INDIA — CERTAIN MEASURES RELATING TO SOLAR CELLS AND SOLAR MODULES

(DS456)

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TABLE OF CONTENTS

TABLE OF REPORTS

SHORT TITLE	FULL CITATION
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
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
EEC – Parts and Components	GATT Panel Report, *European Economic Community – Regulation on Imports of Parts and Components*, L/6657, adopted 16 May 1990
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
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 – 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 – Shrimp	Appellate Body Report, *United States – Import Prohibtion 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 – 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

1. In its first written submission, the United States explained that domestic content requirements ("DCRs") imposed under India's National Solar Mission ("NSM") are inconsistent with Article III:4 of the *General Agreement on Tariffs and Trade* ("GATT 1994") and Article 2.1 of the *Agreement on Trade-Related Measures* ("TRIMs Agreement") because they accord less favourable treatment to imported solar cells and modules as compared to cells and modules manufactured in India. India's rebuttal submission, statements to the Panel, and responses to the Panel's questions have done nothing to call this conclusion into question.

2. India instead attempts to provide defenses under Articles III:8(a), XX(j) and XX(g) of the GATT 1994, but these arguments are unconvincing. India cannot use Article III:8(a) as defense because, as the United States has shown, the Government of India is not procuring solar cells and modules under the NSM Program, but electricity. As such, following the logic of the Appellate Body in *Canada – FIT*, this provision provides no defense at all.

3. India's attempts to utilize Article XX also fall short. India asserts that its DCRs are measures "essential" to address a "general or local short supply" of solar cells and modules, therefore, justified under Article XX(j) of the GATT 1994. But India's own arguments demonstrate that there is *no* general or local short supply of solar cells and modules in India. Even if there were such a short supply, India has failed to adequately explain why the DCRs at issue are "essential" to addressing its purported short supply of solar cells and modules.

4. India also contends that its DCRs are "necessary to secure compliance with a law or regulation" for purposes of Article XX(d) of the GATT 1994. India, however, has not identified any WTO-consistent law or regulation that requires the imposition of DCRs, much less demonstrated that DCRs at issue are in any way "necessary" to secure compliance with a law or regulation.

5. In sum, the DCRs at issue constitute a clear breach of India's national treatment obligations under Article III or the GATT 1994 and the TRIMs Agreement, which cannot be justified under any of the GATT provisions cited by India.

6. In Part II.A of this submission, the United States elaborates further on India's breaches of its national treatment obligations under the TRIMs Agreement and GATT 1994. In Part II.B, the United States addresses India's principle defensive argument: that the DCRs at issue are measures governing government procurement under Article III:8(a) of the GATT 1994. Finally, in Part III, the United States explains why India's arguments under Article XX of the GATT 1994 do not justify India's breach.

II. INDIA HAS RAISED NO VALID DEFENSE TO THE U.S. CLAIMS UNDER GATT 1994 AND THE TRIMS AGREEMENT

A. India Has Not Refuted the U.S. Claims that the DCRs at Issue Are Inconsistent with GATT 1994 Article III:4 and TRIMs Agreement Article 2.1

7. In its first written submission, the United States explained that the DCRs 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] Specifically, the DCRs accord less favorable treatment to imported solar cells and modules within the meaning of Article III:4, because they modify the conditions of competition in favor of cells and modules manufactured in India to the detriment of imported equipment. The DCRs are further inconsistent with Article 2.1 of TRIMS Agreement and Article III:4 of the GATT 1994 because they make the purchase of domestic products (solar cells and modules) a requirement to obtain an advantage (opportunities to bid for and enter into contracts to supply electricity under the NSM), thus falling squarely under paragraph 1(a) of the Annex to the TRIMs Agreement. India has not advanced any meritorious rebuttal to these claims.

8. India acknowledges that the "domestic content requirements at issue in this dispute "would qualify under the meaning of paragraph 1(a) of the Illustrative List … to the extent they are held to be inconsistent with Article III:4 of GATT 1994."[3] The Appellate Body has recognized that a measure that falls under paragraph 1(a) of the Illustrative List is *by definition* inconsistent with Article III:4 of the GATT 1994. Specifically, the Appellate Body in *Canada – FIT* observed 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]'."[4] Thus, the fact that the DCRs at issue "qualify under the meaning of paragraph 1(a) of the Illustrative List" – as India concedes – provides a sufficient basis for the Panel to find that the DCRs are inconsistent with Article III:4 of GATT 1994 and Article 2.1 of the TRIMs Agreement.

9. India has also failed to refute the U.S. substantive argument that the DCRs operate to accord less favourable treatment to imported solar cells and modules within the meaning of Article III:4 of the GATT 1994. India argues that this is not the case because "the benefits or advantages relating to tariff or any other benefits" are not confined "to SPDs that use only domestically manufactured cells and modules."[5] As noted by the United States,[6] however, India's argument on this score is valid only with respect to the portion of solar power projects to which DCRs *do not apply*. For the share of projects reserved for developers that *are* required to use domestic cells or modules, there is necessarily "less favorable treatment" for imported cells or modules, as the NSM measures prohibit use of imported products for those projects.[7] To put

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[1] *See generally*, U.S. First Written Submission, paras. 45-79.

[2] *See generally*, U.S. First Written Submission, paras. 80-93.

[3] India's Response to Panel Question No. 2(b).

[4] *See* U.S. Opening Statement at the First Meeting of the Panel, para. 17 (quoting Appellate Body Report, *Canada – FIT*, para. 5.24.).

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

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

[7] The scope of the DCRs under each phase and batch is as follows

it another way, under Article III of the GATT 1994, compliance with national treatment with respect to *some* projects, and the products associated with those particular projects, does not excuse a Member from its obligation to comply with national treatment with respect to *all* projects and products.

10. Moreover, 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.[8] Even as described by India, the DCRs at issue in this dispute operate so that *some* SPD projects would be prohibited from using imported solar cells and modules as ultimately embodied in the SPD contracts signed – that is, only some of them permit the use of imported solar equipment, while *all* of them allow the use of domestic cells and modules. A measure that bars foreign products from competing for sales opportunities available to domestic suppliers clearly modifies the conditions of competition to the detriment of imported products and is thereby inconsistent with Article III:4 of the GATT 1994.

11. In sum, India has failed to refute the U.S. claims that the DCRs at issue are inconsistent with India's national treatment obligations under both Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. The Panel should therefore find that the DCRs are inconsistent with India's obligations under those provisions.

12. With respect to the order of analysis of the two national treatment provisions, the United States believes that the Panel may properly begin its analysis under either the GATT 1994 or the TRIMs provision, and in both cases, will reach the same conclusion – that, for the reasons described above, India's measures breach its obligations. However, the United State believes that it may be more efficient for the Panel to begin its analysis under Article 2.1 of the TRIMs Agreement, before proceeding to review under Article III:4 of the GATT 1994.[9] This is because as noted, measures that are inconsistent with Article 2.1 of the TRIMs Agreement are necessarily inconsistent with Article III:4 of the GATT 1994.[10] Accordingly, if the Panel were to find that the DCRs at issue in this dispute are covered by paragraph 1(a) of the Illustrative List to the TRIMs Annex, it would obviate the need for the Panel to conduct additional analysis for purposes of establishing that the DCRs are also inconsistent with India's obligations under Article III:4 of the GATT 1994. (The reverse is not true – if the Panel concludes that these measures are inconsistent with Article III:4 of the GATT 1994, it would need to perform further

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Phase I, Batch 1 Guidelines state: "For Solar PV Projects it will be mandatory for Projects based on crystalline silicon technology to *use* the modules manufactured in India…" Section 2.5(D) (Exhibit US-5)

Phase I, Batch 2 Guidelines state: "For Solar PV Projects to be selected in second batch during FY 2011-12, it will be mandatory for all the Projects to *use* cells and modules manufactured in India…" Section 2.5(D) (Exhibit US-6)

Phase II Guidelines state: "Under the DCR, the solar cells and modules *used* in the power plant must both be made in India." Section 2.6(E) (Exhibit US-7)

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

[9] *See* U.S. Responses to Panel Question No. 13(a), paras. 25-26..

[10] *See* U.S. Opening Statement at the First Meeting of the Panel, para. 17.

analysis to evaluate whether the measure was also consistent with Article 2.1 of the TRIMs Agreement.)

B. The NSM Program's Domestic Content Requirements Are Not Covered by the Government Procurement Derogation of Article III:8(a) of the GATT 1994

1. Solar Cells and Modules Are Not in a Competitive Relationship with Electricity

13. As explained in the U.S. first written submission, India cannot properly invoke the government procurement derogation under Article III:8(a) to justify the discriminatory DCRs at issue because India is procuring electricity under the NSM Program, whereas the products subject to discrimination are solar cells and modules. Nothing in the text of Article III:8(a) suggests the "products" subject to the derogation are different from the "product" being accorded less favorable treatment under Article III:4. The Appellate Body in *Canada – FIT* similarly found that Article III:8(a) applies only where the imported product "allegedly being discriminated against [is] in a competitive relationship with the product being purchased."[11] The United States observes that India has essentially conceded that it is not procuring solar cells and modules under the NSM Program.[12] Nor has India attempted to argue that the electricity it is purchasing is in a competitive relationship with imported solar cells and modules. On these facts alone, the Panel has a sufficient basis to reject India's invocation of Article III:8(a).

14. India's remaining arguments similarly fail to justify its invocation of Article III:8(a). In its first written submission, India acknowledges that the Indian government is *not* purchasing solar cells and modules under the NSM Program,[13] and none of its submissions even attempts to argue that solar cells or modules are in a competitive relationship with electricity. Nonetheless, 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."[14] 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."[15]

15. India's reasoning is not new, and was previously rejected by the Appellate Body in *Canada – FIT*. In that dispute, the panel concluded that the Ontario government's "purchases of electricity [fell] within the derogation of Article III:8(a), because the generation equipment was

[11] Appellate Body Report, *Canada – FIT*, para. 5.79

[12] *See* India's First Written Submission, para. 114 ("the Government does not physically acquire or take custody of the solar cells and modules and instead choose to buy the solar power generated from such cells and modules…")

[13] India's First Written Submission, para. 114.

[14] India's First Written Submission, para. 111.

[15] *See* India's First Written Submission, para. 114.

"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, however, the Appellate Body declared that the "connection" between the DCRs and electricity was insufficient to bring the DCRs within the purview of Article III:8(a).[17] 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.[18] It found there was no competitive relationship between solar power (or wind power) equipment purchased by developers and the electricity purchased by the government.

16. The facts of this dispute are essentially identical to those of *Canada – FIT*: as India acknowledges,[19] 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. As Article III:8(a) applies only to measures affecting products procured by the government (or products competitive with those products), it does not permit India to purchase electricity but discriminate against imported solar cells and modules. Simply put, any suggestion that DCRs under the NSM Program are properly viewed as "laws, regulations or requirements governing procurement" within the meaning of Article III:8(a) cannot be squared with the Appellate Body's analysis of that provision.

17. India has made several efforts to avoid the implications of the findings in *Canada – FIT*, but none of them are persuasive. Its primary legal argument rests on the Appellate Body statement that analysis of Article III:8(a) *may* require consideration of discrimination as to inputs into the product being procured, which in India's view "left room" to treat an "integral input" as covered by that Article.[20] But the possibility signaled by this statement does not, as India assumes, mean that an integral input *must* be treated the same as a procured product. Rather, the Appellate Body found that for any product that the government did not procure, Article III:8(a) applies only if there is a "competitive relationship" between the product and the product that the government did procure.[21] There is no indication, and no legal reason, to consider that this test does not apply to "integral inputs." India also relies on a factual assumption that solar panels and modules are an input to the generation of solar power, but they are actually capital equipment that is not consumed or incorporated in the power generated. Finally, India asks the Panel to

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[16] Appellate Body Report, *Canada – FIT*, para. 5.76.

[17] Appellate Body Report, *Canada – FIT*, para. 5.78 ("However, in our view, this c*onnection* …is not dispositive on the issue, because Article III:8(a) imposes also other conditions") (emphasis added).

[18] 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.")

[19] *See* India's First Written Submission, para. 114.

[20] India's Response to Panel Question No. 19, 2nd para.

[21] Appellate Body Report, *Canada – FIT*, para. 5.63.

disregard the findings in *Canada – FIT* because the facts allegedly differ. This is also incorrect. In all relevant ways, the fact patterns are the same.

2. Solar Cells and Modules are Not Inputs, Integral or Otherwise, in the Generation of Electricity

18. In its responses to questions from the Panel, India has begun to characterize solar cells and modules as "integral *inputs*" to the generation of solar power.[22] India then asserts that "the derogation under Article III:8(a) is available" to cover the DCRs at issue because the "product being discriminated against [*i.e.*, solar cells and modules] is an integral input for the generation or production of the product that is finally purchased [*i.e.*, solar power]".[23] To support this reasoning, India cites the Appellate Body statement in *Canada – FIT* that "[w]hat constitutes a competitive relationship between products may require consideration of inputs and processes of production used to produce the product."[24]

19. The United States does not dispute that, in determining whether two products are in a competitive relationship for purposes of applying Article III:8(a), it may sometimes be useful to consider the inputs used to produce those products. India, however, makes a different argument – that an "integral input" to a product procured by the government is by its nature covered by the derogation provided by Article III:8, even if it was not procured by the government or in a competitive relationship with the procured product. The most straightforward rebuttal to this argument is that India has the facts wrong.

20. Solar cells and modules are not inputs in the generation of electricity. They are *not* incorporated into or otherwise physically detectable in the electricity procured by the Indian government. Instead, solar cells and modules are more accurately characterized as capital goods – equipment like a turbine or a generator. Therefore, contrary to India's assertions, when it buys solar electricity, it *does not* acquire the cells and modules. Rather, as it acknowledges, the cells and modules remain in the clear custody and ownership of the solar power developers.[25] Therefore, the legal question of whether Article III:8(a) provides special a rule for "integral inputs" into products procured by the government is one that the Panel does not have to answer.

3. India has Identified No Valid Distinction between the Relevant Facts in this Dispute and *Canada – FIT*

21. India further seeks to avoid the implications of the findings in *Canada – FIT* by highlighting certain mechanical distinctions between the DCRs at issue in that dispute and this

[22] India's Response to Panel Question No. 19, 3rd para. (The United States observes that India did not characterize solar cells and modules as "inputs" in its first written submission.)

[23] India's Response to Panel Question No. 19, 4th para.

[24] India's Response to Panel Question No. 19, 1st para. (quoting Appellate Body, *Canada – FIT*, para. 5.63).

[25] *See* India's First Written Submission, para. 114.

dispute.[26] But the differences it cites are inconsequential. As previously noted by the United States, 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 equipment purchased by SPDs.[27] The metrics used to determine the "Minimum Required Domestic Content Levels" under Ontario's FIT Programme were irrelevant to this conclusion. Therefore, India's detailing of minor differences between criteria used under FIT and the NSM does not detract from the applicability of the Appellate Body's findings to the facts of this dispute.

22. At any rate, the panel and Appellate Body in *Canada – FIT* found that 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…."[28] That was the critical fact underlying the finding. In this regard, the DCRs under the NSM are functionally identical – they require solar power developers to purchase or use domestically sourced renewable energy equipment.

23. Nonetheless, India argues that:

> the focus of the domestic content requirements under Phase I (Batch I and II), and Phase II (Batch I) of JNNSM, 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. *This is unlike the facts in the Canada-Renewable Energy/ Canada- Feed-in Tariff Programme, where the focus was on domestic content in a set of designated activities of a power plant, and not on the generation of electricity by such plant*.[29]

24. Notwithstanding India's characterization to the contrary, the DCRs at issue in *Canada-FIT* overwhelmingly pertained to *equipment used to generate electricity*, including solar cells and modules. Indeed, India's statement is easily contradicted by a simple review of the "Domestic Content Grids" issued by the Ontario government; they set forth the types of generation equipment to which the DCRs applied, and the corresponding "qualifying percentage" necessary to satisfy the DCRs.[30]

25. The government of Ontario issued three different Domestic Content Grids for solar power projects under the FIT Programme: (i) Solar Power Projects Utilizing *Crystalline Silicon Technology* (Greater than 10 kW); (ii) Solar Power Projects Utilizing *Thin-Film* (Greater than 10 kW); and (iii) in Solar Power Projects 10 kW or less.

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[26] *See* India's First Written Submission, para. 112.

[27] *See* U.S. Opening Statement at the First Meeting of the Panel, para. 27.

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

[29] India's First Written Submission, para. 112. (emphasis added).

[30] *See* Panel Report, *Canada – FIT*, paras. 7.158 – 7.160.

26. The established Minimum Required Domestic Content level for solar projects greater than 10 kW (*i.e.*, FIT projects) was 50 percent during 2009-10, rising to 60 percent during 2011. The Minimum Required Domestic Content level for projects 10 kW or less (*i.e.*, microFIT projects) was 40 percent during 2009-2010, rising to 60 percent for 2011. Table 1 below summarizes the requisite Minimum Domestic Content levels for solar projects under the FIT Programme.

Table 1: Minimum Required Domestic Content Levels Prescribed under the FIT Programme[31]

	Solar PV (FIT)		**Solar PV (microFIT)**	
Milestone Date for Commercial Operation	2009-2010	2011-	2009-2010	2011-
Minimum Required Domestic Content Level	50%	60%	40%	60%

27. The Domestic Content Grid for Crystalline Silicon projects (greater than 10 kW) further demonstrates that domestically sourced equipment was required for FIT projects. Seven of the nine "Designated Activities" listed in the grid pertained to generation equipment (*e.g.*, cells, modules, mounting systems, etc.) while only two of the categories (items 8 and 9) pertained to service activities (*i.e.*, construction, consulting).[32] Moreover, the qualifying percentages for the service-related categories amount to only 22 percent – that is, well below the 50 - 60 percent Minimum Required Domestic Content level.[33] This was also the case for Thin Film projects

[31] *See* Panel Report, *Canada – FIT*, para. 7.158.

[32] *See* Panel Report, *Canada – FIT*, Exhibit EU-5, Exhibit D, p. 7.

[33] *See also* Panel Report, *Canada – FIT*, para. 7.161 (quoting Japan's first written submission, para. 173):

> Japan, argues that "for *all* projects", the effect of the Domestic Content Grids is to require that "*at least some* goods manufactured, formed, or assembled in Ontario *must* be utilized in order to satisfy the Minimum Required Domestic Content Levels". Japan contends that purely service activities contained in each Domestic Content Grids are not sufficient to meet the "Minimum Required Domestic Content Levels". In particular, Japan submits that the Minimum Required Domestic Content Levels cannot be achieved, in the light of the relevant Domestic Content Grids, without the use of domestic over imported goods for the following reasons:
>
> > In the FIT Contract, Exhibit D, Table 2 for Solar (PV) Power Projects Greater than 10 kW Utilizing Crystalline Silicon PV Technology, the only designated activities that are purely service activities are line item 8 relating to construction costs (with a qualifying percentage of 18%) and line item 9 relating to consulting services (with a qualifying percentage of 4%). Thus, services may contribute at most 22% to the Domestic Content Level. In other words, where the Minimum Required Domestic Content Level is greater than 22% (as it has always been for these Solar (PV) Power Projects, ...), at least some Ontario-sourced goods must be used to satisfy the Minimum Required Domestic Content Level.

(greater than 10 kW) and solar power projects under 10kW, where the non-equipment categories amounted to only 28 and 27 percent respectively – again, far below the threshold needed to satisfy the requisite Minimum Domestic Content levels.[34] The panel accordingly found that the DCRs at issue in in *Canada – FIT* were structured so as to require the "purchase or use a certain percentage of renewable energy generation equipment and components sourced in Ontario…"[35]

28. Thus, the essential facts of this dispute and *Canada – FIT* are the same: the DCRs at issue require SPDs to use renewable energy generation equipment (*i.e.*, solar cells and modules) made in India. As such, India's attempt to draw material distinctions between the DCRs at issue in this dispute and those at issue *Canada – FIT* must fail.

29. India attempts to draw a further distinction between solar cells and modules – which it characterizes as "integral inputs" to the generation of solar power – and other types of equipment, which India refers to as merely "ancillary" (inverters, electrical wiring, etc.).[36] Specifically, in its Reponses to Questions from the Panel, India highlights the fact that in *Canada – FIT*, "it was possible to achieve the [Minimum Domestic Content] levels by exclusively relying on equipment/designated activities (other than solar cells and modules)."[37] While not explicit on this score, India seems to suggest that the DCRs at issue in this dispute are legally permissible because they are limited to so-called "integral" generation equipment like solar cells and modules, *in contrast* to the DCRs in *Canada – FIT*, which also covered merely "ancillary" equipment like electrical wiring, inverters, mounting systems, etc.

30. The logical import of India's argument is that, had the Ontario Government limited its DCRs to solar cells and modules, the DCRs at issue in *Canada – FIT* would have been properly justified under Article III:8(a). The United States observes, however, that if India's distinction between "integral" and "ancillary" equipment was valid, the Appellate Body in *Canada – FIT* should have found that the DCRs pertaining the solar cells and modules were covered by Article III:8(a), while the DCRs pertaining to other "ancillary" equipment were not so justified. It did not do so.

31. Rather, as noted, the Appellate Body based its findings in *Canada – FIT* on the observations that (1) the DCRs at issue required the purchase or use of renewable generation equipment made in Ontario; and (2) that electricity purchased by the Government of Ontario was not in a competitive relationship with the solar and wind power equipment subject to discrimination. Crucially, in making these findings, the Appellate Body did not discern a distinction between solar cells and modules and the other generation equipment subject to DCRs (*e.g.*, wiring, inverters, and mounting systems). That is, the Appellate Body did not recognize some equipment (including solar cells and modules) as more (or less) integral than other types

[34] *See* Panel Report, *Canada – FIT*, Exhibit EU-5, Exhibit D, pp. 8-9.

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

[36] *See* India's Response to Panel Question No. 19, 3rd para.

[37] India's Response to Panel Question No. 20(a), 2nd para.

for purposes of generating solar power, or for purposes of its finding that DCRs at issue in *Canada – FIT* were "not covered by the derogation of Article III:8(a) of the GATT 1994."[38]

32. The United States submits that India has presented no reason for the Panel in this dispute to treat solar cells and modules as a special class of product covered by Article III:8(a) even if they are they are not in a competitive relationship with energy procured by the government. Rather, as noted by the United States, the essential facts of *Canada – FIT* and the instant dispute are the same. In both cases, the DCRs at issue require the use of domestically manufactured renewable generation equipment. In both cases, the government does not procure the generation equipment, but rather the electricity generated by that equipment. Accordingly, and as reflected in the approach of the Appellate Body in *Canada – FIT*, 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).

III. INDIA HAS FAILED TO MEET THE CONDITIONS FOR JUSTIFYING THE DCRS AT ISSUE UNDER PARAGRAPHS (j) OR (d) OF ARTICLE XX OF THE GATT 1994

33. 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.[39] Accordingly, if India seeks the protection of paragraphs (d) and (j) of Article XX, it bears the burden of demonstrating that the DCRs at issue are justified pursuant to those provisions. India has not met this burden.

A. India Has Not Demonstrated That It Meets the Prerequisites for Invoking Article XX(j) of the GATT 1994

34. India seeks to justify its DCRs under Article XX(j) of the GATT 1994, but it has failed to satisfy two of the criteria for that exception – that there is a product in "general or local short supply" and that India's WTO-inconsistent measures are essential to the acquisition or distribution of that product. Either of these failings is fatal to India's defense under this provision.

35. Article XX(j) provides that "nothing in this Agreement 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." This passage contains several significant elements, and there are more in the proviso that follows it.[40] This submission

[38] Appellate Body Report, *Canada – FIT*, para. 5.79

[39] Appellate Body Report, *US – Wool Shirts and Blouses*, para. 46.

[40] The proviso of Article XX(j) provides in relevant part that:

> any such measures [taken under Article XX(j)] shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist.

addresses the "general or local short supply" and "essential to the acquisition of distribution" criteria.[41]

1. India Is Not Experiencing a "Short Supply" of Solar Cells and Modules

36. India has failed to demonstrate the existence of a short supply of solar cells and modules in India. In *China – Raw Materials*, the Appellate Body observed that, in the context of Article XX(j) of the GATT 1994, the words "general or local short supply," refers to a situation where a product is "available only in limited quantity" or "scarce."[42] Consistent with this interpretation, the terms "general or local" reflect that a product can be in short supply in the international market, without necessarily being in short supply in any particular country. The converse is also true: a product that is generally available on the international market, could possibly be in short supply in a particular country or locality.[43]

37. India, however, has not demonstrated that solar cells and modules are in short supply (*i.e.*, "scarce") either internationally *or* locally in India. Specifically, India acknowledges that there is an "adequate availability" of solar cells and modules on the international market,[44] but has not explained why India is unable to avail itself of this supply through importation. Moreover, India's assertion that more than 90 percent of its solar PV installations rely on imported solar cells and modules[45] suggests that it 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).

2. The DCRs at issue Are Not "Essential" within the Meaning of Article XX(j)

38. Even if India were experiencing a short supply of solar cells and modules, it has failed to establish that the DCRs at issue are "essential" to the acquisition and distribution of products that are in short supply. The Appellate Body has observed that the Oxford English Dictionary defines "essential" to mean "absolutely indispensable or necessary."[46] It follows that measures

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The United States has addressed the language of the proviso in previous submissions. *See* U.S. Response to Panel Question No. 28, paras. 42-48.

[41] The United States has addressed this language in detail in previous submissions, and directs the Panel to those submissions with respect to the remaining elements of Article XX(j). *See* U.S. Response to Panel Questions Nos. 25-27, paras. 33-41.

[42] Appellate Body Reports, *China – Raw Materials*, para. 325.

[43] *See* 3EPCT/A/SR.40(2), p. 15 ("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, 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.")

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

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

[46] Appellate Body Reports, *China – Raw Materials*, para. 326.

that are "essential" within the meaning of Article XX(j) are "absolutely indispensable" or "absolutely necessary" to a Member's ability to engage in the activities referenced in Article XX(j) – "acquisition" or "distribution" of the product at issue. Where a Member is able to acquire and distribute the product, as appears to be the case for solar cells and modules in India, it is difficult to envisage how a WTO-inconsistent measure to decrease the availability of that product domestically (by restricting project for which imports can be used) could be "essential" to the "acquisition" or "distribution" of that product.

39. As previously noted by the United States,[47] a measure that discriminates against imports, such as a DCR, would tend to exacerbate difficulties in the acquisition or distribution of a product in short supply by limiting the potential sources of "supply". Such measures would accordingly be antithetical, rather than "essential," to the objectives of Article XX(j). India has failed to demonstrate how the circumstances of its purported short supply situation could operate differently. In that sense, the United States fails to understand the import of India's statement that "the U.S. … has failed to explain what would be situations of local or general short supply that can justify the imposition of import restraints."[48] While it is true that Article XX(j) does not by its terms apply exclusively to export restrictions, that does not suggest an *a contrario* reading that it *must* be interpreted to apply to import restrictions. Rather, it applies to any measure that meets its criteria, and, it is India, not the United States, that bears the burden of proof that the DCRs meet those criteria.[49]

40. India, however, appears to be not so much concerned with the acquisition or distribution of solar cells and modules as with a supposed dearth of domestic *production* of solar cells and modules. This view of "products in general or local short supply" as referring to domestically produced products rests on a misunderstanding of Article XX(j). As the United States has observed, the term "products" in Article XX(j) is unqualified by origin, indicating that it addresses supply of that product without respect to origin.[50] 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." 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 the acquisition or distribution of domestic products is in error.

41. The United States also considers that, given the element of necessity embodied in the ordinary meaning of "essential," legal tests developed to evaluated whether measures were

[47] *See* U.S. Opening Statement at the First Meeting of the Panel, para. 47.

[48] India's Response to Panel Question No. 26, p. 33.

[49] 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. *See* Appellate Body Report, *US – Wool Shirts and Blouses*, para. 46.

[50] *See* U.S. Opening Statement at the First Meeting of the Panel, para. 45.

"necessary" within the meaning of other paragraphs of Article XX might inform the analysis under Article XX(j). The Appellate Body has found in that regard that such an analysis "involves a process of 'weighing and balancing' a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure."[51] In addition, "in most cases, a comparison between the challenged measure and possible alternatives should then be undertaken."[52] As "essential" means "absolutely indispensable or necessary," the balance of these factors would need to tilt more toward the necessity of the WTO-inconsistent measure than would be the case under the "necessary" standard in other paragraphs of Article XX.

42. The Panel need not identify exactly where this balance falls to resolve this dispute, because the balance of factors with regard to the NSM DCRs does not suggest that they are even "necessary," let alone "essential":

- **The objective.** The "objective" in question in a necessity analysis under Article XX of GATT 1994 is the objective protected under the clause that a Member seeks to invoke. With respect to Article XX(j), that objective would be the acquisition and distribution of solar cells and modules, assuming *arguendo* that they are in short supply.[53] India has in particular expressed a desire "to ensure domestic resilience in addressing any supply side disruptions."[54]

- **The importance of the objective.** The United States does not question that the acquisition and distribution of solar cells and modules to Indian SPDs, and ensuring domestic resilience against supply-side disruptions, are important.

- **Contribution of the measure to the objective.** The NSM DCRs do not appear to make much of a contribution to the objectives. In the short term, they would tend to exacerbate a short supply situation by limiting access to imported solar cells and modules for some solar power projects. It is unclear from India's own

[51] Appellate Body Report, *EC – Seal Products*, para. 5.214.

[52] Appellate Body Report, *EC – Seal Products*, para. 5.214.

[53] India describes the objectives of the NSM in this regard as "developing of its solar manufacturing capacity" and "develop[ing] a bank of knowledge and resources to enable such manufacturing." India's Response to Question 30 (1st paragraph); India First Written Submission, para. 236(f)(i) (fourth point). Enhancing domestic production is not itself an objective within the purview of Article XX(j), except to the extent that it contributes to the reduction of a situation of short supply. Therefore, that promotion of domestic industry is a factor in the evaluation of the extent to which the WTO-inconsistent measure contributes to reaching the Article XX objective in question, rather than one of the objectives *per se*.

[54] India's First Written Submission, para. 209. Immediately preceding this quotation, India states that it also seeks to "minimize dependence on imported cells and modules." The United States understands this statement as reflecting an (unsupported) concern that imported solar cells and modules are particularly subject to supply disruptions, and not as an assertion that the DCRs have a blatantly protectionist objective. In any event, "minimizing dependence" on foreign goods is not an objective protected by Article XX(j) of GATT 1994, or a tool to achieve the acquisition or distribution of goods in short supply and, therefore, is not relevant to this analysis.

arguments whether the NSM would provide sufficient incentive to increase India's capacity to supply cells and modules. In the long term, any capacity added in India would become part of the global market, and in a short supply situation would tend to serve the highest paying purchaser, which would not necessarily be in India.

- **Trade-restrictiveness of the measure.** For projects to which they apply, the DCRs impose a ban on imports, which is one of the most severe forms of trade restriction. While they do not apply to all projects funded through the NSM, they do cover a large proportion, and the NSM envisages a dramatic increase in India's solar power generation capacity. Therefore, even when viewed across the totality of Indian demand for solar cells and modules, the NSM DCRs appear to represent a substantial restriction on trade.

- **Reasonably available alternative measure.** There are two WTO-consistent alternatives. First, India could acquire a "reserve" of solar cells and modules by importing a surplus for the purpose of stockpiling, which it could then draw down in the event of a supply shock.[55] Another option would be to secure dedicated import sources by entering into long-term contracts with foreign suppliers. Either of these measures would do at least as much as DCRs to address any short-supply situation that may arise in India and ensure resiliency in the face of supply shocks in a matter that is consistent with WTO-rules.

In light of these factors, the NSM DCRs are not "necessary" to achieve the objectives of Article XX(j), and certainly are not "essential."

43. To be clear, contrary to India's suggestion,[56] the United States does not argue that Article XX(j), or any other provision of the GATT 1994, prohibits a government from enacting measures to incentivize local production as part of an overall strategy to increase the supply of a product. Moreover, the United States raises no objection to India's aspiration to increase the local manufacture of solar cells and modules. As noted, however, Article XX(j) does not sanction the use of WTO-inconsistent measures to achieve that objective when a government can otherwise acquire the product at issue.

B. India has Not Demonstrated that it Meets the Criteria to Invoke Article XX(d) of the GATT 1994

[55] The United States does not dispute India's statement that solar power "cannot be stockpiled and stored in the same manner as fossils fuels." India's First Written Submission, para. 201. But India's concern is with the availability of capital equipment (solar cells and modules) rather than inputs (the sun). India never even asserts that *solar cells and modules* cannot be stored or stockpiled.

[56] *See* India's Response to Panel Question No. 26, 1st para.

44. India also asserts that the DCRs at issue are measures "necessary ... to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement …"[57] and therefore justifiable under Article XX(d) of the GATT 1994.[58] The Appellate Body has found that "[a] Member who invokes Article XX(d) to justify a measure has the burden of demonstrating that" the measure "is necessary to secure compliance" with a GATT-consistent law or regulation.[59]

45. India has failed to meet its burden in three ways. First, the structure of Article XX(d) indicates that it applies where a Member needs to enforce "compliance" by persons subject to its jurisdiction, but India alleges only that the measure is needed for the government to meet its policy goals. Second, the use of "enforce" in Article XX(d) indicates that the measure in question must obligate conduct. However, the measures cited by India merely set objectives without compelling any particular conduct. Third, the Appellate Body has found a measure is not "necessary" for purposes of Article XX(d) if there is an alternative, less trade-restrictive measure that achieves the Member's objective. That is the case with the DCRs at issue in this dispute – a combination of removing investment restrictions and providing domestic incentives would achieve India's objectives of promoting domestic production and protecting its SPDs against supply shocks. Therefore, India cannot justify its DCRs with Article XX(d).

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

46. At the outset, the United States submits that Article XX(d) does not cover measures taken by a government to secure its *own* compliance with its laws or regulations. Rather, as previously noted by the United States, Article XX(d), by its terms, covers only those measures necessary for a government to enforce its laws and regulations *vis-à-vis* persons subject to its jurisdiction, not measures taken to secure the government's own compliance with its laws and regulations. [60]

47. As the panel in *US – Countervailing and Anti-Dumping Measures (China)*, noted in the context of Article X:2 of the GATT 1994,[61] the OED defines "enforce" to mean:

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[57] Article XX(d) of the GATT 1994 provides in relevant part:

> …necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, *including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices*; (emphasis added)

[58] *See generally*, India's First Written Submission, paras. 236-283.

[59] Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

[60] *See* U.S. Response to Panel Question No. 28(b), paras 45 -56.

[61] *See* Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.105.

Compel the occurrence or performance of"; "*impose* (a course of action) *on a person*"; "*Compel* the observance of (a law, rule, practice, etc.); support (a demand, claim, etc.) *by force*.[62]

48. Terms such as "compel," "impose," and "by force" strongly suggest that the actor doing the enforcing is *distinct from* the object(s) subject to enforcement. It follows that "laws or regulations" within the meaning of Article XX(d) are only those laws and regulations that a government enforces *against* persons or entities subject to the government's jurisdiction. Per this understanding, Article XX(d) can only justify measures necessary for a government to secure *others'* compliance with its laws, *not* measures taken to secure the government's own compliance with its laws and regulations.

49. This understanding is consistent with the view of the GATT panel in *EEC – Parts and Components*, which observed that:

> The examples of the laws and regulations indicated in Article XX(d), [63] namely 'those relating to customs *enforcement*, the *enforcement* of monopolies …, the protection of patents … and the *prevention* of deceptive practices'…suggest[s] that Article XX(d) covers *only* measures designed to prevent actions that would be illegal under the laws or regulations.[64]

On that basis, the panel found that "Article XX(d) covers only measures related to the *enforcement* of obligations under laws or regulations consistent with the General Agreement."[65]

50. As noted above, India cites several domestic and international legal instruments as requiring it to take certain actions to protect the environment or pursue a sustainable development strategy. The United States observes, however, that India does not argue that any of the cited instruments are enforced (much less enforceable) against its citizens or persons otherwise subject the jurisdiction of the Indian government. That is, India has not argued that the cited instruments constitute laws or regulations that persons under its jurisdiction must obey in order to comply with Indian law. Rather, India explicitly describes these instruments as containing legal obligations that apply to the Indian government *itself*.

51. For example, at paragraph 240 of its first written submission, India "respectfully submits that developing and maintaining the DCR measures is integral to *its* compliance with both domestic and international law obligations." (emphasis added). At paragraph 255, India argues

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[62] *The New Shorter Oxford English Dictionary* (1993), p. 820. (emphasis added)

[63] Article XX(d) of the GATT 1994 provides in relevant part:

> …necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, *including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices*; (emphasis added)

[64] GATT Panel Report, *EEC – Parts and Components*, para. 5.16.

[65] GATT Panel Report, *EEC – Parts and Components*, para. 5.18.

that, "[t]he DCR Measures have been designed to secure compliance with *India's obligations* under its law[s] and regulations." (emphasis added). And at paragraph 260, India characterizes the DCR measures as "enforcing the sustainable development commitment undertaken *by India*, through its laws and regulations…" (emphasis added).

52. While states have an obligation to comply with all of their commitments under various international agreements, and should do so, Article XX(d) is not the vehicle for a Member to achieve compliance by its own government with those commitments as such. As this type of self-enforcement is the only enforcement cited by India, it has not satisfied the requirements for invoking Article XX(d) to justify the DCRs at issue in this dispute.

53. In its Responses to Questions from the Panel, India cites the Appellate Body Report in *Mexico – Taxes on Soft Drinks* as supporting the proposition that Article XX(d) covers measures taken to secure a government's *own* compliance with its laws and regulations.[66] But instead, the issue in *Mexico – Taxes on Soft Drinks* was whether Article XX(d) could justify measures implemented "to secure *another* WTO Member's compliance with the other Members' international law obligations."[67] That is, the Appellate Body in *Mexico – Taxes on Soft Drinks* did not entertain whether Article XX(d) covered measures taken to secure a government's *own* compliance with its own laws or regulations. Therefore, contrary to India's suggestion, neither the findings of the Appellate Body in *Mexico – Taxes on Soft Drinks* – nor in any other WTO case for that matter – support the proposition that Article XX(d) covers measures taken to secure a government's *own* compliance with its laws or regulations.

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

54. Moreover, assuming, *arguendo* that Article XX(d) covered Indian laws and regulations that bind the Government of India *itself*, none of the instruments cited by India encourage, much less require, the imposition of DCRs for solar cells and modules. Indeed, several of the cited instruments read more as broad policy documents with non-binding or merely hortatory effect—that is, they do not appear to be laws or regulations that demand legal "compliance" within the meaning of Article XX(d). As noted above, previous GATT 1947 panels have reasoned that "to comply" means "to enforce obligations" not "to ensure the attainment of the objectives of laws and regulations."[68] Thus, even if DCRs at issue are designed to pursue the sustainable

[66] *See* India's Response to Panel Question No. 33. ("Yes, the phrase "measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement" under Article XX(d), refers to measures taken by a government to secure its own compliance with its laws and regulations. As has been noted by the Appellate Body in *Mexico – Taxes on Soft Drinks*, the phrase 'secure compliance' speaks to the types of measures that a WTO Member can seek to justify under Article XX(d), and the expression 'laws or regulations' encompasses the rules adopted by a WTO Member's legislative or executive branches of government, including those which may be intended to implement an international agreement.").

[67] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 79. ("For these reasons, we agree with the Panel that Article XX(d) is not available to justify WTO inconsistent measures that seek "to secure compliance" by another WTO Member with that other Member's international obligations.") (emphasis added).

[68] GATT Panel Report, *EEC – Parts and Components*, para. 5.17.

development goals reflected in the cited instruments, this is still insufficient to demonstrate that the DCRs are necessary to "secure compliance" with the instruments themselves. On this fact alone, India has again failed to demonstrate that the DCRs are "necessary to secure compliance" with any of the instruments cited for purposes of Article XX(d). The United States addresses the cited measures in turn below.

i. The United Nations Framework Convention on Climate Change ("UNFCCC")

55. India, argues that its "DCR measures are necessary for it to secure compliance with the overall commitments under the UNFCCC" that "mandate[] India to formulate and implement programmes containing measures to mitigate climate change." The United States, however, observes that India has not cited any provision of the UNFCCC that mandates the imposition of DCRs for solar cells and modules. That is, there is no indication that the failure to impose DCRs would result in India's non-compliance with any provision of the UNFCCC. Therefore, *at most*, the DCRs at issue can be characterized as measures that India is imposing to pursue the environmental objectives of the UNFCCC, rather than measures necessary to ensure "compliance" with the UNFCCC for purposes of Article XX(d).

ii. The UN Rio Declaration on Climate Change

56. India also asserts that the DCRs are necessary to comply with the UN Rio Declaration on Environment Development ("Rio Declaration"). However, the Rio Declaration, on its face, is a list of 27 "Principles" and not commitments or legal "obligations," as India suggests.[69] Moreover, much as with the UNFCCC, India has pointed to no provision of the Rio Declaration that mandates the imposition of DCRs for solar cells and modules. Thus, India has provided no basis to justify a finding the DCRs at issue are "necessary to secure compliance" with the Declaration.

iii. UN Rio+20 Resolution (2012)

57. The same reasoning holds with respect to India's citation of the United Nations Rio+20 Resolution (2012). India has pointed to no provision that requires the imposition of DCRs, such that the NSM's DCRs could secure "compliance" with the Rio+20 Resolution. Moreover, the Rio+20 Resolution explicitly recognizes that discriminatory trade policies can militate against the sustainable development goals that the Rio+20 Resolution and the Rio Declaration are meant to advance. Specifically, paragraph 281 of the Resolution provides that:

> We reaffirm international trade is an engine for development and sustained economic growth, and also reaffirm the critical role that a universal, rules-based, open, *non-discriminatory* and equitable multilateral trading system, as well as meaningful trade liberalization, can play in stimulating economic growth and development worldwide, thereby *benefiting all countries at all stages of*

[69] *See* Rio Declaration on the Environment and Development (Exhibit IND-35).

> *development as they advance towards sustainable development*. In this context, we remain focused on achieving progress in addressing a set of important issues, such as, *inter alia*, *trade-distorting subsidies and trade in environmental goods and services*. (emphasis added).[70]

58. Thus, the Rio+20 Resolution cannot be viewed as embodying the principle that signatories must impose discriminatory measures with respect to "trade in environmental goods and services," such as DCRs for solar cells and modules.

iv. Preamble of the WTO Agreement

59. India also proffers the Preamble of the WTO Agreement as an instrument that it must comply with for purposes of Article XX(d) and further notes that the Preamble recognizes the "value of sustainable development."[71] India further cites the Appellate Body Report in *US – Shrimp,* which expressed that:

> [the] language [of the Preamble] demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994."[72]

India goes on to assert that "In that case the Appellate Body observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the preamble" and submits "that the Panel should do the same in the context of Article XX(d)."[73]

60. The United States, however, observes that the issue in *US – Shrimp* was whether (and to what extent) the language of the Preamble should inform the interpretation of Article XX(g) and other provisions of the GATT 1994. As India correctly notes, the Appellate Body concluded that the Preamble does, in fact, lend "colour, texture and shading to [the] interpretation of the agreements annexed to the WTO Agreement," including the provisions of the GATT 1994. In coming to this conclusion, however, the Appellate Body did not suggest that the Preamble *itself* embodies legal obligations that bind WTO Members. Indeed, the United States would argue that preambular language is, by definition, non-binding in nature. Thus, the context that the Preamble provides for interpretation of the obligations embodied in the covered agreements does *not* extend to imposing independent legal commitments on WTO Members. Accordingly, the WTO Preamble – even with its recognition of the "value of sustainable development" – cannot serve as a basis for India's invocation of Article XX(d), as it is not a measure that demands

[70] United Nations General Assembly Resolution A/RES/66/288 (adopted on 27 July, 2012), para. 281 (Exhibit IND-28).

[71] India's First Written Submission, para. 257

[72] India's First Written Submission, para. 257 (quoting Appellate Body Report, *US – Shrimp*, para. 153.)

[73] India's First Written Submission, para. 257.

"compliance" within the meaning of Article XX(d).

v. India's National Electricity Policy & the National Climate Change Action Plan

61. India also cites its National Electricity Policy and the National Climate Change Action Plan as measures demanding "compliance" within the meaning of Article XX(d). Specifically, India cites paragraph 5.12.1 of the National Electricity Policy to support the assertion that:

> The specific obligation that the National Electricity Policy *mandates* is that in the effort to focus on non-conventional sources of energy, adequate promotional measures would have to be taken for the development of technologies and a sustained growth of such sources.[74]

62. However, paragraph 5.12.1 does not appear to "mandate" anything at all. Rather, paragraph 5.12.1 provides:

> Non-conventional sources of energy being the most environment friendly there is an urgent need to promote generation of electricity based on such sources of energy. For this purpose, efforts need to be made to reduce the capital cost of projects based on non-conventional and renewable sources of energy. Cost of energy can also be reduced by promoting competition within such projects. At the same time, adequate promotional measures would also have to be taken for development of technologies and a sustained growth of these sources.[75]

63. That is, the National Electricity Policy simply recognizes the need for India to pursue policies to promote the development of "non-conventional and renewable sources of energy." Accordingly, *at most*, the DCRs at issue can be characterized as measures that India is implementing to pursue this policy objective, rather than measures necessary to ensure "compliance" with the National Electricity Policy itself.

64. With respect to the National Climate Change Action Plan, India cites paragraph 5.2.1 of that document to support the assertion that:

> The National Electricity Plan mandates that that for sustainable development to take place, clean and green power is an essential element. In this context the National Electricity Plan takes into account the development of projects based on renewable energy sources towards promoting sustainable development of the country.[76]

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[74] India's Response to Panel Question No. 34 (emphasis added).

[75] *National Electricity Policy*, Ministry of Power, (12th February, 2005), para 5.12.1 (Exhibit IND-14).

[76] India's Response to Panel Question No. 34.

65. Contrary to India's assertion, however, paragraph 5.2.1 also does not appear to "mandate" anything at all. Rather, paragraph 5.12.1 provides in relevant part:

> Sustainable Development of our country is our ultimate goal which encompasses economic development, maintaining environmental quality and social equity. This would also ensure that development takes place to fulfil our present needs without compromising the needs of our future generations. The importance and relevance of power development within the confines of Clean and Green Power is the most essential element. Such a growth depends upon the choice of an appropriate fuel / technology for power generation. Accordingly, the Plan takes into account the development of projects based on renewable energy sources as well as other measures and technologies promoting sustainable development of the country.[77]

66. Thus, the National Climate Change Action Plan, simply recognizes the importance of "renewable energy sources" in India's efforts to promote sustainable development. Accordingly, *at most*, the DCRs at issue can be characterized as measures that India is implementing to pursue this policy objective, rather than measures necessary to ensure "compliance" with the National Climate Change Action Plan itself. As noted above, for purposes of Article XX(d), "to comply" means "to enforce obligations," and not "to ensure the attainment of the objectives of laws and regulations.

67. For the foregoing reasons, India's argument that the DCRs at issue are measures necessary to secure compliance with GATT-consistent laws or regulations, once again, must fail.

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

68. Even aside from India's failure to demonstrate that the cited instruments embody legal obligations with respect to DCRs with which India must comply, India has still failed to establish that the DCRs at issue are, in fact, "necessary" to secure such compliance within the meaning of Article XX(d). The thrust of India's argument in relation to Article XX(d), is that the DCRs at issue are necessary to "develop domestic manufacturing capacity" for solar cells and modules; a domestic manufacturing base for cells and modules, in turn, will equip India to comply with its various sustainable development commitments. Specifically, India argues:

> The DCR Measures, as explained, seek to develop a domestic manufacturing capacity, and in doing so, they seek to serve the purpose of creating the availability of domestic cells and modules, without prohibiting imports, thereby securing the local manufacturing base for domestic cells and modules, without giving them an undue advantage. *The DCR Measures contribute to enforcing the*

[77] *National Electricity Plan*, Central Electricity Authority, (January, 2012), para 5.2.1 (Exhibit IND-16).

> *sustainable development commitment undertaken by India, through its laws and regulations as discussed above.*[78]

69. As previously noted, the Appellate Body has observed that "necessary" can mean anything from "indispensable" to simply "makes a contribution to."[79] 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'."[80] Therefore, for purposes of Article XX(d), while "a measure does not need to be 'indispensable', [it] should constitute something more than strictly making a contribution to."[81] Accordingly, even if the Panel accepts India's assertion the DCRs at issue "contribute" to India's compliance with the cited instruments, this falls far short of demonstrating that the DCRs are "necessary" to secure such compliance within the meaning of Article XX(d).

70. The Appellate Body has also stated that determining whether a GATT-inconsistent measure is "necessary" under Article XX involves, *inter alia*, as assessment of whether there are "possible alternative [GATT-consistent] measures that may be reasonably available to the responding Member to achieve its desired objective."[82] Where a Member has such alternative measures at its disposal, the measure at issue is *not* considered "necessary" for purpose of Article XX.[83]

71. India asserts that it "does not have any reasonably available alternatives to achieve its objective of building a domestic manufacturing base for solar cells and modules."[84] This argument is problematic at two levels.

72. First, to the extent the measures cited by India require compliance, it is primarily with respect to various commitments to mitigate climate change and achieve sustainable development. Increasing the use of solar energy is one tool India has identified to achieve those goals, the promotion of domestic production of solar cells and modules is in turn one tool to promote solar power, and the DCRs are one tool to promote domestic industry. Thus, they are many steps removed from the WTO-consistent laws and regulations that India contends that it is seeking to enforce. A proper necessity analysis for most of the laws and regulations subject to India's Article XX(d) defense would accordingly address reasonably available alternative measures to

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[78] India's First Written Submission, para. 260 (emphasis added).

[79] *See* U.S. Opening Statement at the First Meeting of the Panel, para. 50 (quoting Appellate Body Report, *Korea – Various Measures on Beef*, para. 161).

[80] Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

[81] Panel Report, *US – Shrimp (Thailand)*, para. 7.188.

[82] *E.g.*, Appellate Body Report, *China – Publications and Audiovisual Products*, para. 239.

[83] *See* Appellate Body Report, *Korea – Various Measures on Beef*, para. 182 (Upholding "the conclusion of the Panel that Korea has not discharged its burden of demonstrating under Article XX(d) that alternative WTO-consistent measures were not "reasonably available" in order to detect and suppress deceptive practices in the beef retail sector 134, and that the dual retail system is therefore not justified by Article XX(d).")

[84] India's First Written Submission, para. 262.

satisfy India's commitments to mitigate climate change and achieve sustainable development. There are a plethora of these, including environmental regulations, promoting development of other renewable energy sources, promoting consumption of energy from renewable energy sources (on a non-origin discriminatory basis), etc. DCRs, in contrast, could make only an indirect contribution to compliance with India's international obligations and, as such, can scarcely be considered necessary.

73. India has also cited its National Electricity Policy and National Climate Change Action Plan as calling for the increased use of renewable sources of energy. Even in these more granular measures, there is no requirement to promote domestic production of solar cells and modules. Thus, the proper necessity analysis for these measures would look to reasonably available alternative means to promote the generation or use of renewable energy. Such measures targeting solar, geothermal, hydroelectric, and wind power are all reasonably available alternative measures for increasing India's use of renewable energy. Again, as promotion of domestic production of solar cells and modules could, at best, make only an indirect contribution to increasing use of renewable energy, they can scarcely be considered necessary.

74. Even if the proper necessity analysis involved consideration of measures designed to promote domestic production of solar cells and modules, India appears to have at its disposal reasonably available WTO-consistent alternative measures. Indeed, India notes two possible alternatives in its first written submission: (1) maintaining no limitations on foreign direct investment in the solar technology sector; and (2) reducing import duties on equipment used to manufacture solar cells and modules.[85] The former would appear to facilitate foreign producers of cells and modules in setting up manufacturing sites in India while the latter operates to effectively reduce the cost of manufacturing cells and modules in India. The United States observes that both of these alternative measures, as direct inducements to manufacturers, would tend to be *more* effective at promoting domestic production than DCRs that are targeted at solar power developers.

75. In sum, the United States contends that India could just as effectively pursue its objective of promoting domestic production *without* imposing the DCRs at issue, and by instead adopting one of the alternatives identified above or by India itself. The United States therefore submits that the DCRs at issue are demonstrably not "necessary" within the meaning of Article XX(d)

IV. CONCLUSION

76. For the forgoing reasons, the United States respectfully reiterates its request that the Panel find that:

- the domestic content requirements contained in the JNNSM Programme measures, including both Phase I and Phase II and individually executed PPAs for solar power projects, accord less favorable treatment to imported solar cells and

[85] *See* U.S. Responses to Panel Questions Nos. 25 and 33.

modules than accorded to like products of Indian origin, inconsistent with Article III:4 of the GATT 1994; and

- the domestic content requirements contained in the JNNSM Programme measures, including both Phase I and Phase II and individually executed PPAs for solar power projects, constitute trade-related investment measures inconsistent with the provisions of Article III of the GATT 1994, and are therefore inconsistent with Article 2.1 of the TRIMs Agreement.

77. Accordingly, the United States respectfully requests the Panel to recommend that India bring the domestic content requirements under the JNNSM Programme measures, including Phase I and Phase II and individually executed PPAs for solar power projects, into conformity with the GATT 1994 and the TRIMs Agreement, pursuant to Article 19.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").