

Revisiting the WTO's Short Supply Exception – GATT Article XX(j) in an Era of Energy Insecurity



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NUS-CIL Conceptualising International Energy Law: Shaping the Future Amidst Transition in a VUCA World, 2025



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Research Question

- How do WTO adjudicators approach the short supply exception, and is their jurisprudence sufficiently responsive to challenges in supply chain resilience and energy security?

Research Significance

- The particular exception has not been invoked by any WTO member until recently, in two energy-related disputes.
- The relevance of the particular exception in justifying members' shortage relief measures is expected to grow in the coming years and decades.

Research Outline

- An introduction to the short supply exception under Article XX(j), focusing on the recent two WTO disputes in which the provision was invoked
- A critique of WTO jurisprudence on the short supply exception through the lens of international energy law principles

DS456: India — Certain Measures Relating to Solar Cells and Solar Modules

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See also:

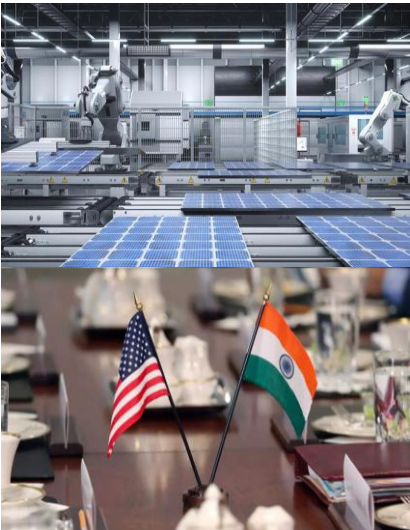
- One-page summary of key findings of this dispute
- News items about this dispute
- The basics: how disputes are settled in WTO
- Computer based training on dispute settlement
- Text of the Dispute Settlement Understanding
- #TradeDisputes

Current status

- Mutually agreed solution notified on 13 July 2023

Key facts

Short title:	India — Solar Cells
Complainant:	United States
Respondent:	India
Third Parties (original proceedings):	Brazil; Canada; China; European Union; Japan; Korea, Republic of; Malaysia; Norway; Russian Federation; Turkey; Ecuador; Saudi Arabia, Kingdom of; Chinese Taipei
Third Parties (Article 21.5):	Brazil; Canada; China; European Union; Indonesia; Japan; Korea, Republic of; Norway; Russian Federation; Singapore; Thailand; Chinese Taipei
Agreements cited: (as cited in request for consultations)	Art. III:4 GATT 1994 Art. 2.1 Trade-Related Investment Measures (TRIMs) Art. 3.1(b), 3.2, 5(c), 6.3(a), 6.3(c), 25 Subsidies and Countervailing Measures (SCM)
Agreements cited: (as cited in panel request)	Art. III:4 GATT 1994 Art. 2.1 Trade-Related Investment Measures (TRIMs)



Measures at issue: India’s domestic content requirements (DCR) under its Jawaharlal Nehru National Solar Mission (JNSM). India required the use of domestically produced solar cells and modules for solar power projects to ‘promote energy security and sustainable development.’

DS476: European Union and its Member States — Certain Measures Relating to the Energy Sector

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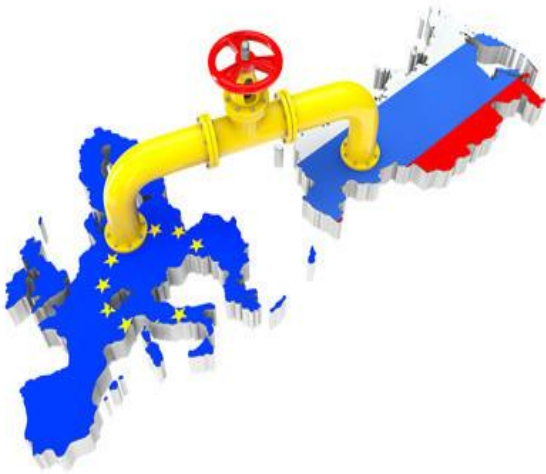
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Current status

- Panel report under appeal on 21 September 2018

Key facts

Short title:	EU — Energy Package
Complainant:	Russian Federation
Respondent:	European Union
Third Parties (original proceedings):	Brazil; China; India; Japan; Ukraine; United States; Colombia; Korea, Republic of; Saudi Arabia, Kingdom of
Agreements cited: (as cited in request for consultations)	Art. II, VI, XVI, XVII Services (GATS) Art. I, III, X, XI GATT 1994 Art. 3 Subsidies and Countervailing Measures (SCM) Art. 2 Trade-Related Investment Measures (TRIMs) Art. XVI:4 Agreement Establishing the World Trade Organization
Agreements cited: (as cited in panel request)	Art. XVI:1, XVII Services (GATS) Art. III:4 GATT 1994 Art. II:1, VI:1, VI:5(a) Services (GATS) Art. I:1, XI:1, X:3(a) GATT 1994 Art. XVI Services (GATS)



Measures at issue: the European Union (EU) and its member states’ Trans-European Networks for Energy measure, which sets out the criteria for the designation of certain infrastructure projects as projects of common interest with an aim to develop and improve infrastructure to connect the EU with the main potential sources of supply of gas within and around the Union to ensure the security of gas supply.

The first and second times Article XX(j) was invoked as a justification in WTO disputes

The General Agreement on Tariffs and Trade (GATT)

Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*
- (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
- (j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.



A two-tier test

1. Provisional Justification under Article XX(j)
 - Whether the products in question are in "*general or local short supply*"
 - whether the measure is "*essential*" to the acquisition or distribution" of the product identified as in short supply
2. Compliance with the Chapeau of Article XX



What constitutes "*general or local short supply*"?

DS456

India	Panel	Appellate Body
Solar cells and modules are products in "general or local short supply" within India due to the country's lack of indigenous production and reliance on imports.	<ul style="list-style-type: none">• a situation in which the quantity of available supply does not meet demand in the relevant geographical area or market.• a lack of domestic production in the products at issue is “a necessary, but not sufficient, condition” for proving “short supply.”	Upheld the panel decisions
There exists a risk of import disruption and a resulting shortage of solar cells and modules.	<ul style="list-style-type: none">• Products which are at risk of becoming in short supply or facing prospective shortages do not fall within the scope of Article XX(j).• Only “imminent risks” (“impending, soon to happen”) of supply shortage stand a chance of falling within a broad interpretation of ‘short supply.’	Upheld the panel decisions

DS476

EU	Panel (unadopted report)
<p>There exist “genuine and serious risks” of disruption to the supply of natural gas, as evidenced by the materialization of such risks in the past.</p> <ul style="list-style-type: none">• the supply of gas from any given source or route may be disrupted by various events• the dependency on a relatively limited number of sources of supply;• the inadequacy of the infrastructure interconnecting the transmission networks of the various EU member states	<p>The products referred to in Article XX(j) are those products that are “<i>presently in short supply</i>” rather than products "at risk" of short supply.</p>

Preliminary Takeaways

- The strict interpretation of Article XX(j), in particular, on what constitutes “short supply”, unduly restricts members’ policy space to respond to fragilities in global supply.
- The unadopted panel report represents a missed opportunity to engage with the reasoning in DS456 regarding whether products facing an “imminent risk” of short supply might fall within the scope of Article XX(j).
- International energy law principles, especially energy security and reliability, should shed light on understanding “short supply”.
- A more security-oriented interpretation of “short supply,” incorporating resource-specific perspectives (network-dependent or not, manufactured goods or not, etc.) under Article XX(j), is much needed to better align international trade and energy regimes.