US & Multilateral Trade and Policy Developments

Japan External Trade Organization

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Contents

US General Trade Policy Highlights

House Ways and Means Committee Requests Section 332 Investigation on Factors Affecting the US Aluminum Industry

On February 24, 2016, the House Ways and Means Committee requested that the US International Trade Commission (ITC) conduct a general fact-finding investigation and provide a report on the factors affecting the global competitiveness of the US aluminum industry. The request, submitted pursuant to Section 332 of the *Tariff Act of 1930*, is likely the result of pressure from US lawmakers and aluminum producers who have expressed concerns in recent months about the impact of subsidies allegedly being provided to foreign aluminum producers. Depending on its findings, the ITC's investigation could presage further US government actions, such as trade remedy investigations or dispute settlement proceedings at the WTO.

The Ways and Means Committee letter requests that the ITC provide an overview of the aluminium industry in the United States and other major global producing and exporting countries, as well as analyses of the following issues:

- **Subsidies.** The Committee letter requests "a qualitative and, to the extent possible, quantitative assessment of the impact of government policies and programs in major foreign aluminum producing and exporting countries on their aluminum production, exports, consumption, and domestic prices, as well as on the US aluminum industry and on aluminum markets worldwide." An accompanying press statement from the Committee emphasizes that Members of Congress are particularly concerned about "the impact of subsidies being provided to foreign aluminum producers."

- **Capacity increases.** The letter requests that the ITC examine countries in which unwrought aluminum capacity has significantly increased to identify factors driving those capacity and related production changes.

- **Other competitive factors.** Also requested is an analysis of the competitive strengths and weaknesses of aluminum production and exports in the United States and other major producing and exporting countries, including factors such as industry structure, input prices and availability, energy costs, and exchange rates, as well as government policies and programs that directly or indirectly affect aluminum production and exportation.

- **Transshipment.** The letter requests information on recent trends and developments in the global market for aluminum, including US and other major foreign producer imports and exports, and trade flows through third countries for further processing and subsequent exports.

The Committee's request likely was prompted by a February 12 letter from the 43-member Congressional Aluminum Caucus, which urged Committee Chairman Kevin Brady (R-TX) and Ranking Member Sander Levin (D-MI) to request the Section 332 investigation. The Aluminum Caucus letter expresses particular concern about recent aluminum and production capacity increases in China, noting that China "has gone from producing 10 percent of global supply to more than 50 percent during the past 10 years[.]" Furthermore, the letter contends that this trend is partially responsible for the recent closure of several US aluminum production facilities.

In recent months, US aluminum producers have pressured Congress and the Obama administration to address alleged foreign subsidies and overcapacity in the aluminum sector, focusing in particular on China. These efforts included the formation of a "China Trade Task Force" comprised of US aluminum producers, which has alleged that China's policies in the aluminum sector are inconsistent with its WTO commitments. In November 2015, the task force urged US Trade Representative (USTR) Michael Froman to initiate dispute settlement proceedings against China at the WTO. Depending on the findings of the ITC's investigation, the resulting report could serve as support for US government allegations of potential violations of WTO commitments by China or other countries. Such findings or US government actions are far from certain, however.

The Ways and Means Committee has requested that the ITC focus its investigation on the period of 2011 to 2015 and make its report publicly available before July 2017.

USTR Publishes List of Products That May Lose GSP Benefits on July 1, 2016

On February 26, 2016, the Office of the US Trade Representative (USTR) published a list of products that exceeded competitive need limitations (CNLs) during the 2015 calendar year, and therefore will become ineligible for duty-free treatment under the US Generalized System of Preferences (GSP) on July 1, 2016 unless USTR grants a waiver for the product in response to a petition filed by an interested party. In addition, USTR published (i) a list of GSP-eligible products that exceeded CNLs in 2015 but are eligible for *de minimis* waivers; and (ii) a list of GSP-eligible articles that are currently not receiving GSP duty-free treatment, but that may be considered for GSP redesignation based on 2015 trade data and consideration of certain statutory factors.[1]

CNLs exceeded in 2015

The GSP statute provides that a beneficiary developing country (BDC) is to lose its GSP eligibility with respect to a product if a CNL is exceeded and no waiver is granted. CNLs are exceeded when US imports of a GSP-eligible product from a BDC during a calendar year (i) account for 50 percent or more of the value of total US imports of that product ("percentage-based CNL"); or (ii) exceed a specified dollar value (USD 170 million in 2015). USTR has determined that the products listed below exceeded CNLs in 2015. As a result, these products will become ineligible for duty-free treatment on July 1, 2016 unless (i) an interested party has filed a petition for a CNL waiver with respect to the product; and (ii) USTR decides to issue such a waiver.

HTS	Brief Description	BDC	2015 Imports from BDC	Share of 2015 Imports	Petition Filed
0804.10.60	Dates, fresh or dried, whole, without pits, packed in units weighing over 4.6kg	Tunisia	$16,768,861	52.60%	Yes
2102.20.60	Single-cell micro-organisms, dead, excluding yeasts, (but not including vaccines of heading 3002)	Brazil	$28,284,207	52.40%	Yes
2202.90.36	Single fruit or vegetable juice (other than orange), fortified with vitamins or minerals, not concentrated	Philippines	$23,464,363	89.40%	No
2202.90.90	Nonalcoholic beverages, nesi, not including fruit or vegetable juices of heading 2009	Thailand	$174,077,585	29.60%	Yes
7325.91.00	Iron or steel, cast grinding balls and similar articles for mills	India	$15,874,146	61.80%	No

[1] Click **here** for USTR's *Federal Register* notice containing instructions for the submission of public comments.

HTS	Brief Description	BDC	2015 Imports from BDC	Share of 2015 Imports	Petition Filed
8708.50.95	Pts. & access. of motor vehicle of 8701, nesoi, 8702 and 8704-8705, half-shafts	India	$16,014,111	52.80%	Yes

Articles eligible for *de minimis* waivers

USTR may also provide a CNL waiver for an article that has exceeded the percentage-based CNL if total US imports of that product from all countries are "*de minimis*". The *de minimis* level for 2015 is USD 22.5 million. Based on 2015 trade data, USTR has compiled a list of more than 100 articles that are eligible for *de minimis* waivers. This list, which consists mainly of agricultural products, chemicals, and textiles, can be found **here** under "List II." USTR will automatically consider providing *de minimis* waivers for all of the listed articles. *De minimis* waivers cannot be requested by petition; however, USTR is accepting public comments (including comments in support of or in opposition to such waivers) until April 1, 2016.

Articles eligible for redesignation

Under the GSP statute, if imports of an eligible article from a BDC ceased to receive duty-free treatment due to exceeding a CNL in a prior year, USTR may, subject to certain considerations, redesignate such an article for duty-free treatment if imports in the most recently completed calendar year did not exceed the CNLs. When determining whether to redesignate articles, USTR will consider factors such as (i) the impact of the redesignation on the economic development of the BDC; (ii) the impact of the redesignation on US producers of like products; and (iii) the extent of the BDCs competitiveness with respect to the eligible article.

The articles that USTR will consider for redesignation in 2016 can be found under "List III" of the attached USTR document. Redesignation determinations are not subject to a petition process, but USTR will review any possible redesignations. USTR is accepting public comments (including comments in support of or in opposition to such redesignations) until April 1, 2016. Products that are redesignated by USTR will become eligible for duty-free treatment on July 1, 2016.

Free Trade Agreement Highlights

United States Launches Two Economic Initiatives with ASEAN During California Summit

On February 15-16, 2016, US and ASEAN Leaders met in Sunnylands, California for the 3rd US-ASEAN Summit. On this occasion, US President Barack Obama and his administration announced two new initiatives to deepen trade and economic engagement with ASEAN – the US-ASEAN Connect initiative and a TPP accession-training workshop.[2]

According to President Obama, the US-ASEAN Connect initiative is a "a network of hubs across the region to better coordinate our economic engagement and connect more of our entrepreneurs, investors and businesses with each other." Specifically, the initiative comprises the following four working pillars to support ASEAN economic integration and facilitate trade.

1. Business Connect supports increased commercial engagement in specific sectors such as infrastructure and information and communications technology.

2. Energy Connect will assist in the development of power sectors in ASEAN built around sustainable, efficient and innovative technologies.

[2] Click **here** for the US-ASEAN Joint Statement.

3. Innovation Connect aims to support Southeast Asia's emerging entrepreneurial ecosystem.

4. Policy Connect focuses on supporting ASEAN countries in creating a policy environment conductive to greater trade and investment, innovation and sustainable growth, including through capacity-building and technical support.

The moniker "Connect" used by the United States when creating the initiative is likely no coincidence given ASEAN's own efforts with the Master Plan on ASEAN Connectivity (MPAC). The MPAC plan of action aims to enhance ASEAN's physical infrastructure, institutions and people-to-people relations, all of which are also focus areas under the US-ASEAN Connect initiative. In this regard, the US-ASEAN Connect initiative resonates well with the vision of ASEAN Connectivity and is likely to give ASEAN's efforts a boost in implementation, especially when implementation of the MPAC faces the lack of resources (*e.g.*, funding and interest).

To support the implementation of the US-ASEAN Connect initiative, the US government will establish a network of three "Connect Centers" in Jakarta, Singapore and Bangkok responsible for focusing and coordinating US government resources on economic engagement. The Jakarta Center will be a part of the US Mission to ASEAN, while the Singapore Center will involve the US Department of Commerce's ASEAN regional office and the Bangkok Center will comprise the regional offices of the US Overseas Private Investment Corporation (OPIC), the US Trade Development Agency (USTDA), and the US Agency for International Development (USAID). In this regard, the US-ASEAN Connect initiative can be viewed as a means to consolidate existing and future US economic engagement with ASEAN within a single framework. Current efforts by the US government to engage ASEAN and its Member States are generally isolated and managed within the specific jurisdictions of respective US agencies.

According to US Secretary of Commerce Penny Pritzker, the United States also launched a new workshop series with ASEAN to help interested parties "to understand the provisions and requirements of TPP because a number of countries have expressed interest in joining [the] Trans-Pacific Partnership (TPP)." The workshop will focus on educating government officials on the terms of the TPP as well as the domestic reforms needed to join the TPP. Indonesia, the Philippines and Thailand have expressed an interest in the TPP, and thus the workshop will initially focus on these countries. Whether Cambodia, Laos and Myanmar will be beneficiaries of these workshops remains unclear as they are not members of APEC (a prerequisite to join the TPP).

Lastly, the fact that the US-ASEAN Summit was held in Sunnylands, California may be attributed to the significance the United States places with respect to its engagement with ASEAN. In June 2013, US President Barack Obama met with Chinese President Xi Jinping in the same venue for one of the highest-level meetings between the two nations. Holding the US-ASEAN Summit in Sunnylands effectively places ASEAN on par with China in terms of diplomat importance in the perspectives of the US government.

ASEAN and United States Hold TIFA Meeting to Discuss TPP Training Workshop and US-ASEAN Connect; United States Deepens Engagement with Laos and Cambodia

On February 19, 2015, trade ministers from the United States and ASEAN met in San Francisco for the US-ASEAN Trade and Investment Framework Arrangement (TIFA) Joint Council Meeting. According to a press release from the Office of the United States Trade Representative (USTR), the ministers discussed the US initiative in launching a new series of US-ASEAN trade workshops to help ASEAN countries better understand the commitments of the Trans Pacific Partnership (TPP) as well as US President Barak Obama's announcement of US-ASEAN Connect.[3]

The TPP training workshop has received the support from Indonesian Minister for Trade Thomas Lembong. Thus far, Indonesia, the Philippines and Thailand have publicly expressed an interest in the TPP and are likely to be the initial beneficiaries of the workshop. Meanwhile, the US government will establish a network of three "Connect Centers" in Jakarta, Singapore and Bangkok responsible for focusing and coordinating US government resources under the US-ASEAN Connect initiative. The US-ASEAN Connect initiative consolidates existing and future US economic

[3] Click **here** for the press release on the US-ASEAN TIFA and **here** on the US-Laos TIFA.

engagement with ASEAN within a single framework as current efforts by the US government to engage ASEAN and its Member States are generally isolated and managed within the specific jurisdictions of respective US agencies.

On the sidelines of the broader US-ASEAN engagement, the United States and Laos signed a bilateral Trade and Investment Framework Agreement (TIFA). The TIFA creates a forum for the United States and Laos to engage on bilateral trade and investment issues, such as intellectual property, labor, environment, and capacity building, as well as to coordinate on multilateral and regional issues.

In addition, shortly prior to the visit of the ASEAN delegation to the United States, a US-Cambodia TIFA[4] meeting in Phnom Penh comprised discussions towards exploring a potential bilateral investment treaty (BIT). A spokesperson from the US Embassy in Phnom Penh stressed, however, that discussions are in their early stages. The meeting also reportedly involved Cambodia's implementation of its WTO commitments on customs, e-commerce, and sanitary and phytosanitary measures, of which the United States is urging for expedited action to facilitate US investment into the country.

Notably, US efforts with Laos and Cambodia are in line with broader efforts to deepen its specific engagement with the Lower Mekong region. Under the US Lower Mekong Initiative, the Obama Administration has prioritized the promotion of inclusive economic growth with partner countries (*i.e.*, Cambodia, Laos, Myanmar, Thailand, and Vietnam). Improving the trading environment in the Lower Mekong is one cross-cutting element in the initiative that aims to address the development gap in this sub-region of ASEAN, which is envisioned to support broader ASEAN economic integration by improving the capacities of these countries. According to statistics provided by USTR, two-way goods trade between the United States and ASEAN Member States reached USD 227 billion in 2015, marking a 47 percent increase since 2009. Meanwhile, US services exports to ASEAN totaled USD 22.6 billion in 2014, an increase of 4.1 percent from the previous year.

Multilateral Policy Highlights

Study: Maximizing the Opportunities Created by the Internet for International Trade

A joint study by the World Economic Forum and the International Centre for Trade and Sustainable Development has proposed that the World Trade Organization should develop a new Agreement devoted to digital trade, with the objective of harmonizing regulations, reducing barriers to internet access and unleashing the huge potential for growth of trade over the internet.[5] This proposal is the most striking of 18 "policy options" or recommendations addressed to governments and the private sector by a group of senior trade policy analysts and experts on the digital economy. The study targets an issue that is of growing relevance to the global economy but that has not been adequately addressed in the multilateral trading system. Nevertheless, the study's recommendations to the World Trade Organization likely will not be addressed there in the near future.

Overview

The study forms part of a comprehensive review of the evolution of the global trade and investment system known as the E15 Initiative. The study's starting point is the phenomenal worldwide growth in internet access and its implications for international trade, productivity, economic growth and employment. Its message is the need to create an enabling environment for digital trade, to ensure that the opportunities created by the internet are fully exploited and not frustrated by conflicting regulations, inadequate infrastructure or protectionism. A key concern is the free flow of data across borders, which is currently threatened by the spread of data localization requirements in the name of privacy protection.

[4] Cambodia and the United States signed the TIFA on July 12, 2006.

[5] Click **here** for a copy of the WEF study.

Digital Trade and the WTO

Most of the study's policy recommendations are addressed to WTO Members, with a view to updating and expanding the body of WTO rules that relate to digital trade, which has become substantial. WTO Members already have obligations on e-commerce, telecommunications services and data flows, notably through the General Agreement on Trade in Services, but they are not systematized and pre-date the technological revolution of the past 20 years. Thus, for example, the study recommends updating the seminal Reference Paper on basic telecommunications, to reflect technological changes and ensure fair competition over the internet as well as over traditional telephone networks. It also recommends clarifying the scope of existing GATS commitments and their consistency with current policies affecting digital trade, and a "firm commitment" to allow cross-border data flows. The study also proposes that the Trade Facilitation Agreement should be updated, notably by addressing the cost and disruption caused by de minimis customs duties on low-value goods.

Most notably, the study proposes the negotiation of an Agreement on digital trade in the WTO – a "plurilateral" agreement negotiated among a critical mass of willing participants but whose benefits might be extended to all WTO Members on a Most Favoured Nation (MFN) basis. Such an agreement could cover, inter alia, commitments to allow cross-border data flows, to observe a set of digital trade principles, not to impose customs duties on trade in digital products, and not to discriminate in favour of national suppliers or products. Such rules have been negotiated in various Free Trade Agreements to which the United States is a party and in the recently-signed Trans-Pacific Partnership (TPP); they also are under negotiation in the US-EU Transatlantic Trade and Investment Partnership (TTIP) and the plurilateral International Agreement on Trade in Services (TiSA). An important objective of such an agreement in the WTO would be to prevent the entrenchment and growth of the "digital divide" between advanced and developing countries.

Some of the study's recommendations are concerned with improved cooperation between governments and the private sector, the most interesting of these being that a dispute settlement system should be developed, outside the WTO, to handle cross-border disputes between businesses and consumers, as previously recommended by the OECD and already operated by eBay.

Outlook

It is not expected that these recommendations to the WTO will be addressed, much less implemented, in the short term. The introduction of new subjects into the WTO agenda is still contentious, with some developing countries likely to insist that outstanding issues from the Doha Round must be resolved before new issues are entertained. This debate may delay progress, but it is nevertheless outdated. It was agreed at the Nairobi Ministerial Conference in December that major issues such as agriculture and tariffs will remain on the negotiating agenda, but the Doha Round itself, as a legal framework and a closed agenda for negotiations, is dead. In order to remain relevant, the WTO must and will address the new issues that preoccupy business and are being negotiated in preferential trade agreements all over the world. The digital economy is certainly one of the most important of these, and for this reason the publication of this study is well-timed.

WTO Publishes Terms of Ukraine's Accession to Government Procurement Agreement

The terms of accession of the Ukraine to the WTO Government Procurement Agreement (GPA) have recently become available, revealing that Ukraine has accepted low thresholds for its procurement and comprehensive coverage of all of its state-owned enterprises (SOEs). This appears to have become the accepted standard for the accession of new members to the GPA, and Members acceding in the future might have to match that standard with only limited scope to negotiate exceptions or exemptions.

The case of Ukraine highlights why other GPA members consider China's latest accession offer to be inadequate, because China's offer falls well short of that standard. Further negotiations with China might provide insights into how much flexibility GPA members are willing to accept in order to gain access to China's large domestic procurement market.

Ukraine has accepted the following thresholds (the minimum amount of a procurement contract that would require it to be open to bids from other GPA members), measured in Special Drawing Rights (SDRs):

Type of Entity	Goods	Services	Construction Services
Central Government Entities	130,000	130,000	5,000,000
Sub-Central Government Entities	200,000	200,000	5,000,000
Other Entities (Including SOEs)	400,000	400,000	5,000,000

These thresholds are the same that apply to all other members of the revised GPA. In its latest (5th) offer, China proposed that its sub-central government entities and SOEs should have a threshold for goods and services of SDR 355,000 and a threshold for construction services of SDR 15,000,000, and furthermore that the thresholds should be phased in over three years. Other GPA members have rejected China's offer as being inadequate.

Ukraine has accepted comprehensive coverage of its public entities that will be subject to the GPA, including all of its SOEs, with no exclusions. An SOE is defined as any undertaking in which the public authorities have more than 50 percent in the authorized capital, or a majority of votes on the governing body, or the right to appoint more than half of the executive or supervisory body, *and/or* which possesses a special or exclusive right granted by the public authorities that restricts others from engaging in activities in the area in which the SOE operates. The main stumbling block in China's negotiation of its GPA accession has been its reluctance to include the bulk of its SOEs in its offer.

A copy of Ukraine's accession document is attached for reference.

GPA Members Urge China to Submit Revised Accession Offer in 2016

China has failed to revise its latest offer in the context of its accession to the WTO Government Procurement Agreement (GPA), and it now appears unlikely that China's accession process will progress before the end of this year. China's terms of accession to the GPA will have implications for the possible accession of other WTO members, in particular with respect to coverage of state-owned enterprises (SOEs). GPA members have been reluctant in the past few years to pressure other high profile countries to begin the GPA accession process until the case of China is settled but, with attention in the WTO turning from the Doha Round to opportunities to advance plurilateral negotiations, the United States and the European Union may expect other Members to start to take a more active stance towards their GPA accession.

China's latest offer (its fifth) of thresholds and coverage in its GPA accession process was tabled at the end of 2014. It was considered to fall well short of expectations by the United States and the EU, in particular, and rejected. In that offer, China proposed that its thresholds (the minimum amount of a purchase contract that would require the contract to be opened up to bids from all GPA members) should be phased in over a three-year period instead of entering into force at once, and it failed to include the majority of its SOEs in the proposed coverage (*i.e.*, those of its public sector entities whose purchases would be subject to the disciplines of the GPA). China's failure to include some of its largest SOEs in its offer was viewed by other GPA members as being the main factor that made the offer unacceptable.

China had been encouraged by GPA members to table an improved offer before the end of 2015, but it failed to do so. At the recent GPA Committee meeting on February 17, China said that it had a sincere desire to join the GPA and that it would work to improve its fifth offer but that current economic conditions prevented it from doing so now. China referred in particular to efforts to reform its SOEs and to the difficulties that many of its SOEs were facing due to the slowdown in its GDP growth. The United States and the EU expressed serious disappointment at the delay in receiving a revised offer and said that they expected China to table a new offer before the end of 2016. China did not agree to any deadline.

At the most recent meeting of the GPA Committee, GPA members continued their examination of the accession offers from Australia, the Kyrgyz Republic and Tajikistan, all of which are considered to be progressing satisfactorily.

WTO Panel Finds That Indian Local Content Requirements for Solar Cells and Modules Violate GATT, TRIMs Agreement

Executive Summary

A WTO Panel has ruled that local content requirements maintained by India for solar cells and modules violate India's national treatment obligations under the General Agreement on Tariffs and Trade (GATT) 1994 and the WTO Agreement on Trade-Related Investment Measures (TRIMs). This decision marks the first time that a WTO Member has sought to justify a WTO violation by pointing to its international obligations on climate change. This argument was rejected by the WTO Panel.

India invoked the United Nations Framework Convention on Climate Change (UNFCCC) as part of its defence under the exception provided for in GATT Article XX(d). GATT Article XX(d) allows WTO Members to maintain measures "necessary to secure compliance" with GATT-consistent "laws or regulations". Among other things, India pointed its international legal obligations, including the UNFCCC. India also argued that it argued that it had "an obligation to take steps to achieve energy security, mitigate climate change, and achieve sustainable development, and that this includes steps to ensure the adequate supply of clean electricity, generated from solar power, at reasonable prices".

The UNFCCC argument foundered on the definition of what constituted "laws or regulations" under the exception provided in Article XX(d). Drawing on prior Appellate Body precedent, the Panel found that the term "laws or regulations" applied only to domestic laws, not international treaties. It also pointed to the Appellate Body's statement that international agreements could only be considered to constitute "laws or regulations" if they had been "incorporated, or have 'direct effect', within a Member's domestic legal system". The Panel found that international treaties did not have direct effect in India and so dismissed the Article XX(d) defence.

Even if international agreements did have direct effect in India, this defence would nevertheless have likely failed, as it would be very difficult to establish that local content requirements are "necessary to secure compliance" with the UNFCCC. The UNFCCC imposes relatively few hard commitments, particularly on developing countries. Indeed, the UNFCCC provisions cited by India in its Article XX(d) defence commit all Parties to formulate "national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing …emissions" of greenhouse gases, and "measures to facilitate adequate adaptation to climate change", and to "[t]ake climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions…." It would be virtually impossible to establish that local content requirements are necessary to "secure compliance" with such general provisions.

This case is also the first time that a WTO Member has invoked GATT Article XX(j) as a defence, a provision that could allow measures "essential to the acquisition or distribution of products in general or local short supply".

Article XX(j), as the Panel noted, was "originally intended to remain in force only for a specified three-year transitional period to deal with shortages that existed following World War II". Although the provision was retained in the GATT, it was virtually a dead letter until invoked by India in the present dispute.

The Panel rejected India's argument that "solar cells and modules are 'products in general or local short supply' in India on account of its lack of domestic manufacturing capacity". India acknowledged that the quantity of solar cells and modules available from all sources, both imported and domestic, was sufficient to meet the demand of Indian solar power developers. The Panel found that the provision did not refer to "products in respect of which there merely is a lack of domestic manufacturing capacity".

Thus, Article XX(j) – awoken from its decades-long slumber – has been interpreted in a narrow way, and seems doubtful that it will be invoked in future disputes. It is likely that this provision will return to its prior state of dormancy in the GATT.

Factual Background: India's National Solar Mission and the local content requirements

This dispute arose from certain local content requirements imposed by India under the Jawaharlal Nehru National Solar Mission, which was established by the Indian government in 2010. The objective of the National Solar Mission 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". It also seeks to make a "major contribution by India to the global effort to meet the challenges of climate change".

In order to promote solar power capacity, the Indian government enters into long-term power purchase agreements with solar power developers, providing a guaranteed rate for a 25-year term. The power developers are in turn subject to mandatory domestic content requirements, obligating them to use certain Indian-manufactured cells and modules.

National treatment: violations of the GATT and the TRIMs Agreement

The United States argued that the local content requirements violated India's national treatment obligations under GATT Article III and the TRIMs Agreement.

GATT Article III:4 provides in part that imported products must be accorded "treatment no less favourable" than that accorded to "like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

Article 2 of the TRIMs Agreement provides that "no Member shall apply any TRIM that is inconsistent with the provisions of Article III… of GATT 1994". The TRIMs Agreement sets out an "illustrative list" of TRIMs considered to be inconsistent with GATT Article III:4, including "those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require…the purchase or use by an enterprise of products of domestic origin or from any domestic source…."

The Panel first determined that India's domestic content requirements for solar cells and modules should be considered as trade-related investment measures. It agreed with the rulings of earlier panels that "if [the] measures are local content requirements, they would necessarily be 'trade-related' because such requirements, by definition, always favour the use of domestic products over imported products, and therefore affect trade". It then found that the Indian measure required "the purchase or use by an enterprise of products of domestic origin or from any domestic source" within the meaning of the TRIMs Agreement. These provisions were also "mandatory or enforceable" under Indian law.

Therefore the Panel found that these local content requirements violated India's obligations under both the TRIMs Agreement and GATT Article III:4.

"Government procurement carve-out" inapplicable

India sought to justify its solar local content requirements by recourse to the so-called "government procurement carve-out" under GATT Article III:8(a). This provision states that the national treatment disciplines of GATT Article III "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."

In the 2013 case of *Canada – Renewable Energy/Feed-In Tariff Program*, Canada unsuccessfully invoked this provision to seek to justify a similar measure maintained by Ontario. The Appellate Body rejected Canada's defence, finding that "the product being procured is electricity, whereas the product discriminated against for reason of its origin is generation equipment". The Appellate Body concluded that "[t]hese two products are not in a competitive relationship", and therefore Article III:8(a) did not apply.

Citing this precedent, the United States argued in the current case that "the product procured (electricity) is not in a competitive relationship with the product being discriminated against (solar cells and modules), and… such discrimination is therefore not covered by the derogation of Article III:8(a)". The Panel agreed, finding that the challenged Indian measures were not "distinguishable in any relevant respect" from the Canadian provisions examined earlier by the Appellate Body. Therefore, the Panel concluded that the Indian local content requirements for solar cells and modules were "not covered by the derogation of Article III:8(a)".

India's overarching arguments on energy security and climate change

India argued that its local content requirements could nevertheless be upheld under the exceptions provided for in GATT Article XX(j) and XX(d). Before turning to the specifics of those provisions, India advanced a "general underlying argument" that applied to both. It argued that it had "an obligation to take steps to achieve energy security, mitigate climate change, and achieve sustainable development, and that this includes steps to ensure the adequate supply of clean electricity, generated from solar power, at reasonable prices". India asserted that this would "reduce its reliance on imported oil and coal". More specifically, India argued that it was "necessary to ensure that there is an adequate reserve of domestic manufacturing capacity for solar cells and modules in case there is a disruption in supply of foreign solar cells and modules".

GATT Article XX(j): Panel rejects India's defence on products in "short supply"

India then invoked the exception of Article XX(j), arguing that "solar cells and modules are 'products in general or local short supply' in India on account of its lack of domestic manufacturing capacity". It added that "the risk of [solar power developers] being unable to access these products makes them 'products in general or local short supply' in India" [original emphasis].

The Panel began its analysis of this issue by noting that it would proceed on the understanding that solar cells and modules were the products claimed to be in "general or local short supply". It also remarked that "the general exception contained in Article XX(j) has never been invoked as a defence before a GATT/WTO dispute settlement panel".

The Panel interpreted the term "products in general or local short supply" to refer to "a situation in which the quantity of available supply of a product does not meet demand in the relevant geographical area or market". It observed that "the words 'products in general or local short supply' do not refer to 'products of national origin in general or local short supply'" [original emphasis]. The Panel considered that "the effect of adopting India's interpretation of Article XX(j) would be tantamount to interpreting the words 'products in general or local short supply', in the first part of Article XX(j), as though they meant 'products in general or local short *production*'" [original emphasis]. The Panel rejected such an interpretation.

The Panel thus concluded that the term "products in general or local short supply" did not refer to "products in respect of which there merely is a lack of domestic manufacturing capacity". It added that "India has not argued that the quantity of solar cells and modules available from all sources, i.e. both international and domestic, is inadequate to meet the demand" of Indian solar power developers.

It also ruled that "the terms 'products in general or local short supply' do not cover products at risk of becoming in short supply" [original emphasis]. It added that "even assuming for the sake of argument" that the term 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".

For these reasons, the Panel ruled that "solar cells and modules are not 'products in general or local short supply' in India". It found that the local content requirements could therefore not be justified under GATT Article XX(j).

GATT Article XX(d): Panel rejects India's defence on "securing compliance" with international and domestic laws

The Panel began its analysis on the Article XX(d) defence by noting that it was now "well established" in the jurisprudence that this exception "contains two cumulative requirements: first, it must be shown that the challenged measure is 'designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994; second, it must be shown that the measure is 'necessary' to secure such compliance".

India argued that its local content requirements for solar cells and modules were justified under Article XX(d) because they were "integral to its compliance with both domestic and international law obligations to ensure ecologically sustainable growth while addressing India's energy security challenge, and ensuring compliance with its obligations relating to climate change".

India first pointed to its "international law obligations … embodied in various international instruments", i.e., "(a) the preamble of the WTO Agreement; (b) the United Nations Framework Convention on Climate Change; (c) the Rio Declaration on Environment and Development; and (d) the United Nations General Assembly Resolution adopting the Rio+20 Document: The Future We Want, adopted by the United Nations General Assembly in 2012".

The Panel did not consider such instruments to be "law and regulations" within the meaning of GATT Article XX(d). The Panel referred to the 2006 ruling of the Appellate Body in *Mexico – Taxes on Soft Drinks*, which interpreted the term "laws or regulations" to refer to "rules that form part of the domestic legal system of a WTO Member" as well as "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". In the current case, the Panel found that "India has failed to meet its burden of demonstrating that any of the international instruments at issue have 'direct effect' in India". Accordingly, the international instruments cited by India could not be "considered 'laws or regulations' within the meaning of Article XX(d).

The domestic laws cited by India similarly failed to meet the requirements of Article XX(d). The Panel found that the term "laws or regulations" referred to "legally enforceable rules of conduct under the domestic legal system of the WTO Member concerned, and do not include general objectives". The Panel found that most of the domestic instruments cited by India were not "legally enforceable, either as against the Government or any other entity". Instead, they set out broad policy objectives.

The Panel found one instrument, a provision in India's Electricity Act, to be a "law or regulation" within the meaning of Article XX(d), but it considered that India failed to demonstrate that the local content requirements were measures "to secure compliance" with it. It dismissed India's defence under Article XX(d).

Therefore, the Panel confirmed that India's local content requirements for solar cells and modules violated India's national treatment obligations under the GATT and the TRIMs Agreement, and were not justified under GATT Article XX(j) or (d).

The Report of the WTO Panel in *India – Certain Measures Relating to Solar Cells and Solar Modules* (DS456) was released on February 24, 2016.

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