



**INDIA – CERTAIN MEASURES RELATING TO SOLAR CELLS
AND SOLAR MODULES**

AB-2016-3

Report of the Appellate Body

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ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
c-Si	crystalline silicon
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
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Electricity Act, 2003	Parliament of India, The Electricity Act, 2003 [No. 36 of 2003] (26 May 2003) (Panel Exhibit USA-20)
GATT 1994	General Agreement on Tariffs and Trade 1994
National Action Plan on Climate Change	Government of India, <i>National Action Plan on Climate Change</i> (June 2008) (Panel Exhibit IND-2)
National Electricity Plan	Government of India, Ministry of Power, Central Electricity Authority, <i>National Electricity Plan</i> , Vol. 1 – Generation (January 2012) (Panel Exhibit IND-16)
National Electricity Policy	Government of India, Ministry of Power, <i>National Electricity Policy</i> , Resolution No. 23/40/2004-R&R (Vol. II) (12 February 2005) (Panel Exhibit IND-14)
National Solar Mission, or NSM	Jawaharlal Nehru National Solar Mission
Panel	Panel is these proceedings
Panel Report	Panel Report, <i>India – Certain Measures Relating to Solar Cells and Solar Modules</i> , WT/DS456/R
PPA	power purchase agreement
PV	photovoltaic
SPD	solar power developer
TRIMs Agreement	Agreement on Trade-Related Investment Measures
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

PANEL EXHIBITS CITED IN THIS REPORT

Panel Exhibit(s)	Description
IND-2	Government of India, <i>National Action Plan on Climate Change</i> (June 2008)
IND-3	United Nations Framework Convention on Climate Change, done at New York, 9 May 1992, UN Treaty Series, Vol. 1771, p. 107
IND-14	Government of India, Ministry of Power, <i>National Electricity Policy</i> , Resolution No. 23/40/2004-R&R (Vol. II) (12 February 2005)
IND-16	Government of India, Ministry of Power, Central Electricity Authority, <i>National Electricity Plan</i> , Vol. 1 – Generation (January 2012)
IND-28	United Nations General Assembly Resolution A/RES/66/288 (adopted 27 July 2012) (Rio+20 Document: "The Future We Want")
IND-35	Rio Declaration on Environment and Development, adopted by the UN General Assembly in 1992
IND-36	G. Sundarrajan v. Union of India and Others, 2013 (6) SCC 620 (excerpts)
USA-4	Government of India, Ministry of New and Renewable Energy, Resolution No. 5/14/2008, Jawaharlal Nehru National Solar Mission (11 January 2010)
USA-20	Parliament of India, The Electricity Act, 2003 [No. 36 of 2003] (26 May 2003)

CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Financial Services</i>	Appellate Body Report, <i>Argentina – Measures Relating to Trade in Goods and Services</i> , WT/DS453/AB/R and Add.1, adopted 9 May 2016
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Canada – Periodicals</i>	Panel Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/R and Corr.1, adopted 30 July 1997, as modified by Appellate Body Report WT/DS31/AB/R, DSR 1997:I, p. 481
<i>Canada – Renewable Energy / Canada – Feed-in Tariff Program</i>	Appellate Body Reports, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program</i> , WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
<i>Canada – Renewable Energy / Canada – Feed-in Tariff Program</i>	Panel Reports, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program</i> , WT/DS412/R and Add.1 / WT/DS426/R and Add.1, adopted 24 May 2013, as modified by Appellate Body Reports WT/DS412/AB/R / WT/DS426/AB/R, DSR 2013:I, p. 237
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
<i>Canada – Wheat Exports and Grain Imports</i>	Panel Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, p. 2817
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, p. 513

Short Title	Full Case Title and Citation
<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
<i>China – Auto Parts</i>	Panel Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/R, Add.1 and Add.2 / WT/DS340/R, Add.1 and Add.2 / WT/DS342/R, Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, DSR 2009:I, p. 119
<i>China – Rare Earths</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, DSR 2014:III, p. 805
<i>China – Rare Earths</i>	Panel Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/R and Add.1 / WT/DS432/R and Add.1 / WT/DS433/R and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, DSR 2014:IV, p. 1127
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
<i>Colombia – Textiles</i>	Appellate Body Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/AB/R and Add.1, adopted 22 June 2016
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – Poultry</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7
<i>EC – Trademarks and Geographical Indications (US)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States</i> , WT/DS174/R, adopted 20 April 2005, DSR 2005:VIII, p. 3499
<i>EEC – Parts and Components</i>	GATT Panel Report, <i>European Economic Community – Regulation on Imports of Parts and Components</i> , L/6657, adopted 16 May 1990, BISD 37S, page 132
<i>India – Solar Cells</i>	Panel Report, <i>India – Certain Measures Relating to Solar Cells and Solar Modules</i> , WT/DS456/R and Add.1, circulated to WTO Members 24 February 2016
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
<i>Korea – Various Measures on Beef</i>	Panel Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, p. 59

Short Title	Full Case Title and Citation
<i>Mexico – Taxes on Soft Drinks</i>	Appellate Body Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, p. 3
<i>Mexico – Taxes on Soft Drinks</i>	Panel Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R, DSR 2006:I, p. 43
<i>Philippines – Distilled Spirits</i>	Appellate Body Reports, <i>Philippines – Taxes on Distilled Spirits</i> , WT/DS396/AB/R / WT/DS403/AB/R, adopted 20 January 2012, DSR 2012:VIII, p. 4163
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
<i>US – Countervailing and Anti-Dumping Measures (China)</i>	Panel Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/R and Add.1, adopted 22 July 2014, as modified by Appellate Body Report WT/DS449/AB/R, DSR 2014:VIII, p. 3175
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Large Civil Aircraft (2nd complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
<i>US – Stainless Steel (Mexico)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
<i>US – Tyres (China)</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811

WORLD TRADE ORGANIZATION
APPELLATE BODY

India – Certain Measures Relating to Solar Cells and Solar Modules

India, *Appellant*
United States, *Appellee*

Brazil, *Third Participant*
Canada, *Third Participant*
China, *Third Participant*
Ecuador, *Third Participant*
European Union, *Third Participant*
Japan, *Third Participant*
Korea, *Third Participant*
Malaysia, *Third Participant*
Norway, *Third Participant*
Russia, *Third Participant*
Saudi Arabia, *Third Participant*
Separate Customs Territory of Taiwan, Penghu,
Kinmen and Matsu, *Third Participant*
Turkey, *Third Participant*

AB-2016-3

Appellate Body Division:

Van den Bossche, Presiding Member
Chang, Member
Graham, Member

1 INTRODUCTION

1.1. India appeals certain issues of law and legal interpretations developed in the Panel Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*¹ (Panel Report). The Panel was established on 23 May 2014 to consider a complaint by the United States² against certain domestic content requirements (DCR measures) imposed by India on solar power developers (SPDs) selling electricity to governmental agencies under its Jawaharlal Nehru National Solar Mission (NSM).³ The DCR measures at issue require that certain types of solar cells and modules used by SPDs be made in India.⁴

1.2. The NSM was launched by the Central Government of India in 2010, and aims to generate 100,000 megawatts of grid-connected solar power capacity by 2022.⁵ The stated objective of the NSM is "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."⁶ The NSM is being implemented in several successive "Phases", with each phase thus far initiated being further divided into "Batches".

1.3. 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, including the so-called "*Guidelines*" and "*Request for Selection*" documents⁷, the model power purchase agreement (PPA), and the individually executed PPAs between the relevant Indian governmental agencies⁸ and the SPDs.⁹ Each individually executed PPA sets out a guaranteed rate for a 25-year term at which the electricity generated by the SPD will be bought by the Central Government. The

¹ WT/DS456/R, 24 February 2016.

² Request for the Establishment of a Panel by the United States of 14 April 2014, WT/DS456/5.

³ Panel Report, para. 2.1.

⁴ Solar cells are photovoltaic (PV) devices that are components of solar modules, also known as solar panels. Solar PV technology transforms sunlight directly into electricity.

⁵ Panel Report, para. 7.1.

⁶ Panel Report, para. 7.1 (quoting Government of India, Ministry of New and Renewable Energy, Resolution No. 5/14/2008, Jawaharlal Nehru National Solar Mission (11 January 2010) (Panel Exhibit USA-4), para. 2).

⁷ Panel Report, para. 7.8 and fn 81 thereto.

⁸ Under Phase I (Batch 1) and Phase I (Batch 2), Vidyut Vyapar Nigam Limited was the agency responsible for implementing the solar power project selection process. Under Phase II (Batch 1-A), the Solar Energy Corporation of India was selected to perform the same functions. (Panel Report, para. 7.4)

⁹ Panel Report, para. 7.2.

government resells the electricity that it purchases to downstream distribution companies, which in turn resell it to the ultimate consumer.¹⁰

1.4. The Panel, having reviewed all of the evidence provided relating to each Batch, carried out its analysis on the understanding that, for each Batch, the measure at issue is the DCR measure reflected or incorporated in the various documents for each Batch, read together in a "holistic" manner.¹¹ The Panel therefore did not treat the separate documents in each Batch as distinct measures.¹²

1.5. A mandatory DCR was imposed on SPDs participating in Phase I (Batches 1 and 2) and Phase II (Batch 1-A) of the NSM. The scope and coverage of the DCR differed, however, across the different Batches.¹³ 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.¹⁴ 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.¹⁵ Under Phase II (Batch 1-A), any solar cells and modules used by the SPDs had to be made in India, irrespective of the type of technology used.¹⁶

1.6. The United States claimed before the Panel that the DCR measures imposed by India are inconsistent with Article III:4 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 2.1 of the Agreement on Trade-Related Investment Measures (TRIMs Agreement). The United States further requested the Panel to recommend that India bring its measures into conformity with its WTO obligations pursuant to Article 19.1 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).¹⁷

1.7. India requested the Panel to find that the DCR measures at issue are not inconsistent with Article III:4 of the GATT 1994 or Article 2.1 of the TRIMs Agreement. India further requested the Panel to find that the derogation under Article III:8(a) of the GATT 1994 is applicable to the measures at issue in this dispute. In the event that the Panel were to find that the measures at issue are inconsistent with any of the obligations under Article III:4 of the GATT 1994 or Article 2.1 of the TRIMs Agreement, India requested that the Panel determine that any such inconsistency would be justified under Article XX(j) and/or Article XX(d) of GATT 1994.¹⁸

1.8. In the Panel Report, circulated to Members of the World Trade Organization (WTO) on 24 February 2016, the Panel found that:

- a. the DCR measures are inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994¹⁹;
- b. the DCR measures are not covered by the derogation in Article III:8(a) of the GATT 1994²⁰; and

¹⁰ Panel Report, para. 7.2.

¹¹ In response to India's request for a preliminary ruling on the scope of the measures at issue, the United States confirmed that, with respect to Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1-A), the measures at issue are only the specific DCRs imposed under each Batch, and do not include any other element of the NSM. (Panel Report, para. 7.22)

¹² Panel Report, paras. 7.29-7.31.

¹³ Panel Report, para. 7.7.

¹⁴ Panel Report, para. 7.8.

¹⁵ Panel Report, para. 7.9.

¹⁶ Panel Report, para. 7.10. Under Phase II (Batch 1-A), the SPDs could bid for a PPA "Part A" (subject to a DCR), "Part B" (not subject to a DCR), or both. The United States challenged only the DCR measure imposed under Part A. (Ibid.)

¹⁷ Panel Report, para. 3.1.

¹⁸ Panel Report, para. 3.2.

¹⁹ Panel Report, para. 8.2.a.

²⁰ Panel Report, para. 8.2.a.

- c. the DCR measures are not justified under the general exceptions in Article XX(j) or Article XX(d) of the GATT 1994.²¹

1.9. On 20 April 2016, India notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Appeal²² and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review²³ (Working Procedures).

1.10. On 2 May 2016, the United States sent a letter to the Appellate Body Division hearing this appeal requesting an extension of the deadline for the filing of its appellee's submission in this appeal by one day. The United States noted that its appellee's submission in another pending appellate proceeding, namely, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea* (DS464), was also due on 9 May 2016, i.e. the same day as the deadline for filing its appellee's submission in the present appeal. Referring to the size of the appeals in these two disputes, the United States indicated that its submissions may be significant in scope. The United States also pointed to the large number of print copies of its appellee's submissions to be prepared for the Divisions and to be served on the participants and third participants in these two appeals. The United States therefore requested that the deadline for the filing of the appellee's submission in this appeal be extended by one day, such that it would be due on 10 May 2016.

1.11. On 3 May 2016, the Appellate Body Division hearing this appeal invited India and the third parties to comment on the United States' request. No objections to the United States' request were received by the Division. Norway submitted, that if the United States' request were granted, the deadline for the filing of the third participants' submissions should similarly be extended to ensure that the third participants could contribute in an informed and efficient manner in the appellate proceedings.

1.12. On 4 May 2016, the Division issued a Procedural Ruling, extending the deadline for the United States to file its appellee's submission by one day to 10 May 2016.²⁴ The Division considered the reasons identified by the United States, in particular the need for the United States to file appellee's submissions in two separate appeal proceedings on the same day, to be relevant factors in its assessment of "exceptional circumstances, where strict adherence to a time-period ... would result in a manifest unfairness" pursuant to Rule 16(2) of the Working Procedures. The Division also noted that neither India, nor the third parties, had raised any objections to the United States' request. Moreover, in order to provide the third participants sufficient time to incorporate reactions to the appellee's submission into their third participants' submissions, the Division decided, pursuant to Rule 16(2) of the Working Procedures, to extend the deadline for the filing of the third participants' submissions and third participants' notifications to 12 May 2016.

1.13. On 10 May 2016, the United States filed an appellee's submission.²⁵ On 12 May 2016, Brazil, the European Union, and Japan each filed a third participant's submission.²⁶ On the same day, Canada, China, Malaysia, Norway, Russia, and Saudi Arabia notified their intention to appear at the oral hearing as a third participant.²⁷ Subsequently, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Ecuador; Korea; and Turkey each notified its intention to appear at the oral hearing as a third participant.²⁸

²¹ Panel Report, para. 8.2.b.

²² WT/DS456/9.

²³ WT/AB/WP/6, 16 August 2010.

²⁴ Contained in Annex D-1 of the Addendum to this Report (WT/DS456/AB/R/Add.1).

²⁵ Pursuant to Rule 22 of the Working Procedures.

²⁶ Pursuant to Rule 24(1) and Rule 16(2) of the Working Procedures.

²⁷ Pursuant to Rule 24(2) of the Working Procedures.

²⁸ On 28 June, 30 June, 30 June, and 29 June 2016, respectively, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Ecuador; Korea; and Turkey each submitted its delegation list for the oral hearing to the Appellate Body Secretariat and the participants and third participants in this dispute. For the purposes of this appeal, we have interpreted these actions as notifications expressing the intention of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Ecuador; Korea; and Turkey to attend the oral hearing pursuant to Rule 24(4) of the Working Procedures.

1.14. By letter of 17 June 2016, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report in this appeal within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision. The Chair of the Appellate Body explained that this was due to a number of factors, including the substantial workload of the Appellate Body in 2016, scheduling difficulties arising from overlap in the composition of the Divisions hearing the different appeals, the number and complexity of the issues raised in this and concurrent appellate proceedings, together with the demands that these concurrent appeals place on the WTO Secretariat's translation services, and the shortage of staff in the Appellate Body Secretariat.²⁹ By letter of 8 July 2016, the Chair of the Appellate Body informed the Chair of the DSB that the Appellate Body Report in these proceedings would be circulated no later than 16 September 2016.³⁰

1.15. The oral hearing in this appeal was held on 4-5 July 2016. The participants and three of the third participants (the European Union, Japan, and Norway) made opening and/or closing oral statements. The participants and third participants responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.³¹ The Notice of Appeal and the executive summaries of the participants' written submissions are contained, respectively, in Annexes A and B of the Addendum to this Report.³²

3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of Brazil, the European Union, and Japan, as third participants, are reflected in the executive summaries of their written submissions provided to the Appellate Body³³, and are contained in Annex C of the Addendum to this Report.³⁴

4 ISSUES RAISED IN THIS APPEAL

4.1. The following issues are raised in this appeal:

- a. with respect to Article III:8(a) of the GATT 1994:
 - i. whether the Panel acted inconsistently with Article 11 of the DSU in finding that the DCR measures at issue in this dispute are not covered by the derogation under Article III:8(a), and that consequently India could not rely on that provision to exclude the application of Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement to the DCR measures; and
 - ii. if the Appellate Body reverses the Panel's finding that the DCR measures are not covered by the derogation under Article III:8(a) of the GATT 1994, then whether the Appellate Body can complete the legal analysis and find that they satisfy the remaining legal elements under that provision;
- b. with respect to Article XX(j) of the GATT 1994:
 - i. whether the Panel erred in its interpretation and application of Article XX(j), and under Article 11 of the DSU, in finding that solar cells and modules are not "products

²⁹ WT/DS456/10.

³⁰ WT/DS456/11.

³¹ Pursuant to the Appellate Body Communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings". (WT/AB/23, 11 March 2015)

³² WT/DS456/AB/R/Add.1.

³³ Pursuant to the Appellate Body Communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings". (WT/AB/23, 11 March 2015)

³⁴ WT/DS456/AB/R/Add.1.

- in general or local short supply" in India, and that consequently the DCR measures are not justified under Article XX(j); and
- ii. if the Appellate Body reverses the Panel's finding that solar cells and modules are not "products in general or local short supply" in India within the meaning of Article XX(j), then whether the Appellate Body can complete the legal analysis and find that the DCR measures meet the requirements for provisional justification under Article XX(j) and satisfy the requirements of the chapeau of Article XX of the GATT 1994; and
- c. with respect to Article XX(d) of the GATT 1994:
- i. whether the Panel erred in its interpretation and application of Article XX(d) in finding that the DCR measures are not measures "to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT 1994]" within the meaning of Article XX(d); and that consequently the DCR measures are not justified under that provision; and
 - ii. if the Appellate Body reverses the Panel's finding that the DCR measures are not measures "to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT 1994]" within the meaning of Article XX(d), then whether the Appellate Body can complete the legal analysis and find that the DCR measures meet the requirements for provisional justification under Article XX(d) and satisfy the requirements of the chapeau of Article XX of the GATT 1994.

5 ANALYSIS OF THE APPELLATE BODY

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

5.1. India appeals the Panel's finding that the DCR measures are not covered by the government procurement derogation under Article III:8(a) of the GATT 1994 because India's government purchases electricity, and the discrimination under the DCR measures relates to solar cells and modules.³⁵ India argues that the Panel acted inconsistently with its obligations under Article 11 of the DSU by failing to make an objective assessment of the matter before it, including of India's arguments and related evidence that: (i) solar cells and modules are indistinguishable from solar power generation; (ii) solar cells and modules can be characterized as inputs for solar power generation; and (iii) Article III:8(a) cannot be applied in a narrow manner that would require direct acquisition of the product purchased in all cases.³⁶ India requests us to reverse the Panel's finding and find that the DCR measures are covered by the derogation under Article III:8(a).³⁷

5.2. In the event that we find that the DCR measures are covered by the government procurement derogation under Article III:8(a), India further requests that we complete the legal analysis of the remaining elements under this provision.³⁸ In particular, India requests that we reaffirm the Panel's findings that the DCR measures are laws, regulations or requirements "governing" procurement and that the procurement under the DCR measures is "by governmental agencies", and that we find that the procurement under the DCR measures is of products purchased "for governmental purposes" and "not with a view to commercial resale".³⁹

5.3. We begin by summarizing the Panel's findings and the issues appealed. We then address the interpretation of Article III:8(a) of the GATT 1994, before turning to consider the Panel's analysis as challenged by India on appeal.

5.1.1 The Panel's findings

5.4. The Panel began by reviewing the requirements set out in the text of Article III:8(a) of the GATT 1994 in order for a measure to be exempted from the national treatment obligations of

³⁵ India's appellant's submission, para. 35(a).

³⁶ India's appellant's submission, para. 35(b).

³⁷ India's appellant's submission, para. 35(c).

³⁸ India's appellant's submission, para. 36.

³⁹ India's appellant's submission, paras. 61-62.

Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.⁴⁰ The Panel observed that, in addition to those factors, there is a "threshold matter" of the applicability of Article III:8(a) in respect of the "products purchased" under the DCR measures.⁴¹ For the Panel, this was the "dispositive" factor of the Appellate Body's analysis in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, and the pertinence, or distinguishability, of the Appellate Body's findings and reasoning in those cases was a primary issue of contention between the parties during the Panel proceedings in the present dispute.⁴² The Panel noted, in this regard, that the Appellate Body 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".⁴³ Recalling that the products subject to discrimination in the present dispute are solar cells and modules originating in the United States and that India purchases the electricity generated from solar cells and modules, rather than the solar cells and modules themselves, the Panel observed that "an approach paralleling that of the Appellate Body in *Canada – Renewable Energy / [Canada –] 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'".⁴⁴

5.5. The Panel further noted that India had not argued that electricity, on the one hand, and solar cells and modules, on the other hand, are in a competitive relationship, and had not requested that the Panel depart from the reasoning of the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*. Rather, India sought to distinguish the DCR measures from the measures at issue in those cases by submitting that the Central Government was "effectively procuring" solar cells and modules by purchasing electricity generated from such cells and modules.⁴⁵

5.6. Regarding India's contention that Article III:8(a) of the GATT 1994 does not require in every case a "competitive relationship" between the product that is procured and the product that is discriminated against, the Panel observed that the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* referred to "consideration of inputs and processes of production" as being potentially relevant to "[w]hat constitutes a competitive relationship between products".⁴⁶ For the Panel, this reference to "inputs and processes of production" seemed to elaborate, rather than displace, what the Appellate Body had referred to as the "competitive relationship" standard, leaving 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".⁴⁷ The Panel did not understand India to disagree with this proposition.⁴⁸ Instead, it understood India to argue that, "when the Appellate Body ... 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

⁴⁰ Panel Report, para. 7.105 (referring to Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, paras. 5.57, 5.69, and 5.74).

⁴¹ Panel Report, para. 7.106.

⁴² Panel Report, para. 7.106.

⁴³ Panel Report, para. 7.113.

⁴⁴ Panel Report, para. 7.113.

⁴⁵ Panel Report, para. 7.114 (quoting India's opening statement at the first Panel meeting, para. 26). In particular, India argued that the fundamental characteristics of solar cells and modules in absorbing light energy, which releases electrons and thereby generates electricity, define their integral role in solar power generation. (Panel Report, fn 292 to para. 7.114 (referring to India's first written submission to the Panel, para. 110; second written submission to the Panel, para. 19; and comments to the United States' response to Panel Question No. 43, para. 11))

⁴⁶ Panel Report, para. 7.118 (quoting Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.63). (emphasis added by the Panel)

⁴⁷ Panel Report, para. 7.118 (quoting Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.63). The Panel referred to the United States' suggestion that 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". (Ibid., fn 300 to para. 7.118 (quoting United States' response to Panel question No. 41, para. 4 (emphasis original)))

⁴⁸ Panel Report, para. 7.118.

production'.⁴⁹ The Panel, however, did not find it necessary "to resolve whether the Appellate Body left room for an alternative to the 'competitive relationship' standard", considering that, "[i]n 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' and disposed of the case on the grounds that 'electricity' and 'generation equipment' are not in such a relationship."⁵⁰

5.7. Concerning the issue of whether solar cells and modules can be characterized as "inputs" in relation to electricity, the Panel recalled the United States' argument 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".⁵¹ The Panel further noted the United States' position that an "input" should be "incorporated into or otherwise physically detectable" in a finished product, and India's position that it could "refer to any resources or materials that are required to obtain a desired output".⁵² The Panel considered that the parties' disagreement turned on issues that the Appellate Body did not consider necessary to resolve in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, and found that it was similarly unnecessary to resolve these issues in the present dispute.⁵³

5.8. The Panel noted that India's arguments also 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".⁵⁴ The Panel stated that the "generation equipment" at issue in *Canada – Renewable Energy / Canada – 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.⁵⁵ The Panel found it noteworthy that the Appellate Body had given "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."⁵⁶ Furthermore, the measures in those cases effectively imposed a requirement to use domestically sourced "goods" or "generation equipment and components" in order to achieve the necessary level of domestic content.⁵⁷

5.9. On this basis, the Panel concluded that "*Canada – Renewable Energy / [Canada –] Feed-in Tariff Program* entailed discrimination against the same 'generation equipment' that is at issue in the present dispute, namely solar cells and modules".⁵⁸ Referring to the panel and Appellate Body reports in those disputes, the Panel was not persuaded that India's arguments in the present case rose 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 those proceedings.⁵⁹ The Panel added that, "[t]o whatever extent Article III:8(a) applies to 'inputs' (however that term is defined) that are not in a competitive relationship with the product

⁴⁹ Panel Report, para. 7.119.

⁵⁰ Panel Report, para. 7.120 (quoting Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, paras. 5.63 and 5.79, respectively).

⁵¹ Panel Report, para. 7.121 (quoting United States' second written submission to the Panel, para. 17).

⁵² Panel Report, para. 7.121 (referring to United States' second written submission to the Panel, para. 20; and quoting India's response to Panel question No. 42, paras. 8 and 10).

⁵³ Panel Report, para. 7.121.

⁵⁴ Panel Report, para. 7.122 (quoting India's second written submission to the Panel, para. 20 (emphasis original)).

⁵⁵ Panel Report, para. 7.123.

⁵⁶ Panel Report, para. 7.123.

⁵⁷ Panel Report, para. 7.125 (quoting Panel Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 7.163). For the Panel, although the requirements in *Canada – Renewable Energy / Canada – 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 other activities could not alone meet the "Qualifying Percentages" for the Minimum Required Domestic Content Level. (Ibid.)

⁵⁸ Panel Report, para. 7.126.

⁵⁹ Panel Report, para. 7.128.

purchased by way of procurement, ... the Appellate Body did not find such considerations germane to its evaluation of electricity and generation equipment that included solar cells and modules."⁶⁰

5.10. The Panel also addressed India's concern that, to read "procurement" in Article III:8(a) as requiring "direct acquisition of the product", would be an unnecessary intrusion into the nature and exercise of governmental actions relating to procurement of solar power.⁶¹ The Panel reasoned that it is by no means self-evident that the scenarios referred to by India⁶² involving the "direct acquisition" of solar cells and modules by governmental agencies would meet the other requirements of Article III:8(a), notably the requirements for products to 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".⁶³

5.11. Having "considered the specific basis" upon which India sought to distinguish the facts and circumstances of the present dispute, the Panel was not persuaded that the DCR measures are "distinguishable in any relevant respect" from the measures examined by the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*.⁶⁴ Referring to 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", the Panel thus 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)".⁶⁵

5.1.2 India's claims on appeal

5.12. India appeals the Panel's conclusion that the DCR measures at issue are not covered by the derogation under Article III:8(a) of the GATT 1994. Central to India's appeal is its contention that the Panel acted inconsistently with its duties under Article 11 of the DSU because it "mechanically applied the Appellate Body's test of competitive relationship" developed in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*⁶⁶ and "refused to consider the facts, evidence and legal arguments advanced by India"⁶⁷ in this case.⁶⁸

5.13. India presents several arguments in support of its contention. India maintains that the Panel "ignored a fundamental basis of India's argument" that solar cells and modules are

⁶⁰ Panel Report, para. 7.128. Similarly, the Panel rejected India's argument that, since the tariff for the power purchased under the PPAs incorporates within it the cost for the solar cells and modules, "India's purchase of electricity generated from solar cells and modules ... constitutes an *effective purchase* of the cells and modules themselves", considering that the argument seemingly conflicted with India's primary argument that "integral inputs", but not other "ancillary equipment" whose costs also may be reflected in the electricity tariff, are "effectively procured". (Panel Report, para. 7.129 (quoting India's response to Panel question No. 41, para. 7 (emphasis added by the Panel))

⁶¹ Panel Report, para. 7.130 (referring to India's first written submission to the Panel, paras. 118 and 120; and opening statement at the first Panel meeting, para. 29).

⁶² According to India, for a government to procure effectively solar cells and modules under Article III:8(a), it would need to either purchase these products by itself and generate the electricity from them, or purchase the products and provide them to SPDs for power generation. (Panel Report, para. 7.130 (quoting India's first written submission to the Panel, para. 117))

⁶³ Panel Report, para. 7.132. India also argued that "procurement" should not be interpreted to require direct acquisition in view of the Appellate Body's statement in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* 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 purchased." The Panel, however, considered that this reference is misplaced and "reverses the logic of the Appellate Body" by subsuming the concept of "purchase" under a broader category of "procurement". (Panel Report, para. 7.133 (quoting Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.59; and European Union's third-party submission to the Panel, para. 40))

⁶⁴ Panel Report, para. 7.135.

⁶⁵ Panel Report, para. 7.135.

⁶⁶ India's appellant's submission, para. 6. See also paras. 17 and 26.

⁶⁷ India's appellant's submission, para. 24.

⁶⁸ Thus, we understand India to argue that, in relying on the Appellate Body's finding in those disputes and not coming to any conclusions with regard to India's claims and arguments relating to solar cells and modules, the Panel failed "to make an objective assessment of the facts of the case, and the applicability of and conformity with the relevant provisions of the covered agreements". (India's appellant's submission, paras. 24 and 28; and responses to questioning at the oral hearing)

"indistinguishable" from solar power generation.⁶⁹ India also submits that the Panel erred "in its factual and legal assessment that it is not necessary to consider whether solar cells and modules qualify as 'inputs' for solar power generation" and "in its application of the relevant tests for consideration regarding whether or not solar cells and modules can be characterized as *inputs*".⁷⁰ Furthermore, India alleges that the Panel erred in dismissing its arguments that sole reliance on the "competitive relationship" test would unduly restrict the scope of Article III:8(a), and that Article III:8(a) should not be interpreted to envisage direct acquisition of products purchased, in all cases.⁷¹ Finally, India contends that the Panel erred in "reasoning that it cannot go beyond the tests applied by the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* since India had not asked it to deviate from this reasoning"⁷², and thus failed to ensure "a meaningful interpretation of Article III:8(a)".⁷³

5.14. For its part, the United States considers that India's arguments under Article 11 of the DSU "are without merit, because ... the Panel thoroughly engaged [with] all of the evidence and arguments advanced by India", even though it did not accord "such evidence the weight India thought it should have".⁷⁴ The United States further submits that the Panel's interpretation of Article III:8(a) is consistent with its text and accords with the legal standard articulated by the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, and that the Panel properly understood that provision as "exempting from Article III only procurements of products directly competitive with the import subject to discrimination".⁷⁵ In the United States' view, "[h]aving rejected the proposition that India could be understood to 'procure' solar cells and modules *without* actually purchasing, acquiring, or otherwise taking custody of any solar cells and modules, it was unnecessary for the Panel to consider or resolve the theoretical question of whether solar cells and modules can be distinguished from solar power generation."⁷⁶

5.15. We recall that Article 11 of the DSU imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", which embraces all aspects of a panel's examination of the "matter", both factual and legal.⁷⁷ Thus, panels are required to make an objective assessment of "the facts", the "applicability" of the covered agreements, and the "conformity" of the measure at issue with the covered agreements.⁷⁸ With respect to "the applicability of and conformity with the relevant covered agreements", a panel is required to conduct an objective assessment of whether the obligations in the covered agreements, with which an inconsistency is claimed, are relevant and applicable to the case at hand, and whether the measures at issue conform to, or are inconsistent with, the specific obligations provided for in those agreements.⁷⁹ That said, a panel has the discretion "to address only those arguments it deems necessary to resolve a particular claim", and "the fact that a particular argument relating to that claim is not specifically addressed in the 'Findings' section of a panel report will not, in and of itself, lead to the conclusion that that panel has failed to make the 'objective assessment of the

⁶⁹ India's appellant's submission, paras. 6 and 8, respectively. In particular, India argues that "Article III:8(a) would apply in situations where the physical form of the product purchased by the government is not identical to the product discriminated against, when it is established that there is really no difference between the products discriminated against (i.e. solar cells and modules) and the product purchased (i.e. solar power)." (Ibid.)

⁷⁰ India's appellant's submission, heading IIB, and para. 10, respectively. (emphasis original)

⁷¹ India's appellant's submission, paras. 21-23.

⁷² India's appellant's submission, heading IIE.

⁷³ India's appellant's submission, para. 34.

⁷⁴ United States' appellee's submission, para. 47.

⁷⁵ United States' appellee's submission, para. 62.

⁷⁶ United States' appellee's submission, para. 52. (emphasis original)

⁷⁷ Appellate Body Report, *Colombia – Textiles*, para. 5.17 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 54).

⁷⁸ Appellate Body Report, *Colombia – Textiles*, para. 5.17 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 54).

⁷⁹ See Appellate Body Report, *Colombia – Textiles*, para. 5.17. In order to make an "objective assessment of the applicability of specific provisions of the covered agreements to a measure properly before it", a panel must "thoroughly scrutinize the measure before it, both in its design and in its operation, and identify its principal characteristics". (Appellate Body Reports, *China – Auto Parts*, para. 171)

matter before it' required by Article 11 of the DSU."⁸⁰ Finally, a challenge to a panel's assessment of the facts cannot be sustained simply by asserting that a panel did not agree with arguments or evidence that had been presented before it, but must be clearly articulated and substantiated with specific arguments, including an explanation of why the alleged error has a bearing on the objectivity of the panel's factual assessment.⁸¹

5.16. As noted, the Panel did 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 abstract, the meaning of 'inputs and processes of production' as used by the Appellate Body in *Canada – Renewable Energy / [Canada –] Feed-In Tariff Program*."⁸² This was because the Panel concluded that the DCR measures at issue in this dispute are not "distinguishable in any relevant respect from those examined by the Appellate Body" in those earlier disputes.⁸³ Under Article 11 of the DSU, the Panel was required, in making an objective assessment of the matter before it, to consider all factual and legal arguments of the parties that were pertinent for ruling on whether the DCR measures are covered by the derogation under Article III:8(a). As a first step in addressing India's challenge to the Panel's analysis, we will examine the scope of application of Article III:8(a) of the GATT 1994.

5.1.3 The scope of application of Article III:8(a) of the GATT 1994

5.17. 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.

5.18. We recall that Article III:8(a) sets out a derogation from the national treatment obligation contained in Article III of the GATT 1994, exempting from that obligation certain measures that contain rules regarding the process by which governmental agencies purchase products. The measures within the scope of Article III:8(a) are "laws, regulations or requirements governing ... procurement", and the entity purchasing products needs to be a "governmental agency". Furthermore, the scope of Article III:8(a) is limited to "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".⁸⁴

5.19. As noted, a primary issue of contention between the parties in the Panel proceedings was the pertinence of the reasoning and findings of the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* regarding the scope of Article III:8(a) of the GATT 1994 with respect to "products purchased". For India, the test of competitive relationship between the product discriminated against and the product purchased "is not a single inflexible rule to be applied in all circumstances for consideration under Article III".⁸⁵ India recalls, in this regard, that the Appellate Body explicitly noted that "[w]hether the derogation in Article III:8(a) can extend

⁸⁰ Appellate Body Report, *EC – Poultry*, para. 135. (emphasis omitted) See also Appellate Body Report, *EC – Fasteners (China)*, para. 511. Furthermore, with regard to a panel's evaluation of the evidence, a panel is required to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence". (Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185 (referring to Appellate Body Report, *EC – Hormones*, paras. 132 and 133)) Within these parameters, however, "it is generally within the discretion of the [p]anel to decide which evidence it chooses to utilize in making findings", and the mere fact that a panel does not explicitly refer to each and every piece of evidence in its reasoning is insufficient to support a claim of violation under Article 11 of the DSU. (Appellate Body Reports, *EC – Hormones*, para. 135. See also Appellate Body Report, *EC – Fasteners (China)*, para. 442)

⁸¹ Appellate Body Reports, *China – Rare Earths*, para. 5.227 (referring to Appellate Body Reports, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238; *US – Steel Safeguards*, para. 498; *US – Tyres (China)*, para. 321; and *EC – Fasteners (China)*, paras. 499 and 500). See also Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 722 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 442).

⁸² Panel Report, para. 7.120.

⁸³ Panel Report, paras. 7.120 and 7.134-7.135.

⁸⁴ See Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.74.

⁸⁵ India's appellant's submission, para. 9. See also para. 4.

also to discrimination [relating to inputs and processes of production used in respect of products purchased by way of procurement] is a matter we do not decide in this case."⁸⁶ According to India, this "left space for legal reasoning on the issue of inputs".⁸⁷

5.20. For its part, the United States underscores that the Appellate Body has found that "Article III:8(a) does not apply when a Member purchases one product, but discriminates against another, different product" and, as read in conjunction with the other paragraphs of Article III, requires that the product "subject to discrimination" and the "product that is purchased" by the government must be: "(1) identical products; (2) 'like' products; or (3) products that are directly competitive or substitutable", or, in other words, "products that are in a competitive relationship".⁸⁸ The United States argues that the Panel was properly guided in the present case by the Appellate Body's interpretation of Article III:8(a) in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, given that both those and the present dispute involve measures under which the government purchases electricity, but discriminates against foreign generation equipment.⁸⁹

5.21. As observed by the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, Article III:8(a) begins with the phrase "[t]he provisions of this Article shall not apply to ...". This introductory clause of Article III:8(a) establishes "a linkage with the remainder of Article III", and the words "[t]he provisions of this Article" encompass the overarching principle in Article III:1 that internal measures "should not be applied ... so as to afford protection to domestic production".⁹⁰ For government procurement activities falling within its scope, Article III:8(a) establishes a derogation from the national treatment obligation under Article III.⁹¹ That is why, as the Appellate Body stated, the derogation in Article III:8(a) "becomes relevant only if there is discriminatory treatment of foreign products that are covered by the obligations in Article III".⁹² In this regard, the Appellate Body stated:

Because Article III:8(a) is a derogation from the obligations contained in other paragraphs of Article III, ... the same discriminatory treatment must be considered both with respect to the obligations of Article III and with respect to the derogation of Article III:8(a). Accordingly, 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.⁹³

5.22. The coverage of Article III:8(a) thus extends to products purchased that are "like" the products discriminated against under Article III:2 and III:4, or, in accordance with the *Ad Note* to Article III:2, to products that are "directly competitive" with or "substitutable" for such products. It is these products that the Appellate Body described as "products that are in a competitive relationship"⁹⁴, using the term "competitive relationship" as a shorthand for delineating the scope of "like", or "directly competitive or substitutable"⁹⁵. In other words, since "the derogation of Article III:8(a) must be understood in relation to the obligations stipulated in Article III", the product of foreign origin must be either "like", or "directly competitive" with or "substitutable" for – i.e. in a "competitive relationship" with – "the product purchased".⁹⁶ We do not consider that the

⁸⁶ Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.63.

⁸⁷ India's appellant's submission, para. 4. See also para. 9 (quoting Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.63). (fn omitted)

⁸⁸ United States' appellee's submission, paras. 38 and 42 (referring to Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.63).

⁸⁹ United States' appellee's submission, para. 66 (referring Panel Report, para. 7.120) and para. 69 (referring to Panel Report, para. 7.135).

⁹⁰ Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.55 (quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 18, DSR 1996:I, p. 111; and referring to Appellate Body Report, *EC – Asbestos*, para. 93).

⁹¹ Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.56.

⁹² Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.63.

⁹³ Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.63.

⁹⁴ Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, paras. 5.62-5.63.

⁹⁵ See Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.74.

⁹⁶ See Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.74.

scope of a derogation can extend beyond the scope of the obligation from which derogation is sought.

5.23. India submits that the Panel erred in equating India's argument that solar cells and modules constitute "inputs" for solar power generation with the "close relationship" standard that was used by the panel in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*.⁹⁷ In those disputes, the panel found that "the very same equipment" was "needed and used to produce the electricity that [was] allegedly procured" and that there was "very clearly a *close relationship* between ... renewable energy generation equipment" and the product purchased (electricity).⁹⁸ While the Appellate Body agreed that a "close relationship" could be relevant for a separate element of Article III:8(a) – i.e. assessing whether a measure can be said to be "governing" procurement of products purchased – it did not consider this dispositive of whether Article III:8(a) applied, because the products purchased were not in a "competitive relationship" with the products being discriminated against.⁹⁹

5.24. On appeal in this dispute, India argues that the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* suggested that the scope of Article III:8(a) may extend, in some cases, to "inputs" and "processes of production", regardless of whether the product subject to discrimination is in a competitive relationship with the product purchased. We disagree with India's reading of the Appellate Body report in *Canada – Renewable Energy / [Canada –] Feed-in Tariff Program*.¹⁰⁰ The Appellate Body explicitly stated that it was not deciding 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 procurement."¹⁰¹ This question arises only after the product subject to discrimination has been found to be like, directly competitive with, or substitutable for – in other words, in a competitive relationship with – the product purchased. In respect of the latter issue, although a consideration of inputs and processes of production may *inform* the question of whether the product purchased is in a competitive relationship with the product being discriminated against, it does not *displace* the competitive relationship standard. Under Article III:8(a) of the GATT 1994, the foreign product discriminated against must necessarily be in a competitive relationship with the product purchased by way of procurement.

5.1.4 India's challenge to the Panel's approach to India's claims under Article III:8(a) of the GATT 1994

5.25. India's appeal under Article III:8(a) of the GATT 1994 hinges largely on its reading of that provision, and in particular on what India sees as the limited scope of the competitive relationship standard, as developed by the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*. We have rejected India's reading of Article III:8(a) above and have found that a competitive relationship between the product discriminated against and the product purchased must be established in all cases. We further recall that India did not argue before the Panel that a competitive relationship exists between electricity, on the one hand, and solar cells and modules, on the other hand, or that the government takes title or custody of solar cells and modules.¹⁰² This is sufficient to address India's appeal to the extent that its arguments rely on the existence of an alternative to the competitive relationship standard. However, in order to dispose fully of the issues raised by India on appeal, we proceed to examine India's arguments to the extent that they relate to the approach taken by the Panel in its review of India's claims under Article III:8(a).

⁹⁷ India's appellant's submission, para. 19.

⁹⁸ Panel Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 7.127. (emphasis added)

⁹⁹ See Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, paras. 5.78-5.79.

¹⁰⁰ Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.63.

¹⁰¹ Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.63. (fn omitted) Conditions imposed in the context of government procurement relating to inputs and processes of production of products purchased, such as conditions regarding "the environmental profile or the environmental attributes that a particular product may incorporate ... could legitimately form part of the requirements of the product purchased that are closely related to the subject matter of the contract." Such conditions may thus be relevant to the analysis under Article III:8(a) insofar as they can be said to be "governing" the relevant procurement process. (Ibid., fn 499 to para. 5.63)

¹⁰² Panel Report, para. 7.114 (referring to India's opening statement at the first Panel meeting, para. 28). See also para. 7.129.

5.26. We recall that the Panel did not consider it necessary in the present dispute to resolve whether the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* had left room for an alternative to the "competitive relationship" standard, since, in applying Article III:8(a) to "closely analogous" facts, the Appellate Body had disposed of the relevant issue in those disputes on the ground that "electricity" and "generation equipment" are not in a competitive relationship.¹⁰³ The Panel also found it unnecessary to decide the issue of whether solar cells and modules can be characterized as "inputs" for electricity. The Panel noted, in this regard, that the considerations advanced by India did not 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 those disputes.¹⁰⁴ Ultimately, the Panel found:

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. We therefore reject India's argument under Article III:8(a) that solar cells and modules "cannot be treated as distinct from solar power" and that, "by purchasing electricity generated from such cells and modules, [India] is effectively procuring the cells and modules".¹⁰⁵

5.27. The Panel focused its analysis on the issue 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"¹⁰⁶, instead of "whether the Appellate Body left room for an alternative to the 'competitive relationship' standard".¹⁰⁷ The Panel's approach appears to have been prompted by the arguments of the parties that focused on drawing parallels with, or distinctions from, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*.¹⁰⁸ The Panel also found that the facts in the present case were not "distinguishable in any relevant respect" from those before the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*.¹⁰⁹

5.28. India submits that the Panel failed to consider "the fundamental characteristics of solar cells and modules" and disregarded India's argument that solar cells and modules "are indistinguishable from solar power generation", and hence failed to make an objective assessment of the matter before it.¹¹⁰ Contrary to what India appears to suggest, the Panel noted India's explanation that, while 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" them.¹¹¹ The Panel observed that India's argument rests on what India considered "to be a 'key factual distinction' with *Canada – Renewable Energy / [Canada –] Feed-in Tariff Program*" involving "the nature of the products in question".¹¹² The Panel proceeded to examine the generation equipment at issue in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, and explained why it considered that those cases "entailed discrimination against the same 'generation equipment' that is at issue in the present dispute".¹¹³ In doing so, the Panel explicitly rejected India's argument that "solar cells and modules 'cannot be treated as distinct from solar power'"¹¹⁴ and that, "by purchasing

¹⁰³ Panel Report, para. 7.120 (referring to Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.79).

¹⁰⁴ Panel Report, para. 7.128.

¹⁰⁵ Panel Report, para. 7.128. (fns omitted)

¹⁰⁶ Panel Report, para. 7.115.

¹⁰⁷ Panel Report, para. 7.120.

¹⁰⁸ See Panel Report, paras. 7.107-7.109 and 7.115.

¹⁰⁹ Panel Report, para. 7.135.

¹¹⁰ India's appellant's submission, para. 6 and heading IIA, respectively.

¹¹¹ Panel Report, para. 7.114 (quoting India's opening statement at the first Panel meeting, para. 28).

¹¹² Panel Report, para. 7.114. (fn omitted)

¹¹³ Panel Report, para. 7.126.

¹¹⁴ Panel Report, para. 7.128 (quoting India's responses to Panel questions No. 19, and No. 41, para. 7; opening statement at the second Panel meeting, para. 8; and opening statement at the first Panel meeting, para. 28). (further text in fn omitted)

electricity generated from such cells and modules, [the government] is effectively procuring the cells and modules."¹¹⁵

5.29. The Panel also recognized the close connection between India's arguments that solar cells and modules are "indistinguishable from", and/or "inputs" for, solar power generation. In particular, the Panel noted that India had 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'".¹¹⁶ While the Panel referred in more detail to India's argument that solar cells and modules can be characterized as "inputs" for solar power generation, it seems to us that the Panel sufficiently considered India's arguments and evidence regarding the fundamental characteristics of these products and their "indistinguishable" nature from the generation of solar power.¹¹⁷

5.30. In a related line of argumentation, India contends that the Panel erred by summarily dismissing its argument that solar cells and modules can be characterized as "inputs" for solar power generation and, in particular, that they 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".¹¹⁸ However, the Panel observed that the "generation equipment" at issue in *Canada – Renewable Energy / [Canada –] 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.¹¹⁹ The Panel further recalled that the measures at issue in *Canada – Renewable Energy / [Canada –] Feed-in Tariff Program*, similarly to the present case, involved a requirement to use domestically sourced "generation equipment and components" in order to achieve the necessary level of domestic content¹²⁰, and noted that neither the panel nor the Appellate Body in those disputes had found any type of equipment "being an 'input' that would be relevant to the analysis under Article III:8(a)".¹²¹

5.31. Moreover, the Panel discussed the parties' arguments over the nature of the "integral" and "ancillary" inputs, and pointed to the tension between India's classification of certain equipment as "ancillary" and its descriptions of solar power generation.¹²² The Panel further explained that it was not "persuaded that the inclusion of other equipment and services under the measure in [*Canada – Renewable Energy / Canada – Feed-in Tariff Program*] 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)".¹²³ We therefore consider that the Panel sufficiently considered this aspect of India's argumentation.

5.32. India also maintains that the Panel "selectively cited" the parties' arguments, and simply dismissed India's arguments on the basis that the Appellate Body did not draw a distinction between the particular categories of equipment or goods specified under the measure at issue in

¹¹⁵ Panel Report, para. 7.128 (quoting India's opening statement at the first Panel meeting, para. 28). The Panel was similarly unpersuaded by India's argument 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." (Ibid., para. 7.129 (quoting India's response to Panel question No. 41, para. 7) (emphasis added by the Panel))

¹¹⁶ Panel Report, fn 326 to para. 7.128 (quoting India's second written submission to the Panel, para. 23).

¹¹⁷ See Panel Report, paras. 7.114 and 7.120-7.129.

¹¹⁸ Panel Report, para. 7.122 (quoting India's second written submission to the Panel, para. 20 (emphasis original)). In this regard, India pointed to the "indispensability" of solar cells and modules for the generation of solar power and the exclusivity of their function for that purpose. (Panel Report, para. 7.122 (referring to India's second written submission to the Panel, para. 21))

¹¹⁹ Panel Report, para. 7.123.

¹²⁰ Panel Report, para. 7.125 (quoting Panel Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 7.163).

¹²¹ Panel Report, para. 7.123. See also para. 7.126.

¹²² See Panel Report, fn 320 to para. 7.127 (referring to India's comments on the United States' response to Panel question No. 41-43, para. 11). The Panel observed *inter alia* that India's contention that "silicon" and "silicon ingots and wafer" are "ancillary" equipment is "in tension with its descriptions of solar energy generation", including the essentiality of "silicon" for the functioning of solar cells and modules, and "reflective of the difficulty of drawing a distinction between 'integral' and 'ancillary' inputs" (Ibid., fn 320 to para. 7.127)

¹²³ Panel Report, para. 7.128. (fn omitted)

Canada – Renewable Energy / Canada – Feed-in Tariff Program.¹²⁴ Contrary to what India suggests, the Panel recognized the parties' disagreement regarding the concept of "inputs", but found that this disagreement "turns on issues that the Appellate Body considered it unnecessary to resolve in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*", and which the Panel similarly considered unnecessary to resolve for the purposes of the present dispute.¹²⁵ The Panel rightly relied on the interpretation of Article III:8(a) developed by the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, and therefore properly rejected India's argument on the relevance of "inputs" for the analysis of the competitive relationship under Article III:8(a).¹²⁶

5.33. India also contends that the Panel erred in dismissing India's arguments that an overly restrictive interpretation of Article III:8(a) would result in imposing "unnecessary fetters" on governmental actions and that the term "procurement" should not be read to require "direct acquisition" of the product purchased in all cases.¹²⁷ India pointed in particular to its concern regarding the consequences of reading Article III:8(a) in a manner that "would mean that for a government to effectively procure solar cells and modules under Article III:8(a)", it would need to purchase these products and either generate electricity from them itself, or provide them to SPDS for power generation.¹²⁸

5.34. In rejecting India's argument regarding "direct acquisition", the Panel did not consider it evident that the scenarios proffered by India "would necessarily meet all of the requirements of Article III:8(a)"¹²⁹, notably because, "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'."¹³⁰ We understand the Panel to have simply pointed out that, even if "procurement" were not read to require "direct acquisition of the product", the competitive relationship standard is only one among other requirements under Article III:8(a), and therefore India's concerns would not necessarily be addressed by a broader reading of the scope of that provision.

5.35. In further support of its argument, India relied on the Appellate Body's statement in *Canada – Renewable Energy / [Canada –] Feed-in Tariff Program* 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 'purchased'".¹³¹ India argued that the term "procurement" should therefore not be read to require direct acquisition of the product in all cases.¹³² The Panel rejected India's argument, noting that the conceptual distinction between "procurement" and "purchase" made by the Appellate Body was simply an expression of the principle of effective treaty interpretation.¹³³ As noted by the Panel, the Appellate Body has explained that "the concepts of 'procurement' and 'purchase' are not to be equated", and the term "procurement", in Article III:8(a), "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".¹³⁴ Therefore, the fact that "procurement" may refer to "the process of obtaining products, rather than ... to an acquisition itself" does not mean that, in order to be

¹²⁴ India's appellant's submission, paras. 11-14 and 16.

¹²⁵ Panel Report, para. 7.121.

¹²⁶ We recall, in this regard, that it was not India's argument before the Panel that electricity and solar cells and modules are in a competitive relationship. Furthermore, it was undisputed that the government does not take title or custody of solar cells and modules. (Panel Report, para. 7.114 (referring to India's opening statement at the first Panel meeting, para. 28); see also para. 7.129)

¹²⁷ India's appellant's submission, paras. 21-23.

¹²⁸ Panel Report, para. 7.130.

¹²⁹ Panel Report, para. 7.132.

¹³⁰ Panel Report, para. 7.132.

¹³¹ India's appellant's submission, para. 22 (quoting Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.59).

¹³² See also Panel Report, para. 7.133 (referring to Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.59).

¹³³ Panel Report, para. 7.133.

¹³⁴ Panel Report, para. 7.133 (quoting Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.59).

covered under Article III:8(a), government procurement can be effectuated by means of a contractual arrangement other than a "purchase", as India appears to suggest.¹³⁵

5.36. Moreover, as we see it, in arguing that the term "procurement" should not be read to require "direct acquisition" of a product¹³⁶, India reiterates, in essence, its argument that Article III:8(a) should cover situations where the discrimination involves inputs or processes of production, regardless of whether the product discriminated against is in a "competitive relationship" with the product purchased. However, we recall that, in order for Article III:8(a) to apply, the product purchased should always be in a competitive relationship with the product discriminated against.¹³⁷

5.37. India also contends that, because of its reliance on *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, the Panel refused to consider the issue of why a separate consideration of solar cells and modules from other generation equipment is necessary.¹³⁸ As we see it, in stating 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"¹³⁹, the Panel correctly found that India's arguments do not have a bearing on the proper determination of the scope of Article III:8(a) of the GATT 1994.¹⁴⁰

5.38. Finally, India argues that the Panel erred in its reasoning that "India did not submit reasons for why a different approach" than the one in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* "should be considered under the facts before the Panel", and that it could not therefore "go beyond the tests applied by the Appellate Body" in those disputes.¹⁴¹ We note that the Panel elaborated on the issue before it, as follows:

... 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 / [Canada –] 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[*]; 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.¹⁴²

[*fn original]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.

5.39. The cases referred to by the Panel in the footnote cited above concern the issue of whether a panel should "resolve the same legal question in the same way in a subsequent case" and whether it can depart for "cogent reasons" from previous Appellate Body findings on the same issue of legal interpretation.¹⁴³ As we understand it, India sought to distinguish from *Canada – Renewable Energy / Canada – Feed-in Tariff Program* on the facts of those cases, rather than to have the Panel re-assess the merits of the Appellate Body's legal standard and

¹³⁵ India's appellant's submission, paras. 21-23. (emphasis omitted) See also European Union's third participant's submission, para. 36. We observe that, although the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* did not rule on the precise range of contractual arrangements that are encompassed by the concept of "purchase", in the present case, it is 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". (Panel Report, para. 7.113 (quoting India's first written submission to the Panel, para. 114))

¹³⁶ Panel Report, para. 7.130 (referring to India's first written submission to the Panel, para. 120).

¹³⁷ See para. 5.24. of this Report.

¹³⁸ India's appellant's submission, para. 24.

¹³⁹ Panel Report, para. 7.134.

¹⁴⁰ See Panel Report, para. 7.130.

¹⁴¹ India's appellant's submission, para. 32 and heading IIE, respectively.

¹⁴² Panel Report, para. 7.115.

¹⁴³ Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160. (fn omitted)

reasoning.¹⁴⁴ Contrary to what India suggests, we do not understand the Panel to have applied "as 'binding' a principle evolved by the Appellate Body", or to have disregarded India's arguments because India did not ask "that the Panel set aside in its entirety the principle of competitive relationship".¹⁴⁵ Rather, as noted above, the Panel was properly guided by the Appellate Body's clarification and application of Article III:8(a) in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, having found that India's arguments were insufficient to distinguish the facts at issue in the present case from those before the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*.

5.1.5 Conclusion

5.40. We have found above that, under Article III:8(a), the product purchased by way of procurement must necessarily be "like", or "directly competitive" with or "substitutable" for – in other words, in a "competitive relationship" with – the foreign product subject to discrimination. Although a consideration of inputs and processes of production may inform the question of whether the product purchased is in a competitive relationship with the product being discriminated against, it does not displace the competitive relationship standard. The question of 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 arises only after the product purchased has been found to be in a competitive relationship with the product subject to discrimination. Based on our review of the Panel's analysis and approach, we consider that the Panel properly addressed India's arguments and conducted its own objective assessment of the matter before it, including the facts of the case and whether the DCR measures are covered by the derogation under Article III:8(a). As we understand it, it was on the basis of its analysis of the facts before it, including the characteristics of solar cells and modules, as well as both parties' legal arguments, that the Panel reached its ultimate conclusion that India's arguments did "not establish that the measures at issue in this case are distinguishable in any relevant respect from those considered by the Appellate Body" in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*. We therefore find that the Panel was properly guided by the Appellate Body report in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* in finding that the DCR measures are not covered by the derogation under Article III:8(a).

5.41. In light of the foregoing, we reject India's claim that the Panel acted inconsistently with Article 11 of the DSU in assessing India's arguments regarding the scope of application of Article III:8(a) of the GATT 1994. Consequently, we uphold the Panel's findings, in paragraphs 7.135 and 7.187 of its Report, that the DCR measures are not covered by the derogation under Article III:8(a) of the GATT 1994.

5.1.6 The remaining elements under Article III:8(a) of the GATT 1994

5.42. We recall that, apart from the applicability of Article III:8(a) of the GATT 1994 in respect of "products purchased", several other cumulative requirements must be met under that provision¹⁴⁶: (i) the measures in question are "laws, regulations or requirements governing ... procurement"¹⁴⁷; (ii) the procurement is "by governmental agencies"¹⁴⁸; (iii) the procurement is of products purchased "for governmental purposes"¹⁴⁹; and (iv) the products purchased are not procured "with

¹⁴⁴ India's responses to questioning at the oral hearing.

¹⁴⁵ India's appellant's submission, para. 34.

¹⁴⁶ See Panel Report, para. 7.105 (referring to Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, paras. 5.57, 5.69, and 5.74), and para. 7.106.

¹⁴⁷ With respect to this element, the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* found 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." (Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.58)

¹⁴⁸ The Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* concluded that "governmental agency" is "an entity acting for or on behalf of government and performing governmental functions within the competences conferred on it". (Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.61)

¹⁴⁹ The Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* found that the phrase "products purchased for governmental purposes" "refers to what is consumed by government or what is provided by government to recipients in the discharge of its public functions" and that there should be "a rational relationship between the product and the governmental function being discharged". (Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.68)

a view to commercial resale or with a view to use in the production of goods for commercial sale".¹⁵⁰ Although the Panel found that the discrimination relating to solar cells and modules under the DCR measures is not covered by the government procurement derogation under Article III:8(a) because of the absence of a competitive relationship between the product purchased and the product discriminated against, it considered it useful to proceed with a limited analysis of the remaining legal elements under that provision.¹⁵¹ In particular, the Panel found that the DCR measures are "laws, regulations or requirements governing the procurement" of electricity¹⁵², and that the procurement of electricity is "by governmental agencies".¹⁵³ The Panel also summarized – but did not make legal findings regarding – the arguments of the parties and addressed, in a limited manner, the questions of whether electricity under the DCR measures is purchased "for governmental purposes" and "not with a view to commercial resale".¹⁵⁴

5.43. India requests that we complete the legal analysis of the remaining elements of Article III:8(a) described above, should we find that the DCR measures are covered by the derogation under that provision.¹⁵⁵ In particular, India asks that we reaffirm the Panel's findings that the DCR measures are "laws, regulations or requirements governing ... procurement", and that the procurement under the DCR measures is "by governmental agencies", and that we complete the legal analysis by ruling that the procurement is of products purchased "for governmental purposes", and that the procurement of products is "not with a view to commercial resale".¹⁵⁶

5.44. We note that India's request for completion of the legal analysis is premised on the condition that we reverse the Panel's finding that the DCR measures are not covered by the government procurement derogation under Article III:8(a) of the GATT 1994.¹⁵⁷ Having upheld this finding by the Panel, we need not, and do not, address India's further claims and related arguments concerning the Panel's interpretation and application of the remaining elements under Article III:8(a) of the GATT 1994. We express no view on the Panel's reasoning and analysis in this regard.

5.2 Article XX(j) of the GATT 1994 – "general or local short supply"

5.45. We have upheld the Panel's finding that the government procurement derogation under Article III:8(a) of the GATT 1994 does not cover the DCR measures at issue in the present case, and therefore turn to address India's conditional appeal of the Panel's finding that the DCR measures are not justified under the general exception in Article XX(j) of the GATT 1994 for measures "essential to the acquisition or distribution of products in general or local short supply". In this appeal, India claims that the Panel erred in its interpretation and application of Article XX(j) and acted inconsistently with its obligations under Article 11 of the DSU.¹⁵⁸ Below, we summarize the Panel's findings and the issues appealed. We then address the interpretation of Article XX(j) before turning to consider the Panel's analysis as challenged by India on appeal.¹⁵⁹

5.2.1 The Panel's findings

5.46. As a general matter, regarding the scope of Article XX(j) of the GATT 1994, India claimed before the Panel that a situation of short supply can exist where a product that is available

¹⁵⁰ The Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* understood the term "commercial resale" to mean "a resale of a product at arm's length between a willing seller and a willing buyer", and explained that this "must be assessed having regard to the entire transaction", both from the seller's and the buyer's perspective. (Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, paras. 5.70-5.71)

¹⁵¹ Panel Report, para. 7.137.

¹⁵² Panel Report, para. 7.145.

¹⁵³ Panel Report, para. 7.151.

¹⁵⁴ Panel Report, paras. 7.162 and 7.186.

¹⁵⁵ India's appellant's submission, para. 36.

¹⁵⁶ India's appellant's submission, para. 61.

¹⁵⁷ India's appellant's submission, para. 36.

¹⁵⁸ India's appellant's submission, paras. 90 and 99.

¹⁵⁹ Our analysis focuses on India's arguments as they relate to the Panel's interpretation and application of the phrase "products in general or local short supply" in Article XX(j) of the GATT 1994. We address India's arguments regarding whether the DCR measures are "essential" within the meaning of Article XX(j) in the final section of this Report, where we also address India's arguments concerning whether those measures are "necessary" within the meaning of Article XX(d) of the GATT 1994.

internationally is nevertheless "in short supply in certain local markets"¹⁶⁰, and that "general or local short supply" could exist in circumstances where a "product is not produced or manufactured in a particular market".¹⁶¹ Specifically, in the context of the present dispute, India explained that it did not seek to argue that Article XX(j) is "available to address any situation where a country's indigenous manufacturing capacity for any product is low".¹⁶² Rather, India argued that a "justification for invoking Article XX(j) would need to rest on whether a measure is *essential to redress* such a situation of general or local short supply"¹⁶³, which, for India, is a question "to be examined in the context of the overall objectives of energy security and ecologically sustainable growth for which acquisition or distribution of indigenously manufactured solar cells and modules is essential."¹⁶⁴ India further submitted that "sole dependence on imported solar cells and modules brings risks associated with supply side vulnerabilities and fluctuations"¹⁶⁵, and that, "[i]n order to achieve energy security, India needs to achieve domestic resilience to such risks."¹⁶⁶

5.47. The Panel determined that "[t]he 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'"¹⁶⁷, which the Panel noted that India had identified to be "solar cells and modules".¹⁶⁸ The Panel then interpreted the phrase "products in general or local short supply" in Article XX(j). With respect to the notion of "short supply", the Panel considered that "the terms 'products in ... short supply' ... refer to products in respect of which the quantity of available supply does not meet demand."¹⁶⁹ Regarding the terms "general or local" short supply, the Panel indicated 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", such that these terms "give Article XX(j) a wide ambit, and ... 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".¹⁷⁰ The Panel thus 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."¹⁷¹

5.48. The Panel then turned to determine whether a lack of domestic manufacturing capacity amounts to solar cells and modules being in "general or local short supply" within the meaning of Article XX(j). In response to India's argument 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'"¹⁷², the Panel noted that "the words 'products in general or local short supply' do not refer to 'products of national origin in general or local short supply'."¹⁷³ Unlike other provisions of the GATT 1994, such as Article III:4¹⁷⁴, Articles II:1(b) and II:1(c)¹⁷⁵, Article XX(g)¹⁷⁶, and Article XX(i)¹⁷⁷, the Panel noted that it did not see any language in Article XX(j) that speaks to the source of the products concerned, or to the question of where those products are produced.¹⁷⁸ The Panel further noted that "India's interpretation of Article XX(j) would be tantamount to interpreting the words 'products in general or local short supply' ... as though they meant 'products in general or local short *production*'", which would amount to "a far-reaching principle that all Members are entitled to an equitable share in the international *production* of products in short supply".¹⁷⁹

¹⁶⁰ Panel Report, Add.1, Annex B-3, para. 41.

¹⁶¹ Panel Report, Add.1, Annex B-3, para. 42.

¹⁶² Panel Report, Add.1, Annex B-3, para. 42.

¹⁶³ Panel Report, Add.1, Annex B-3, para. 43. (emphasis original)

¹⁶⁴ Panel Report, Add.1, Annex B-3, para. 43.

¹⁶⁵ Panel Report, Add.1, Annex B-3, para. 49.

¹⁶⁶ Panel Report, Add.1, Annex B-3, para. 49.

¹⁶⁷ Panel Report, para. 7.199.

¹⁶⁸ Panel Report, paras. 7.199-7.200.

¹⁶⁹ Panel Report, para. 7.205.

¹⁷⁰ Panel Report, para. 7.206.

¹⁷¹ Panel Report, para. 7.207. (fn omitted)

¹⁷² Panel Report, para. 7.220 (quoting India's first written submission to the Panel, para. 213).

¹⁷³ Panel Report, para. 7.223. (emphasis original)

¹⁷⁴ Article III:4 refers to "products of the territory of any Member".

¹⁷⁵ Article II:1(b) designates "products of territories of other Members" and Article II:1(c) refers to "products of territories entitled under Article I to receive preferential treatment upon importation".

¹⁷⁶ Article XX(g) speaks of "domestic production or consumption".

¹⁷⁷ Article XX(i) refers to "restrictions on exports of domestic materials".

¹⁷⁸ Panel Report, para. 7.223.

¹⁷⁹ Panel Report, para. 7.224. (emphasis original)

5.49. The Panel also considered that, for the purposes of making a determination under Article XX(j) of the GATT 1994, "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'¹⁸⁰. However, "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'", given that "India ha[d] not adequately explained what would constitute a 'lack' of domestic manufacturing capacity amounting to a 'short supply'".¹⁸¹ The Panel concluded 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."¹⁸²

5.50. In response to what the Panel considered to be an alternative argument raised by India, 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'¹⁸³, the Panel determined that "[t]he 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."¹⁸⁴ The Panel further determined that "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", the Panel considered that "only imminent risks of such shortage would be covered"¹⁸⁵, which it noted that India had not established.¹⁸⁶ For these reasons, the Panel concluded that the DCR measures do not involve the acquisition of "products in general or local short supply" in India within the meaning of Article XX(j), and that they are therefore not justified under the general exception in that provision.¹⁸⁷ Noting, however, that its findings involved "novel issues of law and legal interpretation" under Article XX(j), and that the Appellate Body might reverse those findings on appeal, the Panel proceeded with a limited analysis and review in order to provide the Appellate Body with factual findings regarding whether the DCR measures are "essential" within the meaning of Article XX(j) of the GATT 1994.¹⁸⁸

5.2.2 India's claims on appeal

5.51. India appeals the Panel's analysis and findings under Article XX(j) of the GATT 1994, and requests us to find that the lack of manufacturing capacity of solar cells and modules in India "amounts to a situation of local and general short supply", and that the DCR measures are measures relating to the acquisition of such products for the purposes of Article XX(j).¹⁸⁹ India contends that the Panel erred in its interpretation of the phrase "products in general or local short supply" because it did not read "'short supply' in Article XX(j) in the context of the specific terms used in that provision, i.e., 'general or local'", and instead adopted an "approach that interpreted the words 'general or local' in isolation of the words 'short supply'".¹⁹⁰ According to India, the use of the terms "general or local short supply" in Article XX(j) "contemplates short supply that is distinct from situations that can be addressed by 'international supply'".¹⁹¹ India submits that an "interpretation that Article XX(j) cannot be applied when imports are available fundamentally veers towards the position that only export restraints will qualify for consideration under Article XX(j), and not import restraints", and that, if such interpretation had been intended by the drafters, they "would have explicitly stated this, as was done in the context of Article XI:2 of the GATT 1994".¹⁹² Regarding the question of risks associated with dependence on imports, India argues that the Panel mischaracterized its argument as an "alternate argument"¹⁹³, adding that it did not intend

¹⁸⁰ Panel Report, para. 7.225. (fn omitted)

¹⁸¹ Panel Report, para. 7.226.

¹⁸² Panel Report, para. 7.234.

¹⁸³ Panel Report, para. 7.237. (emphasis omitted)

¹⁸⁴ Panel Report, para. 7.245.

¹⁸⁵ Panel Report, para. 7.255.

¹⁸⁶ Panel Report, paras. 7.263-7.264.

¹⁸⁷ Panel Report, para. 7.265. Having found that solar cells and modules are not "products in general or local short supply" in India, the Panel did not consider it necessary to examine whether the DCR measures involve the "acquisition or distribution" of those products. (Ibid., fn 629 to para 7.265)

¹⁸⁸ See Panel Report, para. 7.335.

¹⁸⁹ India's appellant's submission, para. 106.

¹⁹⁰ India's appellant's submission, para. 73.

¹⁹¹ India's appellant's submission, para. 86.

¹⁹² India's appellant's submission, para. 87. (fn omitted)

¹⁹³ India's appellant's submission, para. 100 (quoting Panel Report, para. 7.237).

"to place the concept of 'risk' as central to [its] defence, as concluded by the Panel".¹⁹⁴ Rather, India "reiterates its fundamental argument that 'general or local short supply' exists in the first place due to low domestic manufacturing" and its vulnerability "to the risks associated with international supply and market fluctuations".¹⁹⁵

5.52. India further alleges that the Panel acted inconsistently with Article 11 of the DSU in rejecting India's arguments regarding the concept of "sufficient manufacturing capacity" and the context in which India referred to that concept, namely, to argue that the DCR measures do not seek to "maximize" self-sufficiency or "minimize" dependence on imports, but rather to "reduce" the risks linked to such dependence.¹⁹⁶ India contends that it presented evidence of what would constitute "sufficient manufacturing capacity" that would "enable discontinuation of the DCR measures"¹⁹⁷, and maintains that "India does not intend for the DCRs to be applied indefinitely".¹⁹⁸ According to India, "[t]he Panel's refusal to take into account India's arguments" amounts to a breach of the Panel's duties under Article 11 of the DSU.¹⁹⁹ India concludes by requesting us to find that "India's lack of manufacturing capacity of solar cells and modules amounts to a situation of local and general short supply of such products in India, and that the DCR measures are measures relating to the acquisition of such products for the purposes of Article XX(j)".²⁰⁰

5.53. For its part, the United States requests us to uphold the Panel's findings. According to the United States, the Panel correctly interpreted the terms "general or local short supply", in their context and in light of their object and purpose²⁰¹, and properly rejected India's argument that a lack of domestic production can constitute a situation of "short supply" within the meaning of Article XX(j).²⁰² The United States submits that the term "products" in Article XX(j) "is unqualified by origin, indicating that it addresses supply of that product without respect to origin or 'source of supply'"²⁰³, adding, by way of contrast, that other "provisions of the GATT 1994 that address products of a particular origin identify that fact explicitly", such as Article III:4, Articles II:1(b) and II:1(c), and Article XX(i).²⁰⁴ The United States also disagrees with India's contention that the Panel erred under Article 11 of the DSU in assessing India's arguments relating to the lack of domestic manufacturing capacity for solar cells and modules.²⁰⁵

5.54. We turn next to India's appeal as it relates to the Panel's interpretation of Article XX(j) of the GATT 1994, and in particular the phrase "products in general or local short supply". We begin by examining key aspects of the legal standard to be applied in determining whether a measure can be provisionally justified under Article XX of the GATT 1994.

5.2.3 The legal standard under Article XX(j) of the GATT 1994

5.55. Article XX(j) provides, in relevant part, 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 Members 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.²⁰⁶

5.56. The Appellate Body has explained that the evaluation of a defence under Article XX of the GATT 1994 involves a two-tiered analysis, in which a measure must first be provisionally justified

¹⁹⁴ India's appellant's submission, para. 102.

¹⁹⁵ India's appellant's submission, para. 104. (emphasis original)

¹⁹⁶ See India's appellant's submission, paras. 91-101.

¹⁹⁷ India's appellant's submission, para. 94.

¹⁹⁸ India's appellant's submission, para. 94. (fn omitted)

¹⁹⁹ India's appellant's submission, para. 99.

²⁰⁰ India's appellant's submission, para. 106.

²⁰¹ See United States' appellee's submission, para. 88.

²⁰² United States' appellee's submission, paras. 93-94.

²⁰³ United States' appellee's submission, para. 91.

²⁰⁴ United States' appellee's submission, para. 91.

²⁰⁵ United States' appellee's submission, para. 103.

²⁰⁶ Emphasis original.

under one of the paragraphs of Article XX, and then shown to be consistent with the requirements of the chapeau of Article XX.²⁰⁷ This "sequence of steps" in the analysis of a claim under Article XX reflects "not inadvertence or random choice, but rather the fundamental structure and logic of Article XX of the GATT 1994".²⁰⁸

5.57. Regarding the first part of the analysis, it is well established that, for a responding party to justify provisionally a measure under an Article XX exception, two elements must be shown: first, that the measure addresses the particular interest specified in that paragraph²⁰⁹; and, second, that there is a sufficient nexus between the measure and the interest protected, which is specified through the use of terms such as "necessary to" in Article XX(d), and, in the case of Article XX(j), "essential to".²¹⁰

5.58. Since this is the first case in which the Appellate Body is called upon to interpret Article XX(j) of the GATT 1994, we review briefly our jurisprudence under the other paragraphs of Article XX, and in particular our recent jurisprudence under Article XX(d), for the purpose of assessing its possible relevance to Article XX(j). As to the first element of the analysis contemplated under Article XX(d), the Appellate Body has stated that the responding party has the burden of demonstrating that: there are "laws or regulations"; such "laws or regulations" are "not inconsistent with the provisions of" the GATT 1994; and the measure sought to be justified is designed "to secure compliance" with such "laws or regulations". An examination of a defence under Article XX(d) thus includes an initial, threshold examination of the relationship between the challenged measure and the "laws or regulations" that are not GATT-inconsistent so as to determine whether the former is designed "to secure compliance" with specific rules, obligations, or requirements under the relevant provisions of such "laws or regulations".²¹¹ If the assessment of the design of a measure, including its content, structure, and expected operation, reveals that the measure is "incapable" of securing compliance with specific rules, obligations, or requirements under the relevant provisions of such "laws or regulations" that are not GATT-inconsistent, then the measure cannot be justified under Article XX(d), and this would be the end of the inquiry.²¹²

5.59. As to the second element of the analysis contemplated under Article XX(d), the Appellate Body has stated that a determination of whether a measure is "necessary" entails a more in-depth and holistic examination of the relationship between the inconsistent measure and the relevant laws or regulations. This involves, in each case, a process of "weighing and balancing" a series of factors, including: the extent to which the measure sought to be justified contributes to the realization of the end pursued (i.e. securing compliance with specific rules, obligations, or requirements under the relevant provisions of "laws or regulations" that are not GATT-inconsistent); the relative importance of the societal interest or value that the "law or regulation" is intended to protect; and the trade-restrictiveness of the challenged measure.²¹³

²⁰⁷ See Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996: I, p. 20. See also Appellate Body Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 64; *US – Shrimp*, paras. 119-120; and *EC – Seal Products*, para. 5.169.

²⁰⁸ Appellate Body Report, *US – Shrimp*, para. 119.

²⁰⁹ This would consist of "secur[ing] compliance with laws or regulations" in the case of Article XX(d), and "acquisition or distribution of products in general or local short supply" in the case of Article XX(j).

²¹⁰ Appellate Body Report, *Argentina – Financial Services*, para. 6.202. See also Appellate Body Reports, *Colombia – Textiles*, para. 5.67; *EC – Seal Products*, para. 5.169; *US – Gambling*, para. 292; and *Korea – Various Measures on Beef*, para. 157.

²¹¹ Appellate Body Report, *Colombia – Textiles*, para. 5.126 (referring to Appellate Body Report, *Argentina – Financial Services*, para. 6.203). See also Appellate Body Report, *Colombia – Textiles*, paras. 5.68-5.69 (referring to Appellate Body Reports, *Argentina – Financial Services*, para. 6.203; *Mexico – Taxes on Soft Drinks*, para. 72; *US – Shrimp*, paras. 135-142; and *EC – Seal Products*, para. 5.144).

²¹² See Appellate Body Report, *Colombia – Textiles*, para. 5.126. However, as indicated by the Appellate Body, "[a] panel must not ... structure its analysis of the ['design' step] in such a way as to lead it to truncate its analysis prematurely and thereby foreclose consideration of crucial aspects of the respondent's defence relating to the 'necessity' analysis." (Appellate Body Report, *Colombia – Textiles*, para. 5.126 (quoting Appellate Body Report, *Argentina – Financial Services*, para. 6.203))

²¹³ See Appellate Body Reports, *Colombia – Textiles*, paras. 5.71-5.73 and 5.77; and *Korea – Various Measures on Beef*, paras. 162-164.

In most cases, a comparison between the challenged measure and reasonably available alternative measures should then be undertaken.²¹⁴

5.60. The analytical framework for the "design" and "necessity" elements of the analysis contemplated under Article XX(d) is relevant *mutatis mutandis* also under Article XX(j). As with Article XX(d), the examination of a defence under Article XX(j) would appear to include an initial, threshold examination of the "design" of the measure at issue, including its content, structure, and expected operation. In the case of Article XX(j), the responding party must identify the relationship between the measure and "the acquisition or distribution of products in general or local short supply", whereas, in the case of Article XX(d), a panel must examine the relationship between the measure and "securing compliance" with relevant provisions of laws or regulations that are not GATT-inconsistent.²¹⁵ If the assessment of the design of a measure, including its content, structure, and expected operation, reveals that the measure is "incapable", in the case of Article XX(j), of addressing "the acquisition or distribution of products in general or local short supply", or, in the case of Article XX(d), "secur[ing] compliance with [relevant provisions of] laws or regulations that are not inconsistent" with the GATT 1994, there is no relationship that meets the requirements of the "design" element. In either situation, further analysis with regard to whether the measure is "necessary" or "essential" would not be required.²¹⁶ This is because there can be no justification under Article XX(j) for a measure that is not "designed" to address the "acquisition or distribution of products in general or local short supply", just as there can be no justification under Article XX(d) for a measure that is not "designed" to secure compliance with relevant provisions of laws or regulations that are not GATT-inconsistent.²¹⁷

5.61. We recall that, while the "design" and "necessity" elements may provide a useful analytical framework for assessing whether a measure is provisionally justified under Article XX(d), they are "conceptually distinct".²¹⁸ Yet, they are related aspects of the overall inquiry to be carried out into whether a respondent has established that the measure at issue is "necessary to secure compliance with laws or regulations which are not inconsistent" with the GATT 1994²¹⁹, and that the structure of the analysis under Article XX(d) therefore does not have to follow a "rigid path".²²⁰ Thus, the way a panel organizes its examination of these elements may be influenced not only by the measures at issue or the laws or regulations identified by the respondent, but also by the manner in which the parties present their respective arguments and evidence.²²¹ These considerations are equally relevant for the analysis under Article XX(j) in assessing whether a measure is "essential to the acquisition or distribution of products in general or local short supply".

5.62. The participants in the present case disagree as to whether the term "essential" in Article XX(j) introduces a more stringent legal threshold than the necessity analysis under Article XX(d).²²² The Appellate Body has explained in this regard that, in a continuum ranging from "indispensable" to "making a contribution to", a "necessary" measure is "located significantly

²¹⁴ The Appellate Body has explained that, in most cases, a panel must compare the challenged measure and possible alternative measures that achieve an equivalent level of protection while being less trade restrictive. (Appellate Body Report, *Colombia – Textiles*, para. 5.74) See also Appellate Body Reports, *EC – Seal Products*, para. 5.169 (referring to Appellate Body Report, *US – Gambling*, para. 307, in turn referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 166).

²¹⁵ See Appellate Body Report, *Colombia – Textiles*, para. 5.126. The Appellate Body has remarked that the objectives of, or the common interests or values protected by, the relevant law or regulation may assist in elucidating the content of specific rules, obligations, or requirements in such law or regulation. (Appellate Body Report, *Colombia – Textiles*, fn 272 to para 5.126 (referring to Appellate Body Report, *Argentina – Financial Services*, fn 495 to para. 6.203))

²¹⁶ See Appellate Body Report, *Colombia – Textiles*, para. 5.126.

²¹⁷ See Appellate Body Report, *Colombia – Textiles*, para. 5.126 (referring to Appellate Body Reports, *Argentina – Financial Services*, para. 6.203; and *Mexico – Taxes on Soft Drinks*, para. 72).

²¹⁸ Appellate Body Report, *Colombia – Textiles*, para. 5.125.

²¹⁹ See Appellate Body Reports, *Colombia – Textiles*, para. 5.125; and *Argentina – Financial Services*, para. 6.205.

²²⁰ Appellate Body Report, *Argentina – Financial Services*, para. 6.205.

²²¹ Appellate Body Report, *Argentina – Financial Services*, para. 6.205.

²²² India argues, based on dictionary definitions, that the term "necessary" is a synonym for "essential", and that the requirement that a measure be "essential" "is not limited to what is 'absolutely indispensable' but also encompasses situations that are 'necessary'". (India's appellant's submission, para. 120) For its part, the United States submits that "essential" suggests a "higher level of indispensability" than the term "necessary", and that a demonstration that a measure is "essential" therefore "requires a higher threshold than proving that a measure is merely 'necessary'". (United States' appellee's submission, para. 122)

closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'.²²³ The word "essential" in turn is defined as "[a]bsolutely indispensable or necessary".²²⁴ The plain meaning of the term thus suggests that this word is located at least as close to the "indispensable" end of the continuum as the word "necessary".

5.63. Having said this, we recall that a "necessity" analysis under Article XX(d) involves a process of "weighing and balancing" a series of factors. We consider that the same process of weighing and balancing is relevant in assessing whether a measure is "essential" within the meaning of Article XX(j). In particular, we consider it relevant to assess the extent to which the measure sought to be justified contributes to: "the acquisition or distribution of products in general or local short supply"; the relative importance of the societal interests or values that the measure is intended to protect; and the trade-restrictiveness of the challenged measure. In most cases, a comparison between the challenged measure and reasonably available alternative measures should then be undertaken.²²⁵

5.64. As noted, Article XX(j) establishes a general exception for measures "essential to the acquisition or distribution of products in general or local short supply". The "products" at issue are the ones that must be "in ... short supply". It must therefore be established that there are "products in general or local short supply", and that the challenged measures are "essential to the acquisition or distribution of" such products. We also note that Article XX(j) provides that measures covered by the general exception under Article XX(j) 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"²²⁶, and 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 such measures "shall be discontinued as soon as the conditions giving rise to them have ceased to exist". In light of this language in Article XX(j), we consider that a proper interpretation of that provision, including the phrase "products in general or local short supply", requires careful consideration of how the different terms used in that provision inform one another, and should thus be holistic in nature.

5.65. Beginning with the phrase "products in ... short supply", we note that this language refers generally to products "available only in limited quantity, scarce".²²⁷ We understand the phrase "products ... in short supply" to refer therefore to products in respect of which there is a "shortage", that is, a "[d]eficiency in quantity; an amount lacking".²²⁸ This understanding is reinforced by the fact that the French and Spanish versions of Article XX(j) refer to "*pénurie*" and "*penuria*", respectively, which translate best as "shortage" in English.

5.66. We note that "supply" is defined as the "amount of any commodity *actually produced and available for purchase*", and that, in its ordinary meaning, the word "supply" is the "correlative" of the word "demand".²²⁹ An assessment of whether there is a "deficiency" or "amount lacking" in the "quantity" of a product that is *available* would therefore appear to involve a comparison between "supply" and "demand", such that products can be said to be "in short supply" when the "quantity" of a product that is "available" does not meet "demand" for that product.

5.67. This brings us to the question as to the extent of the geographical area or market in which the quantity of "available" supply of a product should be compared to demand. Article XX(j) refers, in this regard, to products in "general *or* local" short supply. The dictionary definitions of "local" include "in a particular locality or neighbourhood, esp. a town, county, etc., as opp. to the country

²²³ Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

²²⁴ See *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2007), Vol. 1, p. 865.

²²⁵ See Appellate Body Reports, *EC – Seal Products*, para. 5.169 (referring to Appellate Body Report, *US – Gambling*, para. 307, in turn referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 166).

²²⁶ Emphasis added.

²²⁷ *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2007), Vol. 2, p. 3115. See also Appellate Body Reports, *China – Raw Materials*, para. 325.

²²⁸ *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2007), Vol. 2, p. 2813. See also Appellate Body Reports, *China – Raw Materials*, para. 325.

²²⁹ See *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 3118. (emphasis added)

as a whole" and "limited or peculiar to a particular place or places".²³⁰ The word "general", in turn, is relevantly 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".²³¹ Their ordinary meanings thus suggest that the terms "general or local" refer to a range of product shortages, which may cover shortages that occur locally, within a region, or a territory within a country, or continuing beyond the boundaries of a particular country. In the context of Article XX(j), however, we understand the phrase "products in general or local short supply" to be focused on products for which a situation of short supply exists within the territory of the Member invoking Article XX(j). This does not mean that a situation of "general" short supply cannot extend beyond the boundaries of that territory, as long as it also occurs within that territory. We further read the terms "general" and "local", together with the disjunctive "or", to suggest that there is no requirement for a Member to demonstrate that the shortage extends to all parts of its territory, but that, depending on the circumstances, it may be sufficient to demonstrate that the existence of such a situation of shortage occurs locally, or is limited to certain parts of its territory.

5.68. Moving on to consider whether Article XX(j) speaks to the origin of products that may be "available" in a particular geographical area or market, we note that the phrase "products in general or local short supply" is immediately preceded by the terms "acquisition or distribution of". The word "acquisition" refers generally to "[t]he action of acquiring something"²³², and "distribution" is defined as "[t]he action of spreading or dispersing throughout a region".²³³ Article XX(j) therefore contemplates measures that seek to redress situations of "short supply" by providing for the "acquisition or distribution of" given products. By its terms, Article XX(j) does not limit the scope of potential sources of supply to "domestic" products manufactured in a particular country that may be "available" for purchase in a given market. Nor does it exclude the possibility that products from sources outside a particular geographical area or market may also be "available" to satisfy demand. In this sense, the language in Article XX(j), which does not speak to the origin of products that may be "acquired" or "distributed", may be contrasted with, for example, Article III:4 of the GATT 1994, which refers expressly to "products of the territory of any Member" and "like products of national origin"; and with Article XX(g) of the GATT 1994, which refers to "domestic production or consumption".²³⁴

5.69. In determining whether products are in general or local short supply, it is relevant to consider the quantity of products *produced* in the particular geographical area or market where the alleged shortage exists. There is, however, no reason not to give due regard to the quantity of products that is produced in other parts of a particular country, as well as in other countries, provided that such quantities are "available" for purchase in the relevant geographical area or market. Further, while an increase in manufacturing capacity or production in a particular geographical area may lead to an increase in the total quantity of a product available for purchase in that area, it does not follow from such increase that domestic manufacturers will necessarily sell their production to domestic buyers, as opposed to exporting their production by selling to buyers abroad. An assessment of whether there is a situation of "products in general or local short supply" should not focus exclusively on availability of supply from "domestic", as opposed to foreign or "international" sources.

5.70. Turning to consider whether there is a temporal dimension to the phrase "products in general or local short supply", we recall that Article XX(j) stipulates that any measures taken under paragraph (j) "shall be discontinued as soon as the conditions giving rise to them have ceased to exist". We read this language in Article XX(j) to contemplate situations of "short supply"

²³⁰ Panel Report, para. 7.206 (quoting *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 1619).

²³¹ Panel Report, para. 7.206 (quoting *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 1081).

²³² *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2007), Vol. 1, p. 20.

²³³ *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2007), Vol. 1, p. 720.

²³⁴ We further note that Article XX(j) requires that measures to be justified under this exception "shall be consistent with the principle that all Members are entitled to an equitable share of the international supply of such products". This language further supports the view that an assessment of whether "products are in general or local short supply" requires consideration of *all sources* of supply that may be "available" in a given geographical area or market, and that "international supply" is not to be excluded from consideration.

that may continue over time, but are nonetheless expected not to last indefinitely. An analysis of whether a respondent has identified "products in general or local short supply" is therefore not satisfied, in our view, by considering only whether there is a mathematical difference at a single point in time between demand and the quantity of supply that is "available" for purchase in a particular geographical area or market. Instead, Article XX(j) requires a careful scrutiny of the relationship between supply and demand based on a holistic consideration of trends in supply and demand as they evolve over time, as well as whether the conditions giving rise to short supply have ceased to exist.

5.71. In light of the above, we read Article XX(j) of the GATT 1994 as reflecting a balance of different considerations to be taken into account when assessing whether products are "in general or local short supply". In particular, a panel should examine the extent to which a particular product is "available" for purchase in a particular geographical area or market, and whether this is sufficient to meet demand in the relevant area or market. This analysis may, in appropriate cases, take into account not only the level of domestic production of a particular product and the nature of the product that is alleged to be "in general or local short supply"²³⁵, but also such factors as the relevant product and geographic market²³⁶, potential price fluctuations in the relevant market, the purchasing power of foreign and domestic consumers, and the role that foreign and domestic producers play in a particular market, including the extent to which domestic producers sell their production abroad. Due regard should be given to the total quantity of imports that may be "available" to meet demand in a particular geographical area or market. It may thus be relevant to consider the extent to which international supply of a product is stable and accessible, including by examining factors such as the distance between a particular geographical area or market and production sites, as well as the reliability of local or transnational supply chains. Whether and which factors are relevant will necessarily depend on the particularities of each case. Just as there may be factors that have a bearing on "availability" of imports in a particular case, it is also possible that, despite the existence of manufacturing capacity, domestic products are not "available" in all parts of a particular country, or are not "available" in sufficient quantities to meet demand. In all cases, the responding party has the burden of demonstrating that the quantity of "available" supply from both domestic and international sources in the relevant geographical market is insufficient to meet demand.

5.72. Our interpretation of Article XX(j) of the GATT 1994 is in consonance with the preamble of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), which refers to 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 [Members'] respective needs and concerns at different levels of economic development". The different levels of economic development of Members may, depending on the circumstances, impact the availability of supply of a product in a given market. Developing countries may, for example, have less domestic production, and may be more vulnerable to disruptions in supply than developed countries. Such factors may be relevant in assessing the *availability* of a product in a particular case, and thus in assessing whether a product is "in general or local short supply".²³⁷

5.2.4 Whether the Panel erred in finding that solar cells and modules are not products in short supply in India

5.73. We recall that the Panel considered that "the terms 'products in ... short supply' ... refer to products in respect of which the quantity of available supply does not meet demand."²³⁸ The Panel thus 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."²³⁹ Based on its analysis of the text and context of

²³⁵ It may be relevant, for example, to consider whether the measure concerns perishable goods or foodstuffs, or products that may be difficult to transport.

²³⁶ A consideration of factors such as product homogeneity, supply-side and demand-side substitutability may also be relevant in order to assess properly whether there is shortage of a particular product in a given market.

²³⁷ We recall that it must also be established that the challenged measure is "essential to the acquisition or distribution of" such products.

²³⁸ Panel Report, para. 7.205.

²³⁹ Panel Report, para. 7.207. The Panel then confirmed its interpretation of the phrase "products in general or local short supply" by having recourse to the negotiating history of the GATT 1994.

Article XX(j) of the GATT 1994, together with relevant jurisprudence, the Panel found 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"²⁴⁰ and that they "do not refer to products in respect of which there merely is a lack of domestic manufacturing capacity".²⁴¹ The Panel added that "India ha[d] not argued that the quantity of solar cells and modules available from all sources, i.e. both international and domestic, is inadequate to meet the demand of Indian SPDs or other purchasers."²⁴²

5.74. As we have explained above, an assessment of whether a Member has identified "products in general or local short supply" requires a case-by-case analysis of the relationship between supply and demand based on a holistic consideration of all relevant factors.²⁴³ We agree with India to the extent that it suggests that an increase in domestic manufacturing "capacity" may lead to an increase in the total quantity of available supply of a product. However, we disagree that a lack of "sufficient" domestic manufacturing "capacity" will necessarily constitute a product "shortage" in a particular market, as India appears to suggest. Nor does it follow from an increase in domestic production capacity that domestic manufacturers will necessarily sell their production to domestic buyers, rather than exporting to buyers abroad.

5.75. This brings us to India's argument that continued dependence on imports of solar cells and modules exposes it to risks related to continued dependence on imports. Before the Panel, India submitted that "[a]ny dependence on imports brings with it risks associated with supply side vulnerabilities and fluctuations"²⁴⁴ and that, since "India's solar PV installations predominantly rely on imported cells and modules", this "exposes India to the risks of market fluctuations in international supply".²⁴⁵ According to India, governmental intervention was thus "required in order to minimize dependence on imports" and to "ensure domestic resilience in addressing any supply side disruptions".²⁴⁶ India reiterated on appeal these arguments relating to the risks associated with continued dependence on imports of solar cells and modules.²⁴⁷

5.76. We understand India's arguments regarding the alleged risks inherent to the continued dependence on imported solar cells and modules to relate to the issue of supply *availability*, and agree that such considerations could, in principle, be relevant in assessing whether a situation of "short supply" exists. While a consideration of potential risks of disruption in supply of a given product may inform the question of whether a situation of "short supply" exists, we note the Panel's finding that India "ha[d] not identified any actual disruptions in imports of solar cells and modules to date", and that SPDs in India had not "experienced an actual disruption in the supply of affordable foreign solar cells and modules".²⁴⁸

5.77. We further disagree with India to the extent that it appears to assume, first, that all imports, in and of themselves, entail supply-related risks and, in that sense, are not "available" to meet demand²⁴⁹; and, second, that such risks are intolerable, as long as a sufficient level of domestic manufacturing capacity of solar cells and modules has not been met, such that a situation of "short supply" exists, as long as domestic manufacturing capacity lies below this level.²⁵⁰ In any event, even assuming that there may be risks of disruption in the supply of imports to a particular market, it may equally be the case that such risks exist in relation to domestic production. Thus, in assessing whether products are "available" in a particular area or market, consideration must be given to all relevant factors, such that an analysis of whether a respondent has identified a situation of "short supply" is carried out on a case-by-case basis for each and every source of supply concerned, both foreign and domestic supply.

²⁴⁰ Panel Report, para. 7.234. (emphasis added)

²⁴¹ Panel Report, para. 7.236.

²⁴² Panel Report, para. 7.236.

²⁴³ See para. 5.71. of this Report.

²⁴⁴ Panel Report, Add.1, Annex B-3, para. 33.

²⁴⁵ Panel Report, Add.1, Annex B-3, para. 35.

²⁴⁶ Panel Report, Add.1, Annex B-3, para. 35.

²⁴⁷ We note that India "reiterates its fundamental argument that 'general or local short supply' exists in the first place due to low domestic manufacturing" and its vulnerability "to the risks associated with international supply and market fluctuations". (India's appellant's submission, para. 104 (emphasis original))

²⁴⁸ Panel Report, para. 7.262.

²⁴⁹ See India's appellant's submission, para. 101.

²⁵⁰ See India's appellant's submission, para. 93.

5.78. We further note that, during the present dispute, India has sought to justify its DCR measures on the basis of the policy objectives underlying them. India has argued that the DCR measures should be seen in light of the policy objectives of: "(i) Energy Security and Sustainable Development; and (ii) Ecologically sustainable growth, while addressing the challenges of climate change."²⁵¹ India argues, for instance, that "[i]t is not India's case ... that Article XX(j) is an exception that would allow countries to impose import restrictions for any and all products which it cannot produce or manufacture by itself", but that a "justification for invoking Article XX(j) would need to rest on whether a measure is *essential* to redress such a situation of general or local short supply", which relates to the "relationship between a measure and its objective of acquisition or distribution of products in general or local short supply".²⁵² India further argues that the DCR measures are consistent with Article XX(j) because they "need to be examined in the context of the overall objectives of energy security and ecologically sustainable growth for which acquisition or distribution of indigenously manufactured solar cells and modules is *essential*."²⁵³

5.79. While policy considerations such as those referred to by India may inform the nature and extent of supply and demand, they do not relieve the responding party invoking the exception in Article XX(j) from the burden to demonstrate that imported products are not "available" to meet demand and that the products at issue are "in general or local short supply".

5.80. India further contends that, under the Panel's interpretation of Article XX(j), import restrictions could not be justified under that provision.²⁵⁴ India suggests that, if the drafters had intended this result, they "would have explicitly stated this, as was done in the context of Article XI:2 of the GATT 1994"²⁵⁵, as well as Article XX(i).²⁵⁶ While the Panel provided illustrations of non-export-related measures that could presumably be justified under Article XX(j)²⁵⁷, India suggests that the examples provided by the Panel do "not address the question of how import restraints on the product would apply in such situations".²⁵⁸ As we understand it, India suggests that, under the Panel's interpretation of the phrase "products in general or local short supply", measures taken to redress a situation of short supply can only take the form of export restrictions, and, hence, that the Panel's interpretation of Article XX(j) cannot be correct.

5.81. As India correctly notes, the text of Article XI:2(a) and Article XX(i) of the GATT 1994 contain express language referring to export restrictions. By contrast, Article XX(j) does not contain express language referring to either import or export restraints. The interpretation of the phrase "products in general or local short supply" must begin with the text of Article XX(j) and in light of the substantive requirements within the provision where this phrase is located. Contrary to what India appears to suggest, a proper interpretation of the phrase "products in general or local short supply" cannot be based merely on textual differences or similarities between Article XX(j) and some other provisions of the GATT 1994.

5.82. In any event, we disagree with India that it follows from the Panel's interpretation of the phrase "products in general or local short supply" that export restrictions are the only type of measure that may be used to redress a situation of "short supply", or that it follows from this interpretation that Article XX(j) cannot cover measures taking the form of import restrictions. The Panel noted, for example, that, "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" and that such "a monopoly could be enforced and given effect through restrictions on both the exportation and the importation by private traders of the product concerned."²⁵⁹

²⁵¹ Panel Report, Add.1, Annex B-3, para. 34.

²⁵² India's appellant's submission, para. 68. (emphasis original; fn omitted)

²⁵³ India's appellant's submission, para. 68. (emphasis original; fn omitted)

²⁵⁴ India's appellant's submission, para. 87.

²⁵⁵ India's appellant's submission, para. 87. (fn omitted)

²⁵⁶ India's appellant's submission, para. 88.

²⁵⁷ See Panel Report, para. 7.230 and fn 566 thereto.

²⁵⁸ India's appellant's submission, para. 89.

²⁵⁹ Panel Report, fn 566 to para. 7.230. The Panel also suggested that, even in the absence of a monopoly, a Member might "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". (Ibid.)

5.83. Based on the foregoing, we disagree with India to the extent that it argues that "short supply" can be determined without regard to whether supply from all sources is sufficient to meet demand in the relevant market. Rather, as noted, we read Article XX(j) of the GATT 1994 as reflecting a balance of different considerations to be taken into account when assessing whether products are "in general or local short supply". This analysis may, in appropriate cases, take into account not only the level of domestic production of a particular product and the nature of the products that are alleged to be "in general or local short supply", but also such factors as the relevant product and geographic market, potential price fluctuations in the relevant market, the purchasing power of foreign and domestic consumers, and the role that foreign and domestic producers play in a particular market, including the extent to which domestic producers sell their production abroad. Due regard should be given to the total quantity of imports that may be "available" to meet demand in a particular geographical area or market. Whether and which factors are relevant will necessarily depend on the particularities of each case.

5.2.5 Whether the Panel acted inconsistently with Article 11 of the DSU in addressing India's arguments and evidence regarding the domestic manufacturing capacity

5.84. India also challenges, under Article 11 of the DSU, the manner in which the Panel dealt with India's arguments and evidence regarding the notion of "sufficient domestic manufacturing capacity".²⁶⁰ India argues that the Panel erred in the assessment of India's argument and the evidence it presented to demonstrate that it currently does not possess a "sufficient manufacturing capacity". India states, for example, that it has explained that it "cannot afford to remain dependent on the import of components intrinsic to solar power development ... [since] [s]olar energy is critical to [its] long-term energy security, and this cannot be achieved if India does not have an indigenous manufacturing capacity of solar cells and modules ... [which] is necessary in order to reduce the risks arising from complete dependence on imports of critical components."²⁶¹

5.85. India argues that it submitted relevant evidence indicating "what will constitute 'sufficient manufacturing capacity'", at which point there would no longer be a need for the DCR measures, since "the conditions giving rise to them [would] have ceased to exist".²⁶² India further argues that "the Panel's conclusion that India does not seek to maximize 'self-sufficiency' or 'self-reliance', negates India's need for maintaining 'sufficient manufacturing capacity', is not based on an objective assessment of facts and legal arguments presented before it ... [and] goes against the basic mandate of Article 11 of the DSU that a panel must consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence."²⁶³ The United States responds that "[t]he absence of an evidence-based baseline and a reasoned comparison in India's argument prevent any conclusion as to whether a situation of short supply existed" and that "[i]t is this legal flaw in India's interpretation that led the Panel to reject India's Article XX(j) defense, and not a mistaken conclusion that India had neglected to provide any estimate of the level of capacity it considered sufficient."²⁶⁴

5.86. We recall that the Panel found, with regard to India's arguments pertaining to the "sufficient domestic manufacturing capacity" requirement, that, in order to assess whether a situation of "short supply" exists within the meaning of Article XX(j) of the GATT 1994, "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'."²⁶⁵ The Panel determined, in this regard, that "India's alternative interpretation of Article XX(j) [did] 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) [since] India ha[d] not adequately explained what would constitute a 'lack' of domestic manufacturing capacity amounting to a 'short supply' under its interpretation of Article XX(j)."²⁶⁶ The Panel further found that "India ha[d] not itself articulated what would constitute 'sufficient' manufacturing capacity for the purposes of Article XX(j) under its alternative interpretation of this provision" and that it was "also not clear whether India [was] arguing that it would fall under the discretion of each Member concerned to

²⁶⁰ India's appellant's submission, section IVA.5.

²⁶¹ India's appellant's submission, para. 93(a). (fn omitted)

²⁶² India's appellant's submission, para. 94.

²⁶³ India's appellant's submission, para. 98 (referring to Appellate Body Report, *Brazil – Retreaded*

Tyres, para. 185, in turn referring to Appellate Body Report, *EC – Hormones*, paras. 132-133).

²⁶⁴ United States' appellee's submission, para. 102. (fn omitted)

²⁶⁵ Panel Report, para. 7.205. (fn omitted)

²⁶⁶ Panel Report, para. 7.226.

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."²⁶⁷ The Panel thus determined 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)."²⁶⁸

5.87. As noted, a panel is required under Article 11 of the DSU to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence."²⁶⁹ At the same time, panels "are not required to accord to factual evidence of the parties the same meaning and weight as do the parties".²⁷⁰ Moreover, "[i]t is ... unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim", and an appellant "must [instead] identify specific errors regarding the objectivity of the panel's assessment".²⁷¹

5.88. India's claim under Article 11 of the DSU relies for its validity on India's reading of Article XX(j) of the GATT 1994, and in particular India's contention that the existence of a situation of "short supply" within the meaning of Article XX(j) is to be determined exclusively by reference to whether there is "sufficient" domestic manufacturing of a given product. The fact that India does not agree with the conclusion the Panel reached does not mean that the Panel committed an error amounting to a violation of Article 11 of the DSU. India is "merely" recasting its arguments before the Panel under the guise of an Article 11 claim. We therefore reject India's claim that the Panel acted inconsistently with Article 11 of the DSU.

5.2.6 Conclusion

5.89. We have found above that Article XX(j) of the GATT 1994 reflects a balance of different considerations to be taken into account when assessing whether products are "in general or local short supply". In particular, a panel should examine the extent to which a particular product is "available" for purchase in a particular geographical area or market, and whether this is sufficient to meet demand in the relevant area or market. This analysis may, in appropriate cases, take into account not only the level of domestic production of a particular product and the nature of the products that are alleged to be "in general or local short supply", but also such factors as the relevant product and geographical market, potential price fluctuations in the relevant market, the purchasing power of foreign and domestic consumers, and the role that foreign and domestic producers play in a particular market, including the extent to which domestic producers sell their production abroad. Due regard should be given to the total quantity of imports that may be "available" to meet demand in a particular geographical area or market. It may thus be relevant to consider the extent to which international supply of a product is stable and accessible, by examining factors such as the distance between a particular geographical area or market and production sites, as well as the reliability of local or transnational supply chains. Whether and which factors are relevant will necessarily depend on the particularities of each case. Just as there may be factors that have a bearing on "availability" of imports in a particular case, it is also possible that, despite the existence of manufacturing capacity, domestic products are not "available" in all parts of a particular country, or are not "available" in sufficient quantities to meet demand. In all cases, the responding party has the burden of demonstrating that the quantity of "available" supply from both domestic and international sources in the relevant geographical market is insufficient to meet demand. For these reasons, we have disagreed with India to the extent that it argues that "short supply" can be determined without regard to whether supply from both domestic and international sources is sufficient to meet demand in the relevant market. We have also rejected India's claim that the Panel acted inconsistently with Article 11 of the DSU.

5.90. In light of our interpretation of Article XX(j), as well as the evidence and arguments presented to the Panel, we find that India has not established that solar cells and modules are

²⁶⁷ Panel Report, para. 7.226. (fn omitted)

²⁶⁸ Panel Report, para. 7.227.

²⁶⁹ Appellate Body Reports, *Philippines – Distilled Spirits*, para. 135 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185, in turn referring to Appellate Body Report, *EC – Hormones*, paras. 132-133).

²⁷⁰ Appellate Body Report, *Australia – Salmon*, para. 267.

²⁷¹ Appellate Body Report, *EC – Fasteners (China)*, para. 442.

"products in general or local short supply" in India. Consequently, we uphold the Panel's findings in paragraph 7.265 of its Report, 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 and that the DCR measures are therefore not justified under Article XX(j) of the GATT 1994.

5.3 Article XX(d) of the GATT 1994

5.91. We have upheld the Panel's finding that the government procurement derogation under Article III:8(a) of the GATT 1994 is not applicable to the DCR measures at issue in the present case.²⁷² We have also upheld the Panel's finding 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 and that the DCR measures are therefore not justified under that provision.²⁷³ We turn therefore to address India's conditional appeal of, first, the Panel's finding that India has not demonstrated that the DCR measures are measures "to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT 1994]" within the meaning of Article XX(d) of the GATT 1994; and, second, the Panel's ultimate finding that the DCR measures are not justified under that provision.²⁷⁴

5.92. India claims that the Panel erred in its interpretation and application of Article XX(d) in finding that the international instruments identified by India do not have direct effect in India and are therefore not "laws or regulations" within the meaning of Article XX(d).²⁷⁵ India further argues that the Panel erred, first, in finding that three of the domestic instruments identified by India, namely, the National Electricity Policy²⁷⁶, the National Electricity Plan²⁷⁷, and the National Action Plan on Climate Change²⁷⁸, do not constitute "laws or regulations"; and, second, by consequently focusing its analysis on a fourth domestic instrument, namely, Section 3 of India's Electricity Act of 2003²⁷⁹, in isolation of these three other instruments.²⁸⁰ India requests that we reverse the Panel's findings, complete the legal analysis, and find that the relevant instruments are "laws or regulations" within the meaning of Article XX(d); that the DCR measures are "necessary to secure compliance" with these "laws or regulations"; and that they meet the requirements of the chapeau of Article XX.²⁸¹

5.93. India's appeal therefore focuses on the Panel's assessment of whether the international and domestic instruments identified by India are "laws or regulations" within the meaning of Article XX(d). We begin by summarizing the Panel's findings before setting out the legal standard applicable under Article XX(d) of the GATT 1994 and considering the Panel's analysis as challenged by India on appeal.

5.3.1 The Panel's findings

5.94. Before the Panel, India argued that it has the obligation "to ensure ecologically sustainable growth while addressing India's energy security challenge, and ensuring compliance with its

²⁷² See para. 5.41. of this Report.

²⁷³ See para. 5.90. of this Report.

²⁷⁴ India's Notice of Appeal, Section III, para. 1 (referring to Panel Report, paras. 7.284-7.333 and 7.337-7.390); appellant's submission, para. 164.

²⁷⁵ India's appellant's submission, paras. 166 and 170-173. India identified the following international instruments: (i) the preamble of the WTO Agreement; (ii) the United Nations Framework Convention on Climate Change, done at New York, 9 May 1992, UN Treaty Series, Vol. 1771, p. 107 (Panel Exhibit IND-3); (iii) the Rio Declaration on Environment and Development, adopted by the United Nations General Assembly in 1992 (Panel Exhibit IND-35); and (iv) United Nations General Assembly Resolution A/RES/66/288 (adopted 27 July 2012) (Rio+20 Document: "The Future We Want") (Panel Exhibit IND-28). (See Panel Report, paras. 7.269-7.274)

²⁷⁶ Government of India, Ministry of Power, *National Electricity Policy*, Resolution No. 23/40/2004-R&R (Vol. II) (12 February 2005) (Panel Exhibit IND-14).

²⁷⁷ Government of India, Ministry of Power, Central Electricity Authority, *National Electricity Plan*, Vol. 1 – Generation (January 2012) (Panel Exhibit IND-16).

²⁷⁸ Government of India, *National Action Plan on Climate Change* (June 2008) (Panel Exhibit IND-2).

²⁷⁹ Parliament of India, *The Electricity Act, 2003* [No. 36 of 2003] (26 May 2003) (Panel Exhibit USA-20).

²⁸⁰ See India's appellant's submission, paras. 164-167 and 171. At the oral hearing, India confirmed that it is not challenging the Panel's findings under Article 11 of the DSU.

²⁸¹ India's appellant's submission, paras. 178 and 180-181.

obligations relating to climate change".²⁸² According to India, this obligation is "reflected in four international instruments, and four domestic instruments"²⁸³, and both sets of instruments qualify as "laws or regulations" within the meaning of Article XX(d) of the GATT 1994. India claimed that its DCR measures "secure compliance" with these "laws or regulations" because they "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".²⁸⁴ India further argued that its 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.²⁸⁵ The United States, for its part, argued that India had failed to demonstrate that the DCR measures are necessary to comply with any law or regulation for purposes of Article XX(d).²⁸⁶

5.95. The Panel began by examining whether the international instruments identified by India are "laws or regulations" within the meaning of Article XX(d), before turning to consider the domestic instruments that India had identified. The Panel explained that it would proceed in this manner because India had distinguished between its "international and domestic obligations", and also "because different issues are raised in relation to these two different groups of instruments".²⁸⁷

5.96. The Panel recalled that India had argued that its "international law obligations" are embodied in the following international instruments: (i) the preamble of the WTO Agreement; (ii) the United Nations Framework Convention on Climate Change; (iii) the Rio Declaration on Environment and Development (1992); and (iv) UN Resolution A/RES/66/288 (2012) (Rio+20 Document: "The Future We Want").²⁸⁸

5.97. Having reviewed the relevant text of the instruments identified by India, the Panel turned to consider whether "laws or regulations" within the meaning of Article XX(d) includes international instruments, as opposed to domestic instruments. Based on its review of the Appellate Body's reasoning and findings in *Mexico – Taxes on Soft Drinks*, the Panel recalled that the terms "laws or regulations" in Article XX(d) refers to "rules that form part of the domestic legal system of a WTO Member".²⁸⁹ The Panel added that "[i]nternational 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."²⁹⁰

5.98. Turning to examine whether the international instruments identified by India form a part of India's domestic legal system, the Panel recalled India's position that such instruments have "direct effect" in India because rules of international law are accommodated into India's domestic

²⁸² Panel Report, para. 7.268 (quoting India's first written submission to the Panel, para. 240; opening statement at the first Panel meeting, para. 54; and opening statement at the second Panel meeting, para. 35).

²⁸³ Panel Report, para. 7.268. Noting that "a central issue in this case is whether the materials identified by India are 'laws or regulations' within the meaning of Article XX(d)", the Panel explained that, in referring to these materials as "instruments", its intention was to "adopt a nomenclature that is neutral with respect to that issue". (Ibid., fn 635 to para. 7.268) We see merit in the Panel's approach and continue to use the term "instruments" to refer to the materials identified by India.

²⁸⁴ Panel Report, para. 7.191 (quoting India's first written submission to the Panel, 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").

²⁸⁵ Panel Report, para. 7.191 (quoting India's first written submission to the Panel, 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").

²⁸⁶ Panel Report, para. 7.194 (referring to United States' opening statement at the first Panel meeting, paras. 48-52).

²⁸⁷ Panel Report, para. 7.284.

²⁸⁸ See Panel Report, paras. 7.269-7.274. More specifically, India referred to: (i) the first recital of the preamble of the WTO Agreement; (ii) Articles 3, 4(1)(b), and 4(1)(f) of the United Nations Framework Convention on Climate Change (Panel Exhibit IND-3); (iii) the Rio Declaration on Environment and Development, adopted by the UN General Assembly in 1992 (Panel Exhibit IND-35); and (iv) paras. 3, 4, and 127 of United Nations General Assembly Resolution A/RES/66/288 (adopted 27 July 2012) (Rio+20 Document: "The Future We Want") (Panel Exhibit IND-28).

²⁸⁹ Panel Report, paras. 7.290 and 7.293 (quoting Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 69-70 and 79). (emphasis omitted)

²⁹⁰ Panel Report, para. 7.293.

legal system "without express legislative sanction, provided they do not run into conflict with laws enacted by the Parliament".²⁹¹ The Panel also noted India's explanation that, "[u]nder the Constitution of India, acts of the executive are not confined to areas where there is a pre-existing law" and that such acts "extend to aspects over which the Parliament has power to enact laws".²⁹² The Panel accepted India's explanations regarding how its domestic legal system functions.²⁹³ The Panel found, however, based on India's explanations, that "international law obligations are not 'automatically incorporated' into Indian law, but rather that they may possibly be acted upon and implemented by certain domestic authorities", and that India had therefore failed to demonstrate that the relevant international instruments have "direct effect" in India.²⁹⁴ The Panel further noted India's argument that principles of international environmental law and the concept of sustainable development "are fundamental to the environmental and developmental governance in India" and "that the concept of sustainable development is a part of customary international law".²⁹⁵ The Panel did not, however, consider that this spoke "to the question of whether international obligations are automatically incorporated into domestic law and have 'direct effect' in India".²⁹⁶ The Panel therefore found that India had failed to demonstrate that the international instruments it had identified can be characterized as "laws or regulations" within the meaning of Article XX(d) in the present dispute.²⁹⁷

5.99. The Panel then turned to consider whether the domestic instruments that India had identified qualify as "laws or regulations". The Panel recalled India's assertion that its obligation "to ensure ecologically sustainable growth" is embodied in Section 3 of India's Electricity Act, 2003, "read with" paragraph 5.12.1 of the National Electricity Policy; subsection 5.2.1 of the National Electricity Plan; and the National Action Plan on Climate Change.²⁹⁸

5.100. The Panel began by noting that the dictionary definitions of the terms "law" and "regulation" make clear that they refer to "rules"²⁹⁹, and that, throughout its report in *Mexico – Taxes on Soft Drinks*, the Appellate Body had understood "laws or regulations" to refer to "rules".³⁰⁰ The Panel further noted that, by its terms, Article XX(d) refers to "laws or regulations" in respect of which "compliance" can be secured, and considered 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'".³⁰¹ Referring to the "context" provided by the illustrative list in Article XX(d), the Panel found this to imply that the "laws or regulations" under Article XX(d) "must be legally enforceable".³⁰² Based on its analysis, the Panel concluded that the terms "laws or regulations" in Article XX(d) refer to "legally enforceable rules of conduct under the domestic legal system of the WTO Member concerned, and do not include general objectives".³⁰³

5.101. In respect of the domestic instruments identified by India, the Panel began by assessing whether Section 3 of the Electricity Act, 2003 constitutes a "law or regulation" within the meaning of Article XX(d). The Panel noted that the Electricity Act, 2003 "has formal characteristics that are normally associated with a statute", in the sense that "it contains a date of entry into force, a section defining the terms used in the instrument", and that it "is divided into numbered parts, sections and subsections that consist of rules cast in binding language".³⁰⁴ The Panel further observed that Section 3 of the Electricity Act, 2003 "appears to constitute a legally enforceable

²⁹¹ Panel Report, para. 7.285 (quoting India's response to Panel question No. 35; and first written submission to the Panel, para. 180).

²⁹² Panel Report, para. 7.295 (quoting India's opening statement at the first Panel meeting, para. 60). The same language is reproduced in para. 7.296 (quoting India's response to Panel question No. 35).

²⁹³ Panel Report, para. 7.297.

²⁹⁴ Panel Report, para. 7.298.

²⁹⁵ Panel Report, para. 7.298 (referring to India's first written submission to the Panel, para. 180, in turn referring to Supreme Court of India, Judgment, *Vellore Citizens Welfare forum v. Union of India and Others* (1996) 5 SCC 647, paras. 10-15).

²⁹⁶ Panel Report, para. 7.298.

²⁹⁷ Panel Report, paras. 7.301 and 7.333.

²⁹⁸ Panel Report, paras. 7.275-7.283.

²⁹⁹ Panel Report, para. 7.308.

³⁰⁰ Panel Report, para. 7.308.

³⁰¹ Panel Report, para. 7.308 (referring to Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 69-70, 75, 77, and 79).

³⁰² Panel Report, para. 7.309.

³⁰³ Panel Report, para. 7.311.

³⁰⁴ Panel Report, para. 7.312. (fns omitted)

rule of conduct under the domestic legal system of India³⁰⁵, in the sense that it "establishes the legal basis" for the development of the National Electricity Plan and the National Electricity Policy and "identifies the entities involved in the periodic preparation, publication, and review of the National Electricity Policy and the National Electricity Plan".³⁰⁶ The Panel added, however, that Section 3 "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'."³⁰⁷

5.102. Drawing a contrast with Section 3 of the Electricity Act, 2003, the Panel observed that the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change are each expressly entitled a "policy" or "plan", and that the language of the provisions and passages in these instruments identified by India "does not suggest the existence of any legally enforceable rules", and is instead "hortatory, aspirational, declaratory, and at times solely descriptive".³⁰⁸ The Panel further noted that India had not suggested that the National Electricity Policy, the National Electricity Plan, or the National Action Plan on Climate Change are "legally binding", or that they are substantively similar to legislative acts or other instruments under its domestic legal system.³⁰⁹ The Panel saw "no reason to doubt" that these instruments were adopted by the Central Government in exercise of its powers under the Constitution of India³¹⁰, but did not consider this to be a decisive criterion in determining whether these instruments qualify as "laws or regulations" within the meaning of Article XX(d).³¹¹ Based on its analysis, the Panel found that "the Electricity Act, and in particular Section 3 thereof, constitutes a 'law' for the purposes of Article XX(d)"³¹², while the other domestic instruments identified by India do not qualify as "laws or regulations" within the meaning of that provision.³¹³

5.103. With respect to Section 3 of the Electricity Act, 2003, the Panel referred to past GATT/WTO jurisprudence, and recalled that the phrase "to secure compliance with laws or regulations" in Article XX(d) refers to measures "to enforce obligations under laws or regulations", and not to measures "to ensure the attainment of the objectives of the laws and regulations".³¹⁴ The Panel, however, saw "no link or nexus" between the DCR measures and Section 3 of the Electricity Act, 2003.³¹⁵ In particular, the Panel said it failed "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."³¹⁶ The Panel added that "India ha[d] 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."³¹⁷ The Panel therefore found that India had failed to demonstrate that its DCR measures are measures "to secure compliance" with the legal obligations in Section 3 of the Electricity Act, 2003.³¹⁸ For all these reasons, the Panel concluded that India had failed to demonstrate that its DCR measures are provisionally justified under Article XX(d) of the GATT 1994.³¹⁹

³⁰⁵ Panel Report, para. 7.312.

³⁰⁶ Panel Report, para. 7.327.

³⁰⁷ Panel Report, para. 7.276 (quoting Electricity Act, 2003 (Panel Exhibit USA-20), Section 3(1)).

³⁰⁸ Panel Report, para. 7.313.

³⁰⁹ Panel Report, para. 7.314.

³¹⁰ Panel Report, para. 7.317.

³¹¹ Panel Report, para. 7.317.

³¹² Panel Report, para. 7.312.

³¹³ Panel Report, para. 7.318.

³¹⁴ Panel Report, para. 7.330 (referring to 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; and *Colombia – Ports of Entry*, para. 7.538).

³¹⁵ Panel Report, para. 7.329.

³¹⁶ Panel Report, para. 7.329. (fn omitted)

³¹⁷ Panel Report, para. 7.329.

³¹⁸ Panel Report, para. 7.332.

³¹⁹ Panel Report, para. 7.333.

5.3.2 The legal standard under Article XX(d) of the GATT 1994

5.104. Having recalled the Panel's analysis and findings, we turn to consider the legal standard that applies under Article XX(d) of the GATT 1994. Article XX(d) sets out a general exception for measures that are:

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;

5.105. Having already surveyed, in the context of our discussion on Article XX(j) of the GATT 1994, the general analytical framework that applies under Article XX(d)³²⁰, we turn immediately to examine the proper interpretation of the terms "laws or regulations" in the context of the phrase "to secure compliance with laws or regulations" in Article XX(d).

5.106. Beginning with the ordinary meaning of the terms "laws" and "regulations", we note that the term "law" is generally understood to refer to "a rule of conduct imposed by authority"³²¹, while the term "regulation" is defined as "[a] rule or principle governing behaviour or practice; *esp.* such a directive established and maintained by an authority".³²² In *Mexico – Taxes on Soft Drinks*, the Appellate Body said 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, 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."³²³ As to the illustrative list contained in Article XX(d), the Appellate Body observed that the matters listed as examples in Article XX(d) – namely, customs enforcement, the enforcement of monopolies, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices – involve the regulation by a government of activity undertaken by a variety of economic actors (e.g. private firms and State enterprises), as well as by governmental agencies.³²⁴ The illustrative list contained in Article XX(d) reinforces the notion that "laws or regulations" refer to rules of conduct and principles governing behaviour or practice that form part of the domestic legal system of a Member.³²⁵

5.107. Furthermore, as noted by the Appellate Body, "laws or regulations" encompass "rules adopted by a WTO Member's legislative or executive branches of government".³²⁶ In ascertaining whether an alleged rule falls within the scope of "laws or regulations" for purposes of Article XX(d), it may therefore be relevant to assess whether the rule at issue has been adopted or recognized by an authority that is competent to do so under the domestic legal system of the Member concerned.

5.108. Turning to the immediate context of the terms "laws or regulations", we note that the text of Article XX(d) refers to "laws or regulations" in respect of which "compliance" can be "secure[d]". The "laws or regulations" referred to in Article XX(d) must therefore be ones in respect of which conduct would, or would not, be in "compliance". As to the term "secure", we understand that, in *Mexico – Taxes on Soft Drinks*, the Appellate Body disagreed with the panel's interpretation that "'to secure compliance' is to be read as meaning to *enforce* compliance".³²⁷ The Appellate Body explained that absolute certainty in the achievement of a measure's stated goal, as well as the use of coercion, are not necessary components of a measure designed "to secure compliance" within the meaning of Article XX(d).³²⁸ Instead, a measure can be said "to secure compliance" with "laws

³²⁰ See paras. 5.56-5.61. of this Report.

³²¹ Oxford English Dictionary online, definition of the word "law"
<<http://www.oed.com/view/Entry/106405>>, accessed 23 August 2016.

³²² Oxford English Dictionary online, definition of the word "regulation"
<<http://www.oed.com/view/Entry/161427>>, accessed 23 August 2016. (italics original)

³²³ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 79.

³²⁴ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 70.

³²⁵ See Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 70.

³²⁶ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 69.

³²⁷ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 73-74 (quoting Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.175). (emphasis added)

³²⁸ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 74.

or regulations" when it seeks to secure observance of specific rules, even if the measure cannot be guaranteed to achieve such result with absolute certainty.³²⁹

5.109. We do not consider that the scope of "laws or regulations" is limited to instruments that are legally enforceable (including, e.g. before a court of law), or that are accompanied by penalties and sanctions to be applied in situations of non-compliance. Instead, as we see it, the concept is broader and may, in appropriate cases, include rules in respect of which a Member seeks to "secure compliance", even when compliance is not coerced, for example, through the imposition of penalties or sanctions. In assessing whether a rule falls within the scope of "laws or regulations" under Article XX(d), a panel should consider the degree to which an instrument containing the alleged rule is normative in nature. It is therefore relevant for a panel to examine whether a rule is legally enforceable, as this may demonstrate the extent to which it sets out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member. It also may be relevant for a panel to examine whether the instrument provides for penalties or sanctions to be applied in situations of non-compliance.

5.110. The Appellate Body has stated that a "measure can be said 'to secure compliance' with laws or regulations when its design reveals that it secures compliance with *specific rules, obligations, or requirements* under such laws or regulations".³³⁰ It is important, in this regard, to distinguish between the specific rules, obligations, or requirements with respect to which a measure seeks to secure compliance, on the one hand, and the objectives of the relevant "laws or regulations", which may assist in "elucidating the content of specific rules, obligations, or requirements" of the "laws or regulations", on the other hand.³³¹ The "more precisely" a respondent is able to identify specific rules, obligations, or requirements contained in the relevant "laws or regulations", the "more likely" it will be able to elucidate how and why the inconsistent measure secures compliance with such "laws or regulations".³³² Thus, in assessing whether an instrument constitutes a "law or regulation" within the meaning of Article XX(d), a panel should also consider the degree of specificity or precision with which the relevant instrument lays down a particular rule of conduct or course of action within the domestic legal system of a Member, as opposed to simply providing a legal basis for action that may be consistent with certain objectives.

5.111. In certain cases, a respondent may be able to identify a specific provision of a single domestic instrument that contains a given rule, obligation, or requirement with which it seeks "to secure compliance" for purposes of Article XX(d). However, it is also possible to envisage situations where a respondent seeks to identify a given rule, obligation, or requirement by reference to, or deriving from, several elements or parts of one or more instruments under its domestic legal system. In *Argentina – Financial Services*, the Appellate Body acknowledged this possibility when it said that a respondent "may choose to demonstrate that the measure is designed and necessary to secure compliance with an obligation or obligations arising from several laws or regulations operating together as part of a comprehensive framework".³³³ Indeed, we do not see anything in the text of Article XX(d) that would exclude, from the scope of "laws or regulations", rules, obligations, or requirements that are not contained in a single domestic instrument or a provision thereof. In a given domestic legal system, several elements of one or more instruments may function together to set out a rule of conduct or course of action. In such a scenario, in order to understand properly the content, substance, and normativity of a given rule, a panel may be required to examine together the different elements of one or more instruments identified by a respondent. Of course, insofar as a respondent seeks to rely on a rule deriving from several instruments or parts thereof, it would still bear the burden of establishing that the instruments or the parts that it identifies actually set out the alleged rule.

5.112. Ultimately, a panel's scrutiny of whether a responding party has identified "laws or regulations" within the meaning of Article XX(d) should focus on the specific features and characteristics of the instruments at issue, including the alleged rules that they may contain. While the form and title given to an instrument may shed light on its legal status and content, a determination of whether an alleged rule falls within the scope of "laws or regulations" for

³²⁹ See Appellate Body Reports, *Colombia – Textiles*, paras. 5.69, 5.126, and 5.131; and *Argentina – Financial Services*, para. 6.203.

³³⁰ Appellate Body Report, *Argentina – Financial Services*, para. 6.203. (emphasis added; fn omitted)

³³¹ Appellate Body Report, *Argentina – Financial Services*, fn 495 to para. 6.203.

³³² Appellate Body Report, *Argentina – Financial Services*, para. 6.203.

³³³ Appellate Body Report, *Argentina – Financial Services*, fn 505 to para. 6.208.

purposes of Article XX(d) cannot be made simply by reference to the label given to an instrument under the domestic law of a Member.³³⁴

5.113. To sum up, in determining whether a responding party has identified a rule that falls within the scope of "laws or regulations" under Article XX(d) of the GATT 1994, a panel should evaluate and give due consideration to all the characteristics of the relevant instrument(s) and should avoid focusing exclusively or unduly on any single characteristic. In particular, it may be relevant for a panel to consider, among others: (i) the degree of normativity of the instrument and the extent to which the instrument operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member; (ii) the degree of specificity of the relevant rule; (iii) whether the rule is legally enforceable, including, e.g. before a court of law; (iv) whether the rule has been adopted or recognized by a competent authority possessing the necessary powers under the domestic legal system of a Member; (v) the form and title given to any instrument or instruments containing the rule under the domestic legal system of a Member; and (vi) the penalties or sanctions that may accompany the relevant rule.

5.114. In some cases, such as those involving a specific, legally enforceable rule under a single provision of a domestic legislative act, determining whether a respondent has identified "laws or regulations" within the meaning of Article XX(d) may be a relatively straightforward exercise. In others, however, the assessment may be more complex. Importantly, this assessment must always be carried out on a case-by-case basis, in light of the specific characteristics and features of the instruments at issue, the rule alleged to exist, and the domestic legal system of the Member concerned.

5.115. Having identified the legal standards under Article XX(d), we turn to address India's claims on appeal, beginning with the arguments directed at the Panel's analysis of whether the domestic instruments and the alleged rules thereunder, as identified by India, fall within the scope of "laws or regulations" under Article XX(d). We note that the Panel adopted a different sequence, beginning, first, by considering whether the international instruments identified by India are "laws or regulations", before turning to the domestic instruments identified by India. We nonetheless consider it useful to begin our assessment with the Panel's analysis of India's domestic instruments, because it is in the course of this analysis that the Panel developed its interpretation of "laws or regulations" under Article XX(d).³³⁵

5.3.3 Whether the Panel erred in its assessment of the domestic instruments identified by India

5.116. With respect to the Panel's analysis of the alleged rule set out in the domestic instruments identified by India, India appeals the Panel's findings that India had failed to demonstrate that its DCR measures are designed "to secure compliance with laws or regulations" within the meaning of Article XX(d) of the GATT 1994. As we see it, India's appeal is based on three main grounds.

5.117. First, India contends that the Panel erred under Article XX(d) in finding that the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change do not constitute "laws or regulations".³³⁶ According to India, these admittedly "non-binding" instruments are nonetheless "laws" within the meaning of Article XX(d) under India's domestic legal system because the "legal framework in India" comprises both "binding" laws, and policies and plans, that provide the "framework for executive action".³³⁷

5.118. Second, India disagrees with the Panel to the extent that it suggested that the phrase "to secure compliance" limits the scope of Article XX(d) to measures that "prevent" actions that would be "illegal" under the laws or regulations at issue.³³⁸

³³⁴ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, fn 87 to para. 87. See also Panel Report, fn 749 to para. 7.314.

³³⁵ See Panel Report, paras. 7.306-7.311.

³³⁶ India's appellant's submission, para. 171.

³³⁷ India's appellant's submission, para. 171.

³³⁸ India's appellant's submission, para. 174 (referring to Panel Report, para. 7.328 and fn 770 thereto; and India's second written submission to the Panel, paras. 131-133).

5.119. Third, India submits that the Panel erred in examining Section 3 of India's Electricity Act, 2003, "in isolation" from the other "non-binding" instruments it had identified, given that India had argued that all the domestic instruments it had identified, taken together, set out the obligation to ensure "ecologically sustainable growth"³³⁹ and that the DCR measures are required in order to secure compliance with this obligation.³⁴⁰ India adds, in this regard, that the fact that the instruments to which it referred "leave open flexibility for India to design its implementation measures does not mean they constitute objectives that need not be complied with, or that compliance with such obligations need not be secured".³⁴¹

5.120. The United States responds that the fact that the domestic instruments that India had identified lay out important and even "critical" objectives does not make them "laws or regulations" within the meaning of Article XX(d). The United States asserts that "to secure compliance" under Article XX(d) means to "enforce" obligations under laws and regulations and not to "ensure" the attainment of the objectives of the laws and regulations.³⁴² According to the United States, India does not even attempt to argue that its DCR measures are necessary to comply with any Indian laws or regulations "as such", but only with the objectives embodied in the laws identified by India.³⁴³ Moreover, the United States recalls that the Panel considered that Section 3 of the Electricity Act, 2003 requires the Central Government to prepare the National Electricity Policy, and that the DCR measures do nothing to enforce this legal requirement.³⁴⁴ Noting India's argument on appeal that it did not mean to cite Section 3 on its own, but as one element of its laws or regulations, the United States further submits that India does not directly appeal the Panel's findings with respect to Section 3 of the Electricity Act, 2003.³⁴⁵

5.121. We address India's arguments below, beginning with India's contention that the Panel erred in its interpretation of the terms "laws or regulations" in Article XX(d) as referring to "legally enforceable rules of conduct under the domestic legal system" of a Member.³⁴⁶ As discussed above, a determination of whether an instrument qualifies as a "law or regulation" within the meaning of Article XX(d) includes an assessment of whether the responding party has identified specific rules, obligations, or requirements that operate with a sufficient degree of normativity under its domestic legal system so as to set out a rule of conduct or course of action. The legal enforceability of an instrument under the domestic legal system of a Member may be an important, even determinative, factor in demonstrating that such an instrument operates with a high degree of normativity within the domestic legal system of that Member. Depending on the domestic legal system of a Member, as well as the characteristics of the instrument at issue, there may, however, be other ways to demonstrate that an instrument operates with a sufficient degree of normativity. Insofar as Article XX(d) is susceptible of application in respect of a wide variety of "laws or regulations"³⁴⁷, we recall that the degree of normativity of an instrument is one of the relevant factors in assessing whether such instrument qualifies as a "law or regulation" under Article XX(d). The Panel goes some way in acknowledging this by stating that the diversity of Members' domestic legal systems should be taken into account in determining whether an instrument can be characterized as a "law or regulation" for purposes of Article XX(d).³⁴⁸ We, however, disagree with the Panel to the extent that it may have suggested that the scope of "laws or regulations" under Article XX(d) is *limited to* "legally enforceable rules of conduct under the domestic legal system" of a Member.³⁴⁹

³³⁹ According to India, "ecologically sustainable growth" means "economic growth in an ecologically sustainable manner". In India's view, the "concept of 'sustainable development' ... encompasses within it the concept of 'ecologically sustainable growth'". India also clarifies that "ecologically sustainable growth is fundamental to India's strategy to address its energy security objective as well" and "they cannot be seen as distinct from each other". (India's appellant's submission, para. 176 (referring to India's second written submission to the Panel, paras. 138 and 140, and fn 172 thereto))

³⁴⁰ India's appellant's submission, para. 173.

³⁴¹ India's appellant's submission, para. 173. (fn omitted)

³⁴² United States' appellee's submission, para. 158 (referring to Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.248).

³⁴³ United States' appellee's submission, para. 158.

³⁴⁴ United States' appellee's submission, para. 159 (referring to Panel Report, para. 7.330).

³⁴⁵ United States' appellee's submission, para. 159.

³⁴⁶ Panel Report, para. 7.311. See also India's appellant's submission, paras. 171-172.

³⁴⁷ Appellate Body Report, *Korea – Various Measures on Beef*, para. 162.

³⁴⁸ See Panel Report, fn 749 to para. 7.314.

³⁴⁹ Panel Report, para. 7.311.

5.122. We next consider the Panel's interpretation of the phrase "to secure compliance" in Article XX(d). Having summarized the position of prior panels³⁵⁰, the present Panel "consider[ed] 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 [Section 3 of the Electricity Act, 2003]", given that the Panel saw "no link or nexus between the DCR measures and Section 3 of the Electricity Act".³⁵¹ Contrary to what India argues on appeal, we therefore do not see the Panel to have found that "to secure compliance" in Article XX(d) restricts the scope of that provision only to measures that "prevent" actions that would be illegal under the "laws or regulations" at issue.

5.123. We turn now to consider India's argument that the Panel erred in its application of Article XX(d) by examining Section 3 of India's Electricity Act, 2003 "in isolation", although India had argued that the domestic instruments that it had identified, when considered together, "mandate achieving ecologically sustainable growth" and that the DCR measures are required for securing compliance with this rule.³⁵²

5.124. We recall that the Panel began its analysis by summarizing India's position as follows:

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.³⁵³

5.125. The Panel noted that India's defence under Article XX(d) was based on the "domestic obligations" of India as reflected in the Electricity Act, 2003, "read with" the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change. Subsequently, the Panel structured its analysis in a manner whereby it assessed the relevant passages and provisions of each of these instruments individually, in order to determine whether any of them fall within the scope of "laws or regulations" under Article XX(d). The Panel found the relevant passages and provisions of the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change to be outside the scope of "laws or regulations". By contrast, the Panel found Section 3 of the Electricity Act, 2003 to be a "law" within the meaning of Article XX(d), and therefore proceeded to analyse whether the DCR measures are designed "to secure compliance" with Section 3 of the Electricity Act, 2003, finding, ultimately, that this is not the case.

5.126. The rule that India sought to identify, with respect to which the DCR measures seek to secure compliance, is that of "ensur[ing] ecologically sustainable growth while addressing India's energy security challenge, and ensuring compliance with its obligations relating to climate change".³⁵⁴ This rule, India alleged, is set out in the passages and provisions of the domestic instruments that were identified by it, and falls within the scope of "laws or regulations" under Article XX(d) with which compliance is sought to be secured.

5.127. As discussed above, a respondent may be able to identify a specific provision of a single domestic instrument that contains a given rule, obligation, or requirement with which it seeks "to secure compliance" for purposes of Article XX(d). However, a respondent may also identify a given rule, obligation, or requirement by reference to, or deriving from, several elements or parts of one or more instruments under its domestic legal system. In the latter scenario, the respondent would bear the burden of demonstrating that the instruments, or parts thereof, that it identifies actually set out the rule alleged by it. Additionally, a respondent would also have to demonstrate that such rule falls within the scope of "laws or regulations" under Article XX(d) by reference to all the factors that may be relevant for such an assessment. As explained above, such factors may include, among others: (i) the degree of normativity of the instrument and the extent to which the

³⁵⁰ Panel Report, para. 7.328 (quoting GATT Panel Report, *EEC – Parts and Components*, para. 5.15; and Panel Reports, *China – Auto Parts*, para. 7.315 and fn 572 thereto, in turn citing Panel Report, *Korea – Various Measures on Beef*, paras. 655 and 658).

³⁵¹ Panel Report, fn 773 to para. 7.329.

³⁵² India's appellant's submission, para. 173 (referring to India's response to Panel question No. 34(a); and second written submission to the Panel, paras. 136-137).

³⁵³ Panel Report, para. 7.275 (referring to India's first written submission to the Panel, para. 240). (emphasis added)

³⁵⁴ Panel Report, para. 7.275 (referring to India's first written submission to the Panel, para. 240).

instrument operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member; (ii) the degree of specificity of the relevant rule; (iii) whether the rule is legally enforceable, including, e.g. before a court of law; (iv) whether the rule has been adopted or recognized by a competent authority possessing the necessary powers under the domestic legal system of a Member; (v) the form and title given to any instrument or instruments containing the rule under the domestic legal system of a Member; and (vi) the penalties or sanctions that may accompany the relevant rule.

5.128. We recall that the Panel analysed each of the domestic instruments that India had identified to assess whether they qualify as "laws or regulations" within the meaning of Article XX(d). The Panel found that, whereas the passages and provisions of the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change are not "laws or regulations" within the meaning of Article XX(d), Section 3 of the Electricity Act, 2003 is a "law" for purposes of that provision. In our view, given how India presented its case alleging the existence of the obligation of ensuring ecologically sustainable growth deriving from several instruments, it may have been appropriate for the Panel to have begun by assessing whether the passages and provisions of the domestic instruments that India had identified, *when considered together*, set out the rule alleged by India. Were the Panel satisfied that India had established the existence of such a rule, it could then have considered whether this rule embodied in the domestic instruments identified by India qualified as a "law or regulation" under Article XX(d).

5.129. Although we acknowledge that the Panel could have carried out its analysis differently, we do not consider that the approach outlined by us above, i.e. considering the different instruments together, would ultimately have led the Panel to a different conclusion as to whether the DCR measures are measures "to secure compliance with laws or regulations" within the meaning of Article XX(d) for the reasons set out below.³⁵⁵

5.130. We recall that, with respect to the National Electricity Policy, India identified paragraph 5.12.1 of the Policy as containing the "specific obligation" with which the DCR measures are designed to secure compliance.³⁵⁶ Paragraph 5.12.1 of the National Electricity Policy reads as follows:

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.³⁵⁷

5.131. As to the National Electricity Plan, India referred to subsection 5.2.1 of the Plan as containing the obligation with which the DCR measures are designed to secure compliance.³⁵⁸ 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.

³⁵⁵ Panel Report, para. 7.333.

³⁵⁶ Panel Report, para. 7.279.

³⁵⁷ National Electricity Policy (Panel Exhibit IND-14), para. 5.12.1.

³⁵⁸ Panel Report, para. 7.281 (referring to India's response to Panel question No. 34(a)).

The foremost Low Carbon Strategy Initiative is the choice of 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.³⁵⁹

5.132. Finally, with respect to the National Action Plan on Climate Change, based on the summary provided by India, the Panel identified three excerpts from the Plan to which it understood India was referring.³⁶⁰ On appeal, India does not take issue with the Panel's identification of these excerpts. These excerpts read as follows:

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 [UN Framework Convention on Climate Change]. ... 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.

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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.

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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 [megawatts]/annum within this time frame. It would also aim to establish at least 1000 [megawatts] of Concentrating Solar Power (CSP) generation capacity, again, with such technical tie-ups as essential within the stated time frame.³⁶¹

5.133. Looking at the passages and provisions of the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change identified by India, we fail to see how these instruments, taken together, could be read to set out a "rule" to ensure ecologically sustainable growth that India alleges.³⁶² The National Electricity Policy states that it "aims at laying guidelines" for the attainment of certain objectives.³⁶³ The National Electricity Plan is described as a "reference document".³⁶⁴ The National Action Plan on Climate Change "updates India's national

³⁵⁹ National Electricity Plan (Panel Exhibit IND-16), subsection 5.2.1, pp. 90-91.

³⁶⁰ Panel Report, para. 7.283.

³⁶¹ National Action Plan on Climate Change (Panel Exhibit IND-2), pp. 1, 20, and 22, respectively.

³⁶² India acknowledges that the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change are, in and of themselves, "non-binding legal instruments". (India's appellant's submission, para. 172; see also Panel Report, para. 7.314)

³⁶³ National Electricity Policy (Panel Exhibit IND-14), para. 1.8.

³⁶⁴ National Electricity Policy (Panel Exhibit IND-14), para. 3.1.

programmes relevant to addressing climate change"; it "identifies measures that promote [India's] development objectives, while also yielding co-benefits for addressing climate change effectively"; and it "lists specific opportunities to simultaneously advance India's development and climate related objectives of both adaptation as well as greenhouse gas (GHG) mitigation."³⁶⁵ We note that there are differences in the substantive content of the passages and provisions of these three instruments, on the one hand, and the substance of the rule that India alleges they contain, on the other hand. In addition, the relevant texts of these instruments, whether seen in isolation or read together, do not set out, with a sufficient degree of normativity and specificity, a "rule" to ensure ecologically sustainable growth, as alleged by India. Instead, we note, as did the Panel, that the text of these passages and provisions "is hortatory, aspirational, declaratory, and at times solely descriptive".³⁶⁶

5.134. We now turn to Section 3 of the Electricity Act, 2003, which reads as follows:

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 [Central Electricity 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).

(5) The [Central Electricity Authority] may review or revise the National Electricity Plan in accordance with the National Electricity Policy.³⁶⁷

5.135. Section 3(1) of the Electricity Act, 2003 thus stipulates that the Central Government "shall" prepare the National Electricity Policy. Section 3(2) requires the Central Government to publish this policy from time to time. Section 3(3) allows the Central Government to review and revise this policy. Section 3(4) requires that 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. Section 3 therefore sets out the obligation, and empowers the relevant entities to periodically prepare, publish, and review the National Electricity Policy, and the National Electricity Plan.³⁶⁸ This obligation is different in content from the rule that India seeks to derive from Section 3 of the Electricity Act, 2003, i.e. to ensure ecologically sustainable growth while addressing

³⁶⁵ National Action Plan on Climate Change (Panel Exhibit IND-2), p. 13.

³⁶⁶ Panel Report, para. 7.313.

³⁶⁷ Electricity Act, 2003 (Panel Exhibit USA-20), Section 3.

³⁶⁸ See Panel Report, paras. 7.312 and 7.327.

India's energy security challenge, and ensuring compliance with its obligations relating to climate change.³⁶⁹

5.136. While Section 3 sets out the legal basis and authority for the development of the National Electricity Policy and the National Electricity Plan, it does not speak to the degree of normativity of these instruments. Thus, for example, Section 3 does not speak to the extent to which these instruments are to be observed or complied with under the domestic legal system of India. Whereas the National Electricity Policy and the National Electricity Plan may well have been enacted by the authorities competent to do so under India's domestic legal system, it is not clear to us how Section 3 of the Electricity Act, 2003 would have the effect of adding to the degree of normativity of these otherwise "non-binding" domestic instruments.

5.137. For all these reasons, we disagree with India's contention that the passages and provisions of the domestic instruments identified by India, when read together, set out the rule "to ensure ecologically sustainable growth while addressing India's energy security challenge, and ensuring compliance with its obligations relating to climate change", as alleged by India.

5.3.4 Whether the Panel erred in its assessment of the international instruments identified by India

5.138. India appeals the Panel's finding that India had failed to demonstrate that the international instruments it had identified have "direct effect" in India, and are therefore "laws or regulations" within the meaning of Article XX(d) of the GATT 1994.³⁷⁰ First, India submits that the Panel's analysis was based on a "complete misunderstanding" of India's arguments regarding the "implementation" of legal obligations.³⁷¹ India asserts that the international instruments it had identified have "direct effect" in India, because the executive branch of the Central Government can take actions to "implement" or "execute" these international instruments without the need for the legislature to enact a domestic law incorporating the international instruments.³⁷² For India, it is because these international instruments have "direct effect" in India that the executive is required to take implementing action.³⁷³ Second, India submits that the "direct effect" of the identified international instruments under its domestic legal system is established by the fact that "the principles of sustainable development under international environmental law have been recognized by the Supreme Court of India to be part of the environmental and developmental governance in India."³⁷⁴ India therefore requests that we reverse the Panel's finding that the international instruments India had identified do not fall within the scope of "laws or regulations" under Article XX(d). India also requests that we find that, "because these instruments of international law have a direct effect in India, ... the executive needs to secure compliance with such laws."³⁷⁵

5.139. The United States responds that, in *Mexico – Taxes on Soft Drinks*, the Appellate Body found that an international agreement is not a "law or regulation" under Article XX(d) if a Member's legal system calls for "domestic legislative or regulatory acts" to implement the

³⁶⁹ Insofar as Section 3 of the Electricity Act, 2003 requires that the "Central Government shall, from time to time, prepare the national electricity policy and tariff policy ... *based on optimal utilisation of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy*" (emphasis added), India agreed, at the oral hearing, with the Panel's view that the "optimal utilisation of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy" are objectives referenced in Section 3 of the Electricity Act, 2003. (See Panel Report, paras. 7.330-7.332) We also note the Panel's finding, not challenged on appeal, that India did not put forth the argument that the DCR measures are designed to secure compliance with the obligations under Section 3 of the Electricity Act, 2003 to periodically prepare the National Electricity Policy and the National Electricity Plan. The Panel also stated that it "faile[d] 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". (Ibid., para. 7.329)

³⁷⁰ India's appellant's submission, para. 170.

³⁷¹ India's appellant's submission, para. 167.

³⁷² India's appellant's submission, paras. 167-168. According to India, legislative action to incorporate the international instrument is required only when there is a "conflicting" domestic legislation, which is not the case with respect to the international instruments that India has identified in this case.

³⁷³ India's appellant's submission, para. 167.

³⁷⁴ India's appellant's submission, para. 168 (referring to India's first written submission to the Panel, para. 180 and fn 172 thereto).

³⁷⁵ India's appellant's submission, para. 170.

agreement.³⁷⁶ According to the United States, "where a 'regulatory act' intervenes, an international agreement is not in and of itself part of a Member's laws and regulations."³⁷⁷ Highlighting India's acknowledgment that the international instruments it had identified require executive "implementation", the United States asserts that these international instruments do not have "direct effect" in India and are therefore outside the scope of Article XX(d), because that provision does not distinguish between executive or legislative action in matters of implementing international law.³⁷⁸ Moreover, the United States submits that India has failed to discharge its burden of proof under Article XX(d), as its arguments consist of "broad generalizations about Indian law, with no supporting evidence".³⁷⁹ With respect to the Decisions of the Supreme Court of India that India relies upon, the United States points out that one of them merely recounts the "history of international agreements regarding sustainable development" and "provides no guidance whatsoever on the role the referenced agreements play in Indian law".³⁸⁰ The United States also submits that India did not provide a copy of the Supreme Court Decision cited in its first written submission to the Panel, thereby preventing an evaluation of the extent to which it supports India's position.³⁸¹

5.140. As set out above, a respondent seeking to justify an otherwise GATT-inconsistent measure under Article XX(d) is required to establish the existence of rules that form part of its domestic legal system and that such rules fall within the scope of "laws or regulations" under that provision.³⁸² In *Mexico – Taxes on Soft Drinks*, the Appellate Body stated that "the terms 'laws or regulations' cover rules that form part of the domestic legal system of a WTO Member, *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".³⁸³ Rules deriving from international agreements may thus become part of the domestic legal system of a Member in at least two ways. For example, Members may *incorporate* such rules, including through domestic legislative or executive acts intended to implement an international agreement³⁸⁴; and, certain international rules may have *direct effect* within the domestic legal systems of some Members without specific domestic action to implement such rules.³⁸⁵ Subject to the domestic legal system of a Member, there may well be other ways in which international instruments or rules can become part of that domestic legal system. An assessment of whether a given international instrument or rule forms part of the domestic legal system of a Member must be carried out on a case-by-case basis, in light of the nature of the instrument or rule and the subject matter of the law at issue, and taking into account the functioning of the domestic legal system of the Member in question.

5.141. We emphasize that, even if a particular international instrument can be said to form part of the domestic legal system of a Member, this does not, in and of itself, establish the existence of a rule, obligation, or requirement within the domestic legal system of the Member that falls within the scope of a "law or regulation" under Article XX(d). Rather, as set out above, an assessment of whether an instrument operates with a sufficient degree of normativity and specificity under the domestic legal system of a Member³⁸⁶ so as to set out a rule of conduct or course of action, and thereby qualify as a "law or regulation", must be carried out on case-by-case basis, taking into

³⁷⁶ United States' appellee's submission, para. 155.

³⁷⁷ United States' appellee's submission, para. 155 (referring to Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 69).

³⁷⁸ United States' appellee's submission, para. 155.

³⁷⁹ United States' appellee's submission, para. 156.

³⁸⁰ United States' appellee's submission, para. 156. (fn omitted)

³⁸¹ United States' appellee's submission, para. 156.

³⁸² See *supra* paras. 5.106-5.114.

³⁸³ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 79. (emphasis added)

³⁸⁴ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para 69.

³⁸⁵ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, fn 148 to para. 69.

³⁸⁶ In the context of India's argument that the "DCR measures ... have been designed to secure compliance with India's obligations under international law" (India's appellant's submission, para. 169), we note that the degree of normativity of an international instrument or rule under the domestic legal system of a Member may be different from the degree of normativity of such an instrument or rule under public international law. Thus, for example, while the principle of *pacta sunt servanda* under public international law, as codified in Article 26 of the Vienna Convention on the Law of Treaties (done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331), requires that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith", this does not mean that, in and of itself, there is a rule, requirement, or obligation within the domestic legal system of a Member that falls within the scope of "laws or regulations".

account all the other relevant factors relating to the instrument and the domestic legal system of the Member.

5.142. We now turn to India's contention that the international instruments it had identified have "direct effect" in India, and fall within the scope of "laws or regulations" under Article XX(d), because the Indian legislature "is not required to legislate on a domestic law incorporating the international law into domestic law" before the executive branch can take action to "implement" or "execute" the international instruments.³⁸⁷ According to India, legislative action to incorporate an international instrument is required only when there is "conflicting" domestic legislation, which is not the case with respect to the international instruments that India has identified in this case.³⁸⁸ India asserts that the very fact that the executive branch can take action to "execute" the international instruments at issue, e.g. by enacting the DCR measures, shows that these international instruments and rules are already a part of its domestic legal system and therefore may be acted upon by the executive branch.³⁸⁹ According to India's reading of Article XX(d), international instruments that can be "implemented" or "executed" in the domestic legal system of a particular Member exclusively through executive action, without any prior domestic legislative basis, have "direct effect" within the legal system of the Member in question, form a part of that legal system, and therefore fall within the scope of "laws or regulations" under Article XX(d).

5.143. We recall that the Panel accepted India's explanation of how its domestic legal system functions and the allocation of powers under the Constitution of India:

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.³⁹⁰

5.144. In the Panel's view, however, India's explanation suggests that, under its domestic legal system, either the executive or the legislative branch, or both, as appropriate, must take "implementing actions" to incorporate and implement India's international obligations into its domestic legal system.³⁹¹ Given that India's explanation established that India's international law obligations may possibly be acted upon and implemented by certain domestic authorities in India, the Panel considered this to suggest that these obligations do not have "direct effect" in India.³⁹² The Panel also saw no basis, either in the text of Article XX(d) or in the Appellate Body's report in *Mexico – Taxes on Soft Drinks*, for drawing 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".³⁹³

5.145. Like the Panel, we see no reason to question India's explanation of the allocation of powers between the executive and legislative branches under the Constitution of India. We also take note of India's submission that the very fact that the executive branch can take action to "execute" the international instruments or rules at issue, e.g. by enacting the DCR measures, because they are not in conflict with domestic legislation shows that these international instruments may already form part of its domestic legal system and therefore may be acted upon by the executive

³⁸⁷ India's appellant's submission, para. 167.

³⁸⁸ India's appellant's submission, paras. 167-168. India explained before the Panel 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". (Panel Report, para. 7.294 (quoting India's first written submission to the Panel, para. 180))

³⁸⁹ India's response to questioning at the oral hearing.

³⁹⁰ Panel Report, para. 7.297.

³⁹¹ Panel Report, para. 7.298.

³⁹² Panel Report, para. 7.298.

³⁹³ Panel Report, para. 7.299 (quoting Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 79).

branch.³⁹⁴ However, the issue of which branch of the Central Government has the power to implement, execute, or otherwise give effect to an international instrument within the domestic legal system is not, in and of itself, determinative of whether such an instrument falls within the scope of "laws or regulations" under Article XX(d). Rather, as explained above, whether a rule set out in an international instrument forms part of the domestic legal system of a Member and falls within the scope of "laws or regulations" under Article XX(d) has to be determined in light of all the relevant factors in a given case, including the characteristics of the instrument at issue and the features of the domestic legal system of the Member concerned.

5.146. We now turn to consider India's contention that the "direct effect" of the identified international instruments under its domestic legal system is established by the fact that "the principles of sustainable development under international environmental law have been recognized by the Supreme Court of India to be part of the environmental and developmental governance in India."³⁹⁵

5.147. The Panel noted India's submission that the Supreme Court of India "has held that principles of international environmental law, and the concept of sustainable development, 'are fundamental to the environmental and developmental governance in India', and 'has also noted that the concept of sustainable development is a part of customary international law'".³⁹⁶ In the Panel's view, however, India's arguments and evidence do not speak "to the question of whether international obligations are automatically incorporated into domestic law and have 'direct effect' in India".³⁹⁷ The Panel also recalled India's opening statement at the first meeting of the Panel, where India, referring to a Decision of the Supreme Court of India, explained:

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 [United Nations Framework Convention on Climate Change], 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.³⁹⁸

5.148. While these Decisions and observations by the Supreme Court may serve to highlight the relevance of the international instruments and rules identified by India for purposes of interpreting provisions of India's domestic law, as well as for guiding the exercise of the decision-making power of the executive branch of the Central Government, we do not consider that this is sufficient to demonstrate that the international instruments India identified are rules that form part of its

³⁹⁴ India's response to questioning at the oral hearing. See also India's appellant's submission, para. 167: stating that "[t]he fact that the executive takes 'implementing' actions, does not mean that the international law instrument has no direct effect. On the contrary, it is because the international law has direct effect, that the executive wing of the government is required to take implementation action in the first place".

³⁹⁵ India's appellant's submission, para. 168 (referring to India's first written submission to the Panel, para. 180 and fn 172 thereto). At the oral hearing, India appeared to suggest that the international instruments it had identified can form an independent and exclusive basis for a cause of action before the domestic courts of India. This position, however, is not supported by the Panel's findings or the Panel record.

³⁹⁶ Panel Report, para. 7.298 (quoting India's first written submission to the Panel, para. 180, in turn referring to Supreme Court of India, Judgment, Vellore Citizens Welfare Forum v. Union of India and Others (1996) 5 SCC 647, paras. 10-15).

³⁹⁷ Panel Report, para. 7.298.

³⁹⁸ Panel Report, fn 715 to para. 7.295 (quoting India's opening statement at the first Panel meeting, para. 61, in turn referring to Supreme Court of India, Decision, G. Sundarajan v. Union of India and Others (2013) (6) SCC 620 (Panel Exhibit IND-36 (excerpts)), paras. 161-174).

domestic legal system and fall within the scope of "laws or regulations" under Article XX(d). To the extent that India relies on these Decisions by the Supreme Court to reinforce its point that the executive branch, by enacting the DCR measures, was "executing", or giving effect to, the international instruments identified by India, we recall that the mere fact that the executive branch takes actions in pursuance of the international instruments at issue is not sufficient, in and of itself, to demonstrate that such international instruments fall within the scope of "laws or regulations" under Article XX(d).

5.149. For the above reasons, we uphold the Panel's finding, in paragraph 7.301 of its Report, that India failed to demonstrate that the international instruments identified by it – namely, the preamble of the WTO Agreement, the United Nations Framework Convention on Climate Change, the Rio Declaration on Environment and Development (1992), and UN Resolution A/RES/66/288 (2012) (Rio+20 Document: "The Future We Want") – qualify as "laws or regulations" under Article XX(d) of the GATT 1994 in the present dispute.

5.3.5 Conclusion

5.150. We have found above that, in determining whether a responding party has identified a rule that falls within the scope of "laws or regulations" under Article XX(d) of the GATT 1994, a panel should evaluate and give due consideration to all the characteristics of the relevant instrument(s) and should avoid focusing exclusively or unduly on any single characteristic. In particular, it may be relevant for a panel to consider, among others: (i) the degree of normativity of the instrument and the extent to which the instrument operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member; (ii) the degree of specificity of the relevant rule; (iii) whether the rule is legally enforceable, including, e.g. before a court of law; (iv) whether the rule has been adopted or recognized by a competent authority possessing the necessary powers under the domestic legal system of a Member; (v) the form and title given to any instrument or instruments containing the rule under the domestic legal system of a Member; and (vi) the penalties or sanctions that may accompany the relevant rule. In some cases, such as those involving a specific, legally enforceable rule under a single provision of a domestic legislative act, determining whether a respondent has identified "laws or regulations" within the meaning of Article XX(d) may be a relatively straightforward exercise. In other cases, however, the assessment may be more complex. Importantly, this assessment must always be carried out on a case-by-case basis, in light of the specific characteristics and features of the instruments at issue, the rule alleged to exist, and the domestic legal system of the Member concerned.

5.151. We recall that India has not demonstrated that the passages and provisions of the domestic instruments it identified, when read together, set out the obligation "to ensure ecologically sustainable growth while addressing India's energy security challenge, and ensuring compliance with its obligations relating to climate change", as alleged by India.³⁹⁹ We have also concluded that the Panel did not err in finding that India did not demonstrate that the international instruments it had identified fall within the scope of "laws or regulations" under Article XX(d) in the present dispute.⁴⁰⁰ Consequently, we uphold the Panel's finding, in paragraph 7.333 of its Report, that India has not demonstrated that the DCR measures are measures "to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT 1994]", and the Panel's ultimate finding, in paragraph 8.2.b of its Report, that the DCR measures are not justified under Article XX(d) of the GATT 1994.

5.4 "Essentiality" and "necessity" under Articles XX(j) and XX(d), and the chapeau of Article XX of the GATT 1994

5.152. We recall the Panel's finding that the DCR measures do not involve the acquisition of "products in general or local short supply" within the meaning of Article XX(j) of the GATT 1994⁴⁰¹, and that India did not demonstrate that its DCR measures are measures "to secure compliance with laws or regulations" that are not GATT-inconsistent within the meaning of Article XX(d) of the

³⁹⁹ See para. 5.137. of this Report. We clarify that, while such an obligation may exist under the domestic legal system of India, our conclusion is limited to India's failure to demonstrate that the passages and provisions of the domestic instruments identified by it set out the obligation alleged by it.

⁴⁰⁰ See para. 5.149. of this Report.

⁴⁰¹ Panel Report, para. 7.265.

GATT 1994.⁴⁰² The Panel therefore considered it unnecessary to make any additional findings as to whether the same measures would be "essential" to the acquisition of solar cells and modules within the meaning of Article XX(j), or "necessary" to secure compliance within the meaning of Article XX(d).⁴⁰³ The Panel explained that, were it to find that the measures at issue "are not 'essential' or 'necessary'" within the meaning of those provisions, this would merely establish a "separate and additional basis for the overall conclusion", which the Panel had already reached, i.e. "that the DCR measures are not justified under Articles XX(j) or XX(d)".⁴⁰⁴ The Panel decided, however, to continue its review and to make additional findings that may assist the Appellate Body should it later be called upon to complete the legal analysis under either Article XX(j) or Article XX(d).⁴⁰⁵ As the Panel pointed out, its approach is consistent with the approach that has been taken in the past by other panels.⁴⁰⁶

5.153. With regard to the requirements of the chapeau of Article XX, the Panel further recalled that "India ha[d] failed to demonstrate that the DCR measures fall within the scope of Articles XX(j) or XX(d)" and that "the arguments that India advance[d] in connection with the requirements of the chapeau of Article XX [were] essentially a repetition of the arguments that it present[ed] 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)."⁴⁰⁷ Consequently, the Panel saw "no compelling reason to proceed with any further examination of the DCR measures under the chapeau of Article XX of the GATT 1994", and therefore refrained from doing so.⁴⁰⁸

5.154. We have addressed India's appeal of the Panel's findings regarding threshold legal elements under Articles XX(j) and XX(d) of the GATT 1994 above, and have upheld the Panel's finding, in paragraph 7.265 of its Report, that solar cells and modules are not "products in local or general short supply" in India, within the meaning of Article XX(j), as well as the Panel's finding, in paragraph 7.333 of its Report, that India did not 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 have also upheld the Panel's conclusion, in paragraph 8.2.b of its Report, that the DCR measures are not justified under either Article XX(j) or Article XX(d) of the GATT 1994.

5.155. Given these findings, we do not consider it necessary further to examine India's claims on appeal pertaining to the Panel's "limited review and analysis" of 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). Nor do we consider it necessary to examine India's arguments as they relate to the requirements of the chapeau of Article XX of the GATT 1994.

5.5 Separate opinion of one Appellate Body Member

5.156. Having upheld the Panel's findings under Article III:8(a), Article XX(j) and Article XX(d) of the GATT 1994, the Division hearing this appeal has determined that it is not necessary further to address India's claims regarding the remaining legal elements under those provisions. While fully agreeing with my colleagues in this regard, I wish to offer some remarks regarding why I consider

⁴⁰² Panel Report, para. 7.333.

⁴⁰³ Panel Report, para. 7.334.

⁴⁰⁴ Panel Report, para. 7.334.

⁴⁰⁵ See Panel Report, para. 7.335.

⁴⁰⁶ As noted by the Panel, 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 Panel noted that 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", and that "the Appellate Body has confirmed that panels have the discretion to make alternative findings, including alternative factual findings." (Panel Report, fn 214 to para. 7.76 (referring to Appellate Body Reports, *US – Softwood Lumber IV*, para. 118; *Canada – Wheat Exports and Grain Imports*, para. 126; *China – Auto Parts*, para. 208; and *US – Carbon Steel (India)*, para. 4.274) (emphasis original))

⁴⁰⁷ Panel Report, para. 7.389. (fn omitted)

⁴⁰⁸ Panel Report, para. 7.390.

that it was appropriate to end our analysis, without further disposing of the other issues raised by India on appeal. My remarks relate mainly to the adjudicatory function of the Appellate Body in general, and I begin therefore by reflecting on the Appellate Body's function as contemplated under the DSU.

5.157. Article 17.1 of the DSU describes the Appellate Body's function in broad terms: to "hear appeals from panel cases". In particular, Article 17.12 of the DSU provides that the Appellate Body "shall address" each of the issues raised by the parties to a dispute during an appellate proceeding, and Article 17.6 delineates the scope of appeals as "issues of law covered in the panel report and legal interpretations developed by the panel". Thus, the Appellate Body is called upon to review any aspect of a panel's analysis, including a panel's legal reasoning, provided that it has been properly raised by the parties on appeal in accordance with Article 17.6. This language in the DSU limits the scope of appellate review to the issues *raised* by the parties in the context of a given dispute. Once raised by the parties on appeal, however, it is the legal "duty" of the Appellate Body to "address" each of those issues.

5.158. In deciding *how* to "address" each of the issues raised by the parties, the Appellate Body is guided by certain overarching principles. First, the Appellate Body, as a part of the WTO dispute settlement mechanism, contributes to the objectives of the "prompt settlement" of a dispute or "positive solution to a dispute", which are enunciated in the DSU.⁴⁰⁹ Thus, the Appellate Body may, for example, decline to make specific findings regarding an issue raised on appeal, and "address" the issue only to the extent necessary to ascertain that, in light of the other rulings under a different, but related, claim on appeal that resolve the dispute, there was no need to rule on that particular additional issue in question.⁴¹⁰ Whether making such an additional finding would serve the goal of facilitating the prompt settlement and effective resolution of a dispute is a matter for the Appellate Body to decide in light of the particular circumstances of each case, including the nature of, and relationship between, the relevant claims on appeal, as well as their implications for implementation.

5.159. In addition, a necessary incident of the adjudicative function conferred upon the Appellate Body is that it must ensure that the parties have the opportunity fully to present their arguments and evidence, and that they enjoy "due process" throughout the appellate proceeding.⁴¹¹ Thus, the need to safeguard the due process rights of the parties in cases where, for example, a particular issue has not been sufficiently explored before the panel is an important constraint on the Appellate Body's ability to rule on particular issues raised on appeal.⁴¹²

5.160. That said, the Appellate Body's decision on *how* to "address" each of the issues on appeal should be understood as an extension of its *duty* to properly exercise its adjudicative function. Given the express language contained in Article 17.12 of the DSU, i.e. "shall address", the Appellate Body is not required to provide reasons as to *why* it adjudicates a particular issue properly raised by the parties on appeal in accordance with Article 17.6 of the DSU. However, when the Appellate Body considers, for example, that further findings on issues appealed are not

⁴⁰⁹ Article 3.3 of the DSU provides, in this regard, that the aim of the WTO's dispute settlement system is the "prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member". Article 3.4 stipulates that DSB recommendations or rulings "shall be aimed at achieving a satisfactory settlement of the matter under consideration." Article 3.7 of the DSU further states that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute".

⁴¹⁰ In *US – Upland Cotton*, the Appellate Body stated as follows: "although we recognize that there may be cases in which it would be useful for us to review an issue, despite the fact that our ruling would not result in rulings and recommendations by the DSB, we find no compelling reason for doing so in this case." The Appellate Body added that an interpretation of a particular phrase in the SCM Agreement was "unnecessary for purposes of resolving" that dispute. (Appellate Body Report, *US – Upland Cotton*, paras. 510-511) In relation to another claim in that case, the Appellate Body stated that it failed to see how an examination of that "claim would contribute to the 'prompt' or 'satisfactory settlement' of this matter or would contribute to 'secure a positive solution' to this dispute." (Appellate Body Report, *US – Upland Cotton*, para. 747)

⁴¹¹ Third parties are conferred relatively more limited rights under Article 10 of the DSU.

⁴¹² See e.g. Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 339, where the Appellate Body observed that "the question of the applicability of the *SCM Agreement* to the export subsidies in this dispute raises a number of complex issues" and that "in the absence of a full exploration of these issues, completing the analysis might affect the due process rights of the participants". See also Appellate Body Reports, *EC – Seal Products*, para. 5.69.

necessary in order to facilitate the prompt settlement and effective resolution of the dispute, it will explain this in its report.⁴¹³

5.161. This brings me to Article 3.2 of the DSU, which provides that the "dispute settlement system of the WTO ... serves ... to clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law". As the Appellate Body has noted, there is nothing in Article 3.2 that would encourage "the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute."⁴¹⁴ The Appellate Body cannot be expected to offer interpretative guidance regarding provisions of the covered agreements in an abstract manner beyond the scope of what is required in a particular dispute. To do so would go beyond the Appellate Body's adjudicatory function as contemplated under the DSU.

5.162. At the same time, WTO Members including the third parties to a dispute have a systemic interest in receiving an Appellate Body report that properly clarifies the existing provisions of the covered agreements.⁴¹⁵ Moreover, an Appellate Body report that appropriately disposes of the matter at issue, which ultimately serves to clarify the relevant provisions of the covered agreement, is not only required under the DSU, it is also important in that it allows the DSB to make sufficiently precise recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members".⁴¹⁶

5.163. Through this separate opinion, I hope to be able to shed light on how I view the Appellate Body's function, as well as its limits, both in the context of the present appeal, as well as others on which I have been working with my distinguished colleagues at the Appellate Body.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.

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

6.2. With respect to the Panel's finding under Article III:8(a) of the GATT 1994, we consider that, under Article III:8(a) the product purchased by way of procurement must necessarily be "like", or "directly competitive" with or "substitutable" for – in other words, in a "competitive relationship" with – the foreign product subject to discrimination. Although a consideration of inputs and processes of production may *inform* the question of whether the product purchased is in a competitive relationship with the product being discriminated against, it does not *displace* the competitive relationship standard. The question of 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 arises only after the product purchased has been found to be in a competitive relationship with the product subject to discrimination. Based on our review of the Panel's analysis and approach:

- a. We find that the Panel was properly guided by the Appellate Body report in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* in finding that the DCR measures are not covered by the derogation under Article III:8(a).
- b. We reject India's claim that the Panel acted inconsistently with Article 11 of the DSU in assessing India's arguments regarding the scope of application of Article III:8(a) of the GATT 1994.

⁴¹³ See e.g. Appellate Body Reports, *Australia – Salmon*, paras. 117-118; *US – Wheat Gluten*, paras. 80-92; and *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 43-52. In addition, if the Appellate Body considers that it is not in a position to complete the legal analysis as requested by a party on appeal, for instance, due to a lack of sufficient factual findings by a panel, it will state this reason in its Report.

⁴¹⁴ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:1, p. 323 at 340.

⁴¹⁵ The Appellate Body has explained, "[w]hile the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case." Appellate Body report, *US – Stainless Steel (Mexico)*, para. 160.

⁴¹⁶ Article 21.1 of the DSU.

- c. Consequently, we uphold the Panel's findings, in paragraphs 7.135 and 7.187 of the Panel Report that the DCR measures are not covered by the derogation under Article III:8(a) of the GATT 1994 and that, therefore, the DCR measures are inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994.

6.3. India's request for completion of the legal analysis is premised on the condition that we reverse the Panel's finding that the DCR measures are not covered by the derogation under Article III:8(a) of the GATT 1994. Having upheld this finding by the Panel, we need not, and do not, address India's further claims and related arguments regarding the remaining elements under Article III:8(a). We therefore express no view on the Panel's reasoning and analysis in this regard.

6.2 Article XX(j) of the GATT 1994

6.4. With respect to the Panel's findings under Article XX(j) of the GATT 1994, we consider that, in assessing whether products are "in general or local short supply" within the meaning of Article XX(j), a panel should examine the extent to which a particular product is "available" for purchase in a particular geographical area or market, and whether this is sufficient to meet demand in the relevant area or market. This analysis may, in appropriate cases, take into account not only the level of domestic production of a particular product and the nature of the products that are alleged to be "in general or local short supply", but also such factors as the relevant product and geographic market, potential price fluctuations in the relevant market, the purchasing power of foreign and domestic consumers, and the role that foreign and domestic producers play in a particular market, including the extent to which domestic producers sell their production abroad. Due regard should be given to the total quantity of imports that may be "available" to meet demand in a particular geographical area or market. It may thus be relevant to consider the extent to which international supply of a product is stable and accessible, including by examining factors such as the distance between a particular geographical area or market and production sites, as well as the reliability of local or transnational supply chains. Whether and which factors are relevant will necessarily depend on the particularities of each case. Just as there may be factors that have a bearing on "availability" of imports in a particular case, it is also possible that, despite the existence of manufacturing capacity, domestic products are not "available" in all parts of a particular country, or are not "available" in sufficient quantities to meet demand. In all cases, the responding party has the burden of demonstrating that the quantity of "available" supply from both domestic and international sources in the relevant geographical market is insufficient to meet demand.

- a. We therefore disagree with India to the extent that it argues that "short supply" can be determined without regard to whether supply from all sources is sufficient to meet demand in the relevant market.
- b. We reject India's claim that the Panel acted inconsistently with Article 11 of the DSU. As we see it, India's claim under Article 11 of the DSU relies for its validity on India's reading of Article XX(j), and in particular India's contention that the existence of a situation of "short supply" within the meaning of Article XX(j) is to be determined exclusively by reference to whether there is "sufficient" domestic manufacturing of a given product. The fact that India does not agree with the conclusion the Panel reached does not mean that the Panel committed an error amounting to a violation of Article 11 of the DSU.
- c. Consequently, we uphold the Panel's finding, in paragraph 7.265 of the Panel Report, 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, and the Panel's ultimate finding, in paragraph 8.2.b of its Report, that the DCR measures are not justified under Article XX(j) of the GATT 1994.

6.5. Having upheld the Panel's finding, in paragraph 7.265 of the Panel Report, that solar cells and modules are not "products in local or general short supply" in India, within the meaning of Article XX(j), we do not consider it necessary further to examine India's claims on appeal pertaining to the Panel's "limited review and analysis" of whether India's DCR measures are "essential" to the acquisition of solar cells and modules for the purpose of Article XX(j). Nor do we

consider it necessary to examine India's arguments as they relate to the requirements of the chapeau of Article XX of the GATT 1994.

6.3 Article XX(d) of the GATT 1994

6.6. With respect to the Panel's findings under Article XX(d) of the GATT 1994, we consider that, in determining whether a responding party has identified a rule that falls within the scope of "laws or regulations" under Article XX(d) of the GATT 1994, a panel should evaluate and give due consideration to all the characteristics of the relevant instrument(s) and should avoid focusing exclusively or unduly on any single characteristic. In particular, it may be relevant for a panel to consider, among others: (i) the degree of normativity of the instrument and the extent to which the instrument operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member; (ii) the degree of specificity of the relevant rule; (iii) whether the rule is legally enforceable, including, e.g. before a court of law; (iv) whether the rule has been adopted or recognized by a competent authority possessing the necessary powers under the domestic legal system of a Member; (v) the form and title given to any instrument or instruments containing the rule under the domestic legal system of a Member; and (vi) the penalties or sanctions that may accompany the relevant rule. Importantly, this assessment must always be carried out on a case-by-case basis, in light of the specific characteristics and features of the instruments at issue, the rule alleged to exist, as well as the domestic legal system of the Member concerned.

- a. We therefore find that India has not demonstrated that the passages and provisions of the domestic instruments identified by India, when read together, set out the rule "to ensure ecologically sustainable growth while addressing India's energy security challenge, and ensuring compliance with its obligations relating to climate change", as alleged by India.
- b. We find that that the Panel did not err in finding that India failed to demonstrate that the international instruments it identified fall within the scope of "laws or regulations" under Article XX(d) in the present dispute.
- c. Consequently, we uphold the Panel's finding, in paragraph 7.333 of the Panel Report, that India has not demonstrated that the DCR measures are measures "to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT 1994]", and the Panel's ultimate finding, in paragraph 8.2.b of the Panel Report, that the DCR measures are not justified under Article XX(d) of the GATT 1994.

6.7. Having upheld the Panel's finding, in paragraph 7.333 of the Panel Report, that India did not 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 do not consider it necessary further to examine India's claims on appeal pertaining to the Panel's "limited review and analysis" of whether the DCR measures are "necessary" within the meaning of Article XX(d). Nor do we consider it necessary to examine India's arguments as they relate to the requirements of the chapeau of Article XX of the GATT 1994.

6.8. The Appellate Body recommends that the DSB request India to bring its measures, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the TRIMs Agreement and the GATT 1994, into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 22nd day of August 2016 by:

Peter Van den Bossche
Presiding Member

Seung Wha Chang
Member

Thomas Graham
Member