AS DELIVERED

India – Certain Measures Relating to Solar Cells and Solar Modules (WT/DS456)

First Substantive Meeting of the Panel with the Parties

Opening Statement of the United States

February 3, 2015

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

I. INTRODUCTION

2. At the outset, as noted in the U.S. first written submission, the United States reiterates its overall support for the environmental and developmental aims and objectives of India's National Solar Mission (NSM). Without a doubt, promoting the use of solar power and other forms of renewable energy is a laudable and important goal. The U.S. challenge is limited to India's discriminatory domestic content requirements, *not* to any other element of the NSM.

3. The United States submits that, following the party's first submissions, there is no real question that the domestic content requirements (DCRs) at issue in this dispute accord less favourable treatment to imported solar cells and modules as compared to cells and modules manufactured in India. That means that they *prima facie* breach India's national treatment obligations under Article III:4 of the GATT 1994[1] and Article 2.1 of the TRIMs Agreement.[2]

4. The remaining question before the Panel is whether there is any *legal* justification for India's decision to impose these discriminatory DCRs. India proffers several, but ultimately fails to demonstrate that any of them are applicable to the facts of this case.

5. The rest of our statement will proceed as follows:

- First, we will explain how the DCRs discriminate against foreign products, contrary to Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.

- Second, we explain why India's invocation of the special rule for procurement under Article III:8(a) of the GATT 1994 fails because the government of India is not procuring solar cells and modules.

[1] *General Agreement on Tariffs and Trade 1994*.
[2] *Agreement on Trade-Related Investment Measures*.

- Third, we address India's argument that its DCRs are measures "essential" to address a "general or local short supply" of solar cells and modules within the meaning of Article XX(j) of the GATT 1994. India's own arguments show that there is *no* general or local short supply of solar cells and modules, so that Article XX(j) does not apply.

- Fourth, we rebut India's contention that its DCRs are "necessary to secure compliance with a law or regulation" for purposes of Article XX(d) of the GATT 1994. India has not identified any WTO-consistent law or regulation that requires the imposition of DCRs, much less demonstrating that DCRs are (in any way) "necessary" to secure compliance with a law or regulation.

II. THE DOMESTIC CONTENT REQUIREMENTS UNDER PHASES I AND II OF THE NSM PROGRAM ARE INCONSISTENT WITH ARTICLE III:4 OF THE GATT 1994 AND ARTICLE 2.1 OF TRIMS AGREEMENT

6. The DCRs imposed under the NSM are inconsistent with Article III:4 of the GATT 1994 because (i) solar cells and modules made in India and those imported are "like products"; (ii) the DCRs are "requirements" that "affect" the "internal" purchase or "use" of solar cells and modules in India; and (iii) the DCRs accord less favorable treatment to solar cells and modules than to like products of Indian origin.[3]

7. These DCRs also fall squarely within the types of measures included in paragraph 1(a) of the Annex to the TRIMs Agreement, and are therefore, by definition, inconsistent with Article III:4 of the GATT 1994, as well as Article 2.1 of the TRIMs Agreement.

8. India in its submissions does not dispute (i) that imported solar cells and modules made in India are "like products" within the meaning of Article III:4 of the GATT 1994;[4] (ii) that the DCRs are "requirements" that "affect" the "internal" purchase or "use" of solar cells and modules in India; or (iii) that the DCRs are "trade-related investment measures" within the meaning of the

[3] *See, e.g.,* Appellate Body Report, *Korea – Various Measures on Beef*, para. 133.
[4] *See* India's First Written Submission, para. 86.

TRIMs Agreement. These facts, by themselves, establish an inconsistency with both Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994.

9. It is also useful to review the precise language of paragraph 1(a) of the Annex to the TRIMs Agreement, which provides in relevant part that:

> TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are ***mandatory*** or enforceable under domestic law or under administrative rulings, or ***compliance with which is necessary to obtain an advantage***, and which require:
>
> (a) the ***purchase or use by an enterprise of products of domestic origin…***

10. The text of the relevant NSM measures make clear that compliance with the applicable DCRs is "mandatory."

11. The Phase I, Batch I Guidelines state that "it will be *mandatory* for Projects based on crystalline silicon technology to *use* modules manufactured in India..." Similarly, the Phase I, Batch II Guidelines state that "it will be *mandatory* for all the Projects to *use* cells and modules manufactured in India…" Likewise, the Phase II, Batch I Guidelines provide that "Under the DCR requirement, the solar cells and modules *used* in a power plant *must* be both be made in India." Finally, the DCR provisions are restated verbatim in the corresponding Request for Selection (RFS) documents for Phase I (Batch I), Phase I (Batch II), and Phase II (Batch I).

12. In addition to demonstrating that the DCRs are "mandatory," the language included in these documents makes clear that "enterprises" – namely, solar power developers (or SPDs) – are required to "purchase or *use*…products of domestic origin..." India has not disputed that SPDs must comply with the applicable DCRs in order to receive certain "advantages" under the NSM Program, such as eligibility to bid for and the ability to enter into long-term contracts under the NSM.

13. Additionally, the RFS documents make clear that any SPD that fails to comply with these requirements will both lose its deposit and "shall be removed from the list of the selected Projects."[5]

14. The DCRs at issue in this dispute fall within the types of measures included in paragraph 1(a) of the Annex to the TRIMs Agreement. Article 2.2 specifies that the Annex contains "[a]n illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994." Therefore, by definition, India's DCRs are inconsistent with Article III:4 of the GATT 1994 (and Article 2.1 of the TRIMs Agreement).

15. The Appellate Body recognized this point in *Canada – Renewable Energy / Canada – Feed-in Tariff ("Canada – FIT*"), where it stated 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 [Article III:4 of the GATT 1994]'."[6]

16. India argues that there is "no violation of Article III:4" because "the United States has failed to demonstrate" that the DCRs accord less favorable treatment to imported solar cells and modules as compared to cells and modules made in India.[7] India's argument on this score is without merit. Article 2.2 of TRIMs *defines* the measure described in the Annex as inconsistent with the national treatment obligation – it does not require a further showing of actual differential treatment.

17. The United States notes India's specific argument that the DCRs do not accord less favorable treatment to imported solar cells and modules because the NSM Program does not "confine the benefits or advantages relating to tariff or any other benefits, to SPDs that use only domestically manufactured cells and modules."[8] But this statement (which appears to envision erroneously that the only "benefits" or "advantages" are the rates under signed contracts) applies

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[5] *See*, *e.g*., Request for Selection (RfS) Document for 750 MW Grid Connected Solar Photo Voltaic Projects Under JNNSM Phase II Batch-I, Solar Energy Corporation of India, p. 27 (October 28, 2013) (Exhibit US-12); *See also* Request for Selection Document for New Grid Connected Solar Photo Voltaic Projects Under Phase 1 of JNNSM, Batch II, NTPC Vidyut Vyapar Nigam Limited, p. 26 (August 2011) (Exhibit US-15).
[6] Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff ("Canada – FIT")*, para. 5.24.
[7] India's First Written Submission, para. 89.
[8] India's First Written Submission, para. 89.

only to *some* of the SPD projects under the NSM – the portion to which DCRs do not apply. It does not change the fact that, for the share of projects reserved to those developers who purchase and use domestic products, there is less favorable treatment for imported products, as the *use of imported cells and/or modules is prohibited*. Under Article III, compliance with national treatment for some transactions does not excuse a Member from its obligation to comply with national treatment for other transactions.

18. The Appellate Body has made clear that where a measure "modifies *the conditions of competition* to the detriment of imported products" that measure operates to accord less favorable treatment to imported products within the meaning of Article III:4.[9] Even as described by India, the NSM Program operates so that *some* SPD contracts prohibit the use of imported solar cells and modules – that is, only some of them allow the use of imported solar equipment. Barring foreign products from some sales opportunities available to domestic suppliers clearly modifies the conditions of competition to the detriment of imported products.

19. Thus, even putting aside the Illustrative List of the TRIMs Annex, under which India's DCRs are *necessarily* inconsistent with Article III:4 of the GATT 1994, as well as Article 2.1 of the TRIMs Agreement, the facts of this dispute also demonstrate that the DCRs <u>do</u> operate to "modify the conditions of competition to the detriment" of imported solar cells and modules and thereby accord less favorable treatment to imported products within the meaning of Article III:4 of the GATT 1994.

20. For the foregoing reasons, the United State respectfully submits that the DCRs under Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1) are inconsistent with India's national treatment 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 ARTICLE III:8(a) OF THE GATT 1994

21. India argues that its DCRs fall under the government procurement derogation of Article III:8(a) and are therefore not subject to the national treatment obligations of Article III of the

[9] *E.g.*, Appellate Body Report, *Korea – Various Measures on Beef*, para. 135 (emphasis in the original).

GATT 1994. As the United States explained in its first written submission, and will further explain today, India cannot properly invoke the government procurement derogation to justify its discrimination against imported solar cells and modules.

A. The NSM Program's Domestic Content Requirements are Not Laws Regulations, or Rules Governing Procurement within the Meaning of Article III:8(a)

22. The Appellate Body has found that Article III:8(a) of the GATT 1994 derogates from Article III only where the imported product "allegedly being discriminated against [is] in a competitive relationship with the product being purchased."[10] In *Canada – FIT*, Canada also invoked the government procurement exception to justify domestic content requirements for renewable energy equipment, which included solar cells and modules under the Province of Ontario's Feed-in-Tariff (or "FIT") Program. The Appellate Body, however, found that the treatment of government procurement under Article III:8(a) was not available because "the product being procured [by the government] [was] electricity, whereas the product discriminated against for reason of its origin [was] generation equipment."[11] The Appellate Body went on to note that the "[those] two products are not in a competitive relationship" and that, accordingly, "the discrimination relating to generation equipment…is not covered by the derogation of Article III:8(a) of the GATT 1994."[12]

23. Similar to the facts of *Canada – FIT*, the Indian government is not purchasing solar cells and modules under the NSM Program, but rather the *electricity* generated through the use of those cells and modules. Therefore, following the logic clearly articulated by the Appellate Body in *Canada – FIT*, the Article III:8(a) government procurement provision does not apply to the facts of *this* dispute. Simply put, Article III:8(a) does not permit India to purchase electricity but discriminate against imported solar cells and modules.

24. In its first written submission, India acknowledges that the Indian government is *not* purchasing solar cells and modules under the NSM Program and makes no attempt to argue that

[10] Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff*, para. 5.79.
[11] Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff*, para. 5.79.
[12] Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff*, para. 5.79.

solar cells or modules are in a competitive relationship with electricity. Rather, India asserts that because "solar cells and modules are [] integral to the generation of solar power [they] cannot be treated as distinct from the generation of solar power."[13] On that basis, India posits that the Panel should consider a theory that the Indian government is *effectively* procuring the cells and modules because it is "buy[ing] solar power [i.e., the electricity] generated from such cells and modules."[14]

25. India's argument is not new, and it has already been rejected by the Appellate Body in *Canada – FIT*. In that dispute, the panel had observed that there was a "difference between the product subject to [DCRs] and the product subject to procurement"[15] and then found that the Ontario government's "purchases of electricity [fell] within the derogation of Article III:8(a), because the generation equipment "[was] needed and used" to produce the electricity, and therefore there [was] a 'close relationship' between the products affected by the domestic content requirement (generation equipment) and the product procured (electricity)."[16] When reviewing the findings on appeal, the Appellate Body rightly declared that the "connection" between the DCRs and electricity was insufficient to bring the DCRs within the purview of Article III:8(a). As noted, the Appellate Body concluded that the government procurement derogation *did not* cover the DCRs at issue in *Canada – FIT* because the government was procuring *electricity*, whereas the products being discriminated against were imported solar and wind power generation equipment. It found there was no competitive relationship between solar power (or wind power) equipment purchased by developers and the electricity purchased by the government.

26. Likewise, because the Indian government is not procuring solar cells and modules under the NSM Program, the DCRs pertaining to those cells and modules fall outside the coverage of Article III:8(a). India has not even tried to demonstrate that solar cells and modules and electricity are in a competitive relationship. Accordingly, any suggestion that DCRs under the NSM Program are properly viewed as "laws, regulations or requirements governing

[13] India's First Written Submission, para. 111.
[14] *See* India's First Written Submission, para. 114.
[15] Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff*, para. 5.76.
[16] Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff*, para. 5.76.

procurement" within the meaning of Article III:8(a) cannot be squared with the Appellate Body's analysis of that provision.

27. India seeks to avoid the implications of the Appellate Body findings in *Canada – FIT* by highlighting certain mechanical distinctions between the DCRs at issue in that dispute and this one.[17] But the differences it cites are inconsequential. The Appellate Body based its findings in *Canada – FIT* on the observation that the electricity purchased by the Government of Ontario did not compete with the solar and wind power generation equipment purchased by power developers. The metrics used to determine the "Minimum Required Domestic Content Levels" under Ontario's FIT Programme were irrelevant to this conclusion. Therefore, the minor differences identified by India do not detract from the applicability of the Appellate Body's findings to the facts of this dispute.

28. And, in relation to solar power generation equipment, the pertinent facts are the same. The FIT Programme's "Minimum Domestic Content Level" was structured so as to "require[]" solar and wind power developers "to purchase or use a certain percentage of renewable energy generation equipment and components sourced in Ontario…"[18] Likewise, the DCRs at issue in this dispute require solar power developers to purchase or use domestic renewable energy equipment. The defining feature of the two programs – a requirement to use domestic content – is therefore the same, notwithstanding India's attempt to draw distinctions.

29. For the reasons just described, the domestic content requirements under India's NSM Program cannot be characterized as rules governing procurement within the meaning of Article III:8(a) of the GATT 1994.

B. India Has Failed to Demonstrate that Any Procurement under the NSM Program is for Governmental Purposes within the Meaning of Article III:8(a)

[17] *See* India's First Written Submission, para. 112.
[18] Panel Report, *Canada – Renewable Energy / Canada – Feed-in Tariff*, para. 7.163.

30. Not only is the Indian government not engaged in the "procurement" of solar cells and modules, but India has also failed to demonstrate that any alleged procurement is "for governmental purposes" within the meaning of Article III:8(a).

31. The Appellate Body has identified two ways for evaluating whether a product is procured for a "governmental purpose" within the meaning of Article III:8(a). Specifically, the Appellate Body has stated that "the phrase 'products purchased for governmental purposes' refers to (i) what is consumed [or used] by the government; or (ii) "what is provided by government to recipients in the *discharge of its public functions*."[19]

32. It is clear from the facts of this dispute that the Indian government is not itself consuming or using the electricity it procures from SPDs through the NSM Program, and India has not argued to the contrary. And India also has not demonstrated that the government is providing electricity to recipients *in the discharge the Indian government's public functions*.

33. The Appellate Body has not explicitly explained how to determine what constitutes a "public function" for purposes of Article III:8(a). However, the Appellate Body has clarified that the mere assertion of "governmental aims or objectives" *does not* amount to a "governmental purpose" within the meaning of Article III:8(a).[20] It follows that a mere showing that a government is procuring a product to pursue certain policy "aims or objectives" is not a sufficient demonstration that the government is procuring the product (much less distributing it to recipients) in the discharge of the government's "public functions."

34. India asserts that its "procurement of solar power…is an act pursuant to the government purpose of promoting ecologically sustainable growth while addressing India's energy security challenge."[21] In its submission, however, India has not explained why promoting sustainable development should be understood as a "public function" as opposed to an important "aim or objective" of the Indian government. This is another crucial omission by India: as noted by the Appellate Body, "governmental agencies *by their very nature* pursue governmental aims or

[19] Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff*, para. 5.68.
[20] *See* Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff*, para. 5.69.
[21] India's First Written Submission, para. 143.

objectives."[22] As such, "the additional reference to 'governmental' in relation to 'purposes' *must* go beyond simply requiring some governmental aim or objective with respect to purchases by governmental agencies."[23]

35. Therefore, the United States respectfully submits that an additional basis to conclude that India cannot avail itself of the derogation in Article III:8(a) is that India has not demonstrated that its procurement of solar power is for a governmental purpose within the meaning of Article III:8(a).

C. The India Government's Procurement of Electricity *Is* With a View to Commercial Resale

36. A third reason that the Panel may conclude that India cannot avail itself of the derogation in Article III:8(a) is that any alleged procurement *is* "with a view to commercial resale" within the meaning of Article III:8(a).

37. The Appellate Body has explained that an inquiry into whether a transaction is with a view to "commercial resale" for purposes of Article III:8(a) "must be assessed having regard to the *entire* transaction."[24] The Appellate Body further explained that a profit motive on part of the seller is a strong indication that a "resale" is "commercial" in nature. The Appellate Body, however, also clarified that the lack of an immediate profit motive does not necessarily rule out the possibility of a "commercial resale" as the seller could have "self-interested" motives for selling at a loss or not gaining an immediate profit.[25] With respect to a buyer, the Appellate Body has stated that "commercial resale" is evident where "the buyer seeks to maximize his or her own interest."[26]

38. The United States observes that many of the distribution companies (or DISCOMs) to which India resells solar power are corporatized entities with a fiduciary duty to maximize profits or returns for shareholder.[27] Indeed, one-quarter of Indian DISCOMs are wholly-private

[22] Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff*, para. 5.66.
[23] Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff*, para. 5.66.
[24] Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff,* para 5.71.
[25] Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff,* para 5.71.
[26] Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff,* para 5.71.
[27] *See Private Distribution Companies in India* (Exhibit US-36).

concerns.[28] Thus, the DISCOMs are properly viewed as "buyer[s] seek[ing] to maximize [their] own interests." And on that basis, India's sale of the solar power (procured from SPDs) to such entities is properly viewed as "commercial resale" within the meaning of Article III:8(a). For this reason as well, India cannot avail itself of the derogation in Article III:8(a).

IV. India Has Failed to Demonstrate that the Exceptions Under Paragraphs (j) or (d) of Article XX of the GATT 1994 Justify the DCRs at Issue

39. The Appellate Body has found that where a party seeks to justify a measure under any of the general exceptions of Article XX, that party must satisfy a two-part test: First, the party must demonstrate that the measure falls within the scope of one of the subparagraphs of Article XX. Second, the party must establish that the measure meets the requirements of the chapeau of Article XX.[29]

40. The Appellate Body has also made clear that a party asserting a defense under Article XX bears the burden of establishing the elements of that defense.[30] Accordingly, if India seeks the protection of paragraphs (d) and (j) of Article XX, India bears the burden of demonstrating that the DCRs at issue are justified pursuant to those provisions, *as well as* the chapeau of Article XX. India has not met this burden.

A. India Has Failed to Demonstrate that the DCRs at Issue Are "Essential" to Addressing a Short Supply of Solar Cells and Modules within the Meaning of Article XX(j)

41. India argues that the DCRs at issue are justified under Article XX(j) of the GATT 1994. Article XX(j) allows a Member to take measures that are "essential to the acquisition or distribution of products in general or local short supply." Therefore, for India to establish that the DCRs at issue are justified under Article XX(j), India must demonstrate that the DCRs are "essential" to address a local or general shortage of solar cells and modules in India.

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[28] Exhibit US-36, Appendix 1.
[29] *E.g.*, Appellate Body Report, *Brazil – Retreaded Tyres*, para. 139.
[30] Appellate Body Report, *US – Wool Shirts and Blouses*, para. 46.

42. India has not demonstrated that there is a short supply of solar cells and modules in India. The Appellate Body has observed that the Oxford English Dictionary defines the term "in short supply" to mean "available only in limited quantity" or "scarce."[31] India, however, acknowledges that there is an "adequate availability"[32] of solar cells and modules on the international market, but does not bother to explain why India is unable to avail itself of this supply. Moreover, India complains that more than 90 percent of its solar PV installations rely on imported solar cells and modules[33] – suggesting that India is experiencing an abundance of solar power generation products, not a "scarcity" or "limited quantity." In short, India has failed to establish the factual predicate for invocation of Article XX(j). This alone demonstrates that India's invocation of Article XX(j) is without foundation.

43. India's view of "products in general or local short supply" as referring to *domestic* products rests on a misunderstanding of Article XX(j). This provision is *not* concerned with the supply of products of a particular origin, but rather the supply of that product in general or local situations *without* respect to origin. The term "products" in Article XX(j) is unqualified by origin while other provisions of the GATT 1994, which are addressed to products of a particular origin identify those products 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." Article XX(j) contains no such specification of the origin of the "products" that are in general or local short supply. Therefore, India's interpretation of this provision as relating to a short supply of *domestic* products is in error.

44. Even aside from the lack of any facts demonstrating the existence of a short supply of solar cells and modules, India has not demonstrated how DCRs could be "essential" to "the acquisition" of those products. The Appellate Body has observed that the Oxford English

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[31] Appellate Body Report, *China – Raw Materials*, para. 325.
[32] India's First Written Submission, para. 233.
[33] India's First Written Submission, para. 236.

Dictionary defines "essential" to mean "absolutely indispensable or necessary."[34] Therefore, for purposes of Article of XX(j), India would need to establish that the DCRs are "absolutely indispensable or necessary" to acquiring solar cells and modules purportedly in short supply. It has not done so.

45. As practical matter, it seems odd that a measure that discriminates against imports like DCRs could be viewed as "absolutely indispensable" to acquiring those same products in short supply. In most cases, such measures would tend to exacerbate the difficulties in acquiring that product. India has failed to demonstrate how the circumstances of its purported short supply could operate differently.

46. Rather, India appears to be not so much concerned with its ability to *acquire* solar cells and modules than with the apparent dearth of Indian-manufactured solar cells and modules. Specifically, India argues that the DCRs are designed to "incentivize domestic *manufacturing* of cells and modules" and are therefore "essential" to addressing the apparent shortage of Indian-produced cells and modules.[35] In other words, by India's own acknowledgment, it views the DCRs as "essential" to encourage local *supply* (production) and not essential to "the acquisition" of solar cells or modules.

47. For the foregoing reasons, India has failed to demonstrate that the DCRs at issue are "essential" to addressing a "short supply" of solar cells and modules for purposes of Article XX(j).

B. India Has Failed to Demonstrate that the DCRs at Issue Are Necessary to Secure Compliance with Laws or Regulations Not Inconsistent with the GATT 1994 within the Meaning of Article XX(d)

48. India also argues that the DCRs at issue are measures "necessary to secure compliance with laws or regulations [not] inconsistent with the provisions of [GATT 1994] …" for purposes of Article XX(d). The Appellate Body has found that "[a] Member who invokes Article XX(d) as a justification has the burden of demonstrating that" the measure at issue "is necessary to

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[34] Appellate Body Report, *China – Raw Materials*, para. 326.
[35] India's First Written Submission, para. 236.

secure compliance."[36]

49. First, many of the instruments cited by India appear to be broad policy documents with non-binding or merely hortatory effect.[37] That is, they do *not* appear to be laws or regulations with which India must "comply" within the meaning of Article XX(d). Previous GATT panels have reasoned that "to comply" means "to enforce obligations" not "to ensure the attainment of the objectives of laws and regulations."[38] Thus, even if the DCRs are designed to pursue the sustainable development goals reflected in the cited instruments, that is still insufficient to demonstrate that the DCRs are *necessary* to "secure compliance" with the instruments *themselves*. On this fact alone, India has failed to demonstrate that the DCRs are necessary to comply with any law or regulation for purposes of Article XX(d).

50. Second, India has also failed to demonstrate that the DCRs at issue are "necessary" to comply with the obligations contained in any allegedly binding instruments. India argues that its DCRs are "necessary" – for purposes of Article XX(d) – because "[t]he DCR Measures *contribute* to enforcing the sustainable development commitments undertaken by India, through its laws and regulations."[39] The Appellate Body has observed that, as a general matter, "necessary" can mean anything from "indispensable" to simply "makes a contribution to." But for purposes of Article XX(d), 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'."[40]

51. Finally, the United State observes that several of the instruments cited by India are international instruments, not domestic Indian laws or regulations.[41] India has not sufficiently demonstrated that those instruments have been incorporated into India's domestic legal system. As India states in its submission, in India "rules of international law are [automatically] accommodated into domestic law" only if "they do not run into conflict with laws enacted by

[36] Appellate Body, *Korea – Various Measures on Beef*, para. 157.
[37] *See also* EU Third Party Submission, para. 66.
[38] GATT Panel Report, *EEC – Parts and Components*, para. 5.79.
[39] India's First Written Submission, para. 260 (emphasis added).
[40] Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.
[41] India's First Written Submission, para. 240.

Parliament."[42] Therefore, India would bear the burden of showing that these instruments are indeed incorporated into India's domestic legal system.[43]

52. For the foregoing reasons, the United States respectfully submits that India has not met its burden of demonstrating that the DCRs at issue are necessary to secure compliance with (otherwise WTO-consistent) laws or regulations within the meaning of Article XX(d).

V. CONCLUSION

53. This concludes the U.S. opening statement. To maximize the time available for the Panel's questions, we have not sought to repeat every argument in our first written submission, or to rebut all of the errors in India's submission. We look forward to answering the Panel's advance questions and any additional questions you may have.

[42] India's First Written Submission, para. 180.
[43] *See also* EU Third Party Submission, para. 65.