India – Certain Measures Relating to Solar Cells and Solar Modules

(WT/DS456)

Second Substantive Meeting of the Panel with the Parties

Opening Statement of the United States

April 28, 2015

TABLE OF EXHIBITS

Exhibit Number	Description
US-37	Jordan, D. C., Sekulic, B., Marion, B., & Kurtz, S. R, *Performance and Aging of a 20-Year-Old Silicon PV System*, IEEE Journal of Photovoltaics (2015).
US-38	Ndiaye, A., Charki, A., Kobi A., Ke´be´, C., Ndiaye P., Sambou, V., *Degradations of silicon photovoltaic modules: A literature review* (2013).

I. INTRODUCTION

1. Mr. Chairman, Members of the Panel: The United States would like to thank you for your continued service on this Panel and the Secretariat staff assisting you.

2. As the United States has noted throughout this dispute, it supports the efforts of WTO Members to pursue environmental objectives, such as clean energy. In light of the submissions made by the parties to date, it has become even more apparent that the domestic content requirements (DCRs) adopted by India that are at issue in this dispute are inconsistent with Article III:4 of the GATT 1994[1] and Article 2.1 of the TRIMs Agreement.[2] Equally clear is that India's attempts to justify the DCRs under Article XX of the GATT 1994 are without merit.

3. In this statement we will summarize briefly why the DCRs maintained under India's National Solar Mission (NSM) are inconsistent with India's national treatment obligations under GATT Article III:4 and TRIMs Article 2.1. However, we will focus on the errors in India's misplaced attempts to justify its measures under Article III:8(a) or Article XX of the GATT 1994, including certain new arguments in India's second written submission.

II. THE DOMESTIC CONTENT REQUIREMENTS AT ISSUE ARE INCONSISTENT WITH ARTICLE III:4 OF THE GATT 1994 AND ARTICLE 2.1 OF THE TRIMS AGREEMENT

A. India Has Failed to Refute the U.S. Claims that the DCRs at Issue are Inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement

4. In its submissions, the United States has explained that the DCRs are inconsistent with India's national treatment obligations because they modify the conditions of competition in favor of cells and modules made in India to the detriment of imported cells and modules. Specifically, India's DCR measures operate to exclude imported solar cells and modules from certain projects under the NSM Program, while allowing the use of Indian cells and modules in *all* projects under the Program. In none of its submissions to date has India attempted to dispute this simple fact.

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[1] *General Agreement on Tariffs and Trade 1994*.

[2] *Agreement on Trade-Related Investment Measures*.

5. Rather than dispute the facts, India has sought to avoid a finding of a breach of the national treatment provisions at issue by arguing that the benefits under the NSM Program are "not confined" to SPDs that use Indian-manufactured cells and modules because some projects permit the use of imported cells and modules.[3] But, this argument is relevant only to the portion of projects to which the DCRs *do not apply*.[4] The United States is not challenging those projects, and India's compliance with the national treatment provisions with respect to *some* projects and products does not excuse its obligation to comply with national treatment with respect to *all* projects and products.

B. Measures that are Inconsistent with Article 2.1 of the TRIMs Agreement are *By Definition* Inconsistent with Article III:4 of the GATT 1994

6. The outcome of this dispute does not hinge on whether the Panel first assesses these measures under the GATT 1994 or the TRIMs Agreement. Either approach will lead to a finding that the DCRs at issue are inconsistent with both Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994.[5]

7. In its second written submission, India continues to argue that the Panel should begin its analysis under Article III:4 before proceeding to an analysis under Article 2.1 of the TRIMs Agreement,[6] arguing further that (1) "A finding under TRIMs Article 2.1 does not obviate the need for an assessment under GATT Article III:4"[7] This assertion is clearly at odds with the text of the TRIMs Agreement.

8. Article 2.2 of the TRIMs Agreement and the text in the chapeau of paragraph 1 of the Illustrative list [8] *define* the measures described in paragraph 1 of the Illustrative List as

[3] India's First Written Submission, para. 89.

[4] *See* U.S. Second Written Submission, para. 9; *See also* U.S. Opening Statement at the First Meeting of the Panel, para. 17 and U.S. Responses to Panel Question No. 13(b), para. 30.

[5] *See* U.S. Second Written Submission, para. 12; *See also* U.S. Responses to Panel Question No. 13(a), para. 24.

[6] *See* India's Second Written Submission, paras. 4-8.

[7] India's Second Written Submission, para. 9.

[8] TRIMs Article 2.2: An illustrative list of TRIMs *that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994* and the obligation of general elimination of quantitative

inconsistent with Article III:4 of the GATT 1994.[9] Thus, there is no need for a separate showing that the measure at issue accords "less favorable treatment" to imported products within the meaning of Article III:4 because, as India notes, "the TRIMs Agreement does not add to or subtract from those GATT [Article III] obligations."[10]

9. The Appellate Body in *Canada – FIT* confirmed this understanding when it observed that "[w]here [] a measure has the characteristics that are described in Paragraph 1(a) of the Illustrative List, it follows from the clear language of this provision that it will be in violation of Article III:4 of the GATT 1994, and thereby also Article 2.1 of the TRIMs Agreement."[11] Thus, as previously noted by the United States, "if the Panel were to find that the DCRs at issue in this dispute are covered by paragraph 1(a) of the Illustrative List, it would obviate the need for the Panel to conduct additional analysis under Article III:4 of the GATT 1994."[12]

10. In response to the Appellate Body's approach above, India cites another statement from the *Canada – FIT* Appellate Body report that "Paragraph 1(a) of the Illustrative List…did not obviate the need for [the *Canada – FIT* Panel] to undertake an analysis of whether the challenged measures are outside the scope of the application of Article III:4 or the GATT 1994, by virtue of Article III:8(a) of the GATT 1994."[13] But this statement addresses a different question – whether the Article III:8(a) defense to an Article III:4 claim would also provide a defense to claims under Article 2.1 of the TRIMs Agreement.[14] It in no way undermines the Appellate

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restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement. (emphasis added).

[9] *See* U.S. Second Written Submission, para. 8; *See also* U.S Response to Panel Question No. 13(a), para. 25 and U.S. Opening Statement at the First Meeting of the Panel, para. 17.

[10] India's Second Written Submission, para. 9 (quoting Panel Report, *EC-Bananas III*, para 7.185).

[11] Panel Report, *Canada – Renewable Energy / Feed-In Tariff Program ("Canada – FIT")*, para. 7.120 (emphasis added).

[12] U.S. Second Written Submission, para. 12; *See also* U.S Response to Panel Question No. 13(a), para 26.

[13] India's Second Written Submission, para. 10 (quoting Appellate Body Report, *Canada – FIT*, para 5.33).

[14] *See* Appellate Body Report, *Canada – FIT*, para. 5.94 ("We we consider that the Panel correctly rejected the European Union's argument that Article III:8(a) of the GATT 1994 is not applicable to measures that fall within the scope of Article 2.2 of the TRIMs Agreement and the Illustrative List annexed thereto. Therefore, we uphold the Panel's finding, in paragraph 7.121 of the Panel Reports, that "Paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement d[id] not obviate the need for [the Panel] to undertake an analysis of whether the challenged

Body's conclusion that measures covered under paragraph 1(a) of the Illustrative List are *by definition* inconsistent with Article III:4 of the GATT 1994.[15]

11. The Panel should therefore find that the DCRs are inconsistent with India's obligations under Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.

III. THE NSM PROGRAM'S DOMESTIC CONTENT REQUIREMENTS ARE NOT COVERED BY THE GOVERNMENT PROCUREMENT DEROGATION UNDER ARTICLE III:8(a) OF THE GATT 1994

12. As the United States has explained in prior submissions, the government procurement derogation under Article III:8(a) does not apply to the DCRs because India is procuring electricity under the NSM Program whereas the products facing discrimination are solar cells and modules. In *Canada – FIT*, the Appellate Body made clear that the government procurement derogation applies only where the imported product facing discrimination and the product purchased by the government are "like products" or in a competitive relationship.

13. India does not dispute that solar cells and modules are not "like products" with electricity. And in none of its submissions has India attempted to argue, much less established, that solar cells and modules and electricity are in a competitive relationship. These facts *alone* provide this Panel with a sufficient basis to reject India's invocation of Article III:8(a).

14. None of India's attempts to rebut this clear conclusion are persuasive. First, the Panel should reject India's theory that it is *effectively* procuring solar cells and modules through its purchase of the electricity generated by those cells and modules.[16] India has presented no facts to support this argument. To the contrary, its measures "effectively" impose local content requirements on solar power developers who effectively must procure domestic solar cells or

measures are outside of the scope of application of Article III:4 of the GATT 1994 by virtue of the operation of Article III:8(a) of the GATT 1994".)

[15] Appellate Body Report, *Canada – FIT*, para. 5.24 ("[By] 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 [Article III:4 of the GATT 1994].")

[16] *See* U.S. Second Written Submission, paras. 14-15; *See also* U.S. Opening Statement at the First Meeting of the Panel, paras. 26-27.

modules to be eligible for and to participate in certain projects. India has not asserted or demonstrated that it has any rights in the cells or modules procured by the solar power developers. As noted, the Appellate Body in *Canada – FIT* concluded that the government procurement derogation did not cover the DCRs at issue in that dispute because the government was procuring *electricity*, whereas the products being discriminated against were imported solar and wind power generation equipment.[17] Here the situation is the same. India is procuring electricity while at the same time discriminating with respect to generation equipment.

15. Second, the United States has also explained why India cannot avoid the implications of the fact that it procures electricity but imposes discriminatory requirements on generating equipment, by emphasizing mechanical differences between the DCRs at issue in *Canada – FIT* and this dispute. As noted in prior submissions, the Appellate Body based its finding that Article III:8(a) did not apply on the observation that the electricity purchased by the government under Ontario's FIT Programme *did not compete* with the solar and wind power equipment purchased by power developers. The precise mechanics of the FIT Programme's "Minimum Required Domestic Content Levels" did not factor into the Appellate Body's conclusion.[18]

16. Third, as a practical matter, the DCRs imposed under the India's NSM Progamme are functionally identical to the DCRs under Ontario's FIT Programme. They both require solar power developers to use domestically sourced renewable energy equipment.

17. In its second written submission, the United States provided a detailed refutation of India's assertion that the DCRs at issue in *Canada – FIT* were focused on "a set of designated activities of a power plant, and not the generation of electricity."[19] Specifically, the United States demonstrated that the DCRs at issue in *Canada – FIT* pertained to equipment used to

[17] Appellate Body Report, *Canada – FIT*, para. 5.79 ("In the case before us, the product being procured in electricity, whereas the product being discriminated against for reason of its origin is generation equipment. These two products are not in a competitive relationship.")

[18] U.S. Second Written Submission, para. 21; *See als*o U.S. Opening Statement at First Meeting of the Panel, para. 29.

[19] U.S. Second Written Submission, para. 23 (quoting India's First Written Submission, para. 112.).

generate electricity, including solar cells and modules. The United States further demonstrated – notwithstanding India's suggestion to the contrary – that it was mathematically impossible to satisfy the DCRs under the FIT Programme without the use of renewable energy equipment sourced from Ontario.[20] The panel found that the DCRs at issue in *Canada – FIT* were structured to require "the purchase or use of a certain percentage of renewable energy generation equipment and components sourced in Ontario…."[21] The DCRs under the NSM Program likewise require SPDs to use renewable energy equipment made in India. As such, India's attempts to draw material distinctions between the DCRs at issue in this dispute and those at issue in *Canada – FIT* must fail.

18. Fourth, the United States has explained why India's more recent attempt to characterize solar cells and modules as "inputs" to the generation of solar power is misplaced and inaccurate. Solar cells and modules are not, in fact, inputs – integral or otherwise – in the generation of electricity. Rather, solar cells and modules are properly viewed as capital equipment akin to a turbine in a hydroelectric plant or the reactor in a nuclear plant.[22] In these instances, the "inputs" are the things that produce the power: sunlight for solar cells, water in a hydroelectric plant, or uranium rods in a nuclear plant. Accordingly, the issue of whether Article III:8(a) can cover inputs into products procured by the government is a question the Panel need not address.

19. Moreover, India has not established that any of the alleged procurement is not "with a view to commercial resale" because the electricity purchased under the NSM Program is resold to retail and commercial consumers over a competitive market for electricity. This understanding is consistent with the observation of the Panel in *Canada – FIT*, which found that electricity purchased under Ontario's FIT Programme was "introduced into commerce"[23] because it was "resold to retail consumers through the [local distribution companies] in

[20] *See* U.S. Second Written Submission, paras. 22 -28.

[21] Panel Report, *Canada – FIT*, para. 7.163.

[22] *See* U.S. Second Written Submission, paras. 18-20.

[23] Panel Report, *Canada – FIT*, para. 7.148.

competition with private-sector retailers."[24] As noted by the United States, many Indian electricity distribution companies (or Discoms) are highly corporatized entities with a fiduciary duty to maximize profits or returns for shareholders.[25] A full one-quarter of Indian Discoms are wholly private concerns.[26] This demonstrates that the electricity purchased under the NSM Program – just like the electricity purchased under Ontario's FIT Programme – is sold to consumers over a competitive electricity market and thereby introduced into commerce.

20. For these reasons, the United States respectfully submits that there is no basis to find that the DCRs at issue in this dispute are covered by the government procurement derogation under Article III:8(a).

IV. INDIA HAS FAILED TO DEMONSTRATE THAT THE DCRS AT ISSUE ARE JUSTIFIED UNDER PARAGRAPHS (j) OR (d) OF ARTICLE XX OF THE GATT 1994

21. The United States has also explained that India has failed to meet the burden of demonstrating that the DCRs at issue are justified under Article XX(j) or (d) of the GATT 1994.[27]

A. India Has Not Demonstrated that it Meets the Criteria for Invoking Article XX(j) of the GATT 1994

1. India is Not Experiencing a Short Supply of Solar Cells or Modules

22. As the United States has noted, India has not demonstrated that solar cells and modules are "in short supply" either generally *or* locally in India within the meaning of Article XX(j) of the GATT 1994.[28] Specifically, India acknowledges that there is an "adequate availability" of solar cells and modules on the international market.[29] Moreover, India's assertion that more than

[24] Panel Report, *Canada – FIT*, para. 7.147.

[25] *See Private Distribution Companies in India* (Exhibit US-36).

[26] Exhibit US-36, Appendix 1.

[27] *See* U.S. Second Written Submission, para. 33.

[28] *See* U.S. Second Written Submission, paras. 36 -37; *See also* U.S. Response to Panel Question No. 25(a), paras. 22-34 and U.S. Opening Statement at the First Meeting of the Panel, para. 44.

[29] India's First Written Submission, para. 233.

90 percent of its solar PV installations rely on imported solar cells and modules[30] suggests that it is experiencing an abundance of solar power generation products, not a "scarcity" or "limited quantity." The United States further observes that India has not even attempted to argue that India is experiencing any difficulty acquiring solar cells and modules. In short, India has failed to establish the factual predicate for invocation of Article XX(j): the existence of a short supply of solar cells and modules. This alone demonstrates that there is no merit to the argument that the DCRs at issue are justified under Article XX(j).

2. A "Lack of Manufacturing Capacity" Does Not Constitute a Short Supply for Purposes of Article XX(j)

23. In its second written submission, however, India argues that a Member's "lack of domestic manufacturing" with respect to certain products can constitute a "short supply" of that product for purposes of Article XX(j).[31] This is the case – per India's reasoning – *even if* the product is available through importation. The United States submits that this argument is at odds with Article XX(j).

24. The import of India's argument is that a Member may impose GATT-inconsistent measures whenever domestic supply is less than domestic demand. Members could presumably keep such measures in place until domestic production is equal to demand. Of course, if all Members exercised this right, imports would arguably cease.

25. As previously noted by the United States, Article XX(j) is concerned with the supply of a product *in general*, not the supply of products of a particular origin.[32] That is, a shortage of Indian-manufactured solar cells and modules is not a cognizable "short supply" for purposes of Article XX(j). This understanding is reflected by the fact that the term "products" in Article XX(j) is unqualified by origin, indicating that it addresses supply of that product without respect to origin. The use of the word "supply" is also significant. Where Article XX focuses on domestic production, it does so specifically, referring to "restrictions on domestic production" in

[30] India's First Written Submission, para. 236.

[31] India's Second Written Submission, para. 54.

[32] *See* U.S. Second Written Submission, para. 40.

paragraph (g) and "domestic processing industry" in paragraph (i). The use of a term – "supply" – that is neutral as between domestic production and importation indicates that Article XX(j) does not address "shortages" arising from production taken in isolation.

26. India, however, appears to misunderstand the U.S. argument on this score. Specifically, in its second written submission, India asserts that the United States "seeks to argue Article XX(j) cannot be applied as an exception to [Article III:4 or TRIMS Article 2.1] because the language of Article XX(j) is not qualified by origin."[33] But in none of its submissions has the United States argued – or even suggested – that Article XX(j) is unavailable to justify measures inconsistent with Article III:4. At any rate, to the extent further clarification is necessary, the United States acknowledges that under the right factual circumstances – that is, where a product is in actual short supply – Article XX(j) can properly justify measures essential to enabling a Member to acquire that product, even if such measures are otherwise inconsistent with Article III of the GATT 1994 or Article 2.1 of the TRIMs Agreement.

27. But against a factual backdrop where India (1) acknowledges that there is an adequate international availability of solar cells and modules; and (2) has demonstrated no difficulty in availing itself of this international supply, there is no basis for finding the existence of a "short supply" of solar cells and modules within the existence of Article XX(j). This is the case even if India wishes that there was greater supply of *Indian*-manufactured solar cells and modules available on its home market.

3. Article XX(j) Applies Only Where the Product at Issue is Currently *In* Short Supply, Not Where the Product *Might* Fall into Short Supply at Some Point in the Future

28. Even though it concedes that it is having no difficulty acquiring solar cells and modules at the current time, India argues that the DCRs are nonetheless justified because there is a *risk* that India could face supply shocks in the future.[34] But Article XX(j), by its very terms, is applicable only with respect to products that are presently "in short supply" *not* products that

[33] India's Second Written Submission, para. 58.

[34] *See generally*, India's Second Written Submission, paras. 87-100.

might or could fall into short supply sometime in the future. Other text in Article XX(j) supports this plain reading. The reference to "general" and "local" gives two concrete areas or markets in which such current short supply should exist. And the condition that the measure "shall be discontinued as soon as the conditions *giving rise* to them *have ceased to exist*" reinforces that the short supply must *currently* exist.

29. India, however, argues that the Panel should simply read the "concept of risk" into Article XX(j), notwithstanding the clear present-tense orientation of the language of the provision (*i.e.*, "*in* short supply"). To support this view, India notes that the Appellate Body has considered risk for purposes of interpreting Article XX(b), even though "there is no explicit reference to risk"[35] in that provision. From this, India asserts that "the concept of risk is inherent in Article XX(b), and the same principle [should] apply to Article XX(j)."[36]

30. But a simple comparison between the texts of the two provisions undercuts India's assertion that the "concept of risk" is inherent in Article XX(j). To the extent that the concept of risk is inherent in XX(b), it is because that provision explicitly sanctions measures "necessary *to protect* human, animal, or plant life."[37] The Oxford English Dictionary defines "protect" to mean "Defend or guard against injury or danger; shield from attack or assault",[38] and "danger" refers, for example, to the *possibility* of suffering harm or injury.[39] Thus, by its terms, Article XX(b) necessarily envisages preemptive measures – that is, measures put into place *before* risks to human, animal, or plant life come to fruition. In contrast, the language of Article XX(j) – "in short supply" – justifies only measures taken once a short supply has actually materialized.

[35] India's Second Written Submission, para. 90.

[36] India's Second Written Submission, para. 90.

[37] Article XX(b) of the GATT 1994: Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures *necessary to protect human, animal or plant life or health*. (emphasis added).

[38] The New Shorter Oxford English Dictionary, 4th Edition.

[39] The New Shorter Oxford English Dictionary, 4th Edition.

4. India Has Failed to Demonstrate that the DCRs at Issue Are "Essential" Within the Meaning of Article XX(j)

31. Even if India were able to demonstrate that it was currently facing a bona fide short supply of solar cells and modules, it has still failed to demonstrate that the DCRs are "essential" within the meaning of Article XX(j).

32. First, as practical matter, import restrictive measures like DCRs would tend to be antithetical to, rather than essential to alleviating a short supply, which is the sole objective of Article XX(j). And India has failed to explain how the circumstances of its purported short supply are different.

33. Second, although the text of Article XX(j) and its use of the term "essential" suggest a higher threshold for invoking this provision as an affirmative defense than other Article XX subparagraphs that merely use the phrase "necessary," India has failed to establish that its measure meets even this lower threshold based on the weighing and balancing of factors that the Appellate Body has done in past disputes where the question at issue was the "necessity" of measures within the meaning of Article XX.[40]

34. Relatedly, the United States notes India's attempt to water down the meaning of "essential" as used in Article XX(j). Specifically, in its second written submission, India suggests Article XX(j) covers not only measures "essential" to acquiring products in short supply, but can also encompass measures that are simply "necessary" to addressing a short supply.[41] But if Article XX(j) covered merely "necessary" measures, the drafters would not have made the choice to use different terms in Articles XX(a), (b), and (d). Moreover, as noted by the United States, the ordinary meaning of these terms and past Appellate Body analysis of them, make clear that the word "essential" suggests a higher level of indispensability than the term "necessary."[42] This counsels against the casual analogizing between the two terms that India

[40] *See* U.S. Second Written Submission, paras 41-43.

[41] *See* India's Second Written Submission, para. 62.

[42] *See* U.S. Response to Panel Question No. 25(a), para. 35; *See also*, U.S. Second Written Submission, para. 38.

seems to suggest and demonstrates the fallacy of India's assertion that Article XX(j) can apply to merely "necessary" measures.

35. The United States has also explained that, at any rate, India has reasonably available alternatives to the DCRs, such as the stockpiling of solar cells and modules or simply eliminating the DCRs.[43] India argues that solar modules cannot be effectively stockpiled because "various components of solar cells and modules" (such as back sheets and laminates) "are vulnerable to degradation."[44] However, India ignores that *finished* solar modules are *not* in fact vulnerable to degradation if stored under proper conditions. That is, even if back sheets and laminates have a limited shelf life as stand-alone materials, once those components are processed into the finished solar modules, they are no longer so vulnerable. Indeed, finished modules are typically sold with a warranty of 25 years, giving the promise that they will last 25 years in the full range of conditions experienced outdoors (subjected to sun, wind, rain, etc.).[45] Thus, if stored properly, modules are subjected to less stress than in normal operating conditions and will remain effective for use for 25 or more years.[46] Therefore, contrary to India's assertion, stockpiling is a viable GATT-consistent alternative to the DCR measures at issue.

36. India has also failed to explain why simply omitting the DCRs would undermine its ability to obtain an adequate supply of electricity, and in fact, as the United States has shown, this would likely be a much more effective way of doing so.

37. For the foregoing reasons, the United States submits that India has still not met its burden of demonstrating that Article XX(j) is applicable to the facts of this dispute. To be clear, the United States is not arguing that the GATT 1994 or the TRIMs Agreement prohibits a

[43] *See* U.S. Second Written Submission, para. 42; *See also* U.S. Second Written Submission, para. 74 and U.S. Response to Panel Question No. 37, paras. 57-62.

[44] India's Second Written Submission, para. 78.

[45] Ndiaye, A., Charki, A., Kobi A., Ke´be´, C., Ndiaye P., Sambou, V, *Degradations of silicon photovoltaic modules: A literature review* (2013), pp. 140-141. (Exhibit US-38); *See also* Jordan, D. C., Sekulic, B., Marion, B., & Kurtz, S. R., *Performance and Aging of a 20-Year-Old Silicon PV System*. IEEE Journal of Photovoltaics (2015) (Exhibit US-37), p. 8 ("It should also be noted that not a single module failure occurred during these 20 years.").

government from enacting measures to promote domestic production.[47] Our point is that such measures must conform to the obligations of the WTO Agreements and that India must pursue that objective through WTO-consistent means instead of discriminatory domestic content requirements.

B. India Has Failed to Demonstrate that the DCRs at Issue are Justified under Article XX(d) of the GATT 1994

1. Article XX(d) Does Not Apply to Measures Taken to Secure a Government's *Own* Compliance with it Laws and Regulations

38. The United States has explained that Article XX(d) does not apply to the DCRs at issue because Article XX(d) does not cover measures taken by a government to secure its *own* compliance with its own laws and regulations. Moreover, the United States has shown that this interpretation is supported by the text of Article XX(d) itself, and is consistent with the interpretation of past panels and the Appellate Body, contrary to India's assertions.[48]

39. Furthermore, the United States observes that India has not affirmatively demonstrated that Article XX(d) *does* cover measures taken to secure a government's own compliance with its laws and regulations. Instead, India merely argues that the text of Article XX(d) and past reports do not rule out this interpretation.[49] It is difficult to see the relevance of this observation. The rules of treaty interpretation, such as Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, focus on the ordinary meaning of terms in their context. They do not call for the elevation of terms not used in the treaty to the status of obligations. And at any rate, the United States has, in fact, proffered a textual basis, supported by relevant prior reports, for the conclusion that Article XX(d) covers only those measures necessary for a government to enforce its laws *vis-à-vis* persons subject to its jurisdiction" and *not* measures taken to secure a government's own compliance.[50]

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[47] *See* U.S. Second Written Submission, para. 43.

[48] India's Second Written Submission, para. 133.

[49] *See* India's Second Written Submission, para. 130.

[50] *See* U.S. Response to Panel Question No. 33, paras. 45-56; *See also*, U.S. Second Written Submission, paras. 46-53.

2. None of the Instruments Cited by India Require or Even Encourage the Imposition of DCRs

40. Even under India's approach, its argument fails. India argues that Article XX(d) covers laws and regulations that bind the Indian government *itself*, but the United States has shown – through a thorough review of each of the relevant documents – that none of the instruments cited by India require the imposition of DCRs.[51] Moreover, some of the instruments do not appear to demand compliance in a legal sense and others appear to *discourage* the use of discriminatory measures like domestic content requirements.[52] For this reason alone, the DCRs at issue cannot be viewed as necessary to "secure compliance" with the cited instruments.

41. In its second written submission, however, India argues "that merely because the legal instruments specified by it do not prescribe specific implementation measures…does not mean that they constitute an objective that need not be complied with, or that compliance with such obligations need not be secured."[53] But even if the Panel accepts that India must comply with the cited instruments, this in no way establishes that the DCRs at issue are "necessary" to secure such compliance with the letter (or spirit) of those instruments.

3. India Has Failed to Establish that the DCRs at Issue are "Necessary" within the Meaning of Article XX(d)

42. Moreover, India's assertion that the DCRs "contribute to enforcing the sustainable development commitments undertaken by India," still falls far short of demonstrating that the DCRs are "necessary" for purposes of Article XX(d). First, as noted, previous GATT panels have reasoned that "to comply" means "to enforce obligations" not "ensure the attainment of objectives of the laws and regulations."[54] Second, the Appellate Body has observed that, for purposes of Article XX(d), "a necessary measure is…located significantly closer to the pole of

[51] *See generally*, U.S. Second Written Submission, paras. 54-67.

[52] *See* U.S. Second Written Submission, para. 57

[53] India's Second Written Submission, para. 141.

[54] GATT Panel Report, *EEC – Parts and Components*, para. 5.17 (adopted 16 May 1990).

'indispensable' than to the opposite pole of simply 'making a contribution to'."[55] And as noted by the Panel in *US – Shrimp (Thailand)*, while a "necessary" measure under Article XX(d) "does not need to be 'indispensable', [it] should constitute something more than strictly making a contribution to."[56]

43. That the DCRs are not "necessary" is further evidenced by the fact that India has reasonably available alternatives to pursue its sustainable development goals and commitments. As the United States notes in its second written submission, increasing the use of solar power – while certainly laudable – is only one of many tools that a government can use to fight climate change and attain sustainable development. Promoting the domestic production of solar cells and modules is in turn one tool to promote solar power. And DCRs are again only one tool for promoting the domestic production of cells and modules. The DCRs at issue are thus many steps removed from the commitments that India contends it must comply with, and in that sense, cannot be viewed as "necessary" to securing compliance with those commitments.

44. India has at its disposal other tools that would appear to keep India in compliance with its various international commitments, including, *inter alia*, more environmental regulation, promoting the development of other renewable energy sources (including geothermal, hydroelectric, and wind), or promoting the consumption of energy from renewable energy sources on a non-discriminatory basis. These alternatives reveal that the DCRs at issue make only an indirect contribution (at most) to India's compliance with its commitments. As such, the DCRs, again, can hardly be considered "necessary" within the meaning of Article XX(d).

45. For the forgoing reasons, the United States respectfully submits that the Panel should find that the DCRs at issue in this dispute are not covered by Article XX(d) of the GATT 1994.

[55] U.S. Second Written Submission, para. 69 (quoting Appellate Body Report, *Korea – Various Measures on Beef*, para. 161).

[56] U.S. Second Written Submission, para. 69 (quoting Panel Report, *US – Shrimp (Thailand)*, para. 7.188).

V. Conclusion

46. This concludes the U.S. opening statement. We look forward to answering any questions the Panel may have.