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INDIA – CERTAIN MEASURES RELATING TO SOLAR CELLS AND SOLAR MODULES

REPORT OF THE PANEL

TABLE OF CONTENTS

LIST OF ANNEXES
ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX B

ARGUMENTS OF THE PARTIES

UNITED STATES

INDIA

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
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Short Title	Full Case Title and Citation
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Short Title	Full Case Title and Citation
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Short Title	Full Case Title and Citation
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Short Title	Full Case Title and Citation
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ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
CERC	Central Electricity Regulatory Authority
DCR measures	Domestic content requirements imposed under Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1-A) of India's Jawaharlal Nehru National Solar Mission
DISCOM	Distribution Company
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
GW	Gigawatt
IAE	International Energy Agency
JNNSM or National Solar Mission	Jawaharlal Nehru National Solar Mission
MNRE	Ministry of New and Renewable Energy
MW	Megawatt
NAPCC	National Action Plan on Climate Change
NTPC	National Thermal Power Corporation
NVVN	NTPC Vidyut Vyapar Nigam Limited
PPA	Power Purchase Agreement
PV	Photovoltaic
SCM Agreement	Agreement on Subsidies and Countervailing Measures
TBT Agreement	Agreement on Technical Barriers to Trade
SECI	Solar Energy Corporation of India
SERC	State Electricity Regulatory Authority
SPD	Solar Power Developer
TRIMs Agreement	Agreement on Trade-Related Investment Measures
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNFCCC	*United Nations Framework Convention on Climate Change*, done at New York, 9 May 1992, 1771 UNTS 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992)
VGF	Viability Gap Funding
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

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Exhibit No.	Title
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USA-3	*Phase II Policy Document, Jawaharlal Nehru National Solar Mission*, Ministry of New and Renewable Energy (December 2012)
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USA-5	*Guidelines for Selection of New Grid Connected Solar Power Projects*, Ministry of New and Renewable Energy (July 2010) ("Phase I (Batch 1) *Guidelines*")
USA-6	*Guidelines for Selection of New Grid Connected Solar Power Projects*, *Batch II*, Ministry of New and Renewable Energy (24 August 2011) ("Phase I (Batch 2) *Guidelines*")
USA-7	*Guidelines for Implementation of Scheme for Setting up of 750 MW Grid-Connected Solar PV Power Projects Under Batch-1, Jawaharlal Nehru National Solar Mission*, Ministry of New and Renewable Energy (October 2013) ("Phase II (Batch 1) *Guidelines*")
USA-10	*Draft Standard Power Sale Agreement for Sale of Solar Power on Long Term Basis*, Solar Energy Corporation of India (23 July 2014)
USA-11	*State Electricity Utilities,* Central Electricity Regulatory Commission
USA-12	*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 (28 October 2013) ("Phase II (Batch 1) *Request for Selection* document")
USA-15	*Request for Selection Document for New Grid Connected Solar Photo Voltaic Projects Under Phase 1 of JNNSM*, NTPC Vidyut Vyapar Nigam Limited (18 August 2010) ("Phase I (Batch 1) *Request for Selection* document")
USA-16	*Draft Standard Power Purchase Agreement for Procurement of __ MW Solar Power on Long Term Basis (Under New Projects Scheme)*, NTPC Vidyut Vyapar Nigam Limited (18 August 2010) ("Phase I (Batch 1) model PPA")
USA-17	*Request for Selection Document for New Grid Connected Solar Photo Voltaic Projects Under Phase 1, Batch II of JNNSM*, NTPC Vidyut Vyapar Nigam Limited (24 August 2011) ("Phase I (Batch 2) *Request for Selection* document")
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USA-19	*Draft Standard Power Purchase Agreement for Procurement of___MW Solar Power on Long Term Basis under JNNSM, Phase II, Batch I Scheme*, Solar Energy Corporation of India (30 November 2013) ("Phase II (Batch 1) model PPA")
USA-20	Electricity Act of 2003 [No. 36 of 2003], §§ 76(1) (2003) ("Electricity Act")
USA-21	*List of Selected Projects*, NTPC Vidyut Vyapar Nigam Limited
USA-22	*List of Solar PV Projects under JNNSM Phase I Batch II Achieved Financial Closure as Per Schedule*, NTPC Vidyut Vyapar Nigam Limited
USA-23	*Notification Regarding Selected Projects of 750 MW Grid Connected Solar PV Projects Under JNNSM Phase-II Batch-I*, Solar Energy Corporation of India (25 February 2014)
USA-24	*Natural Group*, "NSEFI Letter to SECI and MNRE Regarding Issues With DCR Category Projects Under JNNSM Phase II, Batch I" (26 March 2014)
USA-28	*Introduction* on the Ministry of New and Renewable Energy website
USA-36	*Private Distribution Companies in India*
USA-37	Jordan, D. C., Sekulic, B., Marion, B., & Kurtz, S. R, *Performance and Aging of a 20-Year-Old Silicon PV System*, IEEE Journal of Photovoltaics (2015)
USA-38	Ndiaye, A., Charki, A., Kobi A., Ke 'be', C., Ndiaye P., Sambou, V., *Degradations of silicon photovoltaic modules: A literature review* (2013)
USA-39	Edgar Meza, *False alarm: No panel shortage coming*, *PV Magazine* (27 August 2014)
IND-1	*Jawaharlal Nehru National Solar Mission: Towards Building Solar India*, Ministry of New and Renewable Energy ("JNNSM Mission Document")
IND-2	*National Action Plan on Climate Change,* Government of India (June 2008) ("NAPCC")

IND-3	*United Nations Framework Convention on Climate Change,* done at New York, 9 May 1992, 1771 UNTS 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992) ("UNFCCC")
IND-4	*India to boost national solar target to 100 GW by 2022- reports*, PV-Tech (17 November 2014)
IND-8	*Laying the Foundation for a Bright Future: Assessing Progress under Phase 1 of India's National Solar Mission,* Council on Energy, Environment and Water, Natural Resources Defense Council (April 2012) ("*Assessing Progress under Phase I*")
IND-9	*Paving the Way for a Transformational Future, Lessons from JNNSM Phase I,* Energy Sector Management Assistance Programme, World Bank (2013) ("*Lessons from Phase I*")
IND-12	*Approval for Implementation of a Scheme for Setting up of 750 MW of Grid-connected Solar PV Power projects under Batch-I of Phase-II of Jawaharlal Nehru National Solar Mission with Viability Gap Funding support from National Clean Energy Fund*, Ministry of New and Renewable Energy (15 October 2013)
IND-13	*Implementation of first phase of National Solar Mission – Issue of Presidential Directives – reg,* Ministry of Power (22 December 2009)
IND-14	*National Electricity Policy,* Ministry of Power (12 February 2005) ("*National Electricity Policy*")
IND-15	*India,* United States Energy Information Administration (26 June 2014)
IND-16	*National Electricity Plan,* Central Electricity Authority (January 2012) ("*National Electricity Plan*")
IND-17	*Office Memorandum No. 44/19/2004-D(RE)*, Rajiv Gandhi Grameen Vidyutikaran Yojana (RGGVY), Ministry of Power (18 March 2005)
IND-18	*Report of the Working Group on Power for the 12th Plan 2012-2017*, Ministry of Power (January 2012)
IND-19	*Energy Security and Sustainable Development in the Asia and the Pacific*, United Nations Economic and Social Commission on the Asia and the Pacific (April 2008)
IND-22	*Integrated Energy Policy 2006*, Planning Commission, Government of India (2006)
IND-24	International Energy Agency, *Energy Security*
IND-26	*Measuring Short-term Energy Security,* OECD/IEA (2011)
IND-28	United Nations General Assembly Resolution A/RES/66/288 (adopted on 27 July 2012) ("Rio+20 Document: The Future We Want")
IND-29	*Updated data on Manufacturing capacity of Solar Cells and Modules*, Ministry of New and Renewable Energy (June 2014)
IND-30	*Fact Sheet: U.S. and India Climate and Clean Energy Cooperation,* The White House, Office of the Press Secretary (25 January 2015)
IND-32	*Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy,* United States International Trade Commission (December 2014)
IND-35	*Rio Declaration on Environment and Development* (1992)
IND-36	G. Sundarrajan v. Union of India 2013 (6) SCC 620
IND-37	Press Information Bureau, Government of India, *Modi Government is Committed to Provide Affordable and Clean Power 24x7 for all* (12 January 2015)
IND-38	Order in Petition No. 53/2010, determining tariff for 2010-2011, Central Electricity Regulatory Commission (26 April 2010)
IND-39	Order in Petition No. 256/2010, determining tariff for 2011-2012, Central Electricity Regulatory Commission
IND-40	Order in Petition No. Petition No. 243/SM/2012 (Suo-Motu), Central Electricity Regulatory Commission (28 February 2013)
IND-41	*Global Market Outlook for Photovoltaics*, 2013-2017, European Photovoltaic Industry Association (2013)
IND-43	Micheala D. Platzer, *U.S. Solar Photovoltaic Manufacturing: Industry Trends, Global Competition, Federal Support*, Congressional Research Service (January 27 2015)
IND-44	*Formula for Allocation of Power from Central Generating Stations to States*, Press Information Bureau, Ministry of Power, Government of India (19 March 2013)

IND-45	NVVN Letter to Department of Commerce (5 March 2015)
IND-46	Statement of Reasons, The Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, as available at 2010
IND-47	*Sale of Solar Power to State Utilities/Discoms under Phase I of JNNSM- Trading Margin of NVVN,* Ministry of New and Renewable Energy (7 June 2013)
IND-48	Ehren Goossens, *Solar Boom Driving First Global Panel Shortage Since 2006*, Bloomberg Business (18 August 2014)
IND-49	Laura Lorenzetti, *Solar panel shortage looms even as manufacturers invest in production*, Fortune (19 August 2014)
IND-52	*The Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2009*, Central Electricity Regulatory Commission

1 INTRODUCTION

1.1 Complaint by the United States

1.1. On 6 February 2013 and 10 February 2014, the United States requested consultations with India pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 8 of the Agreement on Trade-Related Investment Measures (TRIMs Agreement) with respect to the measures and claims set out below.[1]

1.2. Consultations pursuant to these requests were held on 20 March 2013 and 20 March 2014, respectively.

1.2 Panel establishment and composition

1.3. On 14 April 2014, the United States requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.[2] At its meeting on 23 May 2014, the Dispute Settlement Body (DSB) established a panel pursuant to the request of the United States in document WT/DS456/5, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States in document WT/DS456/5 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 24 September 2014, the parties agreed that the panel would be composed as follows:

Chairperson: Mr David Walker

Members: Mr Pornchai Danvivathana
Mr Marco Tulio Molina Tejeda

1.6. Brazil, Canada, China, Ecuador, the European Union, Japan, the Republic of Korea, Malaysia, Norway, Russia, Saudi Arabia, Chinese Taipei and Turkey have notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, the Panel adopted its Working Procedures[5] and timetable on 13 October 2014.[6]

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[1] See the United States' request for consultations, WT/DS456/1 and WT/DS456/1/Add.1. The United States' first request for consultations was also made pursuant to Articles 4, 7, and 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) with respect to potential inconsistencies with that agreement. The United States' second request for consultations was not made pursuant to the SCM Agreement, nor did the United States' request for the establishment of a panel make reference to any provisions of the SCM Agreement. The first request for consultations made reference to domestic content requirements under Phase I of the Jawaharlal Nehru National Solar Mission, whereas the second request made reference to domestic requirements under Phase II of the Jawaharlal Nehru National Solar Mission.

[2] United States' request for the establishment of a panel, WT/DS456/5.

[3] WT/DSB/M/345.

[4] WT/DS/456/6.

[5] See the Panel's Working Procedures in Annex A-1.

[6] The Panel took Article 12.10 of the DSU into account when setting the timetable for these proceedings. This provision provides that in examining a complaint against a developing country Member, "the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation". Among

1.8. The Panel held a first substantive meeting with the parties on 3-4 February 2015. A session with the third parties took place on 4 February 2015. The Panel held a second substantive meeting with the parties on 28-29 April 2015. On 9 June 2015, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 24 July 2015. The Panel issued its Final Report to the parties on 28 August 2015.

1.3.2 Request for enhanced third-party rights

1.9. On 29 October 2014, Canada requested various additional rights for itself and the other third parties in these proceedings. After having consulted the parties on this matter and carefully considering Canada's request, the Panel informed the parties and third parties on 14 November 2014 that, for reasons to be elaborated in its Report, it had decided to decline Canada's request for enhanced third-party rights in these proceedings. The reasoning for the Panel's decision is provided in section 7 of this Report.

1.3.3 Request for a preliminary ruling

1.10. In its first written submission of 5 December 2014, India requested that the Panel make a preliminary ruling clarifying the scope of the measures falling within the Panel's terms of reference. At the invitation of the Panel, the United States provided a response in writing on 8 January 2015 to India's request for a preliminary ruling. Third parties were also invited to comment on India's request in their third-party submissions. On 16 January 2015, the Panel informed the parties that, in light of the clarification contained in the United States' response of 8 January 2015, the Panel did not consider it necessary to rule on India's request at that time. The Panel indicated that if India wished to comment further on the points raised in the United States' response of 8 January 2015, it could do so at the first substantive meeting scheduled for 3-4 February 2015. In its opening oral statement at the first substantive meeting with the Panel, India reiterated its request for a preliminary ruling on this matter. The panel communicated its decision in writing to the parties and third parties on 6 February 2015. The Panel's decision regarding India's request for a preliminary ruling is set forth in section 7 of this Report.

2 FACTUAL ASPECTS

2.1. The claims brought by the United States concern certain domestic content requirements imposed under the Jawaharlal Nehru National Solar Mission (National Solar Mission). These domestic content requirements concern solar cells and solar modules, and they are imposed on certain entities selling electricity to government agencies under the National Solar Mission. Solar cells are photovoltaic devices that are components of solar modules, also known as solar panels.

2.2. The United States' panel request states that "[t]he domestic content requirements at issue are maintained through the following instruments … as well as any amendments, related measures, or implementing measures"[7]:

> 1. Ministry of New and Renewable Energy, Resolution: Jawaharlal Nehru National Solar Mission, No. 5/14/2008 (January 2010);
>
> ***Phase I***
>
> 2. Ministry of New and Renewable Energy, Guidelines for Selection of New Grid Connected Solar Power Projects, Batch-I (July 2010);
>
> 3. Ministry of New and Renewable Energy, Guidelines for Selection of New Grid Connected Solar Power Projects, Batch-II (August 2011);
>
> 4. National Thermal Power Company Vidyut Vyapar Nigam Limited, Request for Selection Document for New Grid Connected Solar Photo Voltaic Projects under Phase 1 of JNNSM (August 2010);

other things, India was given six weeks after having received the complainant's first written submission to file its own first submission, instead of the two to three weeks envisioned in Appendix 3 of the DSU.

[7] United States' request for the establishment of a panel.

5. National Thermal Power Company Vidyut Vyapar Nigam Limited, Request for Selection Document for New Grid Connected Solar Photo Voltaic Projects under Phase 1, Batch II of JNNSM (August 2011);

6. National Thermal Power Company Vidyut Vyapar Nigam Limited Draft Standard Power Purchase Agreement for Procurement of __ MW Solar Power on Long Term Basis (August 2010);

7. National Thermal Power Company Vidyut Vyapar Nigam Limited, Draft Standard Power Purchase Agreement for Procurement of __ MW Solar Power on Long Term Basis (Second Batch) (August 2011);

8. Power Purchase Agreements entered into under Phase I of the NSM, such as by National Thermal Power Company Vidyut Vyapar Nigam Limited or successors in contract;

Phase II

9. Ministry of New and Renewable Energy, Jawaharlal Nehru National Solar Mission Phase II Policy Document (December 2012);

10. Ministry of New and Renewable Energy, Solar Energy Corporation of India, Request for Selection of Solar Power Developers for 750 MW Grid Connected Solar Photo Voltaic Projects under JNNSM PHASE-II: Batch-I, No.: SECI/2013/JNNSM/Ph-II, Batch-I/Solar PV/750MW (October 4, 2013);

11. Ministry of New and Renewable Energy, Approval for Implementation of a Scheme for Setting up of 750 MW of Grid-connected Solar PV Power projects under Batch-I of Phase-II of Jawaharal Nehru National Solar Mission with Viability Gap Funding support from National Clean Energy Fund (October 15, 2013);

12. Solar Energy Corporation of India, Request for Selection (RfS) Document for 750 MW Grid Connected Solar Photovoltaic Projects Under JNNSM Phase II Batch-I (October 28, 2013);

13. Ministry of New and Renewable Energy, Jawaharlal Neru National Solar Mission Phase-II Guidelines for Implementation of Scheme for Setting up of 750 MW Grid-connected Solar PV Power Projects under Batch-I (October 25, 2013);

14. Solar Energy Corporation of India, Amendments in the RfS Document of JNNSM Phase-II, Batch-I, No.:SECI/JNNSM/SPV/P-2/B-1/RfS/102013 (November 29, 2013);

15. Solar Energy Corporation of India, Amendments in the RfS Document of JNNSM Phase-II, Batch-I, No.:SECI/JNNSM/SPV/P-2/B-1/RfS/102013 (January 9, 2014);

16. Solar Energy Corporation of India, Clarifications on the queries raised by various stakeholders (November 30, 2013);

17. Solar Energy Corporation of India, Draft Standard Power Purchase Agreement for Procurement of___MW Solar Power on Long term Basis (November 30, 2013);

18. Solar Energy Corporation of India, Draft Standard Power Purchase Agreement for Procurement of___MW Solar Power on Long term Basis (January 8, 2014); and

19. Power Purchase Agreements entered into under Phase II of the NSM, such as by National Thermal Power Company Vidyut Vyapar Nigam Limited or the Solar Energy Corporation of India, or successors in contract.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The United States requests that the Panel find that the domestic content requirements at issue, which are incorporated in individually executed power purchase agreements and certain other documents, are inconsistent with India's obligations under Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that India bring its measures into conformity with its WTO obligations.

3.2. India requests that the Panel find that the domestic content requirements at issue are not inconsistent with Article III:4 of the GATT 1994 or Article 2.1 of the TRIMs Agreement. Specifically, India requests that the Panel find that the measures at issue accord imported solar cells and modules treatment no less favourable than that accorded to like products of Indian origin. India further requests that the Panel find that the derogation under Article III:8(a) of GATT 1994 is applicable to the measures at issue. Alternatively, India requests that the Panel find that any such inconsistency would be justified under Articles XX(j) and/or XX(d) of GATT 1994.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes B-1, B-2, B-3, and B-4).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, Canada, the European Union, Japan, Korea, Norway, and Saudi Arabia are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5, C-6, and C-7). China, Ecuador, Malaysia, Russia, Chinese Taipei, and Turkey did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 24 July 2015, the Panel issued its Interim Report to the parties. On 7 August 2015, India and the United States each submitted written requests for review of the Interim Report. Neither party requested an interim review meeting. On 14 August 2015, both parties submitted comments on the other's requests for review.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out our response to the parties' requests for review of precise aspects of the Report made at the interim review stage. We discuss the parties' requests for substantive modifications below, generally in sequence according to the paragraphs or section to which the requests pertain. In addition to the requests discussed below, corrections were made for typographical and other non-substantive errors in the Report, including those identified by the parties.

6.3. The numbering of some of the paragraphs and footnotes in the Final Report has changed from the numbering in the Interim Report. The discussion below refers to the numbering in the Interim Report and, where it differs, includes the corresponding numbering in the Final Report.

6.4. Pursuant to the DSU, all panel proceedings remain confidential until the Panel Report is circulated to WTO Members. Paragraph 23 of our Working Procedures states that "The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed." The confidential nature of the Interim Report was explicitly reiterated when it was transmitted to the parties. On 27 August 2015, the Panel was made aware of press reports about the contents of the confidential Interim Report. In light of this, the Panel wishes to emphasize its disappointment and concern that the confidentiality of the Interim Report was not respected.

Factual description of the measures at issue

6.5. India requests that **paragraph 7.1**, which states that the United States' claims concern "certain domestic content requirements" under the Jawaharlal Nehru National Solar Mission, be amended to clarify that the measures at issue are confined to the DCR measures in Phase I (Batches 1 and 2) and Phase II (Batch 1) of the Mission. India states that "[w]hile paragraph 7.22 of the Panel Report discusses the Panel's decision on India's request for a preliminary ruling, the main impact of the finding in respect of the measure at issue is not reflected in paragraph 7.1". India submits that "[i]n the absence of this clarification, the measure at issue is left open and vague".[8] The United States asks the Panel to reject India's request for an amendment to paragraph 7.1. The United States considers that throughout the interim report the Panel is "explicitly clear" that the measures at issue are the DCR measures imposed by India under Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1) of the National Solar Mission, and that its findings pertain only to those measures. The United States submits that the Report "creates no ambiguity or vagueness" with respect to the precise measures at issue in this dispute.[9]

6.6. We decline India's request that we specify, in the first sentence of the first paragraph of our findings, that the measures at issue are confined to the DCR measures in Phase I (Batches 1 and 2) and Phase II (Batch 1) of the National Solar Mission. Paragraph 7.1 states (in terms identical to paragraph 2.1 of the Report) that "[t]he claims brought by the United States concern certain domestic content requirements" imposed under India's National Solar Mission. Section 7.1 then proceeds to provide additional information on the DCR measures at issue, including information on the Batches at issue. As the United States notes, the Report the Panel is "explicitly clear" that our findings pertain only to the DCR measures imposed by India under Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1) of the National Solar Mission. The fact that this is not specified in the first sentence of the findings does not, in our view, create any "ambiguity or vagueness".

6.7. India states that **paragraph 7.2** "notes as a matter of fact that the entire JNNSM is sought to be achieved through entry into PPAs with SPDs", and states that this "is factually incorrect". India observes that "[t]he Panel does in footnote 12 refer to India's submissions wherein India has explained that PPAs are not the only means to achieve the JNNSM target", but requests that "[t]his aspect needs to be recorded in the main body of the report and not in a footnote since it loses its relevance and makes the Panel's factual statement misleading".[10] The United States did not comment on India's request.

6.8. We note that, contrary to India's comment, paragraph 7.2 of the Interim Report did not state or imply that "the entire JNNSM is sought to be achieved through entry into PPAs with SPDs". Rather, paragraph 7.2 of the Interim Report stated that "[t]o seek to promote the generation of this capacity, the Government of India enters into long-term power purchase agreements (PPAs) with solar power developers (SPDs)"; the footnote accompanying this sentence (footnote 57 in this Report) clarifies that "[t]his is not necessarily the only means being pursued to seek to achieve this target". We have nonetheless sought to accommodate India's request by revising the body text to state that PPAs are "a means" to promote this generation capacity.

6.9. India states that **paragraph 7.3** "notes as a matter of fact that the total number of PPAs in place increases with each new Batch that is implemented", and states that this "is not factually accurate, since it is possible for smaller batches to succeed larger batches of PPAs". India requests that this statement "needs to be amended to state that in the batches under consideration (Batches I and II of Phase I and Batch I of Phase II), there has been an increase in number of PPAs rolled out under each batch".[11] The United States did not comment on India's request.

6.10. We note that paragraph 7.3 refers to the "total number of PPAs in place", and the remainder of this sentence specifies that 28 PPAs were entered into under Phase I (Batch 1), that 27 PPAs were entered into under Phase I (Batch 2), and that 47 PPAs were entered into under Phase II (Batch 1). Thus, we have not stated or suggested that each successive Batch involves a larger batch of PPAs than the Batch that preceded it, nor do we consider that India's suggested

[8] India's request for review of the Interim Report, para. 1.
[9] United States' comments on India's request for review of the Interim Report, para. 2.
[10] India's request for review of the Interim Report, para. 2.
[11] India's request for review of the Interim Report, para. 3.

amendment would bring greater clarification to this point. However, to avoid any misunderstanding and with a view to addressing India's concern, we have revised this sentence to read, "As each PPA remains in force for 25 years, the total number of PPAs in place has increased as new Batches are concurrently implemented: …".

6.11. Regarding the statement in **footnote 26** and **paragraph 7.11** of the Interim Report (footnote 71 and paragraph 7.11 of this Report) that the *Guidelines* document "sets forth legal requirements that are mandatory in nature", India asserts that "[t]his is inaccurate". India states that while the Panel cites the parties' responses to Panel question No. 1 in footnote 26 (footnote 71 of this Report) and a footnote accompanying paragraph 7.11, India's response to this question "does not support the Panel's finding". India states that it had, in its response to Panel question No. 1, "clearly explained that the Guidelines in themselves do not impose the domestic content requirements but provide a guiding principle for the implementation of a specific batch that they pertain to".[12] The United States asks the Panel to reject India's implied request to modify paragraph 7.11 and the footnotes referred to by India. The United States submits that whether or not the *Guidelines* documents themselves impose a legal obligation to comply with domestic content requirements, it is accurate to state that the *Guidelines* documents "*set forth* legal requirements with which compliance is necessary": the DCR provisions in each of the *Guidelines* documents are re-stated *verbatim* in each of the corresponding *Request for Selection* documents; and the DCRs (as reflected in the *Request for Selection* documents) are incorporated by reference into the model PPA, and individually executed PPAs. The United States observes that India's comment on this paragraph of the Report does not dispute that the *Request for Selection* documents and PPAs impose a legal obligation to comply with the applicable DCR measures.[13]

6.12. We do not consider it inaccurate to state that the *Guidelines* document "sets forth legal requirements that are mandatory in nature". Insofar as India is suggesting that our account is incomplete because it would be possible for the *Guidelines* to have no legal impact if no action were taken after the Batch was initiated, i.e. if there were no subsequent bidding/selection process, this is already reflected in paragraph 7.11. Insofar as India is arguing that this hypothetical possibility means that the *Guidelines* cannot be characterized as a document that "sets forth legal requirements that are mandatory in nature", we disagree: in our view, the fact that requirements governing who is eligible to enter into PPAs would have no legal impact on any entity in the event that no subsequent bidding/selection process were ever carried out does not call into question that they are "legal requirements that are mandatory in nature", or that the *Guidelines* document "sets forth" these requirements. We have amended paragraph 7.11 to clarify that India has not suggested that there is any discretion as to whether the applicable DCR measure set forth in the *Guidelines* document would be imposed in the event that the bidding/selection process were actually carried out. We consider that it is not necessary in the context of footnote 26 (footnote 71 of this Report) to repeat that the *Guidelines* document "sets forth legal requirements that are mandatory in nature", and thus we have deleted this language, and the accompanying reference to the parties' responses to Panel question No. 1, from this footnote.

6.13. India states that the last sentence of **paragraph 7.12** "is incorrect, since there is no DCR measure in part B of Phase II (Batch I)".[14] The United States did not comment on India's request.

6.14. We note that the last sentence of paragraph 7.12 states that "SPDs could use foreign cells and/or modules and still comply with the applicable DCR measure in Phase II (Batch 1) by bidding only for projects under Part B of Batch 1". Contrary to India's comment, this does not state or imply that a DCR measure was applicable in respect of Part B of Phase II (Batch 1); rather, it indicates that the scope of the applicable DCR measure for Phase II (Batch 1) does not extend to Part B. However, to avoid any misunderstanding and accommodate India's concern, we have added additional language in this sentence reiterating that the applicable DCR measure in Phase II (Batch 1) extends only to Part A of Batch 1.

[12] India's request for review of the Interim Report, para. 4.
[13] United States' comments on India's request for review of the Interim Report, para. 4.
[14] India's request for review of the Interim Report, para. 5.

Request for enhanced third-party rights in light of the measures at issue

6.15. Regarding the first sentence of **paragraph 7.34**, the United States suggests an addition to the Panel's statement that any enhanced third-party rights granted must be consistent with the provisions of the DSU. The United States requests that the Panel state that these provisions of the DSU include Articles 3.2 and 19.2, and in particular the language therein stating that recommendations and rulings of the DSB, and findings and recommendations of panels, "cannot add to or diminish the rights or obligations provided in the covered agreements". India did not comment on the United States' request.

6.16. We note that paragraph 7.34 already states that a panel has the discretion to grant enhanced third-party rights where the circumstances warrant, "provided that any such rights are consistent with the provisions of the DSU". The United States has not explained why Articles 3.2 and 19.2 should be singled out in this regard. Furthermore, we consider that it would be superfluous, in the context of this sentence, to recite the admonition that we "cannot add to or diminish the rights or obligations provided in the covered agreements". We therefore decline the United States' request that we add this language to paragraph 7.34.

6.17. Regarding the second sentence of paragraph 7.34, the United States requests two changes to our description of prior instances in which enhanced opportunities for third-party participation have been granted. With regard to the first instance identified, the United States asks the Panel to reflect that the third parties in the cited disputes were the beneficiaries of the challenged measures. The United States requests the deletion of a second instance that we identified, i.e. "the potential impact of DSB rulings and recommendations on third parties maintaining similar measures to those challenged", on the grounds that it could encompass most disputes, and appeared only as a secondary rationale in one prior report. India did not comment on the United States' request.

6.18. We recall that the second sentence of paragraph 7.34 states that panels have granted enhanced third party rights only where "there were particular circumstances that merited the granting of enhanced third-party rights", and then provides some instances with reference to past cases. We have accommodated the United States' request with respect to our description of the first instance identified, because we agree that the resulting formulation is more accurate. However, we decline the United States' request that we delete reference to "the potential impact of DSB rulings and recommendations on third parties maintaining similar measures to those challenged". The reason is that it is not apparent to us that this could encompass most disputes, as the United States argues. However, to accommodate the concern of the United States that this would constitute an overly broad basis for granting enhanced third party rights, we have modified the wording of this sentence to clarify that the examples given could *potentially* constitute particular circumstances warranting the granting of enhanced third-party rights.

6.19. Regarding **footnote 75** to paragraph 7.34 of the Interim Report (footnote 119 of this Report), which cites three Appellate Body reports for the proposition that a panel has discretion to grant enhanced third-party rights, the United States requests that we delete the reference to *US – FSC (Article 21.5 – EC)*. The United States makes this request on the grounds that the Appellate Body's statements regarding enhanced third-party rights in that case were *obiter dicta*. India did not comment on the United States' request.

6.20. We are not persuaded that there is a need to delete the reference to paragraph 243 of the Appellate Body report in *US – FSC (Article 21.5 – EC)*, and we have therefore retained it.

Whether the DCR measures fall under paragraph 1(a) of the TRIMs Illustrative List

6.21. The United States requests that **footnote 125** to paragraph 7.55 of the Interim Report (footnote 169 of this Report), which cites to its opening statement at the first meeting with the Panel, be supplemented with a reference to the paragraphs of its first written submission where it first articulated this argument. India did not comment on the United States' request.

6.22. We have supplemented the citation in this footnote as requested by the United States.

Article III:8(a) of the GATT 1994

6.23. With reference to **paragraphs 7.107 through 7.135**, India states that the Panel's summary of India's arguments does not sufficiently refer to the facts that India presented regarding the nature and characteristics of solar cells and modules that are relevant to the application of Article III:8(a) of the GATT 1994. India reproduces arguments as to why "this characteristic of solar cells and modules means that any purchase of solar energy is in essence a procurement of solar cells and modules", and how this makes the present case distinguishable from *Canada – Renewable Energy / Feed-In Tariff Program*.[15] India then recalls some of its additional arguments as to why the purchase of solar energy is in essence a procurement of solar cells and modules, and then sets forth a quotation from its earlier submissions repeating these points. India requests the Panel "to place on record the line of reasoning as explained above".[16] The United States requests that the Panel reject India's request to "place on the record" further Indian argumentation on the "nature of solar cells and modules". The United States considers that "the Panel noted each of the elements of argumentation listed in India's comment on these paragraphs" and "thoroughly considered the parties' arguments pertaining to the application of Article III:8(a) of the GATT 1994". The United States submits that "further elaboration or recitation" of India's arguments is unnecessary.[17] The United States also indicates that it does not understand the nature of solar cells and modules at issue in *Canada – Renewable Energy / Feed-In Tariff Program* to be different from the nature of the cells and modules at issue in this dispute.

6.24. Our findings in paragraphs 7.107 through 7.135 summarize the parties' arguments to the extent necessary to facilitate understanding of our own assessment and reasoning. In these paragraphs and throughout this Report, our findings do not aim to fully reproduce the parties' arguments as set forth in their submissions. India's comment on paragraphs 7.107 through 7.135 consists of a lengthy recitation of its arguments and a request that the Panel place this line of reasoning "on record". India has not explained precisely what it is requesting us to do, and it is therefore unclear if India is requesting replacement of the Panel's summaries with repetition of its submissions, or to revise or supplement one or more elements of our summaries in light of its comments. To the extent India is commenting on the weight assigned to certain arguments in the Panel's reasoning and conclusions, we are mindful that interim review is not the appropriate forum for relitigating arguments already put before a panel. At paragraph 7.114, we note that India's argument that it is "effectively procuring" solar cells and modules through the DCR measures rests on what it considers to be a "key factual distinction" with *Canada – Renewable Energy / Feed-In Tariff Program* involving "the nature of the products in question". With a view to accommodating India's comments on paragraphs 7.107 through 7.135, we have elaborated, in an accompanying footnote (footnote 292 of this Report), on India's argument regarding the nature of solar cells and modules.

6.25. The United States requests that we delete a statement in **paragraph 7.115** implying that prior Appellate Body findings may be deviated from only where there are "cogent reasons" for doing so, as well as an accompanying footnote citing to several prior panel and Appellate Body reports on this issue. The United States submits that the role of past adopted findings has been the subject of some debate and controversy, and that in this case it is simply not necessary to consider or allude to this issue. In this regard, the United States agrees with the Panel's statement in paragraph 7.115 that the issue of not applying adopted findings and reasoning is "not presented" in this dispute, and submits that "[b]oth parties agreed that past findings in *Canada – Renewable Energy / Feed-In Tariff Program* were relevant and should be applied".[18] In the event that the Panel does allude to the issue of "cogent reasons", then the United States elaborates its views on why the Appellate Body's prior statements relating to "cogent reasons" are *obiter dicta*, and also its views on why they are flawed. India notes the United States' arguments on the issue of "cogent reasons", and reiterates that "the Panel should not mechanically apply the reasoning of the Appellate Body's reasoning to the facts before it". India states that it recognizes the "relevance" of previous Appellate Body decisions, "but emphasizes that in the context of this

[15] India's request for review of the Interim Report, para. 6.3.
[16] India's request for review of the Interim Report, para. 6.10.
[17] United States' comments on India's request for review of the Interim Report, para. 6.
[18] United States' request for review of the Interim Report, para. 8.

dispute, it has not, contrary to the United States' suggestion, 'agreed that past findings in *Canada-Renewable Energy/ Feed-in Tariff Program* were relevant and should be applied'."[19]

6.26. In paragraph 7.115, we set forth our understanding that the arguments on the interpretation of Article III:8(a) advanced by the parties in this case appear to be based on their opposing understandings of the Appellate Body's findings and reasoning in *Canada – Renewable Energy / Feed-In Tariff Program*, and that we are therefore presented with the question of how the Appellate Body's findings and reasoning under Article III:8(a) should apply to the DCR measures at issue in this dispute. In this context, we stated that "We are therefore not presented with the question of whether there are any cogent reasons for deviating from the Appellate Body's findings and reasoning in that case", and cited to several prior Appellate Body and panel reports where such questions were presented. The purpose of our statement was to distinguish the type of issue raised in this case from the issue raised in those cases, not to express any view on whether there should be "cogent reasons for deviating" from past adopted findings. We have revised the wording of this sentence, and its accompanying footnote, accordingly.

6.27. With regard to "government purpose and public function" under Article III:8(a), India states that the "reference to India's argument on this aspect is also staccato and does not fully represent the main thrust of India's submissions". India requests that the Panel "record" the arguments set forth at paragraph 29 of India's second written submission in **paragraph 7.153** of the Report.[20] The United States considers that "[t]he Panel's existing summary of India's arguments accurately reflects the arguments identified in this comment", and accordingly asks that the Panel reject India's request to "record" further Indian arguments and "supplement" the summary.[21]

6.28. As stated, our findings summarize the parties' arguments to the extent necessary to facilitate understanding of our own assessment and reasoning. We have not fully reproduced the parties' arguments as set forth in their submissions. Paragraph 7.153 already records, and directly quotes from, paragraph 29 of India's second written submission. In these circumstances, no changes to paragraph 7.153 were considered necessary.

Defences under Articles XX(j) and XX(d) – generally

6.29. India offers a number of comments on section 7.3. India explains that most of these comments reflect concerns about the Panel's "incomplete consideration of India's central argumentation", and involve requests that the Panel "ensure reflection of the same".[22]

6.30. India makes two comments on **paragraphs 7.189 and 7.190**, which set forth a general overview of India's arguments under Articles XX(j) and XX(d). First, regarding the reference to the need for an 'emergency reserve' in paragraph 7.189, India reiterates its argument on why the development of manufacturing capacity of solar cells and modules is essential. The United States considers that this paragraph already explicitly addresses India's arguments relating to the need to develop domestic manufacturing capacity for solar cells and modules, and therefore requests that the Panel reject India's request. Second, India notes that at paragraphs 7.189 and 7.190 the Panel summarizes India's rationale for the DCR measures in terms of ensuring that "Indian SPDs … have access to a continuous and affordable supply of the solar cells and modules", but states that this "does not reflect India's arguments". India then sets forth a longer summary of its arguments, and a request that the Panel "accurately present India's reasoning and argumentation on this issue".[23] The United States did not comment on this request.

6.31. As we note in footnote 482 to paragraph 7.189, in its first written submission India provides a lengthy discussion of the policy objectives it is pursuing before turning to its specific arguments under Articles XX(j) and XX(d). Paragraph 7.189 reflects an effort to provide an overview of India's argumentation underlying Articles XX(j) and XX(d), in a way that distils the fundamental premises of its argumentation regarding the objectives it is pursuing, and how these objectives relate to one another. In that context, we explain that India considers it necessary to ensure that there is an

[19] India's comments on the United States' request for review of the Interim Report, paras. 1-2.
[20] India's request for review of the Interim Report, para. 8.
[21] United States' comments on India's request for review of the Interim Report, para. 8.
[22] India's request for review of the Interim Report, para. 15.
[23] India's request for review of the Interim Report, para. 17.

adequate reserve of domestic manufacturing capacity for solar cells and modules in case there is a disruption in supply of foreign solar cells and modules, and that India refers to this as an "emergency reserve". We also explain that the DCR measures seek to ensure that "a continuous and affordable supply of the solar cells and modules" can be accessed by Indian SPDs. In its comment, India reiterates its argument on why the development of manufacturing capacity of solar cells and modules is essential but does not explain precisely what changes it is requesting. We consider that paragraph 7.189 adequately distils the multiple elements of India's argumentation on why the development of manufacturing capacity of solar cells and modules is essential. However, with a view to accommodating India's comment, we have added a citation to India's submissions where there is wording similar to the formulation we use in paragraph 7.189.

Whether the DCR measures involve "the acquisition or distribution of products in general or local short supply"

6.32. The United States suggests that in **paragraph 7.202**, where Articles 31 and 32 of the Vienna Convention on the Law of Treaties are first expressly mentioned, the Panel could add a reference to the relevant Articles of the DSU that constitute the basis for applying these rules of interpretation. The United States also notes that panel reports frequently contain a section in which the panel sets out its approach to interpretation of the covered agreements (as well as the standard of review and burden of proof), and that for clarity, the Panel may wish to consider inserting such a section at the outset of its findings, in which it would set out its approach to these issues and which would apply generally to the various provisions it reviews. India did not comment on the United States' request.

6.33. We consider that it is well established that Articles 31 to 33 of the Vienna Convention on the Law of Treaties are "customary rules of interpretation of public international law" within the meaning of Article 3.2 of the DSU. We have nonetheless sought to accommodate the United States request by noting, in paragraph 7.202, that Article 3.2 of the DSU directs us to interpret this provision in accordance with customary rules of interpretation of public international law. In light of this addition, we do not see the value in adding a new section, at the beginning of our findings, reciting the well-established rules on treaty interpretation, standard of review, and burden of proof.

6.34. India requests a number of changes to section 7.3.2. We begin by reviewing several comments made by India's regarding the interplay of the terms "local short supply", "general short supply" and "international supply".

6.35. At **paragraph 7.230** of the Interim Report (paragraph 7.231 of this Report), the Panel had stated that India's argument on the need for a "contemporaneous interpretation" of Article XX(j) seemed to be "related to" India's other argument that "the provision could not have meant that short supply will not be considered to exist when products can be imported" because "that would mean that in a globalized world, no product can be said to be in short supply since it can always be imported". The Panel proceeded to address this other argument at **paragraph 7.232** of the Interim Report (paragraph 7.233 of this Report) in the context of addressing India's argument on "contemporaneous interpretation". In its comments, India stated that the Report should not "weave them together in a manner that does not reflect India's argumentation", and that the Panel was "misreading India's arguments" by stating that the second argument is "related to" India's argument on the need for a "contemporaneous interpretation" of Article XX(j).[24] India explained that its argument on the need for a "contemporaneous interpretation" pertains "only with regard to whether Article XX(j) is confined to war and natural disasters, or whether other circumstances, such as the crisis of climate change, can necessitate the use of Article XX(j)".[25] India explained that its argument on access to imports in a "globalized world" relates instead to the interplay of the terms "local short supply", "general short supply" and "international supply".[26] The United States did not respond to this aspect of India's comment.

6.36. We have revised our reasoning in light of India's clarification about the scope of its argumentation on the need for a "contemporaneous interpretation". First, we have removed our

[24] India's request for review of the Interim Report, paras. 24-25.
[25] India's request for review of the Interim Report, para. 25.
[26] India's request for review of the Interim Report, para. 25.

discussion of India's second argument from the section of our reasoning discussing the question of "contemporaneous interpretation", and added it to the part of our reasoning discussing India's argumentation on the interplay of the terms "local short supply", "general short supply", and "international supply" (see paragraph 7.229 of this Report). As a consequence of this change in the placement of this paragraph, we have also made some consequential modifications to the presentation of the reasoning in paragraphs 7.228 and 7.229. Second, in light of India's clarification regarding the scope of its argumentation on the need for a "contemporaneous interpretation", we have revised paragraph 7.232 of the Interim Report (paragraph 7.233 of this Report) so as to not impute to India the argument that "the applicable legal standard for what it means to be a 'product in general or local short supply' has changed over time".

6.37. In the context of discussing India's argument that "the provision could not have meant that short supply will not be considered to exist when products can be imported" because "that would mean that in a globalized world, no product can be said to be in short supply since it can always be imported" (which appeared at paragraph 7.232 of the Interim Report, and as explained above is now found at paragraph 7.229 of this Report), we had stated that this assumption is contradicted by India's insistence in this case on the need for sufficient domestic manufacturing capacity in the face of potential supply-side disruptions; we then recalled that "[t]he essence of India's defence under Article XX(j), and Article XX(d), is that reliance on imported solar cells and modules by SPDs creates a risk of a shortage". In its comments, India submits that this statement is "incorrect", and then provides a lengthy block quote from its submissions that touches on several issues relating to the risk of a disruption in imports.[27] The United States did not respond to this aspect of India's comment.

6.38. We note that India has not explained in what sense it is "incorrect" to state that "[t]he essence of India's defence under Article XX(j), and Article XX(d), is that reliance on imported solar cells and modules by SPDs creates a risk of a shortage". However, with a view to trying to accommodate India's comment, we have replaced this wording with a direct quotation from India's submissions. After stating that the assumption reflected in India's argument is contradicted by India's insistence in this case on the need for sufficient domestic manufacturing capacity in the face of potential supply-side disruptions, paragraph 7.229 now states that "[t]he essence of India's defence under Article XX(j), and Article XX(d), is that '[a]ny dependence on imports brings with it risks associated with supply side vulnerabilities and fluctuations', in the sense of 'risks of market fluctuations in international supply'".

6.39. India states that "a crucial omission by the Panel in its reasoning on Article XX(j) is its failure to examine" India's submissions on the use of the terms "general" and "local" in Article XX(j) to qualify the term "short supply", and the use of the term "international supply" in the proviso to Article XX(j). India asserts that "[t]he Panel has not even alluded to or considered India's argumentation on this aspect".[28] Following a lengthy recitation of its arguments on this point, India requests the Panel "to review this aspect of its report to ensure completeness of analysis", and at a minimum to include "a section explaining India's line of reasoning on this aspect".[29] India reiterates the same argument in the context of commenting on the Panel's conclusion in **paragraph 7.233** of the Interim Report (paragraph 7.234 of this Report), stating that the Panel "has not addressed this specific argument while arriving at its conclusion".[30] The United States considers that, "contrary to India's assertions, the summary in the interim report included all of the arguments listed in this comment, and the Panel took those arguments into account in its analysis".[31] In the context of responding to India's comment on paragraph 7.233 of the Interim Report (paragraph 7.234 of this Report), the United States indicates that it does not understand the Panel's conclusion in this paragraph to reflect the reasoning imputed to the Panel by India, which is that where there is "international supply" of a product, there can be no "general or local short supply". Therefore, the United States requests that the Panel reject India's request to "review this aspect of its report", "include a section explaining India's line of reasoning", or engage in further "reflection" on this score.

[27] India's request for review of the Interim Report, para. 27.
[28] India's request for review of the Interim Report, para. 10.
[29] India's request for review of the Interim Report, para.14.
[30] India's request for review of the Interim Report, para. 28.
[31] United States' comments on India's request for review of the Interim Report, para. 16.

6.40. We consider that the reasoning in paragraphs 7.228 and 7.229 of this Report (corresponding to paragraphs 7.228 and 7.232 of the Interim Report) squarely addresses India's argumentation on this point. As elaborated in those paragraphs, we agree with India that Article XX(j) envisages that there could be an "international supply" of a product at the same time that there is "general" or "local" short supply of that product in a relevant geographical area or market. However, as elaborated in those paragraphs, we do not agree with India that when there is an "international supply" of a product, this necessarily means that there is international supply of a product that can be imported into all countries or regions, or that the quantity of the product is sufficient to meet the level of demand in all countries or regions. We decline India's request that we include "a section explaining India's line of reasoning on this aspect". As we have explained above, our findings summarize the parties' arguments to the extent necessary to facilitate understanding of our own assessment and reasoning, and do not aim to fully reproduce the parties' arguments as set forth in their submissions.

6.41. India makes additional comments related to the interplay between "general", "local", and "international" short supply in the context of commenting on **paragraph 7.229** and **footnote 520** of the Interim Report (paragraph 7.330 and footnote 566 of this Report). India states that it "fails to understand how the examples described by the Panel in footnote 520 would satisfy the requirements of Article XX(j)", because "[i]n both situations described by the Panel, there could well be international supply of a product, and a[n] import restriction, according to the Panel's earlier reasoning, will not be justified when it is possible to satisfy a country's demands through imports".[32] India then asserts that the Panel "has simply refused to acknowledge" the United States' failure to rebut India's arguments on the interplay between "general", "local", and "international" short supply, and provides a lengthy recitation of those arguments.[33] The United States considers that the Panel "sufficiently considered the parties' arguments with respect to circumstances where a product could be available on the international market but 'in short supply' in a local market", and therefore requests that the Panel reject India's request that the Panel engage in further "reflection" on this score.[34]

6.42. We note that India's comments are essentially a recitation of its arguments regarding the interplay between "general", "local", and "international" short supply. We understand India to be saying that the examples given in footnote 520 of the Interim Report (footnote 566 of this Report) do not establish that there is "short supply", as in both examples, there could well be the possibility of that country's demand being met through imports, and under the Panel's reasoning and interpretation of Article XX(j), there will be no "short supply" when it is possible to satisfy demand through imports. However, the point of these hypothetical examples is simply to illustrate that under our interpretation of "short supply" there could still, contrary to India's arguments, be situations in which measures to address that situation could take the form of import restrictions. In these circumstances, no changes were considered necessary.

6.43. Apart from the foregoing comments regarding the interplay between the terms "local short supply", "general short supply", and "international supply", India makes the following additional comments on our analysis of Article XX(j).

6.44. Regarding references to India's "acknowledgement" that there is an adequate availability of solar cells and modules in India, which appeared in both the first sentence of **paragraph 7.221** and the last sentence of **paragraph 7.235** of the Interim Report (paragraphs 7.221 and 7.236 of this Report), India states that the Panel is citing paragraph 233 of India's first written submission "incorrectly as an admission by India that there are solar cells and modules adequately available in India". India clarifies that the statement in question ("internationally, there is adequate availability of solar cells and modules") was made in the context of arguing the DCR measure complies with the proviso of Article XX(j), in the sense that "all countries had access to solar cells and modules, and that the DCR measures do not prohibit or restrict the supply of solar cells and modules that adversely affect the principle of equitable share of these products". India requests that the Panel "rectify this erroneous representation of India's arguments".[35] The United States observes that the first sentence of paragraph 7.221 is characterizing argumentation made by the United States, not

[32] India's request for review of the Interim Report, para. 20.
[33] India's request for review of the Interim Report, para. 21.
[34] United States' comments on India's request for review of the Interim Report, para. 14.
[35] India's request for review of the Interim Report, para. 18.

argumentation proffered by India, and there is no basis for India's suggestion that the Panel has misrepresented India's arguments at paragraphs 7.221 or 7.235. However, to more accurately capture the precise argumentation of the United States on this score, and to address India's concerns, the United States suggests a possible revision to these sentences.

6.45. We have modified the first sentence of paragraph 7.221 in the manner suggested by the United States. We have deleted the last sentence of paragraph 7.235 of the Interim Report (paragraph 7.236 of this Report), as it was not essential to our conclusion.

6.46. Regarding **paragraph 7.226**, India states that the Panel has "paraphrased India's argument" that it "does not seek to maximize" either "self-sufficiency" or "self-reliance", and requests the Panel "to complete this narration of India's argument" by reproducing the full text of paragraph 68 of its second written submission.[36] The United States did not comment on this request.

6.47. We decline India's request that we "complete this narration of India's argument". As we have explained above, our findings summarize the parties' arguments to the extent necessary to facilitate understanding of our own assessment and reasoning, and do not aim to fully reproduce the parties' arguments as set forth in their submissions.

6.48. Regarding **paragraph 7.253** of the Interim Report (paragraph 7.254 of this Report), India requests the Panel "to place on record the centrality of India's challenge to the United States' argument of a singular analyst" cited in the *PV Magazine* article (Exhibit USA-39). In this regard, India "seeks to draw the Panel's attention to India's arguments in paragraphs 72-74 of India's responses to the Panel's question 62, wherein it has analysed US-39 and explained that US-39 is a view of *one analyst*, and cannot in any manner be used to dismiss the several other credible industry sources that are cited in IND-48".[37] The United States did not comment on this request.

6.49. We note paragraph 7.253 of the Interim Report (paragraph 7.254 of this Report) already records that India "emphasizes that the two press reports that it submitted rely on several credible sources, including corporate officers of solar power companies and industry analysts who have made statements relating to the possibility of a short supply in solar cells and modules, and that the article submitted by the United States does not invalidate any of the positions taken by these sources". We further note that this paragraph also already refers to India's response to Panel question No. 62, and to Exhibits IND-48 and IND-49. However, with a view to accommodating India's request, we have reflected India's emphasis that the press report submitted as Exhibit USA-39 reflects the view of only one analyst.

6.50. Regarding **paragraph 7.262** of the Interim Report (paragraph 7.263 of this Report), India observes that the Panel relies on the observation of an analyst who has noted that residential consumers will be more vulnerable to short supply of solar cells and modules. India observes that "[t]his statement however has nothing to do with SPDs in India who are licensed generating companies in India and who cannot, under the prevailing regulatory framework, operate anywhere else, or 'go where the modules go'. Any import side disruption of solar cells and modules will first and foremost impact the entities that require such cells and modules, which are the generating companies."[38] The United States responds that "India mischaracterizes and misquotes the press report referenced by the Panel", and that "language quoted by the Panel accurately reflects the statement of the analyst as expressed in the press report".[39] The United States observes that this understanding, i.e. that solar cells and modules will flow to places with the largest solar projects, is reflected in another press report submitted by India as Exhibit IND-49.

6.51. We did not intend to imply, in paragraph 7.262 of the Interim Report (paragraph 7.263 of this Report), that Indian SPDs could relocate to respond to a shortage in solar cells and modules. To the contrary, we referred to the press reports submitted by India that quote industry experts as stating that, if there is a shortage, the "large-scale utility projects are going to be where the modules go", and the shortage "would be on the residential side". In this case, India argues that

[36] India's request for review of the Interim Report, para. 19.
[37] India's request for review of the Interim Report, para. 29.
[38] India's request for review of the Interim Report, para. 30.
[39] United States' comments on India's request for review of the Interim Report, para. 18.

the DCR measures are aimed at the acquisition of solar cells and modules by SPDs that are engaged in solar power generation, i.e. large-scale utility projects, not residential consumers. In light of India's comment, we have amended paragraph 7.262 of the Interim Report (paragraph 7.263 of this Report) to clarify that what these reports suggest is that, even in the event of a shortage in the international supply of solar cells or modules, large-scale utility projects like Indian SPDs (as distinguished from residential customers) may not be affected.

Whether the DCR measures are measures "to secure compliance with laws or regulations" within the meaning of Article XX(d)

6.52. Regarding **paragraphs 7.297-7.298 of the Interim Report** (paragraphs 7.298-7.299 of this Report), India states that the Panel "appears to be confusing two basic aspects: (i) the direct effect of international law in India; and (ii) implementing legislation to secure compliance with international law that is sought to be justified under Article XX(d)". India states that "[i]t is precisely because the international law instruments cited by India have *direct effect* under Indian law, that the Government has taken implementing measures in the form of the DCR measures to secure compliance with those obligations".[40] India provides a lengthy recitation of its arguments, and "urges the Panel to consider India's argumentation and review its findings".[41] The United States considers that "the Panel sufficiently considered India's arguments with respect the applicability of Article XX(d) of the GATT 1994", including those listed by India in its comments on these paragraphs, and therefore requests that the Panel reject India's request that the Panel give further consideration to India's argumentation on this score.[42]

6.53. We note that India's comments on these paragraphs appear to be a recitation of its main arguments under Article XX(d). The main thrust of India's comment appears to be that the international law instruments cited by India have "direct effect" under Indian law, and that the Government has taken implementing measures in the form of the DCR measures to secure compliance with those obligations. This is consistent with our understanding of India's argument, and almost the entirety of our analysis in section 7.3.3.3.1 (paragraphs 7.285-7.301 of this Report) is devoted to assessing this argument. In light of the foregoing, we have not made any changes to paragraphs 7.297-7.298 of the Interim Report (paragraphs 7.298-7.299 of this Report).

6.54. Regarding **paragraph 7.302**, India requests the Panel to clarify that the argument reflected therein pertains to both the domestic and international law instruments identified by India. The United States did not comment on this request.

6.55. We have accommodated India's request, and clarified that the arguments contained in this paragraph pertain to both the domestic and international law instruments identified by India.

Whether the DCR measures "essential" or "necessary" within the meaning of Articles XX(j) and XX(d)

6.56. Regarding **paragraphs 7.362-7.363** of the Interim Report (paragraphs 7.363-7.364 of this Report), India states that "[t]he JNNSM as a whole has been lauded as a successful programme by several studies" (Exhibits IND-8 and IND-9), which have "highlighted the positive impact as well as the shortcomings of the JNNSM, which are all part of the evolutionary process of JNNSM". India states that it is "important that this aspect is recorded by the Panel". India submits that while these studies "present a balanced view of both successes and shortcomings of the JNNSM", the Panel refers to these studies "selectively highlighting only the shortcomings and teething troubles of the programme including its DCR measures", and in doing so "is not reflecting the essence of India's arguments in this regard".[43] The United States responds that it "has never disputed that there are WTO-consistent elements of the JNNSM that have had positive effects on India's use of

[40] India's request for review of the Interim Report, para. 31.
[41] India's request for review of the Interim Report, para. 33.
[42] United States' comments on India's request for review of the Interim Report, para. 20.
[43] India's request for review of the Interim Report, para. 35.

solar power", but that these are not at issue in this dispute.[44] The United States therefore requests that the Panel reject India's request to "record" positive aspects of the JNNSM.

6.57. We recall that this dispute concerns the WTO-consistency of certain DCR measures maintained under the National Solar Mission. As explained in paragraph 7.22 of this Report, India itself objected to the various references in the United States' first written submission to a purported "JNNSM programme", and argued that these references represented an attempt by the United States to widen the scope of the terms of reference of the Panel to seek findings on the Jawaharlal Nehru National Solar Mission (JNNSM) "as a whole", or potential or future measures under the JNNSM. Further, as noted in paragraph 7.188 of this Report, "the parties' arguments reflect a shared understanding that what needs to be justified under Article XX of the GATT 1994 is not the National Solar Mission as a whole, but rather the DCR measures at issue". In light of the foregoing, we do not see why paragraphs 7.362-7.363 of the Interim Report (paragraphs 7.363-7.364 of this Report), which consider the extent to which the challenged DCR measures contribute to their objective, need to "present a balanced view of both successes and shortcomings" of the National Solar Mission "as a whole". Accordingly, we decline India's request.

6.58. India states that it has submitted evidence on the growth of manufacturing capacity in India, "which the Panel appears to have ignored".[45] In this regard, India refers to the *Phase II Policy Document,* JNNSM, (December 2012), paragraph 1.3.10, last bullet point (Exhibit USA-3). India emphasizes that it also explained that it is undertaking regular review and evaluation of the domestic manufacturing capacity with a view to assessing the growth in its domestic manufacturing capacity. India states that the DCR measures "therefore have a clear role in relation to development of India's domestic manufacturing capacity".[46] The United States did not comment on this point.

6.59. We have sought to accommodate India's comment by amending **paragraph 7.363** of the Interim Report (paragraph 7.364 of this Report) to reflect the statement contained in paragraph 1.3.10, last bullet point, of Exhibit USA-3. The last bullet point reads, "Provision of requirement of domestic content for setting up solar power projects was kept in the guidelines for Phase-I with a view to develop indigenous capacities and generate employment. It was noted that the production capacities for solar PV cells and modules have expanded in the country." We have also reflected the statement, contained in the same document, that "there is no significant capacity utilization despite [the] addition of manufacturing capacity as observed during Phase I". In our view, neither of these statements alters the conclusion that "the information before the Panel concerning the effect of the DCR measures on increasing domestic manufacturing capacity of solar cells and modules appears to cast doubt on whether such effect is positive".

6.60. Regarding **paragraph 7.364** of the Interim Report (paragraph 7.365 of this Report), India requests the Panel "to review its assertion that India has not provided evidence on manufacturing capacity for wafers and polysilicon material", on the grounds that it has provided "validated information" on India's emerging capacity, which is not refuted by the United States, and there is "nothing under WTO law which says that every utterance by the Government needs to be supported by a documentary exhibit". India further notes that the Panel "appears to have completed ignored" India's response to a question on "the issue of raw materials supply raised by it", and India proceeds to reproduce its response.[47] The United States did not comment on this point.

6.61. We have sought to accommodate India's comment by amending paragraph 7.364 of the Interim Report (paragraph 7.365 of this Report) to clarify that India did not assert (as opposed to prove) that Indian companies could supply the required products necessary to produce and put to use solar cells and modules in the event of a disruption in imports of wafers, polysilicon materials, and other raw materials. Regarding India's statement that the Panel "appears to have completely ignored" India's response to a question on "the issue of raw materials supply raised by it", we note that the paragraph in question refers to, and quotes directly from, India's response to this question.

[44] United States' comments on India's request for review of the Interim Report, para. 22.
[45] India's request for review of the Interim Report, para. 38.
[46] India's request for review of the Interim Report, para. 38.
[47] India's request for review of the Interim Report, para. 37.

6.62. Regarding **paragraph 7.367** of the Interim Report (paragraph 7.368 of this Report), India states that the Panel's reasoning in this conclusion, and the paragraphs preceding it, "ignore[] the basic line of reasoning presented by India, which is not that DCR measures will guarantee the outcome of affordable supply of solar cells and modules needed to generate solar power". India then provides a lengthy recitation of its arguments on the rationale of the DCR measures, and states that the Panel "needs to acknowledge and record India's line of reasoning", rather than "brush it away with a single stroke as India has not met the very high threshold of DCR measures 'guaranteeing' the outcome of Indian SPDs having access to a continuous and affordable supply of solar cells and modules".[48] After repeating that the DCR measures "have a clear role in relation to development of India's domestic manufacturing capacity", India then states that they "are the only way in which India can 'guarantee' that manufacturing units for solar cells and modules are actually set up in India, and achieve the objective of energy security by creation of a manufacturing base for solar cells and modules".[49] The United States considers that nowhere in the Report does the Panel impute to India the argument that the DCR measures at issue will "guarantee" that Indian solar power developers have continuous access to an affordable supply of solar cells and modules, nor does the United States understand the Panel to reason that the DCR measures would have to "guarantee" continuous access to solar cells and modules in order for the DCRs to be found "essential" for purposes of Article XX(j), or "necessary" for purposes of Article XX(d). Accordingly, the United States requests that the Panel reject India's "vague request to modify paragraph 7.367 to 'acknowledge and record' certain arguments".[50]

6.63. We stated, in paragraph 7.367 of the Interim Report (paragraph 7.368 of this Report), that "India has not demonstrated that the DCR measures ensure that Indian SPDs have access to a continuous and affordable supply of the solar cells and modules needed to generate solar power, in the sense that they guarantee this outcome". We considered it relevant to refer to the DCR measures not "guaranteeing" this outcome in light of the fact that India appears to apply this high threshold to the alternative measures identified by the United States (see paragraph 7.373 of this Report). However, we do not wish to imply that the DCR measures would have to "guarantee" continuous access to solar cells and modules in order for the DCRs to be found "essential" for purposes of Article XX(j) (or "necessary" for purposes of Article XX(d)). We have therefore deleted the reference to the DCR measures not "guaranteeing" that Indian SPDs have access to a continuous and affordable supply of the solar cells and modules needed to generate solar power. As we have explained above, our findings summarize the parties' arguments to the extent necessary to facilitate understanding of our own assessment reasoning, and do not aim to fully reproduce the parties' arguments as set forth in their submissions. We therefore decline India's request that the Panel "needs to acknowledge and record India's line of reasoning".

6.64. Regarding **paragraph 7.372** of the Interim Report (paragraph 7.373 of this Report), India notes that the Panel refers to the United States' argument that solar cells and modules have a 25 year warranty and the need for intelligent stockpiling, and states that it "has addressed and refuted both these points". India provides a lengthy recitation of its arguments on the issue of stockpiling, which it "requests the Panel to place on record in its reasoning to ensure completeness of the parties' arguments".[51] The United States considers that "the Panel has adequately summarized the parties' arguments and evidence regarding the viability of stockpiling solar cells and modules". In any event, the United States indicates that because the Panel did not make any substantive findings with regard to the issue to which these arguments relate, it is "difficult to see the point of augmenting the summary of India's arguments". Accordingly, the United States requests that the Panel "reject India's request to 'place on record' additional Indian argumentation on the viability of stockpiling solar cells and modules".[52]

6.65. We decline India's request to record its argumentation on stockpiling set forth in its comments on paragraph 7.372 of the Interim Report (paragraph 7.373 of this Report). As we have explained above, our findings summarize the parties' arguments to the extent necessary to facilitate understanding of our own assessment and reasoning, and do not aim to fully reproduce the parties' arguments as set forth in their submissions.

[48] India's request for review of the Interim Report, para. 41.
[49] India's request for review of the Interim Report, para. 44.
[50] United States' comments on India's request for review of the Interim Report, para. 26.
[51] India's request for review of the Interim Report, para. 45.
[52] United States' comments on India's request for review of the Interim Report, para. 27.

7 FINDINGS

7.1 General considerations relating to the measures at issue

7.1.1 Factual description of the measures at issue

7.1. The claims brought by the United States concern certain domestic content requirements (the DCR measures)[53] imposed under India's Jawaharlal Nehru National Solar Mission (National Solar Mission, or JNNSM). The objective of the National Solar Mission is stated as being "to establish India as a global leader in solar energy, by creating the policy conditions for its diffusion across the country as quickly as possible".[54] It was launched by the Government of India in 2010, with the aim of generating 20,000 megawatts (MW) of grid-connected solar power capacity by 2022.[55] India subsequently increased that target to 100,000 MW of grid-connected solar power capacity by 2022.[56]

7.2. As a means to promote the generation of this capacity, the Government of India enters into long-term power purchase agreements (PPAs) with solar power developers (SPDs).[57] Under a PPA, India purchases solar power generated by a particular SPD. Each PPA provides a guaranteed rate for a 25-year term at which the electricity generated by the SPD is bought by India.[58] The rates guaranteed under PPAs are determined by two Indian electricity regulatory commissions, the Central Electricity Regulatory Commission at the national level, and the State Electricity Regulatory Commission at each state level.[59] India resells the electricity that it purchases to downstream distribution utilities (also termed "Discoms")[60], which in turn resell it to the ultimate consumer (e.g. household, industrial, or governmental entities).[61] The flow of electricity generated under the National Solar Mission is as follows[62]:

7.3. In seeking to achieve the National Solar Mission's overall target of 100,000 MW of grid-connected solar power capacity, India is progressively entering into more PPAs over time to

[53] In its submissions, the United States generally characterizes the measures at issue as the "domestic content requirements", or "DCRs". India also characterizes the measures as the "domestic content requirements", or "DCR Measures". Some of the National Solar Mission documents setting forth these measures also refer to them as the "domestic content requirements". See fns 78, 83, and 87 below. In this Report, we adopt the parties' nomenclature and refer to the measures as the "DCR measures". This does not prejudge the Panel's consideration of the substance of the parties' arguments in this dispute.

[54] *Resolution, Jawaharlal Nehru National Solar Mission*, Ministry of New and Renewable Energy (11 January 2010), (Exhibit USA-4), paras. 1 and 2.

[55] Ibid. paras. 1 and 2. With regard to the concept of a "grid", the panel in *Canada – Renewable Energy / Feed-in Tariff Program* explained that "[e]lectricity is delivered to consumers through the operation of a vast integrated infrastructure of high-voltage transmission lines (connecting generators to distributors and large consumers) and lower-voltage distribution lines that ultimately link to individual consumers. This is generally referred to as a grid." Panel Reports, *Canada – Renewable Energy / Feed-in Tariff Program*, para. 7.11.

[56] India's first written submission, para. 28, and India's response to Panel question No. 5 (citing *India to boost national solar target to 100 GW by 2022- reports*, PV-Tech, (17th November, 2014), (Exhibit IND-4); *Fact Sheet: U.S. and India Climate and Clean Energy Cooperation,* The White House, Office of the Press Secretary (25 January 2015), (Exhibit IND-30); and Press Information Bureau, Government of India, *Modi Government is Committed to Provide Affordable and Clean Power 24x7 for all* (12 January 2015), (Exhibit IND-37).

[57] This is not necessarily the only means being pursued to seek to achieve this target. See India's first written submission, para. 38; India's response to Panel question No. 8.

[58] United States' first written submission, paras. 34, 36, and 37; India's first written submission, para. 116.

[59] India's first written submission, para.148. The United States does not contest the tariff setting by CERC/SERC as explained by India.

[60] "Distribution Utilities", also termed "Discoms", are entities that sell electricity directly to commercial and retail end users in India. There are currently 61 distribution utilities in India. See *State Electricity Utilities*, Central Electricity Regulatory Commission, (Exhibit USA-11).

[61] United States' first written submission, para. 15; India's first written submission, para. 151.

[62] United States' first written submission, para. 15; India's first written submission, para. 152.

incrementally add more grid-connected solar power capacity. Specifically, the National Solar Mission is being implemented in several successive "Phases", with each Phase initiated thus far being further divided into "Batches". As each PPA remains in force for 25 years, the total number of PPAs in place has increased as new Batches are concurrently implemented: (a) in 2010-2011, under Phase I (Batch 1), India commissioned a total of 140 MW of solar power capacity by entering into 28 PPAs[63]; (b) in 2011-2012, under Phase I (Batch 2), India commissioned an additional 330 MW of solar power capacity by entering into an additional 27 PPAs[64]; and (c) in 2013-2014, under Phase II (Batch 1), India commissioned an additional 750 MW of solar power capacity through an additional 47 PPAs.[65]

7.4. The Ministry of New and Renewable Energy of India (MNRE) is the Indian central government ministry responsible for "all matters relating to renewable energy".[66] MNRE issued the *Guidelines* documents setting forth the terms and conditions governing each of the three Batches. Under the first two Batches, i.e. Phase I (Batch 1) and Phase I (Batch 2), MNRE selected NTPC Vidyut Vyapar Nigam Limited (NVVN) to act as the agency responsible for implementing the solar power project selection process, including but not limited to issuing the *Request for Selection* document governing selection of solar power projects. NVVN served as the government party in the individually executed PPAs. For Phase II (Batch 1), MNRE selected the Solar Energy Corporation of India (SECI) to perform the same functions that NVVN performed in respect of Phase I.

7.5. NVVN is a wholly-owned subsidiary of the state-owned National Thermal Power Corporation (NTPC).[67] SECI is a "Government of India enterprise" under the administrative control of the MNRE.[68] India states that "[b]oth NVVN and SECI, … have been specifically designated as the implementing agencies for Phase I (Batch [1] and Batch [2]) and Phase II (Batch [1]) respectively and are entities acting for and on behalf of Government of India".[69] Both parties agree that NVVN and SECI are properly characterized as "governmental agencies" whose actions are attributable to India.[70]

7.6. The terms and conditions governing each Batch are set out in several documents, including: (a) the *Guidelines* document[71] governing each Batch (setting out the requirements concerning solar power project eligibility, the bid submission process for SPDs, technical specifications, and contract issuance); (b) the *Request for Selection* document[72] governing the selection process (which incorporates provisions of the *Guidelines* and sets out further details regarding the application process, standard terms and conditions applicable to solar power projects, and technical specifications); (c) the "model PPA" (which incorporates provisions of the *Guidelines* and

[63] India's response to Panel question No. 7(a).
[64] India's response to Panel question No. 7(a).
[65] India's response to Panel question No. 6(c).
[66] *Introduction* on the Ministry of New and Renewable Energy website, (Exhibit USA-28).
[67] United States first written submission, para. 19; India's first written submission, paras. 128-129.
[68] United States first written submission, para. 20; India's first written submission, para. 130.
[69] India's first written submission, para. 131.
[70] Parties' responses to Panel question No. 2.
[71] For the *Guidelines* documents under Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1), see respectively, *Guidelines for Selection of New Grid Connected Solar Power Projects*, Ministry of New and Renewable Energy (July 2010) ("Phase I (Batch 1) *Guidelines*"), (Exhibit USA-5); *Guidelines for Selection of New Grid Connected Solar Power Projects*, *Batch II*, Ministry of New and Renewable Energy (24 August 2011) ("Phase I (Batch 2) *Guidelines*"), (Exhibit USA-6); and *Guidelines for Implementation of Scheme for Setting up of 750 MW Grid-Connected Solar PV Power Projects Under Batch-1, Jawaharlal Nehru National Solar Mission*, Ministry of New and Renewable Energy (October 2013) ("Phase II (Batch 1) *Guidelines*"), (Exhibit USA-7).
[72] For the *Request for Selection* documents under Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1), see respectively, *Request for Selection Document for New Grid Connected Solar Photo Voltaic Projects Under Phase 1 of JNNSM*, NTPC Vidyut Vyapar Nigam Limited (18 August 2010) ("Phase I (Batch 1) *Request for Selection* document"), (Exhibit USA-15); *Request for Selection Document for New Grid Connected Solar Photo Voltaic Projects Under Phase 1, Batch II of JNNSM*, NTPC Vidyut Vyapar Nigam Limited (24 August 2011) ("Phase I (Batch 2) *Request for Selection* document"), (Exhibit USA-17); and *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 (28 October 2013) ("Phase II (Batch 1) *Request for Selection* document"), (Exhibit USA-12).

Request for Selection documents by reference, and which forms the basis for each individually executed PPA)[73]; and (d) the individually executed PPAs (based on the model PPA).[74]

7.7. A mandatory domestic content requirement was imposed on SPDs participating in Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1). For each Batch, the applicable domestic content requirement was initially set forth in the *Guidelines* document and reproduced in the *Request for Selection* document. The applicable domestic content requirement was then reaffirmed in the model PPA and all of the individually executed PPAs in each Batch[75], and further implemented through a "specific plan"[76] that SPDs had to submit after entering into the PPA, specifying how they would meet the requirements of the applicable DCR measure. As elaborated below, the scope and coverage of the applicable DCR measure differed across the three Batches.

7.8. Under Phase I (Batch 1), it was mandatory for all projects based on crystalline silicon (c-Si) technology to use c-Si *modules* manufactured in India, while the use of foreign c-Si cells and foreign thin-film modules or concentrator photovoltaic (PV) cells was permitted. This DCR measure was set forth in the *Guidelines*[77] and reproduced in the *Request for Selection* document.[78] The *Request for Selection* document further provides that SPDs submitting a bid must certify that they will furnish, within 180 days of the signing of the PPA, a "Specific plan for meeting the requirement of domestic content in case of projects based on Crystalline Silicon Technology".[79] Paragraph (B) of the preamble of the model PPA for Phase I (Batch 1) states that the SPD is selected "after meeting the eligibility requirements".[80] It is not in dispute that these eligibility requirements include the relevant provisions of the *Guidelines* and *Request for Selection* documents setting forth the applicable DCR measure.[81]

7.9. Under Phase I (Batch 2), it was mandatory for all projects based on c-Si technology to use c-Si *cells* and *modules* manufactured in India, while the use of domestic or foreign modules made from thin-film technologies or concentrator PV cells was permitted. This DCR measure was set

[73] The United States asserts, and India does not dispute, that individually executed PPAs are based on the model PPA. United States' first written submission, paras. 24 and 41. For the model PPAs used for Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1), see respectively, *Draft Standard Power Purchase Agreement for Procurement of __ MW Solar Power on Long Term Basis (Under New Projects Scheme)*, NTPC Vidyut Vyapar Nigam Limited (18 August 2010) ("Phase I (Batch 1) model PPA"), (Exhibit USA-16); *Draft Standard Power Purchase Agreement for Procurement of __ MW Solar Power on Long Term Basis (Under New Projects Scheme)(Second Batch)*, NTPC Vidyut Vyapar Nigam Limited (23 August 2011) ("Phase I (Batch 2) model PPA"), (Exhibit USA-18); and *Draft Standard Power Purchase Agreement for Procurement of___MW Solar Power on Long Term Basis under JNNSM, Phase II, Batch I Scheme*, Solar Energy Corporation of India (30 November 2013) ("Phase II (Batch 1) model PPA"), (Exhibit USA-19).

[74] The United States submitted a list of the projects selected under Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1). See respectively, *List of Selected Projects*, NTPC Vidyut Vyapar Nigam Limited, undated, (Exhibit USA-21); *List of Solar PV Projects under JNNSM Phase I Batch II Achieved Financial Closure as Per Schedule*, NTPC Vidyut Vyapar Nigam Limited, (Exhibit USA-22); and *Notification Regarding Selected Projects of 750 MW Grid Connected Solar PV Projects Under JNNSM Phase-II Batch-I*, Solar Energy Corporation of India (February 25, 2014), (Exhibit USA-23).

[75] See fns 81, 85 and 89 below.

[76] Phase I (Batch 1) *Request for Selection* document, (Exhibit USA-15), pp. 52; Phase I (Batch 2) *Request for Selection* document, (Exhibit USA-17), pp. 59; and Phase II (Batch 1) *Request for Selection* document, (Exhibit USA-12), pp. 71.

[77] Phase I (Batch 1) *Guidelines*, (Exhibit USA-5), Section 2.5.D (entitled "Domestic Content", and stating that "in the case of Solar PV Projects to be selected in first batch during FY 2010-11, it will be mandatory for Projects based on crystalline silicon technology to use the modules manufactured in India").

[78] Phase I (Batch 1) *Request for Selection* document, (Exhibit USA-15), Section 3.3 (entitled "Domestic Content", and stating that "For Solar PV Projects it will be mandatory for Projects based on crystalline silicon technology to use the modules manufactured in India while there will be no mandatory domestic content requirement for Projects based on other technologies").

[79] Phase I (Batch 1) *Request for Selection* document, (Exhibit USA-15), pp. 23 and 52.

[80] Phase I (Batch 1) model PPA, (Exhibit USA-16), paragraph (B) of the preamble.

[81] See United States' response to Panel question No. 11. Based on its response to Panel question No. 1(c), we understand India to be of the view that compliance with the relevant provisions of the *Guidelines* and *Request for Selection* documents setting forth the applicable DCR measure is also covered by Section 3.1(g) of the model PPA, which provides that "[t]he SPD shall fulfil the technical requirements according to criteria mentioned under Clause 2.5(B) & 3.5(B) of JNNSM guidelines for selection of new projects and produce the documentary evidence of the same." Phase I (Batch 1) model PPA, (Exhibit USA-16), Section 3.1(g).

forth in the *Guidelines*[82] and reproduced in the *Request for Selection* document.[83] Paragraph (B) of the preamble of the model PPA for Phase I (Batch 2) states that the SPD has been selected "after meeting the eligibility requirements".[84] It is not in dispute that these include the relevant provisions of the *Guidelines* and *Request for Selection* documents setting forth the applicable DCR measure.[85]

7.10. Phase II (Batch 1) is divided into two parts. Projects selected under "Part A" are subject to a DCR measure, whereas projects selected under "Part B" are not. The SPD bidding for a PPA can elect to bid for "Part A" or "Part B", or submit separate bids in the event it wishes to bid under both categories. The scope of the United States' challenge under Phase II (Batch 1) is confined to the DCR measure imposed under Part A.[86] Under Phase II (Batch 1-A), any solar cells and modules used by the SPDs must be made in India, irrespective of the type of technology used. This DCR measure was set forth in the *Guidelines*[87] and was reproduced in the *Request for Selection* document.[88] The model PPA for Phase II (Batch 1) refers to the requirements of the *Request for Selection* and expressly states that SECI shall have the right to terminate the Agreement if an SPD fails to "specify their plan for meeting the requirement for domestic content".[89]

7.11. By their terms, the *Guidelines* and *Request for Selection* documents for each Batch make clear that the DCR measure for that Batch is "mandatory". Neither party has suggested that there is any discretion as to whether the applicable DCR measure will be imposed, or whether it must be complied with, in the resulting bidding/selection process.[90] Rather, India explains that it would be possible for the *Guidelines* to have no legal impact if no action were taken after the Batch was initiated, i.e. if there were no subsequent bidding/selection process. India also points out that there is a power of "review and amendment", and to "remove difficulties", but explains that it has not been used to date in respect of the applicable domestic content requirements.[91]

7.12. However, while the DCR measure for each Batch is mandatory in nature, the scope and coverage of the applicable DCR measure did not extend to all types of cells, modules, and/or

[82] Phase I (Batch 2) *Guidelines*, (Exhibit USA-6), Section 2.5.D (entitled "Domestic Content", and stating that "[f]or 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. PV Modules made from thin-film technologies or concentrator PV cells may be sourced from any country, provided the technical qualification criterion is fully met.")

[83] Phase I (Batch 2) *Request for Selection* document, (Exhibit USA-17), Section 3.E (entitled "Domestic Content", and stating "[f]or 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"), and Format 6.7 (stating that details that must be furnished within 210 days of the signing of the PPA include "Specific plan for meeting the requirement of domestic content in case of projects based on Crystalline Silicon Technology").

[84] Phase I (Batch 2) model PPA, (Exhibit USA-18), paragraph (B) of the preamble.

[85] See United States' response to Panel question No. 11. Based on its response to Panel question No. 1(c), we understand India to be of the view that compliance with the relevant provisions of the *Guidelines* and *Request for Selection* documents setting forth the applicable DCR measure is also covered by Section 3.1(f) of the model PPA, which provides that "[t]he SPD shall fulfill the technical requirements according to criteria mentioned under Clause 2.5(B) of JNNSM guidelines for selection of new projects and produce the documentary evidence of the same." Phase I (Batch 2) model PPA, (Exhibit USA-18), Section 3.1(f).

[86] United States' response to Panel question No. 12(c), para. 23. In our Report, we refer to "Phase II (Batch 1-A)" when referring specifically to Part A of Batch 1 of Phase II, and to "Phase II (Batch 1)" when referring collectively to Parts A and B.

[87] Phase II (Batch 1) *Guidelines*, (Exhibit USA-7), Section 2.6.E (entitled "Domestic Content Requirement", stating that "Out of the total capacity of 750 MW under Batch-I Phase-II, a capacity of 375 MW will be kept for bidding with Domestic Content Requirement (DCR). Under DCR, the solar cells and modules used in the solar PV power plants must both be made in India. The Developers at the time of bidding may opt for either "DCR" or "Open" or both the categories.")

[88] Phase II (Batch 1) *Request for Selection* document, (Exhibit USA-12), Section 3.E (entitled "Domestic Content Requirement (Applicable for Projects under Part-A only)", and stating "[f]or Projects to be implemented under Part-A (375 MW), both the solar cells and modules used in the Solar Power Projects must be made in India."), and Format 6.10 (entitled "Format for Technical Criteria"), stating that details that must be furnished within 210 days of the signing of the PPA include "Specific plan for meeting the requirement of domestic content for cells and modules is to be submitted").

[89] Phase II (Batch 1) model PPA, (Exhibit USA-19), Sections 3.1(g) and 3.2.1.

[90] United States' response to Panel question No. 1(a); India's response to Panel question No. 1.

[91] India's response to Panel question No. 1.

projects.[92] As described above, SPDs could use foreign cells and/or modules and still comply with the applicable DCR measure in Phase I (Batch 1) and Phase I (Batch 2), provided they used the types of foreign cells and/or modules that fell outside of the scope and coverage of the applicable DCR measures (i.e. foreign c-SI cells and foreign thin-film modules or concentrator PV cells for Batch 1, and domestic or foreign thin-film modules and concentrator PV cells for Batch 2). In addition, recalling that only projects selected under "Part A" of Phase II (Batch 1) are subject to a DCR measure, SPDs could use foreign cells and/or modules and still comply with the applicable DCR measure in Phase II (Batch 1) by bidding only for projects under Part B of Batch 1.

7.13. India informed the Panel that many of the SPDs that entered into PPAs are in fact using foreign cells and/or modules. According to India, 14 PPAs totalling 70 MW of solar power capacity used foreign cells and/or modules in Phase I (Batch 1), while the remaining 14 PPAs in Phase I (Batch 1), also totalling 70 MW, used Indian cells and/or modules; 19 PPAs totalling 260 MW of solar power capacity used foreign cells and/or modules in Phase I (Batch 2), while the remaining 8 PPAs in Phase I (Batch 2), totalling 70 MW, used Indian cells and/or modules.[93] Under Phase II (Batch 1), India commissioned 750 MW of solar power capacity through 47 PPAs. Twenty-two of these PPAs were entered into under Part A, totalling 375 MW; the other 25 PPAs, also accounting for 375 MW, were entered into under Part B. As per the scope of the applicable DCR measure, all of the PPAs under Part A used domestic cells and modules. According to India, all of the PPAs under Part B used foreign cells and modules.[94]

7.14. The following table summarizes the factual aspects of the DCR measures at issue in this dispute:

Phase & Batch	Agency	Project selection period	Foreign c-Si modules permitted	Foreign c-Si cells permitted	Foreign Thin-film modules or concentra-tor PV cells permitted	Total # PPAs	Using foreign cells and/or modules	Using Indian cells and/or modules
Phase I (Batch 1)	MNRE & NVVN	2010-2011	No	Yes	Yes	28	14 PPAs (70MW)	14 PPAs (70MW)
Phase I (Batch 2)	MNRE & NVVN	2011-2012	No		Yes	27	19 PPAs (260MW)	8 PPAs (70MW)
Phase II (Batch 1-A)	MNRE & SECI	2013-2014	No			22	0	22 PPAs (375MW)

7.1.2 Wider policy objectives and factual context of the DCR measures

7.15. The JNNSM Mission Document states that the National Solar Mission aims "to promote ecologically sustainable growth while addressing India's energy security challenge", and that it will "constitute a major contribution by India to the global effort to meet the challenges of climate change".[95]

7.16. Regarding the objective of "energy security", India refers to the International Energy Agency (IAE) definition of "the uninterrupted availability of energy sources at an affordable price".[96] India also refers to a report by the United Nations Development Programme, which similarly defines energy security as "the continuous availability of energy in varied forms in sufficient quantities at reasonable prices".[97] India refers to several other documents discussing

[92] United States' response to Panel question No. 12.
[93] India's response to Panel question No. 7(a).
[94] India's response to Panel question No. 6(c).
[95] *Jawaharlal Nehru National Solar Mission: Towards Building Solar India*, Ministry of New and Renewable Energy ("JNNSM Mission Document"), (Exhibit IND-1).
[96] India's first written submission, para. 188 (citing International Energy Agency, *Energy Security* (Exhibit IND-24)).
[97] India's first written submission, para. 188 (citing United Nations Development Programme, *World Energy Assessment: Energy and the Challenge of Sustainability* (September, 2000)).

different aspects of energy security, including the Model of Short-Term Energy Security (MOSES) developed by the IEA[98], a report on *Energy Security and Sustainable Development in the Asia and the Pacific* prepared by the United Nations Economic and Social Commission on the Asia and the Pacific[99], and a *Green Paper: Towards a European Strategy for the Security of Energy Supply* prepared by the European Communities.[100] India also refers to its own *Integrated Energy Policy*, which affirms the need to "supply lifeline energy to all our citizens irrespective of their ability to pay for it as well as meet their effective demand for safe and convenient energy to satisfy their various needs at competitive prices, at all times and with a prescribed confidence level considering shocks and disruptions that can be reasonably expected".[101] As India puts it, the *Integrated Energy Policy* confirms that "one of the main goals for India is to secure the assured supply of environmentally sustainable energy and technologies at all times".[102]

7.17. In its submissions, India stresses the objectives that guide the National Solar Mission, including the attainment of energy security, ensuring ecologically sustainable growth, and ensuring sustainable development.[103] India argues that the DCR measures need to be analysed in the context of those objectives.[104] Likewise, India argues that the DCR measures need to be seen in the context of India's overall energy scenario and the challenges it is currently facing, which are characterized by India's rising energy deficit, as well as its dependence on fossil fuels and imported materials for its energy requirements.[105]

7.18. In its submissions, the United States noted that increasing the use of solar energy is a laudable goal that the United States and many other WTO Members share[106], and that it supports the environmental and developmental aims and objectives of the National Solar Mission.[107] The United States further stated that "it 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"[108], and that it "raises no objection to India's aspiration to increase the local manufacture of solar cells and modules".[109] Likewise, the European Union states that it "does not contest the general purpose of the National Solar Mission as helping promote electricity supply from renewable energy sources and, in particular, solar energy", that such a purpose is "legitimate", and that it "does not question the importance of objectives such as energy security and sustainable development".

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[98] India's first written submission, paras. 198-200 (citing *Measuring Short-term Energy Security,* OECD/IEA (2011), (Exhibit IND-26)).

[99] India's first written submission, paras. 202 (citing *Energy Security and Sustainable Development in the Asia and the Pacific*, United Nations Economic and Social Commission on the Asia and the Pacific (April 2008), (Exhibit IND-19)).

[100] India's first written submission, para. 192 (citing European Commission, *Green Paper: Towards a European Strategy for the Security of Energy Supply*, (29 November 2000)).

[101] India's first written submission, para. 189 (citing (citing *Integrated Energy Policy 2006*, Planning Commission, Government of India, (2006), (Exhibit IND-22), at para 4.1(2)).

[102] India's first written submission, para. 195 (citing *Integrated Energy Policy 2006*, Planning Commission, Government of India, (2006) (Exhibit IND-22), p. xiii).

[103] India's first written submission, paras. 2, 136-143, 168-207, 209, 236, 262, and 272.

[104] India's first written submission, paras. 166, 168; India's closing statement at the first meeting of the Panel, para. 9; India's response to Panel question Nos. 25(b), 29(a); India's second written submission, para. 61; India's response to Panel question No. 65, para. 78, and No. 69(a), para. 68.

[105] India's first written submission, paras. 137, 142, and 220; India's opening statement at the first meeting of the Panel, para. 33; India's second written submissions, para. 28, 106. See *India,* United States Energy Information Administration (26 June 2014), (Exhibit IND-15), at p. 2 (stating that "India's per capita energy consumption is one-third of the global average, according to the International Energy Agency (IEA)"); *National Electricity Plan,* Central Electricity Authority, (January, 2012), (Exhibit IND-16), p. 1 (stating that 56% of households in rural areas do not have access to electricity, and that "per capita electricity consumption in India is 24% of the world's average and 35% & 28% respectively of that of China and Brazil); *Report of the Working Group on Power for the 12th Plan 2012-2017*, Ministry of Power (January 2012), (Exhibit IND-18), Chapter 1, Table 1.4 (containing data that the actual power supply all over India in 2010-11 was 789,013 MU as compared to the energy requirement of 862,125 MU, resulting in an energy deficit of -8.5%).

[106] United States' first written submission, para. 1; United States' opening statement at the second meeting of the Panel, para. 43; United States' response to Panel question No. 69(c), para. 69.

[107] United States' opening statement at the first meeting of the Panel, para. 2; United States' opening statement at the second meeting of the Panel, para. 2.

[108] United States' second written submission, para. 42.

[109] United States' second written submission, para. 43.

7.19. Our analysis of the DCR measures proceeds on the understanding that it is the WTO-consistency of those measures, and not the legitimacy of the policy objectives pursued through the National Solar Mission, that is in dispute in this case. India's argumentation regarding the wider policy objectives and factual context of the National Solar Mission relates to the rationale for, and objective behind, the measures at issue. We will take India's policy objectives and the wider factual context into account in the course of our analysis insofar as we conclude that they are legally relevant to our interpretation and application of the relevant articles of the covered agreements raised by the parties' claims and defences.

7.1.3 Request for a preliminary ruling on the measures at issue

7.20. In its first written submission, India argued that the United States was seeking to challenge aspects of the National Solar Mission that in India's view did not, for various reasons, fall within the scope of the Panel's terms of reference. India requested that the Panel make a preliminary ruling upholding its view that those aspects of the National Solar Mission fell outside of the Panel's terms of reference. India requested that the Panel make this preliminary ruling prior to the first substantive meeting with the parties.

7.21. At the invitation of the Panel, the United States provided a response in writing on 8 January 2015 to India's request for a preliminary ruling. Third parties were also invited to comment on India's request in their third-party submissions. In its response, the United States clarified that it was, at that time, only seeking to challenge those measures that India agreed are covered by the panel request and the Panel's terms of reference. On 16 January 2015, the Panel sent the following communication to the parties and third parties:

> In its first written submission of 5 December 2014, India requested a preliminary ruling with respect to the measures covered by the Panel's terms of reference. The United States responded to this request on 8 January 2015 and thereby clarified the measures for which it seeks legal findings in this dispute.
>
> In light of the clarification contained in the United States' response, the Panel does not consider it necessary to rule on India's request at this time. If India wishes to comment further on the points raised in the United States' response, it may do so at the first substantive meeting.

7.22. In its opening oral statement at the first substantive meeting with the Panel, India reiterated its request for a preliminary ruling on this matter. The panel communicated its decision in writing to the parties and third parties on 6 February 2015. The Panel's 6 February 2015 communication is reproduced below, and forms an integral part of this Report:

> In its first written submission of 5 December 2014, India requested that the Panel make a preliminary ruling clarifying the scope of the measures falling within the Panel's terms of reference. India took the position that the Panel's terms of reference are limited to the domestic content requirements in Phase I (Batches 1 and 2) and Phase II (Batch 1). India objected to the various references in the United States' first written submission to a purported "JNNSM programme", to vague and undefined "JSNNM programme measures", and to the draft Guidelines for Phase II (Batch 2). In India's view, these references represented an attempt by the United States to widen the scope of the terms of reference of the Panel to seek findings on the Jawaharlal Nehru National Solar Mission (JNNSM) as a whole, or potential or future measures under the JNNSM.
>
> In its response of 8 January 2015, the United States clarified that at present it only challenges those measures that India agrees are covered by the panel request and the Panel's terms of reference, i.e. the domestic content requirements under Phase I (Batches 1 and 2) and Phase II (Batch 1). The United States clarified that it was not seeking findings on the JNNSM "programme" as a whole, or any other JNNSM programme measures, including the draft Guidelines for Phase II (Batch 2). As to whether any future measure could fall within the Panel's terms of reference, the United States argued that the Panel should refrain from making any ruling in the abstract, and instead reserve judgement until such time as the issue might come

squarely before the Panel. The United States indicated that this would only occur if India promulgates a new measure, and if the United States then asks the Panel to examine that particular measure.

On 16 January 2015, the Panel informed the parties that in light of the clarification contained in the United States' response of 8 January 2015, the Panel did not consider it necessary to rule on India's request at that time. The Panel indicated that if India wished to comment further on the points raised in the United States' response of 8 January 2015, it could do so at the first substantive meeting scheduled for 3-4 February 2015.

In its opening oral statement at the first substantive meeting, the United States confirmed that with respect to Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1), the measures at issue are only the specific domestic content requirements imposed under each batch, and do not include any other element of the JNNSM. In its opening oral statement, India reiterated its request for a preliminary ruling on this matter, on the grounds that despite the clarifications and assurances in the United States' response of 8 January 2015, ambiguities and a lack of clarity persisted regarding the measures the United States is challenging. In response to an oral question from the Panel posed at that meeting, the United States again confirmed that with respect to Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1), the measures at issue are only the specific domestic content requirements imposed under each batch, and do not include any other element of the JNNSM, "JNNSM Programme measures", or any other wider range of measures. In its closing statement at the first meeting, India noted with concern that there continued to be differences between the parties on the scope of the terms of reference of this Panel, and reiterated its request for a preliminary ruling on the measures at issue.

The Panel notes that India does not dispute that the domestic content requirements imposed under Phase I (Batches 1 and 2) and Phase II (Batch 1) are identified in the panel request and fall within the scope of the Panel's terms of reference. The Panel further notes that these are at present the only measures in respect of which the United States seeks findings. In this regard, the Panel recalls the United States' clarifications that it is not challenging any wider range of measures with respect to Phase I (Batches 1 and 2) and Phase II (Batch 1), nor the JNNSM "programme" as a whole, nor the draft Guidelines for Phase II (Batch 2). The Panel does not consider it necessary or appropriate to issue a prospective ruling on the hypothetical question of whether one or more measures that are not yet in existence, and in respect of which the complaining party has not requested any findings, would be found to fall within the scope of the Panel's terms of reference in the event that they were to come into existence and subsequently be challenged by the complaining party.

In light of the foregoing, the Panel declines India's request that the Panel make a ruling on the scope of the measures at issue in this dispute. This is without prejudice to the parties' positions on whether any future measure, if challenged, would fall within the scope of the Panel's terms of reference.[110]

7.23. We note that the United States did not subsequently challenge the aspects of the National Solar Mission that India considered to be outside of the Panel's terms of reference. It therefore never became necessary for the Panel to make a ruling on whether those aspects would, if challenged, be measures covered by the Panel's terms of reference.[111]

[110] Communication from the Panel to the parties and third parties dated 6 February 2015.

[111] We note that our approach is consistent with that taken by other panels that have declined to make preliminary rulings on hypothetical questions about whether certain measures would, if challenged, be found to fall within the scope of their terms of reference. Panel Report, *India – Agricultural Products*, paras. 7.107-7.109; *Australia – Tobacco Plain Packaging (Indonesia)*, Preliminary Ruling by the Panel dated 19 August 2014, para. 5.36, circulated to the Dispute Settlement Body on 27 October 2014 as WT/DS467/19; *Australia – Tobacco Plain Packaging (Dominican Republic)*, Preliminary Ruling by the Panel dated 19 August 2014, para. 5.37, circulated to the Dispute Settlement Body on 27 October 2014 as WT/DS441/19.

7.1.4 Single or multiple DCR measure(s) within each Batch

7.24. As explained above, the DCR measures in Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1-A) are each set forth, reproduced, or otherwise reflected in a series of different documents. This raises the question whether it is necessary, for the purpose of our analysis and findings, to treat each of the documents reflecting the applicable DCR measure as a distinct measure. For the reasons that follow, we conclude that it is not.

7.25. First, the United States' panel request states that "[t]he *measures at issue* are India's *requirements* that solar power developers … purchase or use solar cells or solar modules of domestic origin in order to enter into and maintain certain power purchase agreements under Phase I or Phase II". The panel request then states that "[t]he domestic content requirements at issue are maintained through the following instruments", followed by a list of instruments relating to the three Batches at issue. Thus, the United States' panel request identifies the measures at issue as the DCR measures reflected in the various documents, and not those documents as a series of distinct measures per se.[112]

7.26. Second, throughout the course of the proceedings, both parties have articulated their respective claims and defences in a manner consistent with the view that the relevant measure for each Batch is the DCR measure reflected in the different documents within each Batch, as opposed to the view that the different documents within each Batch constitute a series of distinct measures requiring separate analyses and findings. In response to an oral question at the first substantive meeting, both parties confirmed that it would be correct to analyse the documents within each Batch in a holistic manner, and not as a series of separate measures.[113]

7.27. Third, the different documents within each Batch are interconnected in a way that does not warrant treating each of them as a distinct measure. Within each Batch, the applicable DCR measure was initially set forth in the *Guidelines* document, reproduced in the *Request for Selection* document, and then implemented by means of the PPAs and the "specific plan" that SPDs had to submit after entering into the PPA, specifying how they would meet the requirements of the applicable DCR measure.[114] In other words, it is the same DCR measure that, within each Batch, is reflected throughout. Given that the documents are interconnected in this manner, we agree with the parties that it is correct to analyse the documents within each Batch in a holistic manner, and not as a series of separate measures.

7.28. Based on the foregoing, our analysis proceeds on the understanding that for each Batch, the measure at issue is the DCR measure reflected or incorporated in the various documents discussed above, including the *Guidelines* document, the *Request for Selection* document, the model PPA, the individually executed PPAs, and the "specific plan" that each SPD had to submit after entering into the PPA. We do not treat each of those documents as a distinct measure.

7.1.5 Separate or collective evaluation of DCR measures under the three Batches

7.29. The DCR measures in Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1-A) differ from one another in terms of their scope and coverage. They were also imposed under PPAs that were entered into at different times, involving a range of different SPDs. This raises the question whether it is necessary to separately analyse the three DCR measures for the purpose of examining those measures under Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994, their coverage under Article III:8(a) of the GATT 1994, and/or their justification under Articles XX(j) and XX(d) of the GATT 1994.

7.30. In this case, the parties have not advanced any arguments that are specific to one of the DCR measures at issue, nor have they suggested that the differences that exist between the three DCR measures are relevant for the purpose of examining the claims, defences, and issues before

[112] United States' request for the establishment of a panel, p. 1. (emphasis added)

[113] Although the United States requested "findings with respect to the domestic content requirements in individually executed Power Purchase Agreements", its basis for this request was that such PPAs incorporate the requirements set forth in the applicable *Guidelines* and *Request for Selection* documents. See United States' response to Panel question No. 1(a).

[114] See paragraphs 7.8. to 7.10.

the Panel. Rather, each party has provided a collective evaluation of the three DCR measures, based on the features common to all three DCR measures.

7.31. We see no reason to adopt a different approach. Accordingly, the three DCR measures imposed under the three Batches are referred to and analysed collectively as "the DCR measures" in the analysis that follows.[115]

7.1.6 Request for enhanced third-party rights in light of the measures at issue

7.32. On 29 October 2014, Canada requested enhanced third-party rights based on the nature of the measures at issue in these proceedings.[116] Canada argued that WTO Members other than the disputing parties have an interest in the application of Article III of the GATT 1994 to domestic content requirements, and that issues relating to "green energy measures" are of systemic importance to WTO Members. Canada requested the following rights, for itself and the other third parties in this dispute: (a) to receive electronic copies of all of the parties' written submissions, oral statements, and answers to questions from the Panel up to immediately prior to the issuance of the interim report; (b) to be present for the entirety of all substantive meetings of the Panel with the parties; (c) to respond to questions from the Panel throughout the proceedings; and (d) to have the option to file their written submissions before, and make an oral statement during, the second substantive meeting of the Panel, rather than the first substantive meeting.

7.33. India and the United States opposed Canada's request for enhanced third-party rights.[117] Among other things, they argued that Canada provided no basis to conclude that this dispute differs from any other dispute; that granting enhanced third-party rights is premised on the agreement of both parties to the dispute; and that there were several difficulties regarding the specific rights requested by Canada in this dispute. After consulting with the parties on Canada's request, the Panel informed the parties and third parties that it had decided to decline Canada's request, for reasons to be elaborated in the Report.[118] Our reasons are as follows.

7.34. We recall that it is well established that the third-party rights guaranteed in the DSU are minimum guarantees, and that a panel has the discretion to grant enhanced third-party rights where the circumstances warrant, provided that any such rights are consistent with the provisions of the DSU and the requirements of due process.[119] Panels have done so where there were particular circumstances that merited the granting of enhanced third-party rights, which could potentially include third parties enjoying economic benefits that were the subject of, and directly implicated by, the measure at issue[120], the potential impact of DSB rulings and recommendations on third parties maintaining similar measures to those challenged[121], or a third party in one proceeding participating as a party in a parallel proceeding challenging the same measures.[122]

7.35. In our view, Canada did not identify any particular circumstances in this dispute that would warrant the granting of enhanced third party rights. We agree with the United States that WTO Members always have a collective interest in the interpretation of covered agreements, and that panels' interpretations of WTO agreements "are, by definition, of 'systemic importance' to WTO Members".[123] We consider that the existing Working Procedures provide third parties with an adequate opportunity to express their views on the issues of systemic importance raised in these proceedings. Furthermore, we note that previous panels have consistently denied requests for

[115] We are not suggesting that the three DCR measures implemented in the three different Batches are interrelated in such a way as to constitute a single measure; to the contrary, we refer to the three DCR measures in the plural to reflect that they are three distinct measures.
[116] Letter from Canada dated 29 October 2014.
[117] Letter from the United States dated 6 November 2014; Letter from India dated 6 November 2014.
[118] Letter from the Panel to the parties and third parties dated 14 November 2014.
[119] Appellate Body Reports, *US – 1916 Act*, para. 150; *EC – Hormones*, para. 154; and *US – FSC (Article 21.5 – EC)*, para. 243.
[120] Panel Reports, *EC – Bananas III (Guatemala and Honduras)*, para. 7.8, and *EC – Tariff Preferences*, Annex A, para. 7(a).
[121] Panel Report, *EC – Tariff Preferences*, Annex A, para. 7(b).
[122] Panel Reports, *EC – Bananas III (Guatemala and Honduras)*, para. 7.8; Panel Report, *EC – Hormones (Canada)*, para. 8.18.
[123] Letter from the United States dated 6 November 2014, paras. 3-4.

enhanced third-party rights where the parties were unanimously opposed.[124] We therefore consider it appropriate to give due regard to the parties' agreement that the Panel should decline Canada's request for enhanced third-party rights.

7.2 Claims under Article 2.1 of the TRIMS Agreement and Article III:4 of the GATT 1994

7.2.1 Introduction

7.36. Article III of the GATT 1994 is entitled "National Treatment on Internal Taxation and Regulation". Paragraph 4 of Article III provides in relevant part:

> The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

7.37. Article 2 of the TRIMs Agreement, entitled "National Treatment and Quantitative Restrictions", provides:

> 1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.
>
> 2. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement.

7.38. Paragraph 1(a) of the "Illustrative List" in the Annex to the TRIMs Agreement stipulates that:

> 1. 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 or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production;

7.39. The United States claims that the DCR measures accord less favourable treatment to foreign solar cells and modules than that accorded to like domestic products, resulting in a violation of Article III:4 of the GATT 1994 and of Article 2.1 of the TRIMs Agreement. The United States argues that the DCR measures modify the conditions of competition in favour of solar cells and modules manufactured in India to the detriment of imported equipment in violation of Article III:4 of the GATT 1994. The United States further argues that the DCR measures are inconsistent with Article 2.1 of the TRIMs Agreement because they are trade-related investment measures that make the purchase of domestic products (solar cells and modules) a requirement to obtain an advantage, thus falling under paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement.[125]

7.40. India requests the Panel to reject the United States' claims under Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. In particular, India submits that the DCR

[124] Panel Reports, *Dominican Republic – Safeguard Measures*, para. 1.8; *Argentina — Import Measures,* para.1.24; and *China – Rare Earths*, para. 7.9.

[125] See United States' first written submission, paras. 45-73 and 80-93; United States' responses to Panel question Nos. 13 and 17-18; United States' second written submission, paras. 7-12; United States' responses and comments on India's responses to Panel question Nos. 39-40.

measures do not result in treatment less favourable for imported solar cells and modules than for solar cells and modules of Indian origin. On this basis, India contends that the DCR measures are not inconsistent with Article III:4 of the GATT 1994, and that consequently there is no violation of Article 2.1 of the TRIMs Agreement.[126]

7.41. Issues of sequencing may become relevant to a logical consideration of claims under different agreements.[127] We note that, as a general principle, panels are free to structure the order of their analysis as they see fit.[128] Moreover, we do not consider, nor have the parties argued, that the present case is one in which "there exists a mandatory sequence of analysis which, if not followed, would amount to an error of law" or "have repercussions for the substance of the analysis itself".[129] In structuring our order of analysis, we find it useful to take account of the manner in which the parties have presented their claims and defences.[130] In this case, we commence with the United States' claims under Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994. With respect to these claims, an initial question disputed by the parties concerns the relationship between provisions of the GATT 1994 and the TRIMs Agreement, and the implications of this relationship for the logical order of analysis of the United States' claims under these agreements. We first examine the specific legal question disputed by the parties of whether measures falling under paragraph 1(a) of the TRIMs Illustrative List are necessarily inconsistent with Article III:4 of the GATT 1994, and thereby with Article 2.1 of the TRIMs Agreement, thus obviating the need for separate and additional examination of the legal elements of Article III:4 of the GATT 1994. We then turn to whether the DCR measures in fact fall under paragraph 1(a) of the TRIMs Illustrative List and, applying our conclusions in the preceding legal analysis, whether they are inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. Lastly, we address the parties' arguments specifically relating to the distinct legal elements under Article III:4 of the GATT 1994.

7.42. In addition to arguing that the United States has failed to demonstrate that the DCR measures accord imported solar cells and modules treatment less favourable than that accorded to like products of Indian origin, India further requests that the Panel find that the government procurement derogation under Article III:8(a) of the GATT 1994 is applicable to the measures at issue. As discussed below, Article III:8(a) of the GATT 1994 is a derogation that relates to the scope of application of Article III:4 of the GATT 1994 as well as Article 2.1 and paragraph 1(a) of the Illustrative List of the TRIMs Agreement. While it may be possible to commence our analysis with an assessment of whether the DCR measures are covered by the derogation in Article III:8(a) of the GATT 1994 and therefore fall outside of the scope of the national treatment obligations in Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement[131], such an assessment is grounded upon the alleged discrimination at issue and the particular products that are allegedly subject to that discrimination.[132] Given this interrelationship between these provisions, and following the sequence of analysis presented by the parties in this case, we proceed without prejudice to our analysis in section 7.2.6 of whether the DCR measures are covered by the derogation in Article III:8(a) of the GATT 1994, and thus exempted from the disciplines of Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994.

[126] See India's first written submission, paras. 88-94; India's responses to Panel question Nos. 13-16; India's opening statement at the first meeting of the Panel, paras. 21-23; India's second written submission, paras. 4-13; India's responses and comments on the United States' responses to Panel question Nos. 39-40.

[127] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.8

[128] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126.

[129] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109. See also Panel Reports, *EC – Seal Products*, para. 7.63, and *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.3.

[130] See Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126.

[131] See Canada's response to Panel question No. 1(a) to the third parties.

[132] The Appellate Body has found that the analysis under Article III:8(a) of the GATT 1994 requires an assessment of whether the product purchased is in a competitive relationship with the foreign product(s) allegedly discriminated against. Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.79. See para. 7.111. below.

7.2.2 Whether measures falling under paragraph 1(a) of the TRIMs Illustrative List are necessarily inconsistent with Article III:4 of the GATT 1994, thus obviating the need for separate and additional examination of the legal elements of Article III:4 of the GATT 1994

7.43. The United States submits 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".[133] However, the United States posits that it may be "more efficient" to begin with the TRIMs claim because "measures that are inconsistent with Article 2.1 of the TRIMs Agreement are necessarily inconsistent with Article III:4 of the GATT 1994", which "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".[134]

7.44. India disputes the view that the Panel should begin its analysis with Article 2.1 of the TRIMs Agreement, asserting that a claim under this provision "cannot be read as a stand-alone claim".[135] With respect to the Illustrative List in the Annex to the TRIMs Agreement of trade-related investment measures that are inconsistent with Article III:4 of the GATT 1994, India submits that the DCR measures "would qualify under the meaning of paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement *subject to* the finding that they are held to be inconsistent with Article III:4 of the GATT 1994".[136] India further argues that "Article 2.1 of the TRIMs Agreement is not a more specific provision, in that it does not add to or subtract from GATT obligations, but merely serves to clarify that Article III:4 may cover investment related matters", citing the reasoning of the panel and Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program* as supportive of this position.[137] With respect to the interrelationship of provisions under the TRIMs Agreement, India argues that "the purpose of Article 2.2 and the Illustrative List is only to provide examples of measures that are subject to the obligation under Article 2.1. It does not create any substantive legal obligations in itself."[138] Accordingly, India contends that a violation of Article 2.1 of the TRIMs Agreement must be established by satisfying the distinct elements of Article III:4 of the GATT 1994, independently from reference to the Illustrative List and provisions of the TRIMs Agreement.

7.45. The third parties to this dispute also have diverging views as to the relationship between, and relative specificity of, the TRIMs Agreement and the GATT 1994. The European Union considers that the TRIMs Illustrative List "gives detailed guidance to Members, as well as to WTO panels, by elaborating on the general national treatment rule in the specific context of TRIMs", which "simplifies decision-making by avoiding open-ended assessments under Article III of the GATT 1994".[139] The European Union submits that, "[i]n that sense, Article 2.1, as informed by Article 2.2 and the Illustrative List, is the more specific and detailed provision" that should be applied first, and that "the subsequent analysis of Article III of the GATT 1994 will naturally follow the findings already made under the TRIMs Agreement".[140] Brazil, while declining to comment on the general proposition that the TRIMs Agreement contains the more specific provisions, "does not concur with this proposition in the context of this dispute" and considers that it would be appropriate in this case to fully examine the claims and defences under the GATT 1994 before

[133] United States' second written submission, para. 12. While the United States considers that "paragraph 1(a) of the Illustrative List of the TRIMs Annex may be viewed as a more specific provision than Article III:4 of the GATT 1994", it also observes that "the focus of the U.S. claim is not principally on the DCRs as a trade-related investment measure, which would render the TRIMs Agreement "more specific". United States' response to Panel question No. 13(a), para. 24.

[134] United States' second written submission, para. 12. See also United States' response to Panel question No. 13(a).

[135] India's second written submission, para. 8.

[136] India's second written submission, para. 8. (emphasis added) See also India's response to Panel question No. 13(b), p. 17 (stating that the DCR measures qualify under the relevant provisions of the TRIMs Agreement "to the extent that they are held to be inconsistent with Article III:4" of the GATT 1994).

[137] India's second written submission, paras. 10-13, and response to Panel question No. 13(a).

[138] India's response to Panel question No. 39, para. 3.

[139] European Union's response to Panel question No. 1(a) to the third parties, para. 1.

[140] European Union's response to Panel question No. 1(a) to the third parties, para. 4. In the European Union's view, "the TRIMs Agreement was designed to become the centre of gravity when analysing the trade-restrictiveness of trade-related investment measures. It was not meant to be an afterthought to the analysis of TRIMs under the GATT 1994." European Union's response to Panel question No. 1(a) to the third parties, para. 3.

turning to the TRIMs Agreement.[141] Canada disagrees with the European Union that Article 2.1 of the TRIMs Agreement is a more specific provision, and instead considers it "more specific only to the extent that it applies to a particular set of measures, i.e. trade-related investment measures".[142] Japan also disagrees with the European Union and believes that the analysis of the measures at issue should begin under Article III:4 of the GATT 1994, citing past panels that have done so or that have considered TRIMs and GATT 1994 claims together.[143] Korea notes that "[a]lthough the Appellate Body allowed a discretionary power to a WTO panel in structuring the order of analysis, the panel must structure its order of analysis so as to effectively address the claims raised by the complainant", considering in particular the manner in which a claim is presented by a complainant.[144]

7.46. We note that in prior disputes with concurrent TRIMs and GATT 1994 national treatment claims, some panels have assessed which agreement "deals specifically, and in detail, with" the measures at issue to determine the appropriate sequence of analysis.[145] Past panels have reached differing conclusions in response to this question.[146] We note at the outset that in this case, the issue before the Panel is not whether the TRIMs Agreement is more "specific" or more "detailed" than the GATT 1994, nor is the question before this Panel the relationship between these two agreements more generally. Rather, it is whether measures falling under paragraph 1(a) of the TRIMs Illustrative List are necessarily inconsistent with Article III:4 of the GATT 1994, thus obviating the need for separate and additional examination of the legal elements of Article III:4 of the GATT 1994.

7.47. In our view, this question is resolved by the unambiguous wording of Article 2.2 and the Illustrative List of the TRIMs Agreement. The TRIMs Agreement applies to a limited subset of measures, namely "investment measures related to trade in goods only (referred to in this Agreement as 'TRIMs')".[147] Article 2.1 states that, "[w]ithout prejudice to other rights and obligations under GATT 1994", Members shall not "apply any TRIM that is inconsistent with the provisions of Article III" of the GATT 1994. Article 2.2 then states that "[a]n illustrative list of TRIMs *that are inconsistent with* the obligation of national treatment provided for in paragraph 4 of Article III of the GATT 1994 … is contained in the Annex to this Agreement".[148] The chapeau of paragraph 1 of the Illustrative List repeats, using identical language as that contained in Article 2.2, that "TRIMs *that are inconsistent* with the obligation of national treatment provided for in paragraph 4 of Article III of the GATT 1994 include those" of the type set forth therein.[149] Thus, as noted by the Appellate Body, "[b]y its terms, a measure that falls within the coverage of

[141] Brazil's response to Panel question No. 1(a) to the third parties.

[142] Canada's response to Panel question No. 1(a) to the third parties, para. 3. Canada submits that the "correct analytical sequence in this case starts with examining whether the measure falls within the scope of Article III:8(a)" of the GATT 1994, and if it does not, the Panel should then assess whether the measure is inconsistent with Article III:4 of the GATT 1994 followed by Article 2.1 of the TRIMs Agreement. Canada's response to Panel question No. 1(a) to the third parties, para. 1. Canada additionally cautions against any implication that the greater specificity of the TRIMs Agreement should mean that a measure could violate the TRIMs Agreement despite falling within the scope of the derogation in Article III:8(a) of the GATT 1994. Canada's response to Panel question No. 1(a) to the third parties, para. 5.

[143] Japan's response to Panel question No. 1(a) to the third parties, para. 1.

[144] Korea's third-party statement, para. 6. Korea further states that "[i]t seems more logical that one may first analyze the consistency of Article III or Article XI, and then move forward [to the] next question of whether a specific measure violated Article 2.1". Korea's third-party statement, para. 7.

[145] See Appellate Body Reports, *EC – Bananas III*, para. 204; *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.6.

[146] See, e.g. Panel Report, *Indonesia – Autos*, para. 14.63 (deeming the TRIMs Agreement to be "more specific" than the GATT 1994 as a basis for examining the TRIMs claims first); Panel Reports, *Canada – Autos*, para. 10.63 and *India – Autos*, para. 7.157 (expressing doubt as to whether the TRIMs Agreement can in fact be characterized as more specific than the relevant GATT 1994 provisions); and Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.70 (noting that "the measures at issue are trade-related investment measures affecting imports of renewable energy generation equipment and components", which "suggests that, compared with the SCM Agreement and Article III:4 of the GATT 1994, it is the TRIMs Agreement that deals most directly, specifically and in detail" with the challenged aspects of the measures at issue in that case).

[147] Article 1 of the TRIMs Agreement provides: "This Agreement applies to investment measures related to trade in goods only (referred to in this Agreement as 'TRIMs')."

[148] Emphasis added.

[149] Emphasis added.

paragraph 1(a) of the Illustrative List is 'inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994'."[150]

7.48. Apart from textual considerations, this view is further supported by the Appellate Body's assessment in *Canada – Renewable Energy / Feed-in Tariff Program* that the panel in that dispute did not err in declining to rule on a "stand-alone Article III:4 claim" after having reached its finding under Article 2.1 and the Illustrative List of the TRIMs Agreement. The Appellate Body considered that "it is not obvious what a stand-alone finding of violation of Article III:4 of the GATT 1994 would add to a finding of violation of Article III:4 that is consequential to an assessment under the Illustrative List of the TRIMs Agreement."[151] Further explaining the interplay between the TRIMs Illustrative List and Article III:4 of the GATT 1994, the Appellate Body stated that "[i]n the present case, *fulfilment of the elements in paragraph 1(a) of the Illustrative List of TRIMs results in a finding of inconsistency with Article III:4 of the GATT 1994*."[152]

7.49. The panel in *Canada – Renewable Energy / Feed-In Tariff Program* specifically noted that "it is apparent from the terms of Article 2.1 of the TRIMs Agreement that, in undertaking this evaluation [of claims made under the TRIMs Agreement], we will also necessarily have to come to a view about the merits of the complainants' allegations concerning the consistency of the challenged measures with Article III:4 of the GATT 1994".[153] We do not understand this statement, as India seems to contend[154], to support the view that inconsistency with Article 2.1 of the TRIMs Agreement can be established only by a separate analysis under Article III:4 of the GATT 1994. To the contrary, the panel in *Canada – Renewable Energy / Feed-In Tariff Program*, having found that the challenged measures were "trade-related investment measures" falling within the scope of paragraph 1(a) of the Illustrative List, concluded on that basis alone that there was a violation of Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. The panel did not conduct any additional or separate examination of whether there was "less favourable treatment" within the meaning of Article III:4 of the GATT 1994.[155] Thus, its statement reproduced above simply reflects the understanding that Article 2.2 and the Illustrative List identify certain "TRIMs that are inconsistent with the obligation of national treatment" provided for in Article III:4 of the GATT 1994 and, consequently, Article 2.1 of the TRIMs Agreement. As explained by the Appellate Body, "Article 2.2 provides further specification as to the type of measures that are inconsistent with Article 2.1. The operative part of Article 2.2 is the reference to the Illustrative List, which provides examples of measures that are inconsistent with the national treatment obligation".[156]

7.50. India further relies on the Appellate Body's upholding of the panel finding in *Canada – Renewable Energy / Feed-In Tariff Program* that "Paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement d[id] not obviate the need for [the Panel] to undertake an analysis of whether the challenged measures are outside of the scope of application of Article III:4 of the GATT 1994 by virtue of the operation of Article III:8(a) of the GATT 1994."[157] However, we note that this finding by its own terms concerns the "scope of application" of Article III:4, and was made in the context of addressing whether the government procurement exemption in Article III:8(a) of the GATT 1994 applies to measures covered by paragraph 1 of the TRIMs Illustrative List – in other words, "whether the Article III:8(a) defence to an Article III:4 claim would also provide a defense to claims under Article 2.1 of the TRIMs Agreement".[158] We follow the Appellate Body's finding that measures falling outside of the scope of application of

[150] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.24.
[151] Appellate Body Reports, *Canada – Renewable Energy / Feed-in Tariff Program*, para. 5.94.
[152] Appellate Body Reports, *Canada – Renewable Energy / Feed-in Tariff Program*, para. 5.103. (emphasis added)
[153] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, 7.70.
[154] See, e.g. India's response to Panel question No. 13(a); India's second written submission, para. 11.
[155] After finding that the measures fell within the scope of paragraph 1(a) of the Illustrative List, the panel's analysis of Article III:4 of the GATT 1994 consisted of a one-sentence consequential finding: "We are therefore satisfied that the challenged measures are TRIMs falling with the scope of Paragraph 1(a) of the Illustrative List, *and that in the light of Article 2.2 and the chapeau to Paragraph 1(a) of the Illustrative List, they are inconsistent with Article III:4 of the GATT 1994*, and thereby also with Article 2.1 of the TRIMs Agreement." Panel Report, *Canada – Renewable Energy / Feed-in Tariff Program*, para. 7.166. (emphasis added)
[156] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, 5.26.
[157] Appellate Body Reports, *Canada – Renewable Energy / Feed-in Tariff Program*, para. 5.33. See India's response to Panel question No. 13(a) and India's second written submission, para. 10.
[158] United States' opening statement at the second meeting of the Panel, para. 10.

Article III:4 by virtue of Article III:8(a) of the GATT 1994 also fall outside of the scope of the obligation in Articles 2.1 and 2.2 of the TRIMs Agreement and the TRIMs Illustrative List. This does not answer or for that matter relate to the specific question contested by the parties, which, as noted above, is whether measures falling under paragraph 1(a) of the TRIMs Illustrative List are necessarily inconsistent with Article III:4 of the GATT 1994, thus obviating the need for separate and additional examination of the legal elements of Article III:4 of the GATT 1994.

7.51. In support of its view, India additionally cites[159] the Appellate Body's statement in *Canada – Renewable Energy / Feed-In Tariff Program* that "Article 2.2 and the Illustrative List must be understood as clarifying to which TRIMs the general obligation in Article 2.1 applies"[160] as well as the panel statement that "Article 2.2 of the TRIMs Agreement does not impose any obligation on Members, but rather informs the interpretation of the prohibition set out in Article 2.1".[161] In response to Panel questioning, India clarified its argument that "the purpose of Article 2.2 and the Illustrative List is only to provide examples of measures that are subject to the obligation under Article 2.1."[162] According to this view, falling under paragraph 1(a) of the Illustrative List would only be an initial trigger for the obligations of Article 2.1 of the TRIMs Agreement, with respect to which a further assessment under Article III:4 of the GATT 1994 would be required.

7.52. We are mindful that "the task of the treaty interpreter is to ascertain and give effect to a legally operative meaning for the terms of the treaty. The applicable fundamental principle of *effet utile* is that a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility."[163] In this connection, we question what purpose Article 2.2 and the Illustrative List of the TRIMs Agreement would serve if a finding that a measure falls within the terms of the Illustrative List of TRIMs "that are inconsistent with paragraph 4 of Article III" were insufficient to establish that such measure is inconsistent with Article III:4 of the GATT 1994. It is thus difficult to reconcile the plain language of Article 2.2 or the chapeau of paragraph 1 of the TRIMs Illustrative List with the suggestion that these provisions simply clarify the *scope of application* of Article 2.1.[164]

7.53. Indeed, the particular panel statement cited by India, read in its entirety, clarifies that Article 2.2 "informs the interpretation of the prohibition set out in Article 2.1. In particular, Article 2.2 explains that the TRIMs described in the Illustrative List of the Annex to the TRIMs Agreement *are to be considered inconsistent with Members' specific obligations under Articles III:4 and XI:1 of the GATT 1994*."[165] The particular Appellate Body statement cited by India is one of agreement with the panel's clarification, and is accompanied by a footnote reproducing that statement in full. In setting out a harmonious interpretation of provisions of the TRIMs Agreement and the GATT 1994[166], the Appellate Body gave effect to the terms of the TRIMs Illustrative List by stating that, "[i]n any event, the broader subset of TRIMs that fall within the Illustrative List and do not qualify for derogation under Article III:8(a) of the GATT 1994 *remains inconsistent with the national treatment obligation* in Article III:4 of the GATT 1994 and Article 2.1

[159] See India's second written submission, para. 12; India's opening statement at the second meeting of the Panel, para. 3; and India's response to Panel question No. 39, para. 2.

[160] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.26.

[161] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.119 (cited in Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program,* fn 449).

[162] India's response to Panel question No. 39, para. 3.

[163] Appellate Body Report, *Canada – Dairy*, para. 133. The Appellate Body has also stated that "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously. And, an appropriate reading of this 'inseparable package of rights and disciplines' must, accordingly, be one that gives meaning to *all* the relevant provisions of these two equally binding agreements." Appellate Body Report, *Argentina – Footwear (EC)*, para. 81. (emphasis original)

[164] Insofar as India's understanding is that Article 2.2 and the Illustrative List provide *non-exhaustive examples* of what constitute "trade-related investment measures" falling within the *scope* of Article 2.1, we note that these provisions do not state that the TRIMs contained in the Illustrative List are TRIMs *subject to* Article 2.1; they state that the TRIMs contained in the Illustrative List are TRIMs "*that are inconsistent with* the obligation of national treatment provided for in paragraph 4 of Article III of the GATT 1994". Insofar as India's understanding is that it clarifies the scope of application of Article 2.1 in the sense of providing an *exhaustive* list of examples of the types of TRIMs subject to the obligation in Article 2.1, then the same point would apply, and such an interpretation would also transform the "illustrative" list into an exhaustive, closed list.

[165] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, fn 449 (citing Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.119). (emphasis added)

[166] See Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.26.

of the TRIMs Agreement".[167] Thus, the Appellate Body did not consider fulfilment of the requirements of the TRIMs Illustrative List merely to be an initial threshold regarding the *applicability* of Article 2.1, but rather a decisive determinant of *consistency* with that provision based on the national treatment obligation of Article III:4 of the GATT 1994.

7.54. We therefore find that TRIMs falling under paragraph 1(a) of the TRIMs Illustrative List are necessarily inconsistent with Article III:4 of the GATT 1994, thus obviating the need for separate and additional examination of the legal elements of Article III:4 of the GATT 1994. We consider that this approach gives meaning and effect to the explicit terms of the TRIMs Agreement and the definitional operation of the Illustrative List with respect to "TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994".[168]

7.2.3 Whether the DCR measures fall under paragraph 1(a) of the TRIMs Illustrative List

7.55. The United States argues that the DCR measures are "mandatory", and also that compliance is necessary to obtain certain "advantages".[169] In this regard, the United States argues that the DCR measures "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 [National Solar Mission]), thus falling squarely under paragraph 1(a) of the Annex to the TRIMs Agreement".[170]

7.56. India submits that the "domestic content requirements in this dispute would qualify under the meaning of paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement to the extent that they are held to be inconsistent with Article III:4" of the GATT 1994.[171] This includes the DCR measures being "trade-related investment measures" within the meaning of the TRIMs Agreement.[172] This is consistent with India's view regarding the relationship between the TRIMs Illustrative List and Article III:4 of the GATT 1994, and, as detailed below, India has presented its rebuttal arguments in connection with the specific elements of Article III:4 of the GATT 1994 rather than in connection with the terms of the TRIMs Illustrative List.

7.57. In the absence of specific counterarguments by India, we proceed to examine the evidence and arguments adduced by the United States to meet its burden of establishing a *prima facie* case under paragraph 1(a) of the TRIMs Illustrative List. We recall that "a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case".[173] Based on the requirements of the TRIMs Illustrative List, we examine the United States' claim based on: (a) whether the DCR measures are "TRIMs" within the meaning of Article 1 of the TRIMs Agreement; (b) whether the DCR measures "require the purchase or use of products by an enterprise of products of domestic origin" within the meaning of paragraph 1(a) of the Illustrative List; and (c) whether the DCR measures are TRIMs that "are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage" within the meaning of the chapeau of the Illustrative List.[174]

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[167] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.28. (emphasis added)

[168] This finding is without prejudice to our analysis of whether the derogation in Article III:8(a) of the GATT 1994 is applicable to the DCR measures. See section 7.2.6 below.

[169] United States' first written submission, paras. 61-64; United States' opening statement at the first meeting of the Panel, paras. 9-13.

[170] United States' second written submission, para. 7.

[171] India's response to Panel question No. 13(b).

[172] India's response to Panel question No. 14.

[173] Appellate Body Report, *EC – Hormones*, para. 104.

[174] See Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.157. We note that the chapeau of paragraph 1 of the Illustrative List applies to TRIMs that are "mandatory or enforceable under domestic law or under administrative rulings, *or* compliance with which is necessary to obtain an advantage". (emphasis added) Like the panel in *Canada – Renewable Energy / Feed-In Tariff Program*, we take cognizance of the disjunctive nature of the provision and consider that it would be sufficient for the purposes of paragraph 1(a) of the TRIMs Illustrative List for a complainant to establish that compliance with a TRIM "is necessary to obtain an advantage". See also Panel Report, *Indonesia – Autos*, paras. 14.88 and 14.91.

7.2.3.1 Whether the DCR measures are "TRIMs"

7.58. The United States submits that the measures in question are "investment measures" "because their objective is to encourage the production of solar cells and modules in India".[175] The United States refers to the approach of the panel in *Canada – Renewable Energy / Feed-In Tariff Program* and various instruments reflecting the aim of the National Solar Mission to incentivize the production of solar power generation in India.[176] As cited by the United States, the panel in *Canada – Renewable Energy / Feed-In Tariff Program* considered that "one of the aims of the [measure] is to encourage investment in the local production of equipment associated with renewable energy generation".[177] The panel further noted that the "objectives" of the challenged measure included "enabling 'new green industries through new investment and job creation' and the provision of 'incentives for investment in renewable energy technologies'".[178] As to whether the DCR measures are "related to trade in goods", the United States argues that the DCR measures are trade-related "because those measures impose domestic content requirements related to the purchase, sale, or use of goods".[179]

7.59. Article 1 of the TRIMs Agreement provides that "[t]his Agreement applies to investment measures related to trade in goods only (referred to in this Agreement as 'TRIMs')." Although its coverage is thus restricted to a specific type of measure, the TRIMs Agreement does not define these terms.[180] In addressing the threshold question of whether the DCR measures are of the kind covered by the TRIMs Agreement, we follow past panels[181] as well as the United States' presentation of its arguments to consider, in turn, whether the DCR measures are "investment measures" and "related to trade in goods".

7.60. We note that the United States' arguments are consistent with the approach of the panel in *Indonesia – Autos*, which assessed the question of "investment measures" based upon evidence that the measure pursued the promotion and development of specific industries with explicit reference to investment-related implications.[182] The panel observed that the measures in that case "have investment objectives and investment features and … refer to investment programmes", and further that they "are aimed at encouraging the development of a local manufacturing capability" for the goods and sectors in question. The panel deemed that "[i]nherent to this objective is that these measures necessarily have a significant impact on investment in these sectors".[183]

7.61. In the present case, the United States contends that the aim of the National Solar Mission is to incentivize the production of solar power generation equipment in India, and that this aim is explicitly reflected in relevant documents.[184] For instance, the United States observes that the *Guidelines* for each of the contested Batches cite one of their objectives as being "[t]o promote manufacturing in the solar sector, in India".[185] The United States additionally cites the Phase I

[175] United States' first written submission, para. 85.
[176] United States' first written submission, paras. 85-88.
[177] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.109.
[178] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.109. (footnote omitted)
[179] United States' first written submission, paras. 89-90.
[180] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.108.
[181] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 7.109-7.112; *Indonesia – Autos*, para. 14.72.
[182] Panel Report, *Indonesia – Autos*, para. 14.72.
[183] Panel Report, *Indonesia – Autos*, para. 14.80. The panel went on to qualify its finding as follows:
We do not intend to provide an overall definition of what constitutes an investment measure. We emphasize that our characterization of the measures as "investment measures" is based on an examination of the manner in which the measures at issue in this case relate to investment. There may be other measures which qualify as investment measures within the meaning of the TRIMs Agreement because they relate to investment in a different manner.
[184] United States' first written submission, para. 86.
[185] United States' first written submission, para. 88 (citing Phase I (Batch 1) *Guidelines,* (Exhibit USA-5), Section 1.2; Phase I (Batch 2) *Guidelines,* (Exhibit USA-6), Section 1.2; and Phase II (Batch 1) *Guidelines*, (Exhibit USA-7), Section 1.2). See also Phase I (Batch 1) *Guidelines*, (Exhibit USA-5), and Phase I (Batch 2) *Guidelines,* (Exhibit USA-6), Section 2.5D ("One of the important objectives of the National Solar Mission is to promote domestic manufacturing").

(Batch 1) *Request for Selection* document[186] in support of its argument, as well as the following passage from the *Phase II Policy Document*:

> A domestic solar manufacturing base to provide solar components is an important part of India's aspirations to become a major global solar player. The mission aims to establish [the] country as a solar manufacturing hub, to feed both a growing domestic industry as well as global markets. *The solar mission, while leveraging other government policies, looks to provide favorable regulatory and policy conditions to develop domestic manufacturing of low-cost solar technologies, with the support of significant capital investment and technical innovation*.[187]

7.62. In addition to the documents cited by the United States, we find additional support regarding the investment-related aims of the DCR measures within the broader policy context outlined in the JNNSM Mission Document. This document explains that "[t]he objective of the Mission is to create a policy and regulatory environment which provides a predictable incentive structure that enables rapid and large-scale capital investment in solar energy applications and encourages technical innovation and lowering of costs."[188] The JNNSM Mission Document goes on to explicitly discuss the bundling mechanism employed in Phase I in terms of the relevant entities and transaction structure, adding that "[t]he requirement of *phased indigenization* would be specified while seeking development of solar power projects under this scheme".[189] We take note of India's explanation that this document "presents a mission and vision statement [that] only highlights the need to achieve manufacturing capabilities and makes broad recommendations regarding the same", without "mandat[ing] any specific methods or approaches to achieve its aims and objectives", such as domestic content requirements.[190] At the same time, India acknowledges that the National Solar Mission "seeks to ensure that part of the procurement of solar power is from domestically manufactured cells and modules. The clear government purpose inherent in this regard is, as explained in the JNNSM Mission Document itself, the need to incentivize capacities for manufacture of cells and modules."[191] In our view, this is further evidence that the DCR measures adopted in furtherance of the broader "mission and vision" can be considered "investment measures" within the meaning of the TRIMs Agreement.

7.63. With respect to whether the DCR measures are "related to trade in goods", we note that the United States' argument is closely in line with the view of previous panels that "if [the] measures are local content requirements, they would necessarily be 'trade-related' because such requirements, by definition, always favour the use of domestic products over imported products, and therefore affect trade".[192] In the present case, the DCR measures expressly stipulate the origin of specified goods that may be used by SPDs for bidding eligibility and participation under each of the relevant Batches of the National Solar Mission. Inasmuch as this necessarily pertains to the use of goods based on their origin, we are of the view that the DCR measures are "trade-related" in the sense identified by previous panels.

7.64. Based on the foregoing, we find that the DCR measures constitute "TRIMs" within the meaning of Article 1 of the TRIMs Agreement.

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[186] United States' first written submission, para. 86 (citing Phase I (Batch 1) *Request for Selection* document, (Exhibit USA-15), Section 1.2).

[187] United States' first written submission, para. 87 (citing *Phase II Policy Document, Jawaharlal Nehru National Solar Mission*, Ministry of New and Renewable Energy (December 2012), (Exhibit USA-3), Section 2.6). (emphasis added by United States)

[188] JNNSM Mission Document, (Exhibit IND-1), Section 6, p. 7.

[189] Exhibit IND-1, Section 6, pp. 8-9. (emphasis added)

[190] See India's first written submission, paras. 26 and 39.

[191] India's first written submission, para. 142.

[192] Panel Reports, *Indonesia – Autos*, para. 14.82; *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.111.

7.2.3.2 Whether the DCR measures "require the purchase or use by an enterprise of products of domestic origin"

7.65. The United States contends that the DCR measures "explicitly 'require the purchase or use by an enterprise of products of domestic origin' within the meaning of paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement".[193]

7.66. The European Union observes that the *Guidelines* for the relevant Batches "stipulate, at least in respect of a part of the generation capacity aimed at by the respective Batch, that participating SPDs are required to use solar cells and modules manufactured in India".[194]

7.67. We recall that the DCR measures, as reflected in the *Guidelines* and *Request for Selection* documents reviewed above[195], mandate that certain SPDs participating in the National Solar Mission use solar cells and/or modules manufactured in India. This includes any SPDs that are using the particular products to which the DCR measure in question applies, namely those SPDs using c-Si modules in Phase I (Batch 1), those SPDs using c-Si cells or modules in Phase I (Batch 2), and all SPDs participating in Phase II (Batch 1-A). Thus, the DCR measures are TRIMs that "require" the "use" by "an enterprise" of "products of domestic origin", and "are specified in terms of particular products", namely in terms of solar cells and modules with the possibility of additional specification of the technology used.[196] We accordingly find that the DCR measures "require the purchase or use by an enterprise of products of domestic origin" within the meaning of paragraph 1(a) of the TRIMs Illustrative List.

7.2.3.3 Whether the DCR measures are TRIMs that "are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage" within the meaning of the chapeau of the TRIMs Illustrative List

7.68. The United States argues that the DCR measures are "mandatory", and also that compliance is necessary to obtain certain "advantages".[197] The United States points out that, when submitting a bid pursuant to the *Request for Selection* documents, SPDs must "certify" that they will "specify their plan for meeting the requirement for domestic content" "within 180 days of signing of [a] PPA" under Phase I and within "210 days of signing of [a] PPA" under Phase II (Batch 1).[198] The United States observes that, by so certifying, SPDs also acknowledge that failure to provide such specification will be penalized by forfeiture of an "earnest money deposit".[199] With respect to the "advantages" obtained under the DCR measures, the United States argues that the "advantages" available to SPDs for purposes of paragraph 1(a) are the ability to bid for and enter into PPAs with NVVN and SECI to develop solar power projects.[200] In addition to this "fundamental advantage to SPDs conforming to the DCRs", the United States submits that, under these PPAs, NVVN and SECI agree to purchase electricity from SPDs at guaranteed tariff rates for a term of 25 years. Additionally, the United States notes that under Phase II (Batch 1), SPDs are provided with a "capital grant" of up to 30 percent of their total product costs or 25 million Rupees/MW (whichever is lower).[201]

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[193] United States' response to Panel question No. 13(b), para. 27.

[194] European Union's third-party submission, para. 9.

[195] See paras. 7.6. to 7.14. above.

[196] Given that India has raised arguments regarding the partial coverage of the DCR measures only in connection with the meaning of "less favourable treatment" under Article III:4, we do not analyse those aspects here, but consider them in the specific context in which India has raised them. See section 7.2.4 below.

[197] United States' opening statement at the first meeting of the Panel, paras. 9-13.

[198] United States' first written submission, para. 63 (citing Phase I (Batch 1) *Request for Selection* document, (Exhibit USA-15), pp. 51-52; and Phase II (Batch 1) *Request for Selection* document, (Exhibit USA-12), p. 71).

[199] United States' first written submission, para. 63. See Phase I (Batch 1) *Request for Selection* document, (Exhibits USA-15), pp. 51-52; and Phase II (Batch 1) *Request for Selection* document, (Exhibit USA-12, p. 71 ("Failure or delay on our part in achieving the above conditions shall constitute sufficient grounds for encashment of our Performance Bank Guarantee").

[200] See United States' response to Panel question No. 18, para. 32 (citing Phase I (Batch 1) *Guidelines*, (Exhibit USA-5), p. 7).

[201] See United States' response to Panel question No. 18, para. 32 (citing Phase II (Batch 1) *Guidelines*, (Exhibit USA-7), Section 1.3).

7.69. The European Union states that the DCR measures are "requirements with which compliance is mandatory in order to have access to an advantage in respect of that portion of the market"[202], in that they impose "a condition for obtaining the advantage of long-term contractual tariffs rates and other financial benefits".[203] The European Union considers that the DCR measures "grant a significant advantage to solar cells and modules manufactured in India to the detriment of like imported products".[204]

7.70. In our view, the arguments of the United States are in close accord with the explanations provided by India with respect to the operation of the DCR measures. India does not contest that the bidding eligibility and potential contractual benefits under the DCR measures qualify as "advantages" within the meaning of paragraph 1(a) of the TRIMs Illustrative List. For example, India explains that "[o]nce SPDs are selected based on the technical and financial criteria of the bid process, PPAs are entered into by NVVN in Phase I (Batch I and Batch II) and SECI in Phase II (Batch I). These criteria, and *the advantages resulting from the selection, such as guaranteed long-term tariffs in Phase I (Batch I and Batch II), and guaranteed long-term tariffs as well as VGF support in Phase II (Batch I), are available for all SPDs*" meeting the applicable requirements.[205]

7.71. Regarding the means of enforcement under the DCR measures, India notes that "[u]nder the PPAs in respect of Phase I (Batch I and Batch II) and Phase II (Batch I), NVVN or SECI (as the case may be) have the discretion, but no mandatory obligation, to impose sanctions and penalties in the event an SPD fails to comply with the requirements of DCR as provided under the PPAs for the respective batches."[206] India specifically highlights various clauses of the model PPAs for Phase I (Batches 1 and 2) and Phase II (Batch 1), setting out the "Conditions Subsequent" that must be fulfilled by the SPD, including various technical requirements provided in the relevant *Guidelines* and, under Phase II (Batch 1), "their plan for meeting the requirement for domestic content".[207] Additional clauses of the model PPAs provide for "Consequences of non-fulfillment of conditions subsequent", which entail potential termination of the PPA and entitlement of NVVN or SECI to "encash all the Bank Guarantees submitted by the SPD".[208] We note that the model PPAs also specifically detail the terms and consequences of default and/or breach by SPDs of the obligations undertaken in the PPA.[209]

7.72. In our view, the parties' explanations and arguments are in accord as to whether compliance with the DCR measures is necessary in order to obtain an advantage. We consider that the present case is not unlike that examined by the panel in *Canada – Renewable Energy / Feed-In Tariff Program*, in which contracts with qualifying generators provided for specific performance and certification requirements in exchange for long-term guaranteed prices "to ensure economically viable operations".[210] We find these considerations to be persuasive in the present case, and conclude that compliance with the DCR measures "is necessary to obtain an advantage" within the meaning of paragraph 1(a) of the TRIMs Illustrative List. Moreover, we find the various contractual obligations and penalties for default by SPDs, in combination with the requirements established under the relevant *Guidelines* and *Request for Selection* documents, to sustain the conclusion that the DCR measures are "mandatory or enforceable under domestic law".

[202] European Union's third-party submission, para. 28.
[203] European Union's third-party submission, para. 27.
[204] European Union's third-party submission, para. 12.
[205] India's first written submission, para. 92. (emphasis added)
[206] India's response to Panel question No. 1(c).
[207] India's response to Panel question No. 1(c).
[208] India's response to Panel question No. 1(c) (citing Phase I (Batch 1) model PPA, (Exhibit USA-16); Phase I (Batch 2) model PPA, (USA-18); and Phase II (Batch 1) model PPA, (Exhibit USA-19)).
[209] See, e.g. Article 13 in each of Phase I (Batch 1) model PPA, (Exhibit USA-16); Phase I (Batch 2) model PPA, (USA-18); and Phase II (Batch 1) model PPA, (Exhibit USA-19).
[210] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 7.164-7.165.

7.2.3.4 Conclusion on paragraph 1(a) of the TRIMs Illustrative List, Article III:4 of the GATT 1994, and Article 2.1 of the TRIMs Agreement

7.73. Having found that the DCR measures are TRIMs that "require the purchase or use by an enterprise of products of domestic origin", and that "are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage", we find that the DCR measures fulfil the requirements of paragraph 1(a) of the TRIMs Illustrative List. Accordingly, the DCR measures "are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994" and thereby also inconsistent with Article 2.1 of the TRIMs Agreement.

7.2.4 Parties' arguments relating to the legal elements of Article III:4 of the GATT 1994

7.74. Having found that the DCR measures are inconsistent with Article III:4 of the GATT 1994 by virtue of paragraph 1(a) of the TRIMs Illustrative List, it is by definition unnecessary for us to proceed with another separate and additional examination of whether the DCR measures satisfy the legal elements of Article III:4 of the GATT 1994 without reference to the terms of the TRIMs Agreement. Such an examination could only serve to establish a separate and additional basis for arriving at the same conclusion that we have already reached, which is that the DCR measures are inconsistent with Article III:4 of the GATT 1994.

7.75. In particular, previous panels have observed that the TRIMs Agreement, including its Illustrative List, "interprets and clarifies" Article III:4 of the GATT 1994.[211] By its nature, the TRIMs Illustrative List has a narrower scope of application and sets out different specific requirements than the underlying obligation in Article III:4 of the GATT 1994.[212] For measures falling within its scope, applying the terms of the TRIMs Illustrative List means that the clarifications of the TRIMs Illustrative List lead to a consequential finding of inconsistency with the broader underlying obligation in Article III:4 of the GATT 1994. We note that the United States argues that any measure satisfying the elements of paragraph 1(a) of the TRIMs Illustrative List "will also satisfy all of the elements of a national treatment breach under Article III:4 of the GATT 1994".[213] The particular facts of this case do not require us to determine whether this is correct as a general matter, nor do they present a situation of conflicting provisions. Nevertheless, we note that the General Interpretative Note to Annex 1A of the WTO Agreement provides that, in the event of a conflict between a provision of the GATT 1994 and a provision of another agreement in Annex 1A, which includes the TRIMs Agreement, the provision of the other agreement shall prevail to the extent of the conflict. Thus, even in the event of any hypothetical conflict, the provisions of the TRIMs Agreement would prevail.

7.76. Although we need not conduct any further assessment to reach a finding on the United States' claims, it is well established that panels have the discretion to address arguments and make additional findings beyond those strictly necessary to resolve a particular claim or defence.[214] These could include, for example, alternative factual findings that could serve to assist

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[211] See, e.g. Panel Report, *EC – Bananas III (Guatemala and Honduras)*, para. 7.185.

[212] The Appellate Body has noted of the TRIMs Illustrative List, as well as the Illustrative List of Export Subsidies in the SCM Agreement, that "the elements that must be demonstrated under the relevant paragraphs of the Illustrative Lists are not necessarily the same as those that must be demonstrated pursuant to the underlying obligation", and that "the underlying obligation captures a broader set of measures than the examples in the Illustrative Lists". Appellate Body Reports, *Canada – Renewable Energy/Feed-in Tariff Program*, para. 5.103.

[213] United States' response to Panel question No. 40, para. 1. (emphasis original)

[214] The Appellate Body has confirmed that "[j]ust as a panel has the discretion to address only those *claims* which must be addressed in order to dispose of the matter at issue in a dispute, so too does a panel have the discretion to address only those *arguments* it deems necessary to resolve a particular claim". Appellate Body Report, *EC – Poultry*, para. 135. (emphasis original) The logical corollary of this proposition is that a panel has the discretion based on the circumstances of each case to address certain claims and arguments even where it is *not* strictly necessary to do so to resolve the matter at issue. We observe that Article 11 of the DSU provides that a panel should make an objective assessment of the matter before it, "and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements". While Article 11 does not specify what "such other findings" might include, the Appellate Body has confirmed that panels have the discretion to make alternative findings, including alternative factual findings. Appellate Body Reports, *US – Softwood Lumber IV*, para. 118; *Canada – Wheat Exports and Grain Imports*, para. 126; *China – Auto Parts*, para. 208; *US – Carbon Steel (India)*,

the Appellate Body in completing the legal analysis should it disagree with legal interpretations developed by the panel.[215] A panel may be guided by a range of different considerations when deciding whether to address arguments beyond those strictly necessary to resolve the matter[216], and the manner in which a panel may do so, including the scope and nature of any such other alternative findings, may also vary depending on the issues before the panel.[217]

7.77. As a general matter we agree with the Appellate Body that "it is not obvious what a stand-alone finding of violation of Article III:4 of the GATT 1994 would add to a finding of violation of Article III:4 that is consequential to an assessment under the Illustrative List of the TRIMs Agreement".[218] We further consider that proceeding with such an examination, if done without a clear justification, could call into question the meaning and legal effect of the terms of Article 2.2 and the Illustrative List of TRIMs that are inconsistent with Article III:4 of the GATT 1994. We therefore do not consider that we are required to proceed with another separate and additional examination of whether the DCR measures satisfy the legal elements of Article III:4 of the GATT 1994 without reference to the terms of the TRIMs Agreement.

7.78. However, there are competing considerations in this case arising from the particular circumstances and manner in which the disputing parties have presented their argumentation on the claims under Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994. In this case, the respondent contended that inconsistency with Article III:4 of the GATT 1994 cannot be established solely through a demonstration that a measure falls within paragraph 1(a) of the TRIMs Illustrative List. This was the subject of extensive argumentation between the parties. Consistent with its understanding of the relationship between Article III:4 of the GATT 1994 and the TRIMs Illustrative List, the respondent in this case did not specifically contest that the DCR measures fall within paragraph 1(a) of the Illustrative List of TRIMs; it instead advanced its rebuttal arguments on the substance of the complainant's national treatment claims in terms of whether the DCR measures satisfy the legal elements of Article III:4 of the GATT 1994, and in particular the element of "less favourable treatment". Furthermore, it is possible that the manner in which the respondent has presented its arguments on this issue was influenced to some extent by the manner in which the complainant presented its arguments in its first written submission[219], and by the respondent's understanding of the legal relationship between paragraph 1(a) of the Illustrative List of TRIMs and Article III:4 of the GATT 1994.

7.79. Having weighed the considerations and particular circumstances set forth above, the Panel has decided to conduct a further assessment of the parties' additional arguments concerning the same claim under Article III:4 of the GATT 1994 upon which we have already reached a conclusion, and pursuant to Article 11 of the DSU to "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements". As stated, our further assessment is based on the particular circumstances above, and should not be understood as calling into question our earlier conclusion regarding the meaning and legal effect of the terms of Article 2.2 and the Illustrative List of TRIMs that are inconsistent with Article III:4 of the GATT 1994.

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para. 4.274. See, e.g. Panel Reports, *India – Patents (US)*, paras. 6.11-6.12 and 7.44-7.50; *Canada – Dairy*, para. 7.119; *EC – Bed Linen (Article 21.5 – India)*, paras. 6.234-6.246; *US – Corrosion-Resistant Steel Sunset Review*, paras. 7.172-7.184; *China – Auto Parts*, fn 641 to para. 7.371; *EC and certain member States – Large Civil Aircraft*, para. 7.224; *China – Raw Materials*, paras. 7.229-7.230; *China – Rare Earths*, para. 7.140; and *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.672.

[215] See, e.g. Appellate Body Reports, *US – Softwood Lumber IV*, para. 118; *US – Tuna II (Mexico)*, para. 405.

[216] See, e.g. Panel Reports, *Canada – Dairy*, para. 7.119, and *China – Auto Parts*, fn 641 to para. 7.371.

[217] See, e.g. Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.672.

[218] Appellate Body Reports, *Canada – Renewable Energy/Feed-in Tariff Program*, para. 5.94.

[219] See India's second written submission, para. 5 (emphasis by India, footnotes omitted):

India respectfully submits that the United States has not made any standalone claim under TRIMs Article 2.1, but has linked its claims under TRIMs Article 2.1 to its request for the Panel's findings under GATT Article III:4. The United States has argued that "the requirements under the JNNSM Programme measures are also inconsistent with Article 2.1 of the TRIMs Agreement <u>because</u> they are trade-related investment measures ("TRIMs") that are inconsistent with the provisions of Article III of the GATT 1994". In other words, the United States has itself linked the request for the Panel's finding on TRIMs Article 2.1 <u>contingent on</u> a finding of violation under GATT Article III:4.

7.80. As cited by the parties[220], for a measure to be found inconsistent with the national treatment obligation of Article III:4 of the GATT 1994, the following elements must be demonstrated:

(a) that the imported and domestic products in question are "like products";

(b) that the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and

(c) that the imported products are accorded "less favourable" treatment than that accorded to like domestic products.[221]

7.2.4.1 Like products

7.81. With respect to "like products", the United States asserts that, "[a]part from country of origin", the measures in question "make no further distinction between imported and domestic solar cells and modules".[222] The United States cites prior disputes in which this served as a basis to conclude that imported and domestic products are like[223], as well as the fact that SPDs under the National Solar Mission have made use of solar modules manufactured in the United States.[224]

7.82. India "agrees with the United States that the solar cells and modules manufactured domestically in India and those imported from the United States are 'like products' within the meaning of Article III:4" of the GATT 1994.[225]

7.83. We note that, as pointed out by the United States, previous panels examining claims under Article III:4 of the GATT 1994 have repeatedly found that products at issue were like where the sole distinguishing criterion was origin.[226] In the present case, the DCR measures impose requirements on the use of certain types of solar cells and modules exclusively based on the criterion of their origin. For example, and as observed by the United States[227], the Phase I (Batch 1) *Guidelines* state that "it will be mandatory for Projects based on crystalline silicon technology to use the modules manufactured *in India*".[228] Similarly, the Phase I (Batch 2) *Guidelines* state "it will be mandatory for all the Projects to use cells and modules manufactured in India", but also noted that "modules made from thin film technologies or concentrator PV cells may be *sourced from any country*".[229] Finally, the Phase II *Guidelines* state that for Part A of Batch 1 "the solar cells and modules used in the power plant must both be made *in India*".[230]

7.84. Based on the foregoing, and guided by the reasoning of past panels, we consider that the DCR measures apply to "like products" within the meaning of Article III:4 of the GATT 1994.

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[220] India's first written submission, para. 85; United States' first written submission, para. 47.
[221] Appellate Body Report, *Korea – Various Measures on Beef*, para. 133.
[222] United States' first written submission, para. 49.
[223] United States' first written submission, paras. 50-54.
[224] United States' first written submission, para. 55.
[225] India's first written submission, para. 86.
[226] See Panel Reports, *India – Autos*, para. 7.174 ("Origin being the sole criterion distinguishing the products, it is correct to treat such products as like products within the meaning of Article III:4."); *Canada – Autos*, para. 10.74 ("it has not been contested that the distinction made between domestic products and imported products in the definition of Canadian value added is based solely on origin and that, consequently, there are imported products which must be considered to be like the domestic products the costs of which are included in the definition of Canadian value added"); *Turkey – Rice*, para. 7.214 ("where a difference in treatment between domestic and imported products is based exclusively on the products' origin, it is correct to treat products as "alike" within the meaning of Article III:4"); and *Argentina – Import Measures*, para. 6.274 ("when origin is the only factor distinguishing between imported and domestic products, there is no need to conduct a likeness analysis on the basis of the traditional likeness criteria established in the GATT panel report on *Border Tax Adjustments*").
[227] See United States' first written submission, para. 54 and fn 55.
[228] Phase I (Batch 1) *Guidelines*, (Exhibit USA-5), Section 2.5(D). (emphasis added)
[229] Phase I (Batch 2) *Guidelines*, (Exhibit USA-6), Section 2.5(D). (emphasis added)
[230] Phase II (Batch 1) *Guidelines*, (Exhibit USA-7), Section 2.6(E). (emphasis added)

7.2.4.2 Laws, regulations, or requirements affecting internal sale, purchase, or use

7.85. The United States submits that the DCR measures are "'requirements' that 'affect' the 'internal' 'sale', 'purchase', or 'use' of solar cells and modules in India within the meaning of Article III:4 of the GATT 1994".[231] The United States argues that the DCR measures are requirements because SPDs entering into a PPA will be legally bound, by contract, to fulfil the obligation of using solar cells and modules manufactured in India.[232] The United States further contends that the DCR measures affect the internal sale, purchase, or use of solar cells and modules because they modify the conditions of competition between imported and domestic products. Specifically, it is argued that an SPD satisfies the applicable requirements by purchasing and using solar cells and modules made in India, and that this should be considered "internal" because "the requirements apply with respect to the sale, purchase, or use … only inside the customs territory of India and not at the border".[233]

7.86. India did not advance any arguments to contest this element.

7.87. We note that, in the context of Article III:4 of the GATT 1994, past panels and the Appellate Body have understood the term "affecting" to have a "broad scope of application" in the specific context of the impact of domestic content requirements on private operators' choices and incentives.[234] Further, panels have repeatedly found that measures covered by Article III:4 of the GATT 1994 include "conditions that an enterprise accepts in order to receive an advantage"[235], and the Appellate Body has confirmed that measures that "create an incentive" for use of domestic over imported goods can be considered to "affect" the internal sale, purchase, or use of those goods.[236]

7.88. We consider it relevant to recall our findings above with respect to compliance with the DCR measures being "necessary to obtain an advantage", and whether the DCR measures "require the purchase or use by an enterprise of products of domestic origin".[237] The DCR measures operate to impose compulsory conditions for bidding eligibility and participation under each of the relevant Batches of the National Solar Mission, and further mandate the use of domestically manufactured solar cells and modules through enforceable contractual obligations of SPDs. We therefore agree with the United States that the DCR measures are properly viewed as "requirements" affecting the internal sale, purchase, or use of solar cells and modules in India.

7.2.4.3 Less favourable treatment

7.89. The United States submits that, under the National Solar Mission, an SPD "that opts to use imported solar cells and/or modules is not eligible to participate in such portion of the program subject to" the DCR measures and hence "may not enter into a PPA under the program without undertaking the domestic use commitment".[238] According to the United States, this creates an "incentive for SPDs to purchase solar cells and modules made in India", resulting in an alteration of the conditions of competition to the detriment of such equipment produced in the United States.[239]

7.90. India responds that merely drawing regulatory distinctions or providing *different* treatment does not necessarily amount to "less favourable treatment".[240] India contends that "what is required is a careful scrutiny of the domestic content provisions in the bid related documents that

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[231] United States' first written submission, para. 57.
[232] United States' first written submission, paras. 59-64.
[233] United States' first written submission, paras. 65-67.
[234] As to the "broad scope of application" denoted by the word "affecting" in Article III:4 of the GATT 1994, see Appellate Body Report, *US – FSC (Article 21.5)*, paras. 210-212. See also Panel Reports, *US – FSC (Article 21.5 – EC)*, paras. 8.147-8.148; *Argentina – Import Measures*, paras. 6.282-6.286; *Turkey – Rice*, para. 7.222; *Canada – Autos*, para. 10.80; and *India – Autos*, para. 7.196.
[235] Panel Report, *Canada – Autos*, para. 10.73. See also Panel Reports, *India – Autos*, para. 7.184; *Turkey – Rice*, para. 7.218-7.219; and *Argentina – Import Measures*, para. 6.277.
[236] Appellate Body Report, *China – Auto Parts*, para. 196.
[237] See sections 7.2.3.2 and 7.2.3.3 above.
[238] United States' first written submission, para. 70.
[239] United States' first written submission, paras. 71-73.
[240] India's first written submission, paras. 88-91.

are the subject matter of this dispute"[241], and submits a series of factual considerations upon which it alleges that the "bidding conditions … have not affected the opportunity for imported solar cells and modules to enter the market".[242] In general, India's counterarguments relate to the possibility of using imported solar cells and modules to obtain the same benefits and advantages that are otherwise provided to SPDs under the National Solar Mission.[243] Drawing upon the partial coverage and limited extent of the DCR measures, India highlights the fact that the advantages under the National Solar Mission are available to SPDs using imported cells and modules[244], and the fact that imported solar cells and modules have a dominant market share overall.[245]

7.91. The European Union states that "the aim of the DCR [measures] is to progressively build up domestic production of solar cells and modules", and that inconsistency with Article III:4 of the GATT 1994 need not be based on actual market effects.[246] In addition, the European Union expresses doubt as to the relevance of "[a]rguments concerning the current shares of domestic and imported solar cells and modules in the total solar PV installed capacity in India, as well as the extent to which imported solar cells and modules may be used in some projects or parts of the projects supported under the National Solar Mission".[247] The European Union further "recalls that it is well established in the case law that incentives to favour domestic products are inconsistent with Article III:4 of the GATT 1994".[248] Japan considers that the DCR measures "generate an incentive to purchase and use domestically produced renewable energy generation equipment and hence create a disincentive to use imports of such equipment manufactured outside of India".[249] In Japan's view, arguments regarding the dominant market share of imports "do not address the fact that India's measures create incentives that affect negatively the conditions of competition for imported goods".[250]

7.92. We observe at the outset that less favourable treatment pertains to "whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products"[251], such that "the term 'treatment no less favourable' in Article III:4 requires effective equality of opportunities for imported products to compete with like domestic products".[252] With this standard in mind, we address the arguments raised under Article III:4 of the GATT 1994.

7.93. In response to a question from the Panel, India confirmed that its position is that there is no "less favourable treatment" in this case for three reasons: (a) the scope of the domestic content requirements did not extend to all cells and modules in Phase I (Batch 1) and Phase I (Batch 2) or all projects in Phase II (Batch 1), and therefore SPDs could use and in fact relied on imported cells and modules; (b) the same advantages were given to all SPDs selected to participate in the National Solar Mission regardless of whether they used imported or domestically manufactured cells and modules; and (c) imported cells and modules currently have a dominant share of the

[241] India's first written submission, para. 92.
[242] India's first written submission, para. 93.
[243] See India's first written submission, paras. 89 and 92.
[244] See, e.g. India's first written submission, para. 92: "Once SPDs are selected based on the technical and financial criteria of the bid process, PPAs are entered into by NVVN in Phase I (Batch I and Batch II) and SECI in Phase II (Batch I). These criteria, and the advantages resulting from the selection, such as guaranteed long-term tariffs in Phase I (Batch I and Batch II), and guaranteed long-term tariffs as well as VGF support in Phase II (Batch I), are available for all SPDs, whether or not they use imported or domestically manufactured cells and modules."
[245] See, e.g. India's first written submission, para. 93: "The afore-mentioned facts indicate that imported cells and modules have a dominant share of the market for solar cells and modules in India. The bidding conditions under Phase I (Batch I and Batch II), and Phase II (Batch I), have not affected the opportunity for imported solar cells and modules to enter the market. There is therefore no adverse trade effect on their market access, and it cannot be said that they are subject to less favourable treatment for the purposes of GATT Article III:4."
[246] European Union's third-party submission, para. 31.
[247] European Union's third-party submission, para. 32.
[248] European Union's third-party submission, para. 33.
[249] Japan's third-party submission, para. 11.
[250] Japan's third-party submission, para. 11.
[251] Appellate Body Report, *Korea –Various Measures on Beef,* para. 137.
[252] Appellate Body Reports, *EC – Seal Products*, 5.101 (citing Appellate Body Reports, *US – Clove Cigarettes*, para. 176 (referring to GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.10); *China – Publications and Audiovisual Products*, para. 305 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, paras. 135 and 136); and *Thailand – Cigarettes (Philippines)*, para. 126 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16)).

market for solar cells and modules in India.[253] In our view, the arguments presented by India share a common feature of seeking to place the DCR measures in a larger context, either within the National Solar Mission or the Indian market generally, so as to diminish the restrictive character of the requirements imposed on the use of imported solar cells and modules.

7.94. With respect to India's first argument, it is not in dispute that the scope of the domestic content requirements did not extend to all cells and modules in Phase I (Batch 1) and Phase I (Batch 2) or all projects in Phase II (Batch 1), and that SPDs therefore could use, and many in fact are using, foreign cells and modules. At the same time, we recall that it is not in dispute that the requirements imposed under Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1 – Part A)[254] prohibit the use of certain types of foreign cells or modules, without establishing any comparable restriction on domestic cells or modules. The fact that all SPDs participating in the National Solar Mission could use (and the fact that some in fact are using) *certain types* of foreign cells and modules (e.g. thin film solar modules under Phase I) does not negate the fact that the DCR measures accord less favourable treatment to the *other types of foreign cells* and modules whose use *is* prohibited by the requirements in question (e.g. c-Si solar modules in Phase I – Batch 2).[255]

7.95. This is particularly clear in view of the standard under Article III:4 of the GATT 1994, according to which panels and the Appellate Body have consistently found less favourable treatment to exist where domestic content requirements provided some (or even total) allowance for use or purchase of imported goods to obtain the relevant benefits. The measures at issue in these other disputes differed factually from the DCR measures in the present case in that they did not specify an outright restriction on particular imports as a condition to obtain certain benefits, but rather involved more general requirements to use some level of domestic value-added either in terms of unspecified products, services, or combination thereof. Even so, we consider these cases instructive in applying the standard of less favourable treatment under Article III:4 of the GATT 1994 to India's arguments regarding the allowance and actual use of imported solar cells and modules. For example, in *US – FSC (Article 21.5)*, the panel and Appellate Body examined a situation in which the benefits of a measure with domestic content requirements could be obtained without necessarily using domestic inputs.[256] These domestic content requirements were defended under Article III:4 of the GATT 1994 on the grounds that there was "no obligation to use domestic content", as the respondent in that dispute "underline[d], and deem[ed] it fundamental, that goods can meet this requirement even if 100 per cent of the fair market value of their inputs is foreign".[257] Nevertheless, both the panel and Appellate Body concluded that the domestic content requirements created a disincentive to use imported products, notwithstanding the possibility of obtaining the benefits in question without necessarily requiring the use of domestic inputs.[258] Importantly, the Appellate Body considered that this conclusion was "not nullified by the fact that the [measure] will not give rise to less favourable treatment for like imported products in each and

[253] India's response to Panel question No. 15. See also India's first written submission, paras. 89 and 92.

[254] We recall that there are no exemptions for the use of imported solar cells and modules by SPDs in Phase II (Batch 1 – Part A), which is explicitly designated as a "DCR" portion of Phase II (Batch 1). See Phase II (Batch 1) *Guidelines*, (Exhibits USA-7), Section 2.6(E); and Phase II (Batch 1) *Request for Selection* document, (Exhibit USA-12), Section 1.1.4; India's first written submission, para. 83.

[255] As argued by the United States, "[u]nder Article III of the GATT 1994, compliance with national treatment for *some* products does not excuse a Member from its obligation to comply with national treatment with respect to *all* products." United States' response to Panel question No. 13(b), para. 30. (emphasis original) The European Union makes a similar point in stating that "[e]ven if the DCRs cover only one portion of the market, they would still be requirements with which compliance is mandatory in order to have access to an advantage in respect of that portion of the market." European Union's third-party submission, para. 28.

[256] The domestic content requirements challenged in that dispute were in the form of a tax exemption on income derived from the foreign sale of products, of which more than 50 per cent of the fair market value was attributable to articles made, or costs of labour performed, inside the United States (referred to as the "fair market value rule"). See Panel Report, *US – FSC (Article 21.5) US – FSC (Article 21.5 – EC)*, para. 8.123. See also Appellate Body Report, *US – FSC (Article 21.5)*, paras. 21 and 197.

[257] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.152.

[258] See, e.g. Appellate Body Report, *US – FSC (Article 21.5)*, para. 220, and Panel Report, *US – FSC (Article 21.5)*, para. 8.157 ("That there may exist other ways to impute permissible fair market value in order to obtain qualifying foreign trade property does not vitiate the fact that this incentive inherently advantages domestic goods and that less favourable treatment is thereby accorded to imported goods than to domestic goods").

every case".[259] Other panels have similarly held that measures imposing domestic content requirements modified conditions of competition to the detriment of like imported products, notwithstanding their partial coverage and/or the existence of other means of obtaining an advantage afforded under the measure in question.[260]

7.96. With respect to India's second argument, it is not in dispute that the same advantages were given to all SPDs selected to participate in the National Solar Mission regardless of whether they used imported or domestically manufactured cells and modules. However, we fail to see the legal relevance of the fact that the same advantages were given to all selected SPDs regardless of whether they used domestically manufactured cells and modules, or instead foreign cells or modules not disallowed by the DCR measures. The proper focus of the examination of less favourable treatment under Article III:4 of the GATT 1994 in this case is not whether SPDs using permitted types of foreign cells or modules are accorded less favourable treatment than SPDs using domestic cells or modules. Rather, the focus of the examination is on the foreign products whose use is prohibited under the DCR measures that are the subject of the less favourable treatment claimed by the United States. The less favourable treatment accorded to the types of foreign products whose use is prohibited under the applicable DCR measures is not negated by the fact that SPDs using other types of foreign products obtain the same benefits as SPDs using domestic cells and modules.

7.97. With respect to the third argument, it is not in dispute that imported cells and modules currently have a dominant share of the market for solar cells and modules in India. However, India has not explained the legal relevance of the fact that imported cells and modules currently have a dominant share of the market for solar cells and modules in India, and that the DCR measures at issue affect a relatively small amount of production.[261] Insofar as this argument is premised on the view that "less favourable treatment" is limited to some threshold degree of detrimental impact, or that less favourable treatment can be counterbalanced by the continued existence of other competitive opportunities, we see no basis in the text of Article III:4 of the GATT 1994 or related jurisprudence to support this view. India has not specifically argued or provided any support for the position that Article III:4 of the GATT 1994 is qualified by a *de minimis* standard[262], or that

[259] Appellate Body Report, *US – FSC (Article 21.5)*, para. 221. Despite instances in which the domestic content requirements would not "bear upon the input choices manufacturers make", the Appellate Body considered that "the fact remains that in an indefinite number of other cases, the [measure] operates, by its terms, as a significant constraint upon the use of imported input products. We are not entitled to disregard that fact."

[260] The panel in *Canada – Autos* addressed various arguments made with respect to domestic content requirements that could be satisfied by use of domestically produced goods in addition to other forms of domestic "value-added" to qualify for an exemption from the generally applicable customs duty. The panel found that "the equality of competitive opportunities between domestic and like imported products is affected if a measure accords an advantage to the sale or use of domestic products but not to the sale or use of like imported products, *regardless of whether or not that advantage can also be obtained by other means*". Panel Report, *Canada – Autos*, para. 10.87. (emphasis added) Consequently, the panel considered that the denial of competitive opportunities by according advantages to the use of domestic products "is not negated by the fact that the advantage may also be obtained by other means than sale or use of domestic products". Panel Report, *Canada – Autos*, para. 10.87.

The panel in *India – Autos* addressed claims against an indigenization requirement according to which certain percentages of domestic content had to be reached as a condition to import automobile parts and components, and found that "the very nature of the indigenization requirement generates an incentive to purchase and use domestic products and hence creates a disincentive to use like imported products". Panel Report, *India – Autos*, para. 7.201. The panel thus concluded that this "requirement clearly modifies the conditions of competition of domestic and imported parts and components in the Indian market in favour of domestic products." Panel Report, *India – Autos*, para. 7.202.

[261] India argues, for example, that imported solar cells and modules play a significant role in India's solar industry, and that the bidding conditions of the National Solar Mission "have not affected the opportunity for imported solar cells and modules to enter the market". India's opening statement at the first meeting of the Panel, paras. 22-23.

[262] The panel in *China – Publications and Audiovisual Products* rejected the view "that a lack of 'significant' alteration in the conditions of competition would mean that [the respondent] has fulfilled its obligation to treat the imported products no less favourably than the like domestic products". The panel "note[d] that the phrase 'treatment no less favourable' is not qualified by a *de minimis* standard" and that, "[a]ccordingly, any less favourable treatment of imported products … is contrary to the obligation in Article III:4, provided such treatment modifies the conditions of competition to the detriment of imported products". Panel Report, *China – Publications and Audiovisual Products*, para. 7.1537.

less favourable treatment is negated when imported products might still have opportunities for market access through alternative channels.[263]

7.98. Based on the foregoing, we are unpersuaded by the arguments advanced by India relating to the absence of "less favourable treatment" under Article III:4 of the GATT 1994.

7.2.5 Conclusion on Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994

7.99. We have found that the DCR measures fulfil the requirements of paragraph 1(a) of the TRIMs Agreement, thus establishing that they are inconsistent with Article III:4 of the GATT 1994 and thereby Article 2.1 of the TRIMs Agreement. Based on our separate and additional examination of the legal elements of Article III:4 of the GATT 1994, which we have conducted in the particular circumstances of this case, we also conclude that the DCR measures accord less favourable treatment under Article III:4 of the GATT 1994. We now turn to whether the DCR measures are exempted from the obligations of Article III by virtue of the derogation in Article III:8(a) of the GATT 1994.

7.2.6 Article III:8(a) of the GATT 1994

7.2.6.1 Introduction

7.100. Article III:8(a) of the GATT 1994 provides:

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

7.101. India submits that the government procurement derogation under Article III:8(a) of the GATT 1994 is applicable to the DCR measures, and that, by virtue of this derogation, the DCR measures are not inconsistent with Article III:4 of the GATT 1994 or Article 2.1 of the TRIMs Agreement.[264]

7.102. The United States contests the applicability of this derogation to the DCR measures with respect to certain elements under Article III:8(a) of the GATT 1994. In particular, the United States argues that the "products purchased" by India (electricity) under the DCR measures are not in a competitive relationship with the products subject to discrimination (solar cells and modules). In this respect, the United States considers the present case to be indistinguishable from the relevant circumstances in *Canada – Renewable Energy / Feed-In Tariff Program*, and that the present facts similarly lead to the conclusion that Article III:8(a) of the GATT 1994 is inapplicable.

The panel in *Canada — Wheat Exports and Grain Imports* similarly rejected the proposition that analysis of less favourable treatment should turn on the degree of burden imposed on imported products. In the view of that panel, "[t]hat the requirement in question may not be very onerous in commercial and/or practical terms does not, in our view, detract from the fact that it is an additional requirement not imposed on like domestic grain". Panel Report, *Canada — Wheat Exports and Grain Imports*, para. 6.190. In this regard, the panel further noted that "[n]either the text of Article III:4 of the GATT 1994 nor GATT/WTO jurisprudence indicates that there is a de minimis exception to the 'no less favourable treatment' standard in Article III:4". Panel Report, *Canada — Wheat Exports and Grain Imports*, fn 281.

[263] See, e.g. Panel Reports, *Canada — Wheat Exports and Grain Imports*, paras. 6.211-6.213; *Dominican Republic – Import and Sale of Cigarettes*, para. 7.192. We further note that, "[i]n WTO jurisprudence under Article III, offsetting less favourable treatment of some imported products with more favourable treatment of other imported products has been rejected." Appellate Body Report, *India – Additional Import Duties*, fn 405. While we do not understand India to argue that the market share of imported solar cells and modules amounts to *more* favourable treatment, we consider that the rejection of this as a defence to less favourable treatment would apply *a fortiori* to an argument that the continued market access for some imports offsets the detrimental impact on the competitive opportunties of other imports. See Panel Report, *US – Gasoline*, para. 6.14.

[264] See India's first written submission, paras. 101-164; India's opening statement at the first meeting of the Panel, paras. 24-31; India's responses to Panel question Nos. 19-24; India's second written submission, paras. 14-45; India's opening statement at the second meeting of the Panel, paras. 4-12; India's responses and comments on the United States' responses to Panel question Nos. 41-55.

The United States additionally disputes whether products are purchased under the DCR measures "for governmental purposes and not with a view to commercial resale" in accordance with Article III:8(a) of the GATT 1994.[265] The United States does not dispute that the DCR measures qualify as "laws, regulations or requirements governing procurement", and that this procurement is by "governmental agencies".

7.103. Canada, the European Union, Japan, and Norway agree with the United States and consider that the situation in the present case is analogous to that examined in *Canada – Renewable Energy / Feed-In Tariff Program* regarding the applicability of Article III:8(a) of the GATT 1994.[266]

7.104. The Appellate Body interpreted Article III:8(a) for the first time in *Canada – Renewable Energy / Feed-In Tariff Program*. The Appellate Body explained that this provision "establishes a derogation from the national treatment obligation of Article III for government procurement activities falling within its scope".[267] Moreover, the Appellate Body determined that "the application of Article III:8(a) of the GATT 1994 is not precluded where the challenged measure falls within the scope of Article 2.2 and paragraph 1(a) of the Illustrative List of the TRIMs Agreement".[268] As a result, measures covered by the government procurement derogation in Article III:8(a) of the GATT 1994 are exempt from – and thus not inconsistent with – the obligation of national treatment provided for in Article III:4 of the GATT 1994 and referred to in Articles 2.1 and 2.2 and paragraph 1(a) of the Illustrative List of the TRIMs Agreement.[269]

7.105. In order for a measure to be exempted from the obligations in Article III:4 of the GATT 1994 and Articles 2.1 and 2.2 and paragraph 1(a) of the Illustrative List of the TRIMs Agreement, the various requirements set out in the text of Article III:8(a) must be met. These requirements are that: (a) the measures in question are "laws, regulations, or requirements governing procurement"; (b) the procurement is "by governmental agencies"; (c) the procurement is of products purchased "for governmental purposes"; and (d) the products purchased are not procured "with a view to commercial resale or with a view to use in the production of goods for commercial sale". The Appellate Body has explained that these requirements are cumulative in nature, such that a measure failing to meet any one of those requirements will not be exempted from the national treatment obligations of Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.[270]

7.106. In addition to these elements, there is a threshold matter of the applicability of Article III:8(a) in respect of the "products purchased" under the DCR measures. This was the dispositive factor of the Appellate Body's analysis in *Canada – Renewable Energy / Feed-In Tariff Program*, and a primary issue of contention between the parties in this dispute is the pertinence,

[265] See United States' first written submission, paras. 74-79; United States' opening statement at the first meeting of the Panel, paras. 21-38; United States' second written submission, paras. 13-32; United States' opening statement at the second meeting of the Panel, paras. 12-20; United States' responses and comments on India's responses to Panel question Nos. 41-55.

[266] Canada's response to Panel question No. 2 to the third parties, para. 9; European Union's response to Panel question No. 2 to the third parties, para. 8 and third-party submission, para. 36; Japan's response to Panel question No. 2 to the third parties and third-party submission, para. 4; Norway's third-party statement, paras. 5-6.

[267] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.56.

[268] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.29.

[269] The Appellate Body noted that "Article III:8(a) is a derogation limiting the scope of the national treatment obligation and it is not a justification for measures that would otherwise be inconsistent with that obligation." Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.56. The Appellate Body further considered that "the characterization of the provision as a derogation does not pre-determine the question as to which party bears the burden of proof with regard to the requirements stipulated in the provision". Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.56.

Like the Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program*, we do not consider it necessary for our analysis and conclusions in this dispute to decide upon which party, as a general rule, bears the burden of proof with regard to the requirements of Article III:8(a). Insofar as the parties' arguments primarily raise questions of law concerning the interpretation and scope of the derogation in Article III:8(a), as opposed to disputed questions of fact, we note that, "[c]onsistent with the principle of *jura novit curia*, it is not the responsibility of the [parties] to provide us with the legal interpretation to be given to" the provisions of Article III:8(a). Appellate Body Report, *EC – Tariff Preferences*, para. 105.

[270] See Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.57, 5.69, and 5.74.

or distinguishability, of the Appellate Body's findings and reasoning in that dispute. After assessing this threshold matter, we then consider the parties arguments with respect to the remaining elements of Article III:8(a).

7.2.6.2 Applicability of Article III:8(a) in respect of the "products purchased" under the DCR measures

7.107. The United States contends that the DCR measures are not exempted under Article III:8(a) because India acquires electricity under the PPAs, whereas the products that are subject to requirements affecting their sale, purchase, or use are solar cells and modules.[271] The United States further argues based on *Canada – Renewable Energy / Feed-In Tariff Program* that the product procured (electricity) is not in a competitive relationship with the product being discriminated against (solar cells and modules), and that such discrimination is therefore not covered by the derogation of Article III:8(a).[272] The United States further disputes India's characterization of solar cells and modules as "inputs" into electricity, and challenges the legal relevance of that characterization to the analysis under Article III:8(a).[273]

7.108. India contests the applicability of *Canada – Renewable Energy / Feed-In Tariff Program* to the facts of the present dispute, and submits that "[t]he reasoning by the Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program* cannot be read out of context to fit into all sets of facts and circumstances that are sought to be pleaded under Article III:8(a)".[274] Specifically, India understands the facts of that dispute to have involved "the use of designated percentages of equipment for setting up a renewable energy generation facility" and domestic content requirements "pertain[ing] to the entire electricity generation facility".[275] India argues that the Appellate Body's reasoning in *Canada – Renewable Energy / Feed-In Tariff Program* "needs to be seen in the context of the products in question which pertained to a range of equipment required for the 'development and construction of' the electricity generation facility as a whole".[276] According to India, the focus of the domestic content requirements in *Canada – Renewable Energy / Feed-In Tariff Program* "was therefore on certain designated activities in a power plant, rather than on the electricity generated from such equipment".[277]

7.109. India contrasts the focus of the DCR measures at issue in the present dispute with the factual context of *Canada – Renewable Energy / Feed-In Tariff Program* on the grounds that "[s]olar cells and modules do not have any purpose other than generating solar power [and] are intrinsic to solar power"[278], and thus "cannot be treated as distinct from the generation of solar power".[279] Citing the "focus" of the DCR measures "on generation of solar power from Indian manufactured solar cells and modules"[280], India argues that the DCR measures "effectively seek to procure solar cells and modules that result in solar power generation".[281] India emphasizes that "solar cells and modules are *integral inputs* for the generation system" as contrasted with "all other components of a PV generation plant [that] can be classified as ancillary equipment".[282] According to India, the Appellate Body "left open space for a different analysis when the

[271] United States' first written submission, paras. 75-76.
[272] United States' first written submission, paras. 77-79.
[273] United States' second written submission, paras. 13-20.
[274] India's first written submission, para. 104.
[275] India's first written submission, para. 108.
[276] India's first written submission, para. 109. India further refers to the "regulatory requirement in *Canada – Renewable Energy / Feed-In Tariff Program* … that each wind power, Solar PV project and solar microFIT project contain a defined percentage of domestic content" and the fact that "the methodology for the calculation of the domestic content level was linked to a range of different designated activities".
[277] India's first written submission, para. 109. See also India's opening statement at the first meeting of the Panel, para. 26 ("The focus of the domestic content requirements under Canada's programme was therefore on materials and activities for the 'development and construction of' the power plant, including labour requirements for such construction and development, rather than on generation of electricity from the plant").
[278] India's first written submission, para. 111.
[279] India's first written submission, para. 111.
[280] India's first written submission, para. 112. See also India's opening statement at the first meeting of the Panel, para. 26 ("By purchasing electricity, the Government in effect seeks to facilitate procurement of solar cells and modules that result in solar power generation").
[281] India's first written submission, para. 112.
[282] India's second written submission, para. 20. (emphasis original)

discrimination is on inputs for a product that is purchased".[283] India thus distinguishes inputs of a "fundamental, integral and intrinsic" nature and submits that "the key issue for consideration by the Panel is whether the derogation under Article III:8(a) may also extend to discrimination relating to inputs such as solar cells and modules that are used in respect of the electricity purchased by way of procurement".[284]

7.110. India additionally argues that "[t]o deny the characterization of 'government procurement' to India's method of procuring solar cells and modules … would inadvertently narrow the scope and intent of Article III:8(a)."[285] India contends that this would limit the ways a government could "effectively procure solar cells and modules under Article III:8(a)", which "would be an unnecessary intrusion into the nature and exercise of government actions relating to procurement of solar power".[286]

7.111. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body determined that "the scope of the terms 'products purchased' in Article III:8(a) is informed by the scope of 'products' referred to in the obligations set out in other paragraphs of Article III. Article III:8(a) thus concerns, in the first instance, the product that is subject to the discrimination."[287] On this basis, the Appellate Body considered the product subject to discrimination to be the reference point for the "products purchased" in Article III:8(a) and, thus, the scope of the government procurement derogation:

> The coverage of Article III:8 extends not only to products that are identical to the product that is purchased, but also to "like" products. In accordance with the Ad Note to Article III:2, it also extends to products that are directly competitive to or substitutable with the product purchased under the challenged measure. For convenience, this range of products can be described as *products that are in a competitive relationship*.[288]

7.112. Applying the criterion of a "competitive relationship" to the specific facts and products at issue in *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body found as follows:

> In the case before us, the product being procured is electricity, whereas the product discriminated against for reason of its origin is generation equipment. These two products are not in a competitive relationship. None of the participants has suggested otherwise, much less offered evidence to substantiate such proposition. Accordingly, the discrimination relating to generation equipment contained in the FIT Programme and Contracts is not covered by the derogation of Article III:8(a) of the GATT 1994.[289]

7.113. The Appellate Body thus framed the applicability of Article III:8(a) according to whether the particular products subject to discrimination are in a "competitive relationship" with the products purchased under the measures in question. We recall from our analysis of the United States' national treatment claims above that the products subject to discrimination in this dispute are solar cells and modules originating in the United States. We further note India's position that the government does not "purchase" solar cells and modules as it "does not physically acquire or take custody of the solar cells and modules, and instead chooses to buy the solar power generated from such cells and modules".[290] Thus, an approach paralleling that of the Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program* would entail a comparison of solar cells and modules with the generated electricity that is purchased in order to ascertain whether these products are in a "competitive relationship".

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[283] India's second written submission, para. 23.
[284] India's second written submission, para. 23.
[285] India's first written submission, para. 114.
[286] India's opening statement at the first meeting of the Panel, para. 29.
[287] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.63.
[288] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.63. (emphasis added)
[289] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.79.
[290] India's first written submission, para. 114.

7.114. However, India has clarified that, in this dispute, "[i]t is not India's argument that *electricity* and *solar cells and modules* are in a competitive relationship. Instead, the essence of India's argument is that even though the Government does not take title or custody of solar cells and modules, by purchasing electricity generated from such cells and modules, it is effectively procuring the cells and modules."[291] India's argument that it is "effectively procuring" solar cells and modules through the DCR measures rests on what it considers to be a "key factual distinction" with *Canada – Renewable Energy / Feed-In Tariff Program* involving "the nature of the products in question".[292] In particular, India stresses that the DCR measures "are applicable only to solar cells and modules, as opposed to [*Canada – Renewable Energy / Feed-In Tariff Program*] where domestic content requirements were applicable cumulatively on a wide range of equipment and services required to construct and maintain a solar power generation system."[293] With respect to the legal test under Article III:8(a), India submits that the Appellate Body "acknowledged that there may be situations wherein the products purchased are quite different from the inputs that have been discriminated upon", and therefore "left room for interpretation based on the facts before a panel" when the products purchased are not themselves in a competitive relationship with the product subject to discrimination.[294]

7.115. Thus, we do not understand India to argue that we should deviate from the interpretation of Article III:8(a) developed by the Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program*. To the contrary, the arguments on the interpretation of Article III:8(a) advanced by the parties in this case appear to be based on their opposing understandings of the Appellate Body's findings and reasoning in *Canada – Renewable Energy / Feed-In Tariff Program*. We are therefore not presented with the question of whether we should deviate from the Appellate Body's findings and reasoning in that case[295]; rather, we are presented with the question of how the Appellate Body's findings and reasoning under Article III:8(a) should apply to the DCR measures at issue in this dispute.

7.116. We first examine India's contention that solar cells and modules are "inputs" whose coverage under Article III:8(a) was left open by the Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program,* and we then examine India's contention that the DCR measures are factually distinguishable from those before the Appellate Body in that dispute in that they pertain only to solar cells and modules and not to a wider range of equipment that do not constitute integral inputs into the product that is purchased.

7.117. With respect to the argument that Article III:8(a) of the GATT 1994 may not require in every case a "competitive relationship" between the relevant products, India contends that the

[291] India's opening statement at the first meeting of the Panel, para. 28. (emphasis original)

[292] India's opening statement at the first meeting of the Panel, para. 26. India explains that solar photovoltaic (PV) technology transforms sunlight directly into electricity by relying on the property of semi-conducting materials that enables them to conduct electricity when heated or combined with other substances. A solar cell, or photovoltaic (PV) cell, is an electrical device that converts the energy of light directly into electricity by the photovoltaic effect. India argues that solar cells and modules are not distinct from solar power itself because of the fundamental characteristics of solar cells and modules in absorbing light energy, which releases electrons and thereby generates electricity, and that it is this aspect which defines their integral role in solar power generation. India has further explained that the most commonly used material used in solar cells and modules, i.e. silicon, is essentially a semi-conducting material that produces the photovoltaic effect, which is basically photons of light which excite electrons in the silicon into a higher state of energy, thereby allowing them to act as charge carriers for an electric current. India explains that the photons of light come from sunlight, whereas the electrons, which are the carriers of electric current, come from the silicon in the solar cells and modules. India states that sunlight falling on any other material such as stone, or water, will not release electrons, and in fact, there is no other part or any system which is required to produce this effect. India's submission is that this characteristic of solar cells and modules means that any purchase of solar energy is in essence a procurement of the solar cells and modules, which have no meaning or existence other than producing solar electricity. India's first written submission, paras 110; India's second written submission, para 19; India's comments to the United States' response to Panel Question 43, para 11.

[293] India's opening statement at the second meeting of the Panel, para. 6.

[294] India's opening statement at the second meeting of the Panel, para. 5. See also India's response to Panel question No. 41.

[295] The present case is therefore distinguishable from other cases in which one of the disputing parties argued that a panel should deviate from a legal interpretation of the covered agreements arrived at by the Appellate Body. For example, see Appellate Body Reports, *US – Stainless Steel (Mexico)*, paras. 154-162; *US – Continued Zeroing*, para. 358-365; and Panel Reports, *China – Rare Earths*, paras. 7.55-7.61; *US – Countervailing and Anti-Dumping Measures (China)*, paras. 7.311-7.317.

Appellate Body "left open space for a different analysis when the discrimination is on inputs for a product that is purchased".[296] India argues further that, "[i]f the discrimination is on inputs and processes of production, this will not be in a competitive relationship with the product being actually purchased", but that "when a product being discriminated against is an integral input for generation or production of the product that is finally purchased, the derogation under Article III:8(a) is available for such products".[297] In support of this position, India relies on the following passage from *Canada – Renewable Energy / Feed-In Tariff Program*:

> What constitutes a competitive relationship between products may require consideration of inputs and processes of production used to produce the product. In its rebuttal of Canada's claim under Article III:8(a), the European Union acknowledges that the cover of Article III:8(a) may also extend to discrimination relating to inputs and processes of production used in respect of products purchased by way of procurement.[298] Whether the derogation in Article III:8(a) can extend also to discrimination of the kind referred to by the European Union is a matter we do not decide in this case.[299]

7.118. We note that the Appellate Body did not provide any specific indication of how "inputs and processes of production" would pertain to the question of whether products are in a competitive relationship; nor did it apply these considerations to the facts of *Canada – Renewable Energy / Feed-In Tariff Program*. The Appellate Body referred to "consideration of inputs and processes of production" as being potentially relevant to "*[w]hat constitutes a competitive relationship between products*". This reference to "inputs and processes of production" would seem to elaborate, rather than displace, the basic standard of products being in a competitive relationship under Article III:8(a) of the GATT 1994. In other words, the first sentence of the passage cited above leaves open the possibility that a consideration of inputs and processes of production would inform an assessment of whether the products subject to discrimination are "like" and/or "directly competitive to or substitutable with the product purchased under the challenged measure".[300] We do not understand India to argue otherwise.

7.119. Rather, we understand India's argument to be that when the Appellate Body, in the second and third sentences of the passage cited above, referred to (and expressly declined to decide) whether "the cover of Article III:8(a) may also extend to discrimination relating to inputs and processes of production used in respect of products purchased by way of government procurement", it was no longer referring to the question of "[w]hat constitutes a competitive relationship between products", but was rather introducing the possibility of an alternative to the "competitive relationship" standard in a situation involving discrimination against "inputs and processes of production". Thus, we understand India's argument to be that the Appellate Body "left open space"[301] for the possibility that consideration of inputs and processes of production could enter into the analysis under Article III:8(a) in two different ways: first, for the limited purpose of informing the determination of whether two products are in a competitive relationship; and second, to create a potential alternative to the "competitive relationship" standard in certain circumstances.

7.120. We do not consider it necessary in the present dispute to resolve whether the Appellate Body left room for an alternative to the "competitive relationship" standard, or to decide, in the

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[296] India's second written submission, para. 23.

[297] India's response to Panel question No. 19.

[298] (footnote original) The European Union explains that, when it refers to product "characteristics", it does so not as necessarily referring to physically detectable characteristics, but as referring to elements that define the nature of the product more broadly. The European Union submits that the environmental profile or the environmental attributes that a particular product may incorporate, even if they do not materialize into any particular physical characteristic, could legitimately form part of the requirements of the product purchased that are closely related to the subject matter of the contract. (European Union's other appellant's submission (DS426), fn 43 to para. 51)

[299] Appellate Body Report, *Canada – Renewable Energy / Feed-in Tariff Program*, para. 5.63.

[300] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.63. As suggested by the United States, this could be understood to mean that "where product A and product B are comprised of similar inputs (or manufactured through similar processes), this *might* suggest that product A and product B are 'like products' or in a competitive relationship". United States' response to Panel question No. 41, para. 4. (emphasis original)

[301] India's second written submission, para. 23.

abstract, the meaning of "inputs and processes of production" as used by the Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program*. The reason, as elaborated below, is that we are not persuaded that the measures at issue in this case are distinguishable in any relevant respect from those examined by the Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program.* In applying Article III:8(a) to closely analogous facts that involved the purchase of electricity and discrimination against generation equipment, the Appellate Body stated that the derogation "extends" to products in a "competitive relationship"[302] and disposed of the case on the grounds that "electricity" and "generation equipment" are not in such a relationship.[303] As we explain below, we consider that we are presented in this dispute with a similar situation, and India's arguments on the "effective procurement" of "integral inputs" are incompatible with the interpretation and application of Article III:8(a) in *Canada – Renewable Energy / Feed-In Tariff Program*.

7.121. The parties debate whether solar cells and modules can accurately be characterized as "inputs" into the electricity they are used to generate. The United States considers that India "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".[304] Whereas the United States asserts than an "input" should be "incorporated into or otherwise physically detectable" in a finished product[305], India considers that the term "input" may "refer to any resources or materials that are required to obtain a desired output" and that "the test of physical detection of an input cannot be used as a decisive factor".[306] The parties have debated various facets of what the Appellate Body may have intended in its reference to "inputs", and of the application of this concept to solar energy.[307] The parties' disagreement in this regard turns on issues that the Appellate Body considered it unnecessary to resolve in *Canada – Renewable Energy / Feed-In Tariff Program*; for the reasons detailed in this section, it is similarly unnecessary for us to resolve these issues for the purposes of applying Article III:8(a) to the DCR measures at issue in the present dispute.

7.122. Apart from whether solar cells and modules can even be considered "inputs" into electricity in the sense intended by the Appellate Body, India's arguments further hinge upon whether "solar cells and modules are *integral inputs* for the generation system" as contrasted with "all other components of a PV generation plant [that] can be classified as ancillary equipment".[308] In support

[302] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.63.
[303] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.79.
[304] United States' second written submission, para. 17.
[305] United States' second written submission, para. 20.
[306] India's response to Panel question No. 42, paras. 8 and 10.
[307] A primary focus of the parties' disagreement is whether the term "input" is necessarily confined to objects that are physically detectable or incorporated into a finished product. India posits that "the key issue for consideration is the relationship between solar cells and modules and electricity", and further that "solar cells and modules are clearly resources/inputs that are integral to the generation of solar power, and their physical manifestation in the electricity so generated is not a relevant criterion for consideration". India's response to Panel question No. 42, para. 13. The United States considers that the juxtaposition with "processes of production" indicates an understanding of the term "inputs" as being "raw materials, consumed in production of a finished product". United States' response to Panel question No. 42, para. 11. Applying this logic to "solar power electricity", the United States submits that "sunlight (or light energy) could be characterized as an 'input'" in that "[s]olar cells and modules convert light into electricity. Light energy is therefore arguably physically incorporated into solar power electricity." United States' response to Panel question No. 42, para. 13. See also Canada's third-party statement, paras. 9-12; Canada's response to Panel question No. 2 to the third parties, para. 11 ("Canada considers that generation equipment do not constitute direct inputs incorporated into the solar power being purchased. They are not physically detectable in the power being purchased.").

We note that the Appellate Body in *Canada – Renewable Energy / Feed-in Tariff Program* explicitly declined to decide on whether the concept of "inputs and processes of production" is confined to objects that are physically detectable or incorporated into the finished product that is purchased. In particular, the Appellate Body noted the European Union's suggestion regarding non-physical incorporation of "characteristics", such as "the environmental profile or the environmental attributes that a particular product may incorporate", before stating that "[w]hether the derogation in Article III:8(a) can extend also to discrimination of the kind referred to by the European Union is a matter we do not decide in this case." *Canada – Renewable Energy / Feed-in Tariff Program*, para. 5.63 and fn 499. Thus, the Appellate Body specifically raised, and declined to apply, the notion of non-physical incorporation in determining whether "the cover of Article III:8(a)" extended to governmental purchase of electricity.

[308] India's second written submission, para. 20. (emphasis original)

of this distinction between "integral inputs" and all other "ancillary equipment", India points to the indispensability of solar cells/modules for the generation of solar power, and the exclusivity of their function for that purpose. India specifically argues that "solar power can in fact be generated solely with solar cells and modules"[309] and that the "key determinative fact for consideration by the Panel" is that "no solar electricity can be generated without solar cells and modules; however solar electricity can still be generated without all other ancillary equipment".[310]

7.123. However, we observe that the "generation equipment" at issue in *Canada – Renewable Energy / Feed-In Tariff Program* included the exact same products, i.e. solar cells and modules, which were used to generate electricity purchased by the government. It is noteworthy that the Appellate Body gave no indication of these, or any other type of equipment, being an "input" that would be relevant to the analysis under Article III:8(a) of the GATT 1994, nor did it make any distinction between inputs of an "integral" or "ancillary" nature.

7.124. In this connection, despite its argument regarding the "range of equipment" and "designated activities" that allegedly distinguish the facts of the present dispute from those in *Canada – Renewable Energy / Feed-In Tariff Program*, India acknowledges that "the range of equipment included solar cells and/or modules".[311] We note the explanation of the panel in *Canada – Renewable Energy / Feed-In Tariff Program* that the "domestic content level of a contract facility is calculated pursuant to a methodology" involving certain "Qualifying Percentages" associated with a range of different "Designated Activities".[312] This methodology applied to facilities generating electricity exclusively from certain sources of renewable energy, including solar photovoltaic energy.[313] Notwithstanding the various possible combinations of "designated activities" through which contract facilities could satisfy the "Minimum Required Domestic Content Level", the panel found that the measures "require[d] … electricity generators using solar PV technology … to purchase or use a certain percentage of renewable energy generation equipment and components that are sourced in Ontario".[314]

7.125. India is correct in observing that the requirements in *Canada – Renewable Energy / Feed-In Tariff Program* pertained to other activities for the development and construction of facilities that are not covered by the DCR measures in the present dispute, such as construction costs, consulting services, and other labour and services.[315] However, the panel in that dispute found that such other activities could not alone meet the "Qualifying Percentages" for the Minimum Required Domestic Content Level, and that the measures effectively imposed a requirement to use domestically-sourced "goods" or "generation equipment and components" in order to achieve the necessary level of domestic content.[316] With respect to these goods and equipment, the panel did

[309] India's second written submission, para. 21.

[310] India's second written submission, para. 21. India also contends that it is a "fundamental characteristic of solar cells and modules – i.e. their inherent and intrinsic property of being able to absorb light energy and convert it to electrons, and thereby generate electricity, which defines them as inputs that are integral for solar power generation". India's second written submission, para. 22. See also India's opening statement at the second meeting of the Panel, para. 6.

[311] India's response to Panel question No. 20(a). See also India's first written submission, para. 108 (referring to "the use of designated percentages of *equipment* for setting up a renewable energy generation facility").

[312] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.159.

[313] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.66.

[314] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.163.

[315] See Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.161, India's response to Panel question No. 20 (citing relevant portions of FIT contracts). See also India's first written submission, paras. 107 and 109.

[316] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.163. We note that India has questioned whether the measures in *Canada – Renewable Energy / Feed-in Tariff Program* would necessarily require the use of the specific products at issue in this dispute, arguing that it was possible to meet the minimum domestic content levels by relying on other equipment and activities. In particular, India focuses on the two specific items corresponding to "crystalline silicon solar photovoltaic cells" and "[s]olar photovoltaic modules (i.e. panels)" in the list of "designated activities" for which a qualifying percentage of domestic content could be achieved in projects using crystalline silicon technology. See India's response to Panel Question No. 20(a). In addition to these two items, the United States also includes other items pertaining to "generation equipment" generally (as opposed to "service activities") that needed to be domestically sourced in order to meet the Minimum Required Domestic Content Level. See United States' second written submission, paras. 22-28; United States' opening statement at the second meeting of the Panel, para. 17. In our view, the parties' differing calculations and conclusions in this respect derive from their disagreement as to the nature of

not draw any distinctions between the particular categories of equipment or goods specified under the measures in *Canada – Renewable Energy / Feed-In Tariff Program*.[317]

7.126. The Appellate Body likewise referred generally to "generation equipment" throughout its analysis in *Canada – Renewable Energy / Feed-In Tariff Program*, without specifying the precise nature or diversity of equipment that this comprised.[318] The Appellate Body did not suggest that there was any legally relevant distinction between such equipment and the other activities and services provided for under the measure in question.[319] Thus, we note that *Canada – Renewable Energy / Feed-In Tariff Program* entailed discrimination against the same "generation equipment" that is at issue in the present dispute, namely solar cells and modules, and that neither the panel nor the Appellate Body attached any legal relevance in their reasoning to the fact that *other* types of equipment were encompassed by the measure in question.

7.127. In our view, India's argument regarding the indispensable nature of "integral inputs" might also have been made with respect to generation equipment at issue in *Canada – Renewable Energy / Feed-In Tariff Program*, at least insofar as solar cells and modules were concerned.[320] We take particular note of the panel's observation on the relationship of the Minimum Required Domestic Content Level to "the very same equipment that is needed and used to produce the electricity that is allegedly procured", and its related conclusion that "there is very clearly a *close relationship* between … renewable energy generation equipment … and the product that is allegedly procured (electricity)".[321] The Appellate Body acknowledged that "a connection is articulated between the procurement of electricity and the Minimum Required Domestic Content Levels regarding generation equipment".[322] However, the Appellate Body considered that "this connection under municipal law is not dispositive of the issue, because Article III:8(a) imposes also other conditions"[323], such as the competitive relationship between relevant products, which was the dispositive factor regarding the applicability of Article III:8(a) in *Canada – Renewable Energy / Feed-In Tariff Program*.

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different equipment in the generation of solar power, particularly regarding the alleged distinction between "integral" and "ancillary" equipment.

[317] For example, the panel stated elsewhere in its reports that electricity generators (including those using solar PV technologies) were compelled "to purchase and use *certain types of renewable energy generation equipment* sourced in Ontario in the design and construction of their facilities". Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.111. (emphasis added)

[318] In particular, the Appellate Body stated that "the product that is subject to the [measures] challenged by the complainants as discriminatory under Article III:4 of the GATT 1994 and the TRIMs Agreement is *certain renewable energy generation equipment*". Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.75. (emphasis added)

[319] See Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.75-5.85.

[320] We note the European Union's view that the requirements in *Canada – Renewable Energy / Feed-in Tariff Program* were imposed on "components [that] were equally necessary to generate electricity". European Union's third-party submission, para. 37. In distinguishing "integral" from "ancillary" equipment, India contrasts solar cells and modules with other equipment such as "inverters, electrical wiring, etc." and argues that "if we eliminate an inverter or for that matter any other item, the solar cells and modules would continue to generate electricity". India's response to Panel question No. 19; India's opening statement at the second meeting of the Panel, para. 6. Leaving aside whether solar power could in fact be generated without inverters and electrical wiring, we note that India has specified the following products to be among the "range of equipment" other than solar cells and modules in *Canada – Renewable Energy / Feed-in Tariff Program*: "Silicon that has been used as input to solar photovoltaic cells" and "Silicon ingots and wafer". India's response to Panel question No. 20(b). The exclusion of these products appears to be an underlying assumption of India's contention that the requirements in *Canada – Renewable Energy / Feed-in Tariff Program* could be satisfied "by exclusively relying on the other equipment/designated activities (other than solar cells and modules)". India's response to Panel question No. 20(a). However, insofar as India contends that such products are "ancillary", we consider this to be in tension with its descriptions of solar energy generation and reflective of the difficulty of drawing a distinction between "integral" and "ancillary" inputs. See India's comments on the United States' response to Panel question No. 41-43, para. 11 (emphasis original):

> The most commonly used material used in solar cells and modules- *silicon*, is essentially a semi-conducting material that produces the photovoltaic effect- which is basically *photons of light* which excite *electrons in the silicon* into a higher state of energy, thereby allowing them to act as charge carriers for an electric current. The photons of light come from sunlight; whereas the electrons- which are the *carriers of electric current, come from the silicon in the solar cells and modules*.

[321] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.127. (emphasis added)

[322] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.78.

[323] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.78.

7.128. We are not persuaded that the considerations advanced by India rise to anything more than the "close relationship" between generation equipment and electricity that the Appellate Body rejected as the relevant standard under Article III:8(a) in *Canada – Renewable Energy / Feed-In Tariff Program*. Nor are we persuaded that the inclusion of other equipment and services under the measure in that dispute was of any relevance to the Appellate Body's implicit finding that the solar cells and modules subject to the measure did not constitute "inputs and processes of production" for the purposes of Article III:8(a).[324] To whatever extent Article III:8(a) applies to "inputs" (however that term is defined) that are not in a competitive relationship with the product purchased by way of procurement, it is evident that the Appellate Body did not find such considerations germane to its evaluation of electricity and generation equipment that included solar cells and modules.[325] We therefore reject India's argument under Article III:8(a) that solar cells and modules "cannot be treated as distinct from solar power"[326] and that, "by purchasing electricity generated from such cells and modules, [India] is effectively procuring the cells and modules".[327]

7.129. India additionally argues that "[t]he tariff for the power purchased under the PPAs incorporates within it the cost for the solar cells and modules", and that "India's purchase of electricity generated from solar cells and modules therefore constitutes an *effective purchase* of the cells and modules themselves".[328] However, we are similarly unpersuaded that these considerations alter the reasoning and conclusions set out above. It is undisputed that it is SPDs, rather than the Government of India, that are required to purchase solar cells and modules under the DCR measures.[329] India has not explained how *Canada – Renewable Energy / Feed-in Tariff Program* would be distinguished in any relevant respect from the present case based on the fact that the payment made by SPDs is facilitated by the contracts entered into with governmental entities, or that the price of electricity incorporates that of solar cells and modules.[330] Indeed, India's argument as to "effective purchase" based on the incorporation of costs would seemingly conflict with its primary argument that "integral inputs", but not the other "ancillary equipment" whose costs also may be reflected in the electricity tariff, are "effectively procured" based on the special nature of those integral products.[331]

7.130. India also raises concern about the potential consequences of a finding that "would mean that for a government to effectively procure solar cells and modules under Article III:8(a), it would need to: (a) purchase these products by itself and generate the electricity from it, or (b) purchase the products and provide it to SPDs for power generation".[332] According to India, "[s]uch an interpretation of Article III:8(a) would be an unnecessary intrusion into the nature and exercise of government actions relating to procurement of solar power, and this could not have been the intent of the drafters of Article III:8(a)."[333] Notwithstanding these arguments, India does not directly question the soundness of the Appellate Body's findings in *Canada – Renewable Energy /*

[324] The United States submits that a logical consequence of India's argument would be that, "had the Ontario Government limited its DCRs to just solar cells and modules, the [domestic content requirements] at issue in [*Canada – Renewable Energy / Feed-in Tariff Program*] would have been properly justified under Article III:8(a)". United States' comments on India's response to Panel question No. 42, para. 8.

[325] The same considerations apply to whatever extent that India bases its arguments on "processes of production" as opposed to, or in conjunction with, its assertion that solar cells and modules are "integral inputs". For example, we note that India states that "solar cells and modules can be characterized as constituting *integral inputs involved in the process of production*/generation of solar electricity, which is the product purchased by way of procurement". India's response to Panel question No. 44, para. 14. (emphasis added)

[326] See, e.g. India's response to Panel question No. 19 and India's response to Panel question No. 41, para. 7; India's opening statement at the second meeting of the Panel, para. 8. We note that India has used various formulations in its characterization of solar cells and modules, for example referring to them as "so fundamental, integral and intrinsic to generation of electricity, they cannot be treated as distinct or separate from the purchase of electricity itself". India's second written submission, para. 23.

[327] India's opening statement at the first meeting of the Panel, para. 28.

[328] India's response to Panel question No. 41, para. 7. (emphasis added)

[329] See, e.g. United States' response to Panel question No. 41, para. 8.

[330] See India's response to Panel question No. 23(b); India's comments on the United States' response to Panel question No. 41-43, paras. 12-15.

[331] See United States' comments on India's response to Panel question No. 41, paras. 4-5.

[332] India's first written submission, para. 117. See also India's opening statement at the first meeting of the Panel, para. 29.

[333] India's first written submission, para. 118. See also India's opening statement at the first meeting of the Panel, para. 29.

Feed-In Tariff Program, but rather asserts that "procurement" in Article III:8(a) should not be read to require "direct acquisition of the product".[334]

7.131. The United States and several third parties have raised concerns about the potential consequences of India's broader interpretation of Article III:8(a). The United States observes that the consequence of India's interpretation of Article III:8(a) would be to "permit India to purchase electricity but discriminate against imported solar cells and modules".[335] The European Union raises the concern that India's argument of "effective procurement", without direct acquisition, could "allow discrimination by proxy" whereby "Members could freely rely on contractors to breach their national treatment obligations for them, as long as the product they are procuring is somehow connected to a favoured domestic product".[336] Canada argues that Article III:8(a) should not be interpreted in a manner "that would allow discrimination through the production supply chain, including through measures governing process and production methods".[337]

7.132. We do not consider that the Appellate Body's interpretation of Article III:8(a) necessarily leads to the result that, in order for the Government of India to act within the scope of this derogation, it would have to purchase domestically produced solar cells and modules by itself and generate the electricity itself, or purchase solar cells and modules and then provide them to SPDs for power generation. In our view, it is by no means self-evident that the above scenarios referred to by India, which would involve the "direct acquisition" of solar cells and modules by governmental agencies, would necessarily meet all of the requirements of Article III:8(a). Notably, to fall within the scope of Article III:8(a), products must be purchased "for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale".

7.133. In further support of its argument regarding the direct acquisition of solar cells and modules, India cites the Appellate Body's statement that "if procurement was understood to refer simply to any acquisition, it would not add any meaning to Article III:8(a) in addition to what is already expressed by the word purchase".[338] However, we consider India's reliance on this statement to be misplaced. The Appellate Body noted that "the concepts of 'procurement' and 'purchase' are not to be equated" – the former concept " refer[s] to the process pursuant to which a government acquires products", while the concept of "purchase" relates to "the type of transaction used to put into effect that procurement".[339] In our view, this conceptual distinction informs the cumulative and separate elements of Article III:8(a), and India has not explained how its argument comports with the Appellate Body's holistic interpretation of Article III:8(a) or with "the principle of effective treaty interpretation [that] requires us to give meaning to every term of the provision".[340] Rather, we agree with the European Union that India's argument "reverses the logic of the Appellate Body" by subsuming the concept of "purchase" under a broader category of "procurement".[341] Thus, we do not find support for India's broad interpretation of "procurement" in the Appellate Body's reasoning in *Canada – Renewable Energy / Feed-In Tariff Program*.

7.134. Moreover, we observe that India's consequentialist arguments do not establish that the measures at issue in this case are distinguishable in any relevant respect from those considered by the Appellate Body. We note that the Appellate Body did state that the product acquired need not be "identical" to the foreign product subject to discrimination. At the same time, in the Appellate Body's assessment of similar factual circumstances, this flexibility was held to be constrained by the competitive relationship of products that are either like or directly competitive or substitutable, in accordance with the terms of Article III.[342] With respect to other factual scenarios that may be distinguishable in relevant respects from those of the present dispute, we found that it is unnecessary in this case to decide whether Article III:8(a) could cover the procurement of inputs into products purchased by a government. Thus, our finding does not necessarily imply a requirement of "direct acquisition" of a product under all factual circumstances, as we do not

[334] See, e.g. India's first written submission, para. 120.
[335] United States' second written submission, para. 16.
[336] European Union's third-party submission, paras. 38-40.
[337] Canada's third-party statement, para. 8.
[338] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.59.
[339] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.59.
[340] See Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.57.
[341] See European Union's third-party submission, para. 40.
[342] See Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.63.

decide upon the scope of Article III:8(a) beyond what is necessary to resolve the matter presented in this dispute.

7.135. Having considered the specific basis upon which India seeks to distinguish the facts and circumstances of the present dispute, we are not persuaded that there is any basis to find that the DCR measures are distinguishable in any relevant respect from the measures examined by the Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program*. In light of the Appellate Body's legal interpretation of Article III:8(a) as applied to the governmental purchase of electricity and discrimination against foreign generation equipment, we find that the discrimination relating to solar cells and modules under the DCR measures is not covered by the derogation of Article III:8(a).

7.2.6.3 Remaining elements under Article III:8(a) of the GATT 1994

7.136. We have found that the "product purchased" under the DCR measures is electricity and that the discrimination relating to solar cells and modules under the DCR measures is not covered by the derogation of Article III:8(a). This is a threshold legal element that must be satisfied in order to find that a measure is covered by the derogation in Article III:8(a), and the DCR measures fail to meet this threshold. Accordingly, it is not necessary for us to conduct any further assessment of the remaining legal elements of Article III:8(a) to determine the applicability of this derogation. Were we to find that one or more of the remaining legal elements were not satisfied, this would merely serve to establish a separate and additional basis for the overall conclusion, which we have already reached, that the DCR measures are not covered by the derogation in Article III:8(a). Were we to find that the remaining elements are satisfied, this would still have no implications for the overall conclusion given that the threshold legal element under this provision is not satisfied.

7.137. Nevertheless, we recall that panels have the discretion to address arguments and make additional findings beyond those strictly necessary to resolve a particular claim or defence, including, for example, factual findings that could serve to assist the Appellate Body in completing the legal analysis should it disagree with legal interpretations developed by the panel.[343] In this case, our finding on the threshold legal element under Article III:8(a) involves a question of law concerning the interpretation and scope of the derogation in Article III:8(a), in respect of which the parties hold opposing views. Furthermore, the issues raised under some of the remaining legal elements of Article III:8(a), and in particular whether the procurement and purchase of products under the DCR measures is "not with a view to commercial resale", involve extensive factual information of a technical nature relating to the purchase and sale of electricity under the National Solar Mission. If our findings on the threshold legal element under Article III:8(a) were modified or reversed on appeal, then the Appellate Body could be called upon to proceed to examine whether the DCR measures satisfy the remaining legal elements under Article III:8(a). In such circumstances, we consider it useful to proceed with a limited analysis and review of those issues, so that the Appellate Body may have the benefit of our factual findings related to these issues.

7.138. Therefore, our limited analysis and review is primarily factual, and will involve identifying the different issues that would need to be considered under remaining elements of Article III:8(a), the parties' positions on those different issues, and our factual findings on some of those issues.

7.2.6.3.1 Whether the DCR measures are "laws, regulations, or requirements governing procurement"

7.139. Article III:8(a) describes the types of measures falling within its ambit as "laws, regulations or requirements governing the procurement" by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

7.140. India submits that the instruments and documents governing the bidding process for the selection of SPDs under Phase I (Batch 1), Phase I (Batch 2) and Phase II (Batch 1) are a well-

[343] See para. 7.76. above.

defined framework of requirements governing procurement of solar power generated from solar cells and modules.[344]

7.141. According to the United States, the fact that the National Solar Mission is being carried out in phases "demonstrates the existence of a coherent program of related measures"[345] that govern relevant bidding and procurement procedures.[346] The United States further notes that India procures electricity under the National Solar Mission through PPAs.[347]

7.142. The Appellate Body explained that Article III:8(a) "requires an articulated connection between the laws, regulations, or requirements and the procurement, in the sense that the act of procurement is undertaken within a binding structure of laws, regulations, or requirements".[348] We recall our earlier conclusion, under Article III:4 of the GATT 1994, that the DCR measures are properly viewed as "requirements" affecting the internal sale, purchase, or use of solar cells and modules in India. Thus, the question before us is whether there is "an articulated connection" between "requirements" of the DCR measures relating to solar cells and modules, on the one hand, and the "act of procurement" that is effectuated through the government's purchase of electricity, on the other.[349]

7.143. The panel in *Canada – Renewable Energy / Feed-In Tariff Program*, although it was not examining the precise question later formulated by the Appellate Body, i.e. whether an "articulated connection" exists, made certain findings and observations that may be pertinent to answering the question. The panel considered that the domestic content requirement imposed on generation equipment, i.e. the products discriminated against, could be seen as "governing" the procurement of electricity. In this regard, the panel stated that the domestic content requirement in that case "compels the purchase and use of certain renewable energy generation equipment that is sourced [domestically] as a necessary prerequisite for the alleged procurement … to take place".[350] Thus, the procurement of electricity was considered to be "governed" by the requirements imposed on generation equipment.[351]

7.144. We note that it was in this context that the panel in *Canada – Renewable Energy / Feed-In Tariff Program* observed that the electricity procured is produced by "the very same equipment" subject to the domestic content requirement in that dispute and that "there is very clearly a close relationship between the products that are affected by the relevant 'laws, regulations or requirements' (renewable energy generation equipment) and the product that is allegedly procured (electricity)".[352] The Appellate Body considered "this connection under municipal law" to be relevant to whether "the act of procurement is taken within a binding structure of laws, regulations, or requirements", and not pertinent to the specific question of whether the product purchased was in a competitive relationship with the product discriminated against, which we addressed above.[353] Thus, the Appellate Body acknowledged that "a connection is articulated between the procurement of electricity and the Minimum Required Domestic Content Levels regarding generation equipment" in the context of whether "the act of procurement is taken within a binding structure of laws, regulations, or requirements".[354]

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[344] India's first written submission, para. 125.
[345] United States' response to India's request for a preliminary ruling, para. 30.
[346] See United States' first written submission, paras. 58-64.
[347] United States' first written submission, para. 76.
[348] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.58.
[349] As noted above, the Appellate Body distinguished the concepts of "procurement" and "purchase" under Article III:8(a), finding that the latter is the transactional means through which the former process of governmental acquisition is effectuated. Applying these considerations to the particular facts of *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body found that the product purchased *and* procured by the government was electricity. See, e.g. Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.75 (referring to "the product being purchased by a governmental agency for purposes of Article III:8(a)" as electricity) and 5.79 (considering that the "the product being procured is electricity"). By contrast, the "generation equipment" at issue in that dispute, like solar cells and modules in the present dispute, were neither purchased nor procured by the government within the meaning of Article III:8(a).
[350] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.124.
[351] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 7.125-7.127.
[352] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.127.
[353] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.78.
[354] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.78.

7.145. In the present case, in assessing whether the DCR measures "govern the procurement" of electricity, we recall our conclusion under Article III:4 that the DCR measures operate to impose compulsory conditions for bidding eligibility and participation under each of the relevant Batches of the National Solar Mission, and further mandate the use of domestically manufactured solar cells and modules through enforceable contractual obligations of SPDs. Similar to the measures before the panel and Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program*, compliance with these conditions is a "necessary prerequisite" for the government's procurement of the electricity generated by SPDs using the same equipment to which the DCR measures apply. In this sense, we consider that "a connection is articulated between the procurement of electricity"[355] and the requirements imposed by the DCR measures on the use of solar cells and modules. We therefore conclude that the DCR measures are "laws, regulations or requirements governing the procurement" of electricity.

7.2.6.3.2 Whether the procurement under the DCR measures is "by governmental agencies"

7.146. Article III:8(a) applies to laws, regulations or requirements governing procurement "by governmental agencies".

7.147. India states that "[a] 'governmental agency' is an entity acting for or on behalf of government and performing governmental functions within the competences conferred on it".[356] India refers to NVVN and SECI as the designated governmental agencies "for entering into PPAs with SPDs for purchase of solar power and feeding the same into the grid".[357] India characterizes NVVN as "a wholly owned subsidiary of the state-owned NTPC" and SECI as "a not-for-profit government company, which is under the administrative control of MNRE".[358] According to India, both NVVN and SECI "have been specifically designated as the implementing agencies for Phase I (Batch [1] and Batch [2]) and Phase II (Batch [1]) respectively and are entities acting for and on behalf of Government of India".[359] India further states that "[i]n their capacities as the implementing agencies, these entities are discharging the governmental function of ensuring solar power that is partially generated from domestically manufactured solar cells and modules is procured to meet the overall objective of ensuring stable supply of energy and contributing towards energy security."[360]

7.148. The United States submits that "NVVN and SECI are acting for India when they implement the DCRs India has determined to require as part of Phases I and II" of the National Solar Mission.[361] The United States considers that "NVVN and SECI are governmental agencies within the meaning of" Article III:8(a) because "(1) the Government of India designated NVVN and SECI as 'implementing agencies' for the JNNSM Program and (2) NVVN and SECI are responsible for enforcing the DCRs, a typical governmental action".[362]

7.149. The Appellate Body explained that " Article III:8(a) refers to entities acting for or on behalf of government", and stated that "the meaning of 'government' is derived, in part, from the functions that it performs and, in part, from the authority under which it performs those functions".[363] The Appellate Body thus considered that "the question of whether an entity is a 'governmental agency', in the sense of Article III:8(a), is determined by the competences conferred on the entity concerned and by whether that entity acts for or on behalf of government".[364]

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[355] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.78.
[356] India's first written submission, para. 126.
[357] India's first written submission, para. 128.
[358] India's first written submission, paras. 129-130.
[359] India's first written submission, para. 131.
[360] India's first written submission, para. 131.
[361] United States' response to Panel question No. 2, para. 4.
[362] United States' response to Panel question No. 2, para. 6.
[363] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.60 (citing Appellate Body Reports, *Canada – Dairy*, para. 97; and *US – Anti-Dumping and Countervailing Duties (China)*, para. 290).
[364] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.60.

7.150. As explained above, NVVN and SECI were selected by the Ministry of New and Renewable Energy of India to act as the agencies responsible for implementing the solar power project selection process and to serve as the government party in the individually executed PPAs. More specifically, NVVN was appointed by the central government as the "nodal agency" for Phase I (Batch 1 and Batch 2) of the National Solar Mission to purchase electricity from SPDs and to enter into Power Sale Agreements (PSAs) with Discoms.[365] In executing these transactions under Phase I (Batch 1 and Batch 2), NVVN was also designated as the recipient of an allocation of coal power from the Indian Ministry of Power "for bundling together solar power to be procured by NVVN" and selling the "bundled" power to Discoms, as discussed further below.[366] Under Phase II (Batch 1), SECI was similarly designated as the governmental entity to purchase electricity from SPDs and to enter into "back-to-back" PSAs with Discoms.[367] The role of SECI in these transactions also involved administration of the "Viability Gap Funding" scheme under Phase II (Batch 1), whereby successful bidders received a capital grant (as discussed in the next section).[368]

7.151. Based on the above competences conferred on NVVN and SECI in their implementation of Phase I (Batch 1 and Batch 2) and Phase II (Batch 1) of the National Solar Mission, and in particular their purchase of electricity on behalf of the government through individually executed PPAs, we conclude that the procurement of electricity is "by governmental agencies" within the meaning of Article III:8(a).

7.2.6.3.3 Whether the procurement under the DCR measures is of products purchased "for governmental purposes"

7.152. Article III:8(a) applies to laws, regulations or requirements governing the procurement by governmental agencies of products purchased "for governmental purposes".

7.153. India submits that "the government procurement of solar power from solar cells and modules by the governmental agencies, NVVN and SECI, … is an act pursuant to the government purpose of promoting ecologically sustainable growth while addressing India's energy security challenge".[369] India further submits that "the specific public function sought to be discharged is that of ensuring sustainable solar power development and enabling affordable access to solar power".[370] India explains that the governmental purpose and public function in this case is discernible "at two levels". First, India describes the bundling and VGF mechanisms (explained in more detail below) through which "[t]he clear and specific public function sought to be discharged is that of ensuring solar power development and enabling affordable access to solar power." Second, India refers to the use of the DCR measures "to ensure that the development of solar power is sustainable, and does not become excessively dependent on imports of solar cells and modules".[371] According to India, the governmental role "with regard to ensuring access to renewable solar electricity" is to be seen in the context of "the overall challenges for India to cater

[365] See JNNSM Mission Document, (Exhibit IND-1), Section 6; *Implementation of first phase of National Solar Mission – Issue of Presidential Directives – reg,* Ministry of Power (22 December 2009), (Exhibit IND-13).

[366] *Implementation of first phase of National Solar Mission – Issue of Presidential Directives – reg,* Ministry of Power (22 December 2009), (Exhibit IND-13).

[367] Phase II (Batch 1) *Guidelines*, (Exhibit USA-7), Section 2.8.1. The Phase II (Batch 1) *Guidelines* further state that "SECI will also hold responsibility for subsequent activities related to projects commissioning and performance monitoring & reporting on regular basis during the tenure of the projects". See also Phase II (Batch 1) *Guidelines*, (Exhibit USA-7), Section 2.2.

[368] See *Approval for Implementation of a Scheme for Setting up of 750 MW of Grid-connected Solar PV Power projects under Batch-I of Phase-II of Jawaharlal Nehru National Solar Mission with Viability Gap Funding support from National Clean Energy Fund*, Ministry of New and Renewable Energy (15 October 2013), (Exhibit IND-12) (additionally specifying that "funds for provision of the VGF support … will be made available to MNRE from the National Clean Energy Fund (NCEF) operated by the Ministry of Finance (Department of Expenditure) and [will] be disbursed to SECI based on physical and financial progress of the projects").

[369] India's first written submission, para. 143. In response to the Panel's questions, India submits that "'promoting ecologically sustainable growth' and 'addressing [India's] energy security challenge' cannot be seen as distinct from each other, and that ecologically sustainable growth is fundamental to India's strategy to address energy security". India's response to Panel question No. 21.

[370] India's response to Panel question No. 24(b). Also see India's first written submission, para. 142.

[371] India's second written submission, para. 29.

to the economic development requirements of its population in an environmentally sustainable manner".[372]

7.154. The United States argues that India has not "sufficiently explained why promoting sustainable development, solar power development, or affordable access to solar power should be understood as 'public functions' as opposed to important 'aims or objectives' of the Indian government".[373] This, according to the United States, is insufficient to establish a governmental purpose, as the Appellate Body's has explained that governmental agencies by their very nature pursue governmental aims or objectives.[374] The United States further argues that India does not regulate the downstream usage of solar power electricity, which "strongly suggests that India's procurement of electricity is not procurement for a 'governmental purpose' within the meaning of Article III:8(a)".[375]

7.155. Japan considers that "[o]nly purchases objectively necessary to achieve a 'governmental purpose' should be considered as those '*for*' governmental purposes", so that the exclusion for such purchases is not too "expansive".[376] In the view of Japan, India "need not purchase solar power" in order "to ensure the availability of affordable solar power to consumers or to ensure that the development of solar power does not become dependent on imports of cells and modules".[377]

7.156. The Appellate Body interpreted the term "governmental purposes" in Article III:8(a) as referring to "purchases of products directed at the government or purchased for the needs of the government in the discharge of its functions".[378] The Appellate Body was of the view that the phrase "products purchased for governmental purposes" in Article III:8(a) "refers to what is consumed by the government or what is provided by government to recipients in the discharge of its public functions", with the scope of such functions determined on a case by case basis.[379] Further, the Appellate Body read the word "for" relating the term "products purchased" to "governmental purposes" to require that there be "a rational relationship between the [purchased] product and the governmental function being discharged".[380] Importantly, the Appellate Body explained that "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", given that "governmental agencies by their very nature pursue governmental aims or objectives".[381] In summarizing its assessment, the Appellate Body framed the specific question under this element as whether products are "purchased for the use of government, consumed by government, or provided by government to recipients in the discharge of its public functions".[382]

7.157. We note that the "governmental purpose" and "public functions" advanced by India have multiple interrelated aspects. For instance, a primary governmental purpose or public function of the DCR measures alleged by India is "ensuring availability of affordable solar power to consumers", and that "in the process, it also seeks to ensure that part of the procurement of solar

[372] India's response to Panel question No. 24(b).

[373] United States' answer to Panel question No. 46, para. 20; United States' comments to India's answer to Panel question No. 47, para. 21.

[374] United States' answer to Panel question No. 46, paras. 20-21 (citing Appellate Body Reports, *Canada – Renewable Energy / Feed-in Tariff Program*, para. 5.66).

[375] United States' answer to Panel question No. 46, para. 24. India has argued that this is not a relevant test for the purposes of the present analysis. See India's comment to the United States' response to Panel question 46, paras. 21-23.

[376] Japan's third-party submission, para. 4. Japan explains its underlying concern that a "governmental purpose" could be easily assigned "by requiring a product to be distributed to consumers through a governmental agency allegedly for the purpose of ensuring the stable supply of such product or the supply of such product at an affordable price or of promoting certain domestic industry". See also Japan's response to Panel question No. 2 to the third parties, para. 8.

[377] Japan's response to Panel question No. 2 to the third parties, para. 9.

[378] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.67.

[379] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.68.

[380] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.68.

[381] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.66.

[382] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.74; see also para. 5.68 (stating that "the phrase 'products purchased for governmental purposes' in Article III:8(a) refers to what is consumed by government or what is provided by government to recipients in the discharge of its public functions").

power is from domestically manufactured cells and modules".[383] The various dimensions of the governmental purpose and public function at issue are evident in India's reference to "the public function to ensure that solar energy generation is achieved in an ecologically sustainably manner that is not excessively dependent on imports and can effectively contribute to … addressing the challenge of energy security".[384] India appears to present its governmental purposes and public functions as being inseparable and mutually dependent.[385] For its part, the United States "does not understand the existence of other non-governmental purposes to *ipso facto* preclude the application of Article III:8(a)", if the procurement at issue is "directed towards or intended to carry out at least one legitimate governmental purpose".[386] However, in the view of the United States, "where there are significant non-governmental motivations behind the procurement at issue, this might indicate that the procurement is not, in fact, directed towards the 'governmental purpose' articulated by the Member invoking Article III:8(a)".[387]

7.158. We consider the arguments raised by the parties in light of the Appellate Body's understanding that "for governmental purposes" can refer to two situations, namely "to what is consumed by the government or what is provided by government to recipients in the discharge of its public functions".[388]

7.159. With respect to the first scenario, which focuses on what is consumed by the government, India states that "downstream 'distribution utilities' can have any type of end use consumers including the central and state government and public agencies"[389], and that "NVVN and SECI sell the electricity to Discoms that feed it into the grid. To the extent that the supply from the grid caters to the requirements of the government (government offices, schools, hospitals, roads, railways, etc.), the government of India will be a consumer of the products it purchases."[390] To the extent that the transmission of electricity to government consumers is merely incidental and/or unintended, the United States questions whether this would meet the standard of a "purpose" understood as an "intention" or "aim".[391] In our view, it is not clear that India has argued the potential consumption of electricity by governmental entities as an independent grounds to find that procurement is "for governmental purposes" under the DCR measures. Instead, it appears that the governmental purpose and public function primarily contended by India concern the "supply of reliable and affordable electricity to recipients across India", which incidentally includes governmental entities.[392] Without deciding whether such incidental consumption by the government of purchased goods may be "for governmental purposes" within the meaning of Article III:8(a), we consider that India's arguments relate more closely to providing solar power to a broader range of recipients in the discharge of public functions.

7.160. The specific "public functions" cited by India concern ensuring affordable access to solar power, and ensuring some level of domestic production for ecologically sustainable growth and energy security. With regard to "what is provided by government to recipients in the discharge of its public functions", the Appellate Body has stated that "[t]he scope of these functions is to be determined on a case by case basis".[393] The Appellate Body also referred to an example in which "a public hospital purchases pharmaceuticals and provides them to patients".[394] One relevant limitation noted by the Appellate Body is that the finding of a governmental purpose "must go beyond simply requiring some governmental aim or objective with respect to purchases by governmental agencies".[395]

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[383] India's second written submission, para. 28.
[384] India's second written submission, para. 30, first bullet point.
[385] For example, India submits that "'promoting ecologically sustainable growth' and 'addressing energy security challenge' cannot be seen as distinct from each other, and that ecologically sustainable growth is fundamental to India's strategy to address energy security". India's response to Panel question No. 21.
[386] United States' answer to Panel question No. 47, para. 25.
[387] United States' comments to India's answer to Panel question No. 47, para. 20.
[388] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.68.
[389] India's first written submission, p. 36, table row 4.
[390] India's response to Panel question No. 24(a). See also India's response to Panel question No. 45, para. 16.
[391] United States' answer to Panel question No. 45, paras. 17-18.
[392] See India's response to Panel question No. 45, para. 16.
[393] Appellate Body Report, *Canada – Renewable Energy/Feed-in Tariff Program*, para. 5.68.
[394] Appellate Body Report, *Canada – Renewable Energy/Feed-in Tariff Program*, fn 514.
[395] Appellate Body Report, *Canada – Renewable Energy/Feed-in Tariff Program*, para. 5.66.

7.161. We note overlaps between the governmental purposes and public functions alleged by India under Article III:8(a) and the wider policy objectives it has described in relation to the DCR measures. The additional requirement under Article III:8(a), as explained by the Appellate Body, is that "the products purchased must be intended to be directed at the government or be used for governmental purposes" and that, consequently, "there be a rational relationship between the product and the governmental function being discharged".[396] Recalling our finding that the "product purchased" by the government in this case is electricity, we note that India refers to national legislation and initiatives regarding the importance of electricity in the context of its "crippling energy deficit".[397] India also cites reports of the United Nations Economic and Social Commission for Asia and the Pacific as well as the United Nations Development Programme regarding the role of the state in ensuring access to energy.[398] Furthermore, as discussed below in the context of whether the procurement and purchase of products under the DCR measures is not with a view to "commercial resale", India presents various considerations about the framework through which electricity is supplied and the role of regulatory control in its transmission to consumers.

7.162. As explained above[399], our analysis of this element of Article III:8(a) is confined to identifying the different issues that would need to be considered under this element and the parties' positions on those issues. Therefore, we do not decide on the legal questions of whether ensuring the affordable access of a product, or the other governmental purposes and functions identified by India[400], can constitute a "governmental purpose" or "public function" within the meaning of Article III:8(a). Nor do we express a view on whether this may turn on the particular product(s) in question and the specific context in which the government is purchasing and providing such product(s) to other recipients.[401]

7.2.6.3.4 Whether the procurement and purchase of products under the DCR measures is "not with a view to commercial resale"

7.163. Article III:8(a) applies to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes "and not with a view to commercial resale or with a view to use in the production of goods for commercial sale".

7.164. According to India, "the Appellate Body has emphasized that whether a transaction constitutes a commercial resale must be assessed having regard to the entire transaction".[402] In India's view, the relevant transaction in this case, which is not "with a view to commercial resale", is "one comprehensive transaction that begins with the process of solar power generation by the SPD, and ending with the sale of power to the Discoms and by the Discoms to the consumers".[403] India argues that in order to "minimize the impact of the price of solar power on the electricity tariff"[404], NVVN and SECI serve as intermediaries between SPDs, from whom solar power is purchased, and Discoms, to whom it is sold, through the bundling scheme implemented under Phase I (Batch 1 and Batch 2) and the viability gap funding (VGF) capital grant scheme under Phase II (Batch 1). The purpose of these schemes "was to ensure that the price of sale of solar power to Discoms was at a level that would enable distribution to consumers at an affordable price".[405] In other words, according to India, the bundling and VGF schemes "essentially ensured

[396] Appellate Body Report, *Canada – Renewable Energy/Feed-in Tariff Program*, para. 5.68.
[397] India's first written submission, paras. 136-137.
[398] India's first written submission, paras. 138-139.
[399] See para. 7.138. above.
[400] For instance, India submits that public functions are "by definition multidimensional in nature", and argues that "[t]he public functions to ensure that the development of solar power is sustainable, reliable and stable, and does not become excessively dependent on imports of solar cells and modules, requires development of a domestic manufacturing base for solar cells and modules". See India's response to Panel question No. 47, paras. 17-18.
[401] For example, India argues that "[t]he government of India's role with regard to ensuring access to renewable solar electricity is a natural corollary of the overall challenges for India to cater to the economic development requirements of its population in an environmentally sustainable manner". India's response to Panel question No. 24(b).
[402] India's response to Panel question No. 48, para. 21 (emphasis omitted) (citing Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Programme*, para 5.71).
[403] India's response to Panel question No. 48, para. 19.
[404] India's response to Panel question No. 48, para. 23.
[405] India's second written submission, para. 32; India's first written submission, para. 160.

that the sale of solar power is not linked to the costs of generation of such power, since that would have essentially made it unviable for Discoms to purchase it, or for consumers to pay for the same".[406] India further argues that neither NVVN nor SECI "has profit as a motive in entering into the relevant transactions under Phase I and Phase II. They had neither any 'view to commercial resale' nor any possibility of engaging in commercial resale."[407]

7.165. The United States submits that "any and all resale transactions envisaged by the government are relevant for assessing 'commercial resale' within the meaning of Article III:8(a)".[408] Therefore, the United States argues, "the relevant transactions include *both* (1) NVVN/SECI's resale of electricity to Discoms; *and* (2) the Discoms further downstream resale of electricity to commercial and retail customers".[409] This is the case because "the transaction occurs with the knowledge and intent that the Discoms will resell the electricity to downstream commercial and retail consumers".[410] The United States clarifies that it "does not argue that the sale of electricity is oriented at generating a profit for NVVN or SECI".[411] However, this is "not determinative of whether their procurement of electricity is taken with a view to commercial resale"[412] as, in the United States' view, "the bundling and VGF are designed to make the purchase and resale of electricity viable as a *commercial proposition* for Discoms", which indicates that the procurement of electricity by NVVN and SECI "is clearly undertaken 'with a view to commercial resale' – that is, with the knowledge and intent that the electricity will compete on the market and therefore need to be competitively-priced to ensure that it is marketable to consumers".[413]

7.166. The Appellate Body noted that "the words 'with a view to commercial resale' relate back to the 'products purchased'"[414], and thus "the product not to be 'resold' on a commercial basis is the product 'purchased for governmental purposes'".[415] In this case, we have found that the product procured and purchased by governmental agencies under the DCR measures is the electricity that is generated by SPDs. The focus of the parties' arguments under this element is also on electricity, and particularly on whether the resale of the electricity purchased by NVVN and SECI is commercially resold, rather than whether that electricity is purchased "with a view to use in the production of goods for commercial sale", as also provided under Article III:8(a). We accordingly confine our assessment to whether electricity generated by SPDs is a product purchased by governmental agencies "with a view to commercial resale".

7.167. The Appellate Body considered that "'commercial resale' is a resale of a product at arm's length between a willing seller and a willing buyer".[416] The Appellate Body further stated that "whether a transaction constitutes a 'commercial resale' must be assessed having regard to the entire transaction", and that "the assessment must look at the transaction from the seller's perspective and at whether the transaction is oriented at generating a profit for the seller. We see profit-orientation generally as an indication that a resale is at arm's length … [and] that the seller is acting in a self-interested manner".[417] The Appellate Body recognized that "there are circumstances where a seller enters into a transaction out of his or her own interest without making a profit", and in such cases "it may be useful to look at the seller's long term strategy". According to the Appellate Body, "[t]his is because loss-making sales could not be sustained

[406] India's second written submission, paras. 34 and 44; India's response to Panel question No. 48, para. 25.

[407] India's response to Panel question No. 48, para. 28; India's response to Panel question No. 49, para. 33; India's response to Panel question No. 52, para. 40.

[408] United States' response to Panel question No. 48, para. 27. (emphasis omitted)

[409] United States' response to Panel question No. 48, para. 29 (emphasis original); United States' comment to India's response to Panel question No. 48, paras. 22-23.

[410] United States' response to Panel question No. 48, para. 28.

[411] United States' response to Panel question No. 50, para. 32; United States' comment to India's response to Panel question No. 48, para. 24. Similarly, "[e]ven if the trading margin imposed on NVVN/SECI does not allow for recovery of costs or profits, this would not refute a finding that NVVN/SECI's procurement is taken with a view to commercial resale." United States' comment to India's response to Panel question No. 52, para. 29.

[412] United States' comments on India's response to Panel question No. 49, para. 27.

[413] United States' response to Panel question No. 51, para. 36; United States' comments on India's response to Panel question No. 51(c), para. 32.

[414] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.69.

[415] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.70.

[416] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.70.

[417] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.71.

indefinitely and a rational seller would be expected to be profit-oriented in the long term, though we accept that strategies can vary widely and thus do not see this as applying axiomatically".[418] In addition to the seller's perspective, the Appellate Body stated that the "transaction must also be assessed from the perspective of the buyer", and that "[a] commercial resale would be one in which the buyer seeks to maximize his or her own interest".[419] Therefore, "[i]t is an assessment of the relationship between the seller and the buyer in the transaction in question that allows a judgement to be made whether a transaction is made at arm's length".[420]

7.168. Although the parties have opposing views on the applicability of Article III:8(a) in light of the Appellate Body's interpretation in *Canada – Renewable Energy / Feed-In Tariff Program*, the facts that are potentially relevant to the analysis of whether electricity is purchased with a view to commercial resale are largely undisputed. In particular, the United States clarifies that it "does not dispute any point of India's factual description of the bundling or VGF schemes. Nor does the United States dispute that the bundling and VGF schemes are geared towards enabling the sale of solar power to Discoms (and eventually consumers) at a lower cost."[421] We recall in this connection that one of India's central contentions in the context of commercial resale is that "*but for* the bundling scheme and the VGF scheme being built into the process of procurement of solar power (through the involvement of NVVN and SECI respectively), the rate at which the solar power would have been purchased by Discoms from SPDs and sold by Discoms to consumers would have been significantly higher."[422] We therefore set out pertinent undisputed facts in relation to the bundling and VGF schemes administered through NVVN and SECI, respectively.

7.169. Under Phase I (Batch 1 and Batch 2), India employs a mechanism of "bundling" relatively expensive solar power with power from the "unallocated quota of the power from NTPC coal based stations, which is relatively cheaper".[423] This "bundling" scheme requires that, "for each MW of installed capacity of solar power for which a PPA is signed by NVVN, the Ministry of Power shall allocate to NVVN an equivalent amount of MW capacity from the unallocated quota of NTPC coal based stations and NVVN will supply this 'bundled' power to the Discoms".[424] The rate paid by NVVN for solar power is based on a "reverse bidding" process according to which SPDs enter competing bids against the "solar power tariff" determined under the regulatory framework described below.[425] Under Phase II (Batch 1), the VGF scheme entails a capital grant made available to SPDs through SECI that is linked to the capital costs of the SPD, with an upper limit of 30% of the project cost or Rs. 2.5 Cr/MW/project (i.e. 25 million Rupees per MW for each project), whichever is lower.[426] The amount of the VGF capital grant is likewise established through a "reverse bidding" process wherein the selection criteria are based on the amount of VGF quoted by prospective bidders.[427]

[418] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.71.
[419] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.71.
[420] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.71.
[421] United States' response to Panel question No. 51, para. 33.
[422] India's second written submission, para. 44. (emphasis original) See also India's response to Panel question No. 53(a), paras. 41-44; India's response to Panel question No. 55, para. 57.
[423] See India's second written submission, para. 36 (citing Phase I (Batch 1) *Guidelines*, (Exhibit USA-5), para. 1.1). India explains that "power from Central Generating Stations to beneficiary States/Union Territories is allocated in accordance with formula for allocation of power as specified by the Government. This is made to the States/ Union Territories in two parts, namely a firm allocation of 85% of the power, and the balance 15% of the unallocated power for allocation by the Government for meeting the urgent/overall requirement". India's second written submission, para. 37 (citing *Formula for Allocation of Power from Central Generating Stations to States*, Press Information Bureau, Ministry of Power, Government of India (19 March 2013), (Exhibit IND-44)).
[424] See India's second written submission, para. 36 (citing *Implementation of first phase of National Solar Mission – Issue of Presidential Directives – reg,* Ministry of Power (22 December 2009), (Exhibit IND-13)). India further states that the "energy output from 1 MW solar power is approximately one-fourth of that from 1 MW thermal power. The bundling of the two sources of power thereby enables creation of volume of energy whose combined costs would be substantially lowered because of the bundling".
[425] See, e.g. India's first written submission, p. 36, row 7 (citing Phase I (Batch 1) *Guidelines*, (Exhibit USA-5), p. 2; and Phase I (Batch 2) *Guidelines*, (Exhibit USA-6), p. 2).
[426] India's first written submission, para. 159; see also Phase II (Batch 1) *Request for Selection* document, (Exhibit USA-12), p. 6; India's response to Panel question No. 48, paras. 23-25. See also United States' first written submission, para. 37.
[427] India's second written submission, para. 41.

7.170. In the context of both Phase I (Batch 1 and Batch 2) and Phase II (Batch 1), India refers to the role of the Central Electricity Regulatory Commission (CERC), which is the central governmental entity "charged with the responsibility to specify terms and conditions for determination of tariff[s] for electricity", as well as the similar regulatory function of State Electricity Regulatory Commissions (SERCs) at the state level.[428] India describes the regulatory framework through which certain prices are determined by CERC and SERCs, as the case may be, which covers: the determination of "generic levellized" electricity prices on an annual basis from renewable energy sources, including solar power projects[429]; the price at which NVVN obtains coal power to be bundled with solar power in Phase I[430]; and "[t]he price at which electricity can be sold by Discoms".[431]

7.171. Based on the information provided by India, and not contested by the United States, the following table provides a breakdown of the various prices charged and paid by the Indian governmental agencies in the purchase and sale of electricity under Phase I (Batch 1 and Batch 2) and Phase II (Batch 1).

	Average price paid by NVVN/SECI to SPDs	**Price of unallocated coal power paid by NVVN [432]**	**Price of sale from NVVN/SECI to Discoms**	**CERC determined tariff for solar power**
Phase I (Batch 1)	Rs. 12.12/kWh[433]	Rs. 2.59/kWh to Rs. 3.67/kWh	Rs. 4.14/kWh to Rs. 4.81/kWh[434]	Rs. 17.91/kWh[435]
Phase I (Batch 2)	Rs. 8.77/kWh[436]	Rs. 2.59/kWh to Rs. 3.67/kWh		Rs. 15.39/kWh[437]
Phase II (Batch 1)	Rs. 5.45/kWh	N/A	Rs. 5.50/kWh	Rs. 8.75/kWh[438]

7.172. India points to the "generic levellized" price of solar power in the right-hand column as the "CERC approved benchmark tariffs", which represent the price "at which solar power could be purchased during the relevant time periods covered by" Phase I (Batch 1 and Batch 2) and Phase II (Batch 1).[439] Accordingly, India emphasizes that the bundling and VGF mechanisms "enabled the sale price of solar power to be significantly lower than these benchmark tariffs".[440] For its part, the United States acknowledges that the bundling and VGF schemes enable the sale of

[428] India's response to Panel question No. 53(a), para. 41. India explains that CERC regulates, *inter alia*: (a) the tariff of generating companies owned or controlled by the Central Government; (b) tariff for inter-state transmission of electricity; and (c) the trading margin in inter-state trading in electricity". India further explains that SERCs regulate, *inter alia*: (a) determination of tariff for generation, supply, transmission and wheeling of electricity within the State; (b) price at which electricity shall be produced/purchased for distribution within the State. India's first written submission, para. 148.

[429] India's response to Panel question No. 53(a), para. 42 (citing *The Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2009*, Central Electricity Regulatory Commission, (Exhibit IND-52)).

[430] India's second written submission, para. 40.

[431] India's first written submission, para. 151. India notes that this price may vary according to factors such as whether the supply is to residential or industrial entities, urban or rural areas, and the units of electricity consumed. See also India's response to Panel question No. 53(b) and (c).

[432] See NVVN Letter to Department of Commerce (5 March 2015), (Exhibit IND-45).

[433] Range from Rs. 10.95/kWh to Rs. 12.76/kWh

[434] See NVVN Letter to Department of Commerce (5 March 2015), (Exhibit IND-45). But see also India's response to Panel question No. 22: "The weighted average rate for bundled power which ranges from INR 4.34 to INR 4.60 per kWh, which is the price at which the bundled power procured by NVVN is sold to Discoms".

[435] See Order in Petition No. 53/2010, determining tariff for 2010-2011, Central Electricity Regulatory Commission (26 April 2010), (Exhibit IND-38).

[436] Range from Rs. 7.49/ kWh to Rs. 9.44/kWh

[437] See Order in Petition No. 256/2010, determining tariff for 2011-2012, Central Electricity Regulatory Commission, (Exhibit IND-39).

[438] See Order in Petition No. Petition No. 243/SM/2012 (Suo-Motu), Central Electricity Regulatory Commission (28 February 2013), (Exhibit IND-40).

[439] India's Response to Panel question No. 53(a), para. 43.

[440] India's Response to Panel question No. 53(a), para. 44.

solar power to Discoms (and eventually consumers) at a lower cost than these "benchmark tariffs"[441], which is confirmed in comparing the figures in the two adjacent right-hand columns.

7.173. We note that the above table reflects certain differences in the cost reduction implemented through the bundling and VGF mechanisms under Phase I (Batch 1 and Batch 2) and Phase II (Batch 1), respectively. In particular, the information for Phase I (Batch 1 and Batch 2) reflects average prices paid by NVVN for solar power generated by SPDs. These prices are established through the reverse bidding process, wherein SPDs offering the largest discount on the "benchmark" CERC determined rate are selected.[442] This solar power purchased by NVVN is then "bundled" with coal power allocated to NVVN at the prices set forth in the next column, thereby facilitating the sale from NVVN to Discoms at a further reduced price. With respect to Phase II (Batch 1), by contrast, the price at which electricity is purchased by SECI is fixed by the relevant *Guidelines* document at the rate of Rs. 5.45/kWh[443], and the *Request for Selection* document fixes the selling price of that electricity to Discoms at the rate of Rs. 5.50/kWh.[444]

7.174. India explains that "both NVVN and SECI include a small amount as 'trading margin' in the price at which they sell to Discoms", which is "a charge that compensates the trader in relation to risks inherent in the trading business such as default risk, late payment risk, contract dishonor risk, and inflationary risk".[445] This "trading margin" has been fixed by the MNRE at Rs. 0.07/kWh under Phase I (Batch 1 and Batch 2), and at Rs. 0.05/kWh under Phase II (Batch 1).[446] We note that the trading margin under Phase II (Batch 1) accounts for the exact difference in the price at which SECI purchases electricity from SPDs and the price at which it sells electricity to Discoms. Conversely, the trading margin under Phase I (Batch 1 and Batch 2) is not reflected so uniformly in the series of transactions through which bundling is implemented, in which there are variable prices arising from the processes of SPD selection and allocation of coal power to NVVN.[447]

7.175. With this factual background, we turn to the parties' disagreement on whether electricity is purchased by governmental agencies under the National Solar Mission "with a view to commercial resale".[448]

7.176. A fundamental point of contention between the parties relates to the scope of the relevant transaction for the purposes of assessing commercial resale. We recall the Appellate Body's explanation that "'commercial resale' must be assessed having regard to the entire transaction", which involves an assessment of "the transaction from the seller's perspective" as well as "from the perspective of the buyer".[449] India argues that the relevant transaction in this respect is "one comprehensive transaction that begins with the process of solar power generation by the SPD, and ending with the sale of power to the Discoms and by the Discoms to the consumers".[450] India further submits that, in the context of the present dispute, "NVVN/SECI acting as government

[441] See United States' response to Panel question No. 51, para. 33.

[442] See India's first written submission, p. 36, row 7; United States' first written submission, para. 36.

[443] Phase II (Batch 1) *Guidelines*, (Exhibit USA-7), Section 1.3(1). See also Phase II (Batch 1) *Request for Selection* document, (Exhibit USA-12), Section 1.3.2; and Phase II (Batch 1) model PPA, (Exhibit USA-19), p. 4, clause I.

[444] Phase II (Batch 1) *Request for Selection* document, (Exhibit USA-12), Section 3.11(iii).

[445] India's second written submission, para. 42 (citing Statement of Reasons, The Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, as available at 2010, (Exhibit IND-46)).

[446] India's second written submission, para. 43 (citing *Sale of Solar Power to State Utilities/Discoms under Phase I of JNNSM- Trading Margin of NVVN,* Ministry of New and Renewable Energy (7 June 2013), (Exhibit IND-47); Phase II (Batch 1) *Guidelines*, (Exhibit USA-7), Section 2.8.1; *Draft Standard Power Sale Agreement for Sale of Solar Power on Long Term Basis*, Solar Energy Corporation of India (23 July 2014), (Exhibit USA-10), Section 5.1.1).

[447] In this context, we observe from the above table that the cost reduction occurs at different stages in the transaction under the bundling and VGF schemes. The cost reduction achieved under Phase I (Batch 1 and Batch 2) occurs in sequential steps through the combination of "reverse bidding" by SPDs and bundling cheaper coal power before the sale of electricity to Discoms. Under Phase II (Batch 1), the VGF capital grant is a pre-established condition that enables SPDs to sell electricity in the first instance to SECI at a reduced rate, to which the trading margin is uniformly added in the subsequent sale of electricity to Discoms.

[448] As noted, "the word 'resale' refers to the term 'products purchased'" and, accordingly, "the product not to be 'resold' on a commercial basis is the product 'purchased for governmental purposes". Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.70.

[449] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.71.

[450] India's response to Panel question No. 48, para. 19.

agents for bundling and VGF are the *sellers*" and that "[t]he buyers are both the Discoms and ultimately the consumers who purchase the electricity from the Discoms".[451] By contrast, the United States argues that "the relevant transactions include *both* (1) NVVN/SECI's resale of electricity to Discoms; *and* (2) the Discoms further downstream resale of electricity to commercial and retail customers".[452] Based on this bifurcation of potentially relevant transactions, the United States argues that the relevant "buyers" are "(1) the Discoms that purchase the electricity from NVVN/SECI and (2) the downstream household and commercial consumers that purchase the electricity from the Discoms"; the corresponding "sellers" relevant to Article III:8(a) are "(1) NVVN/SECI, with respect to their resale of electricity to the Discoms and (2) the Discoms, with respect to their further resale of electricity to downstream household and commercial consumers".[453]

7.177. We note that, in its interpretation of "commercial resale" under Article III:8(a), the Appellate Body used the terms "transaction", "buyer", and "seller" in the singular tense after having narrowed the focus of the relevant "resale" to that of the "product purchased for governmental purposes".[454] Although the Appellate Body did not apply these considerations to the specific facts of *Canada – Renewable Energy / Feed-In Tariff Program*, we are of the view that this could be read to support the understanding that "commercial resale" under Article III:8(a) is concerned with the *immediate* resale by the governmental entity that purchases the product in question. India seems to adopt this understanding, notwithstanding its reference to a single "comprehensive transaction", in stating that "Article III:8(a) does not envisage any seller other than the Government which has purchased the product in the first place", and that "[t]he reference to 'commercial resale' is therefore with regard to sale by the governmental agency that has engaged in the 'purchase for governmental purposes'".[455] The United States disagrees with this interpretation, and submits that Article III:8(a) relates to whether the purchase is undertaken "*with a view to* commercial resale". On this basis, the United States argues that the sale of electricity by NVVN/SECI "occurs with the knowledge and intent that the Discoms will resell the electricity to downstream commercial and retail consumers", and that the focus of the analysis thus comprises *all* downstream resale transactions.[456]

7.178. An issue underlying the parties' disagreement is therefore whether "commercial resale" under Article III:8(a) is limited to the government's immediate resale of the product purchased, or if instead it may be understood as extending to resale transactions further downstream. The Appellate Body did not specifically address this question in *Canada – Renewable Energy / Feed-In Tariff Program*, nor did it analyse the implications of the language "with a view to" in Article III:8(a) upon which the United States bases its argument that the commercial character of downstream transactions might be imputed to a governmental entity with "knowledge and intent" of those transactions. However, we note that the assessment of the panel in *Canada – Renewable Energy / Feed-In Tariff Program*, which was ultimately rendered moot by the Appellate Body's finding that the "product purchased" in that case was electricity and that the discrimination relating to generation equipment was not covered by the derogation of Article III:8(a) of the GATT 1994, focused on the profit-making and downstream competition of entities all the way through to final retail sale.[457]

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[451] India's response to Panel question No. 48, para. 27.

[452] United States' response to Panel question No. 48, para. 29.

[453] United States' response to Panel question No. 48, para. 30. The United States also contests India's characterization of a single "comprehensive transaction", stating that "[t]here are, in fact, three transactions: (1) NVVN and SECI enter in Power Purchase Agreements to buy electricity from SPDs; (2) NVVN and SECI then enter into Power Sale Agreements to sell electricity to Discoms; and (3) the Discoms then resell the electricity to downstream retail and commercial consumers." United States' comments on India's response to Panel question No. 48, para. 23.

[454] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.70.

[455] India's comments on the United States' response to Panel question No. 48, para. 25.

[456] United States' comments on India's response to Panel question No. 48, para. 22.

[457] In this respect, the panel was addressing specific arguments raised by the parties in that case that "with a view to commercial resale" means either "a purchase with the aim to resell for profit", or more broadly as "with a view to being sold or introduced into the stream of commerce, trade or market, regardless of any profit". Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.146. The panel observed that the Government of Ontario purchased electricity from generators that was "eventually sold to consumers" by certain intermediaries, including government-owned entities and private-sector retailers. Panel Reports, *Canada – Renewable Energy/Feed-in Tariff Program*, para. 7.147. In reaching its conclusion under this

7.179. For the purposes of our limited analysis and review, we do not consider it necessary to decide on the legal question of the scope of the relevant transaction(s) for the purpose of assessing whether a governmental purchase is "with a view to commercial resale" within the meaning of Article III:8(a). However, we note that the manner in which the relevant transaction(s) is defined would have potentially significant implications for the assessment of whether there is "a resale of a product at arm's length between a willing seller and a willing buyer"[458], taking into account the Appellate Body's understanding that "whether a transaction constitutes a 'commercial resale' must be assessed having regard to the entire transaction".[459]

7.180. For example, the Appellate Body considered "profit-orientation [of the seller] generally as an indication that a resale is at arm's length", and noted that in some circumstances "it may be useful to look at the seller's long term strategy" to consider whether they are "acting in a self-interested manner".[460] In the present case, it is undisputed that the government agencies that purchase electricity are not themselves profit-oriented or self-interested.[461] It is also undisputed that those governmental agencies administer schemes that are designed to enable the sale of electricity at a reduced cost to downstream intermediaries and final consumers.[462] Thus, we consider that, with respect to the *immediate* resale of electricity to Discoms, it would be difficult to characterize the transaction as a "commercial resale" from the perspective of the relevant "sellers" (i.e. NVVN and SECI). In this regard, we recall that the NVVN and SECI enter into long term contractual purchase and sale agreements, and serve as vehicles for the bundling and VGF schemes whereby government resources (either in the form of coal power allocations or capital grants) are supplied in order to lower the cost of the electricity sold downstream.[463] The legal issue that arises from this is whether the lack of commercial resale from a seller's (or buyer's) perspective *alone* could be sufficient to establish that a transaction is not a "commercial resale" within the meaning of Article III:8(a).

7.181. Beyond the government's perspective in the context of its immediate resale of electricity to Discoms, the Appellate Body explained that "[t]he transaction must also be assessed from the perspective of the buyer", and that "[a] commercial resale would be one in which the buyer seeks to maximize his or her own interest".[464] Whether Discoms are viewed only as buyers in the government's immediate resale of electricity, or also as sellers in the full chain of transactions[465], the parties attach different significance to the fact that the bundling and VGF mechanisms are designed to ensure the viability of Discoms in their transmission of solar-generated electricity to retail consumers. India argues that "the intervention by the Government in designing the

element, the panel considered that "the Government of Ontario's purchases of electricity … may be considered to be a first step in the resale of electricity to retail consumers", and found relevant the "fact that electricity purchased by the Government of Ontario under the FIT Programme is bought from generators and sold to retail consumers through the same channels as all other electricity by [government-owned and municipal intermediaries] *in competition with private sector electricity retailers*". Panel Reports, *Canada – Renewable Energy/Feed-in Tariff Program*, para. 7.148. (emphasis original) See also parties' responses and comments on Panel question No. 55.

[458] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.70.

[459] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.71.

[460] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.71. At the same time, the Appellate Body "accept[ed] that strategies can vary widely and thus do not see this applying axiomatically".

[461] See United States' comments on India's response to Panel question No. 48, para. 24; United States' comments on India's response to Panel question No. 49, para. 27.

[462] See United States' response to Panel question No. 51(a), para. 33.

[463] With respect to the 'trading margin' that is included in the price at which NVVN and SECI sell to Discoms, India explains that "NVVN and SECI were not free to impose a trading margin based on their pure commercial assessment/profit maximization and interests" but rather "are bound by a cap … imposed on them by a Government direction which therefore removes the concept of 'commercial sale' from their operations, as they are no longer free to sell to maximize their profits in view of market conditions". India's response to Panel question No. 52, para. 39. The United States argues that "[e]ven if the trading margin imposed on NVVN/SECI does not allow for recovery of costs or profits", the procurement would still be "with a view to commercial resale" because "NVVN AND SECI purchase the electricity from SPDs … with the knowledge and intent that Discoms will resell the electricity to downstream retail and commercial consumers". United States' comments on India's response to Panel question No. 52, para. 29.

[464] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.71.

[465] We note India considers the United States to incorrectly classify the Discoms as "sellers" based on its view that "the focus of Article III:8(a) is on the Government as the seller of the product that is purchased". India's comments on the United States' response to Panel question No. 51, para. 30.

procurement programmes incorporating bundling and VGF, therefore, essentially ensured that the sale of solar power is not linked to the costs of generation of such power, since that would have essentially made it unviable for Discoms to purchase it, or for consumers to pay for the same".[466] The United States submits that "India's statements demonstrate that the bundling and VGF are designed to make the purchase and resale of electricity viable as a *commercial proposition* for Discoms", and that NVVN and SECI procure electricity "with knowledge and intent that electricity will compete on the market and therefore need to be competitively priced to ensure that it is marketable to consumers".[467]

7.182. The parties also raise various considerations of potential relevance to the assessment of the purchases and sales of electricity that occur downstream from the involvement of NVVN and SECI, particularly concerning the extent to which Discoms themselves are profit-seeking entities. The United States argues, for example, that many of the Discoms "to which India resells solar power are corporatized entities with a fiduciary duty to maximize profits or returns for shareholder[s]".[468] In response, India states that the evidence provided by the United States "discusses private sector distribution companies, with which no power sale agreements have been signed in Phase I and Phase II. As of now, all power sale agreements under Phase I and Phase II have been entered into only with public sector Discoms."[469]

7.183. Apart from the status of the particular Discoms to which NVVN and SECI sell electricity, both parties advance arguments as to Discoms' commercial nature based on the market and regulatory conditions in which they operate. In the view of the United States, the "fact that most Indian Discoms are either wholly private or corporatized demonstrates that India's electricity market is competitive, even if highly regulated. This means that when Discoms resell the electricity purchased from NVVN/SECI, they do so in competition with other Indian Discoms, including wholly private Discoms".[470] The United States also argues that "India has not denied that the CERC/SERC tariff is designed to allow for Discoms to recover a profit. Nor has India disputed that the Discoms are properly viewed as 'profit-oriented' actors that 'seek to maximize [their] own interests".[471]

7.184. India contends that the fact that Discoms are "corporatized entities, does not change their fundamental character as regulated entities which operate within the framework of a license from the Government".[472] India further submits that "Discoms resell electricity at tariffs regulated by the state electricity regulatory commissions, and cannot charge in excess of the tariff determined by the commission."[473] According to India, this regulation of "the sale price of electricity ensure[s] that the interests of consumers are accounted for and the sale of electricity in the market is viable to the extent that the cost of supply is recovered by the Discoms, and therefore consistency in the supply of affordable electricity is ensured".[474] Additionally, India contends that "there is no competitive market in terms of Discoms 'competing' with each other to provide electricity to consumers" as consumers do not choose the Discom from which they purchase electricity.[475] In India's view, Discoms "are not free to undertake 'commercial resale'. Their fiduciary duty to their shareholders is therefore over-ridden by the regulatory regime".[476]

7.185. We note some parallelism between the parties' arguments in the present dispute and those that were examined by the panel in *Canada – Renewable Energy / Feed-In Tariff Program*. In particular, the panel in that dispute was not persuaded by Canada's argument that there could be

[466] India's second written submission, para. 34.
[467] United States' response to Panel question No. 51, para. 36.
[468] United States' opening statement, para. 40 (citing *Private Distribution Companies in India,* (Exhibit USA-36)).
[469] India's second written submission, fn 38.
[470] United States' response to Panel question No. 54, para. 38.
[471] United States' comment to India's response to Panel question No. 53(b), para. 31 (citing Appellate Body Reports, *Canada – Renewable Energy/Feed-in Tariff Program*, para. 5.71).
[472] India's comment to the United States' response to Panel question No. 50, para. 28.
[473] India's comment to the United States' response to Panel question No. 50, para. 28 (citing Electricity Act of 2003 [No. 36 of 2003], §§ 76(1) (2003) ("Electricity Act"), (Exhibit USA-20), Section 42).
[474] India's comment to the United States' response to Panel question No. 50, para. 28; see also India's response to Panel question No. 53(b), para. 45; India's comment to the United States' response to Panel question No. 54, para. 33.
[475] India's comment to the United States' response to Panel question No. 54, para. 36; see also India's comment to the United States' response to Panel question No. 50, para. 27.
[476] India's comment to the United States' response to Panel question No. 54, para. 32.

no "commercial resale" because a market "'where supply and demand freely meet' does not exist in the Ontario electricity system".[477] The panel in that dispute also dismissed considerations of the fact that the initial resale by the government was only geared towards cost-recovery for the entity concerned, and went further to examine the profit-making of downstream intermediaries, some of which were governmental.[478] These aspects of the panel's reasoning were not examined on appeal and were rendered moot by the Appellate Body's reversal of other findings by the panel.

7.186. For the purposes of our limited analysis and review[479], we do not consider it necessary to decide on the legal issues raised above. Rather, we have identified the legal issues that would need to be considered under this element and the parties' positions on those issues. In addition, we have set out pertinent undisputed facts in relation to the bundling and VGF schemes administered through NVVN and SECI, respectively, including a factual description of the regulated prices at which electricity is purchased and sold by NVVN and SECI.

7.2.7 Conclusion on claims under Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994

7.187. In accordance with the Appellate Body's legal interpretation of Article III:8(a) of the GATT 1994 as applied to the governmental purchase of electricity and discrimination against foreign generation equipment, we have found that the discrimination relating to solar cells and modules under the DCR measures is not covered by the derogation of Article III:8(a) of the GATT 1994. Consequently, the discrimination relating to solar cells and modules under the DCR measures is inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994.

7.3 Defences under Articles XX(j) and XX(d) of the GATT 1994

7.3.1 Introduction

7.188. We now turn to India's defences under the general exceptions in Articles XX(j) and XX(d) of the GATT 1994. The general exceptions in Article XX of the GATT 1994 apply to the obligation in Article III:4 of the GATT 1994, and also to the corresponding obligation in Article 2.1 of the TRIMs Agreement.[480] As the party invoking general exceptions under Article XX of the GATT 1994, India bears the burden of demonstrating that the GATT-inconsistent measures at issue are justified under those exceptions. In addition, the parties' arguments reflect a shared understanding that what needs to be justified under Article XX of the GATT 1994 is not the National Solar Mission as a whole, but rather the DCR measures at issue.[481]

7.189. India advances a general underlying argument concerning the rationale of the DCR measures which forms the common basis for its more specific arguments under Articles XX(j) and XX(d).[482] India argues that it has an obligation to take steps to achieve energy security, mitigate climate change, and achieve sustainable development, and that this includes steps to ensure the adequate supply of clean electricity, generated from solar power, at reasonable prices.[483] India

[477] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.148.
[478] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 7.149-7.150.
[479] See para. 7.138. above.
[480] Article 3 of the TRIMs Agreement provides that "[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement".
[481] In *Thailand – Cigarettes (Philippines)*, the Appellate Body clarified that "when Article XX(d) is invoked to justify an inconsistency with Article III:4, what must be shown to be 'necessary' is the treatment giving rise to the finding of less favourable treatment. Thus, when less favourable treatment is found based on differences in the regulation of imports and of like domestic products, the analysis of an Article XX(d) defence should focus on whether those regulatory differences are "necessary" to secure compliance with 'laws or regulations' that are not GATT-inconsistent". Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 177 (citing See GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.27). See also para. 7.19. above.
[482] In its first written submission, India provides a lengthy discussion of the policy objectives it is pursuing before turning to its specific arguments under Articles XX(j) and XX(d). India's first written submission, paras. 168-207. India advances the same argument in the context of Article III:8(a). See, for instance, India's first written submission, para. 142.
[483] India's first written submission, paras. 188, 192, and 202.

explains that doing so would reduce its reliance on imported oil and coal.[484] According to India, ensuring an adequate supply of clean energy generated from solar power is only possible if Indian SPDs in turn have access to a continuous and affordable supply of the solar cells and modules they use to generate that solar power.[485] India emphasizes that its SPDs currently depend predominantly on foreign solar cells and modules for that purpose, and according to India this dependence on imports of foreign solar cells and modules creates a risk of disruption in continuous and affordable supply of solar cells and modules.[486] India submits that it is therefore necessary to ensure that there is an adequate reserve of domestic manufacturing capacity for solar cells and modules in case there is a disruption in supply of foreign solar cells and modules.[487] India refers to this as an "emergency reserve".[488] India argues that the DCR measures are necessary to the acquisition of solar cells and modules by SPDs because they are the only means that India has to increase domestic manufacturing capacity of cells and modules, and thereby reduce the risk of a disruption in Indian SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power.[489] In sum, India argues that the DCR measures "are essential to the acquisition of solar cells and modules by SPDs that are engaged in solar power generation, in order to ensure realization of India's policy objectives of energy security, sustainable development and ecologically sustainable growth".[490]

7.190. Based on the foregoing, India claims that the DCR measures are "essential to the acquisition or distribution of products in short supply" within the meaning of Article XX(j).[491] Specifically, India argues that the DCR measures are aimed at the "acquisition or distribution" of solar cells and modules "by SPDs that are engaged in solar power generation".[492] India submits that solar cells and modules are "products in general or local short supply" in India on account of its lack of domestic manufacturing capacity.[493] India has also argued that the *risk* of SPDs being unable to access these products makes them "products in general or local short supply" in India.[494] India argues that the DCR measures are "essential" to the acquisition of solar cells and modules by SPDs because they are the only means that India has to increase domestic manufacturing capacity of cells and modules, and thereby reduce the risk of a disruption in Indian SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power.[495] India further submits that the DCR measures comply with the elements of the *proviso* in the second part of Article XX(j), as they do not adversely impact the equitable entitlement to the product by other Members, and the conditions giving rise to the situation of short supply have not yet ceased to exist.[496]

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[484] India's first written submission, paras. 140 and 170-171.

[485] E.g., India's first written submission, para. 261 ("India is seeking to develop a functional local manufacturing base for cells and modules, which are the essential components in a solar PV generation plant, thereby ensuring a sustained supply of the same in the event of disruptions in imports"). See also India's first written submission, para. 229, 236 (subheading (ii), first bullet point).

[486] India's first written submission, paras. 168, 193, 209, 236 (subheading (i), third bullet point; and subheading (ii) second bullet point), and 272.

[487] India's first written submission, paras. 193, 201, and 209. At paragraph 195ff, India discusses indigenous manufacturing as an "emergency reserve".

[488] India's first written submission, paras. 195-201.

[489] India's first written submission, para. 236 (suheading (iv), last bullet point) and 262; India's second written submission, para. 65.

[490] India's first written submission, para. 229; India's opening statement at the first meeting of the Panel, para. 51.

[491] India's first written submission, paras. 208-237; India's opening statement at the first meeting of the Panel, paras. 41-51; India's responses to Panel question Nos. 25-31; India's second written submission, paras. 46-119; India's opening statement at the second meeting of the Panel, paras. 19-29; India's responses to Panel question Nos. 56, 59-62, 64-65, 69, and 71-73; India's comments on the United States' responses to Panel question Nos. 56-59, 69, 73, and 74.

[492] See para. 7.200. below.

[493] See para. 7.220. below.

[494] See paras 7.237. to 7.239. and 7.242. below.

[495] India's first written submission, para. 236 (heading (iv), last bullet point), stating in the context of Article XX(j) that India "does not also have within its disposal any alternative measure that could potentially be as effective as DCR in achieving the objective of incentivizing local manufacturing of cells and modules"). See also India's second written submission, paras. 74-86.

[496] India's first written submission, paras. 230-234, para. 236, and subheading (iv); India's opening statement at the first meeting of the Panel, para. 51; India's response to Panel question No. 28; India's second

7.191. India additionally claims that the DCR measures are "necessary to secure compliance with laws or regulations" within the meaning of Article XX(d).[497] In this regard, India refers to a series of international and domestic instruments reflecting its obligations to mitigate climate change and achieve sustainable development. India argues that because the DCR measures reduce the risk of a disruption in Indian SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power, the DCR measures "secure compliance with" those "laws and regulations".[498] As in the context of Article XX(j), India argues that the DCR measures are "necessary" because they are the only means it has to incentivize local manufacturing of solar cells and modules, and thereby reduce this risk.[499]

7.192. With regard to the chapeau of Article XX, India submits that the DCR measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.[500]

7.193. According to the United States, India has failed to demonstrate that the DCR measures are justified under Article XX(j).[501] The United States accepts that measures taken to increase domestic manufacturing capacity for certain products may, if those products are in short supply, qualify as a measure involving the "acquisition" of those products.[502] The United States also accepts that if the DCR measures were found to be measures "essential to the acquisition or distribution of products in general or local short supply", they would comply with the elements of the *proviso* in the second part of Article XX(j).[503] However, it argues that solar cells and modules are not "products in general or local short supply" in India within the meaning of Article XX(j). In addition to arguing that this threshold element of Article XX(j) is not satisfied, the United States argues that India has failed to demonstrate that the measures are "essential" to the acquisition of solar cells or modules, because there are several less trade-restrictive and WTO-consistent alternative measures that India could take to reduce the risk of a disruption in Indian SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power, including but not limited to less trade-restrictive and WTO-consistent alternative measures for increasing domestic manufacturing capacity.

7.194. As noted at the outset of our findings, the United States does not contest the legitimacy of the objectives pursued by India.[504] However, the United States argues that India has failed to demonstrate that the DCRs are "necessary to secure compliance with laws or regulations" under

written submission, paras. 108-119; India's opening statement at the second meeting of the Panel, paras. 28-29.

[497] India's first written submission, paras. 238-263; India's opening statement at the first meeting of the Panel, paras. 52-62; India's responses to Panel question Nos. 33-36; India's second written submission, paras. 120-144; India's opening statement at the second meeting of the Panel, paras. 30-37; India's responses to Panel question Nos. 66-68; India's comments on the United States' responses to Panel question Nos. 69, 73, and 74.

[498] India's first written submission, para. 255 (stating that "[t]he DCR Measures have been designed to secure compliance with India's obligations under its law and regulations which require it to ensure ecologically sustainable growth and sustainable development. The DCR Measures seek to achieve this by creating a local manufacturing base for solar PV cells and modules, in order to ensure the ability of satisfy the requirements for such cells and modules without being susceptible to the risks of imports, such as price fluctuations, and geo-political factors.") See also India's closing statement at the first meeting of the Panel, para. 10.

[499] India's first written submission, para. 262 (stating, in the context of Article XX(d), that "India does not have any reasonably available alternatives to achieve its objectives of building a domestic manufacturing base for solar cells and modules with a view to ensuring domestic resilience to the fluctuations and uncertainties associated with imports"). See also India's opening statement at the first meeting of the Panel, para. 62.

[500] India's first written submission, paras. 264-273; India's Response to Panel question No. 38; India's second written submission, paras. 145-154; India's opening statement at the second meeting of the Panel, paras. 38-39.

[501] United States' opening statement at the first meeting of the Panel, paras. 41-47; United States' responses to Panel question Nos. 25-32; United States' second written submission, paras. 34-43; United States' opening statement at the second meeting of the Panel, paras. 22-37; United States' responses to Panel question Nos. 56-61, 63, 69-70, 73, and 74; United States' comments on India's responses to Panel question Nos. 56, 59-62, 64-65, 69, and 71-73.

[502] United States' response to Panel question No. 56(b), paras. 44-45.

[503] United States' response to Panel question No. 63.

[504] See para. 7.18.

Article XX(d).[505] The United States argues as a threshold matter that the DCR measures are not designed "to secure compliance with laws or regulations" within the meaning of Article XX(d). The United States further argues that India has in any event failed to demonstrate that the DCR measures are "necessary" to mitigate climate change and achieve sustainable development as there are several less trade-restrictive and WTO-consistent alternative measures that India could take to reduce the risk of a disruption in Indian SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power, including but not limited to less trade-restrictive and WTO-consistent alternative measures for increasing domestic manufacturing capacity.

7.195. With regard to the chapeau of Article XX, the United States submits that "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."[506] However, the United States advanced no argumentation with respect to the requirements of the chapeau.

7.196. Canada[507], the European Union[508], and Japan[509] submit that the Panel should reject India's defence under Article XX(j). Each argues that solar cells and modules are not "products in general or local short supply" in India[510], and that the DCR measures are not "essential" to the acquisition of solar cells or modules.[511] With respect to Article XX(d), Canada and the European Union question whether the international and/or domestic instruments referred to by India are "laws or regulations", and whether the DCR measures can be said to "secure compliance" with them.[512] In addition, the European Union and Japan argue that the DCR measures are not "necessary" within the meaning of Article XX(d).[513] The European Union and Japan further argue that the DCR measures, as essentially "protectionist" policies, do not meet the requirements of the chapeau.[514]

7.197. In light of the focus of the parties' arguments, we consider that the main issues before us are whether the DCR measures involve the acquisition or distribution of "products in general or local short supply" within the meaning of Article XX(j) of the GATT 1994, whether the DCR measures are measures "to secure compliance with laws or regulations" within the meaning of Article XX(d) of the GATT 1994, and whether the DCR measures are "essential" (Article XX(j)) or "necessary" (Article XX(d)). If we find that the DCR measures are provisionally justified under Articles XX(j) or XX(d), then we will proceed to examine whether the DCR measures are applied in a manner that meets the requirements of the chapeau of Article XX.

[505] United States' opening statement at the first meeting of the Panel, paras. 48-52; United States' responses to Panel question Nos. 33 and 37; United States' second written submission, paras. 44-75; United States' opening statement at the second meeting of the Panel, paras. 38-45; United States' responses to Panel question Nos. 69-70, 73, and 74; United States' comments on India's responses to Panel question Nos. 66-69 and 71-73.

[506] United States' opening statement at the first meeting of the Panel, para. 40. (emphasis original)

[507] Canada's third-party statement, paras. 13-28.

[508] European Union's third-party submission, paras. 46-58; European Union's third-party statement, paras. 14-15.

[509] Japan's third-party submission, paras. 14-23; Japan's third-party statement, paras. 7-8.

[510] Canada's third-party statement, paras. 19-23; European Union's third-party submission, paras. 51-54; Japan's third-party submission, para. 19.

[511] Canada's third-party statement, paras. 15-18; European Union's third-party submission, paras. 55-58; Japan's third-party submission, paras. 20-22.

[512] Canada's response to Panel question No. 6 to the third parties, para. 31; European Union's third-party submission, paras. 64-68;

[513] European Union's third-party submission, paras. 69-76; Japan's third-party submission, paras. 14 and 24.

[514] European Union's third-party submission, paras. 77-83; European Union's third-party statement, para. 20; Japan's third-party submission, para. 23; Japan's third-party statement, para. 8.

7.3.2 Whether the DCR measures involve "the acquisition or distribution of products in general or local short supply"

7.3.2.1 Introduction

7.198. Article XX(j) establishes a general exception for measures essential to the acquisition or distribution of products in general or local short supply. It provides that nothing in the GATT 1994 shall be construed to prevent the adoption or enforcement by any Member of measures:

> essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures 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. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

7.199. The logical starting point of an assessment under Article XX(j) is the identification of the products that are alleged to be in "general or local short supply". We consider that it is for the party invoking and carrying the burden of proof under Article XX(j) to identify what those products are.

7.200. In this case, India has clearly identified solar cells and modules as the products allegedly in "general or local short supply" for the purpose of Article XX(j), and it has argued that the DCR measures are aimed at the "acquisition" of solar cells and modules "by SPDs that are engaged in solar power generation".[515] In response to the Panel's second set of questions, India confirmed that "[t]he DCR measures involve the acquisition of solar cells and modules by SPDs".[516] However, India then added, without any further elaboration, that "[e]qually, they could be seen as enabling the distribution of solar power generated from solar cells and modules".[517] This statement seems to allude to an alternative approach to analysing the challenged DCR measures under Article XX(j) that would constitute a fundamental change in India's argumentation, as it would involve focusing on a different product that is allegedly in short supply (i.e. electricity, as opposed to solar cells and modules), a different set of transactions relating to those products (i.e. their "distribution" rather than "acquisition"), and potentially by different entities (i.e. unspecified entities other than SPDs involved in the distribution). It appears to us that with the exception of this one statement, the entirety of India's argumentation under Article XX(j) in these proceedings rests on the premise that the DCR measures are aimed, in India's words, at the "acquisition" of solar cells and modules "by SPDs that are engaged in solar power generation". As noted, this statement was made without any further elaboration. Therefore, we do not consider this statement, alluding to an alternative way that the DCR measures "could be seen" under Article XX(j), to reflect any fundamental change in India's argumentation.[518] To the extent that we are to infer from this statement that India is actually arguing in the alternative that the DCR measures involve "the distribution of solar power generated from solar cells and modules", then we consider this undeveloped argument to be insufficient to meet India's burden of proof under Article XX(j).[519]

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[515] India's first written submission, paras. 229 and 236 (subheading (ii), first bullet point), and India's opening statement at the first meeting of the Panel, para. 50 (in each instance stating that "the DCR Measures are essential to the acquisition of solar cells and modules by SPDs that are engaged in solar power generation").

[516] India's response to Panel question No. 56(a), para. 60.

[517] India's response to Panel question No. 56(a), para. 60.

[518] Likewise, the United States indicates that it "understands India's position to be that the measures at issue involve *only* the 'acquisition' of cells and modules". United States' comments on India's response to Panel question No. 56(a), para. 38. (emphasis original)

[519] See Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 178-180.

7.201. Our analysis thus proceeds on the understanding that solar cells and modules are the products allegedly in "general or local short supply" for the purpose of Article XX(j), and that the DCR measures are aimed at the "acquisition" of solar cells and modules "by SPDs that are engaged in solar power generation". If we find that solar cells and modules are "products in general or local short supply", we will then examine, as a second step, whether the DCR measures involve the "acquisition or distribution" of those products.

7.3.2.2 Interpretation of "products in general or local short supply"

7.202. We note at the outset that the general exception contained in Article XX(j) has never been invoked as a defence before a GATT/WTO dispute settlement panel. Article 3.2 of the DSU directs us to interpret this provision "in accordance with customary rules of interpretation of public international law". In accordance with the general rule of treaty interpretation reflected in Article 31 of the Vienna Convention on the Law of Treaties, we will interpret the terms "products in general or local short supply" pursuant to the ordinary meaning of the terms of Article XX(j), read in their context and in the light of the object and purpose of the covered agreements. In accordance with Article 32 of the Vienna Convention, we may have recourse to supplementary means of interpretation to confirm the meaning resulting from the application of Article 31, or to determine the meaning of the terms if we conclude that the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable.

7.203. We begin with the ordinary meaning of the words "in short supply". In *China – Raw Materials,* the Appellate Body set forth its understanding of the meaning of these terms, as context to the interpretation of Article XI:2(a) of the GATT 1994:

> We consider that context lends further support to this reading of the term "critical shortage" [in Article XI:2(a)]. In particular, the words "general or local short supply" in Article XX(j) of the GATT 1994 provide relevant context for the interpretation of the term "critical shortage" in Article XI:2(a). We note that the term "in short supply" is defined as "available only in limited quantity, scarce".[520] Thus, its meaning is similar to that of a "shortage", which is defined as "[d]eficiency in quantity; an amount lacking".[521] Contrary to Article XI:2(a), however, Article XX(j) does not include the word "critical", or another adjective further qualifying the short supply. We must give meaning to this difference in the wording of these provisions. To us, it suggests that the kinds of shortages that fall within Article XI:2(a) are more narrowly circumscribed than those falling within the scope of Article XX(j).[522]

7.204. Thus, the Appellate Body understood the concept of "products in … short supply" to mean products "available only in limited quantity, scarce". In other words, products are "in short supply" when there is a "deficiency" or "amount lacking" in the "quantity" that is "available". Therefore, as a starting point to our interpretative analysis, it is clear to us that the concept of "products in … short supply" is concerned with the quantity of the product that is available.

7.205. We consider that there must be some objective point of reference to serve as the basis for an objective assessment of whether there is a "deficiency" or "amount lacking" in the "quantity" of a product that is "available".[523] The dictionary definitions referred to above do not expressly identify the point of reference for an assessment of whether there is a "deficiency" or "amount lacking" in the "quantity" of a product that is "available". However, they suggest that the point of reference relates to the "quantity" of a product that is "available", such as to enable an assessment of whether there is a "deficiency" or "amount lacking" in that available quantity

[520] (footnote original) *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 3115.

[521] (footnote original) *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2813.

[522] Appellate Body Report, *China – Raw Materials*, para. 325.

[523] We note that, among other things, this could lead to the result that there would be no objective basis upon which to make an objective assessment of whether a Member taking measures essential for the acquisition or distribution of products in general or local short supply was in compliance with the requirement, in the proviso to Article XX(j), that such measures "shall be discontinued as soon as the conditions giving rise to them have ceased to exist".

relative to demand. In this respect, we note that the definition of "in short supply" referred to by the Appellate Body is found within the broader definition of the word "supply", and is immediately preceded by the following main definition of "supply": "[t]he amount of any commodity actually produced and available for purchase. Correl. to *demand*" (emphasis original).[524] Thus, in its ordinary meaning, the word "supply" is the "correlative" of the word "demand", which is to say that the words "supply" and "demand" involve an interrelation and degree of mutual interdependency. This strongly implies that there is a "deficiency" or "amount lacking" in the "quantity" of a product that is "available" when the amount of the product available does not meet demand for that product. This understanding is reinforced by the fact that in *China – Raw Materials*, the Appellate Body understood the term "short supply" used in Article XX(j) to be synonymous with the term "shortage" used in Article XI:2(a). Although the Appellate Body considered that "the kinds of shortages" that fall within the scope of Article XX(j) are not as narrowly circumscribed as those falling within the scope of Article XI:2(a), it considered both provisions to deal with "shortages", and used the term "shortage" interchangeably with the term "short supply". We note that a product "shortage" is widely understood to mean a situation in which the supply of a product is not sufficient to meet demand.[525] Given that the word "supply" is the correlative of "demand", and their similarity with the term "shortage", we consider that the terms "products in … short supply" likewise refer to products in respect of which the quantity of available supply does not meet demand.

7.206. Turning to the remainder of the phrase in question, Article XX(j) refers to products in "general or local" short supply. We consider that these words relate to the extent of the geographical area or market in which the available quantity of supply of a product does not meet demand. The word "local" is defined as "in a particular locality or neighbourhood, esp. a town, county, etc., as opp. to the country as a whole", and "limited or peculiar to a particular place or places".[526] The word "general" is defined as "all or nearly all of the parts of a (specified or implied) whole, as a territory, community, organization, etc.; completely or nearly universal; not partial, particular, local, or sectional".[527] Taken together, the words "general *or* local" give Article XX(j) a wide ambit, and in our view cover product shortages within a region inside a country, a single country as a whole, an area including several countries, or even global shortage of a product.

7.207. Based on the foregoing, we consider that the ordinary meaning of the terms "products in general or local short supply" refers to a situation in which the quantity of available supply of a product does not meet demand in the relevant geographical area or market.[528]

7.208. We do not consider it necessary to have recourse to supplementary means of interpretation to determine the meaning of these terms. However, we have had recourse to supplementary means of interpretation to confirm our interpretation of the terms "products in general or local short supply".

7.209. The report on discussions in the London session of the Preparatory Committee of the United Nations Conference on Trade and Employment, which took place in 1946, notes that:

> The Preparatory Committee agreed that during a post-war transitional period it should be permissible to use [quantitative] restrictions to achieve [i] *the equitable distribution of products in short supply*, [ii] the orderly maintenance of war-time price control by countries undergoing shortages as a result of the war, and [iii] the orderly liquidation of temporary surpluses of government-owned stocks and of industries,

[524] *Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 3118. (emphasis original)

[525] J. Black, N. Hashimzade, G. Myles, *Dictionary of Economics* (Oxford University Press, 2009), p. 41 (defining "shortage" as "[a] situation when the demand for a good or service exceeds the available supply"); F. Foldvary, *Dictionary of Free-Market Economics*, (E. Elgar, 1998) p. 262 (defining "shortage" as "[t]he quantity demanded being greater than the quantity supplied at the prevailing price").

[526] *Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 1619.

[527] *Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 1081.

[528] The "relevant geographical area or market" would vary from case-to-case, and we use this expression to include, as appropriate, a region inside a country, a single country as a whole, an area including several countries, or a global shortage of a product.

> which were set up owing to the exigencies of war, but which it would be uneconomic to maintain in normal times. … all these exceptions would be limited to a specified post-war transitional period, which might, however, be subject to some extension in particular cases.[529]

7.210. These three different situations were provided for in Article 25:2(a) of the drafts of the Havana Charter for an International Trade Organization. Article 25:2(a) provided that the obligation to eliminate quantitative restrictions would not extend to the following:

> Prohibitions or restrictions on imports or exports instituted or maintained during the early post-war transitional period which are essential to: (i) *The equitable distribution among the several consuming countries of products in short supply, whether such products are owned by private interests or by the Government of any Member*; (ii) The maintenance of war-time price control by a Member country undergoing shortages subsequent to the war; (iii) The orderly liquidation of temporary surpluses of stocks owned or controlled by the government of any Member or of industries developed in any Member country owing to the exigencies of war, which would be uneconomic to maintain in normal conditions …[530]

7.211. The Second Session of the Preparatory Committee was held in Geneva from 10 April 1947 through 30 October 1947. During the Geneva session of the Preparatory Committee, it was decided to move these three post-war temporary exceptions to Article 43 (general exceptions to the commercial policy chapter) as a new second part of Article 43. Measures of these three types were to be removed in principle not later than 1 January 1951. It was stated that:

> The effect of this would be to permit during the transitional period [i] *the use of differential internal taxes and mixing regulations as well as quantitative restrictions in order to distribute goods in short supply*, [ii] to give effect to price controls based on shortages and [iii] to liquidate surplus stocks or uneconomic industries carried over from the war period.[531]

7.212. The general exceptions set forth in Article 43 ultimately became Article XX of the General Agreement on Tariffs and Trade. In the 30 October 1947 text of the General Agreement on Tariffs and Trade, Article XX included a Part II. This consisted of three paragraphs corresponding to the three situations noted above. The first situation was reflected in paragraph XX:II(a) of the General Agreement, which provided for measures:

> essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with any multilateral arrangements directed to an equitable international distribution of such products or, in the absence of such arrangements, with the principle that all contracting parties are entitled to an equitable share of the international supply of such products.

7.213. Article XX:II of the General Agreement further provided that:

> Measures instituted or maintained under part II of this Article which are inconsistent with the other provisions of this Agreement shall be removed as soon as the conditions giving rise to them have ceased, and in any event not later than January 1, 1951; *Provided* that this period may, with the concurrence of the CONTRACTING PARTIES, be extended in respect of the application of any particular measure to any

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[529] *GATT Analytical Index: Guide to GATT Law and Practice, 6th edn* (WTO, 1995), p. 592 (citing Report of the First Session of the London Preparatory Committee of the United Nations Conference on Trade and Employment, October 1946, E/PC/T/33, p. 11, para. III.C.1(b). (emphasis added)

[530] Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, March 1947, E/PC/T/34, p. 20. (emphasis added) See also Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, November 1946, E/PC/T/33, p. 29.

[531] *GATT Analytical Index*, p. 593 (citing E/PC/T/A/PV/30 p. 22. (emphasis added) Also referring to report at E/PC/T/W/245; discussion at E/PC/T/A/SR/30 p. 3-5, E/PC/T/A/PV/30 p. 21-27, E/PC/T/A/SR/33 p. 1-2, EPCT/A/PV/33 p. 2-7).

> particular product by any particular contracting party for such further periods as the CONTRACTING PARTIES may specify.

7.214. 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".[532]

7.215. At the Fifth Session of the Preparatory Committee, held in 1950, it was decided to prolong the validity of all three paragraphs of Article XX:II until 1 January 1952.[533] Further decisions extended this waiver until 1 January 1954[534] and 1 July 1955.[535] In the Review Session of 1954-55, it was agreed that the substance of paragraph (a) of Section II should be retained for the time being, subject to review not later than 30 June 1960, but that the remainder of paragraph XX:II should be deleted.[536] The Report of the Review Working Party on "Other Barriers to Trade" notes in this connection:

> In connexion with the proposed suppression of Section II of Article XX, one member of the Working Party made the point that the need for the exception in Section II(b) was not limited to shortages subsequent to the war, but might be needed in the event of a natural catastrophe. The Working Party considered, however, that other provisions of the Agreement were adequate to cover the application of restrictions when required by any natural catastrophe, and therefore did not consider it necessary to retain or amend the exception in Section II(b).[537]

Section II(a) then became paragraph (j) of Article XX. This change was effected through the Protocol Amending the Preamble and Parts II and III of the General Agreement and entered into effect on 7 October 1957.

7.216. The 1950 Report of the Working Party on "The Use of Quantitative Restrictions for Protective and Other Commercial Purposes"[538] also examined the use of export restrictions for products in "short supply" under what was then Article XX:II(a) of the General Agreement:

> The Working Party discussed the proviso … requiring the observation of the principle of equitable shares for all contracting parties in the distribution of the international supply of a product in local or general short supply, and noted that the word 'equitable' is used in Article XX:II(a) and not the word 'non-discriminatory' which is used in Article XIII.
>
> In respect of this type of restriction, general agreement existed on the following statements:
>
> (a) Apart from situations to which the provisions of Article XX:II(a) are applicable, the practice referred to is inconsistent with the provisions of the Agreement.
>
> (b) Although the requirement of Article XX:II(a) relates to the total international supply and not the supply of an individual contracting party, nevertheless if a contracting party diverts an excessive share of its own supply to individual countries (which may or may not be contracting parties) this may well defeat the principle that

[532] *GATT Analytical Index*, p. 593 (citing E/PC/T/A/SR.40(2), p. 15).
[533] *GATT Analytical Index*, p. 593 (citing Decision of 30 November 1950 on Extension of Time-Limit in Article XX Part II, GATT/CP/94. Also referring to Report on "Amendment to the Last Paragraph of Part II of Article XX", GATT/CP.5/32, II/46, 48, paragraph 7).
[534] *GATT Analytical Index*, p. 593 (citing II/28).
[535] *GATT Analytical Index*, p. 593 (citing 2S/27).
[536] *GATT Analytical Index*, p. 593 (citing L/334, and Addendum, adopted on 3 March 1955, 3S/222, p. 230, para. 41).
[537] *GATT Analytical Index*, p. 593 (citing L/334, and Addendum, adopted on 3 March 1955, 3S/222, pp. 230-231, para. 42).
[538] *GATT Analytical Index*, p.594 (citing GATT/CP.4/33).

all contracting parties are entitled to an equitable share of the international supply of such a product.

(c) What would not be regarded as an equitable share if it were the result of a unilateral allotment by a contracting party could not appropriately be defended as equitable within the meaning of Article XX:II(a) simply because it had been the consequence of an agreement between two contracting parties.

(d) The determination of what is 'equitable' to all the contracting parties in any given set of circumstances will depend upon the facts in those circumstances.[539]

7.217. When the need for paragraph (j) was reviewed at the Sixteenth Session in 1960, the GATT Contracting Parties noted "that the contracting parties have resorted to the provisions of this sub-paragraph in a relatively limited number of cases and that it is generally recognized that it would be appropriate to retain such provisions to enable contracting parties to meet emergency situations which may arise in the future".[540]

7.218. For the reasons given further above, we consider that the ordinary meaning of the terms "products in general or local short supply" refers to a situation in which the quantity of available supply of a product does not meet demand in the relevant geographical area or market. From the foregoing review of supplementary means of interpretation relating to the history of Article XX(j), it appears that this interpretation is consistent with the drafting history of this provision, the circumstances of its conclusion, and early practice of the GATT Contracting Parties.

7.219. Having set forth our understanding of the terms "products in general or local short supply", we now proceed to examine two specific interpretative issues that have been raised in this case. The first is whether a lack of domestic manufacturing capacity amounts to solar cells and modules being in "general or local short supply". The second is whether the risk of a shortage in India amounts to solar cells and modules being "products in general or local short supply" in India.

7.3.2.3 Whether a lack of domestic manufacturing capacity amounts to solar cells and modules being in "general or local short supply"

7.220. India argues that its "lack of manufacturing capacity of solar cells and modules amounts to a situation of local and general short supply of solar cells and modules in India".[541] India's view "is that a situation of 'local or general short supply' occurs when a country does not by itself produce or manufacture a product"[542], in the sense that a "[l]ack of production or manufacture in a market creates a situation of short supply".[543] In this regard, India submits that "[t]he fact that cells and modules can be imported does not negate the fact that they are in short supply in the Indian market because of the lack of indigenous production".[544]

7.221. The United States refers to India's acknowledgment that there is an "adequate availability" of solar cells and modules on the international market, notes that India has failed to explain why it is unable to avail itself of this supply , and submits that India has therefore failed to establish the factual predicate for invocation of Article XX(j).[545] According to the United States, India's view of "products in general or local short supply" as referring to domestically produced products rests on a misunderstanding of Article XX(j).[546] In the United States' view, "a local short supply exists if

[539] *GATT Analytical Index*, p. 594 (citing GATT/CP.4/33 (Sales No. GATT/1950-3, paras. 8-9).
[540] *GATT Analytical Index*, p. 594 (citing 9S/17). It was decided to retain the paragraph and to review the matter again in 1965. At the Twenty-second Session in 1965, the Contracting Parties decided that paragraph (j) "should be retained for the time being" and to review the need for it again in 1970. *GATT Analytical Index,* p. 594 (citing Decision of 15 March 1965, 13S/18). At the Twenty-sixth Session in 1970, the Contracting Parties adopted a recommendation of the Council that paragraph (j) be retained with no provision for further review. *GATT Analytical Index*, p. 594 (citing Decision of 20 February 1970, L/3361, 17S/18. Also referring to L/3350).
[541] India's first written submission, para. 213.
[542] India's closing statement at the first meeting of the Panel, para. 9.
[543] India's responses to Panel question Nos. 26 and 29(a).
[544] India's first written submission, para. 236 (subheading (i), second bullet point).
[545] United States' opening statement at the first meeting of the Panel, para. 42.
[546] United States' second written submission, para. 40.

domestic production plus imports and minus exports is inadequate to meet domestic demand".[547] Thus, where the facts demonstrate that a country is able to acquire the product at issue through importation, there is no "general or local short supply" within the meaning of Article XX(j).[548]

7.222. Canada, the European Union, and Japan all reject India's interpretation of the terms "general or local short supply". Canada considers that "the source (i.e. domestically manufactured or imported) of the supply of the products is not relevant".[549] The European Union considers that "[i]n and of itself … low or even non-existent domestic manufacturing capacity does not mean that there is a shortage".[550] Japan states that "it is plain that the term 'products' covers both domestically manufactured and foreign manufactured imported products".[551]

7.223. Beginning with the text of Article XX(j), we note that the words "products in general or local short supply" do not refer to "products *of national origin* in general or local short supply". Likewise, the term "supply" appears to be neutral as between domestic production and importation, in a way that Article XX(j) might not be if it instead referred to "products in general or local short *production*". The wording of Article XX(j) may thus be contrasted with other provisions of the GATT 1994 that contain rules that do relate, expressly, to the origin of the product concerned. 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"; Article XX(g) refers to "domestic production or consumption"; and Article XX(i) speaks of "restrictions on exports of domestic materials". We do not see any comparable language in Article XX(j) that speaks to the source of the products concerned, or to the question of where those products are produced.

7.224. We consider that the effect of adopting India's interpretation of Article XX(j) would be tantamount to interpreting the words "products in general or local short supply", in the first part of Article XX(j), as though they meant "products in general or local short *production*". We agree with India that the terms "supply" and "production" may be said to be "intrinsically linked"[552], in the sense that the total supply of a product available will generally increase as the total level of production in that product increases. In our view, however, it does not follow that these two words are interchangeable, such that a product in "short supply" can be equated with a product in "short production". Likewise, we consider that the words "supply" and "production" are not interchangeable in the context of the proviso contained in the second part of Article XX(j), which provides that measures covered by this general exception are subject to the requirement that they "shall be consistent with the principle that all Members are entitled to an equitable share of the international *supply* of such products". If these words were treated as interchangeable in that context, then the principle that all Members are entitled to an equitable share of the international *supply* of products in short supply would be tantamount to a far-reaching principle that all Members are entitled to an equitable share in the international *production* of products in short supply. This provides further support for the view that the word "supply" cannot, in the context of Article XX(j), be equated with the term "production".

7.225. As explained above, we consider that there must be some objective point of reference to serve as the basis for an objective assessment of whether there is a "deficiency" or "amount lacking" in the "quantity" of a product that is "available".[553] We have concluded that the ordinary meaning of the terms "products in general or local short supply" refers to a situation in which the quantity of available supply of a product does not meet demand in the relevant geographical area or market.[554] The alternative interpretation advanced by India is that a "lack" of domestic manufacturing capacity establishes that a product is in "short supply", irrespective of whether demand for that product can be met through other sources of supply.

[547] United States' response to Panel question No. 56(b), para. 44; United States' comments on India's response to Panel question No. 65, para. 48.
[548] United States' response to Panel question No. 26, para. 38.
[549] Canada's response to Panel question No. 3(a)(ii) to the third parties, para. 13.
[550] European Union's response to Panel question No. 3(a)(ii) to the third parties, para. 15.
[551] Japan's response to Panel question No. 3(a)(ii) to the third parties, para. 12.
[552] India's opening statement at the first meeting of the Panel, para. 49.
[553] See para. 7.205. above.
[554] See para. 7.207. above.

7.226. In our view, India's alternative interpretation of Article XX(j) does not present any objective point of reference to serve as the basis for an objective assessment of whether a product is in "short supply" within the meaning of Article XX(j). India has not adequately explained what would constitute a "lack" of domestic manufacturing capacity amounting to a "short supply" under its interpretation of Article XX(j). We note that India refers to its need for "sufficient manufacturing capacity".[555] In emphasizing that there is "short supply" by virtue of its lack of domestic manufacturing capacity, India might be understood to argue that domestic manufacturing is not "sufficient", and a product is in "local short supply", if the level of domestic manufacturing capacity does not meet the level of domestic demand. However, it appears that this is not India's position, as throughout these proceedings India has stressed that it "does not seek to maximize" either "self-sufficiency" or "self-reliance".[556] India maintains there is no need for the Panel to undertake "a quantification of its degree of self-reliance".[557] We consider that India has not itself articulated what would constitute "sufficient" manufacturing capacity for the purposes of Article XX(j) under its alternative interpretation of this provision. It is also not clear whether India is arguing that it would fall under the discretion of each Member concerned to determine what "sufficient" manufacturing capacity would be, or whether the point of reference for assessing the level of "sufficient" manufacturing capacity would vary from case-to-case, depending on the policy objective being pursued.[558]

7.227. India states that it "does not have a quantitative tool or a mathematical formula to determine with absolute precision as to what would amount to sufficient domestic manufacturing capacity", but "believes that the overall goal specified under the JNNSM Mission Document that domestic manufacturing capacity of solar cells and modules should be in the range of 4-5 GW, could be considered as reaching the point where such a concern would be addressed".[559] India notes that this target is specified under the JNNSM Mission Document.[560] However, India does not explain why this level of domestic manufacturing capacity would constitute "sufficient" manufacturing capacity, whether and if so how it is connected to the level of actual or anticipated domestic demand in India, and whether solar cells and modules would in its view no longer be in "short supply" within the meaning of Article XX(j) if it reaches this level of domestic manufacturing capacity. Based on the foregoing, we consider that India's interpretation of Article XX(j) is problematic because it does not reflect an objective point of reference that can be used for the purpose of making an objective assessment of whether a product is in "short supply" within the meaning of Article XX(j).

7.228. In support of its interpretation of Article XX(j), India argues that this provision makes clear that there can be a situation of "general or local short supply" within the meaning of the first clause even where there is, in the words of the *proviso*, an "international supply" of that product. We understand India to reason from this that, because Article XX(j) envisages that a product could be in "general or local" short supply in a relevant geographical area or market, while at the same time there is an "international supply" of that product, it follows by necessary implication that the possibility of meeting demand by importing the product, i.e. from the "international" supply, cannot mean that there is no "general or local" short supply. We agree with India that Article XX(j) envisages that there could be an "international supply" of a product at the same time that there is a short supply of that product in a relevant geographical area or market. However, we do not see how this contradicts the conclusion that "products in general or local short supply" refers to products in respect of which the quantity of available supply, from all sources, is not sufficient to meet demand. India's argument appears to rest on the unsupported factual premises that if there is an "international supply" of a product, i.e. if a product is generally available on the international market, it follows that this product can be imported into the country or area in question, and also that the quantity of the product that can be imported in quantities sufficient to meet demand. The

[555] India's opening statement at the first meeting of the Panel, para. 37.
[556] India's response to Panel question No. 38(b); India's second written submission, paras. 68 and 150; India's comments on the United States' response to Panel question No. 74, para. 86.
[557] India's response to Panel question No. 38(b).
[558] India's response to Panel question No. 31.
[559] India's second written submission, para. 119.
[560] India's second written submission, para. 119. See JNNSM Mission Document, (Exhibit IND-1), p. 9 (stating that "One of the Mission objectives is to take a global leadership role in solar manufacturing (across the value chain) of leading edge solar technologies and target a 4-5 GW equivalent of installed capacity by 2020, including setting up of dedicated manufacturing capacities for poly silicon material to annually make about 2 GW capacity of solar cells.")

fact that there is an "international supply" of a product does not mean that this supply is available in all places and regions, as this would seem to assume perfect and permanent integration across all markets and products. As the United States observed in response to a question from India, "a breakdown of local supply chains, or of transnational means of distribution, could lead to a short supply of a product in a particular region or locality, even as the same product is generally available on the international market".[561] Furthermore, assuming for the sake of argument that the existence of an "international supply" in a product meant that it was available in all places and regions, this would not necessarily mean that there was an ample or large quantity of the product in international supply sufficient to meet demand.

7.229. Related to the foregoing, India also argues that "the provision could not have meant that short supply will not be considered to exist when products can be imported", because "that would mean that in a globalized world, no product can be said to be in short supply since it can always be imported", rendering the whole of Article XX(j) redundant.[562] We observe that this argument again rests on the factual premise that in every country and region in the globalized world, or at least all WTO Members, demand for any product can always be fulfilled by relying on imports. For the reasons given above, we are not persuaded that this is the case. Further, the assumption that any such supply is necessarily stable and readily accessible, and in a globalized world always available in ample or large quantities sufficient to meet demand, is contradicted by India's insistence in this case on the need for sufficient domestic manufacturing capacity in the face of potential supply-side disruptions. The essence of India's defence under Article XX(j), and Article XX(d), is that "[a]ny dependence on imports brings with it risks associated with supply side vulnerabilities and fluctuations"[563], in the sense of "risks of market fluctuations in international supply".[564] If it is *a priori* the case that "in a globalized world, no product can be said to be in short supply since it can always be imported", then this would mean, *a priori*, that there are no such risks, and the DCR measures are not "essential" to the acquisition or distribution of solar cells and modules.

7.230. India also emphasizes that Article XX(j) is not textually or otherwise limited to *export* restrictions, and argues that under the interpretation of "short supply" advanced by the United States and certain third parties, it is not clear "what would be situations of local or general short supply that can justify the imposition of *import* restraints".[565] We understand India to reason that under the United States' interpretation of the terms "products in general or local short supply", measures to redress a situation of "short supply" could only take the form of export restrictions; however, the text of Article XX(j), unlike Articles XX(i) and XI:2(a) of the GATT 1994, is not confined to measures in the form of export restrictions; therefore, it must follow that the United States' interpretation of "products in general or local short supply" cannot be correct. We are not persuaded by such reasoning, because it does not necessarily follow from our interpretation of the terms "general or local short supply" that export restrictions are the only type of measures to redress a situation of "short supply".[566]

7.231. India further argues that the terms of this provision need to be interpreted in light of contemporaneous circumstances, following the Appellate Body's "evolutionary interpretation" of Article XX(g) of the GATT 1994 in *US – Shrimp*.[567] According to India, "what is essential to address situations of general or local short supply, needs to be seen in the context of contemporary

[561] United States' response to question No. 2 posed by India, para. 65.
[562] India's first written submission, para. 216.
[563] India's first written submission, paras. 142 and 168.
[564] India's second written submission, para. 72.
[565] India's closing statement at the first meeting of the Panel, para. 7. (emphasis added)
[566] For example, where the quantity of available supply of a product does not meet demand for that product in a given Member, it is conceivable that this Member might establish a temporary monopoly in respect of the sale of that product as a measure essential to the distribution of such products within its territory; a monopoly could be enforced and given effect through restrictions on both the exportation and the importation by private traders of the product concerned. Likewise, in a situation where the quantity of available supply of a product does not meet demand for that product in a given Member, it is conceivable that a Member might, even in the absence of a monopoly, take other measures to control both the importation and distribution of the product in a manner as part of a plan for the rationing of the product. We do not decide upon the types of measures and restrictions that may fall under Article XX(j) in situations other than that before us in the present dispute. These hypothetical examples merely serve to illustrate that it does not necessarily follow from our interpretation of the terms "general or local short supply" that export restrictions are the only type of measures to redress a situation of "short supply".
[567] India's first written submission, paras. 212, 213, 221, and 236 (subheading (i), first bullet point).

concerns of a country and the international community".[568] India argues that "the spectre of scarcity and shortages that may have been relevant only in situations of 'war' or post-war during the 1940s and 50s, needs to be seen in the present times in the context of evolution of circumstances whereby energy security and sustainable development have moved up the global agenda".[569]

7.232. We recall that in *US – Shrimp*, the Appellate Body rejected the view that the terms "exhaustible natural resources" in Article XX(g) of the GATT 1994 should be interpreted as covering only mineral/non-living natural resources. The Appellate Body noted that, "[t]extually, Article XX(g) is *not* limited to the conservation of 'mineral' or 'non-living' natural resources."[570] The Appellate Body also considered that "the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'".[571] We note that textually, Article XX(j) is not limited to situations of short supply arising from war or natural catastrophe. We therefore agree with India that the scope of Article XX(j) is not limited to post-wartime shortages or shortages arising from natural disasters.[572] In our view, it follows from the absence of any textual limitation or qualification that it would cover shortages arising from these or any other causes, insofar as it is a shortage of the kind covered by Article XX(j). We further note that in contrast to Article XI:2(a), which refers to "essential products", Article XX(j) refers to "products" without any such qualification.[573] We therefore consider that the terms "products in general or local short supply" includes not only any situation, but also any product, in respect of which the quantity of available supply, from all sources, does not meet demand. Furthermore, we agree with India insofar as it suggests that the types of measures that are "essential" to address situations of general or local short supply may need to be seen in the context of contemporary concerns of a country and the international community.[574] For example, we consider that the types of measures that may have existed in 1947 for acquiring or distributing products in short supply may not be the same as the types of measures that exist today for achieving the same purpose. In light of the foregoing, we consider that, as the Appellate Body found with respect to the provisions of Article XX(g), the terms "products in general or local short supply" in Article XX(j) are not static in their "content or reference", but are "sufficiently generic that what they apply to may change over time".[575]

7.233. However, we do not consider that the applicable legal standard for what it means to be a "product in general or local short supply" has changed over time. We consider that, even if a consequence of globalization and trade liberalization were the elimination of all product shortages in the world, such that the factual circumstance for invoking Article XX(j) would no longer exist and the provision would no longer have any sphere of operation, it would not be open to a treaty interpreter to change the applicable legal standard for what it means to be a "product in general or local short supply" in the name of "evolutionary interpretation" or ensuring that there would continue to be factual circumstances triggering the application of this provision.[576]

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[568] India's response to Panel question No. 29(b).

[569] India's response to Panel question No. 29(b).

[570] Appellate Body Report, *US – Shrimp*, para. 128. (emphasis original)

[571] Appellate Body Report, *US – Shrimp*, para. 130. We note that the Appellate Body followed a similar approach in *China – Publications and Audiovisual Products*. In that case, the Appellate Body stated that the relevant terms used in China's GATS Schedule were "sufficiently generic that what they apply to may change over time", and that GATS Schedules, like the GATS itself and all WTO agreements, "constitute multilateral treaties with continuing obligations that WTO Members entered into for an indefinite period of time". Appellate Body Report, *China – Publications and Audiovisual Products*, para. 396.

[572] The United States also indicates its agreement with this proposition. See United States' response to Panel question No. 32, para. 50.

[573] All of the parties and third parties that expressed a view on this point agree that the word "essential" does not modify the same terms in Article XI:2 and Article XX(j). By its terms, Article XI:2(a) concerns "foodstuffs or other products that are essential" to the Member concerned. In Article XX(j), the issue is whether the measure is "essential to the acquisition or distribution" of products in general or local short supply. In our view, whether a measure is "essential to the acquisition or distribution" of products in short supply is separate from the question of whether those products are essential, and is also separate from the question of whether the acquisition or distribution of those products is essential to one or more policy objectives.

[574] India's response to Panel question No. 29(b).

[575] Appellate Body Report, *US – Shrimp*, para. 130.

[576] Sir Gerald Fitzmaurice offered the following observations on the possibility of a treaty provision's "sphere of operation" being narrowed as a consequence of changing factual circumstances: "Treaties not

7.234. Based on the foregoing, we consider that the terms "products in general or local short supply" refer to a situation in which the quantity of available supply of a product, from all sources, does not meet demand in a relevant geographical area or market. We do not consider that India's manufacturing capacity for solar cells and modules is irrelevant to the question of whether those are "products in general or local short supply" in India. Rather, our view is that a product is "in general or local short supply" when the quantity of available supply of that product, from all sources, does not meet demand in the relevant geographical area or market in question. This includes all available sources of supply, including both foreign and domestic sources. Domestic manufacturing capacity is therefore one variable that must be taken into account to assess whether solar cells and modules are products in short supply in India. In other words, our view is that a lack of domestic production in the products at issue is a necessary, but not sufficient, condition for finding that supply of that product, from all sources, does not meet demand in the relevant geographical area or market in question.

7.235. We do not consider it necessary to have recourse to supplementary means of interpretation to resolve the specific interpretative issue of whether a lack of domestic manufacturing capacity amounts to solar cells and modules being in "general or local short supply". However, we recall that in accordance with Article 32 of the Vienna Convention, we may have recourse to supplementary means of interpretation to confirm the meaning resulting from the application of Article 31. We have reviewed supplementary means of interpretation related to the history of Article XX(j) to confirm our interpretation. We see nothing in these supplementary means of interpretation[577] to support the conclusion that the terms "products in general or local short supply" were intended to cover products in respect of which there is merely a lack of domestic manufacturing capacity.

7.236. For the reasons set forth above, we are not persuaded that India's "lack of manufacturing capacity of solar cells and modules amounts to a situation of local and general short supply of solar cells and modules in India".[578] We conclude that the terms "products in general or local short supply" refer to a situation in which the quantity of available supply of a product, from all sources, does not meet demand in a relevant geographical area or market. They do not refer to products in respect of which there merely is a lack of domestic manufacturing capacity. India has not argued that the quantity of solar cells and modules available from all sources, i.e. both international and domestic, is inadequate to meet the demand of Indian SPDs or other purchasers.

7.3.2.4 Whether the risk of a shortage in India amounts to solar cells and modules being "products in general or local short supply" in India

7.237. We now turn to an alternative argument that was advanced by India in the course of these proceedings, which is that the *risk* of a disruption in imports, and the risk of a resulting shortage of solar cells and modules for Indian SPDs, makes these "products in general or local short supply". The question of "risk" is therefore central to India's defence and argumentation in this case. According to India, its "abysmally low"[579] level of domestic manufacturing capacity for solar cells and modules, and the resulting reliance on imported solar cells and modules by SPDs, create a risk of a shortage; the DCR measures increase domestic manufacturing capacity, and thereby reduce the risk of a disruption in SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power.

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infrequently assume or base themselves on the pre-existence of some fact or right. … There is no *a priori* necessity for any result other than that, if the fact does actually persist, or the right remain in existence, the treaty will continue to have relevance and applicability – and if not, not: that is to say, it (or the particular clauses concerned) will to that extent become obsolete or cease to have any useful sphere of operation." G. Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points" *The British Year Book of International Law*, Vol. 33 (1957) 203, at pp. 233-234.

[577] See paragraphs 7.209. to 7.217.

[578] India's first written submission, para. 213.

[579] India's first written submission, para. 209. India states that of the total 2775 MW of solar PV installed capacity in India, domestically manufactured cells and modules under the DCR Measures account for only 140 MW; over 90% of India's solar PV installations are based on imported cells and modules. India's first written submission, para. 271; India's response to Panel question No. 7(a). See *Updated data on Manufacturing capacity of Solar Cells and Modules*, Ministry of New and Renewable Energy (June 2014), (Exhibit IND-29).

7.238. In its first written submission, India did not state that solar cells and modules are "products in general or local short supply" on the grounds that they are at *risk* of being in short supply; rather, it argued that "India's lack of manufacturing capacity of solar cells and modules amounts to a situation of local and general short supply of solar cells and modules in India".[580] In the context of arguing that the DCR measures "seek to address general or local short supply of solar cells and modules", India stated:

> India's dependence on imported cells and modules makes her vulnerable to the risks associated with international supply and market fluctuations. … The DCR Measures seek to build manufacturing capacity and skilled human resources that can understand and use the technology associated with solar cells and modules, to redress the issue of local short supply to minimize the risks of dependence on imported cells and modules, and achieve domestic resilience in addressing any supply side disruptions.[581]

In the context of arguing that the DCR measures are "essential" to the acquisition of solar cells and modules, India reiterated that:

> Having the ability to manufacture cells and modules is essential to minimizing the risks resulting from being solely dependent on imports of such products. This is essential for attaining India's policy objectives of energy security and sustainable development.[582]

7.239. However, in response to a question from the Panel asking India to clarify whether its position is that the concept of "products in general or local short supply" covers products at *risk* of being in short supply, India stated that "the concept of 'short supply' under Article XX(j) would include situations of existing short supply, as well as any risks to short supply".[583] In support of this view, India argued that the principle of addressing "risks" associated with the other sub-paragraphs of Article XX has been recognized, including for example halting the spread of risks to human life or health under Article XX(b), notwithstanding that those provisions are also, like Article XX(j), drafted in the present tense. [584]

7.240. The United States responded that Article XX(j) is applicable only with respect to products that are presently "in short supply", and does not cover preventative or anticipatory measures with respect to products that might or could fall into short supply sometime in the future.[585] Among other things, the United States argued that to the extent that the concept of risk is inherent in Article XX(b) of the GATT 1994, it is because that provision explicitly sanctions measures necessary "*to protect* human, animal, or plant life". Thus, the United States argues that by its terms Article XX(b) necessarily envisages pre-emptive measures, that is measures put into place before risks to human, animal, or plant life come to fruition, whereas the language of Article XX(j) ("in short supply") justifies only measures taken once a short supply has actually materialized.[586]

7.241. Canada, the European Union, and Japan all advanced arguments supporting the conclusion that the terms "products in general or local short supply" under Article XX(j) do not cover products at *risk* of becoming in short supply.[587] Brazil however stated that "an imminent risk of a product becoming in short supply may allow for countries to adopt measures", but that those measures would be "less drastic than those required when a shortage is already under way".[588]

7.242. In its comments on the United States' responses to the second set of questions from the Panel, India clarified its position. First, in response to the United States' argument is that Article XX(j) addresses situations of products that are currently in short supply, India stated that it

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[580] India's first written submission, para. 213.
[581] India's first written submission, para. 272. See also para. 236 (subheading (i), third bullet point).
[582] India's first written submission, para. 236 (subheading (i), fourth bullet point).
[583] India's response to Panel question No. 29(c). See also India's second written submission, paras. 87-91; India's opening statement at the second meeting of the Panel, para. 26.
[584] India's response to Panel question No. 29(c); India's second written submission, paras. 89-91.
[585] United States' opening statement at the second meeting of the Panel, paras. 28-30. See also United States' response to Panel question No. 57.
[586] United States' opening statement at the second meeting of the Panel, para. 30.
[587] Responses of Canada, the European Union and Japan to Panel question No. 3(a)(i) to third parties.
[588] Brazil's response to Panel question No. 3(a)(i) to the third parties.

"emphasizes that its fundamental argument is that there is local and general short supply of solar cells and modules because of low capacity of domestic manufacturing".[589] Second, after expressing its disagreement with the United States "that the concept of risks in any form cannot be taken into account under Article XX(j)", and reiterating its argument that the "element of risk is inherent in [the] use of any of the provisions of Article XX", India stated:

> India however clarifies that the risks relating to dependence on imports is not relevant for an assessment of the threshold issue in Article XX(j) regarding whether there is "local or general short supply" in the first place. The element of risks relating to reliance on imports could assume relevance in the overall assessment of whether a measure is essential in addressing a situation of short supply.[590]

7.243. The foregoing leads us to understand that when India argues that there is a risk of a disruption in imports of affordable solar cells and modules, and of SPDs being unable to acquire solar cells and modules as a consequence of their reliance on imported solar cells and modules, it is addressing whether the DCR measures are "essential" to the acquisition of solar cells and modules, and *not* the threshold issue of whether there is "local or general short supply" in the first place. With respect to the threshold question of whether there is "local or general short supply" in the first place, we understand India's sole argument to be that "India's lack of manufacturing capacity of solar cells and modules amounts to a situation of local and general short supply of solar cells and modules in India".[591] We understand India's view to be that the concept of "products in general or local short supply" *may* cover products at risk of being in short supply, but it is not arguing, in the present case, that solar cells and modules are "products in general or local short supply" on that basis. However, given that India's position is not entirely free of ambiguity, we will consider this issue in light of Articles 31 and 32 of the Vienna Convention.

7.244. Article XX(j) establishes a general exception for measures "essential to the acquisition or distribution of products in general or local short supply". The ordinary meaning of the terms "products in … short supply" is of course products that are presently in short supply. The Spanish version is also drafted in the present tense, referring to measures "esenciales para la adquisición o reparto de productos *de los que haya* una penuria general o local"; the French version is also drafted in the present tense, referring to measures "essentielles à l'acquisition ou à la répartition de produits pour lesquels *se fait sentir* une pénurie générale ou locale". Thus, the English, Spanish and French versions of the text, each equally authentic, are each equally difficult to reconcile with the view that this language covers products at risk of being in short supply.

7.245. The immediate context of the terms "products in … short supply" does not lend support to the view that they cover products at risk of being in short supply. The proviso in the second part of Article XX(j) provides that Members may take GATT-inconsistent measures essential to the acquisition or distribution of products "in general or local short supply", subject to the requirement that they "shall be discontinued as soon as the conditions giving rise to them have ceased to exist". This implies that the conditions giving rise to the measures already exist. Moreover, insofar as there is always some risk of a future shortage of any product, the strict wording of this proviso does not sit well with the view that "products in general or local short supply" includes products at risk of being in short supply.

7.246. In contrast to the wording of Article XX(j), the text of Article XI:2(a) of the GATT 1994 expressly refers to export prohibitions temporarily applied "to prevent or relieve critical shortages" of foodstuffs or other products essential to the exporting Member. Thus, the text of Article XI:2(a), unlike the text of Article XX(j), contains express language allowing Members to take preventive or anticipatory measures adopted to pre-empt a product shortage. We consider Article XI:2(a) to be highly relevant context for the interpretation of Article XX(j) by virtue of the close similarities between the other elements of these two provisions. In particular, both provisions allow Members to take temporary measures to address product "shortages" and products in "short supply" (which, as noted above, are synonymous); at the same time, we consider textual differences between the

[589] India's response to Panel question No. 57, para. 44.
[590] India's comments on United States' response to Panel question No. 59, para. 59.
[591] India's first written submission, para. 213.

provisions to be suggestive of differences in "the kinds of shortages" covered under the distinct terms of each provision.[592]

7.247. India argued that the principle of addressing "risks" associated with the other sub-paragraphs of Article XX has been recognized, including for example halting the spread of risks to human life or health under Article XX(b), notwithstanding that those provisions are also, like Article XX(j), drafted in the present tense. In our view, India's argument that there is a risk of a disruption in imports of affordable solar cells and modules, and of SPDs being unable to acquire solar cells and modules as a consequence of their reliance on imported solar cells and modules, is highly relevant and indeed central to the question of whether the DCR measures are "essential to the acquisition" of solar cells and modules. To that extent, the treatment of "risks" under Article XX(j) may, as India argues, parallel elements of Article XX(b) and other sub-paragraphs of Article XX that are drafted in the present tense. Beyond this, however, we consider Article XX(b) to be of limited relevance as context to the question of whether "products in general or local short supply" in Article XX(j) may cover products at risk of becoming in short supply. We see no language in Article XX(b) that is comparable to the language in Article XX(j) that establishes the additional factual predicate, in Article XX(j), that the products being acquired must be "products in … short supply".

7.248. India argues that it "cannot afford to wait for imports to completely be affected by supply side vulnerabilities, before it contemplates the action of setting up domestic manufacturing facilities for solar cells and modules. Manufacturing facilities for solar cells and modules cannot spring up overnight".[593] India has emphasized that its legitimate policy objectives include sustainable development, which is part of the object and purpose of the WTO Agreement as reflected in its preamble.[594] We note that a finding that Article XX(j) does not cover preventative or anticipatory measures to acquire or distribute products at risk of becoming (but that not yet are) in short supply would not mean that Members cannot take such measures; it would simply mean that the general exception set forth in paragraph (j) of Article XX does not cover such measures.

7.249. We do not consider it necessary to have recourse to supplementary means of interpretation to resolve the specific interpretative issue of whether the terms "products in general or local short supply" include products at risk of becoming in general or local short supply. However, we recall that in accordance with Article 32 of the Vienna Convention, we may have recourse to supplementary means of interpretation to confirm the meaning resulting from the application of Article 31. We have reviewed supplementary means of interpretation related to the history of Article XX(j) to confirm our interpretation. We find nothing in these supplementary means of interpretation[595] to suggest that the phrase "products in general or local short supply" was intended to cover products at risk of becoming in short supply. We see no mention of such a situation having been made. To the contrary, the provision was originally intended to remain in force only for a specified three-year transitional period to deal with shortages that existed following World War II. Furthermore, when the decision was taken to retain the provision indefinitely, in what became Article XX(j), it was agreed that the scope of the exception was "not limited to shortages subsequent to the war, but might be needed in the event of a natural catastrophe".[596] While the text of Article XX(j) refers to product shortages without limitation to war, natural catastrophe, or other particular situations, the foregoing does not suggest that the concept of "products in … short supply" was envisaged as covering prospective shortages.

7.250. Based on the foregoing, we conclude that the terms "products <u>in</u> general or local short supply" do not cover products at <u>risk</u> of becoming in short supply. We will nonetheless proceed to examine the parties' arguments and evidence on the question of whether solar cells and modules are at risk of becoming in short supply in India, so as to assist the Appellate Body in the event that our interpretation of the terms "products in general or local short supply" is modified or reversed on appeal.

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[592] Appellate Body Report, *China – Raw Materials*, para. 325. As explained further above, the Appellate Body treated the concepts of "shortage" and "short supply" as synonymous.

[593] India's second written submission, para. 87.

[594] India's first written submission, paras. 206, 212, and 221.

[595] See paras 7.209. to 7.217.

[596] See para. 7.215. above (citing *GATT Analytical Index*, p. 593 (citing L/334, and Addendum, adopted on 3 March 1955, 3S/222, 230-231, para. 42)).

7.251. India has provided evidence on what the possible supply-side disruptions for solar cells and modules are, and why India considers that such disruptions can be reasonably expected.[597] The United States argues that supply-side disruptions are a risk in international and local markets for solar cells and modules, but that India has not demonstrated that imported solar cells and modules are particularly subject to supply-side disruptions.[598]

7.252. India refers to a study by the World Bank to explain "the real and foreseeable risks associated with the development of solar energy", which notes that dependence on foreign financing for India's solar projects "is fraught with risks arising from mismatches in currency flows, as the revenues of the solar projects are all denominated in INR while overseas debt servicing is in foreign currency".[599] The study also indicates "limited or no hedging by developers, which was always fraught with risk, as indicated by the unprecedented depreciation of the [Indian rupee] in 2013, and that this will affect the future risk appetite for such structures".[600] The United States responds that there is no requirement that India rely on foreign financing with respect to imports of solar cells and modules; to the contrary, it asserts that Indian banks could also provide financing to support imports of solar cells and modules, and that the World Bank study cited by India notes that the "participation of domestic banks becomes even more critical for the success of the [NSM] program in the future".[601] India replies that the United States ignores the fact that the use of imported cells and modules "often comes tied in with the use of foreign financing, as is the case with imported cells and modules from the United States".[602]

7.253. India also refers to a recent study on the *Global Market Outlook for Photovoltaics, 2013-2017*, which notes that "[solar] PV remains a policy-driven business, where political decisions considerably influence the potential market off-take". The study notes how the PV industry went through a challenging period in 2011 as well as 2012, with political, market and industry factors affecting business along the whole value chain. The study notes the volatility in the PV market resulting from the political and investment climate across various countries.[603] India further notes that the United States Congressional Research Service in its report on *U.S. Solar PV Manufacturing: Industry Trends, Global Competition and Federal Support* observes that "PV manufacturers operate in a dynamic, volatile, and highly competitive global market now dominated by Chinese and Taiwanese companies". It also states that the "volatile industry trends have adversely affected the operations of many solar companies, forcing some to reassess their business models and others to close factories or declare bankruptcy". The report notes that "[t]en firms now control nearly half of global solar module production. Of these, six are based in China, two in Japan, one in South Korea and one in the United States." The report further cites another study by the U.S. Department of Energy which notes that by the end of 2017, 10 of China's major producers would cater to 70-80% of China's domestic demand.[604] The United States responds that India does not claim that its current ability to acquire and distribute solar cells and modules has been hindered by such "uncertainties" and "volatility".[605] In the United States' view, the evidence cited by India shows that supply and prices of solar cells and modules fluctuate, but not that they do so to an unusual or exceptional degree; India's observations about imports show only that the supply and demand also fluctuate, and they indicate nothing about whether imports are "particularly subject to supply disruptions", that is, whether they are more "volatile" than domestic sources.[606] With regard to Chinese producers, the United States submits that India has provided no evidence that Chinese exporters would forsake profitable sales to export customers to make

[597] India's second written submission, paras. 92-100.
[598] United States' response to Panel question No. 58.
[599] India's first written submission, paras. 66 and 92 (last bullet point).
[600] India's second written submission, para. 93 (citing *Paving the Way for a Transformational Future, Lessons from JNNSM Phase I,* Energy Sector Management Assistance Programme, World Bank (2013) ("*Lessons from Phase I*"), (Exhibit IND-9)).
[601] United States' response to Panel question No. 58, para. 53 (citing *Lessons from Phase I*, (Exhibit IND-9)); United States' comments on India's response to Panel question No. 61, para. 43.
[602] India's comments on the United States' response to Panel question No. 58, para. 52.
[603] India's second written submission, para. 94 (citing *Global Market Outlook for Photovoltaics*, 2013-2017, European Photovoltaic Industry Association (2013), (Exhibit IND-41)).
[604] India's second written submission, paras. 95-96 (citing Micheala D. Platzer, *U.S. Solar Photovoltaic Manufacturing: Industry Trends, Global Competition, Federal Support*, Congressional Research Service (January 27 2015), (Exhibit IND-43)).
[605] United States' response to Panel question No. 58, para. 54.
[606] United States' response to Panel question No. 61; United States' comments on India's response to Panel question No. 61, para. 42.

less profitable sales to domestic customers.[607] India replies that these studies are cited as "documented acknowledgement by credible sources of the prevailing uncertainties and risks in the international supply of solar cells and modules", which validate its own understanding and reading of the prevailing circumstances where it believes that it would be unwise and irresponsible for it to take availability of imports for granted.[608]

7.254. India also refers to two press reports to support the assertion that as recently as in August 2014, it was reported that the solar industry is facing a looming shortage of photovoltaic panels reversing a two-year slump triggered by a global glut. One of those reports also observes that the solar industry is cyclical, and quotes US-based solar manufacturers including SunPower Corp as stating that their panels were in short supply. It also quotes experts as stating that regions with heavy price competition such as Latin America will feel a shortage first, while regions with stable prices such as the United States and Japan will be prioritized.[609] The United States responds that those reports "appear to be overstated and are disputed". The United States submits that *PV Magazine* characterized such reports as a "false alarm", and that an analyst quoted prominently in the reports cited by India said the "impression given by the [Bloomberg reports] are wrong" and that "current projections don't indicate a supply shortage [in 2015]".[610] India emphasizes that the two press reports that it submitted rely on several credible sources, including corporate officers of solar power companies and industry analysts who have made statements relating to the possibility of a short supply in solar cells and modules, and that the article submitted by the United States, which reflects the view of only one analyst, does not invalidate any of the positions taken by these sources.[611] The United States comments that the two press reports India submitted as exhibits indicate that any short supply is unlikely to affect the kinds of large-scale, grid-connected solar power projects at issue in this dispute; instead, off-grid, residential projects will likely take the brunt of any shortage.[612] Moreover, an analyst quoted in one of the press reports states that a shortage would not result in an increase in prices for solar cells and modules.[613]

7.255. We have concluded that the terms "products in general or local short supply" do not cover products at risk of becoming in short supply. However, even assuming for the sake of argument that the concept of "products in general or local short supply" in Article XX(j) could be interpreted to include products at risk of being in short supply, we consider that only imminent risks of such shortage would be covered.

7.256. First, we consider that because Article XX(j) refers to "products in … short supply" in the present tense, a risk of a shortage could not be a remote possibility, or too far removed from the present time, in order to fall even within the broadest possible interpretation of these terms.

7.257. Second, as relevant context, we observe that in *China – Raw Materials*, the Appellate Body interpreted the words "to prevent … critical shortages" in Article XI:2(a) as encompassing shortages that, while not yet existing, were "imminent":

> Article XI:2(a) allows Members to apply prohibitions or restrictions temporarily in order to "prevent or relieve" such critical shortages. The word "prevent" is defined as "[p]rovide beforehand against the occurrence of (something); make impracticable or impossible by anticipatory action; stop from happening".[614] The word "relieve" means "[r]aise out of some trouble, difficulty or danger; bring or provide aid or assistance

[607] United States' comments on India's response to Panel question No. 61, para. 43.
[608] India's comments on the United States' response to Panel question No. 58, para. 53.
[609] India's second written submission, para. 97 (citing Laura Lorenzetti, *Solar panel shortage looms even as manufacturers invest in production*, Fortune (19 August 2014), (Exhibit IND-49)).
[610] United States' response to Panel question No. 58, para. 55 (citing Edgar Meza, *False alarm: No panel shortage coming*, *PV Magazine* (27 August 2014), (Exhibit USA-39)).
[611] India's response to Panel question No. 62, paras. 73-74 (citing Ehren Goossens, *Solar Boom Driving First Global Panel Shortage Since 2006*, Bloomberg Business (18 August 2014), (Exhibit IND-48); and Laura Lorenzetti, *Solar panel shortage looms even as manufacturers invest in production*, Fortune (19 August 2014), (Exhibit IND-49)).
[612] United States' comments on India's response to Panel question No. 62, para. 45.
[613] United States' comments on India's response to Panel question No. 62, para. 45.
[614] *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2341.

> to".[615] We therefore read Article XI:2(a) as providing a basis for measures adopted to alleviate or reduce an existing critical shortage, as well as for *preventive or anticipatory* measures adopted to pre-empt an *imminent* critical shortage.[616]

7.258. Thus, the Appellate Body understood the express reference in Article XI:2(a) to measures "to prevent" critical shortages of essential products as providing a basis to adopt measures to pre-empt "an imminent" critical shortage. Assuming for the sake of argument that Article XX(j) also provides a basis to adopt preventive measures, we consider that, in light of the terms used in Articles XI:2(a) and XX(j), the standard applicable under Article XX(j) must be at least equivalent to that of "imminent" shortage as has been determined to be applicable for Article XI:2(a). We are mindful of the fact that Article XI:2(a) applies to "critical shortages", and that the kinds of shortages that fall within the scope of Article XI:2(a) are thus more narrowly circumscribed than those falling within the scope of Article XX(j).[617] We do not consider that this would justify the application of a lower standard of risk for preventative actions under Article XX(j), as compared with the "imminent" standard under Article XI:2(a). In this regard, the Appellate Body did not link the "imminent" standard to the fact that the kinds of shortages falling within the scope of Article XI:2(a) are confined to "critical shortages". Moreover, Articles XX(j) and XI:2(a) both deal with the same subject matter, namely measures taken to address product shortages. Indeed, given that the text of Article XX(j) contains no similar language to that found in Article XI:2(a) allowing Members to take preventive or anticipatory measures adopted "to prevent" critical shortages of a product, and given that the scope of Article XX(j) extends to any products in "general or local short supply" whereas the scope of the derogation in Article XI:2(a) covers only those products that are "essential to the exporting Member", we fail to see how a lower and more permissive standard of risk could apply to preventative actions under Article XX(j) as compared with Article XI:2(a). In our view, assuming for the sake of argument that the terms "products in general or local short supply" can be read to include products at risk of being in short supply, at minimum this same standard of an "imminent" shortage would have to apply with respect to this element of Article XX(j).

7.259. Therefore, on the basis of the wording of the Article XX(j) and taking into account the Appellate Body's interpretation of Article XI:2(a) of the GATT 1994, which for the reasons above we consider highly relevant context for the interpretation of Article XX(j), we conclude that if the terms "products in general or local short supply" can be read to include products at risk of being in short supply, this could only extend to an "imminent" shortage.[618] With regard to the standard of an "imminent" shortage, India submits that "this is the threshold that India is seeking to apply in its submissions".[619]

7.260. This leads us to elaborate on what would have to be shown to establish the existence of an "imminent" shortage. The word "imminent" is defined to mean "impending, soon to happen".[620] We further note that where the covered agreements require that harm be "imminent", they typically explain further that the harm be "clearly foreseen" and not a matter of "conjecture or remote possibility".[621] As regards the use of the word "imminent" as a standard of probability in a different

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[615] *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2522.

[616] Appellate Body Report, *China – Raw Materials*, para. 327.

[617] Appellate Body Report, *China – Raw Materials*, para. 325.

[618] We see no basis for applying the same standard of imminent risk, and therefore do not apply this same standard, in the context of assessing whether the DCR measures are designed to secure compliance with laws or regulations within the meaning of Article XX(d) of the GATT 1994, or are "essential" or "necessary" within the meaning of Articles XX(j) and XX(d).

[619] India's response to Panel question No. 59, para. 62.

[620] *Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 1323.

[621] Article 3.7 of the Anti-Dumping Agreement, dealing with threat of material injury from dumped imports, provides that the change in circumstances which would create a situation of injury "shall be based on facts" and "must be clearly foreseen and imminent", and not "merely on allegation, conjecture or remote possibility". See also Article 15.7 of the SCM Agreement, and Article 4.1(b) of the Safeguards Agreement. We observe that Article XII:2(a)(i) of the GATT 1994, concerning balance of payments measures, provides that import restrictions may be taken to "forestall the imminent threat of, or stop to", a serious decline in its monetary reserves; and Article 50 of the TRIPS Agreement requires that national judicial authorities have the authority to order effective provisional measures to prevent an infringement of intellectual property rights from occurring where there is "a sufficient degree of certainty …. that such infringement is imminent".

context, the Appellate Body has expressed the view that "the use of this word implies that the anticipated 'serious injury' *must be on the very verge of occurring*".[622] Thus, an "imminent" event passes a higher threshold than one of mere possibility.

7.261. We consider that the evidence provided by India establishes that, in the absence of any measures taken by SPDs or India to ensure continued access to foreign solar cells and modules, and simply taking their continued availability "for granted"[623], there is some risk of disruption in the supply of affordable foreign solar cells and modules to India.

7.262. However, we find it significant that India has not identified any actual disruptions in imports of solar cells and modules to date, whether stemming from "the unprecedented depreciation in [Indian rupee] in 2013" or otherwise. In this regard, India states that "shortfall and uncertainties in the import of solar cells and modules has occurred before in 2006, followed by a global glut, and then a situation of global shortfall as recently as 2014".[624] Leaving aside what the evidence shows about the nature and extent of those "shortfalls", India has directed us to no evidence of any SPDs in India having experienced an actual disruption in the supply of affordable foreign solar cells and modules.

7.263. In addition, our assessment is that the individual pieces of evidence provided by India do not establish any imminent risk of SPDs in India encountering a disruption in the supply of affordable foreign solar cells and modules to India. In this regard, it appears to us that the passages in the World Bank study cited by India relate to "participation of domestic banks" in funding projects under the National Solar Mission, not to risks that imports of solar cells or modules could be disrupted, and the relevance of this is therefore unclear. Furthermore, while the *Global Market Outlook for Photovoltaics* does state that solar PV remains "a policy-driven business", it does not speak to whether imports of solar cells or modules in India could be disrupted, and the relevance of this information is therefore unclear. In addition, the various references to this industry being "volatile" and "cyclical" do not suffice to establish that a shortage of solar cells or modules in India is either likely or imminent. Finally, the press reports submitted by India quote industry experts as stating that if there is a shortage, the "large-scale utility projects are going to be where the modules go", and the shortage "would be on the residential side". In this case, India argues that the DCR measures are aimed at the acquisition of solar cells and modules by SPDs that are engaged in solar power generation, i.e. large-scale utility projects, not residential consumers.[625] Thus, leaving aside the weight that should be given to these press reports as evidence[626], and also the weight that should be given to the conflicting press report subsequently submitted by the United States[627], we question their relevance to the specific factual issues before us. These reports suggest that, even in the event of a shortage in the international supply of solar cells or modules, large-scale utility projects like Indian SPDs (as distinguished from residential customers) may not be affected.

7.264. Assuming for the sake of argument that products at risk of being in "short supply" could be "products in general or local short supply" within the meaning of Article XX(j), which we have found is not the case, we consider that only imminent risks of shortage would be potentially covered. Accordingly, we have applied the standard of "imminent" risk in the context of assessing whether solar cells and modules are "products in general or local short supply" within the meaning of Article XX(j).[628] Based on our review of India's evidence, we conclude that India has not

[622] Appellate Body Report, *US – Lamb*, para. 125. (emphasis added)

[623] India's comments on the United States' response to Panel question No. 58, para. 53.

[624] India's comments on the United States' response to Panel question No. 58, para. 48.

[625] India's first written submission, paras. 229 and 236 (subheading (ii), first bullet), and India's opening statement at the first meeting of the Panel, para. 50 (in each instance stating that "the DCR Measures are essential to the acquisition of solar cells and modules by SPDs that are engaged in solar power generation").

[626] While press reports are not *per se* unreliable or inadmissible, panels have treated them with a certain degree of caution. As one panel recently observed: "Previous panels have taken into account information contained in articles published in newspapers or magazines. In some cases, however, the probative value of the information contained in press articles has been rejected; for example, because the information was 'too little and too random', it consisted of a 'single, anecdotal newspaper article', or it was limited to foreign press or originated from non-authoritative sources of information on the country at issue." Panel Reports, *Argentina – Import Measures*, para. 6.69.

[627] Edgar Meza, *False alarm: No panel shortage coming*, *PV Magazine* (27 August 2014), (Exhibit USA-39).

[628] See paragraph 7.258. and fn 618 above.

established any imminent risk of a disruption in supply of foreign solar cells and modules to India SPDs. We therefore find that the risk of solar cells and modules becoming products in general or local short supply in India does not amount to solar cells and modules being "products in general or local short supply" in India within the meaning of Article XX(j).

7.3.2.5 Conclusion

7.265. For the reasons set forth above, we find that solar cells and modules are not "products in general or local short supply" in India within the meaning of Article XX(j) of the GATT 1994. Accordingly, we find that the DCR measures do not involve the acquisition of "products in general or local short supply" in India, and are therefore not justified under the general exception in Article XX(j) of the GATT 1994.[629]

7.3.3 Whether the DCR measures are measures "to secure compliance with laws or regulations" within the meaning of Article XX(d)

7.3.3.1 Introduction

7.266. Article XX(d) establishes a general exception for measures:

> 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

7.267. There is a considerable body of jurisprudence under Article XX(d).[630] It is now well established that Article XX(d) contains two cumulative requirements: first, it must be shown that the challenged measure is "designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994"; second, it must be shown that the measure is "necessary" to secure such compliance.[631] The responding party has the burden of demonstrating that both of these elements are met.[632] Demonstrating that a measure is designed to secure compliance with laws or regulations which are not inconsistent with the GATT 1994 entails demonstrating that there are "laws or regulations", that they are "not inconsistent with the provisions of" the GATT 1994, and that the measures at issue are measures "to secure compliance" with those laws and regulations. These elements are cumulative.[633]

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[629] Having found that solar cells and modules are not "products in general or local short supply" in India, we do not consider it necessary to examine whether the DCR measures involve the "acquisition or distribution" of those products.

[630] GATT Panel Reports, *US – Spring Assemblies*, 1982, paras. 50-61; *Canada – FIRA*, 1983, paras. 5.19-5.20; *Japan – Agricultural Products I*, 1987, paras. 5.2.2.3 and 6.2; *US – Section 337 Tariff Act*, 1998, paras. 5.22-5.35; *EEC – Parts and Components*, 1990, paras. 5.12-5.18; *US – Tuna (Mexico)*, 1991, paras 5.39-5.40; *US – Malt Beverages*, 1992, paras. 5.40-5.43; 5.51-5.52; *US – Taxes on Automobiles*, 1994, para. 5.67; and *US – Tuna (EEC)*, 1994, paras. 5.40-5.41; WTO Panel Reports, *US – Gasoline*, paras. 6.30-6.34; *Canada – Periodicals*, paras. 5.6-5.11; *Korea – Various Measures on Beef*, paras. 645-685; *Argentina – Hides and Leather* , paras. 11.290-11.331; *Canada – Wheat Exports and Grain Imports*, paras. 6.220-6.251, 6.298-6.320; *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.328-7.341; *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.203-7.232; *Mexico – Taxes on Soft Drinks*, paras. 8.162-8.204; *Brazil – Retreaded Tyres*, paras. 7.381-7.389; *US – Customs Bond Directive*, paras. 7.286-7.312; *US – Shrimp (Thailand)*, paras. 7.164-7.192; *China – Autos Parts*, paras. 7.277-7.365; *Colombia – Ports of Entry*, paras. 7.482-7.620; *Thailand – Cigarettes (Philippines)*, paras. 7.749-7.758; Appellate Body Reports, *Korea – Various Measures on Beef*, paras. 152-185; *Dominican Republic – Import and Sale of Cigarettes*, paras. 57-73; *Mexico – Taxes on Soft Drinks*, paras. 58-80; *US – Shrimp (Thailand) / US – Customs Bond Directive*, paras. 304-319; *Thailand – Cigarettes (Philippines)*, paras. 174-181.

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

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

[633] See, Panel Report, *Colombia – Ports of Entry*, para. 7.514 (citing Panel Reports, *US – Shrimp (Thailand)*, para. 7.174; *US – Customs Bond Directive*, para. 7.295). Our review of prior panel and Appellate Body reports leads us to conclude that, while these elements are cumulative, there is no requirement to analyse these elements separately, as opposed to being taken together as part of a holistic analysis of whether the challenged measure is a measure "to 'secure compliance' with laws or regulations that are not themselves

7.268. In this case, India argues that the DCR measures are justified under Article XX(d) because they are "integral to its compliance with both domestic and international law obligations to ensure ecologically sustainable growth while addressing India's energy security challenge, and ensuring compliance with its obligations relating to climate change".[634] According to India, these obligations are reflected in four international instruments, and four domestic instruments.[635]

7.3.3.2 Relevant provisions of the international and domestic instruments identified by India

7.269. India submits that its "international law obligations … embodied in various international instruments" are: (a) the preamble of the WTO Agreement; (b) the United Nations Framework Convention on Climate Change; (c) the Rio Declaration on Environment and Development; and (d) the United Nations General Assembly Resolution adopting the Rio+20 Document: The Future We Want, adopted by the United Nations General Assembly in 2012.[636]

7.270. Beginning with the preamble to the WTO Agreement, India refers to the elements of the first recital that recognize "that the objective of sustainable development will be pursued by countries, guided by their own needs and concerns depending on their levels of economic development".[637] The first recital of the preamble to the WTO Agreement reads:

> Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development

7.271. India submits that its "international law obligations" are also embodied in the United Nations Framework Convention on Climate Change (UNFCCC).[638] In its first written submission, India explained that the UNFCCC "specifically recognizes that the problem of climate change cannot be looked at in isolation, and that there are close inter-linkages between social economic development and measures to address climate change".[639] According to India, the UNFCCC "further recognizes that the range of policy choices available will depend on the specific context of each country"[640], and India argues that it recognizes the following six principles: first, that "the ultimate objective is to achieve stabilization of greenhouse gas concentrations in a manner that enables economic development to proceed in a sustainable manner"[641]; second, that

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inconsistent with some provision of the GATT 1994". Insofar as these elements are analysed separately, we see no prescribed sequence. We consider that the manner in which a panel analyses these elements should be informed by the particular circumstances of case.

[634] India's first written submission, para. 240; India's opening statement at the first meeting of the Panel, para. 54; India's opening statement at the second meeting of the Panel, para. 35.

[635] As elaborated in our findings below, a central issue in this case is whether the materials identified by India are "laws or regulations" within the meaning of Article XX(d). In referring to these materials as "instruments", our intention is to adopt a nomenclature that is neutral with respect to that issue.

[636] India's first written submission, para. 240; India's opening statement at the first meeting of the Panel, para. 54; India's response to Panel question No. 34(a); India's second written submission, para. 137; India's response to Panel question No. 66, para. 82. When listing the relevant domestic instruments in its first written submission and opening statement at the first meeting of the Panel, India also referred to "the Environment Protection Act". India offered no further elaboration. In its response to Panel question No. 34(a), which asked India to identify "the specific provisions of India's laws and regulations with which the measures at issue are designed to secure compliance", India made no reference to "the Environment Protection Act". Accordingly, we do not understand India to be arguing that the Environment Protection Act is one of the "laws or regulations" with which the DCR measures are designed to secure compliance.

[637] India's first written submission, para. 206; India's response to Panel question No. 34(a).

[638] *United Nations Framework Convention on Climate Change,* done at New York, 9 May 1992, 1771 UNTS 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992) ("UNFCCC") (Exhibit IND-3).

[639] India's first written submission, para. 178.

[640] India's first written submission, para. 178.

[641] India's first written submission, para. 178 (citing Article 2 of the UNFCCC).

"environmental standards, management objectives and priorities should reflect the environment and development context to which they apply, and that standards applied by some countries may be inappropriate and of unwarranted economic and social cost, to other countries, in particular, developing countries"[642]; third, that "responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter (i.e., on social and economic development), taking into full account the legitimate priority needs of developing countries, for the achievement of sustained economic growth"[643]; fourth, that "Parties have the right to promote sustainable development, and that the policies and measures to protect the climate system should be appropriate for the specific conditions of each Party and integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change"[644]; fifth, that "developing countries need access to resources to achieve sustainable social and economic development, for which, they would need to apply new technologies on terms that make such application economically and socially beneficial"[645]; and sixth, that "various actions to address climate change can be justified economically in their own right".[646]

7.272. According to India, Articles 4(1)(b) and 4(1)(f) of the UNFCCC are the specific provisions with which the measures at issue are designed to secure compliance.[647] Articled 4 is entitled "Commitments", and reads in relevant part:

> All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:
>
> ...
>
> (b) Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change;
>
> ...
>
> (f) Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change;

India also refers to Article 3(4) of the UNFCCC, and states that the DCR measures are designed to secure compliance with "the overall commitments" under the UNFCCC.[648] Article 3 is entitled "Principles", and reads in relevant part:

> In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following:
>
> ...
>
> 4. The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change

[642] India's first written submission, para. 178 (citing the 10th recital of the preamble of the UNFCCC).
[643] India's first written submission, para. 178 (21st recital of the Preamble and Article 4.1 of the UNFCCC).
[644] India's first written submission, para. 178 (citing Article 3.4 of the UNFCCC) (emphasis omitted).
[645] India's first written submission, para. 178 (citing the 22nd recital of the preamble of the UNFCCC).
[646] India's first written submission, para. 178 (citing 17th recital of the preamble of the UNFCCC).
[647] India's response to Panel question No. 34(a).
[648] Ibid.

> should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.

7.273. India also refers to the Rio Declaration on Environment and Development, adopted by the United Nations General Assembly in 1992.[649] India did not refer to any particular provision of the Rio Declaration in its first written submission, or in response to a question from the Panel asking India to identify the specific provisions of India's laws and regulations with which the measures at issue are designed to secure compliance.[650] Rather, India stated that its "notion of sustainable development is also informed by the obligations that it has undertaken under" the Rio Declaration.[651] We note that the concept of sustainable development is expressly mentioned in Principles 1, 4, 5, 7, 8, 9, 12, 20, 21, 22, 24, and 27 of the Rio Declaration.[652]

7.274. India also refers to the United Nations General Assembly Resolution adopted in connection with the Rio+20 Outcome Document "The Future We Want", which was adopted by the United Nations General Assembly in 2012.[653] India states that this instrument "emphasizes the need to mainstream sustainable development at all levels, integrating economic, environmental, social aspects and recognizing their interlinkages so as to achieve sustainable development in all its dimensions", and that it "also emphasizes the need for sustainable energy services and the right of countries to determine the energy mix based on their development aspirations".[654] India clarified that it is "the specific obligations embodied in paragraphs 3, 4 and 127 of the Rio+20 Resolution with which India seeks to secure compliance".[655] These read:

> 3. We therefore acknowledge the need to further mainstream sustainable development at all levels, integrating economic, social and environmental aspects and recognizing their interlinkages, so as to achieve sustainable development in all its dimensions.
>
> 4. We recognize that poverty eradication, changing unsustainable and promoting sustainable patterns of consumption and production and protecting and managing the natural resource base of economic and social development are the overarching objectives of and essential requirements for sustainable development. We also reaffirm the need to achieve sustainable development by promoting sustained, inclusive and equitable economic growth, creating greater opportunities for all, reducing inequalities, raising basic standards of living, fostering equitable social development and inclusion, and promoting the integrated and sustainable management of natural resources and ecosystems that supports, inter alia, economic, social and human development while facilitating ecosystem conservation, regeneration and restoration and resilience in the face of new and emerging challenges.
>
> ...
>
> 127. We reaffirm support for the implementation of national and subnational policies and strategies, based on individual national circumstances and development aspirations, using an appropriate energy mix to meet developmental needs, including through increased use of renewable energy sources and other low emission technologies, the more efficient use of energy, greater reliance on advanced energy technologies, including cleaner fossil fuel technologies, and the sustainable use of traditional energy resources. We commit to promoting sustainable modern energy services for all through national and subnational efforts, inter alia, on electrification and dissemination of sustainable cooking and heating solutions, including through collaborative actions to share best practices and adopt policies, as appropriate. We

[649] *Rio Declaration on Environment and Development* (1992), (Exhibit IND-35).
[650] India's first written submission, para. 240; India's response to Panel question No. 34(a).
[651] India's response to Panel question No. 34(a).
[652] *Rio Declaration on Environment and Development* (1992), (Exhibit IND-35).
[653] United Nations General Assembly Resolution A/RES/66/288 (adopted on 27 July 2012) ("Rio+20 Document: The Future We Want"), (Exhibit IND-28). See India's first written submission, para. 204.
[654] India's response to Panel question No. 34(a).
[655] India's comments on the United States' response to Panel question No. 69(c), para. 77.

> urge governments to create enabling environments that facilitate public and private sector investment in relevant and needed cleaner energy technologies.

7.275. India also submits that its "domestic … obligations to ensure ecologically sustainable growth while addressing India's energy security challenge, and ensuring compliance with its obligations relating to climate change" are embodied in: (a) the Electricity Act "read with"; (b) the National Electricity Policy; (c) the National Electricity Plan; and (d) the National Action Plan on Climate Change.[656]

7.276. India identifies Section 3 of the Electricity Act of 2003 as the relevant provision of this instrument. Section 3 mandates the development of a National Electricity Policy and a National Electricity Plan.[657] Section 3 thus establishes the legal basis for the development of the Policy and the Plan (discussed below). It identifies the entities involved in the periodic preparation, publication, and review of the National Electricity Policy and the National Electricity Plan. It does not address the content or substance of either the National Electricity Policy or the National Electricity Plan, other than to state that the Policy to be prepared from time to time will be "based on optimal utilisation of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy".[658]

7.277. In response to a question from the Panel asking India to identify the specific provisions of India's laws and regulations with which the measures at issue are designed to secure compliance, India reiterated that "[t]he Electricity Act mandates the formation of the National Electricity Policy and the National Electricity [Plan]".[659] We understand India to be referring to Section 3 of the Electricity Act, which reads:

> 3. (1) The Central Government shall, from time to time, prepare the national electricity policy and tariff policy, in consultation with the State Governments and the Authority for development of the power system based on optimal utilisation of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy.
>
> (2) The Central Government shall publish National Electricity Policy and tariff policy from time to time.
>
> (3) The Central Government may, from time to time, in consultation with the State Governments and the [Central Electricity Authority], review or revise, the National Electricity Policy and tariff policy referred to in sub-section (1).
>
> (4) The [Central Electricity Authority] shall prepare a National Electricity Plan in accordance with the National Electricity Policy and notify such plan once in five years:
>
> Provided that the [Central Electricity Authority] in preparing the National Electricity Plan shall publish the draft National Electricity Plan and invite suggestions and objections thereon from licensees, generating companies and the public within such time as may be prescribed:
>
> Provided further that the [Central Electricity Authority] shall -
>
> (a) notify the plan after obtaining the approval of the Central Government;
>
> (b) revise the plan incorporating therein the directions, if any, given by the Central Government while granting approval under clause (a).

[656] India's first written submission, para. 240.
[657] Electricity Act, (Exhibit USA-20).
[658] Electricity Act, (Exhibit USA-20), Section 3(1).
[659] India's response to Panel question No. 34(a).

> (5) The [Central Electricity Authority] may review or revise the National Electricity Plan in accordance with the National Electricity Policy.[660]

7.278. The National Electricity Policy was announced in 2005.[661] In its first written submission, India states that the Policy "emphasizes that electricity is an essential requirement for all facets of our life, and constitutes a basic human necessity"[662], and observes that electricity "is the critical infrastructure on which the socio-economic development of the country depends, and that it is one of the key drivers for rapid economic growth and poverty alleviation".[663] India highlights that the National Electricity Policy lays down guidelines for "the accelerated development of the power sector", for providing "supply of electricity to all areas", and for "protecting the interests of consumers and other stakeholders keeping in view availability of energy resources, technology available to exploit these resources, economics of generation using different resources, and energy security issues".[664] India notes that the National Electricity Policy recognizes that "considering electricity in itself cannot be stored, demand and supply of electricity, as a commodity needs to be continuously balanced".[665]

7.279. According to India, paragraph 5.12.1 of the National Electricity Plan is "[t]he specific obligation" with which the measures at issue are designed to secure compliance.[666] The National Electricity Policy is a 16-page document addressing 13 broad issues, one of which is "Cogeneration and Non-Convention Energy Sources". Part 5.12 of the National Electricity Policy bears a title of the same name, and consists of three paragraphs. Paragraph 5.12.1 reads:

> 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.[667]

7.280. The next domestic instrument identified by India is the National Electricity Plan.[668] As set forth above, the Electricity Act mandates the Central Electricity Authority to develop, and notify, a National Electricity Plan every five years. In its first written submission, India notes that the National Electricity Policy further mandates that this Plan be developed "keeping in mind the fuel choices based on the economy, energy security and environmental considerations".[669] India highlights that the National Electricity Plan for 2012 recognizes that "sustainable development is the ultimate goal which encompasses economic development, maintaining environmental quality and social equity".[670] India observes that in this context the Plan emphasizes "the importance and relevance of the development of clean and green power based on the choice of appropriate fuels/ technology for renewable energy development projects".[671]

7.281. The National Electricity Plan is a 31-page document, divided into 14 chapters. Chapter 5, entitled "Generation Planning", contains an introduction followed by sections on "Options for Power Generation in India" (5.1), "Principles of Generation Planning" (5.2), "Planning Tools – Details of Planning Models" (5.3), "Planning Approach" (5.4), and a "Conclusion". Section 5.2 on "Principles of Generation Planning" is divided into three subsections, including "Sustainable Development" (5.2.1), "Operational Flexibility and Reliability" (5.2.2), and "Efficient Use of Resource" (5.2.3).

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[660] Electricity Act, (Exhibit USA-20), Section 3.
[661] *National Electricity Policy*, Ministry of Power (12 February 2005) ("National Electricity Policy"), (Exhibit IND-14).
[662] India's first written submission, para. 174 (citing para. 1.2 of the National Electricity Policy).
[663] India's first written submission, para. 174 (citing para. 1.2 of the National Electricity Policy).
[664] India's first written submission, para. 174 (citing para. 1.8 of the National Electricity Policy).
[665] India's first written submission, para. 174 (citing para. 1.5 of the National Electricity Policy).
[666] India's response to Panel question No. 34(a) (citing para. 5.12.1 of the National Electricity Policy).
[667] National Electricity Policy, (Exhibit IND-14), para. 5.12.1.
[668] *National Electricity Plan,* Central Electricity Authority (January 2012) ("National Electricity Plan"), (Exhibit IND-16).
[669] India's first written submission, para. 175 (citing para. 3.2 of the National Electricity Policy).
[670] India's first written submission, para. 175 (citing subsection 5.2.1 of the National Electricity Plan).
[671] Ibid.

India specifically cites subsection 5.2.1 of the National Electricity Plan as containing the specific provisions of India's laws and regulations with which the measures at issue are designed to secure compliance.[672] Subsection 5.2.1 reads:

> 5.2.1 Sustainable Development
>
> 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.
>
> The foremost Low Carbon Strategy Initiative is the choice for resources for power generation. Projects in the Plan based on Conventional Sources i.e. Hydro, Nuclear & thermal are selected as a result of Studies carried out using Capacity Expansion Software programmes to meet the demand as stipulated by the draft 18th EPS Report. Power from Renewable Energy Sources has also been considered while carrying out these studies.
>
> The demand adopted for planning purpose is the draft 18th EPS demand projections. This demand is based on use of energy efficient technologies being used and energy conservation measures being adopted. Therefore, the planning strategy adopted is in accordance with low carbon strategy growth.[673]

7.282. Finally, India refers the Panel to India's National Action Plan on Climate Change (NAPCC).[674] In its first written submission, India states that the NAPCC "seeks to implement India's obligations under the UNFCCC".[675] India explains that the NAPCC consists of eight missions, including the National Solar Mission, which together present India's multi-pronged strategy to address the challenge of climate change. According to India, the "overall vision" of the NAPCC "is to promote sustainable development through the use of clean technologies".[676] In its first written submission, India highlights that the NAPCC recognizes "that the poor are the most vulnerable to climate change, and that rapid economic growth is an essential prerequisite to reduce poverty".[677] India highlights the fact that the NAPCC "notes the strong positive correlation between energy use and human development, and that India needs to substantially increase its per capita energy consumption to provide a minimally acceptable level of well-being to its people".[678] India also highlights the fact that the NAPCC "notes that solar based power technologies are an extremely clean form of generation with practically no form of emissions at the point of generation, and that this would lead to energy security through the displacement of coal and petroleum".[679]

7.283. The NAPCC is a 56-page document divided into several parts, entitled "Overview", "Principles", "Approach", "The Way Forward: Eight National Missions", "Implementation of Missions", and "Technical Document". The bulk of the NAPCC consists of the "Technical Document", which is divided into six sections entitled "Background to India's National Action Plan on Climate Change", "Some Current Programmes on Adaptation and Mitigation", "Way Forward: Eight National Missions", "Other Initiatives", "International Cooperation", and "References". In response to a question from the Panel asking India to identify the specific provisions of India's laws and regulations with which the measures at issue are designed to secure compliance, India

[672] India's response to Panel question No. 34(a).
[673] *National Electricity Plan,* (Exhibit IND-16), subsection 5.2.1, pp. 90-91.
[674] *National Action Plan on Climate Change,* Government of India (June 2008) ("NAPCC"), (Exhibit IND-2).
[675] India's first written submission, para. 176.
[676] Ibid.
[677] India's first written submission, para. 176 (citing para. 1.1 of the NAPCC).
[678] India's first written submission, para. 176 (citing para. 1.2 of the NAPCC).
[679] India's first written submission, para. 176 (citing para. 3.1 of the NAPCC).

summarizes several aspects of the NAPCC.[680] First, India states that the NAPCC "seeks to implement India's obligations under the UNFCCC and specifically emphasizes that India's approach should be compatible with its role as a responsible and enlightened Member of the international community", citing to page 1 of the "Overview".[681] Based on our review of the NAPCC, we understand India to be referring to the following statements on page 1 of the NAPCC:

> Recognizing that climate change is a global challenge, India will engage actively in multilateral negotiations in the UN Framework Convention on Climate Change, in a positive, constructive and forward-looking manner. Our objective will be to establish an effective, cooperative and equitable global approach based on the principle of common but differentiated responsibilities and respective capabilities, enshrined in the [UNFCCC]. … Finally, our approach must also be compatible with our role as a responsible and enlightened member of the international community, ready to make our contribution to the solution of a global challenge, which impacts on humanity as a whole.[682]

Second, India states that the NAPCC "charts the way forward for India through eight missions including the National Solar Mission, which was instituted to promote the use of solar energy, as an important way in which to achieve energy security through displacement of coal and petroleum". India cites to page 20 of the NAPCC, where a brief summary of the National Solar Mission is found, in the context of the section entitled "The Way Forward: Eight National Missions". We understand India to be referring to the following statements made there:

> The National Solar Mission would promote the use of solar energy for power generation and other applications. …
>
> Solar based power technologies are an extremely clean form of generation with practically no form of emissions at the point of generation. They would lead to energy security through displacement of coal and petroleum.[683]

Third, India states that the "NAPCC also notes the importance of local manufacturing capacity with necessary technology tie-ups".[684] India cites to page 22 of the NAPCC, which continues with the NAPCC's description of the National Solar Mission. The following statements are made in the context of a two-page subsection "R&D Collaboration, Technology Transfer, and Capacity Building":

> Rural solar thermal applications would also be pursued under public-private partnerships where feasible. Commensurate local manufacturing capacity to meet this level of deployment, with necessary technology tie-ups, where desirable, would be established. Further, the Mission would aim for local Photovoltaic (PV) production from integrated facilities at a level of 1000 MW/annum within this time frame. It would also aim to establish at least 1000 MW of Concentrating Solar Power (CSP) generation capacity, again, with such technical tie-ups as essential within the stated time frame.[685]

7.3.3.3 Whether the instruments identified by India are "laws or regulations"

7.284. Having reviewed the relevant provisions of the international and domestic instruments identified by India, we now proceed to assess whether they are "laws or regulations" within the meaning of Article XX(d) of the GATT 1994. We will begin by examining the international instruments, and we will then address the domestic instruments. We proceed in this manner not simply because India has distinguished between its "international and domestic obligations", but because different issues are raised in relation to these two different groups of instruments. India

[680] India's response to Panel question No. 34(a).
[681] India's response to Panel question No. 34(a) (citing page 1 of the NAPCC).
[682] NAPCC, (Exhibit IND-2), p. 1.
[683] NAPCC, p. 20.
[684] India's response to Panel question No. 34(a) (citing page 22 of the NAPCC).
[685] NAPCC, (Exhibit IND-2), at p. 22.

accepts that "[t]he burden is on India to establish that there is a law with which compliance is sought to be secured".[686]

7.3.3.3.1 International instruments identified by India

7.285. India states that the international instruments that it has identified have "direct effect in the domestic legal system of India".[687] Among other things, India explains that "[u]nder Indian law, rules of international law are accommodated into domestic law without express legislative sanction, provided they do not run into conflict with laws enacted by the Parliament".[688]

7.286. The United States submits that "India has not sufficiently demonstrated that those instruments have been incorporated into India's domestic legal system".[689] In this regard, the United States refers to India's statement that, in India, "rules of international law are [automatically] accommodated into domestic law" only if "they do not run into conflict with laws enacted by Parliament".[690]

7.287. Canada submits that "[t]he meaning of the term 'laws and regulations' does not include international obligations unless they form part of the domestic legal system of the WTO Member", and that "the international obligations must be those that are binding on the WTO Member and then transformed into legal obligations under the Member's domestic system".[691] Canada states that India refers to a number of international instruments in its submission "but does not identify the specific obligations in them, how such obligations have become part of Indian law, or how its measures secure compliance with those laws".[692] The European Union likewise submits that "it is questionable whether India can rely on instruments of international law, such as the United Nations Framework Convention on Climate Change (UNFCCC), when its own submissions point out that, under Indian law, rules of international law are accommodated into domestic law without express legislative sanction only if they do not run into conflict with laws enacted by the Parliament.[693]

7.288. We note that India identifies the UNFCCC and other international legal instruments as "laws or regulations" within the meaning of Article XX(d). This raises the question of whether the terms "laws or regulations" include international legal instruments, as opposed to domestic legal instruments.

7.289. The Appellate Body addressed this issue in *Mexico – Taxes on Soft Drinks*. In that case, the Appellate Body found that the terms "laws or regulations" in Article XX(d) "refer to rules *that form part of the domestic legal system of a WTO Member*".[694] The Appellate Body arrived at this conclusion following a careful textual analysis that took into account a number of different interpretative elements. Beginning with the ordinary meaning of the words used, the Appellate Body observed that "[t]he terms 'laws or regulations' are generally used to refer to domestic laws or regulations", and that "one does not immediately think about international law when confronted with the term 'laws' in the plural".[695]

7.290. The Appellate Body proceeded to examine the context in which these terms appear in Article XX(d). In this regard, the Appellate Body observed that "[t]he illustrative list of 'laws or regulations' provided in Article XX(d)" includes "matters [that] are typically the subject of domestic laws or regulations".[696] Next, the Appellate Body observed that the terms "laws or regulations" are qualified by the requirement that they not be "inconsistent" with the GATT 1994.[697] Whereas the

[686] India's opening statement at the first meeting of the Panel, para. 55.
[687] India's response to Panel question No. 35.
[688] India's first written submission, para. 180.
[689] United States' opening statement at the first meeting of the Panel, para. 51.
[690] United States' opening statement at the first meeting of the Panel, para. 51 (citing India's first written submission, para. 180).
[691] Canada's third-party submission, para. 31.
[692] Ibid.
[693] European Union's third-party submission, para. 65.
[694] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 69. (emphasis added)
[695] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 69.
[696] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 70.
[697] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, fn 152.

word "inconsistent" appears elsewhere in the GATT 1994 in connection with domestic measures, the Appellate Body observed that the WTO agreements generally use the word "conflict" when referring to treaty obligations.[698] The Appellate Body also observed that in contrast to Article XX(d), other provisions of the covered agreements, including Article XX(h) of the GATT 1994, refer expressly to "international obligations" or "international agreements".[699] The Appellate Body also found it significant that, in Article X:1 of the GATT 1994, a distinction is drawn in the same provision between "laws [and] regulations" and "international agreements".[700] Finally, the Appellate Body considered that where the term "regulations" is used elsewhere in the covered agreements, it generally relates to domestic regulations.[701] Thus, the Appellate Body held that "the terms 'laws or regulations' refer to rules *that form part of the domestic legal system of a WTO Member*".[702]

7.291. This is not to say that international rules cannot become "part of the domestic legal system of a WTO Member". In the course of its analysis, the Appellate Body identified two ways in which this may be the case. First, the Appellate Body stated that "[d]omestic legislative or regulatory acts sometimes may be intended to implement an international agreement. In such situations, the origin of the rule is international, but the implementing instrument is a domestic law or regulation".[703] Thus, the Appellate Body explained that an international agreement may become "part of the domestic legal system" of a WTO Member through an "implementing instrument". Second, and of particular significance in the present dispute, the Appellate Body noted that "[i]n some WTO Members, certain international rules may have direct effect within their domestic legal systems without requiring implementing legislation. In such circumstances, these rules also become part of the domestic law of that Member".[704]

7.292. Regarding the second way for international rules to become "part of the domestic legal system of a WTO Member" as identified by the Appellate Body, the Appellate Body noted the following point made by a third party in that dispute:

> [i]t is entirely possible that international agreements may be incorporated into the domestic legal order in such a way that they can be invoked as against individuals, and enforce[d] against them. If this is the case, the international agreement, albeit international in origin, may be regarded as having become an integral part of the domestic legal order of such Member, and thus a law or regulation within the meaning of Article XX (d) [of the] GATT [1994].[705]

The Appellate Body made further similar statements regarding "direct effect" at several other points in the context of explaining its conclusion that "the terms 'laws or regulations' refer to rules that form part of the domestic legal system of a WTO Member". Specifically, in the context of explaining the significance of the distinction drawn between "laws [and] regulations" and "international agreements" in Article X:1 of the GATT 1994, the Appellate Body stated that "[s]uch a distinction would have been unnecessary if, as Mexico argues, the terms 'laws' and 'regulations' were to encompass international agreements that have not been incorporated, or do not have direct effect in, the domestic legal system of the respective WTO Member".[706] In addition, in the above-mentioned context of observing that the covered agreements typically use the word "inconsistent" (as in Article XX(d)) in connection with domestic measures, and instead "conflict" when referring to international treaty obligations, the Appellate Body stated that "this distinction supports the position that the terms 'laws or regulations' refer to the rules that are part of the domestic legal system of a WTO Member, including international rules that have been incorporated or have direct effect in a particular domestic legal system".[707] Finally, when stating its overall conclusion, the Appellate Body reiterated that "we conclude that the terms 'laws or regulations' cover rules that form part of the domestic legal system of a WTO Member, including rules deriving

[698] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, fn 152.
[699] Ibid. para. 71.
[700] Ibid.
[701] Ibid. fn 156.
[702] Ibid. paras. 69, 70, and 79. (emphasis added)
[703] Ibid. para. 69.
[704] Ibid. fn 148.
[705] Ibid. fn 149.
[706] Ibid. para. 71.
[707] Ibid. fn 152.

from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system".[708]

7.293. Based on the foregoing, it is apparent to us that in *Mexico – Taxes on Soft Drinks*, the Appellate Body found that the terms "laws or regulations" in Article XX(d) only include "rules that form part of the domestic legal system of a WTO Member", including any "implementing instruments" to "incorporate" international agreements in the domestic legal system. International agreements (or other sources of international law) may constitute "laws or regulations" only insofar as they have been incorporated, or have "direct effect", within a Member's domestic legal system. We now turn to assess whether the international instruments identified by India form part of India's domestic legal system.

7.294. In its first written submission, India explained that "[u]nder Indian law, rules of international law are accommodated into domestic law without express legislative sanction, provided they do not run into conflict with laws enacted by the Parliament".[709] India added that "[t]he Supreme Court of India has held that principles of international environmental law, and the concept of sustainable development, which acts as a balancing concept between ecology and development, are fundamental to the environmental and developmental governance in India".[710] India further observed that "[t]he Supreme Court has also noted that the concept of sustainable development is a part of customary international law".[711] India stated that "India's obligations under international treaties are also considered as a part of domestic law".[712]

7.295. At the first meeting of the Panel, India stated that "international law obligations are automatically incorporated into Indian law when there is no conflicting national law, and the executive wing of the government can implement such obligations".[713] In this regard, India explained that "[u]nder the Constitution of India, acts of the executive are not confined to areas where there is a pre-existing law. Acts of the union executive extend to aspects over which the Parliament has power to enact laws".[714] Referring to a recent decision of the Supreme Court, India stated that "[a]cts of the Government in implementing international law obligations pursuant to treaties and resolutions that India has adhered to at the international level, are recognized under Indian law as constituting implementation of those obligations".[715]

7.296. In response to a question from the Panel, India stated that the international instruments that it has identified have "direct effect in the domestic legal system of India". India explained as follows:

> Under the Constitution of India, acts of the executive are not confined to areas where there is a pre-existing law. Acts of the union executive extend to aspects over which the Parliament has the power to enact laws. This means that the Government can *suo moto* take implementing actions to secure compliance with India's international law

[708] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 79.
[709] India's first written submission, para. 180.
[710] Ibid.
[711] Ibid.
[712] India's first written submission, para. 256.
[713] India's opening statement at the first meeting of the Panel, para. 60.
[714] Ibid.
[715] India's opening statement at the first meeting of the Panel, para. 61. India explained as follows:
The Supreme Court of India, in the context of exercise of the Central Government's executive power of establishing a power plant, recently ruled that the decision-making power by the executive in that case was based on the touchstone of sustainable development and its impact on ecology following national and international environmental principles. The principles on sustainable development in that case were inferred from the provisions of several instruments of international environmental law, including the UNFCCC, the principles arrived at the other conventions concluded at the United Nations Conference on Environment and Development in 1992, including Agenda 21 and the Convention on Biological Diversity, as well as the Rio+5 Summit of 1997, which adopted the Programme for Further Implementation of Agenda 21. The court did not go into whether or not the provisions or principles were legally binding or non-binding in nature. It simply noted the relevance of international environmental law, as enshrined in several legal instruments that states, in the exercise of their sovereign power, have adhered to. It is in exercise of these powers that the policies referred to in India's submission were formulated by the Government, including the National [Action Plan on Climate Change], the National Electricity Policy. (India's opening statement at the first meeting of the Panel, para. 61, citing G. Sundarrajan v. Union of India 2013 (6) SCC 620, paras 161-174, (Exhibit IND-36))

> obligations under the afore-mentioned instruments. They therefore have direct effect in the domestic legal system in India.[716]

In its response to the same question, India also stated that "[a]cts of the Government in implementing international law obligations pursuant to treaties and resolutions that India has adhered to at the international level", have been recognized under Indian law as "constituting implementation" of those obligations.

7.297. We have taken careful note of India's explanation of how its domestic legal system functions. We accept India's explanation of the allocation of powers under the Constitution of India, and we accept its explanation that the executive branch may take implementing actions to secure compliance with India's international law obligations under the afore-mentioned instruments. We also accept India's explanation that the executive branch may take implementing actions without express sanction by the legislative branch, provided those implementing actions do not run into conflict with laws enacted by the Parliament.

7.298. However, in our view, these explanations fail to demonstrate that the international instruments identified by India have "direct effect" in India. To the contrary, they seem to demonstrate that international agreements do *not* have "direct effect" in India. Specifically, India's explanations all suggest that either the executive branch and/or the legislative branch, as appropriate, must take "implementing actions" to incorporate and implement India's international obligations into its domestic legal system. By definition, this suggests that those obligations do not have "direct effect"; India's own explanations establish that international law obligations are not "automatically incorporated" into Indian law[717], but rather that they may possibly be acted upon and implemented by certain domestic authorities. India emphasizes that its Supreme Court has held that principles of international environmental law, and the concept of sustainable development, "are fundamental to the environmental and developmental governance in India"[718], and "has also noted that the concept of sustainable development is a part of customary international law".[719] However, this does not in our view speak to the question of whether international obligations are automatically incorporated into domestic law and have "direct effect" in India.

7.299. We recall the Appellate Body's statement that "[i]n some WTO Members, certain international rules may have direct effect within their domestic legal systems without requiring implementing legislation. In such circumstances, these rules also become part of the domestic law of that Member". We do not believe that the Appellate Body's reference to implementing "legislation" in this context can be understood as implying a distinction between implementing actions taken by the legislative branch versus implementing actions taken by the executive branch, such that the question of whether an international agreement would be found to have "direct effect" for purposes of Article XX(d) would depend on whether the executive branch, as opposed to the legislative branch, takes implementing measures to incorporate them into the domestic legal system. India has not explained what would be the basis for such a distinction, and we find it difficult to see how such a definition of "direct effect" could be reconciled with the distinction that the Appellate Body did draw, as between rules deriving from international agreements "that have been incorporated into the domestic legal system of a WTO Member" versus rules that "have direct effect according to that WTO Member's legal system".[720] Rather, we consider the Appellate Body to have been using the terms "direct effect" to mean international rules automatically incorporated into the domestic legal system without any form of "implementing instrument" being required, by the executive branch, the legislative branch, or any other branch of the government or organ of the State.

7.300. India has stated that the NAPCC "seeks to implement India's obligations under the UNFCCC".[721] As noted above, India has also stated that "[a]cts of the Government in implementing

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[716] India's response to Panel question No. 35.
[717] India's opening statement at the first meeting of the Panel, para. 60.
[718] India's first written submission, para. 180 (citing *Vellore Citizens Welfare Forum* v. *Union of India and Others*, (1996) 5 SCC 647 at paras 10-15).
[719] India's first written submission, para. 180.
[720] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 79.
[721] India's first written submission, paras. 2 and 176.

international law obligations pursuant to treaties and resolutions that India has adhered to at the international level" have been recognized under Indian law as "constituting implementation" of those obligations. We understand India to be explaining that NAPCC seeks to "implement" the UNFCCC in the sense that it takes measures pursuant to, and in furtherance of, India's obligations under the UNFCCC. Based on our above review of the provisions in the NAPCC referred to by India, we do not understand India to be asserting that the NAPCC has the legal effect of incorporating India's rights and obligations under the UNFCCC into its domestic legal system, so as to make those rights and obligations legally enforceable in India.[722] We understand the Appellate Body to have been referring to implementation in this second sense, when it referred to "rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member".[723]

7.301. India accepts that "[t]he burden is on India to establish that there is a law with which compliance is sought to be secured".[724] Based on the foregoing, we find that India has failed to meet its burden of demonstrating that any of the international instruments at issue have "direct effect" in India, or that any of those instruments are "rules that form part of [its] domestic legal system". Accordingly, we find that India has failed to demonstrate that the preamble of the WTO Agreement, the United Nations Framework Convention on Climate Change, the Rio Declaration on Environment and Development, and the Rio+20 Document: The Future We Want, adopted by the United Nations General Assembly in 2012, can be considered "laws or regulations" within the meaning of Article XX(d) in the present dispute.

7.3.3.3.2 Domestic instruments identified by India

7.302. We now turn to the domestic instruments identified by India. We recall that these domestic instruments include the Electricity Act, the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change.

7.303. India argues that "[e]ach of these instruments would qualify as 'laws or regulations' for the purposes of Article XX(d)."[725] India submits that "[m]erely because the law in question does not prescribe the means of implementation, does not mean they constitute an objective, or that their compliance cannot be secured".[726] In seeking to argue that Article XX(d) should not be interpreted in a manner that attaches undue significance to the distinction between "legally binding and non-binding instruments", India states that "[s]uch an interpretation would mean that if India had a Climate Change Act, instead of a National Action Plan on Climate Change, it would have been able to justify [the] DCR [measures], but since it is only seeking to implement the National Action Plan on Climate Change and the UNFCCC, it cannot claim the exception under Article XX(d)."[727] These arguments pertain to both the domestic and international law instruments identified by India.

7.304. The United States notes that "many of the instruments cited by India appear to be broad policy documents with non-binding or merely hortatory effect", and "do *not* appear to be laws or regulations with which India must 'comply' within the meaning of Article XX(d)".[728] The United

[722] To the extent that the UNFCCC (or any other international obligation) has been "implemented" by the NAPCC (or any other domestic instrument) under Indian domestic law in the legal sense of the term, a matter upon which we express no view, then we consider that it would be the NAPCC (or any other domestic instrument), not the UNFCCC (or any other international obligation), that constitutes the "law or regulation" under Article XX(d). In other words, we consider that when an international agreement has been incorporated through a domestic "implementing instrument", it would be that domestic implementing instrument derived from the international agreement that constitutes the relevant "law or regulation" for the purpose of Article XX(d). As the Appellate Body explained, "[i]n such situations, the *origin* of the rule is international, but the *implementing instrument* is a *domestic law or regulation*". Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 69. (emphasis original) We address the NAPCC below in the context of assessing whether any of the domestic instruments identified by India are "laws or regulations" within the meaning of Article XX(d).

[723] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 79.

[724] India's opening statement at the first meeting of the Panel, para. 55.

[725] India's response to Panel question No. 68, para. 84.

[726] India's opening statement at the first meeting of the Panel, para. 57.

[727] India's opening statement at the first meeting of the Panel, para. 58.

[728] United States' opening statement at the first meeting of the Panel, para. 49. (emphasis original) See also United States' second written submission, para. 54.

States submits that, "[o]n 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)."[729]

7.305. The European Union likewise observes that "some of the documents relied upon by India … are policy documents or non-binding declarations", and that India "seems to be largely relying on the general objectives of the laws and regulations it cites".[730]

7.306. By its terms, Article XX(d) only covers measures taken to secure compliance with "laws and regulations". The equally authentic Spanish and French versions likewise refer to "las leyes y de los reglamentos" and "des lois et règlements", respectively. Pursuant to Article 31 of the Vienna Convention, we must interpret Article XX(d) in accordance with the ordinary meaning to be given to these terms in their context and in the light of the object and purpose of the WTO Agreement.

7.307. We commence our examination of the phrase "laws or regulations" by noting that "law" is defined in the *Shorter Oxford English Dictionary* as a "rule of conduct imposed by secular authority", while "regulation" is defined as a "rule prescribed for controlling some matter, or for the regulating of conduct".[731] We observe that these definitions have been applied by prior panels interpreting the words "laws or regulations" in the context of Article XX(d)[732] and Article X:1[733] of the GATT 1994. Prior panels have further found that the ordinary meaning of the term "regulations", in the context of Article III:4 and Article X:1 of the GATT 1994, is equivalent to "mandatory rules applying across-the-board".[734]

7.308. As a starting point, these dictionary definitions make clear that "laws" and "regulations" refer to "*rules*". We note that in *Mexico – Taxes on Soft Drinks*, the Appellate Body concluded that "the terms 'laws or regulations' refer to *rules* that form part of the domestic legal system of a WTO Member".[735] Throughout its analysis of Article XX(d) and the meaning of the terms "laws or regulations", the Appellate Body understood these terms to refer to "rules".[736] We further note that the dictionary definition of "law" includes a "rule of *conduct*", and that the definition of "regulation" likewise refers to a "rule prescribed for controlling some matter, or for the regulating *of conduct*".[737] We consider that interpreting "laws or regulations" to mean rules governing conduct is consistent with the immediate context in which these terms appear.[738] By its terms, Article XX(d) refers to "laws or regulations" in respect of which "compliance" can be secured. We consider that, by necessary implication, the "laws or regulations" referred to in Article XX(d) must therefore be rules in respect of which conduct would, or would not, be in "compliance".

7.309. The immediate context of the words "laws or regulations" also implies that the "laws or regulations" referred to in Article XX(d) must be legally enforceable. First, as already explained above, the Appellate Body noted in the context of "rules that form part of the domestic legal system" that international agreements may constitute "laws or regulations" covered by Article XX(d) "insofar as they are incorporated into the domestic legal order in such a way that they can be invoked as against individuals, and enforce[d] against them".[739] To the extent that this is a criterion for an international agreement to constitute a rule forming part of the domestic legal system, we do not see how a different standard could apply in respect of domestic instruments. Furthermore, the illustrative list of "laws or regulations" provided in Article XX(d) sheds light on

[729] United States' opening statement at the first meeting of the Panel, para. 49.
[730] European Union's third-party submission, paras. 66-67.
[731] *Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 1552.
[732] Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.193.
[733] Panel Report, *EC – IT Products*, para. 7.1025.
[734] Panel Reports, *China – Publications and Audiovisual Products*, para. 7.1448, and *China – Auto Parts*, para. 7.239 (both citing GATT Panel Report on *Canada – FIRA*, para. 5.5, which was followed by Panel Report on *India—Autos*, para. 7.181), and *EC – IT Products*, fn 1335.
[735] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 69. (emphasis added)
[736] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 69, 70, 75, 77, and 79.
[737] *Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 2516.
[738] In the context of interpreting Article III:8(a) of the GATT 1994, the Appellate Body noted that the word "governing" is defined as "constitut[ing] a law or rule for". Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.58 (citing Oxford English Dictionary online).
[739] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, fn 149.

the scope of the "laws or regulations" covered by this provision.[740] These examples refer, inter alia, to measures relating to customs "enforcement", and the "enforcement" of monopolies. Other examples refer to measures for the "protection" of intellectual property rights, and for the "prevention" of deceptive practices; the Appellate Body has also characterized those types of "laws or "regulations" as "enforcement measures".[741]

7.310. We further observe that Article XX(d) refers to measures that are necessary to "*secure compliance*" with "laws or regulations" and not, for example, measures that are necessary "to fulfil a legitimate objective"[742] of such "laws or regulations". It is well established in GATT/WTO jurisprudence that the phrase "to secure compliance with laws or regulations" in Article XX(d) means measures "to enforce obligations under laws or regulations", and not measures "to ensure the attainment of the objectives of the laws and regulations".[743] Therefore, prior panels have found that measures that may be consistent with or further the objectives of a law or regulation, but which do not enforce any obligations contained therein, do not fall within the scope of Article XX(d).[744]

7.311. Based on the foregoing, we conclude that the terms "laws or regulations" refer to legally enforceable rules of conduct under the domestic legal system of the WTO Member concerned, and do not include general objectives. We will now examine whether the domestic instruments identified by India constitute "laws or regulations" within the meaning of Article XX(d).

7.312. The Electricity Act was enacted by India's Parliament, and received the "assent" of the President on 26 May 2003.[745] It has formal characteristics that are normally associated with a statute. For example, it contains a date of entry into force[746], a section defining the terms used in the instrument[747], and throughout it is divided into numbered parts, sections and subsections that consist of rules cast in binding language. Section 3, the provision identified by India, appears to constitute a legally enforceable rule of conduct under the domestic legal system of India. As elaborated above, it mandates that the Central Government "shall" perform certain conduct, i.e. prepare and publish the National Electricity Policy and tariff policy from time to time. It further mandates that the Central Electricity Authority referred to in sub-section (1) of section 70 "shall" perform certain conduct, most notably that it must prepare a National Electricity Plan in accordance with the National Electricity Policy and notify such plan once in five years. Based on the foregoing, we find that the Electricity Act, and in particular Section 3 thereof, constitutes a "law" for the purposes of Article XX(d).

7.313. There are striking contrasts between the Electricity Act, on the one hand, and the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change, on the other. First, each is expressly entitled a "policy" or "plan", and the language of the provisions and passages in these documents identified by India, which we have set out above, does not suggest the existence of any legally enforceable rules. Rather, these extracts appear to consist of language that is hortatory, aspirational, declaratory, and at times solely descriptive. In this regard, these documents appear similar to the JNNSM Mission Document, which India has variously characterised as a "vision document", containing "broad recommendations", and a "'wish list' of objectives".[748]

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[740] The Appellate Body has referred to this illustrative list for the purpose of interpreting the meaning of "laws or regulations" by implication. Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 70.

[741] See, e.g. Appellate Body Report, *Korea –Various Measures on Beef*, paras. 163 and 170.

[742] In contrast to the wording of Article XX(d) of the GATT 1994, Article 2.2 of the TBT Agreement refers to measures "necessary *to* fulfil a legitimate *objective*, taking account of the risks non-fulfilment would create".

[743] GATT Panel Report, *EEC – Parts and Components*, para. 5.17; Panel Reports, *Canada – Periodicals*, para. 5.9; *Canada – Wheat Exports and Grain Imports*, para. 6.248; *EC – Trademarks and Geographical Indications (US)*, para. 7.447; *Mexico – Taxes on Soft Drinks*, para. 8.175; *Colombia- Ports of Entry*, para. 7.538.

[744] We return to this issue, and prior jurisprudence, in the context of addressing whether the DCR measures are measures "to secure compliance" with laws or regulations. See paras. 7.330. to 7.332.

[745] Electricity Act, (Exhibit USA-20), p. 1.

[746] Electricity Act, Section 1.

[747] Electricity Act, Section 2.

[748] India's first written submission, paras. 2, 26, 38, and 39.

7.314. Second, apart from the hortatory, aspirational, and declaratory language in the provisions and passages identified, India has not suggested that these "policies" and "plans" are legally binding, or that they are substantively similar to Acts or other instruments under its domestic legal system.[749] To the contrary, in seeking to argue that Article XX(d) should not be interpreted in a manner that attaches undue significance to the distinction between "legally binding and non-binding instruments", India states that "[s]uch an interpretation would mean that if India had a Climate Change Act, instead of a National Action Plan on Climate Change, it would have been able to justify [the] DCR [measures], but since it is only seeking to implement the National Action Plan on Climate Change and the UNFCCC, it cannot claim the exception under Article XX(d)."[750] This appears to be an acknowledgement that the National Action Plan on Climate Change is not legally binding.

7.315. We see nothing in the National Electricity Policy, the National Electricity Plan, or the National Action Plan on Climate Change to suggest that these documents are legally enforceable, either as against the Government or any other entity. For example, in contrast to the *Guidelines* and *Request for Selection* documents analysed earlier in our Report, we see nothing in these policy documents referring to sanctions or penalties in the event of a failure to achieve the objectives set forth therein. The National Electricity Policy states that it "aims at laying guidelines" for the achievement of certain objectives.[751] The National Electricity Plan is described as a "reference document".[752] The National Action Plan on Climate Change states:

> The Prime Minister's Council on Climate Change, in the first meeting on 13th July, 2007, had decided that "*A National Document compiling action taken by India for addressing the challenge of Climate Change, and the action it proposes to take*" be prepared.
>
> The National Action Plan for Climate Change responds to the decision of the PM's Council, as well as updates India's national programmes relevant to addressing climate change. It identifies measures that promote our development objectives, while also yielding co-benefits for addressing climate change effectively. It lists specific opportunities to simultaneously advance India's development and climate related objectives of both adaptation as well as greenhouse gas (GHG) emission.[753]

7.316. We asked India to clarify the legal status, under the domestic law of India, of the National Action Plan on Climate Change, the National Electricity Policy, and the National Electricity Plan. India responded that each of these instruments are "laws or regulations" within the meaning of Article XX(d). In this regard, India first referred to the Appellate Body's conclusion that "the terms 'laws or regulations' cover rules that form part of the domestic legal system of a WTO Member,

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[749] In the absence of any agreed definition or practice regarding the formal characteristics that an instrument must possess to be characterized as a "law" or "regulation", and in light of the diversity of WTO Members' domestic legal systems, it would be unwise to seek to formulate one in the abstract. Thus, we agree with the Appellate Body's statement that what constitutes a "law" or "regulation" falling within the scope of WTO provisions using those terms should be judged "not simply" by reference to the label given to various instruments under the domestic law of each WTO Member and "not merely on its form or nomenclature", but rather "based on the content and substance of the instrument". Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, fn 87.

However, within a given legal system, we consider that the label and nomenclature given to an instrument may be relevant insofar as it sheds light on the substance and status of that instrument within that Member's domestic legal system. We note the statement by another panel, in a different context, that "the Panel sees no reason why, for example, the type of instrument or so-called 'formal' features of the transaction would be disregarded *if* they shed light on the nature" of the domestic instruments under consideration. Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.1137.

[750] See, e.g. India's opening statement at the first meeting of the Panel, para. 58.

[751] *National Electricity Policy*, (Exhibit IND-14), paragraph 1.8 (stating, "[t]he National Electricity Policy aims at laying guidelines for accelerated development of the power sector, providing supply of electricity to all areas and protecting interests of consumers and other stakeholders keeping in view availability of energy resources, technology available to exploit these resources, economics of generation using different resources, and energy security issues.")

[752] *National Electricity Policy*, (Exhibit IND-14), paragraph 3.1 (stating that [t]he Plan prepared by CEA and approved by the Central Government can be used by prospective generating companies, transmission utilities and transmission/distribution licensees as reference document".)

[753] NAPCC, (Exhibit IND-2), p. 13.

including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system".[754] We do not see how this statement relates to the question of the legal status, under the domestic law of India, of the National Action Plan on Climate Change, the National Electricity Policy, and the National Electricity Plan under the domestic law of India.[755]

7.317. India further stated, in response to this same question concerning the legal status of these instruments under its domestic law, that these instruments "are all policies adopted by the Government of India in exercise of its executive powers granted under the Constitution". With respect to India's statement that these instruments were adopted lawfully, we have no reason to doubt that this is the case. Nor would we preclude the possibility that the legality of an instrument's adoption or enactment could potentially be relevant for an assessment of whether it constitutes a "law or regulation" within the meaning of Article XX(d). However, insofar as this is a necessary condition, an issue we need not decide, we see no basis for treating the legality of a document's adoption or enactment as a sufficient condition, or the decisive factor, for finding that it is a "law or regulation" within the meaning of Article XX(d).

7.318. India accepts that "[t]he burden is on India to establish that there is a law with which compliance is sought to be secured".[756] Based on the foregoing, we find that Section 3 of the Electricity Act is a "law" within the meaning of Article XX(d). However, we find that India has failed to meet its burden of demonstrating that the other domestic provisions and instruments at issue constitute legally enforceable rules of conduct in its domestic legal system. Accordingly, we find that the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change do not constitute legally enforceable rules of conduct, and are not "laws or regulations" within the meaning of Article XX(d) of the GATT 1994.

7.319. As indicated at the outset, demonstrating that a challenged measure is a measure "to secure compliance with laws or regulations which are not inconsistent" with the GATT 1994 entails demonstrating the cumulative requirements that there are "laws or regulations", that they are "not inconsistent with the provisions of" the GATT 1994, and that the measures at issue are measures to "secure compliance" with those laws and regulations. Of the international and domestic instruments identified by India, we have found that only one, Section 3 of the Electricity Act, is a "law or regulation" within the meaning of Article XX(d). Will therefore proceed to examine whether Section 3 of the Electricity Act is "not inconsistent with the provisions of" the GATT 1994. If we find that it is, we will then examine whether the DCR measures are measures "to secure compliance" with Section 3 of the Electricity Act.

7.3.3.4 Whether Section 3 of the Electricity Act is "not inconsistent with the provisions" of the GATT 1994

7.320. India asserts that all of the international and domestic instruments at issue "constitute laws or regulations that are not inconsistent with the provisions of GATT 1994".[757] India also notes that the "importance of the value of sustainable development sought to be implemented by the DCR Measures is accepted and forms a part of the letter and spirit of the WTO Agreement".[758]

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[754] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 79.

[755] It is not clear to us if the intended import of India's citation to these statements is that these domestic instruments are "rules deriving from international agreements", and it therefore follows, from this, that they qualify as "rules that form part of the domestic legal system of a WTO Member" for purposes of Article XX(d). Insofar as India is making this argument, we disagree. First, we do not consider that the Appellate Body's statement can be construed to mean that domestic instruments that would not otherwise qualify as "laws or regulations" will so qualify insofar as they derive from international agreements that likewise are not "laws or regulations" within the meaning of Article XX(d). Second, even if we were to agree with such a reading of the Appellate Body's statement, which we do not, it would still need to be demonstrated that the domestic instruments are "rules" deriving from international agreements. We have found that India has failed to demonstrate that the provisions referred to by it constitute legally enforceable rules of conduct under its domestic legal system.

[756] India's opening statement at the first meeting of the Panel, para. 55.

[757] India's first written submission, para. 241. See also India's opening statement at the first meeting of the Panel, para. 55.

[758] India's first written submission, para. 257.

7.321. The United States has not questioned the GATT-consistency of Section 3 of the Electricity Act. Members' laws are presumed to be WTO-consistent unless proven otherwise.[759]

7.322. Accordingly, by virtue of the normal operation of the burden of proof, we conclude that Section 3 of the Electricity Act meets the requirement of being "not inconsistent with the provisions" of the GATT 1994.

7.3.3.5 Whether the DCR measures are measures "to secure compliance" with Section 3 of the Electricity Act

7.323. The parties hold opposing views on whether the DCR measures are measures "to secure compliance" with any of the international or domestic instruments identified by India. Their disagreement appears to revolve around two main issues.

7.324. First, the parties disagree on whether the exception in Article XX(d) extends to measures taken by a government to secure its *own* compliance with laws or regulations. The United States argues that Article XX(d) does not apply to measures taken to secure a government's own compliance with its laws and regulations.[760] In support of its view that Article XX(d) covers only those measures necessary for a government to enforce its laws and regulations *vis-à-vis* persons subject to its jurisdiction, the United States argues that the wording of Article XX(d), including the terms "secure compliance" and "enforce", "strongly suggest that the actor doing the enforcing is distinct from the object(s) subject to enforcement".[761] India argues that measures "to secure compliance with laws or regulations" in Article XX(d) include measures taken by a government to secure its own compliance with its laws and regulations.[762] In India's view, the reasoning by the United States "is without any basis or support in the actual legal texts".[763] Third parties have expressed divergent views on this interpretative issue.[764]

7.325. Second, the parties have expressed different views on the nature of the link or nexus that is required, between the challenged measure and the underlying "laws or regulations", in order for a measure to be characterized as a measure "to secure compliance" with those laws or regulations under Article XX(d). In this regard, the United States emphasizes that "none of the instruments cited by India encourage, much less require, the imposition of DCRs for solar cells and modules".[765] Likewise, the European Union states, with respect to the instruments at issue, that India has not shown that there is "any provision that would require specific action of imposing DCRs".[766] India argues that this cannot be the correct legal standard to apply, because any laws or regulations that mandated the imposition of a measure found to be inconsistent with one or more GATT obligations, and sought to be justified under Article XX(d), would never constitute a law or regulation "not inconsistent with the provisions of this Agreement".[767]

7.326. We note that in the context of its argumentation under Article XX(d), India's references to the Electricity Act are confined to explaining that Section 3 of the Electricity Act mandates the

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[759] Panel Reports, *US – Gambling*, para. 6.549; *US – Customs Bond Directive*, para. 7.301; *Colombia – Ports of Entry*, para. 7.531 (citing Appellate Body Report, *US – Carbon Steel*, para. 157).

[760] See United States' response to Panel question No. 28(b), paras 45 -56; United States' second written submission, paras. 46-53; United States' opening statement at the second meeting of the Panel, paras. 38-39; United States' comments on India's response to Panel question No. 66, paras. 51-52.

[761] United States' second written submission, para. 48.

[762] See India's response to Panel question No. 33; India's second written submission, paras. 124-135; India's opening statement at the second meeting of the Panel, paras. 30-34; India's response to Panel question No. 66, para. 81; India's comments on the United States' response to Panel question No. 69(b), paras. 60-61.

[763] India's second written submission, para. 133.

[764] See the responses by Canada, the European Union, and Japan to Panel question No. 6 to the third parties.

[765] United States' second written submission, paras. 54-67; United States' opening statement at the second meeting of the Panel, paras. 40-41; United States' comments on India's response to Panel question No. 66, para. 53.

[766] European Union's third-party submission, para. 67; European Union's response to question No. 5 from India following the first meeting.

[767] India's opening statement at the second meeting of the Panel, para. 36; India's closing statement at the second meeting of the Panel, para. 14; India's comments on the United States' response to Panel question No. 69(c), para. 76.

Government to prepare a National Electricity Policy and tariff policy.[768] India states that its domestic law obligations are those embodied in the Electricity Act, "read with"[769] the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change. India has not advanced any arguments on the issue of how the DCR measures "secure compliance" with Section 3 of the Electricity Act as such.

7.327. As set forth above, Section 3 of the Electricity Act establishes the legal basis for the development of the National Electricity Policy and the National Electricity Plan. It identifies the entities involved in the periodic preparation, publication, and review of the National Electricity Policy and the National Electricity Plan. It does not prescribe the content or substance of either the National Electricity Policy or the National Electricity Plan, other than to state that the National Electricity Policy to be prepared from time to time will be "based on optimal utilisation of resources" such as "coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy".

7.328. We note that prior panels have found that for a measure to be one to "secure compliance" with "laws or regulations" within the meaning of Article XX(d), it must be established that the actions prevented by the measure are inconsistent with one or more obligations contained in those laws or regulations. In this regard, the GATT panel in *EEC – Parts and Components* explained that "to secure compliance with laws or regulations" means that the measure "must prevent actions inconsistent with the obligations set out in laws or regulations", i.e. measures that "prevent actions that would be illegal under the laws or regulations" at issue.[770] Likewise, the panel in *China – Autos*, following the example of the earlier panel in *Korea – Various Measures on Beef*, framed the issue as whether the actions that the measure "aimed to prevent" are "contrary to the specific provisions" of the law or regulation at issue.[771] Following this approach, the panel in *China – Auto Parts* concluded that:

> China has not discharged its burden to prove that the measures "secure compliance" with its tariff schedule, because China has not explained to our satisfaction how the types of actions that China claims amount to "circumvention" of the tariff provisions for motor vehicles (i.e. importing and assembling auto parts in China, with or without any intention to avoid/evade the higher tariff duties for motor vehicles) are inconsistent with the obligations under its tariff schedule and hence need to be prevented through the measures.[772]

7.329. Therefore, even assuming for the sake of argument that Article XX(d) could potentially cover measures taken by India to secure its *own* compliance with its laws or regulations, which is a legal issue we consider it unnecessary to resolve, it would have to be demonstrated that the DCR measures secure compliance, by the Central Government of India or the Central Electricity Authority, with their obligations set out in Section 3 of the Electricity Act. India has advanced no such argument, and we see no link or nexus between the DCR measures and Section 3 of the Electricity Act. In this regard, we fail to see how the DCR measures could be said to secure compliance with the obligations in Section 3 of the Electricity Act, which are to periodically prepare the National Electricity Policy and the National Electricity Plan.[773] India has not suggested that the DCR measures are aimed at preventing the Central Government of India or the Central Electricity Authority from acting inconsistently with their obligations to periodically prepare the National Electricity Policy and the National Electricity Plan.

7.330. In our view, the most that could be said is that the DCR measures may be consistent with or further the same objectives referred to in the Electricity Act, namely the "optimal utilisation of resources" such as "coal, natural gas, nuclear substances or materials, hydro and renewable

[768] India's first written submission, paras. 173 and 175; India's response to Panel question No. 34(a).

[769] India's first written submission, para. 240; India's opening statement at the first meeting of the Panel, para. 54; India's response to Panel question No. 34(a); India's second written submission, para. 137.

[770] GATT Panel Report, *EEC – Parts and Components*, para. 5.15.

[771] Panel Report, *China – Autos Parts*, para. 7.315 and fn 572 (citing Panel Report, *Korea – Various Measures on Beef*, paras. 655, 658).

[772] Panel Report, *China – Auto Parts*, para. 7.346.

[773] Given that we see no link or nexus between the DCR measures and Section 3 of the Electricity Act, we consider it unnecessary to resolve the question of precisely what type of link or nexus would be required to establish that the DCR measures "secure compliance" with this law.

sources of energy".[774] However, we recall that, as indicated above, it is well established in GATT/WTO jurisprudence that the phrase "to secure compliance with laws or regulations" in Article XX(d) means measures "to enforce obligations under laws or regulations", and not measures "to ensure the attainment of the objectives of the laws and regulations".[775] Therefore, prior panels have found that measures that may be consistent with or further the objectives of a law or regulation, but which do not enforce any obligations contained therein, do not fall within the scope of Article XX(d).

7.331. For example, in *Canada – Periodicals*, Canada asserted that a prohibition on imported magazines containing domestic advertising was required to secure compliance with a tax measure that limited deductions to expenses incurred in advertising in domestic magazines. The panel concluded that although the ban on imported magazines might have the incidental consequence of ensuring that the tax deduction was not abused, and, therefore, the ban "may share the same policy objective" with the tax measure, that alone was insufficient to establish that the import ban was meant to "secure compliance" with tax legislation.[776] Likewise, in *Canada – Wheat Exports and Grain Imports*, the panel found that the measure "may allow Canada … to ensure the attainment of the objectives" of the Canada Grain Act, but that this did not suffice to establish that it was a measure designed to "secure compliance" with laws or regulations. Canada argued that if certain products, such as GMO grain not approved in Canada, were found in shipments of Canadian grain, this would have deleterious effects on Canadian exports, as it would have a negative impact on consumer confidence in Canada's quality assurance system. The Panel rejected this argument, stating:

> We note in this respect that Article XX(d) provides that the WTO-inconsistent measure that is sought to be justified must be "necessary to *secure compliance* with laws and regulations" that are not themselves inconsistent with the provisions of the GATT 1994. The panel in *European Economic Community - Regulations on Imports of Parts and Components* found this phrase to mean "to enforce obligations under laws and obligations" and *not* "to ensure the attainment of the objectives of the laws and regulations".[777] Therefore, the fact that Section 57(c) of the *Canada Grain Act* may allow Canada to control for SPS and GMO problems and thus helps Canada preserve consumer confidence which, in turn, helps to ensure the attainment of the objectives of, say, the *Canada Grain Act*, would not be sufficient to bring Section 57(c) within the protective scope of Article XX(d).[778]

7.332. In line with these cases, we consider that it is insufficient for the DCR measures to merely ensure the attainment of, or be consistent with, objectives referenced in Section 3 of the Electricity Act. Rather, it would be necessary to demonstrate that the DCR measures serve to enforce the specific obligations contained in the law at issue. Based on the foregoing, we conclude that India has failed to demonstrate that DCR measures are measures "to secure compliance" with the legal obligations in Section 3 of the Electricity Act.

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[774] Electricity Act, (Exhibit USA-20), Section 3(1).

[775] GATT Panel Report, *EEC – Parts and Components*, para. 5.17; Panel Reports, *Canada – Periodicals*, para. 5.9; *Canada – Wheat Exports and Grain Imports*, para. 6.248; *EC – Trademarks and Geographical Indications (US)*, para. 7.447; *Mexico – Taxes on Soft Drinks*, para. 8.175; *Colombia- Ports of Entry*, para. 7.538.

[776] Panel Report, *Canada – Periodicals*, para. 5.10. The panel stated:

"Tariff Code 9958 cannot be regarded as an enforcement measure for Section 19 of the Income Tax Act. It is true that if a government bans imports of foreign periodicals with advertisements directed at the domestic market, as does Canada in the present case, the possibility of non-compliance with a tax provision granting tax deductions for expenses incurred for advertisements in domestic periodicals will be greatly reduced. It would seem almost impossible for an enterprise to place an advertisement in a foreign periodical because there would be virtually no foreign periodical available in which to place it. Thus, there would be no way for the enterprise legally to claim a tax deduction therefor. However, that is an incidental effect of a separate measure distinct (even though it may share the same policy objective) from the tax provision which is designed to give an incentive for placing advertisements in Canadian, as opposed to foreign, periodicals."

[777] GATT Panel Report, *EEC – Parts and Components*, paras. 5.14-5.18.

[778] Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.248.

7.3.3.6 Conclusion

7.333. For the reasons set forth above, we find that, with the exception of Section 3 of the Electricity Act, India has failed to demonstrate that the international and domestic instruments that it has identified are "laws or regulations" within the meaning of Article XX(d). As regards Section 3 of the Electricity Act, India has failed to demonstrate that DCR measures are measures to "secure compliance" with the legal obligations in this provision. Accordingly, we find that India has failed to demonstrate that the DCR measures are measures "to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT 1994]". We therefore find that the DCR measures are not justified under Article XX(d) of the GATT 1994.

7.3.4 Whether the DCR measures are "essential" or "necessary" within the meaning of Articles XX(j) and XX(d)

7.3.4.1 Introduction

7.334. We have found that solar cells and modules are not "products in general or local short supply" in India within the meaning of Article XX(j) of the GATT 1994. We have further found that the DCR measures are not designed "to secure compliance with laws or regulations" within the meaning of Article XX(d) of the GATT 1994. These are the threshold legal elements that must be satisfied in order to find that a measure is justified under Articles XX(j) and XX(d), and India's defences fail to meet this threshold. Accordingly, it is unnecessary for us to make any further findings on whether the DCR measures are "essential" to the acquisition of solar cells and modules for the purpose of Article XX(j), or whether they are "necessary" within the meaning of Article XX(d). Were we to find that they are "essential" or "necessary" within the meaning of Articles XX(j) and XX(d), this would still have no implications for the overall conclusion given that the threshold legal elements under these provisions are not satisfied. Were we to find that they are not "essential" or "necessary" within the meaning of these provisions, this would merely serve to establish a separate and additional basis for the overall conclusion, which we have already reached, that the DCR measures are not justified under Articles XX(j) or XX(d).

7.335. However, we note that our findings on the threshold legal elements under Articles XX(j) and XX(d) each involve novel issues of law and legal interpretation on which the parties hold opposing views. We further note that the question of whether the DCR measures are "essential" or "necessary" within the meaning of Articles XX(j) and XX(d) has been the subject of extensive argumentation, and implicates a number of factual issues. If our findings on the threshold legal elements under Articles XX(j) or XX(d) were modified or reversed on appeal, then the Appellate Body could be called upon to proceed to examine whether the DCR measures are "essential" or "necessary" within the meaning of Articles XX(j) and XX(d), respectively. In such circumstances, we consider it useful to proceed with a limited analysis and review so that the Appellate Body may have the benefit of our factual findings related to these issues.

7.336. Our limited analysis and review is primarily factual. This limited analysis and review will involve identifying the different issues that would need to be considered, the parties' positions on those different issues, and our factual findings on those issues. Having found that the threshold legal elements under Articles XX(j) and XX(d) are not satisfied in this case, and given the limited and specific purpose for our proceeding further with an examination of whether the DCR measures are "essential" or "necessary", we do not see any compelling reason for the Panel to reach any overall conclusion, or make any finding, on whether the DCR measures are "essential" or "necessary" within the meaning of Articles XX(j) and XX(d), respectively.[779]

7.3.4.2 The relevant objective and fundamental issue in dispute for the purpose of assessing whether the DCR measures are "essential" or "necessary"

7.337. In the context of addressing whether solar cells and modules are "products in general or local short supply" in India, we have already considered the evidence and arguments of the parties regarding the risk of a disruption in imports of solar cells and modules. We found that the evidence provided by India establishes that, in the absence of any measures taken by SPDs or India to

[779] Our approach is similar to that taken by another panel in a recent case. See Panel Report, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.672-7.716.

ensure continued access to foreign solar cells and modules, and simply taking their continued availability for granted, there is some risk of disruption in the supply of affordable foreign solar cells and modules to India.[780]

7.338. Given our finding that there is some risk of disruption in the supply of affordable foreign solar cells and modules to India, and in light of the parties' argumentation[781], it appears to us that the fundamental issue in dispute for the purpose of determining whether the DCR measures are "essential" or "necessary" under Articles XX(j) and XX(d) is whether the DCR measures ensure, or reduce this risk of a disruption in, Indian SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power.

7.339. We understand that the objective of ensuring Indian SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power exists in a wider context. In particular, we understand that the objective of ensuring Indian SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power is not an objective that exists in isolation from India's ultimate policy objectives of energy security and sustainable development. In other words, realizing the objective of ensuring Indian SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power would enable India's SPDs to maintain a continuous and affordable supply of clean electricity generated from solar power, which would in turn reduce India's reliance on imported oil and coal to meet its energy needs, and would ultimately contribute to the realization of achieving its objectives of energy security and sustainable development.

7.340. Nevertheless, we do not consider that these wider objectives of energy security and sustainable development would be legally relevant to the question of whether the DCR measures are "essential to the acquisition" of products in short supply under Article XX(j). We therefore disagree with India's statement that, in the context of Article XX(j), the DCR measures must "be examined in the context of the overall objectives of energy security and ecologically sustainable growth *for which* acquisition or distribution of domestically manufactured solar cells and modules is *essential*".[782] As we see it, measures taken to ensure Indian SPDs' access to a continuous and affordable supply of solar cells and modules, and thus to eliminate or reduce the risk of a disruption in the supply of these products, can be characterized as measures for the "acquisition" of those products by Indian SPDs, and would therefore fall within the scope of Article XX(j). It would follow that if India could demonstrate that the DCR measures are "essential" to ensure Indian SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power, this would constitute a sufficient basis for establishing that the DCR measures are "essential to the acquisition" of those products by Indian SPDs. However, we see no basis, in the text of Article XX(j) or otherwise for requiring India to further demonstrate that such "acquisition" is in turn necessary for the realization of India's ultimate objectives of realizing energy security and sustainable development. In this regard, the relevant question under Article XX(j) is whether the DCR measures are "essential to the acquisition" of products in short supply, and not whether the acquisition of those products is in turn essential for the achievement of some wider policy objective.

7.341. Demonstrating that the DCR measures are necessary to ensure Indian SPDs' access to a continuous and affordable supply of the solar cells and modules is also a fundamental premise of India's argumentation under Article XX(d). In this regard, India argues that the DCR measures "have been designed to secure compliance with India's obligations under its law and regulations which require it to ensure ecologically sustainable growth and sustainable development", and it explains that they do so "by creating a local manufacturing base for solar PV cells and modules, in order to ensure the ability of [domestic manufacturers to] satisfy the requirements for such cells and modules" by Indian SPDs.[783] To the same effect, India argues, in the context of Article XX(d), that it "is seeking to develop a functional local manufacturing base for cells and modules, which

[780] See para. 7.261. above.
[781] See paras. 7.15. to 7.17. , and 7.189. to 7.191. , above.
[782] India's response to Panel question No. 69(a), para. 86. (emphasis original)
[783] India's first written submission, para. 255.

are the essential components in a solar PV generation plant, thereby ensuring a sustained supply of the same in the event of disruptions in imports".[784]

7.342. For purposes of the analysis under Articles XX(j) and XX(d), it therefore appears that the fundamental issue in dispute is whether the DCR measures are "essential" or "necessary" to ensure, or reduce the risk of a disruption in, Indian SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power. Our limited analysis and review proceeds on this understanding.

7.3.4.3 The legal standards in Articles XX(j) and XX(d)

7.343. For a measure to be justified under Article XX(j), it must be "essential" to the acquisition or distribution of products in general or local short supply. For a measure to be justified under Article XX(d), it must be "necessary" to secure compliance with laws or regulations not inconsistent with the GATT 1994. We recall that in its Report in *US – Gasoline*, the Appellate Body noted, with regard to the terms linking the chapeau and each paragraph of Article XX of the GATT 1994, that:

> It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.[785]

7.344. In this case, the parties have advanced different views on whether the use of the word "essential" in Article XX(j) establishes a different and more stringent legal threshold as compared with the word "necessary" in Article XX(d). According to the United States, a measure that is "essential" within the meaning of Article XX(j) of the GATT 1994 must be "absolutely indispensable" or "absolutely necessary".[786] India notes that the Oxford English Dictionary includes "necessary" as a synonym for "essential", and argues that the requirement that the measure is "essential" for its policy objective is not limited to what is "absolutely indispensable" but also encompasses situations that are "necessary".[787]

7.345. We do not consider it necessary to resolve this issue for the purpose of our limited analysis and review. In our view, the following considerations are sufficient for the purpose of establishing a general analytical framework to apply for the purpose of assessing whether the DCR measures are "essential" or "necessary".

7.346. First, in Article XX(j), the relevant legal issue is whether the measure is "essential to the acquisition or distribution" of products in general or local short supply. We agree with India when it states that the term "essential to" serves to "signif[y] the relationship between a measure, and its objective of acquisition or distribution of products in general or local short supply".[788] As noted above in our findings under the threshold legal element in Article XX(j), this stands in contrast to Article XI:2(a) of the GATT 1994, which refers to "products essential" to the exporting Member. Thus, whether a measure is "essential to the acquisition or distribution" of products in short supply is different from the question of whether those products are essential. It is also different from the question of whether the acquisition or distribution of those products in turn is essential to one or more policy objectives.

7.347. Furthermore, we consider that whether the DCR measures are "essential" to the acquisition or distribution of products is also different from the threshold legal questions under Articles XX(j) and XX(d). We found, in the context of our assessment of whether solar cells and modules are "products in general or local short supply" under Article XX(j), that India has not demonstrated any imminent risk of a shortage of solar cells and modules in India. However, the relevant question for the purposes of assessing whether the DCR measures are "essential" or

[784] India's first written submission, para. 261.
[785] Appellate Body Report, *US – Gasoline*, p. 18.
[786] United States' second written submission, para. 38.
[787] India's second written submission, para. 62; India's response to Panel question No. 25(b), p. 32.
[788] India's closing statement at the first meeting of the Panel, para. 9; India's response to Panel question No. 25(b); India's second written submission, para. 61.

"necessary" within the meaning of Articles XX(j) or XX(d) is not whether this risk is imminent, but rather whether the DCR measures are essential or necessary to reducing or eliminating this risk by ensuring affordable access to those products by SPDs which, as we have noted above, can be characterized as the "acquisition" of those products. In our view, measures taken to prevent relevant risks can be "essential" within the meaning of Article XX(j), and "necessary" within the meaning of Article XX(d), without a showing that those risks are imminent.[789]

7.348. Second, it is not in dispute that the threshold for establishing that a measure is "essential" under Article XX(j) is at least the same as for establishing that a measure is "necessary" under Article XX(d). We note that in interpreting the meaning of "necessity" as it is used in Article XX(d), the Appellate Body clarified that:

> the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".[790]

We further note that, in interpreting the word "essential" in the context of Article XI:2(a) of the GATT 1994, which refers to "products essential" to the exporting Member, the Appellate Body was of the view that the term "essential" means "absolutely indispensable or necessary".[791] Thus, we agree that a measure that would not meet the threshold of being "necessary" within the meaning of Article XX(d) would not meet the minimum threshold needed to demonstrate that it is "essential" within the meaning of Article XX(j).

7.349. Third, the parties agree that the general analytical framework that applies for assessing whether a measure is "necessary" under Article XX(d) can also be applied in the context of assessing whether a measure is "essential" under Article XX(j). We note that it is well established that an analysis of whether a measure is "necessary" within the meaning of Article XX(a), XX(b), and XX(d) involves, in most cases, a two-step analysis. The first step of a necessity analysis is a holistic weighing and balancing process of a series of factors, which must include the importance of the objective, the trade-restrictiveness of the measure, and the contribution of the measure to the objective.[792] The second step of the necessity analysis asks whether "a WTO-consistent alternative measure which the Member concerned could 'reasonably be expected to employ' is available or whether a less WTO-inconsistent measure is 'reasonably available'".[793] In other words, it must be demonstrated that no alternative measure is reasonably available.[794] In this case, the United States and India apply this same general analytical framework to the "essential" nexus in Article XX(j).[795] Several third parties have advanced similar views.[796] We see no reason to disagree with the parties and third parties. Therefore, for the purpose of our limited analysis and review of the information before the Panel, we will proceed on the basis that the general analytical framework that would need to be applied to assess whether the DCR measures are "essential" under Article XX(j) is similar to whether a measure is "necessary" to realize a given objective.

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[789] See fn 618 above.

[790] Appellate Body Reports, *Korea – Various Measures on Beef*, para. 161.

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

[792] Appellate Body Reports, *Korea – Various Measures on Beef*, para. 164; *US – Gambling*, para. 306; and *Brazil – Retreaded Tyres*, para. 182.

[793] Appellate Body Reports, *Korea – Various Measures on Beef*, para. 166; *EC – Seal Products*, para. 5.261.

[794] See Panel Reports, *EC – Seal Products*, para. 7.639, upheld by the Appellate Body in para. 5.290 of its Reports in *EC – Seal Products*.

[795] United States' second written submission, paras. 41-42; India's second written submission, paras. 62-86.

[796] In this regard, Canada states that the "essential" test would operate in a similar way to the "necessary" test. Canada's response to Panel question No. 3(b) to the third parties, para. 18. The European Union notes that the necessity analysis under Article XX(a), XX(b), and XX(d) may be instructive for the "essential" test. European Union's response to Panel question No. 3(b) to the third parties, para. 18. Brazil, Canada and the European Union indicate that an analysis of the term "essential" requires, under the same conditions as an analysis of the term "necessary", a comparison of the measure with reasonably available alternatives. Brazil's response to Panel question No. 3(b) to the third parties, p. 4; Canada's response to Panel question No. 3(b) to the third parties, paras. 17-18; European Union's response to Panel question No. 3(b) to the third parties, paras. 18-19.

7.350. In sum, it appears to us that for purposes of the analysis under both Articles XX(j) and XX(d), the relevant and fundamental objective that India is seeking to fulfil is to ensure, or reduce the risk of a disruption in, Indian SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power. It further appears to us that, leaving aside the question of whether the terms "essential" and "necessary" establish the same legal threshold[797], the parties agree that the threshold for establishing that a measure is "essential" under XX(j) is at least as high as that for establishing that a measure is "necessary" under Article XX(d). The parties further agree that the general analytical framework that would need to be applied to assess whether the DCR measures are "essential" under Article XX(j) is similar to the two-step analysis of assessing whether a measure is "necessary" to realize a given objective. We note that all of the third parties that expressed views on the similarities and possible differences between the legal standards in Articles XX(j) and XX(d) also seem to agree with the foregoing.[798]

7.3.4.4 Importance of the objective, trade restrictiveness, and contribution

7.351. We now turn to the arguments and information presented by the parties on the factors that would have to be weighed and balanced in the first step of the analysis under Articles XX(j) and XX(d), which are: (a) the importance of the objective of ensuring Indian SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power; (b) the trade-restrictiveness of the DCR measures; and (c) the contribution of the DCR measures to the realization of that objective.

7.352. We begin with the importance of the objective that India is seeking to realize. The Appellate Body has stated that:

> assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument.[799]

7.353. The United States has indicated that "it 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".[800]

7.354. In our view, ensuring that Indian SPDs have access to a continuous and affordable supply of the solar cells and modules needed to generate solar power is an important objective. Having said this, we do not have specific information or evidence on what the consequences would be in the event of a disruption in Indian SPDs' access to affordable supply of the solar cells and modules that are needed to generate solar power. The consequences could depend on the nature and duration of any such disruption, as well as the volume of solar cells and modules that SPDs would be seeking to acquire. However, it is not in dispute that solar cells and modules are needed to generate solar power. Thus, in the event that Indian SPDs were unable to access any affordable supply of solar cells or modules for any extended period of time, this could have serious implications for SPDs' ability to maintain or increase their capacity to generate solar power. Furthermore, we recall our earlier conclusion that India has provided evidence establishing that, in the absence of any measures taken by SPDs or India to ensure continued access to foreign solar

[797] We note that the United States observes that, for the purpose of resolving this dispute, the Panel "need not identify exactly" the difference between these two legal standards. United States' second written submission, para. 42.

[798] Brazil's response to Panel question No. 3(b) to the third parties, p. 4; Canada's response to Panel question No. 3(b) to the third parties, paras. 15-18; European Union's response to Panel question No. 3(b) to the third parties, paras. 16-18; Japan's response to Panel question No. 3(b) to the third parties, para. 15.

[799] Appellate Body Report, *Korea - Various Measures on Beef*, para. 162. See Panel Reports, *EC – Seal Products*, para. 7.632, and Appellate Body Reports, *EC – Seal Products*, para. 5.203.

[800] United States' second written submission, para. 42.

cells and modules, and simply taking their continued availability "for granted"[801], there is some risk of disruption in the supply of affordable foreign solar cells and modules to India.[802]

7.355. We turn now to the second factor, which is the trade-restrictiveness of the DCR measures. The Appellate Body has explained that the necessity analysis may include consideration of "the extent to which the compliance measure produces restrictive effects on international commerce, that is, in respect of a measure inconsistent with Article III:4, restrictive effects *on imported goods*", and stated that "[a] measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects".[803]

7.356. As we have already found, the DCR measures restrict the use of foreign solar cells and modules by SPDs that are participating, or would have participated, in the National Solar Mission. Thus, the measures at issue are trade restrictive.[804]

7.357. As regards the degree of trade-restrictiveness, India emphasizes that the DCRs "are limited in scope" and "do not constitute a ban on imported solar cells and modules", and recalls that as part of its overall strategy of ensuring adequate supply, it has taken measures to encourage and incentivize imports of solar cells and modules.[805] In contrast, the United States emphasizes that "[f]or projects to which they apply, the DCRs impose a ban on imports, which is one of the most severe forms of trade restriction", and adds that "while they do not apply to all projects funded through the NSM, they do cover a large proportion".[806] In our view, the parties' arguments regarding the degree of trade-restrictiveness do not present any disputed factual issues. Rather, it appears to us that the parties emphasize different aspects of the DCR measures, and attach different significance to the undisputed facts concerning the scope and context of the DCR measures.

7.358. The arguments presented by India generally seek to emphasize that the scope and coverage of the applicable DCR measure did not extend to all types of cells, modules, and/or projects, and further seek to place the DCR measures in a larger context, so as to diminish the restrictive character of the requirements imposed on the use of imported solar cells and modules. If that is the correct perspective for assessing the trade restrictiveness of the measure, then we consider that the DCR measures at issue in this dispute could be said, as India argues, to have a "relatively slight impact upon imported products".[807] Likewise, insofar as the analysis of trade-restrictiveness focuses on the types of solar cells and modules whose use was permitted under the DCR measures at issue, and the extent to which SPDs made use of those flexibilities, then it may be concluded that "[t]he first phase of the JNNSM likely had little negative impact on U.S. exports of PV modules to India" given that "thin film modules are the primary U.S. exports to India, and these products were not subject to [D]CRs in phase [I]".[808] Insofar as the analysis of trade-restrictiveness focuses on the wider context of the solar power market in India, then it would also be relevant that "U.S. firms, however, continue to pursue projects outside of the JNNSM".[809]

7.359. The United States, on the other hand, seeks to focus more closely on the restrictive effects on those foreign goods whose use is not permitted under Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1), and focuses on the portion of projects under the National Solar Mission where domestic solar cells and modules were used, rather than those that were not. If that is the correct perspective for assessing the trade restrictiveness of the measure, then we consider that the DCR measures at issue in this dispute could not be said to have a "relatively slight impact upon imported products".[810] For example, the outright prohibition on SPDs using any foreign c-SI

[801] India's comments on the United States' response to Panel question No. 58, para. 53.
[802] See paragraph 7.261.
[803] Appellate Body Report, *Korea – Various Measures on Beef*, para. 163. (emphasis original)
[804] See paragraphs 7.7. to 7.14. above.
[805] India's second written submission, para. 67.
[806] United States' second written submission, para. 42 (fourth bullet point).
[807] See Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.
[808] *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy,* United States International Trade Commission (December 2014), (Exhibit IND-32), p. 179.
[809] *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy,* United States International Trade Commission (December 2014), (Exhibit IND-32), p. 182.
[810] See Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.

modules in Phase I could not be said to have had a relatively slight impact on the use of those particular products under Phase I.

7.360. We note that the overall analysis of whether the DCR measures are "essential" or "necessary" would need to reflect a coherent perspective and even-handed approach with respect to the assessment of the DCR measures' trade-restrictiveness and the assessment of the DCR measures' contribution to ensuring Indian SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power. Thus, if it were concluded that the DCR measures have had a "relatively slight impact upon imported products"[811] based on the facts that the DCR measures apply only to projects within the National Solar Mission rather than more broadly within India's solar energy market, and that the scope and coverage of the applicable DCR measure did not extend to all types of cells, modules, and/or projects, then those same facts would also have to be taken into account in the assessment of the contribution of the DCR measures to their objective.

7.361. The third factor to be considered would be the contribution of the DCR measures to ensuring Indian SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power. We recall that the Appellate Body has explained that "a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue", and that the selection of a methodology to assess a measure's contribution "depends on the nature, quantity, and quality of evidence existing at the time the analysis is made".[812] The contribution of a measure to the fulfilment of an objective can be demonstrated by way of "quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence".[813] For example, the extent to which a measure is apt to contribute at some point in the future may lead to the conclusion that the measure makes a contribution.[814]

7.362. We consider that the following factual findings could be relevant to an assessment of the contribution made by the DCR measures to ensuring Indian SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power.

7.363. First, it appears that India does not dispute the argument made by the United States and the European Union that the DCR measures, by reducing the sources of supply available to SPDs, are, in the short term, antithetical to the objective of ensuring Indian SPDs' access to a continuous and affordable supply of the solar cells and modules.[815] In our view, it is self-evident that, in the short term, the DCR measures are unlikely to contribute to ensuring that Indian SPDs' have access to a continuous and affordable supply of the solar cells and modules needed to generate solar power.

7.364. Second, the information before the Panel concerning the effect of the DCR measures on increasing domestic manufacturing capacity of solar cells and modules appears to cast doubt on whether such effect is positive. The DCR measures could provide an incentive to actors to set up domestic manufacturing capacity through the benefits accorded to projects which comply with their mandatory conditions. In this regard, India notes that the *Phase II Policy Document* provides the following assessment: "Provision of requirement of domestic content for setting up solar power projects was kept in the guidelines for Phase-I with a view to develop indigenous capacities and generate employment. It was noted that the production capacities for solar PV cells and modules have expanded in the country."[816] On the other hand, we note that the same document states that "there is no significant capacity utilization despite addition of manufacturing capacity as observed during Phase I".[817] Further, a World Bank study submitted by India, entitled *Paving the Way for a Transformational Future, Lessons from JNNSM Phase I,* found that the DCR measure "which was

[811] See Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.
[812] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.
[813] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.
[814] Appellate Body Reports, *EC – Seal Products*, para. 5.213.
[815] United States' second written submission, para. 39; European Union's third-party submission, paras. 51 and 73.
[816] *Phase II Policy Document, Jawaharlal Nehru National Solar Mission*, Ministry of New and Renewable Energy (December 2012), (Exhibit USA-3), p. 21, section 1.3.10, last bullet point.
[817] *Phase II Policy Document, Jawaharlal Nehru National Solar Mission*, Ministry of New and Renewable Energy (December 2012), (Exhibit USA-3), p. 50.

intended to promote the local manufacturing industry, has actually resulted in a skewed technology choice and Indian manufacturers have derived minimal benefit from the program".[818] Furthermore, Indian manufacturers appear to have raised similar concerns. In an exhibit submitted by India, the "key finding" regarding the DCR measures as formulated in Phase I of the National Solar Mission is the following:

> While the domestic content requirement (DCR) has garnered international attention and raised concerns among some foreign stakeholders, most developers do not identify it as a major barrier to project development. The case for a robust domestic manufacturing base rests on multiple objectives: energy security, technology development, energy access, ensuring product standards, attracting foreign investment, and creating jobs. Even so, *many manufacturers expressed the view that the DCR, as currently structured, is not sufficiently stimulating local manufacturing*. Manufacturers face other systemic limitations, such as poor infrastructure, lack of raw materials, an undeveloped supply chain, and lack of financing.[819]

We further note that information before the Panel shows that some stakeholders have questioned the bias for thin-film technologies in Phase I, noting that the DCR measures create "an uneven playing field and ha[d] helped propagate significant overcapacity in the domestic silicon PV manufacturing industry", whereas, since thin-film PV technologies are exempted from the DCR measures in Phase I, "many solar players believe the DCR [in Phase I] is not creating the right conditions for domestic manufacturing in India".[820] This "has possibly been a detriment to Indian crystalline-based manufacturing".[821] Regarding the DCR measures in Phase I, the conclusion in the cited exhibit is that the DCR measures in Phase I appear "largely ineffectual to date".[822] Whereas this exhibit concludes that "[a] modified DCR could have a positive influence on domestic manufacturing if it is technology-neutral and not overly restrictive"[823], we do not see that India has put forward evidence that, under Phase II (Batch 1) of the National Solar Mission, the DCR measure indeed has a positive influence on domestic manufacturing capacity. To the contrary, in an exhibit submitted by the United States, the National Solar Energy Federation of India (NSEFI), an industry association comprised of Indian solar power developers, notes that "developers are facing tremendous challenges" regarding the DCR measure in Phase II (Batch 1), most importantly "a supposed cartelization by some of the larger domestic cell manufacturers" that "has made DCR projects economically unviable", and consequentially, "it has become impossible for developers to execute DCR projects".[824]

7.365. Third, India has not identified any related measures that it is taking to ensure the supply of the raw materials necessary to domestically produce and utilize solar cells and modules. According to information provided by India, the Indian PV manufacturing industry is dependent on imports for raw materials and consumables, such as wafer and polysilicon manufacturing, as India does not have polysilicon manufacturing capacity and has no significant wafer manufacturing capability.[825] In an exhibit presented by India concerning Phase I, it is stated that: "[w]hile India

[818] *Lessons from JNNSM Phase I,* (Exhibit IND-9), p. 19.
[819] *Assessing Progress under Phase I*, (Exhibit IND-8), p. 10. (emphasis added)
[820] *Assessing Progress under Phase I*, p. 21.
[821] *Assessing Progress under Phase I*, p. 23.
[822] *Assessing Progress under Phase I*, p. 21. Footnote 131 to this citation adds that "the states are not interested in imposing such DCR requirements since their primary objective is to lower the cost of solar power".
[823] *Assessing Progress under Phase I*, (Exhibit IND-8), p. 23.
[824] *Natural Group*, "NSEFI Letter to SECI and MNRE Regarding Issues With DCR Category Projects Under JNNSM Phase II, Batch I" (26 March 2014), (Exhibit USA-2), p. 2.
[825] *Lessons from JNNSM Phase I,* (Exhibit IND-9). At page 21, the exhibit states that "[t]he PV manufacturing industry in India has also not been able to integrate backwards in the areas of wafer and polysilicon manufacturing, thus being substantially dependent on imports for raw materials and consumables". At page 72 (footnote omitted), Exhibit IND-9 states: "[w]hile there is no polysilicon manufacturing capability in India, technically 15 MW of ingot and wafer manufacturing capacity exists, although this is a pilot unit which is not commercial in nature. The Indian solar manufacturing segment is thus primarily represented by solar cell and module manufacturers. A few projects have been announced to undertake manufacturing of other components in the value chain such as polysilicon, ingots and wafers; however, none of these have made progress on the ground on account of viability concerns in the current global pricing scenario". Page 72 of Exhibit IND-9, Box A101, entitled Indian Manufacturing Landscape, explains that: (a) "India has no polysilicon manufacturing capacity", and that "[t]o sustain 20 GW of installation (including central and state policies),

has many cell and module manufacturers, there is a dearth of producers of raw materials, inverters, and balance of system components". Whereas the exhibit notes that "[t]he industry is now taking steps toward greater self-sufficiency"[826], these steps seem limited: "[f]or example, SOLARCON, a yearly conference, is organized by SEMI India with an objective to widen solar industry manufacturing capabilities".[827] According to another exhibit, India is also highly dependent on batteries, and needs to develop a network of system integrators.[828] Finally, as noted above, Indian manufacturers have stated themselves that they "face other systemic limitations, such as poor infrastructure, lack of raw materials, an undeveloped supply chain, and lack of financing".[829] In response to a question from the Panel on this issue, India argues that it does not "foresee any problems in supply of materials such as wafers and polysilicon materials".[830] This argument is based on the assertion that there are many smaller companies, including in India, which "are making significant strides in the solar PV upstream manufacturing segment".[831] India submits the names of two public sector companies and one private sector company, but does not assert that these companies could supply the required products necessary to produce and put to use solar cells and modules in the event of a disruption in imports of wafers, polysilicon materials, and other raw materials.

7.366. Fourth, from the information and arguments before the Panel, it is not clear that any increase in domestic manufacturing capacity for solar cells and modules would result in ensuring that Indian SPDs have access to a continuous and affordable supply of the solar cells and modules. The reason is that it is not clear that domestic manufacturers, who are separate entities from SPDs, would sell solar cells or modules to Indian SPDs in the event of a shortage or other disruption in imported solar cells and modules. In this regard, India does not dispute that domestically produced solar cells and modules would become part of the global market and thus likely be sold to the highest paying purchaser, which would not necessarily be an Indian buyer. The information before the Panel is that, currently, Indian manufacturers of solar cells and modules, rather than selling exclusively to Indian SPDs, also sell their products to foreign buyers.[832] In response to a question from the Panel in this regard, India stated that it does not have plans to restrict the entities to which Indian manufacturers could supply domestically produced solar cells and modules, because "the situation posed by the United States is not foreseeable. Adequate policy measures may need to be considered if and when such a situation was to arise".[833] We note that, insofar as the depreciation of the Indian currency could cause a disruption in supply by virtue of imports becoming more expensive, as India has argued, this depreciation would necessarily make domestically produced solar cells and modules cheaper and thus more competitive on the international market. We further note that the United States has provided evidence that NSEFI has complained that domestic manufacturers of solar cells and modules significantly increased the prices charged to Indian SPDs immediately following the imposition of the DCR measures.[834]

India would need an annual capacity of approximately 14,000 metric ton of polysilicon"; and (b) "[t]here is no significant wafer manufacturing capability in India", and that "[a]round 2,000 MW per annum of wafer manufacturing capability would be required for sustaining 20 GW of installation". Finally, at page 73 of Exhibit IND-9 it is noted that "[m]ost of the raw materials and consumables for cell and module manufacturing are imported. This includes all gases, silver paste, ethylene vinyl acetate, and so on. A domestic ecosystem needs to be developed which can make the most of locally accessible components, minimizing supply chain challenges and also exercising control over random price fluctuations".

[826] *Assessing Progress under Phase I*, (Exhibit IND-8), p. 20.

[827] *Assessing Progress under Phase I*, (Exhibit IND-8), p. 36, fn 108 on p. 20.

[828] *Lessons from JNNSM Phase I,* (Exhibit IND-9), p. 74, Table A102.

[829] *Assessing Progress under Phase I*, (Exhibit IND-8), p. 10.

[830] India's response to Panel question No. 72, paras. 97-98.

[831] Ibid.

[832] The evidence provided by India indicates that the Indian solar PV manufacturers exported their goods for a total of US$321.89 million in 2009, US$549.54 million in 2010, US$174.82 million in 2011, and US$80.88 million in 2012. Exhibit IND-9, p. 73. According to another exhibit submitted by India, "[p]rior to the NSM, Indian manufacturing of solar components was primarily export-dependent, with about 70 percent of cells and 80 percent of modules exported to Europe, the United States, Japan, and Australia". *Assessing Progress under Phase I*, (Exhibit IND-8), p. 17 (footnote omitted).

[833] India's response to Panel question No. 71, para. 95.

[834] *PV Tech*, "Solar Cell Price Rises 'Putting Indian Domestic Content Projects At Risk'" (March 28, 2014), (Exhibit USA-1).

7.367. In sum, we conclude that ensuring that Indian SPDs have access to a continuous and affordable supply of the solar cells and modules needed to generate solar power is an important objective. Furthermore, India has provided evidence that establishes that, in the absence of any measures taken by SPDs or India to ensure continued access to foreign solar cells and modules, and simply taking their continued availability "for granted", there is a risk of disruption in the supply of affordable foreign solar cells and modules to India. With regard to the trade-restrictiveness of the measures, it is not in dispute that the DCR measures restrict the use of foreign solar cells and modules by SPDs that are participating in the National Solar Mission. With regard to the contribution of the DCR measures to the realization of India's objective, we conclude that, in the short term, the DCR measures are unlikely to make any contribution to ensuring Indian SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power, and arguably undermine that objective. With regard to the contribution of the DCR measures to the realization of India's objective over the long term, we conclude that the information before the Panel concerning the effect of the DCR measures on increasing domestic manufacturing capacity of solar cells and modules appears to cast doubt on whether such effect is positive; that India has not identified any related measures that it is taking to ensure the supply of the raw materials and consumables necessary to domestically produce and utilize solar cells and modules; and that it is not clear that domestic manufacturers would sell solar cells or modules to Indian SPDs, as opposed to their foreign competitors, in the event of a shortage or other disruption in the supply of imported solar cells and modules.

7.368. Based on the foregoing, we find that India has not demonstrated that the DCR measures ensure that Indian SPDs have access to a continuous and affordable supply of the solar cells and modules needed to generate solar power. Beyond this, the information submitted to the Panel does not enable us to assess the extent to which the DCR measures could lead to some increased domestic manufacturing capacity of solar cells and modules in the long term, or the extent to which any such increased domestic manufacturing capacity could in turn contribute to reducing the risk of a disruption in Indian SPDs' ability to access to a continuous and affordable supply of the solar cells and modules. Thus, we conclude that the effect of the DCR measures is uncertain and unpredictable with respect to the realization of India's objective of ensuring a continuous and affordable supply of solar cells and modules to Indian SPDs.

7.3.4.5 Alternative measures

7.369. The second step of a necessity analysis (which, as noted, the parties also apply to the "essential" requirement) asks whether "a WTO-consistent alternative measure which the Member concerned could 'reasonably be expected to employ' is available or whether a less WTO-inconsistent measure is 'reasonably available'".[835] In other words, it must be demonstrated that no alternative measure is reasonably available.[836] We will proceed to provide an overview of the arguments and information presented by the parties on this issue.

7.370. The United States argues that there are a number of alternative measures that India could take that would contribute to ensuring Indian SPDs' access to a continuous and affordable supply of the solar cells and modules needed to generate solar power, including alternative measures to increase India's domestic manufacturing capacity for solar cells and modules. According to the United States, these include: (a) removing barriers to trade and investment in solar cells and modules; (b) stockpiling solar cells and modules; (c) entering into long term contracts with suppliers of solar cells and modules; (d) direct subsidisation of domestic manufacturers of cells and modules; (e) investing in research & development in solar cells and modules; and (f) increasing domestic demand for solar cells and modules.

7.371. India argues that these alternative measures are either already in place, not reasonably available to India, or would not make the same contribution to the achievement of its objective, at its desired level of protection. According to India, "other than the DCR Measures, India does not have any assured way in which to achieve its legitimate policy objectives".[837] India submits that

[835] Appellate Body Reports, *Korea – Various Measures on Beef*, para. 166; *EC – Seal Products*, para. 5.261.

[836] See Panel Reports, *EC – Seal Products*, para. 7.639, upheld by the Appellate Body in para. 5.290 of its Reports in *EC – Seal Products*.

[837] India's second written submission, para. 74.

"[i]nherent in the nature of each of these alternatives is that their outcome is unpredictable".[838] India submits that it cannot leave a goal as critical as energy security "to the chance and expectation that domestic manufacturing facilities will in fact be set up in India to ensure the country's resilience to the uncertainties of imports of solar cells and modules that are so intrinsic to solar power development".[839] Therefore, India argues, none of the alternatives identified by the United States meet "the desired level of protection that India seeks with respect to its legitimate policy objectives".[840]

7.372. A first proposed alternative measure identified by the United States is maintaining no limitations on foreign direct investment in the solar technology sector and reducing import duties on equipment used to manufacture solar cells and modules. The United States argues that such measures would facilitate foreign producers of cells and modules in setting up manufacturing sites in India, and that reducing import duties on equipment used to manufacture solar cells and modules operates to effectively reduce the cost of manufacturing cells and modules in India.[841] India responds that it has already enacted measures to incentivise and promote imports, including: (a) fiscal incentives; (b) a memorandum of understanding between the Indian Renewable Energy Development Agency and the Export-Import Bank of the United States; (c) the absence of limitations on foreign direct investments in the renewable energy sector; and (d) the reduction of import duties on a variety of equipment and machinery required for manufacturing of cells and modules, and excise and custom duty exemptions for solar cells and modules as well as other equipment used in solar power generation.[842] However, India argues that these incentives are in themselves insufficient "to ensure development of manufacturing of solar cells and modules".[843] According to India, these incentives "have unpredictable outcomes", as they "cannot ensure" that private entities are motivated and encouraged to manufacture in India.[844]

7.373. A second proposed alternative measure is acquiring a reserve of solar cells and modules by importing a surplus of such products for the purpose of stockpiling.[845] India claims that solar cells and modules, especially the back sheets and laminating materials of solar modules, degrade when stored.[846] Furthermore, India responds that this is not a reasonably available alternative because stockpiled solar cells and modules would become obsolete in less than two years, due to rapidly advancing technology, which would lead to an unrecoverable, prohibitive cost.[847] The United States disputes India's arguments concerning the possible degradation of solar cells and modules, and submits that finished modules are typically sold with a warranty of 25 years, giving the promise that they will last 25 years in the full range of conditions experienced outdoors (subjected to sun, wind, rain, etc.).[848] The United States also argues that a situation of short supply could constitute a situation in which users would accept less technologically advanced products[849], and that "intelligent stockpiling" in which older models are periodically sold off and replaced by newer models would alleviate the cost of stockpiling.[850]

7.374. A third proposed alternative measure identified by the United States is securing dedicated import sources by entering into long term contracts with foreign suppliers. India claims that, because long term contracts are not standard industry practice and because of technological

[838] India's second written submission, para. 82.
[839] India's second written submission, para. 83.
[840] India's second written submission, para. 86.
[841] United States' response to Panel question No. 37, para. 60.
[842] India's first written submission, para. 236 (subheading (iv), fourth and fifth bullet points); India's second written submission, paras. 75 and 81.
[843] India's first written submission, para. 236 (subheading (v), fifth bullet point).
[844] India's second written submission, para. 82.
[845] United States' response to Panel question No. 37, para. 61; United States' second written submission, para. 42; United States' opening statement at the second meeting of the Panel, para. 35; United States' response to Panel question No. 73(b).
[846] India's second written submission, paras. 78-79 and 84.
[847] India's second written submission, paras. 76-77 and 79.
[848] United States' opening statement at the second meeting with the Panel, para. 35 (citing Jordan, D. C., Sekulic, B., Marion, B., & Kurtz, S. R, *Performance and Aging of a 20-Year-Old Silicon PV System*, IEEE Journal of Photovoltaics (2015), (Exhibit USA-37; and Ndiaye, A., Charki, A., Kobi A., Ke´be´, C., Ndiaye P., Sambou, V., *Degradations of silicon photovoltaic modules: A literature review* (2013), (Exhibit USA-38)); United States' response to Panel question No. 73(b), paras. 75-77.
[849] United States' response to Panel question No. 73(b), para. 76.
[850] United States' response to Panel question No. 73(b), para. 78.

strides and price fluctuations, it does not make sense from an economic or practical perspective to enter into long term contracts.[851] India argues that the volatility in the solar cells and modules market has led to manufacturers' bankruptcy, and that long term contracts would not protect India from such bankruptcy, from closing factories, or from the specific producers' inability to supply solar cells and modules in a global market.[852] Therefore, India argues, long term contracts with foreign suppliers in such a scenario "[do] not hold any guarantee for long-term availability of such cells and modules".[853]

7.375. A fourth proposed alternative measure is direct subsidisation of domestic manufacturers of cells and modules. The United States argues that India's claim that it cannot afford to grant direct subsidies to solar cell and modules manufactures is belied by the substantial payments that India is currently making to SPDs through feed-in tariff and VGF schemes.[854] India asserts that subsidies are not an economically feasible option for a developing country with limited resources.[855] India further explains that the economics of resorting to VGF to enable bringing down the costs of solar power generation, on the one hand, and providing direct production subsidies to manufacturers of cells and modules, on the other, is "vastly different".[856]

7.376. A fifth proposed alternative measure identified by the United States is investing in research and development of solar or other renewable technologies.[857] India has noted that "the JNNSM Mission Document also notes the importance of technically qualified manpower of international standard, both for applied, and research and development sectors".[858] India submits that R&D related work is in fact already being done; however, R&D can only focus on new technologies, and does not in any manner act as a way in which domestic manufacturing of cells and modules using existing technologies could be achieved.[859]

7.377. A sixth alternative measure identified by the United States is to increase domestic manufacturing capacity by increasing domestic demand. The United States notes that the National Solar Mission would likely stimulate significant expansion of domestic demand for solar cells and modules, and the European Union expressed a similar view.[860] India agrees that the creation of demand for solar power is an incentive for domestic manufacturing. However, India underscores that, this in itself is insufficient "and in fact, unpredictable, since there is no certainty" that manufacturing facilities will in fact be set up in India.[861]

7.378. We observe that the alternative measures identified by the United States include alternative measures to reduce the risk of a disruption in imports of foreign solar cells or modules, as well as alternative measures to increase the supply of domestically-produced solar cells and modules. They include measures that are currently being taken by India, as well as hypothetical alternative measures that, in the United States' view, India could take.

7.379. We consider that an evaluation of the alternative measures would require a comparison of their trade-restrictiveness with that of the DCR measures, as well as a determination as to their reasonable availability, and whether they make an equivalent contribution to the relevant objective. We do not understand India to dispute that each of these alternative measures would be less trade-restrictive than the DCR measures, and that each of these alternative measures is *prima facie* WTO-consistent. The issues in dispute are whether some of these alternative measures are "reasonably available" to India, and whether the alternative measures would make the same contribution to the realization of India's objective, and desired level of protection, as that made by the DCR measures.

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[851] India's response to Panel question No. 73(c), para. 100.
[852] India's response to Panel question No. 73(c), para. 99.
[853] Ibid.
[854] United States response to Panel question No. 73(a), para 71.
[855] India's first written submission, para. 236 (subheading (iv)).
[856] India's comments on the United States' response to Panel question No. 73(a), paras. 79-81.
[857] United States response to Panel question No. 73(a), para 71.
[858] India's first written submission, para. 194.
[859] India's comments on the United States' response to Panel question No. 73(a), para. 82.
[860] United States' response to Panel question No. 73(a), para. 73. European Union's third-party submission, para. 76.
[861] India's second written submission, para. 80.

7.380. We have concluded that the effect of the DCR measures is uncertain and unpredictable with respect to the realization of India's objective of ensuring a continuous and affordable supply of solar cells and modules to Indian SPDs. Specifically, we have concluded that the information before the Panel does not enable us to assess the extent to which the DCR measures could lead to some increased domestic manufacturing capacity of solar cells and modules in the long term, or the extent to which any such increased domestic manufacturing capacity would in turn contribute to reducing the risk of a disruption in Indian SPDs' ability to access to a continuous and affordable supply of the solar cells and modules.

7.381. Accordingly, we consider that the information before the Panel is insufficient to reach a conclusion on the extent to which the alternative measures identified by the United States would contribute to the realization of India's objective, and desired level of protection, as compared with any contribution being made by the DCR measures.

7.3.4.6 Conclusion

7.382. In the event that our findings on the threshold legal elements under Articles XX(j) and XX(d) are modified or reversed on appeal, we have conducted a limited review of whether the DCR measures are "essential" or "necessary" within the meaning of Articles XX(j) and XX(d) respectively. This limited analysis and review has involved identifying the different issues that would need to be considered to make definitive findings, the parties' positions on those different issues, and our factual findings on those issues based on the arguments of the parties and the information provided to the Panel. For the reasons given above, we consider it unnecessary to reach any overall conclusion, or make any finding, on these issues.

7.3.5 Chapeau of Article XX of the GATT 1994

7.383. It is well established that a panel must first examine whether a challenged measure falls under one of the exceptions listed in the various sub-paragraphs of Article XX; if a measure is found to be provisionally justified under one or more of the various sub-paragraphs of Article XX, then a panel must then proceed to examine, as a second step, whether that measure satisfies the requirements of the chapeau of Article XX. For an Article XX defence to succeed, both elements of the two-tiered test must be met.[862] The chapeau of Article XX of the GATT 1994 provides that nothing in the GATT shall be construed to prevent the adoption or enforcement of measures covered by one or more sub-paragraphs in Article XX:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade…

7.384. India submits that the DCR measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.[863] India states that "the impact on trade is minimal, and limited only to the extent of achieving India's legitimate objectives relating to energy security, sustainable development and ecologically sustainable growth".[864] India recalls that of the total 2775 MW of solar PV installed capacity in India, domestically manufactured cells and modules under the DCR Measures account for only 140 MW, and that over 90% of India's solar PV installations are based on imported cells and modules.[865] India repeats that it has encouraged and incentivized imports of solar cells and modules.[866] India reiterates its argument that the DCR measures are "important for India's pursuit of its objectives of energy security, sustainable development, and ecologically sustainable growth, by improving its resilience to the uncertainties

[862] Appellate Body Reports, *US – Gasoline*, p. 22; *US – Shrimp*, paras. 119-120; *Brazil – Retreaded Tyres*, para. 139.

[863] India's first written submission, paras. 264-273; India's Response to Panel question No. 38; India's second written submission, paras. 145-154; India's opening statement at the second meeting of the Panel, paras. 38-39.

[864] India's first written submission, para. 270.

[865] India's first written submission, para. 271. India's response to Panel question Nos. 38(a) and (c); India's second written submission, paras. 145-150 and 152-153.

[866] India's first written submission, para. 272.

of imports of critical components such as solar cells and modules".[867] India also reiterates its view that "a developing economy does not have the cash resources to directly provide subsidies to its SPDs or to manufacturers of solar cells and modules".[868]

7.385. India concludes that its DCR measures "are therefore applied in a carefully calibrated manner" to facilitate the development by domestic manufacturers of some manufacturing capacity that can contribute towards India's overall objectives of ensuring energy security in a sustainable manner.[869] India also characterizes the DCR measures as measures applied in a "careful", "reasonable", and "very limited manner".[870] India reiterates that its measure "is not a ban on imports".[871] At the same time, India clarifies that it does not hold the view that there is a "quantitative threshold" for finding "arbitrary or unjustifiable discrimination" under the chapeau of Article XX.[872] India adds that the publication of the draft guidelines under Phases I and II of the NSM indicates that the DCRs are not concealed or unannounced, and to that extent, are not disguised restrictions on trade.[873]

7.386. The United States suggests that India has not met its burden of demonstrating that the DCR measures are applied in accordance with the requirements of the chapeau.[874] However, the United States did not advance any argumentation with respect to the requirements of the chapeau, and has not specifically responded to India's arguments under the chapeau.

7.387. The European Union argues that although India connects its overall strategy of promoting the use of solar energy through the National Solar Mission and other measures with legitimate objectives such as the protection of the environment, sustainable development and the security of energy supply, the specific measures at issue, namely the DCR measures, could only be connected with the aim of favouring domestic manufacturers of solar cells and modules. The European Union submits, therefore, that the latter aim, and not the more general aims identified by India as its policy objectives, should be seen as the "cause" or the "rationale" of discrimination for the purpose of the chapeau of Article XX. Such a rationale should, in the view of the European Union, be described as arbitrary and unjustifiable.[875] The European Union adds that India's submission regarding the "allegedly minimal impact" of the measures at issue on trade should be read in light of the findings of the Appellate Body in *Brazil – Retreaded Tyres* rejecting an interpretation of the term "unjustifiable" under the chapeau that would depend on the *effects* of the discrimination.[876] The European Union further argues that if it were established that India failed to explore non-discriminatory alternatives to the imposition of the DCR measures that could equally achieve aims such as sustainable development and the security of energy supply, "such an omission could be in itself described as a disguised restriction [on] trade".[877] Finally, the European Union submits that, if discriminating against imports with the express aim of favouring domestic industry were acceptable under the specific exceptions and the chapeau of Article XX, then the notion of preventing "arbitrary or unjustifiable discrimination" and "disguised restrictions on trade" would be devoid of content, as protectionism of that nature "is precisely what the *chapeau* is meant to control".[878]

7.388. Japan submits that "[t]here are some paragraphs regarding the chapeau in India's first written submission", but that "India has offered very little or almost no defense of its domestic content requirements measures under the chapeau". Japan submits that India has therefore failed

[867] India's first written submission, para. 272.
[868] India's first written submission, para. 273.
[869] India's first written submission, para. 273..
[870] India's response to Panel question No. 38(a).
[871] India's response to Panel question No. 38(a).
[872] India's response to Pane question No. 38(c).
[873] India's second written submission, para. 154.
[874] United States' opening statement at the first meeting of the Panel, para. 40.
[875] European Union's third-party submission, para. 80.
[876] European Union's third-party submission, para. 81 (citing Appellate Body Report, *Brazil – Retreaded Tyres*, para. 229).
[877] European Union's third-party submission, para. 82 (citing Appellate Body Report, *US – Gasoline*).
[878] European Union's third-party submission, para. 83.

to demonstrate how a Member could justify the use of import substitution measures – "essentially protectionist policies" – under the chapeau of Article XX.[879]

7.389. We have already found that India has failed to demonstrate that the DCR measures fall within the scope of Articles XX(j) or XX(d). We further note that the arguments that India advances in connection with the requirements of the chapeau of Article XX[880] are essentially a repetition of the arguments that it presents in relation to the issue of whether solar cells and modules are "essential to the acquisition or distribution of products in general or local short supply" under Article XX(j), and "necessary to secure compliance with laws or regulations" under Article XX(d). As a consequence, we have already addressed the substance of these arguments and factual assertions in the preceding sections of this Report.

7.390. Based on the foregoing, we see no compelling reason to proceed with any further examination of the DCR measures under the chapeau of Article XX of the GATT 1994, and we therefore refrain from doing so.

8 CONCLUSIONS AND RECOMMENDATION

8.1. The measures at issue in this dispute (the DCR measures) are the domestic content requirements imposed by India under Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1) of the National Solar Mission, which are incorporated or otherwise reflected in various documents within each Batch, including the *Guidelines* and *Request for Selection* documents, the model power purchase agreement, and the individually executed power purchase agreements between Indian government agencies and solar power developers.

8.2. For the reasons set forth in this Report, the Panel concludes that:

a. the DCR measures are inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994, and are not covered by the derogation in Article III:8(a) of the GATT 1994; and

b. the DCR measures are not justified under the general exceptions in Article XX(j) or Article XX(d) of the GATT 1994.

8.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994, they have nullified or impaired benefits accruing to the United States under those agreements.

8.4. Pursuant to Article 19.1 of the DSU, we recommend that India bring its measures into conformity with its obligations under the TRIMs Agreement and the GATT 1994.

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[879] Japan's third-party submission, para. 23.
[880] See paras. 7.384. to 7.385.