the terms "products in general or local short supply" in their context and in light of their object and purpose.[121]

90. India's allegation of legal err is two-fold. First, India asserts that the Panel erred by interpreting the terms "'general or local' in isolation from the words "'short supply.'"[122] India argues that this constitutes a legal err because

> The terms of Article XX(j) are unequivocal: the terms "general or local" [sic] qualify the terms "short supply", and not the demand in the general or local market. The use of the terms "general or local" to qualify the words "short supply" is a clear reflection of intent to qualify the source of the supply as "general or local" as opposed to "international supply" as reflected in the proviso to Article XX(j). *The text of Article XX(j) amplifies that situations of "international supply" are distinct from situations of "general or local" supply.* The words "short supply" in Article XX(j) cannot therefore be read without imparting meaning to the context in which these terms have been used, which is "general or local short supply. (emphasis)

India thus maintains that Article XX(j) recognizes two distinct "sources of supply": (i) "general or local supply" versus (ii) "international supply." In India's view, the Panel's "piecemeal" approach to interpreting the phrase "general or local short supply" failed to capture this distinction. The upshot of India's argument is that a product can be "in general or local short supply" in a country, even if there is "international supply" of the product available for import into the country.

91. India's legal interpretation is incorrect because Article XX(j) is manifestly agnostic with respect to the *source* of supply of a product. The terms "products" in Article XX(j) is unqualified by origin, indicating that it addresses supply of that product without respect to origin or "source of supply." In contrast, the provisions of the GATT 1994 that address products of a particular origin identify that fact explicitly. For example, Article III:4 speaks of "products of the territory of any contracting party" and "like products of national origin"; Article II:1(b) refers to "products of territories of other contracting parties"; Article II:1(c) refers to "products of territories entitled under Article I to receive preferential treatment upon importation"; and Article XX(i) speaks of "restrictions on exports of domestic materials."

---

[117] *India – Solar Cells (Panel)*, 7.234. (emphasis added)
[118] India's Appellant Submission, para. 76.
[119] India's Appellant Submission, para. 76.
[119] India's Appellant Submission, para. 73.
[120] India's Appellant Submission, para. 73.
[121] Article 31 of the Vienna Convention of the Law of Treaties provides that:
> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

[122] India's Appellant Submission, para. 73.

92. India also errs in seeking to use the phrase "international supply" to give an *a contrario* reading to the earlier phrase "general or local short supply." The two phrases address different economic phenomena. "International supply" simply refers to the supply of a product on an international basis. "Short supply," in contrast, is understandable only as a product of the interplay between supply *and* demand. That is, "supply" is only "short" when it is inadequate to demand. The modifiers "general or local" make clear that this situation may exist if "supply" is "short" on a local basis (for example, the territory of a Member or Members) or on a "general" basis (for example, the global or international markets). Thus, "international supply" in the proviso does not exist in opposition to the concept of "general or local supply" as India argues. It instead refers to one of the potential sources of supply that, when confronted with a particular level of local or general demand, might lead to a situation of "short" supply. The proviso ensures that, whatever essential remedial measures a Member takes consistent with Article XX(j), they will not deprive other Members of an equitable share of international supply of the product in question.

93. Second, India argues that the Panel erred by reading the concept of "production" out of the meaning of "supply." India cites the dictionary definition of "supply" – "amount of a commodity actually produced and available for purchase"[123] and reasons that "supply" in Article XX(j) encompasses only those products "actually produced in the general or local market."[124] The upshot of India's preferred interpretation is that a product can be "in general or local short supply" in a country where there is a "lack of domestic manufacturing/production" of the product, even if the product can and is being imported in sufficient quantities to satisfy consumer demand.

94. India's allegation of err on this score is also without merit because the Panel did assess the element of "production" in interpreting the terms "general or local" and "supply".[125] Indeed, the Panel acknowledged that it did "not consider that India's manufacturing capacity for solar cells and modules is *irrelevant* to the question of whether those are "products in general or local short supply."[126] The Panel observed that "a lack of domestic production…is a *necessary*, but not sufficient, condition for finding that the supply of that product, from all sources, does not meet demand in the relevant geographic are or market in question."[127] Thus, the Panel did not fail to refer to domestic production in its evaluation of short supply.

2. The Panel Did Not Err In Its Assessment and Application of the Negotiating History of Article XX(j)

95. India asserts that the negotiating history of Article XX(j) contradicts the Panel's finding that "products in general or local short supply refers to a situation in which the quantity of available supply of a product, from *all sources*, does not meet demand in a relevant geographical

[123] India's Appellant Submission, para. 75. (emphasis original).
[124] India's Appellant Submission, para. 75.
[125] *See* India's Appellant Submission, para. 75 ("The Panel should have logically scrutinized the terms 'general or local' in the context of the meaning of the word 'supply' which would include an assessment of production.")
[126] *India – Solar Cells (Panel),* para. 7.234. (emphasis added)
[127] *India – Solar Cells (Panel),* para. 7.234. (emphasis added)

area or market."[128] India's assertion are without merit because applicable rules of treaty interpretation do not call for the use of negotiating history in this fashion; and, in any event, the Panel's interpretation, in fact, finds support in the negotiating history of Article XX(j).

96. India asserts that the Panel's interpretation is legally erroneous because it

> is not supported by the negotiating history, since nothing in the negotiating history indicates any discussion as regards the ability of supply to meet demand of a product in the relevant geographical area/market when the terms "general or local" was introduced into the text.

97. First, under customary rules of international law, the recourse to supplementary means of interpretation, such as negotiating history, may be had where an interpretation based on the "ordinary meaning" of the terms in a provision using Article 31 results in meaning that is "ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable," or to confirm the meaning resulting from the Article 31 rule.[129] The Panel considered that its interpretation based on ordinary meaning did not result in an ambiguous or absurd interpretation and, therefore found it unnecessary to have recourse to supplementary means of interpretation of the terms "products in general or local short supply."[130] Thus, assuming arguendo that the Panel's survey of the negotiating *had* suggested one more possible alternative interpretations of the phrase "general or local short supply," this would not call into question that soundness of the interpretation arrived at by the Panel based on the ordinary meaning of terms of Article XX(j). At any rate, as the United States has explained above, the ordinary meaning of the word "supply" (*i.e.*, "[t]he amount of any commodity actually produced and available for purchase. Correl. to *demand*."), necessarily involves a corresponding measurement of the level of demand for that product. Thus, contrary to India's suggestion,[131] the fact that the negotiating history of Article XX(j) might not include an *explicit* discussion "as regards the ability of supply to meet demand in [a] relevant geographic area/market" hardly indicates that the Panel's interpretation is in error.

98. Second, the negotiating history supports the Panel's finding that Article XX(j) does not recognize distinctions among "sources of supply" for purposes of assessing whether a product is "in general or local short supply" within the meaning of that provision. As recorded in the GATT Analytical Index

> It was stated during the course of the discussion at Geneva in 1947 that the phrase "general or local short supply" was "understood to *include* cases where a product,

---

[128] *India – Solar Cells (Panel)*, 7.234.

[129] Article 32 of Vienna Convention on the Law of Treaties provides that

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

[130] *See India – Solar Cells (Panel)*, paras. 7.207-7.208 ("[W]e consider that the ordinary meaning of the terms "products in general or local short supply" refers to a situation in which the quantity of available supply of a product does not meet demand in the relevant geographical area or market. We do not consider it necessary to have recourse to supplementary means of interpretation to determine the meaning of these terms.").

[131] India's Appellant Submission, para. 81.

> although in international short supply, was not necessarily in short supply in all markets throughout the world. It was not used in the sense that every country importing a commodity was in short supply otherwise it would not be importing it.[132]

Thus, contrary to India's assertions, the GATT 1947 Contracting Parties did not understand the terms "general or local short supply" and "international supply" to denote "distinct" conditions of "short supply." Rather, they understood the single phrase "general or local short supply" to describe and encompass both situations where a product is in "general" short supply at the international level and situations where a product is in short supply in one or more "local" (*i.e.*, country-specific or regional) markets. So while the Contracting Parities appreciated that the conditions of supply could differ across geographic regions, they did not recognize any distinction in the sources relevant to an evaluation of whether supply was "short" on a general or local basis.

99. In addressing the negotiating history, India places particular emphasis on revision to the draft that that changes the conditions for invoking what is now Article XX(j) from "to achieve the equitable distribution of a product in short supply" to "essential to the acquisition of a product in short supply."[133] In India's view, that change signals a recognition that short supply may exist locally even if the product in question is generally available on an international basis.[134] The United States agrees, and the Panel's interpretation encompasses such scenarios which may occur, for example, when there is a breakdown in supply chains or local conditions that preclude ready access to imports.

3. The Panel Did Not Err under Article 11 of the DSU in Its Assessment that India Failed to Articulate What Constitutes a "Sufficient Level of Manufacturing" of Solar Cells and Modules in India for Purposes of Article XX(j)

100. While assessing the argument that India's "'lack of domestic manufacturing capacity for solar cells and modules amounts to a situation of local and general short supply,'"[135] the Panel observed that "India has not itself articulated what would constitute 'sufficient' manufacturing capacity for purposes of Article XX(j)."[136] India asserts that Panel acted inconsistently with Article 11 of the DSU by "refus[ing] to take into account" India's submissions regarding its domestic manufacturing and solar power generation targets.[137] India's allegation is without merit, because the Panel did, in fact, take account of India's submissions on this score, but found them irrelevant in light of other findings of the Panel.

101. India argued that its low domestic manufacturing capacity for solar cells and modules demonstrated that those products are "in local and general short supply" in India for purposes of Article XX(j). While India admitted that it could not "determine with absolute precision as to what would amount to sufficient domestic manufacturing capacity," it estimated that a "domestic

---

[132] GATT Analytical Index (citing EPCT/A/SR.40(2), p. 15).
[133] India's Appellant Submission, para. 79.
[134] India's Appellant Submission, para. 80.
[135] *India – Solar Cells (Panel),* para. 7.220 (citing India's closing statement at the first meeting of the Panel, para. 9).
[136] *India – Solar Cells (Panel),* para. 7.226.
[137] India's Appellant Submission, para. 99.

manufacturing capacity of solar cells and modules…in the range of 4-5 GW, could be considered as reaching the point where such a concern would be addressed."[138] India, on appeal, asserts that,[139] in light its submissions relating to production and solar power generation targets, the Panel erred by concluding that India has not "articulated what would constitute 'sufficient' manufacturing capacity for the purposes of Article XX(j)." [140]

102. India, however, misunderstands how the Panel arrived at this conclusion. The Panel did not find that India's 4-5 GW target was insufficiently precise. Rather, it found that India has failed to explain how it concluded that that particular figure was the level of domestic production needed to avoid a situation of short supply. Specifically, the Panel observed that India's "interpretation of Article XX(j) does not present any objective point of reference to serve as the basis for an objective assessment of whether a product is in 'short supply' within the meaning of Article XX(j)."[141] The absence of an evidence-based baseline and a reasoned comparison in India's argument prevent any conclusion as to whether a situation of short supply existed.[142] It is this legal flaw in India's interpretation that led the Panel to reject India's Article XX(j) defense, and not a mistaken conclusion that India had neglected to provide any estimate of the level of capacity it considered sufficient. This was an especially problematic omission on part of India in light of the requirement that any measures taken under Article XX(j) "shall be discontinued as soon as the conditions give rise [to the short supply] have ceased to exist."

103. Thus, to the extent the Panel declined to rely on India's submissions relating to targets for solar cell and module production and electricity generation targets, it did so because it did not find such evidence relevant in light of the Panel's legal finding that a "short supply," within the meaning of Article XX(j), refers to a situation in which the quantity of available supply of a product from all sources (including imports), does not meet demand in the relevant geographic area or market."[143] The fact that the Panel did not attribute the weight or significance to India's submissions that India considers the Panel should have, does not suffice to establish that the Panel acted inconsistently Article 11 of the DSU.

4. The Panel Did Not Err in Its Assessment of India's Arguments Relating to the Risk of Short Supply

104. In light of India's submissions related to the "risk of short supply" and "risk of a disruption in imports of solar cells and modules,"[144] the Panel examined whether Article XX(j) covers "products at risk of becoming in short supply."[145] On appeal, India asserts that the Panel mischaracterized India's argumentation relating to the "risk of short supply." However, the Panel explicitly recognized the very points that India states were "mischaracterized," and India

[138] India's second written submission, para. 119.
[139] India's Appellant Submission, para.
[140] *India – Solar Cells (Panel)*, para. 7.226.
[141] *India – Solar Cells (Panel)*
[142] *India – Solar Cells (Panel)*, para. 7.227.
[143] *See India – Solar Cells (Panel)*, para. 7.207.
[144] *See generally India – Solar Cells (Panel)*, para. 7.237-7.250.
[145] *India – Solar Cells (Panel)*, para. 7.250.

indicates no way in which the alleged errors affected the Panel's ultimate conclusion. These arguments accordingly fail to identify any appealable error.

105. The Panel recognized that, in addition to arguing that solar cell and modules were currently in short supply, India also argued that "there is a *risk* of a disruption in imports, and the risk of a resulting shortage of solar cells and modules for Indian SPDs."[146] It characterized these as "alternative" arguments. India takes issue with this characterization, insisting that India actually advanced it not as an alternative argument, but as support for its main argument that current production levels are too low in light of "the risks associated with imports."[147] It is India that errs. The Panel explicitly recognized that India made these points as part of a single argument that domestic production levels are currently too low, and evaluated them as such. But in light of very real ambiguity in India's position, it also addressed the possibility that India's assertions on the risk of supply disruption were an alternative basis for the purported short supply. This was a matter of thoroughness on the Panel's part. India identifies no way in which this additional step interfered with the remainder of the Panel's analysis. Its argument accordingly provides no basis for appeal.

106. The Panel fully appreciated the substance of India's argumentation relating to "risk of short supply," as reflected in its statement that it

> Understand[s] that when India argues that there is a risk of a disruption in imports of affordable solar cells and modules… it is addressing whether the DCR measures are "essential" to the acquisition of solar cells and modules, and *not* the threshold issue of whether there is "local or general short supply" in the first place. With respect to the threshold question of whether there is "local or general short supply" in the first place, we understand India's sole argument to be that "India's lack of manufacturing capacity of solar cells and modules amounts to a situation of local and general short supply of solar cells and modules in India". *We understand India's view to be that the concept of "products in general or local short supply" may cover products at risk of being in short supply, but it is not arguing, in the present case, that solar cells and modules are "products in general or local short supply" on that basis.* However, given that India's position is not entirely free of ambiguity, we will consider this issue in light of Articles 31 and 32 of the Vienna Convention.[148]

107. Thus, there is no basis to India's allegation that the Panel mischaracterized India's arguments relating to short supply. Indeed, that the Panel was acutely aware of the nuance and nature of India's argumentation on this score, and appreciated that India had not argued that solar cells and modules are at *risk* of falling into short supply.

108. Second, it is clear that the Panel was correct in observing that India's position was "not entirely free from ambiguity."[149] When the Panel asked India "*Is it India's position that the*

[146] *India – Solar Cells (Panel),* para. 7.237.
[147] India's Appellant Submission, para. 7.104.
[148] *India – Solar Cells (Panel),* para. 7.243. (emphasis added)
[149] *India – Solar Cells (Panel),* para. 7.243.

concept of a product in "short supply" covers a product at risk of becoming in short supply?" instead of replying that they were part of a single analysis, India stated:

> India submits that the concept of "short supply" under Article XX(j) would include situations of existing short supply, *as well as any risks to short supply*. India's legitimate policy objectives of ecologically sustainable growth while addressing the challenge of energy security, would necessarily require addressing risks of short supply. (emphasis added)

109. Thus any uncertainty as to the nature of India's arguments on this issue arose from India's presentation, and not any error on the part of the Panel.

110. In any event, India does not indicate any way in which this supposed error affected the Panel's ultimate conclusion. If anything, the Panel attempted to give India the benefit of the doubt by evaluating whether the potential alternative meaning of India's argument might independently supported an Article XX(j) defense. Such thoroughness on the Panel's part does not provide a basis for appeal.[150]

B. The Panel Did Not Err By Finding that the Relevant Analysis Under Article XX(j) Is Whether the *Measure* in Question is "Essential"

111. As noted above, the Panel correctly found that solar cells and modules were not "products in general or local short supply" in India within the meaning of Article XX(j), because facts not in dispute demonstrated that India was not experiencing any difficulty satisfying domestic demand for solar cells and modules through importation. In light of this threshold finding, the Panel found it unnecessary to undertake a separate legal analysis of whether India DCRs measures were "essential" within the meaning of Article XX(j).

112. The Panel, however, did observe that "the relevant question under Article XX(j) is whether [India's] DCR measures are "essential to the acquisition" of products in short supply, [] not whether the acquisition of those products is in turn essential for the achievement of some wider policy objective."[151] On appeal India argues that the "issue of whether the acquisition of solar cells is essential under Article XX(j) has to be seen in the context of the policy objectives of such acquisition."[152] India's assertion is without merit because Article XX(j), by its terms, is concerned with whether the *measure* at issue is "essential" to acquiring a product, not whether the product itself – or even acquisition of the product – is essential. In this regard, the United

[150] In its conclusion to this argument India asserts that it "is not a disputed fact" that "[t]here is an actual situation of general and local short supply because of lack of domestic production manufacturing of solar cells and modules" India's Appellant Submission, para. 105, first bullet. The United States disputes this view, and the facts established that the combination of domestic production and imports is adequate to meet domestic demand in India. *India – Solar Cells (Panel),* para. 7.236. ("India has not argued that the quantity of solar cells and modules available from all sources, i.e. both international and domestic, is inadequate to meet the demand of Indian SPDs or other purchasers.").
[151] *India – Solar Cells (Panel),* para. 7.340.
[152] India's Appellant Submission, para. 116.

States observes that India did not even attempt to argue that its DCR measures are "essential to the acquisition" of solar cells and modules in India.

1. The Panel Did Not Err In its Characterization of the Objectives behind India's DCR Measures

113. In the course of assessing whether India's DCR measures are "essential" for purposes of Article XX(j), the Panel took note of India's stated rationale(s) for its DCR measures.[153] On appeal, India asserts that the Panel mischaracterized those and thereby committed an error under Article 11 of the DSU. India's assertion is without merit because (1) the Panel, in fact, accurately characterized India's argument for why its DCR measures were "essential" for purposes of XX(j); and (2) in any event, even if the Panel had mischaracterized the rationale for India's DCR measures in the way that India alleges, that would not give rise to an appeal under Article 11 of the DSU.

114. India asserts that the Panel inaccurately characterized the rationale for India's DCR measures "as the need for 'India SPDs [to] have access to a continuous and affordable supply of solar cells and modules.'"[154] India explains that, instead

> The essence of India's argument, as presented in both its written submissions as well as its responses to the Panel's questions is that the *DCR measures are essential to the acquisition of solar cells and modules by SPDs that are engaged in solar power generation, in order to ensure realization of India's policy objectives of energy security, sustainable development and ecologically sustainable growth*. India needs to ensure that it is not dependent on imports for critical components for solar energy, such as solar cells and modules, and for this reason it needs to have the ability to use the DCR measures to enable the growth of local manufacturing. Additionally, India has also emphasized that domestic manufacturing of solar cells and modules is fundamental to India's objective to ensure sustainability in affordable supply of solar power to consumers.[155]

115. India is splitting hairs. Indeed, the entirety of India's argument is reflected at paragraph 7.189 of the Panel report:

> India emphasizes that its SPDs currently depend predominantly on foreign solar cells and modules for that purpose, and according to India this dependence on imports of foreign solar cells and modules creates a risk of disruption in continuous and affordable supply of solar cells and modules. India submits that it is therefore necessary to ensure that there is an adequate reserve of domestic manufacturing capacity for solar cells and modules in case there is a disruption in supply of foreign solar cells and modules. India refers to this as an "emergency reserve". India argues that the DCR measures are necessary to the acquisition of solar cells and modules by SPDs because they are the only means that India has to increase domestic manufacturing capacity of cells and modules, and thereby reduce the risk of a disruption in Indian SPDs' access to a continuous and affordable

[153] *See generally India – Solar Cells (Panel)*, para. 7.243, paras. 7.189-7.190.
[154] India's Appellant Submission, para. 109.
[155] India's Appellant Submission, para. 110. (emphasis added)

> supply of the solar cells and modules needed to generate solar power. In sum, India *argues that the DCR measures "are essential to the acquisition of solar cells and modules by SPDs that are engaged in solar power generation, in order to ensure realization of India's policy objectives of energy security, sustainable development and ecologically sustainable growth"*.[156]

116. Thus, the panel report captures the overall objectives behind India's DCR measures. Importantly, the panel report records *verbatim* India's specific argument for why its DCR measures are "essential" within the meaning of Article XX(j), namely that they are essential to the acquisition of solar cells and modules by SPDs that are engaged in solar power generation, in order to ensure realization of India's policy objectives of energy security, sustainable development and ecologically sustainable growth.[157] There is therefore no basis to India's assertion that the Panel misconstrued India's arguments relating to the rationales behind its DCR measures.

2. The Panel Correctly Found that the Policy Objectives Behind India's DCR Measures are Not Legally Relevant to an Evaluation of Whether the DCR Measures are "Essential" Within the Meaning of Article XX(j)

117. The Panel found that the policy objectives behind India's DCR measures are not "legally relevant to the question of whether the DCR measures *themselves* are 'essential to the acquisition' of products in short supply under Article XX(j)."[158] India asserts that this finding is in error, arguing that "the issue of whether or not acquisition of solar cells and modules is essential under Article XX(j) has to be seen in the context of the policy objectives of such acquisition."[159] India's assertion is without merit because Article XX(j), by its terms, is concerned with whether the *measur*e at issue is "essential" to the acquisition a product, not whether the "product" is essential, or even whether "acquisition" of the product is "essential."

118. Read in tandem with the chapeau of Article XX, Article XX(j) provides in relevant part that

> [N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of *measures* . . . (j) *essential* to the acquisition or distribution of products in general or local short supply[.] (emphasis added)

119. The term "essential" in clause (j) modifies the term "measure" in the Chapeau. Accordingly, Article XX(j), applies when a *measure* is "essential" to acquisition of a product. The question(s) of whether the "product" is essential, or whether "acquisition" of the product is essential for the achievement of certain policy goals, are thus not relevant for purposes of this threshold question.

---

[156] *India – Solar Cells (Panel),* para. 7.189.
[157] India's Appellant Submission, para.110. (emphasis added)
[158] *India – Solar Cells (Panel),* para. 7.340. (emphasis added)
[159] India's Appellant Submission, para. 116.

120. Second, at any rate, the Panel did go on to evaluate India's DCR measures in light of India's "wider objectives of energy security and sustainable development" as part of the multi-factor analysis developed by the Appellate Body to evaluate whether a measure is "necessary".[160] As explained in sections V.B.5 and V.B.6 below, however, the Panel found that India had failed to establish that its DCR measures even "contribute to" these objectives.

3. "Essential" Means "Absolutely Indispensable" or "Absolutely Necessary"

121. India correctly notes that the Panel recorded the parties' arguments on the meaning of the term "essential" within Article XX(j). In its appellant submission, India asserts that the term "essential" is a synonym for "necessary" and further that "[t]he requirement that the measure is 'essential' for its policy objective is not limited to what is "absolutely indispensable" but also encompasses situations that are 'necessary.[161]'"

122. India's assertion is not supported by the ordinary meanings of the terms "essential" or "necessary," or the Appellate Body's evaluation of those terms. Rather, it is clear that the term "essential" suggests a higher level of indispensability than the term "necessary." As a result, proving that a measure is "essential" requires a higher threshold than merely proving that a measure is merely "necessary."

123. Specifically, the Appellate Body has observed that the Oxford English Dictionary defines "essential" to mean "absolutely indispensable or necessary."[162] In contrast, the Appellate Body has found that the term "necessary" exists along a continuum; its meaning can range from "indispensable" to simply "making a contribution to." [163] It is clear that being "necessary" is less than being "absolutely necessary", and thus less than being "essential."

4. The Panel Did Not Misconstrue India's Submission Relating to the Trade-Restrictiveness of Its DCR measures

124. The Appellate Body has found that an assessment of whether a measure is "necessary" may include consideration of "the extent to which the compliance measure produces restrictive effects on international commerce."[164] The Appellate Body has further observed that "[a] measure with a relatively slight impact upon imported products might more easily be considered as 'necessar' than a measure with intense or broader restrictive effects."[165] The Panel determined – and the parties agreed – that a consideration of "trade restrictiveness" can also apply to the assessment of whether a measure is "essential" for purposes of Article XX(j).[166] Accordingly, the Panel took note of and recorded the parties' argumentation concerning the "trade-restrictiveness" of India's DCR measures. On appeal, India's asserts that the Panel

[160] *See EC – Seal Products (AB)*, para. 5.214.
[161] India's Appellant Submission, para. 120.
[162] *China – Raw Materials (AB)*, para. 326.
[163] *Korea – Various Measures on Beef (AB)*, para. 161.
[164] *Korea – Various Measures on Beef (AB)*, para. 161.
[165] *Korea – Various Measures on Beef (AB)*, para. 163. (emphasis original)
[166] *See India – Solar Cells (Panel)*, para. 7.340.

"misconstrued" India's submissions on this point.[167] India's assertion is without merit because the Panel accurately depicted India's submissions.

125. The Panel observed that

> The arguments presented by India generally seek to emphasize that the scope and coverage of the applicable DCR measure did not extend to all types of cells, modules, and/or projects, and further seek to place the DCR measures in a larger context, so as to diminish the restrictive character of the requirements imposed on the use of imported solar cells and modules[168]

126. India asserts that "[t]his is an incorrect characterization of India's arguments" and further that

> India's submissions were on the aspect of weighing and balancing all the variables, and providing a holistic contextual picture on how it is seeking to put in place a mechanism that comprises of DCR measures, which restrict imports only for a limited set of projects, while encouraging and incentivizing imports in recognition of their important role to play in India's supply chain.[169]

127. India's submissions on this point were, in fact, targeted to address the issue of "trade restrictiveness." This is made demonstrably clear by the following statements in India's second written submission:

> 66. Applying the principles of the *necessity test*, India submits that it has carefully undertaken the process of weighing and balancing of a series of factors, including the importance of the objective, the contribution of the measure to the objective, *and the trade-restrictiveness of the measure*. These are elaborated below.
>
> *Weighing and balancing of factors*
>
> 67. The Appellate Body has explained that weighing and balancing is a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgment. As explained by India, it has weighed and balanced its various priorities and in sum, the DCR Measures implemented in a limited manner, provide the best possible manner in which its policy objectives can be achieved. *It is important to understand this in the context of the fact that the DCR Measures are limited in scope, and do not operate as a prohibition on imports of solar cells and modules. In fact, India acknowledges the strong and critical role that imports have to play in the growth*

[167] India's Appellant Submission, paras. 122-124.
[168] *See India – Solar Cells (Panel)*, para. 7.358.
[169] India's Appellant Submission, para. 122.

> *of its solar power generation, and continues to encourage and incentivize the same.*

128. Thus, when India emphasized the "limited scope" of its DCR measures against a broader backdrop where India "continues to encourage and incentive" imports, it is evident that India was doing so with the explicit purpose of downplaying the "trade restrictiveness" of its DCR measures, as depicted by the Panel. That India may have also sought to address other factors of the "necessity test" (*e.g.*, importance of the objective, contribution of the measure to the objective) does not demonstrate that the Panel's "misconstrued" India's submissions relating to "trade-restiveness." At any rate, it difficult to see how the "limited scope" of India's DCR measures and India's encouragement of imports would be relevant to any other factor in the necessity analysis apart from "trade restrictiveness."

5. The Panel Did Not Err in Its Assessment of the Contribution that India's DCR Measures Make to the Objective of Ensuring a Continuous and Affordable Supply of Solar Cells and Modules for Indian SPDs

129. The Panel found that India had not demonstrated that its DCRs measures contribute to the India's stated objective of "ensur[ing] that India SPDs have access to a continuous and affordable supply of solar cells and modules."[170] India asserts that the Panel erred in arriving as this assessment by (1) characterizing India as having "not disputed" that it DCR measures would reduce the sources of supply for solar cells and modules; and (2) dismissing India's submissions on how the DCR measures have facilitated an increase in domestic production capacity for solar cells and modules.[171] The former assertion is without merit because it is simply inaccurate. The latter is without merit because, even if true, it does not give rise to a claim of error.

130. The Panel found that India had not demonstrated that its DCRs measures contribute to India's stated objective of "ensur[ing] that India SPDs have access to a continuous and affordable supply of solar cells and modules."[172] Apart from argumentation advanced by the parties, the Panel's findings was also informed by evidence in the form of real-world studies of India's DCR measures.[173] Both India and the United States submitted such evidence. The Panel found that these studies – even those submitted by India – generally cast doubt on the idea that that India's DCR measures were effective tool for increasing India's production capacity for solar cells and modules.[174]

[170] *India – Solar Cells (Panel)*, para. 7.368.
[171] *See* India's Appellant Submission, paras. 125-127.
[172] *India – Solar Cells Panel)*, para. 7.368.
[173] *See generally India – Solar Cells (Panel)*, paras. 7.364-7.366.
[174] *See India – Solar Cells (Panel)*, para. 7.367 (""With regard to the contribution of the DCR measures to the realization of India's objective over the long term, we conclude that the information before the Panel concerning the effect of the DCR measures on increasing domestic manufacturing capacity of solar cells and modules appears to cast doubt on whether such effect is positive")

131. India asserts that the Panel erred "in its conclusion that India ha[d] not disputed the argument made by the United States and the European Union on DCR measures reducing sources of supply for India SPDs."[175] India argues that the Panel's conclusion

> [I]gnores the premise of India's argument that the DCR measures are essential for developing local manufacturing capacities, which are aimed at reducing the risks arising from import dependence of solar cells and modules.

132. India's claims of error is without merit because the Panel, while noting that India had not disputed the arguments of the United States and European Union, implicitly acknowledged India's argument that DCR measures were geared toward promoting domestic production. This becomes evident upon consideration of the complete quotation of the Panel's observation:

> [I]t appears that India does not dispute the argument made by the United States and the European Union that the DCR measures, by reducing the sources of supply available to SPDs, are, *in the short term*, antithetical to the objective of ensuring Indian SPDs' access to a continuous and affordable supply of the solar cells and modules[176]

133. The Panel's inclusion of the qualifier "in the short term" reflects an the acknowledgement that, while India's DCR measures may result in near-term reductions in supply, they could result in greater domestic supply over the longer term as a result of increased manufacturing capacity. Thus, there is no merit to India's assertion that the Panel "ignore[d] the premise of India's argument that the DCRs measures are essential for developing local manufacturing capacities."[177]

134. Second, India asserts that the Panel dismissed India's refutation of the argument that "DCR measure have no role to play in the acquisition of solar cells and modules."[178] Specifically, India asserts that the Panel dismissed portions of the Phase II Policy Document that purportedly demonstrate that India's DCR measures "have in fact resulted in expansion of production capacities for solar PV cells and modules in India."[179] India's allegation of error are without merit because (1) as India acknowledges, the Panel explicitly referenced the reports in Phase II Policy Document regarding the expansion of solar cell and modules production facilities in India[180]; and (2) the Panel was correct to find that this single data point did not "refute" an overall finding that India's DCR measures do not contribute to the acquisition of solar cells and modules, in light of other evidence which indicated that the DCR measures have been ineffective in promoting the domestic manufacture of solar cells and modules. [181]

---

[175] India's Appellant Submission, paras. 126.
[176] India – Solar Cells *(Panel)*, paras. 7.363. (emphasis added)
[177] India's Appellant Submission, paras. 126.
[180] *See India – Solar Cells (Panel)*, para. 7.364.
[180] *See India – Solar Cells (Panel)*, para. 7.364.
[180] *See India – Solar Cells (Panel)*, para. 7.364.
[181] *See generally India – Solar Cells (Panel)*, para. 7.364.

6. The Panel Did Not Fail to Make an Objective Assessment of Evidence Submitted by India Pertaining to Whether India's DCR Measures Contribute to Ensuring a Continuous and Affordable Supply of Solar Cells and Modules for India SPDs

135. As noted above, Panel consulted several real-world studies of India's DCR measures, and found that they generally cast doubt on the contention that India's DCR measures were effective tool for increasing India's production capacity for solar cells and modules.[182] The Panel noted that this was true *even for the two studies submitted by India*.[183] India now asserts that the Panel acted inconsistently with Article 11 of the DSU by (1) selectively highlighting the negative aspects of the studies submitted by India, as they pertained to India's DCR measures; and (2) failing to ask India questions that might have allowed India to provide "clarifications" or "explanations" that put the documented "shortcomings"[184] of its DCR measures in context.[185] These arguments do not provide a valid basis to appeal under Article 11 of the DSU.

136. India's argument errs in four principal ways. First, India's claim of error relies on the assertion that the Panel selectively referenced only the parts of the studies that cast doubt on the effectiveness of the DCR measures, while allegedly ignoring the parts that detailed the "positive impact" of the DCR measures. [186] India forgets that panels have no obligation to refer to every piece of evidenced submitted by party, or every statement within a particular piece of evidence.[187] Thus, the fact that the Panel did not explicitly refer to certain points raised by India does not rise to an error under Article 11 of the DSU.

137. Second, the quotations cited by the Panel accurately reflect the general tenor of the reports cited by India, which were for the most part damning in their assessment of India's DCR measures as a tool for increasing India's production capacity for solar cells and modules.[188] Isolated examples of supposedly "positive" findings do not detract from the overarching conclusion, as supported by the negative findings to which the Panel referred. Thus, the Panel's summary of the evidence in question does not suggest any failure to make an objective assessment under Article 11 of the DSU. [189]

138. Third, India argues that the Panel "has deprived India of a right to a fair response" by not seeking "clarifications" or "explanations" that might have permitted India to respond to parts of the studies that cast doubt on the effectiveness of India's DCR measures.[190] India's assertion is without merit because the "right of response" does not impose an obligation on panels to seek unprompted "clarifications" or "explanations" with respect to evidence submitted by the parties.

---

[182] *See India – Solar Cells (Panel)*, para. 7.367 (""With regard to the contribution of the DCR measures to the realization of India's objective over the long term, we conclude that the information before the Panel concerning the effect of the DCR measures on increasing domestic manufacturing capacity of solar cells and modules appears to cast doubt on whether such effect is positive")
[183] *See India – Solar Cells (Panel)*, para. 7.364 (referencing Exhibits IND-8 and IND-9)..
[184] India's Appellant Submission, para. 128.
[185] *See* India's Appellant Submission, para. 129.
[186] *See* India's Appellant Submission, para. 129.
[187] *China Rare Earths (AB)*, para. 5.178; *EC – Fasteners (AB)*, paras. 441-442; *Brazil – Retreaded Tyres*, para. 202.
[188] *See generally India – Solar Cells (Panel)*, para. 7.364.
[189] *See China Rare Earths (AB)*, para. 5.178; *EC – Fasteners (AB)*, para. 442.
[190] *See* India's Appellant Submission, para. 129, 136.

There is no indication that the Panel misunderstood any of the content detailed in the studies submitted as evidence by India, so the United States does not understand what point of departure there would have been for the Panel to seek further "clarifications" or "explanations." Moreover, India misunderstands the "right of response"[191] it invokes. As the Appellate Body has found in *Australia – Salmon*, "[a] fundamental tenet of due process is that a party be provided with an *opportunity to respond to claims made against it*."[192] India, however, now seeks to invoke the "right of response" with respect to *evidence that India submitted* to the Panel. India had a full chance to review the reports before submitting them, as well as an opportunity at the time of their submission to address any "negative" findings and explain why the positive findings were entitled to greater weight. Thus, the Panel's summary of these reports did not deprive India of its opportunity to respond.

139. Fourth, and finally, the Appellate Body has made clear that a party asserting a defense under Article XX bears the burden of establishing the elements of that defense.[193] To the extent India considered that some of the information in the documents it submitted to the Panel might undermine India's argument, it was incumbent upon India to affirmatively provide any necessary "clarifications" or "explanations" that might mitigation such information. That India failed to do so does not give rise to a claim of error under Article 11 of the DSU.

7. The Panel Did Not Err In Its Observations Regarding Indian Manufactures' Access to Raw Materials and Lack of Guarantee that Indian Manufactures Would Supply Solar Cells and Modules to Indian SPD

140. In its assessment of whether India's DCR measures contribute to the objective "ensur[ing] that India SPDs have access to a continuous and affordable supply of solar cells and modules" the Panel observed that (1) Indian solar cell and modules manufacturers were facing difficulties acquiring raw materials[194]; and (2) there was no guarantee that India solar cell and module manufactures would choose to supply Indian SPDs.[195] India does not dispute either of these facts, but asserts that the Panel's observations reflect a "basic misunderstanding" of the rationale behind India's DCR measures,[196] and thus constitute an error in the Panel's assessment of the "contribution of the DCR measures to [India's] objectives."[197] India allegation is without merit, as nothing in the Panel's observations demonstrates any misunderstanding of India's arguments.

---

[191] India's Appellate Submission, para. 136.
[192] *Australia – Salmon (AB)*, para. 278. (emphasis added)
[193] *US – Wool Shirts and Blouses (AB)*, para. 46.
[194] *See India – Solar Cells (Panel)*, para. 7.365. ("Indian manufacturers have stated themselves that they face other systemic limitations, such as poor infrastructure, lack of raw materials, an undeveloped supply chain, and lack of financing.").
[195] *See India – Solar Cells (Panel)*, para. 7.366 ("India does not dispute that domestically produced solar cells and modules would become part of the global market and thus likely be sold to the highest paying purchaser, which would not necessarily be an Indian buyer. The information before the Panel is that, currently, Indian manufacturers of solar cells and modules, rather than selling exclusively to Indian SPDs, also sell their products to foreign buyers.").
[196] India's Appellant Submission, para. 138.
[197] India's Appellant Submission, para. 138.

141. India takes issue with following observations of the Panel[198]:

> "Indian manufacturers have stated themselves that they face other systemic limitations, such as poor infrastructure, *lack of raw materials*, an undeveloped supply chain, and lack of financing."[199]; and
>
> "India does not dispute that domestically produced solar cells and modules would become part of the global market and thus likely be sold to the highest paying purchaser, which would not necessarily be an Indian buyer. The information before the Panel is that, currently, Indian manufacturers of solar cells and modules, rather than selling exclusively to Indian SPDs, also sell their products to foreign buyers."[200]

142. India asserts that the Panel's observations "reflect[] the Panel's view that for assessing contribution of the DCR measures to [India's] objectives, the products would necessarily need to be used by India's SPDs."[201] India further asserts that this demonstrates an error in Panel's "basic misunderstanding" of the rationale behind India's DCR measures.[202] Instead, India explains that goal of its DCR measures

> is to ensure that [India] has the technology and human skills to produce critical components required for its energy security. It is this which will reduce the risks associated with dependence on imports.[203]

143. India is incorrect – the Panel's observations go precisely to the question of whether India's DCR measure can help reduce India's reliance on imports. First, to the extent domestic producers of the raw materials are unable to supply Indian manufactures, it follows that India will continue to face "risks associated dependence on imports,"[204] albeit imports of raw materials. DCRs on solar cells and modules would do nothing to alleviate this concern. Second, to the extent that Indian manufacturers of solar cells and modules opt not to supply Indian SPDs, increasing their production would not lessen SPDs' reliance on imported solar cells and modules. Thus, even if India does not intend for Indian SPDs to consume all domestically produced cells and modules, the Panel's observations are clearly relevant to the overall assessment of the contribution of India's DCR measures to India's stated objective of ensur[ing] that India SPDs have access to a continuous and affordable supply of solar cells and modules."

8. Reasonably Available Alternatives

---

[198] *See* India's Appellant Submission, para. 138. ("In paragraph 7.365 the Panel suggested that Indian manufacturers of raw materials need to exclusively supply to Indian manufacturers of solar cells and modules; and in paragraph 7.366, the Panel's suggestion is that Indian manufacturers of solar cells and modules should exclusively supply to Indian SPDs.").
[199] *See India – Solar Cells (Panel)*, para. 7.365. (emphasis added).
[200] *See India – Solar Cells (Panel)*, para. 7.366
[201] India's Appellant Submission, para. 138.
[202] India's Appellant Submission, para. 138.
[203] India's Appellant Submission, para. 138 (emphasis added)
[204] *See*, India's Appellant Submission, para. 138.

144. The United States identified several GATT-consistent alternatives to its DCR measure that were reasonably available to India and "that would contribute to ensuring Indian SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power."[205] These alternatives included: (i) removing barriers to trade and investment in solar cells and modules; (ii) stockpiling solar cells and modules; (ii) entering into long term contracts with suppliers of solar cells and modules; (iv) direct subsidization of domestic manufacturers of cells and modules; (v) investing in research & development in solar cells and modules; and (vi) increasing domestic demand for solar cells and modules. [206]

145. The United States will not repeat its arguments regarding reasonably available alternatives here, but will respond to India's argument that stockpiling of solar cells and modules is not feasible and would not ensure a continuous supply for SPDs.[207] In its appellant submission, India argues that stockpiling is not feasible because the stockpiled cells and modules would soon become obsolete, with negative cost implications for SPDs that used them.[208] The United States does not doubt that users of solar technology would prefer the newest technology at any given point. However, as a factual matter, the 25-year life expectancy of solar cells and modules[209] suggests that any particular technology remains viable even after new models become available. Moreover, in the event of an actual short supply of solar cells and modules, purchasers might need to accept less technologically advanced models. Short supply is exactly the time when such exigencies become acceptable to producers.

146. In any event, the stated goal of India's DCRs is to ensure a "continuous and affordable supply of solar cells and modules," not to provide the most technologically advanced cells or modules at any given time. In this regard, India has not even attempted to argue – much less established – that its DCR measures contribute to the deployment of the most technologically advanced cells or modules. Thus, the possibility that stockpiled cells and modules might not reflect the most up-to-date technology does not support India's contention that "stockpiling of solar cells and modules is not a reasonably available alternative that India can consider."[210]

VI. ISSUES RELATED TO ARTICLE XX(D) OF THE GATT 1994

147. Article XX(d) of the GATT 1994 provides that nothing in the Agreement shall be construed to prevent the adoption or enforcement by any Member of measures ""necessary ... to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement …." India cited several international and domestic instruments as "laws or regulations" for purposes of Article XX(d) and argued that its DCR measures were "necessary…to secure" India's compliance with those instruments. The Panel correctly found that none of these instruments (with the exception of Section 3 of India's Electricity Act), were "laws or regulation" within the meaning of Article XX(d).[211] With respect to Section 3 of the

[205] *India – Solar Cells (Panel),* para. 7.370.
[206] *India – Solar Cells (Panel),* para. 7.370.
[207] *India – Solar Cells (Panel),* para. 7.370.
[208] *See* India's Appellant Submission, paras. 144-147.
[209] *See,* Exhibit US-38.
[210] India's Second Written Submission, para. 79.
[211] *India – Solar Cells (Panel),* para. 7.333.

Electricity Act, the Panel found that India had failed to demonstrate that its DCR measures were measures to "secure compliance" with legal provisions of that Act.[212] In light of these threshold findings, the Panel found it unnecessary to examine whether the India's DCR measures were "necessary" within the meaning of Article XX(d).[213]

148. On appeal, India contends that the Panel erred in finding that the international instruments cited by India do not have direct effect in India, and that the domestic instruments cited by India do not constitute "laws and regulations" within the meaning of Article XX(d). India's assertions are without merit.

149. India does not dispute that the executive branch in India must take certain "implementing" actions before international law obligations enter into legal effect in India, but argues that the international instruments do have "direct effect" because "the legislature is not required to legislate on a domestic law incorporating the international law into domestic law." However, the Appellate Body's findings in *Mexico – Soft Drinks* clarify that where a "regulatory act" is necessary for an international obligation to have domestic effect, that obligation is not in and of itself part of a Member's laws and regulations for purposes of Article XX(d). As that is the case with the executive "implementing" measures in India's system, India argument presents no basis to reverse the Panel's finding.

150. The Panel found that the domestic law instruments cited by India – apart from Section 3 of India's Electricity Act – are not "law and regulations" for purposes of Article XX(d) because India cited only "hortatory, aspirational and declaratory language" that is not "legally enforceable."[214] India argues on appeal that the Panel erred because these measures, while non-binding are nonetheless part of India's legal system, and that although they do not prescribe specific action, they do "mandate achieving ecologically sustainable growth," which is more than a mere "objective."[215] These assertions do not undermine the Panel's conclusions. The Appellate Body has consistently found that Article XX(d) applies to measures that are may be enforced against individuals, and to not general government objectives. The most India shows in its appeal is that these domestic measures lay out important, and even critical, objectives. That does not make them the type of laws and regulations to which Article XX(d) applies.

151. The Panel found India's reference to Section 3 of the Electricity Act unavailing because that provision requires the government to prepare a National Electrical Policy and tariff policy, and the DCRs do nothing to enforce this legal requirement.[216] India states on appeal that it did not mean to cite this law on its own, but as one element of legislative scheme encompassing the other cited measures that collectively "mandate" action to achieve "ecologically sustainable growth."[217] Thus, it does not directly appeal the Panel's findings with regard to Section 3.

[212] *India – Solar Cells (Panel)*, para. 7.333.
[213] *See India – Solar Cells (Panel)*, para. 7.334.
[214] *India – Solar Cells (Panel)*, para. 7.313
[215] India's appellant submission, para. 174-175.
[216] *India – Solar Cells (Panel)*, para. 7.330.
[217] *India – Solar Cells (Panel)*, para. 7.173.

152. In the event the Appellate Body reverses the Panel's "law or regulations" finding, India has requested the Appellate Body to complete the Panel's analysis with respect to whether India's DCRs measures are "necessary" within the meaning of Article XX(d). India, however, has failed to establish that its DCR measures even "contribute to" India's "compliance" with any of the domestic or international instruments that it identifies, much less that the DCRs measures are "necessary" to secure compliance with those instruments. Therefore, it has failed to identify any basis for the Appellate Body to find the DCR measures to be "necessary."

A. The Panel Did Not Err in Its Assessment that India's International Law Obligations Do Not Have Direct Effect in India

153. The Panel found that India failed to demonstrate that international instruments cited by India had "direct effect" such that they were incorporated into India's domestic legal system and thereby constituted "law or regulations" for purposes of Article XX(d).[218] The Panel based this finding on its observation that the executive branch in India must take certain "implementing" actions before international law obligations enter into legal effect in India. India does not dispute this fact,[219] but argues that the international instruments do have "direct effect" because "the legislature is not required to legislate on a domestic law incorporating the international law into domestic law."[220] This argument does not provide sufficient basis to reject the Panel's finding.

154. As a legal matter, the Appellate Body found in *Mexico – Tax Measures on Soft Drinks and Other Beverages* that

> Domestic legislative or regulatory acts sometimes may be intended to implement an international agreement. In such situations, the origin of the rule is international, but the implementing instrument is a domestic law or regulation. [221]

In the accompanying footnote, the Appellate Body stated that

> In some WTO Members, certain international rules may have direct effect within their domestic legal systems without requiring implementing legislation. In such circumstances, these rules also become part of the domestic law of that Member. [222]

155. Thus, an international agreement is not a "law or regulation" for purposes of Article XX(d) if a Member's legal system calls for "domestic legislative or regulatory acts" to implement the agreement. Conversely, if legislation is not necessary, "rules" from an agreement may be treated as "part of the domestic law" of a Member. India acknowledges that the international instruments it cites require executive "implementation." Therefore, they do not have direct effect in India and are not "laws and regulations" for purposes of Article XX(d). India seeks to avoid this conclusion by arguing that no action by its legislature is necessary for

[218] *See India – Solar Cells (Panel)*, para. 301.
[219] *See* India's Appellant Submission, para. 167.
[220] India's Appellant Submission, para. 167.
[220] India's Appellant Submission, para. 167.
[221] *Mexico – Tax Measures on Soft Drinks and Other Beverages (AB)*, para. 69.
[222] *Mexico – Tax Measures on Soft Drinks and Other Beverages (AB)*, footnote 148.

an international agreement to have domestic effect, and that the "implementing" actions by the executive wing are merely actions to execute obligations that are already part of domestic law.[223] This distinction has no basis in Article XX(d), which covers the laws or regulations *of a Member*, and not its international agreements. The Appellate Body's reasoning in *Mexico – Soft Drinks* further clarifies that where a "regulatory act" intervenes, an international agreement is not in and of itself part of a Member's laws and regulations.[224] As that is the case with the executive "implementing" measures in India's system, the Panel was correct in finding that Article XX(d) did not apply.

156. It is also important to recall that the party asserting a defense under Article XX (in this instance, India) bears the burden of proof with respect to its entitlement to the defense.[225] India's arguments before the Panel, and its reiteration of those arguments on appeal, do not do so. India's appellant submission cites two paragraphs in support of the argument – one from its first written submission and another from its first oral statement – that in turn cite two decisions of the Supreme Court of India.[226] The text consists of broad generalizations about Indian law, with no supporting evidence accept the cited decisions by the Supreme Court. But the portion of *Sundarrajan v. Union of India* cited in India's first oral statement simply recounts the history of international agreements regarding sustainable development and impact on the ecosystem.[227] It provides no guidance whatsoever on the role the referenced agreements play in Indian law. India did not submit a copy of *Vellore Citizens Welfare Forum v. Union of India and Others*, the decision cited in the first written submission, preventing an evaluation of the extent to which it supported India's assertions. Therefore, India's citation to these materials on appeal does not point to any flaw in the Panel's conclusion that India's argument "does not . . . speak to the question of whether international obligations are automatically incorporated into domestic law and have 'direct effect' in India."[228]

B. The Panel Did Not Err In Its Assessment that the Domestic Law Instruments Cited by India Do Not Constitute "Laws or Regulations" for Purpose of Article XX(d)

157. The Panel found that the domestic law instruments cited by India – apart from Section 3 of India's Electricity Act – are not "law and regulations" for purposes of Article XX(d) because India cited only "hortatory, aspirational and declaratory language" that is not "legally enforceable."[229] This was based on the Panel's legal finding that "laws or regulations" with the meaning of Article XX(d), refers to "legally enforceable rules of conduct under the domestic legal system of the WTO Member concerned, and do not include general objectives."[230] India argues on appeal that the Panel erred because these measures, while non-binding are nonetheless

[223] India's appellant submission, para. 167.
[224] *See Mexico – Tax Measures on Soft Drinks and Other Beverages (AB)*, para. 69.
[225] *China – Rare Earths (Panel)*, para. 7.202, *citing US – Gasoline (AB)*, pp. 22-23 ("it is the Member invoking Article XX that bears the burden of proof to demonstrate that the measure at issue is justified under that Article.").
[226] India's appellant submission, para. 168, *citing* India's first written submission, para. 190 and footnote 172; and India's opening statement at the first meeting of the parties, para. 61 and footnote 74.
[227] *Sundarrajan v. Union of India*, 2013 (6) SCC 628, paras. 161-174 (Exhibit IND-36).
[228] *India – Solar Cells (Panel)*, para. 7.298.
[229] *India – Solar Cells (Panel)*, para. 7.313
[230] *India – Solar Cells (Panel)*, para. 7.311.

part of India's legal system, and that although they do not prescribe specific action, they do "mandate achieving ecologically sustainable growth," which is more than a mere "objective."[231] These assertions do not undermine the Panel's conclusions.

158. The most India shows in its appeal is that the domestic instruments it identifies lay out important, and even critical, objectives. That does not make them the type of laws and regulations to which Article XX(d) applies. Rather, panels have consistently found that "to secure compliance," within the meaning of Article XX(d), means to *enforce* obligations under laws and regulations," not "to ensure the attainment of the *objectives* of the laws and regulations."[232] As observed by panel in, *EEC – Parts and Components*, "Article XX(d) merely covers measures to secure compliance with laws and regulations *as such* and not with their objectives."[233] India asserts that its DCR measures are "necessary for securing compliance with the mandate of ecologically sustainable growth and sustainable development as embodied in the [domestic] laws identified by India."[234] Thus, India does not even attempt to argue that its DCR measures are necessary to comply with any Indian laws or regulations "as such," but only with the objectives "embodied in the laws identified by India." [235]

159. The Panel found India's reference to Section 3 of the Electricity Act unavailing because that provision requires the government to prepare a National Electrical Policy and tariff policy, and the DCRs do nothing to enforce this legal requirement.[236] India states on appeal that it did not mean to cite this law on its own, but as one element of legislative scheme encompassing the other cited measures that collectively "mandate" action to achieve "ecologically sustainable growth."[237] Thus, India does not directly appeal the Panel's findings with regard to Section 3.

C. India Has Failed to Establish That Its DCR Measures are "Necessary" for Purposes of Article XX(d)

160. As noted, in light of the Panel's threshold finding that India's DCR measures were not "law or regulations" within the meaning of Article XX(d) the Panel found it unnecessary to examine whether the India's DCR measures were "necessary" within the meaning of the provision.[238] Likewise, if the Appellate Body upholds this finding, it would be unnecessary to examine India's appeals regarding whether the DCR measures are necessary for purposes of Article XX(d). In the event the Appellate Body reverses the Panel's "law or regulations" finding, India has requested the Appellate Body to complete the Panel's analysis with respect to whether India's DCRs measures are "necessary" within the meaning of Article XX(d).[239] India, however, has failed to establish that its DCR measures even "contribute to" India's "compliance"

---

[231] India's appellant submission, para. 174-175.
[232] *Canada – Wheat Exports and Grain Imports (Panel)*, para. 6.248.
[233] GATT Panel Report, *EEC – Parts and Components*, para. 5.16. (emphasis added)
[234] India's Appellant Submission, para. 181.
[235] India's Appellant Submission, para. 181.
[236] *India – Solar Cells (Panel)*, para. 7.330.
[237] *India – Solar Cells (Panel)*, para. 7.173.
[238] *See India – Solar Cells (Panel)*, para. 7.334.
[239] *See* India's Appellant Submission, para. 181.

with any of the domestic or international instruments that it identifies, much less that the DCRs measures are "necessary" to secure compliance with those instruments.

161. The Appellate Body has observed that, as a general matter, the word "necessary" can mean anything from "indispensable" to simply "makes a contribution to."[240] For purposes of Article XX(d), however, the Appellate Body has made clear that a "necessary measure is … located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'."[241] Therefore, while a "necessary" measure "does not need to be 'indispensable', [it] should constitute something more than strictly making a contribution to."[242]

162. India does not even attempt to argue that its DCR measures are "indispensable" or "essential" to securing India's compliance with any of the domestic or international instruments its cites. Instead, India's argues that its DCR measures are "necessary" for purposes of Article XX(d) because they "*contribut*e[] to the realization of India's obligations of sustainable development,"[243] including the "mandate of ecologically sustainable growth and sustainable development as embodied in the laws identified by India."[244] But as noted above, a measure that merely "contributes to" a Member's ability to "secure compliance" with a law or regulation is not a "necessary" measure within the meaning of Article XX(d). Thus, given that India has not even attempted to argue that its DCR measures do any more than "contribute to" the "realization of India's obligations of sustainable development," India has not met its burden of demonstrating that the DCR measures are "necessary" for purposes of Article XX(d). This is reason alone to reject India's defense under Article XX(d).

163. Moreover, India has asked that Appellate Body to evaluate whether India's DCR measures are "necessary" for purposes of Article XX(d) in light of "India's arguments on why the measures are "essential" to India's acquisition of solar cells and modules under Article XX(j).[245] But as explained in sections V.B.5 and V.B.6 above, India has failed to establish that its DCR measures even "contribute to" India's objective of developing a domestic manufacturing base for solar cells and modules. Thus to the extent India seeks to rely on it arguments pertaining to Article XX(j), this simply further demonstrates that India's DCR measures are not "necessary" for purposes of Article XX(d).

VII. CONCLUSION

164. For the reasons given in this submission, the United States respectfully requests the Appellate Body to reject India's appeal in its entirety.

[240] *Korea – Various Measures on Beef (AB), p*ara. 161.
[241] *Korea – Various Measures on Beef (AB)*, para. 161.
[242] *US – Shrimp (Thailand) (Panel)*, para. 7.188.
[243] India's Appellant Submission, par. 177.
[244] India's Appellant Submission, par. 181
[245] *See* India's Appellant Submission, par. 179.