

# The "Necessity Test" as Expressed by the Enigmatic Article XX(j) of the *General Agreement on Tariffs and Trade* (1994): Appellate Body Report, *India - Certain Measures Relating to Solar Cells and Solar Modules*



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### Abstract

The *General Agreement on Tariffs and Trade* (1994) (GATT) is premised on the elimination of all barriers to trade in goods. Contrary to this approach, Article XX of the GATT authorises the circumvention of this imperative. More specifically, Article XX(j) of the GATT essentially provides that GATT contracting parties are authorised to promulgate measures that are "essential" to the acquisition of products in general or local short supply. This invariably means that only measures that are "essential" will satisfy the "necessity test" contemplated under Article XX(j). The Appellate Body Report, *India - Certain Measures Relating to Solar Cells and Solar Modules* is the first World Trade Organisation case to elaborate on the "necessity test" of Article XX(j) of the GATT. This paper seeks to evaluate the Appellate Body's findings on the "necessity test" of Article XX(j).

### Keywords

Article XX(j) of the GATT; essential; necessary; dispensable; safeguard measures.

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## 1 Introduction

The *General Agreement on Tariffs and Trade* (1994) (GATT) seeks to significantly eliminate barriers to trade and prohibits discriminatory conduct in the international trade of goods. However, Article XX of the GATT provides for "limited and conditional exceptions" that permit the circumvention of the GATT rules on specific grounds.<sup>1</sup> More specifically, Article XX(j) essentially provides that GATT contracting parties are authorised to promulgate or enforce measures that are essential to the acquisition or distribution of products in general or local short supply. The Appellate Body Report, *India - Certain Measures Relating to Solar Cells and Solar Modules* (hereafter, *AB India Solar Cells*) is the first World Trade Organisation (WTO) case to adjudicate on the scope of the Article XX(j) exception.<sup>2</sup> This paper seeks to assess the findings of this Appellate Body (AB) decision with a specific focus on the "necessity test" as espoused by Article XX(j). In essence, this paper argues that the AB's approach to the "necessity test" in *India Solar Cells* could be found to be unreasonable in that it assumes the same degree of connection or relationship is required by Article XX(j) and Article XX(d) of the GATT, despite the fact that the drafters of Article XX used different terms to articulate the "necessity test" in these two exceptions. This paper also argues that the AB in *India Solar Cells* has restricted the scope of "necessary" measures to those measures that are "indispensable" only.

## 2 The WTO Panel decision in *India Solar Cells*

The impugned measures in this regard were the Domestic Content Requirements (DCR) employed by the government of India, which required that certain types of solar cells and modules used by the solar power developers be made in India.<sup>3</sup> India argued that its DCR measures were justifiable on the basis of Article XX(j) of the GATT. In simple terms, Article XX(j) authorises the promulgation or implementation of measures which are

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<sup>1</sup> Van den Bossche and Zdouc *Law and Policy of the World Trade Organisation* 546.

<sup>2</sup> Appellate Body Report *India - Certain Measures Relating to Solar Cells and Solar Modules* WT/DS456/AB/R (adopted 14 October 2016) (hereafter *AB India Solar Cells*).

<sup>3</sup> WTO Panel Report *India - Certain Measures Relating to Solar Cells and Solar Modules* WT/DS456/R (adopted 14 October 2016) (hereafter *Panel Report India Solar Cells*) para 7.1.

"essential to the acquisition or distribution of products in general or local short supply".<sup>4</sup> In this regard, the issue before the Panel was whether the DCR measures were "essential" or "necessary" within the ambit of Articles XX(j).<sup>5</sup> On this score, the Panel held that the solar cells and modules were not "products in general or local short supply" in India in the manner contemplated by Article XX(j) of the GATT 1994.<sup>6</sup> This was identified by the Panel as the "threshold legal requirement" that needs to be complied with to justify a measure under Articles XX(j).<sup>7</sup> Thus the Panel found it unnecessary to make any further findings on whether the DCR measures are "essential" to the acquisition of solar cells and modules for the purpose of Article XX(j).<sup>8</sup>

Ultimately, the Panel declined to ascertain whether the terms "essential" and "necessary" carry the same meaning and saw its task as that of conducting a "limited analysis and review".<sup>9</sup> However, the Panel identified a set of factors that it deemed crucial for the purpose of determining whether a measure is "essential" or "necessary".<sup>10</sup> First, the Panel held that the standard for determining whether a measure is "essential" under XX(j) is the similar to that for determining whether a measure is "necessary" under Article XX(d).<sup>11</sup> Thus the Panel equated the "necessity test" under Article XX(j) with that of Article XX(d). Second, the Panel accepted the view that the assessment criteria that would have to be applied to evaluate whether a measure is "essential" under Article XX(j) are similar to the two-tier analysis of assessing whether a measure is "necessary" to achieve a stated objective.<sup>12</sup> Consequently, the Panel then held that the first step of a necessity analysis is a comprehensive weighing and balancing process of a number of factors, which should include the significance of the objective, the trade-restrictiveness of the measure, and the contribution of the

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<sup>4</sup> This is subject to the proviso that any such measures must not be in conflict with the principle that all Members have a right to an equitable share of the international supply of such products, and that any such measures which are inconsistent with the other provisions of the *General Agreement on Tariffs and Trade* (1994) (hereafter GATT) must be halted as soon as the conditions that prompted them no longer exist and the chapeau of Article XX which provides that such measures are not applied in a way that would be tantamount to arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

<sup>5</sup> Panel Report *India Solar Cells* para 7.3.4.

<sup>6</sup> Panel Report *India Solar Cells* para 7.334.

<sup>7</sup> Panel Report *India Solar Cells* para 7.334.

<sup>8</sup> Panel Report *India Solar Cells* para 7.334.

<sup>9</sup> Panel Report *India Solar Cells* para 7.335.

<sup>10</sup> Panel Report *India Solar Cells* para 7.345.

<sup>11</sup> Panel Report *India Solar Cells* para 7.350.

<sup>12</sup> Panel Report *India Solar Cells* para 7.350.

measure to the objective.<sup>13</sup> These factors were transplanted from the decisions of the AB in Article XX(d) cases.<sup>14</sup> The second step of the necessity analysis assesses the accessibility of an alternative measure.<sup>15</sup> Consequently, India then filed a notice of appeal on the basis that the Panel erred in its finding that the DCR measures could not be justified under Article XX(j).

### 3 The Appellate Body decision in *India Solar Cells*

On appeal, in respect of Article XX(j), India requested the AB to reverse the Panel's finding that the DCR measures are not justified under Article XX(j) of the GATT 1994 and to conduct the full enquiry under Article XX(j) to assess:<sup>16</sup>

- i. Whether the Panel erred in its interpretation and application of Article XX(j), and under Article 11 of the DSU, in finding that solar cells and modules are not 'products in general or local short supply' in India, and that consequently the DCR measures are not justified under Article XX(j); and
- ii. If the Appellate Body reverses the Panel's finding that solar cells and modules are not 'products in general or local short supply' in India within the meaning of Article XX(j), then whether the Appellate Body can complete the legal analysis and find that the DCR measures meet the requirements for provisional justification under Article XX(j) and satisfy the requirements of the chapeau of Article XX of the GATT 1994.

The focus of this paper is on the first issue: which is the AB's interpretation of the "necessity test" under Article XX(j). To this end, the AB in *India Solar Cells* noted that a finding on whether a measure is "necessary" entails a meticulous and comprehensive evaluation of the nexus between the inconsistent measure and the relevant legislation.<sup>17</sup> Significantly, the AB agreed with the Panel's reasoning that in respect of Article XX(j), the approach for the "necessity" test would be identical to that employed in Article XX(d) cases.<sup>18</sup> In the AB's view, the analytical rigours for the "design" and "necessity" aspects of the assessment envisaged under Article XX(d) must inform Article XX(j).<sup>19</sup> The AB then held that despite the fact that the "design" and "necessity" aspects under Article XX(j) are materially different,

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<sup>13</sup> Panel Report *India Solar Cells* para 7.349.

<sup>14</sup> Appellate Body Report *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef* WT/DS161/AB/R and WT/DS169/AB/R (adopted 10 January 2001) (hereafter *AB Korea Beef*) para 166.

<sup>15</sup> Panel Report *India Solar Cells* para 7.349.

<sup>16</sup> *AB India Solar Cells* para 4b.

<sup>17</sup> *AB India Solar Cells* para 5.59.

<sup>18</sup> *AB India Solar Cells* para 5.60.

<sup>19</sup> *AB India Solar Cells* para 5.60.

they are still symbiotic parts of the necessity test of Article XX(j).<sup>20</sup> Thus the AB held that the way a panel organises its examination of these elements may depend not only on the impugned measure, but also on the manner in which the parties posture their arguments and evidence.<sup>21</sup> On the contrary, it is submitted that judicial officers are compelled to establish the applicable law.<sup>22</sup> The manner in which the argument is "presented" should be peripheral to the substance of the arguments presented. On the whole, it is clear that the AB equated the test for "essential" as postulated in Article XX(j) with that of "necessity" as postulated under Article XX(d) of the GATT.<sup>23</sup> This finding demands that there must be an evaluation of the "necessity test" under Article XX(d).

In essence, Article XX(d) of the GATT provides that GATT contracting parties must be permitted to promulgate or implement any measure "necessary" to secure compliance with legislation which is in accordance with the provisions of the GATT. The evolution of the "necessity test" under Article XX(d) began in the Panel Report, *United States Section 337 of the Tariff Act of 1930 and Amendments thereto*, held that in respect of Article XX(d) one cannot justify a measure that contravenes another GATT provision as "necessary" if an alternative measure which it could reasonably be postulated to use and which does not violate other GATT provisions is at its disposal.<sup>24</sup> The Panel in *United States Section 337* also held that where a measure which in accordance with other GATT provisions is not reasonably accessible, one must, within the measures reasonably within one's disposal, employ the measure which involves the least degree of violation of other GATT provisions.<sup>25</sup> The nub of this dictum was reiterated by the Panel in *United States Measures Affecting Alcoholic and Malt Beverages*.<sup>26</sup> The AB in *Korea Beef* also endorsed the necessity test and its rationale as espoused in the Panel *United States Section 337*.<sup>27</sup> However, the AB found that as employed in Article XX(d), the term "necessary" accommodates various degrees of necessity ranging from "indispensable" to "making a contribution to".<sup>28</sup> Consequently, the AB held

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<sup>20</sup> AB *India Solar Cells* para 5.61.

<sup>21</sup> AB *India Solar Cells* para 5.61.

<sup>22</sup> See Vinti 2016 *PELJ* 15.

<sup>23</sup> See AB *India Solar Cells* para 5.62.

<sup>24</sup> WTO Panel Report *United States Section 337 of the Tariff Act of 1930 and Amendments thereto* L/6439 - 36S/345 (adopted 7 November 1989) (hereafter Panel Report *US Section 337*) para 5.26.

<sup>25</sup> Panel Report *US Section 337* para 5.26.

<sup>26</sup> WTO Panel Report *United States - Measures Affecting Alcoholic and Malt Beverages* DS23/R - 39S/206 (adopted 19 June 1992) para 5.43.

<sup>27</sup> AB *Korea Beef* paras 165-166.

<sup>28</sup> AB *Korea Beef* para 161.

that a "necessary" measure is, in this spectrum, "located significantly closer to the pole of "indispensable" than to the converse pole of simply "making a contribution to".<sup>29</sup> The AB established that this evaluation of whether a measure is necessary under Article XX(d) involves in every case a process of weighing and balancing a number of factors which include the contribution made by the compliance measure to the enforcement of the impugned legislative instrument, the significance of the common interests or values protected by that legislation, and the subsequent effect of the legislation on imports or exports.<sup>30</sup>

In light of these considerations, the AB in *India Solar Cells* held that the evaluation of a defence under Article XX(j) seems to require a preliminary evaluation of the "design" of the measure at issue, including its material provisions and projected application, and must establish that the measure is able to cater for "the acquisition or distribution of products in general or local short supply" as required by Article XX(j).<sup>31</sup> In the case of Article XX(j), one must explore the nexus between the measure and "the acquisition or distribution of products in general or local short supply", whereas in respect of Article XX(d) one must consider the connection between the measure and "securing compliance" with the relevant legislation that is in line with GATT.<sup>32</sup> If the evaluation of the scheme of a measure shows that the measure cannot in respect of Article XX(j) ensure "the acquisition or distribution of products in general or local short supply" or in respect of Article XX(d) secure "compliance with relevant provisions of laws or regulations that are not inconsistent" with the GATT 1994, there is no connection that complies with the requirements of the "design" element.<sup>33</sup> On both grounds, further analysis with regard to whether the measure is "necessary" or "essential" would be futile.<sup>34</sup> This is because there is no basis under Article XX(j) for a measure that does not seek to ensure the "acquisition or distribution of products in general or local short supply", just as there can be no valid basis under Article XX(d) for a measure that is not

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<sup>29</sup> AB *Korea Beef* para 161.

<sup>30</sup> AB *Korea Beef* para 164; Appellate Body Report *Colombia - Measures Relating to the Importation of Textiles, Apparel and Footwear* WT/DS461/26 (adopted 22 June 2016) (hereafter AB *Colombia Textiles*) para 5.71; Appellate Body Report *United States - Measures Affecting the Cross-border Supply of Gambling and Betting Services* WT/DS285/AB/R (adopted 20 April 2005) (hereafter AB *US Gambling*) para 306; Appellate Body Report *European Communities - Measures Affecting Asbestos and Products Containing Asbestos* WT/DS135/AB/R (adopted 5 April 2001) para 172.

<sup>31</sup> AB *India Solar Cells* para 5.60.

<sup>32</sup> AB *India Solar Cells* para 5.60.

<sup>33</sup> AB *India Solar Cells* para 5.60.

<sup>34</sup> AB *India Solar Cells* para 5.60.

intended to secure compliance with relevant legislation that is in accordance with the GATT.<sup>35</sup> Consequently, the AB established that the "necessity test" under Article XX(j), as informed by the necessity test of Article XX(d), requires the weighing and balancing of the following factors, which include:

- a) the extent to which the impugned measure contributes to the achievement of the intended objective;
- b) the relative significance of the societal interest or value that the measure seeks to protect; and
- c) whether the impugned measure obstructs trade.<sup>36</sup>

It must be noted that the AB in *India Solar Cells* held that this list "includes" these factors, which means that the list is not exhaustive of the factors that the AB will examine.<sup>37</sup> In most instances, a comparison between the impugned measure and reasonably accessible alternative measures must then be conducted.<sup>38</sup>

Significantly, the AB in *India Solar Cells* accepted the onerous task of defining the term "essential", which the Panel had declined to do. According to the AB, for a measure to be deemed "essential" under Article XX(j) it needs to be "indispensable", but must amount to something more than simply "making a contribution to".<sup>39</sup> Thus the AB in *India Solar Cells* in part endorsed the necessity test as provided in *Korea Beef*.<sup>40</sup> However, the AB in *India Solar Cells* rejected the lower threshold for the "necessity test" as postulated in *Korea Beef*. This is because in *India Solar Cells* the AB explicitly provided that a measure can be "necessary" only if it is "indispensable". This means that the AB rejected the notion in *Korea Beef* that even a measure that is "dispensable" can still be found to be "necessary". Consequently, the AB in *India Solar Cells* then held that the word "essential" denotes that a measure is "absolutely indispensable or necessary".<sup>41</sup> The AB then explained that the plain meaning of the word "essential" implies that this word is "located at least as close to the "indispensable" end of the continuum as the word "necessary".<sup>42</sup> It can then

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<sup>35</sup> AB *India Solar Cells* para 5.60.

<sup>36</sup> AB *India Solar Cells* para 5.63 read with para 5.59.

<sup>37</sup> AB *India Solar Cells* para 5.59.

<sup>38</sup> AB *India Solar Cells* para 5.59.

<sup>39</sup> AB *India Solar Cells* para 5.62; AB *Korea Beef* para 161.

<sup>40</sup> AB *Korea Beef* para 161.

<sup>41</sup> AB *India Solar Cells* para 5.62.

<sup>42</sup> AB *India Solar Cells* para 5.62.

be seen that the AB in *India Solar Cells* equated the terms "necessary" in Article XX(d) and "essential" located in Article XX(j).

It must be noted that though the AB in *India Solar Cells* made these significant findings on the meaning of the term "necessary" and the requirements for the necessity test under Article XX(j), it did not have the opportunity to decide on whether the DCR measures were "necessary". This is because it is common cause that the assessment of a defence under Article XX of the GATT 1994 involves a two-tier analysis in which an impugned measure must first be initially justified under one of the paragraphs of Article XX, and then proven to be in compliance with the provisions of the chapeau of Article XX.<sup>43</sup> In respect of the first leg of the analysis, it is trite law that for one to provisionally justify a measure under an Article XX exception, two elements must be proved: first, that the measure caters to the specific interest contemplated in that paragraph; and, second, that there is an adequate connection between the measure and the interest protected, which is articulated through terms such as "necessary to" in Article XX(d) and, in respect of Article XX(j), "essential to".<sup>44</sup> The AB in *India Solar Cells* halted the inquiry in the first part of the "two-tier analysis" because India had not proved that the DCR measures "address[ed] the particular interest specified" in Article XX(j). Consequently, the "necessity test" was never conducted in this case. However, the novel finding of the AB, that the necessity test under Article XX(j) is identical to that of Article XX(d), merits an evaluation of the veracity of this rationale.

#### **4 Evaluation of the rationale for the "necessity test" under Article XX(j)**

It is my submission that the AB in *India Solar Cells* misdirected itself in equating the "necessity test" of Article XX(j) with that of Article XX(d).<sup>45</sup> The necessity test under Article XX(j) is expressed through the term "essential",

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<sup>43</sup> AB *India Solar Cells* para 5.56; Appellate Body Report *United States - Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R (adopted 20 May 1996) (hereafter AB *US Reformulated Gasoline*) 22; Appellate Body Report *Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes* WT/DS302/17 (adopted 19 May 2005) para 64; Appellate Body Report *European Communities Measures Prohibiting the Importation and Marketing of Seal Products* WT/DS400/AB/R and WT/DS401/AB/R (adopted 18 June 2014) (hereafter AB *EC Seal Products*) para 5.169.

<sup>44</sup> AB *India Solar Cells* para 5.57; Appellate Body Report *Argentina- Measures Relating to Trade in Goods and Services* WT/DS453/12 (adopted 9 May 2016) para 6.202; AB *Colombia Textiles* para 5.67; AB *EC Seal Products* para 5.169; AB *US Gambling* para 292; AB *Korea Beef* para 157.

<sup>45</sup> See AB *India Solar Cells* para 5.62.

whereas the necessity test for Article XX(d) is expressed through the term "necessary". It is clear then that the drafters of the GATT used two different terms to articulate the "necessity test" in this respect. On appeal, India had argued that the word "essential" is a synonym for the term "necessary",<sup>46</sup> whereas the United States of America contended that the term "essential", requires a higher standard of proof than a demonstration that a measure is simply "necessary".<sup>47</sup> In response, the AB in *India Solar Cells* held that the term "essential" like the term "necessary" denotes "indispensability".<sup>48</sup> However, faced with similar considerations, the AB in *US Reformulated Gasoline* rejected the Panel's approach, which had applied the necessity test not only to evaluate a measure under Article XX(b) but also in the interpretation of Article XX(g).<sup>49</sup> According to the AB in *US Reformulated Gasoline*, the significant problem with the Panel's approach is that it ignored a fundamental rule of treaty interpretation, that the words of a treaty such as the GATT should be accorded their ordinary meaning, in their context and in line with the treaty's object and purpose. The Panel Report failed to appropriately consider the words employed by the provisions of Article XX.<sup>50</sup> This general rule of interpretation constitutes a rule of customary or general international law and is an integral part of the "customary rules of interpretation of public international law", which the Appellate Body is mandated by Article 3(2) of the DSU to use in interpreting the GATT.<sup>51</sup> In outlining the various types of legislative instruments which WTO Members may use in seeking to achieve different credible state policies outside the domain of trade liberalisation, Article XX employs different terms in respect of each exception: "necessary" - in paragraphs (a), (b) and (d); "essential" - in paragraph (j); "relating to" - in paragraphs (c), (e) and (g); "for the protection of" - in paragraph (f); "in pursuance of" - in paragraph (h); and "involving" - in paragraph (i).<sup>52</sup> Consequently, the AB held that it is irrational to assume that the drafters of the GATT sought to require, in respect of each

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<sup>46</sup> AB *India Solar Cells*: India's appellant's submission para 120.

<sup>47</sup> AB *India Solar Cells*: United States' appellee's submission para 122; Art XX(b) employs the term "necessary" whereas Art XX(g) uses the term "relating to" to articulate the "necessity test".

<sup>48</sup> AB *India Solar Cells* para 5.62. For a contrary opinion see Sharp 2010 *Drake J Agric L* 272.

<sup>49</sup> AB *US Reformulated Gasoline* 16-17. Art XX(b) of the GATT regulates the use of measures that are "necessary" to protect human, animal or plant life or health whereas A XX(g) of the GATT refers to measures "relating to" the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

<sup>50</sup> AB *US Reformulated Gasoline* 16-17. See Art 31.1 of the *Vienna Convention on the Law of Treaties* (1969).

<sup>51</sup> AB *US Reformulated Gasoline* 17.

<sup>52</sup> AB *US Reformulated Gasoline* 17.

exception in Article XX, "the same kind or degree of connection or relationship" between the impugned measure and the state policy objective sought to be achieved.<sup>53</sup> It can then be said that on the basis of this ratio of the AB in *Reformulated Gasoline*, that Article XX(j) contemplates a degree of connection between the impugned measure and the stated policy objective different from that which is envisaged under Article XX(d). This ratio endorses the argument of the United States of America before the AB in *India Solar Cells*. In this regard, the Panel in *India Solar Cells* acknowledged but appears not to have heeded the dictum of the AB in *Reformulated Gasoline*.<sup>54</sup> Similarly, the AB in *India Solar Cells* also ignored this cautionary dictum and made a fundamental finding on the necessity test under Article XX(j) despite the pitfalls identified by the AB in *Reformulated Gasoline*. Indeed, some commentators have questioned this "uniform interpretation" of the term "necessary" as employed by the different provisions of Article XX.<sup>55</sup> This sense of unease is reflected in the argument that the GATT seems to reject the uniform interpretation of the Article XX exceptions by requiring different thresholds for the different exceptions.<sup>56</sup> Every exception in Article XX symbolises a policy objective that the WTO has asserted must remain uncontroverted by the imperative of trade liberalisation.<sup>57</sup> It can then be argued that the terms "essential" in Article XX(j) and "necessary" as provided in XX(d) require different degrees of connection between the impugned measure and the stated policy objective.

Furthermore, the AB's ambiguous interpretation of the term "necessary" militates against the uniform interpretation of the Article XX exceptions.<sup>58</sup> In this regard, the AB's finding in *India Solar Cells* that the word "essential" denotes the "indispensability" of a measure was derived from the ratio of the AB in *Korea Beef*.<sup>59</sup> In light of this finding, it must be noted that the AB in *Korea Beef* cautioned that the term "necessary" must be assessed in the context in which it is employed, as it is a word that has various meanings. For instance, it may mean "absolute physical necessity or inevitability, or it may mean that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought".<sup>60</sup> Thus the AB in *Korea Beef*

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<sup>53</sup> AB *US Reformulated Gasoline* 18. Also see Kapterian 2010 *ICLQ* 102; Sharp 2010 *Drake J Agric L* 271.

<sup>54</sup> Panel Report *India Solar Cells* para 7.343.

<sup>55</sup> Kapterian 2010 *ICLQ* 102.

<sup>56</sup> Kapterian 2010 *ICLQ* 105. See Van den Bossche and Zdouc *Law and Policy of the World Trade Organisation* 554; Sharp 2010 *Drake J Agric L* 272.

<sup>57</sup> Kapterian 2010 *ICLQ* 119.

<sup>58</sup> See Doyle 2011 *BU Int'l LJ* 166-167.

<sup>59</sup> See AB *India Solar Cells* para 5.62 read with fn 223; AB *Korea Beef* para 161.

<sup>60</sup> AB *Korea Beef* para 160.

conceded that the term "necessary" refers to degrees of necessity ranging between what is seen as "indispensable" and what is simply "making a contribution to".<sup>61</sup> It is clear then that the dictum of the AB in *Korea Beef* is "contradictory" in that it provides that the term "necessary" as used in Article XX(d) denotes varying degrees of "necessity", yet in the same breath it found that a "necessary" measure must be "indispensable".<sup>62</sup> Despite this finding, it must then be noted that the approach of the AB in *Korea Beef* has been hailed as affording due consideration to the actual words of the treaty and according the correct weight to the "nuances" of each sub-clause.<sup>63</sup> It can then be argued that there is no one meaning for the word "necessary" and thus, interpreting the term "essential" on the basis of the word "necessary" is a task fraught with much uncertainty and more importantly renders it susceptible to the constant vacillation and ambiguous approach of the AB in this regard. Consequently, the AB's approach in *India Solar Cells* could be found to be irrational in that it "supposes" that the same degree of connection or relationship is required by Article XX(d) and Article XX(j) despite the fact that the drafters of Article XX used different terms with different meanings to articulate the "necessity test" in this regard.

It must also be borne in mind that Article XX(j) must also be construed in context and in a way that gives effect to the purport and objectives of the GATT.<sup>64</sup> The context of Article XX(j) must include the rest of the provisions of the GATT, including in particular Articles VI, XVIII and XIX; in the alternative, the context of Articles VI and XVIII and XIX includes Article XX.<sup>65</sup> This is because these Articles *inter alia* may be used to justify measures that flout the provisions of the GATT in order to ensure the protection and development of infant domestic industry. It follows that the term "essential" in Article XX(j) may not be read so liberally as to materially circumvent the purpose and object of say Article XIX of the GATT.<sup>66</sup> In the same vein, Article XIX must not be read to effectively negate Article XX and the policies and interests it references.<sup>67</sup> By the same token, the relationship between

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<sup>61</sup> AB *Korea Beef* para 161. See Bown and Trachtman 2009 *World Trade Rev* 86; Mitchell and Henckels 2013 *Chi J Int'l L* 131.

<sup>62</sup> See Regan 2007 *World Trade Rev* 355-357.

<sup>63</sup> Kapterian 2010 *ICLQ* 106; Osiro 2002 *LIEI* 133.

<sup>64</sup> See AB *US Reformulated Gasoline* 18.

<sup>65</sup> See AB *Reformulated Gasoline* 18. Art VI permits the imposition of anti-dumping duties to protect domestic industry against cheap imports whereas Art XVIII authorises *inter alia* a deviation from the obligations under the GATT to facilitate the development of local industry with the object of raising the standard of living, and Art XIX permits the imposition of "safeguard measures" to protect domestic industry.

<sup>66</sup> See the approach of the AB *US Reformulated Gasoline* 18. Art XIX of the GATT legalises the use of "safeguard measures" to protect domestic industry.

<sup>67</sup> See AB *US Reformulated Gasoline* 18.

the precepts of Articles XIX and the policies and interests provided in the "General Exceptions" listed in Article XX can be interpreted within the framework of the GATT and its object and purpose from case-to-case through a prudent analysis of the factual and legal considerations in a particular dispute, without ignoring the words employed by the drafters of the GATT.<sup>68</sup> In other words, Article XX(j) must not be interpreted in such a manner that it "seriously subverts" the import of Article XIX and other provisions of the GATT. In light of this rationale, it can be argued that India may have misconstrued its defence of the DCR measures. This is because India argued before the Panel that it sought to develop its solar manufacturing capacity in order for it to ensure "resilience" in its ability to continue to produce solar cells and modules that can generate solar power, and to develop a repository of knowledge and resources to enable such manufacturing.<sup>69</sup> India repeated this argument on appeal by arguing that the basis of its defence was the "lack of manufacturing capacity".<sup>70</sup> Thus the nub of India's defence was that the DCR measures were aimed at developing its nascent domestic solar manufacturing industry. If this were the case, then India should rather have pursued the "safeguards" instrument contemplated in Article XIX of the GATT.

On the safeguards ground, India would have to prove that its "lack of manufacturing capacity" and its "predominant dependence on imports" speak to an infant domestic industry that is suffering or threatened with serious injury from the increased imports of the solar panels or the "import dependence" as provided for by Article XIX of the GATT and the Agreement on Safeguards.<sup>71</sup> India would also be required to prove that the solar modules and cells are "being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products".<sup>72</sup> India must also show that the importation of the solar cells and modules has grown either in absolute or relative terms causing serious injury.<sup>73</sup> This increase in

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<sup>68</sup> AB *US Reformulated Gasoline* 18.

<sup>69</sup> Panel Report *India Solar Cells* paras 7.17-7.18.

<sup>70</sup> AB *India Solar Cells* para 5.51.

<sup>71</sup> AB *India Solar Cells* WT/DS456/AB/R/Add.1: Addendum: Annex B-1- Executive Summary of India's Appellant's Submission paras 17-18; Art XIX of the GATT. See *Decision on Safeguard Action for Development Purposes of 28 November 1979* (1979).

<sup>72</sup> Article XIX.1(a) of the GATT and Art 2.1 read with Art 3.1 of the *Agreement on Safeguards* (1994).

<sup>73</sup> See Appellate Body Report *United States - Definitive Safeguard Measures on Imports of Certain Steel Products* WT/DS248/AB/R (adopted 10 December 2003) (hereafter *AB US Steel Safeguards*) para 390.

imports must have been "recent enough, sudden enough, sharp enough, and material enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury".<sup>74</sup> The term domestic industry" refers only to the producers of the "like or directly competitive products".<sup>75</sup>

A WTO Member seeking to apply a safeguard measure is able to contend that the right to apply safeguard measures must be guaranteed in order to sustain the domestic progress and appetite for trade liberalisation.<sup>76</sup> This argument lends itself to India's submission that it needs to develop and fortify its domestic manufacturing base before it prematurely grants market access to other more developed economies that may eviscerate the infant domestic industry.<sup>77</sup> "Capacity building" has been identified as a significant constraint of developing country economies and is regarded as integral to the development agenda of the Doha Ministerial Declaration.<sup>78</sup> India could then use the argument that the DCR measures were intended to build capacity so as to avoid the risk of disturbance in the supply of affordable foreign solar cells and modules to India. This argument was endorsed and accepted by the Panel in *India Solar Cells*.<sup>79</sup>

In the alternative, a WTO Member whose trade is affected is justified to argue that the implementation of such measures must be restricted in order to sustain the multilateralism thrust of the WTO.<sup>80</sup> This approach is in keeping with the Doha Ministerial Declaration which rejects protectionism in favour of trade liberalisation in the pursuit of multilateralism.<sup>81</sup> On this score, one could argue that the DCR measures militate against market access and foster protectionism at the expense of the multilateral integrity of the WTO free trade initiative. Distinguishing between protectionist and non-protectionist trade-related measures can be cumbersome because some measures that are apparently intended for non-protectionist ends actually

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<sup>74</sup> Appellate Body Report *Argentina - Safeguard Measures on Imports of Footwear* WT/DS121/AB/R (adopted 12 January 2000) (hereafter *AB Argentina Footwear*) para 131; *AB US Steel Safeguards* para 346.

<sup>75</sup> Appellate Body Report *United States - Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand* WT/DS177/AB/R and WT/DS178/AB/R (adopted 16 May 2001) para 84; A 4.1(c) of the *Agreement on Safeguards* (1994).

<sup>76</sup> Appellate Body Report *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* WT/DS202/AB/R (adopted 8 March 2002) (hereafter *AB US Line Pipe*) paras 82-84.

<sup>77</sup> Panel Report *India Solar Cells: Addendum: Annex B-3: First Part of the Integrated Executive Summary of the Arguments of India* para 35.

<sup>78</sup> *Doha Work Programme: Decision Adopted by the General Council on 1 August 2004* (2004) para 1(d).

<sup>79</sup> Panel Report *India Solar Cells* para 7.354.

<sup>80</sup> *AB US Line Pipe* para 83.

<sup>81</sup> *Doha Ministerial Declaration* (2001) para 1.

constitute apt examples of disguised protectionism.<sup>82</sup> The "multilateralism" argument is at the core of the drive towards improved market access and trade liberalisation in the WTO. In the context of Article XX(j), the Panel in *India Solar Cells* had found that DCR measures were trade restrictive in that they limit the use of foreign solar cells.<sup>83</sup> Regardless, properly construed, it is my submission that India could have sought the refuge of the safeguards instrument.

## 5 Concluding remarks

This paper has explored the legal implications of the enigmatic Article XX(j) of the GATT. The AB *India Solar Cells* is the first case to adjudicate on the scope of the Article XX(j) exception. On the whole, this paper contends that the AB's approach in *India Solar Cells* could be found to be irrational in that it assumes that the same degree of connection is required by Article XX(d) and Article XX(j) despite the fact that the drafters of Article XX used different terms to articulate the "necessity test" in this regard. This note also argues that the AB in *India Solar Cells* has narrowed the scope of "necessary" measures to measures that are "indispensable" only. While it is commendable that the AB in *India Solar Cells* has offered more clarity by narrowing the scope of the term "necessary", the AB's arbitrary decision to equate the "necessity test" under Article XX(d) with that of Article XX(j), has invariably transplanted the jurisprudential ambiguity born out of the constant vacillation of the AB on the "necessity test" under Article XX(d).

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<sup>82</sup> Warikandwa and Osode 2014 *PELJ* 1277; Appellate Body Report *United States - Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/AB/R (adopted 4 April 2012).

<sup>83</sup> Panel Report *India Solar Cells* para 7.356.

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*General Agreement on Tariffs and Trade* (1994)

*Vienna Convention on the Law of Treaties* (1969)

### **List of Abbreviations**

AB	Appellate Body
BU Int'l LJ	Boston University International Law Journal
Chi J Int'l L	Chicago Journal of International Law
DCR	Domestic Content Requirements
Drake J Agric L	Drake Journal of Agricultural Law
GATT	General Agreement on Tariffs and Trade 1994
DSU	Dispute Settlement Understanding
ICLQ	International and Comparative Law Quarterly
LIEI	Legal Issues of Economic Integration
PELJ	Potchefstroom Electronic Law Journal
World Trade Rev	World Trade Review
WTO	World Trade Organisation