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INDIA – CERTAIN MEASURES RELATING TO SOLAR CELLS AND SOLAR MODULES

AB-2016-3

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS456/AB/R.

The Notice of Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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NOTICE OF APPEAL

ANNEX A-1

INDIA'S NOTICE OF APPEAL*

Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") and Rule 20 of the *Working Procedures for Appellate Review* (WT/AB/WP/6) ("Working Procedures"), India hereby notifies its decision to appeal certain issues of law covered by in the panel report in *India – Certain Measures relating to Solar Cells and Solar Modules* (WT/DS456/R) ("Panel Report"), and certain legal interpretations developed by the Panel in this dispute.

Pursuant to Rules 20(1) and 21(1) of the Working Procedures, India files this Notification together with its Appellant's Submission with the Appellate Body Secretariat.

For the reasons to be elaborated in its submissions to the Appellate Body, India appeals the following errors of law and legal interpretation contained in the Panel Report and requests the Appellate Body to reverse the related findings, conclusions and recommendations of the Panel, and where indicated, to complete the analysis.[1]

I THE PANEL ERRED IN ITS FINDING THAT ARTICLE III:8(A) OF THE GATT 1994 IS NOT APPLICABLE TO THE DCR MEASURES

1. India appeals the Panel's conclusion that the DCR measures are not covered by the derogation under Article III:8(a) of the GATT 1994 for the following reasons:

    i. The Panel erred in not considering India's arguments that solar cells and modules are indistinguishable from solar power generation[2], and that in its factual and legal assessment, it is not necessary to consider whether solar cells and modules qualify as "inputs" for solar power generation. The basis for the Panel's reasoning was that the Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program*, did not consider this issue[3], while ignoring the fact that this issue was not presented for consideration before the Appellate Body in that dispute.

    ii. The Panel erred in its conclusion that discrimination relating to solar cells and modules under the DCR measures is not covered by the derogation under Article III:8(a) of the GATT 1994.[4]

2. India requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU in failing to consider and to make an objective assessment of India's arguments that: (i) solar cells and modules are indistinguishable from solar power generation, and (ii) solar cells and modules can be characterized as inputs for generation of solar power.[5]

3. India further requests the Appellate Body to reverse the Panel's findings that the derogation under Article III:8(a) of the GATT 1994 is not available for solar cells and modules since what the Government purchases is electricity generated from such cells and modules[6] and

* This Notice, dated 20 April 2016, was circulated to Members as document WT/DS456/9.

[1] Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, this Notice of Appeal provides an indicative list of the paragraphs of the Panel Report containing the alleged errors of law and legal interpretation by the Panel in its report, without prejudice to India's ability to rely on other paragraphs of the Panel Report in its appeal.

[2] Panel Report, paras. 6.24, 7.114 and 7.116.

[3] Panel Report, paras. 7.116-7.135, particularly paras. 7.116, 7.118, 7.123, 7.125, 7.126, 7.128.

[4] Panel Report, paras. 7.100-7.187, particularly paras. 7.135 and 7.187.

[5] Panel Report, para. 6.24, paras. 7.116-7.135, particularly paras. 7.116, 7.118, 7.123, 7.125, 7.126, 7.128.

[6] Panel Report, paras.7.135 and 7.187.

instead complete the analysis to find that the DCR measures are covered by the derogation under Article III:8(a) of the GATT 1994.

4. Should the Appellate Body hold that the DCR measures are covered by the derogation under Article III:8(a) of the GATT 1994, India requests the Appellate Body to complete the analysis under Article III:8(a) of the GATT 1994 and find that:

   i. The DCR measures are laws, regulations or requirements governing procurement;

   ii. The procurement under the DCR measures is made by governmental agencies;

   iii. The procurement under the DCR measures is of products purchased for governmental purposes;

   iv. The procurement and purchase of products under the DCR measures is not with a view to commercial resale.

5. Based on the above, India requests the Appellate Body to find that the DCR measures are not inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994.

II THE PANEL ERRED IN ITS FINDING THAT THE EXCEPTION UNDER ARTICLE XX(J) OF THE GATT 1994 IS NOT APPLICABLE TO THE DCR MEASURES

1. Should the Appellate Body uphold the Panel's finding that the DCR measures are not covered by the derogation of Article III:8(a) of the GATT 1994, India requests the Appellate Body to find that the Panel erred in its conclusion that the DCR measures are not justified under the general exception in Article XX(j) of the GATT 1994.[7]

2. India also requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU in its assessment of India's arguments on "sufficient manufacturing capacity"[8]; by disregarding India's justification with regard to the DCR measures, and substituting it with one which had no basis in India's submissions[9]; and in arriving at various conclusions based on a piecemeal and selective analysis of two reports without providing India due process rights to respond to its conclusions.[10]

3. India requests the Appellate Body to reverse the Panel's conclusion that the DCR measures are not justified under Article XX(j) of the GATT 1994 and to complete the analysis under Article XX(j) to find that:

   i. 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 defence under Article XX(j) is available to it;

   ii. The DCR measures are essential for addressing the local and general short supply of solar cells and modules;

   iii. The DCR measures are justified under Article XX(j) of the GATT 1994 because they meet with the requirements of the chapeau of Article XX.

[7] Panel Report, paras. 6.30-6.31, paras. 7.188-7.265, paras. 7.337-7.390, particularly paras. 7.189, 7.190, 7.207, 7.218, 7.236, 7.237, 7.265, 7.337-7.342, 7.346, 7.350, 7.354, 7.360-7.368, 7.380, 7.382, 7.389 and 7.390.

[8] Panel Report, para. 7.226.

[9] Panel Report, paras. 7.189, 7.190, 7.237, 7.337-7.342, 7.350, 7.351, 7.354, 7.360-7.363, 7.366-7.368 and 7.380.

[10] Panel Report, paras. 7.364-7.365 and para. 7.367.

III SUBSIDIARILY, THE PANEL ERRED IN ITS FINDING THAT THE DCR MEASURES ARE NOT JUSTIFIABLE UNDER ARTICLE XX(D) OF THE GATT 1994

1. Should the Appellate Body find that the derogation under Article III:8(a) of the GATT 1994 is not available for India, and that the DCR measures are not justifiable under Article XX(j) of the GATT 1994, then India requests the Appellate Body to find that the Panel erred in its conclusion that the DCR measures are not justified under the general exception in Article XX(d) of the GATT 1994.[11]

2. India requests the Appellate Body to reverse the Panel's conclusion that the DCR measures are not justified under Article XX(d) of the GATT 1994 and to complete the analysis under Article XX(d) to find that:

    i. The international and domestic laws and regulations identified by India, constitute laws and regulations for the purpose of Article XX(d);

    ii. The DCR measures are necessary for securing compliance with the mandate under India's laws and regulations to achieve ecologically sustainable growth and sustainable development; and

    iii. The DCR measures are justified under Article XX(d) of the GATT 1994 because they meet with the requirements of the chapeau of Article XX.

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[11] Panel Report, paras. 7.284-7.333, paras. 7.337-7.390, particularly paras. 7.298-7.301, 7.318, 7.319, 7.333, 7.337-7.342, 7.350, 7.354, 7.360-7.368, 7.380, 7.382, 7.389 and 7.390.

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

ANNEX B-1

EXECUTIVE SUMMARY OF INDIA'S APPELLANT'S SUBMISSION

SUMMARY OF ISSUES UNDER ARTICLE III:8(A) OF THE GATT 1994

(i) The Panel erred in not considering India's arguments that solar cells and modules are indistinguishable from solar power generation.

1. India's submission before the Panel was based on the inherent physical characteristics of solar cells and modules that make it indistinguishable from the electricity generated from it. This aspect was not pleaded and therefore not considered by the Appellate Body in *Canada – Renewable Energy/Canada – Feed-in Tariff Program*.

2. In dismissing India's arguments based on the reasoning that "… the Appellate Body did not find such considerations germane to its evaluation of electricity and generation equipment that included solar cells and modules",[1] the Panel ignored the substance of India's arguments on why solar cells and modules stand on a different footing. The Panel's reasoning indicates that merely because such arguments were not made, and therefore not considered, in a separate dispute – the *Canada – Renewable Energy/Canada – Feed-in Tariff Program*, it too cannot consider the same.

(ii) The Panel erred in its assessment that it is not necessary to consider whether solar cells and modules qualify as "inputs" for solar power generation.

3. India argued that solar cells and modules can also be seen as "inputs for solar power generation", and reasoned that the Appellate Body report in *Canada – Renewable Energy/Feed in Tariff Program*, left space for legal reasoning on the issue of inputs.[2]

4. The Panel dismissed India's arguments that it is not necessary for it to assess regarding whether solar cells and modules can be considered as inputs for generation of solar power, since the Appellate Body in Canada's dispute referred to "generation equipment" throughout its analysis, and did not distinguish between "solar cells and modules" and other "generation equipment".[3] The Panel's reasoning ignores that this argument or reasoning was not submitted by any of the parties to *Canada – Renewable Energy/Feed-In Tariff Program*.

(iii) The Panel erred in dismissing India's argument that the consequence of sole reliance on the test of competitive relationship, would be an unduly restrictive interpretation of Article III:8(a).

5. India argued that an overly restrictive interpretation of Article III:8(a) will mean that governments can act only in certain ways to avail of its benefit, such as: (a) they would need to purchase the solar cells and modules by themselves, and generate the electricity from it, or (b) purchase the solar cells and modules, and provide it to solar power developers for power generation.[4] The Panel dismissed this argument, not on any consideration of the merits of India's arguments under Article III:8(a), but because in its view, the measure at issue is not distinguishable in any relevant respect from those considered by the Appellate Body in *Canada – Renewable Energy/Feed-In Tariff Program*.[5]

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[1] Panel Report, para. 7.128.
[2] Appellate Body Report, *Canada-Renewable Energy/Canada- Feed-in Tariff Programme,* para 5.63.
[3] Panel Report, para. 7.126.
[4] India's first written submission, paras. 117-119.
[5] Panel Report, para 7.134.

(iv) The Panel acted inconsistently with its obligations under Article 11 of the DSU to make an objective assessment of the matter before it in evaluating the issues under Article III:8(a).

6. The Panel seems to have simply taken shelter under the Appellate Body's ruling in *Canada – Renewable Energy/Feed-in Tariff Program*, and wherever it could not find an answer for a specific issue or argument within the reasoning in that dispute, it simply dismissed it as a matter that had not been considered as relevant by the Appellate Body, and for that reason alone, it too would not consider these arguments.

7. India requests the Appellate Body to find that this abnegation of responsibility to make an objective assessment of the facts and arguments before it, amounts to action inconsistent with the responsibility of a panel under Article 11 of the DSU 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.

(v) Findings and conclusions with regard to Article III:8(a) of the GATT 1994.

8. India requests the Appellate Body to reverse the Panel's findings that the derogation under Article III:8(a) of the GATT 1994 is not available for solar cells and modules,[6] and complete the analysis to find that the DCR measures are covered by the derogation under Article III:8(a) of the GATT 1994.

9. Should the Appellate Body find that the derogation of Article III:8(a) is available for India's DCR measures, India further requests the Appellate Body to complete the analysis under Article III:8(a) of the GATT 1994 and find that:

   i. The DCR measures are laws, regulations or requirements governing procurement;

   ii. The procurement under the DCR measures is made by governmental agencies;

   iii. The procurement under the DCR measures is of products purchased for governmental purposes;

   iv. The procurement and purchase of products under the DCR measures is not with a view to commercial resale.

SUMMARY OF ISSUES UNDER ARTICLE XX(J) OF THE GATT 1994

10. Should the Appellate Body uphold the Panel's finding that the DCR measures are not covered by the derogation under Article III:8(a) of the GATT 1994, India requests the Appellate Body to find that the Panel erred in its conclusion that the DCR measures are not justified under the general exception in Article XX(j) of the GATT 1994.

(i) The Panel erred in its legal interpretation of the terms "general or local short supply" used in Article XX(j).

11. The Panel erred in its interpretation by not reading "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 a piecemeal approach that interpreted the words "general or local" in isolation of the words "short supply". The Panel concluded that "short supply" in "a general or local market" would occur when the supply in such market does not meet the demand for the concerned product.[7] The Panel imputed new words into the provision, the effect of which was a rewording of the first sentence of Article XX(j) as follows:

"essential to the acquisition or distribution of products when the quantity of available supply of a product does not meet the demand in the relevant local or general geographical area or market".

[6] Panel Report, paras.7.135 and 7.187.
[7] Panel Report, para.7.207.

12. The use of the terms "general or local" to qualify the words "short supply" is a clear reflection of intent to qualify the source of the supply as "general or local" as opposed to "international supply" as reflected in the proviso to Article XX(j). The words "short supply" in Article XX(j) cannot therefore be read without imparting meaning to the full phrase: "general or local short supply".

13. The term "supply" encompasses within it what is actually *produced*, and thereby available for purchase. The amount of any commodity actually produced at the general or local level therefore needs to be considered for assessing "general or local short supply."

14. The Panel further erred in its assessment of the negotiating history of Article XX(j)[8], since it failed to consider a crucial event in 1947 when the original wording of the provision: "equitable distribution of products in short supply", was replaced with "general or local short supply". The concept of equitable distribution as relevant for "international supply" was shifted as a proviso to the main provision. The Panel failed to note that the use of the terms "general or local short supply" contemplates short supply that is distinct from situations that can be addressed by "international supply". If the intention of the negotiators was to refer to international short supply in the first sentence of Article XX(j), this could have been achieved by qualifying the phrase "short supply" with "international or with nothing at all.

15. The Panel's interpretation that Article XX(j) cannot be used in situations where the local or general demand can be met from all sources including imports,[9] would render Article XX(j) incapable of being used as a tool for import restraints. For Article XX(j) to be applicable effectively in situations of both export and import restraints, the source of supply at the general or local level, would need to be considered.

16. India requests the Appellate Body to reverse the interpretation of the terms "general or local short supply" as evolved by the Panel, as having no basis in the text of the provision, and running counter to settled principles of interpretation as laid out in Article 31 of the Vienna Convention on the Law of Treaties. India further requests the Appellate Body to complete the analysis based on interpretation of the ordinary meaning of the terms used in Article XX(j) and find that the situation of lack of manufacturing of solar cells and modules therefore constitutes "general or local short supply" under Article XX(j).

(ii) The Panel erred in its assessment that the DCR measures are not essential for the acquisition of solar cells and modules.

17. In its assessment of whether or not the DCR measures are essential under Article XX(j), the Panel erred in characterizing India's DCR measure as one which can assure that Indian SPDs "have access to a continuous and affordable supply of the solar cells and modules."[10] The Panel's conclusion had absolutely no basis in the facts and arguments before it. India's justification for the DCR measures was that the measures are essential because they reduce the risks linked to predominant dependence on imports.

18. The difference is crucial: India's DCR measures is <u>not</u> about "affordable supply of solar cells and modules" to Indian SPDs; but that the energy security objective in India's solar policy requires India to reduce the risks linked to predominant dependence on imports. India requests that the Appellate Body to reverse the Panel's findings and conclusions based on its erroneous assessment, and complete the analysis with regard to the justification of the DCR measures.

19. The Panel notes that the question of whether the acquisition or distribution of products is essential for fulfilment of a policy objective, is irrelevant.[11] India disagrees, for the reason that the "acquisition or distribution" for the purpose of Article XX(j) cannot be seen in isolation of *why* such acquisition or distribution is *essential*. India requests the Appellate Body to reverse the Panel's findings and find that acquisition under Article XX(j)

[8] Panel report, paras. 7.209-7.213.
[9] Panel Report, para. 7.236.
[10] Panel Report, paras. 7.189, 7.190, 7.337-7.342, 7.350, 7.351, 7.354, 7.360-7.363, 7.366-7.368 and 7.380.
[11] Panel Report, para. 7.346.

cannot be justified merely by existence of short supply; but by a justification of why such acquisition is essential to redress the short supply, which can be done only with reference to a policy objective, which in India's case is achieving energy security and ecologically sustainable development.

20. The Panel erred in its assessment that for assessing contribution of the DCR measures, it needs to assess whether all Indian manufactured cells and modules are exclusively consumed by Indian SPDs.[12] India requests the Appellate Body to reverse this finding and instead find that the contribution of the DCR measures needs to be assessed in the context of how they seek to address the issue of risks of import dependency; and not from the perspective of exclusive use by Indian SPDs.

21. The Panel has noted some of the arguments relating to the parties' arguments on the issue of reasonably available alternatives for the purpose of Article XX of the GATT 1994. In this regard, India has presented in its submissions a few critical elements that the Panel has not recorded, to enable the Appellate Body to complete the analysis regarding the availability of alternatives.

(iii) The Panel acted inconsistently with Article 11 of the DSU.

22. India also requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU in in misinterpreting India's arguments on "sufficient manufacturing capacity";[13] by disregarding India's justification for the DCR measures, and substituting it with one which had no basis in India's submissions;[14] and in arriving at various conclusions based on a piecemeal and selective analysis of two reports, without providing India due process rights to respond to its conclusions.[15]

(iv) Findings and conclusions with regard to Article XX(j) of the GATT 1994.

23. India requests the Appellate Body to reverse the Panel's conclusion that the DCR measures are not justified under Article XX(j) of the GATT 1994 and to complete the analysis under Article XX(j) to find that:

    i. 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.

    ii. The DCR measures are essential for addressing the local and general short supply of solar cells and modules, and these are justified under Article XX(j) of the GATT 1994 because they meet with the requirements of the chapeau of Article XX.

SUMMARY OF ISSUES UNDER ARTICLE XX(D)

24. Should the Appellate Body find that the DCR measures are not justifiable under Article XX(j) of the GATT 1994, then India requests the Appellate Body to find that the Panel erred in its conclusion that the DCR measures are not justified under the general exception in Article XX(d) of the GATT 1994.

25. India's defence was premised on its need to secure compliance with instruments of both international and domestic law which mandate it to take appropriate actions for securing ecologically sustainable growth and sustainable development. The Panel erred in its assessment that none of these instruments justify the use the DCR measures to secure compliance with them.[16]

26. With regard to the instruments of international law, the Panel erroneously concluded that because the government, through its executive wing, takes actions pursuant to

[12] Panel Report, para 7.366.
[13] Panel Report, para 7.226.
[14] Panel Report, paras. 7.189, 7.190, 7.237, 7.337-7.342, 7.350, 7.351, 7.354, 7.360-7.363, 7.366-7.378 and 7.380.
[15] Panel Report, paras. 7.364-7.365 and para. 7.367.
[16] Panel Report, para. 7.333.

implementation obligations arising from instruments of international law, these instruments have no "direct effect" in India, and cannot be considered as laws or regulations for the purposes of Article XX(d).[17] This ignores the fundamental aspect that it is because international law has direct effect, that the executive wing of the government is required to take implementation action in the first place.

27. The Panel rejected the domestic law instruments identified by India constitute "laws and regulations" because they are in the nature of action plans and policies, rather than laws enacted by the legislature.[18] This ignores that the legal framework in India comprises of both binding laws, as well as policies and plans that provide the framework for executive action.

28. India requests the Appellate Body to reverse the Panel's findings that the international and domestic laws and regulations identified by India, are not laws and regulations for the purpose of Article XX(d). India further requests the Appellate Body to complete the analysis to find that the legal instruments identified by India constitute laws and regulations for the purpose of Article XX(d) of the GATT 1994, and further that the DCR measures are necessary for securing compliance with the mandate under these laws and regulations regarding ecologically sustainable growth and sustainable development.

[17] Panel Report, paras. 7.298, 7.301.
[18] Panel Report, para. 7.318.

ANNEX B-2

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLEE'S SUBMISSION[1]

1. India does not appeal the Panel's finding in *India – Solar Cells* that the requirement under the Jawaharlal Nehru National Solar Mission ("JNNSM") that certain suppliers of electricity use Indian solar cells and modules (the "DCR measures") are *prima facie* inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. Its appeal is limited to the Panel's rejection of various defenses that India raised under Article III:8(a), Article XX(j), and Article XX(d) of the GATT 1994.

2. The Panel correctly rejected India's efforts to defend the WTO inconsistency. First, India asserted that the DCR measures were laws, regulations, or requirements governing the procurement by governmental agencies of products purchased for governmental purposes, and that Article III:8(a) took them outside the scope of Article III. The Panel found, however, that because India procured *electricity* under the DCR measures, the exemption under Article III:8(a) did not apply to India's discrimination against a different product, solar cells and modules.

3. Second, India sought refuge in the Article XX(j) exception for measures essential to the acquisition of products in general or local short supply. The Panel rejected this argument because it concluded that Indian solar power developers' ("SPDs") ready access to imported solar cells meant there was no general or local short supply that would justify resort to Article XX(j).

4. Third, India argued that the DCR measures qualified for the Article XX(d) exception because they were necessary to secure compliance with various Indian obligations under international agreements related to ecologically sustainable growth and sustainable development. The Panel rejected this argument because Article XX(d) applies to measures to secure compliance with a Member's *domestic* laws and regulations, and India had not established that these international commitments had direct application in India's domestic legal system.

5. India asserts on appeal both that the Panel made legal errors in its evaluation of India's defenses and that it failed to carry out its duties under Article 11 of the DSU. As general matter, India's Article 11 appeals rely on allegations that the Panel failed to "consider" certain evidence or arguments proffered by India. The fact that a panel does not address every piece of evidence presented by a party does not give rise to a claim of error under Article 11.[2] Nor does Article 11 impose an obligation on a panel to address in its report every argument raised by a party. For these reasons, India has not identified any way in which the Panel failed to make an objective assessment of the matter before it. There is accordingly no basis to reverse the Panel's findings under Article 11.

6. India's legal arguments fare no better. The Panel found that India's discrimination against imported solar cells and modules cannot be justified under Article III:8(a) of GATT 1994 because solar cells and modules are not among the "products purchased" by India under the DCR measures at issue in this dispute. The Panel's finding follows the reasoning laid out by the Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program* when it found that Article III:8(a) does not apply when a Member procures one product, but discriminates against a different product.[3] Specifically, the Panel found that (1) the "product purchased" by the government under the DCR measures is electricity, whereas the products facing discrimination under those measures are generation equipment, namely solar cells and modules; and (2) electricity and solar cells and modules are not in a competitive

[1] Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 2,146 words (including footnotes), and this U.S. appellee submission (not including the text of the executive summary) contains 21,480 words (including footnotes).

[2] *China Rare Earths* (AB), para. 5.178.

[3] *See Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.63.

relationship. India acknowledged that the government does not actually purchase, physically acquire, or take title or custody of any solar cells or modules under its DCR measures. Thus, the governmental procured of electricity did not excuse India from its national treatment obligations under Article III with respect to solar cells and modules.

7. On appeal, India asserts that the Panel failed to consider its argument that electricity is indistinguishable from solar cells and modules. The Panel, however, explicitly addressed that argument, and found it inapposite in light of the broader conclusion that India could not be understood to have procured solar cells and modules for purposes of Article III:8(a) when it never actually purchased, acquired, or had possession of them.

8. India also asserts that the Panel failed to consider its related argument that solar cells and modules are inputs into the electricity procured by India, and that this relationship makes Article III:8(a) applicable to discrimination against the cells and modules. Again, the Panel explicitly considered this argument. But it found that India's DCR measures were indistinguishable "in any relevant respect" from the DCRs that the Appellate Body found to fall outside the coverage of Article III:8(a) in *Canada – Renewable Energy / Feed-In Tariff Program*. The Panel thus discerned no reason why the Appellate Body's interpretation of Article III:8(a), as developed and articulated in *Canada – Renewable Energy / Feed-In Tariff Program*, should not guide the Panel's examination of India's DCR Measures.

9. In light of these findings, the Panel found it unnecessary to assess India's DCR measures under the remaining elements of Article III:8(a). India requests that if the Appellate Body reverses the Panel on the threshold question, it complete the Panel's analysis with respect to these issues.

10. However, the findings of the Panel and undisputed facts cited by India do not support the conclusions it advocates. The procurement of electricity does not satisfy the "governmental purpose" criterion of Article III:8(a) because government agencies are only incidental users of the electricity purchased, and India has provided no basis to conclude that the sale to commercial entities and private households is a governmental purpose. In addition, the direct purchasers of the power are profit-making entities, and they resell the electricity to consumers seeking to maximize their own interest, precluding a conclusion that the government purchases are "not with a view to commercial resale."

11. The Panel also rejected India's arguments with respect to Article XX(j) of the GATT 1994, which provides that nothing in the GATT 1994 shall be construed to prevent the adoption or enforcement by any Member of measures "essential to the acquisition or distribution of products in general or local short supply." The Panel correctly found that, in light of India's ready access to imported solar cells and modules, India could not defend its DCR measures under Article XX(j) of the GATT 1994 as "essential" for the "acquisition of products in short supply."

12. India argued that solar cell and modules are in "local short supply" in India because it "lack[s] manufacturing capacity of solar cells and modules." The Panel concluded that the phrase "products in general or local short supply" refers 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." It observed that India did not dispute that there was a sufficient quantity of solar cells and modules available in India from all sources (i.e., imported and domestically manufactured) to meet the demand of India consumers.

13. On appeal, India alleges that the Panel erred by finding that a product cannot be in "general or local short supply" for a Member if its consumers can acquire the product through importation. However, Article XX(j), by its terms, is concerned solely with situations involving the ability to acquire the product in purported short supply. It does not differentiate between domestic production and importation for determining whether supply is "short". Thus, where the consumers of a Member are satisfying demand for a product through importation or through a combination of importation and local production, that product cannot be in "general or local short supply" within the meaning of Article XX(j). The Panel was therefore correct to conclude that solar cells and modules are not "products in general or local short supply" in India.

14. India also asserts that the Panel made several legal errors in its "limited analysis" of whether India's DCR measures are "essential" within the meaning of Article XX(j). The Panel observed that "the relevant question under Article XX(j) is whether [India's] DCR measures are 'essential to the acquisition' of products in short supply, [] not whether the acquisition of those products is in turn essential for the achievement of some wider policy objective." On appeal, India argues that this issue must "be seen in the context of the policy objectives of such acquisition." India's assertion is without merit because Article XX(j), by its terms, is concerned with whether the measure at issue is "essential *to the acquisition*" of a product, not whether the product itself – or even acquisition of the product – is essential.

15. Finally, the Panel also rejected India's arguments regarding Article XX(d), which provides that nothing in the Agreement shall be construed to prevent the adoption or enforcement by any Member of measures "necessary ... to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement." India cited several international and domestic instruments as "laws or regulations" for purposes of Article XX(d). The Panel correctly found that none of these instruments (with the exception of Section 3 of India's Electricity Act) were "laws or regulations" within the meaning of Article XX(d). With respect to Section 3 of the Electricity Act, the Panel found that India had failed to demonstrate that its DCR measures were measures to "secure compliance" with legal provisions of that Act. In light of these findings, the Panel found it unnecessary to examine whether the India's DCR measures were "necessary" within the meaning of Article XX(d).

16. On appeal, India contends that the Panel erred in finding that the international instruments cited by India do not have direct effect in India, and that the domestic instruments cited by India do not constitute "laws and regulations" within the meaning of Article XX(d). India's assertions are without merit.

17. India does not dispute that the executive branch in India must take certain "implementing" actions before international law obligations enter into legal effect in India, but argues that the international instruments do have "direct effect" because "the legislature is not required to legislate on a domestic law incorporating the international law into domestic law." However, the Appellate Body's findings in *Mexico – Soft Drinks* clarify that where a "regulatory act" is necessary for an international obligation to have domestic effect, that obligation is not in and of itself part of a Member's laws and regulations for purposes of Article XX(d). As that is the case with India's executive "implementing" measures, India's argument presents no basis to reverse the Panel's finding.

18. The Panel found that the domestic law instruments cited by India, with one exception, - are not "law and regulations" for purposes of Article XX(d) because India cited only "hortatory, aspirational and declaratory language" that is not "legally enforceable."[4] India argues on appeal that the Panel erred because these measures, while non-binding are nonetheless part of India's legal system, and that although they do not prescribe specific action, they do "mandate achieving ecologically sustainable growth," which is more than a mere "objective."[5] These assertions do not undermine the Panel's conclusions. Panels have consistently found that "to secure compliance," within the meaning of Article XX(d), means to *enforce* obligations under laws and regulations," not "to ensure the attainment of the *objectives* of the laws and regulations."[6] The most India shows in its appeal is that these domestic measures lay out important, and even critical, objectives. That does not make them the type of laws and regulations to which Article XX(d) applies.

19. The Panel found India's reference to Section 3 of the Electricity Act unavailing because that provision requires the government to prepare a National Electrical Policy and tariff policy, and the DCRs do nothing to enforce this legal requirement.[7] India states on appeal that it did not mean to cite this law on its own, but as one element of legislative scheme encompassing the other cited measures that collectively "mandate" action to achieve

[4] *India – Solar Cells (Panel)*, para. 7.313.
[5] India's appellant submission, paras. 174-175.
[6] *Canada – Wheat Exports and Grain Imports (Panel)*, para. 6.248.
[7] *India – Solar Cells (Panel)*, para. 7.330.

"ecologically sustainable growth."[8] Thus, India does not directly appeal the Panel's findings with regard to Section 3.

20. In the event the Appellate Body reverses the Panel's "law or regulations" finding, India has requested the Appellate Body to complete the Panel's analysis with respect to whether India's DCRs measures are "necessary" within the meaning of Article XX(d) India, however, has failed to establish that its DCR measures even "contribute to" India's "compliance" with any of the legal instruments that it identifies, much less that the DCRs measures are "necessary" to secure compliance. Therefore, it has failed to identify any basis for the Appellate Body to find the DCR measures to be "necessary."

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[8] *India – Solar Cells (Panel)*, para. 7.173.

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

ANNEX C-1

EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION

1. Brazil addresses in this submission an issue central to the policy space Members have in connection to government procurement: the scope of Article III:8(a) of GATT 1994, and discusses the relevant findings of the Appellate Body in *Canada – Renewable Energy / FIT*.

2. Brazil understands that the Appellate Body did not accept Canada's arguments that the FIT Programme qualified under the terms of Article III:8(a), basically because the product purchased by the Canadian agency "[was] not the same as the product that [was] treated less favourably", and they were not in a competitive relationship. Brazil emphasizes the fact that there is no finding by the Appellate Body in the *Canada – Renewable Energy / FIT* case with regard to the inclusion of inputs or production processes under Article III:8(a).

3. Brazil considers that there is no reason to exclude *a priori* the possibility that the purchase of inputs may be covered by the derogation under Article III:8(a). Brazil understands that the competitive relationship test does not apply in all cases. The purchase of inputs to be assembled into a final product purchased by a government may be tantamount to the purchase of the final good. If the Appellate Body considers that the products at issue in the present dispute are inputs necessary to produce the products purchased by governmental agencies for governmental purposes, under Article III:8(a), then it should also take into account the possibility that the purchase of those inputs may also be within the purview of Article III:8(a).

ANNEX C-2

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION[1]

1. India makes several allegations of error, mainly based on Article 11 of the DSU, with respect to Articles III:8(a), XX(j) and XX(d) of the GATT 1994.

2. At the outset, the European Union recalls that, as clarified by the Appellate Body, Article 11 of the DSU obliges panels to make "an objective assessment of the matter before it'". Since India's claims of error are based on Article 11 of the DSU, the Appellate Body should consider first and foremost whether the alleged failure to "consider" some of India's arguments before the Panel reaches the level of a violation of Article 11 of the DSU.

3. With respect to Article III:8(a) of the GATT 1994, the Panel appears to have based its findings on the fact that it was not persuaded that the measures at issue are distinguishable from those in *Canada – FIT*. In doing so, the Panel rejected some of the arguments raised by India in the present appeal. To the extent that the Appellate Body agrees with the Panel's ultimate finding, the European Union does not see that the alleged lack of examination of certain arguments would amount to an error under Article 11 of the DSU.

4. In this context, the Appellate Body may want to recall its previous finding in *Canada – FIT* that Article III:8(a) of the GATT 1994 did not apply to DCRs imposed on generation equipment used by renewable energy producers, because the product being procured was electricity. Those products are not in a competitive relationship. The European Union considers that the situation in the present case is identical and that the Appellate Body should reach the same conclusions, regardless of whether DCRs cover all or only some of the types of equipment used to generate electricity.

5. The European Union further disagrees with India's formalistic reliance on footnote 523 of the Appellate Body Report in *Canada – FIT*, relating to discrimination with respect to inputs. When procuring products, governments may impose certain conditions on inputs or methods of production which add to and are connected to the basic nature of the product purchased. However, the view that the relevant test is of "competitive relationship", as outlined by the Appellate Body, not of "close relationship". Article III:8(a) does not permit the inclusion of origin-related discriminatory requirements in the procurement of goods with respect to other goods which are not the subject-matter of the actual procured product in question and bearing no competitive relationship.

6. The European Union further disagrees with India's interpretation of the distinction made by the Appellate Body in *Canada – FIT* between "procurement" and "purchase". Under Article III:8(a), the connection between "procurement", the "requirements" that "govern" procurement, and the "products purchased" is vital in order to avoid an interpretation of Article III:8(a), like the one suggested by India, that could lead to circumvention of the national treatment obligation.

7. The European Union also disagrees that the procurement under the DCR measures is for all products purchased "for governmental purposes", such as energy security. The terms "governmental purposes" or the "needs of the government" do not refer to public policy objectives as such, but rather to the purchase of goods that will be used by a government, for its own consumption or use in the performance of its functions.

8. Finally, the European Union disagrees with India's interpretation of the phrase "and not with a view to commercial resale or with a view to use in the production of goods for commercial sale". The European Union does not share either India's reliance on any absence of profitability as relevant for the last element in Article III:8(a).

[1] Total words of the submission (including footnotes but excluding the executive summary) = 12,227; total words of the executive summary = 1,182.

9. India also maintains that the Panel erred in finding that the DCR measures were not justified under the general exception in Article XX(j).

10. Some of India's allegations of error connected to Article XX(j) of the GATT 1994 pertain to Article 11 of the DSU. The Appellate Body should thus consider whether the alleged failure to consider some of the arguments raised by India, or the alleged mischaracterisation of India's arguments, reaches the level of a violation of Article 11 of the DSU.

11. Article XX(j) does not entitle WTO Members to an "equitable share" in the global or local *production* of a certain product. Rather, it enables them to adopt certain measures in order to address general or local shortages in the availability of that product. With that in mind, the connection drawn by the Panel between the reference to the *supply* of a product in Article XX(j) and the *demand* for such a product appears appropriate. A separate issue is *where*, i.e. in what geographical area, a product is said to be in short supply. In that respect, the Panel has rightly adopted a flexible interpretation of the terms "general or local" in Article XX(j).

12. India faults the Panel's analysis of whether the DCR measures are essential with mistakenly finding that their objective to ensure that "Indian SPDs have access to a continuous and affordable supply of the solar cells and modules", instead of achieving "energy security, sustainable development and ecologically sustainable growth". The European Union agrees, in principle, that the broader objective informs the more specific objective, and that this should be reflected in the analysis. However, in the context of an analysis of necessity or "essentiality" of a measure under Article XX of the GATT 1994, the narrower the regulatory objective, the likelier it is that the invoking party will prevail.

13. With respect to the international instruments, it appears that India does not take issue with the Panel's interpretation of the legal requirements of Article XX(d) but rather with the Panel's factual assessment. If this understanding is correct, the European Union considers that such a claim would not be properly before the Appellate Body, since India does not appear to have raised an allegation of error under Article 11 of the DSU.

14. With respect to the domestic instruments, the European Union comments on the Panel's general interpretation of the terms "laws or regulations" in Article XX(d).

15. The Appellate Body in *Mexico – Taxes on Soft Drinks* found that "laws and regulations" refers simply to "rules that form part of the domestic legal system of a WTO Member". The Appellate Body has also not demanded absolute certainty regarding the efficiency of the measure or the use of coercion. The European Union is thus not convinced that the terms "laws or regulations" should only cover "legally enforceable rules of conduct" or "mandatory rules applying across-the-board." Domestic laws or regulations may be adopted either by the legislative or by the executive. They may have different kinds of legal effects and need not be fully binding in all situations, yet nevertheless require various governmental bodies of the Member concerned to take compliance action. Finally, it may be appropriate to read several laws or regulations together, even when those laws or regulations are adopted by different levels or branches of government.

ANNEX C-3

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION[1]

1. Japan addresses in its third participant submission the proper legal interpretation of the "government procurement exemption" in GATT 1994 Article III:8(a), as well as the general exceptions in GATT 1994 Article XX(d) and (j) invoked by India.

2. As for the scope of the term "products purchased" under Article III:8(a) of the GATT the Panel correctly determined in this dispute that, just as in *Canada – Renewable Energy/Feed-in Tariff Program*, the product discriminated against by India, by reason of its origin, is *generation equipment* (i.e., solar cells and modules), while *electricity* is the "product purchased". Contrary to India's position, solar cells and modules and electricity are distinguishable. There is no basis to characterize solar cells and modules as "inputs" for solar power generation.

3. Japan submits that even if the Panel were to find that electricity and solar cells and modules were the "products purchased", purchases of electricity by the Government of India under the JNNSM Programme cannot be viewed as purchases "for governmental purposes" under Article III:8(a).

4. Article XX(j) cannot be applied to the DCR Measures. According to the terms, context, as well as negotiating history of Article XX(j), this article addresses only export measures that restrict access to, and secure an equitable share of, the supply of a product.

5. India's argument that the acquisition of solar cells and modules is "essential" to India's policy objective of energy security is premised on the false proposition that "general or local short supply" applies to the lack of domestic manufacturing capacity and simply assumes that the DCR measures are *for* the acquisition of a product in short supply. The "acquisition" of the products is the objective with which the "essential" relationship with the DCR must be established; the "acquisition" of the products need not be shown to be "essential" to some other broader policy objectives.

6. As regards reasonably available alternatives, even if one were to assume that, in ensuring that the development of solar power would not be entirely dependent on the importation of cells and modules, India were pursuing a legitimate policy objective for purposes of GATT 1994 Article XX, it could have provided WTO-consistent subsidies to manufacturers of such cells and modules instead of imposing DCR requirements.

7. Article XX(d) cannot be applied to the DCR Measures either. First, the fact that an international instrument "forms the basis for executive action" in a WTO Member does not determine whether such instrument has direct effect on the domestic legal system of that Member. Second, whether a particular domestic instrument constitutes "laws or regulations" under Article XX(d) is a matter of WTO law.

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[1] Pursuant to the Guidelines in Respect of Executive Summaries of Written Submissions, WT/AB/23 (March 11, 2015), Japan indicates that this executive summary contains a total of 435 words, and Japan's Third Participant Submission contains 4508 words (including footnotes).

ANNEX D

PROCEDURAL RULING

ANNEX D

PROCEDURAL RULING OF 4 MAY 2016

1. On 20 April 2016, India filed a Notice of Appeal in the above proceedings. In accordance with Rule 26 of the Working Procedures for Appellate Review (Working Procedures), a Working Schedule for Appeal was drawn up by the Appellate Body Division hearing this appeal and circulated to the participants and the third parties on 22 April 2016.

2. On 2 May 2016, the Division received a letter from the United States requesting an extension of the deadline for the filing of its appellee submission in these proceedings. The United States noted that its appellee submission in another pending appellate proceeding, namely, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea* (DS464), is also due on 9 May 2016, i.e. the same day as for the filing of its appellee submission in the present proceedings. 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 submissions to be prepared for the Divisions and to be served on the participants and third parties in these two disputes. The United States therefore requested that the deadline for the filing of the appellee submission be extended by one day, such that it would be due on 10 May 2016.

3. On 3 May 2016, we invited India and the third parties to comment by 12 noon today on the United States' request. We received no objections to the United States' request. Norway submitted that if the United States' request were granted, the deadline for the filing of third participants' submissions should similarly be extended to ensure that third participants can contribute in an informed and efficient manner in the appellate proceedings.

4. We consider the reasons identified by the United States, in particular the need for the United States to file appellee submissions in two separate appeal proceedings on the same day, to be relevant factors in our 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. As a further relevant consideration, we note that India and the third participants have not raised any objection to the United States' request.[1]

5. In these circumstances, the Division has decided to extend the deadline for the United States to file its appellee submission by one day to Tuesday, 10 May 2016.

6. Furthermore, we recall that the third participants' submissions under the original Working Schedule would have been due on Wednesday, 11 May 2016, i.e. one day after the revised deadline for the filing of the appellee's submission. In order to provide the third participants sufficient time to incorporate reactions to the appellee submission into their third participants' submissions, the Division has decided, pursuant to Rule 16 of the Working Procedures, to extend the deadline for the filing of the third participants' submissions and third participants' notifications to Thursday, 12 May 2016.

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[1] See in this regard Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 11.