INDIA – CERTAIN MEASURES RELATING TO SOLAR CELLS AND SOLAR MODULES
(DS456)

RESPONSE OF THE UNITED STATES TO INDIA'S REQUEST FOR A PRELIMINARY RULING

January 8, 2015

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I. Introduction

1. The U.S. Panel Request[1] in this dispute identified the measures that the United States seeks to challenge, and the arguments in the U.S. First Written Submission seek findings only with regard to those measures. In fact, India accepts that the U.S. panel request identifies the specific measures at issue pursuant to DSU Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Nonetheless, India argues that the U.S. First Written Submission seeks to bring before the Panel measures outside the scope of the U.S. Panel Request.

2. India's concerns are unwarranted. The United States only seeks findings on the measures identified in the panel request – domestic content requirements under the JNNSM – as they existed as of the date of panel establishment. Most of the legal instruments for which India seeks a preliminary ruling are, in fact, described in the U.S. Panel Request. Others are referenced in the U.S. First Written Submission, but are not subject to requests for findings by the Panel. The remainder are future instruments that were not in existence when the DSB referred the matter to the Panel – and therefore any requests in relation to such future instruments are not ripe for consideration by the Panel at this time. For all of these categories, the United States respectfully submits that India's request for preliminary ruling presents no issue requiring adjudication by the Panel at this time.

3. This submission first discusses the rules that govern the appropriate terms of reference for WTO disputes – Articles 6.2 and 7.1 of the DSU. Second, it demonstrates that all of the measures for which the United States is seeking legal findings are identified in the U.S. Panel Request and therefore within the Panel's terms of reference. Third, the submission explains why the Panel should refrain from making findings in the abstract on whether future instruments may fall within its terms of reference.

II. The Requirements of Articles 6.2 and 7.1 of the DSU

4. Article 6.2 of the DSU requires that a complaining party's panel request "identify the specific measures at issue" in a dispute.

5. With respect to Article 7.1 of the DSU, the Appellate Body has stated that:

> a panel's terms of reference are governed by the request for the establishment of a panel. In other words, the panel request identifies the measures and the claims that a panel will have the authority to examine and on which it will have the authority to make findings.[2]

6. Therefore, to demonstrate that a particular measure falls outside a panel's terms of reference, the responding Member must show that it is *not* identified in the complainant's panel

[1] WT/DS456/5.
[2] Appellate Body Report, *EC – Selected Customs Matters*, para. 131.

request.[3] As discussed below, India has failed to show that any of the measures for which the United States is seeking legal findings are not identified in the U.S. Panel Request.

III. The Measures for which the United States Seeks Legal Findings are All Identified in the U.S. Panel Request

7. India has not challenged the identification of the specific measures at issue in the U.S. panel request. To the contrary, India recognizes that the request identifies as the specific measures "domestic content requirements" under the JNNSM and further establishes that "the domestic content requirements at issue" are maintained through certain legal instruments.[4] And consistent with DSU Articles 6.2, 7.1, 11, and 19.1, and as reflected in the approach of previous WTO reports, the United States seeks findings with respect to the identified measures as they existed on the date of panel establishment.[5]

8. Contrary to India's assertions,[6] all of the measures for which the United States seeks legal findings in its first written submission – the domestic content requirements in the JNNSM maintained through legal instruments – *are* identified in the U.S. Panel Request and therefore properly within the Panel's terms of reference.

9. In paragraph 94 of its first written submission, the United States describes the measures for which it is seeking legal findings from the panel. That paragraph reads as follows:

> [T[he United States requests that the Panel make the following findings:
>
> - the domestic content requirements contained in the JNNSM Programme measures, including both Phase I and Phase II and individually executed PPAs for solar power projects, accord less favorable treatment to imported solar cells and modules than accorded to like products of Indian origin, inconsistent with Article III:4 of the GATT 1994; and
>
> - the domestic content requirements contained in the JNNSM Programme measures, including both Phase I and Phase II and individually executed PPAs for solar power projects, constitute

[3] *See* Panel Report, *Indonesia – Autos*, para. 14.3 ("In our view…the United States in its request has clearly identified the measures to be considered by the Panel, and those measures do not include this loan. Accordingly, we conclude that the loan in question is not within the terms of reference of this panel."); *See also* Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, paras. 6.4-6.5 ("In the absence of any compelling reason to do so, we decline to conclude that a measure specifically identified in the request for establishment is not within our terms of reference").

[4] India's First Written Submission, para. 12.

[5] *See* Appellate Body Report, *EC – Selected Customs Matters*, para. 184 (quoting Appellate Body Report, *EC – Chicken Cuts*, para. 156) ("The term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel. (footnote omitted)).

[6] "The United States has through its written submissions attempted to expand the scope and ambit of the terms of reference of the Panel…" India's First Written Submission, para. 30.

> trade-related investment measures inconsistent with the provisions of Article III of the GATT 1994, and are therefore inconsistent with Article 2.1 of the TRIMs Agreement.

10. Thus, contrary to India's assertion that the United States seeks a legal finding "that the JNNSM Programme measures are [broadly] inconsistent with India's WTO obligations,"[7] the United States explicitly limited its request to the "*domestic content requirements* contained in [those] measures."[8]

11. The U.S. Panel Request specifies the instruments through which India imposes the domestic content requirements at issue. Specifically, the U.S. Panel Request, in relevant part, states:

> The domestic content requirements at issue are maintained through the following instruments:
>
> 1. Ministry of New and Renewable Energy, Resolution: JNNSM (January 2010);
>
> Phase I
>
> 2. Ministry of New and Renewable Energy, *Guidelines for Selection of New Grid Connected Solar Power Projects*, Batch-I (July 2010);
>
> 3. Ministry of New and Renewable Energy, *Guidelines for Selection of New Grid Connected Solar Power Projects*, Batch-II (August 2011);
>
> 4. National Thermal Power Company Vidyut Vyapar Nigam Limited, *Request for Selection Document for New Grid Connected Solar Photo Voltaic Projects under Phase 1 of JNNSM* (August 2010);
>
> 5. National Thermal Power Company Vidyut Vyapar Nigam Limited, *Request for Selection Document for New Grid Connected Solar Photo Voltaic Projects under Phase 1, Batch II of JNNSM* (August 2011);
>
> 6. National Thermal Power Company Vidyut Vyapar Nigam Limited Draft Standard *Power Purchase Agreement for Procurement of __ MW Solar Power on Long Term Basis* (August 2010);
>
> 7. National Thermal Power Company Vidyut Vyapar Nigam Limited, *Draft Standard Power Purchase Agreement for Procurement of __*

[7] India's First Written Submission, para. 30.
[8] U.S. First Written Submission, para. 94.

MW Solar Power on Long Term Basis (Second Batch) (August 2011);

8. Power Purchase Agreements entered into under Phase I of the NSM, such as by National Thermal Power Company Vidyut Vyapar Nigam Limited or successors in contract;

Phase II:

9. Ministry of New and Renewable Energy, *Jawaharlal Nehru National Solar Mission Phase II Policy Document* (December 2012);

10. Ministry of New and Renewable Energy, *Solar Energy Corporation of India, Request for Selection of Solar Power Developers for 750 MW Grid Connected Solar Photo Voltaic Projects under JNNSM PHASE-II: Batch-I*, No.: SECI/2013/JNNSM/Ph-II, Batch-I/Solar PV/750MW (October 4, 2013);

11. Ministry of New and Renewable Energy, *Approval for Implementation of a Scheme for Setting up of 750 MW of Grid-connected Solar PV Power projects under Batch-I of Phase-II of Jawaharal Nehru National Solar Mission with Viability Gap Funding support from National Clean Energy Fund* (October 15, 2013);

12. Solar Energy Corporation of India, *Request for Selection (RfS) Document for 750 MW Grid Connected Solar Photovoltaic Projects Under JNNSM Phase II Batch-I* (October 28, 2013);

13. *Ministry of New and Renewable Energy, Jawaharlal Nehru National Solar Mission Phase-II Guidelines for Implementation of Scheme for Setting up of 750 MW Grid-connected Solar PV Power Projects under Batch-I* (October 25, 2013);

14. Solar Energy Corporation of India, *Amendments in the RfS Document of JNNSM Phase-II, Batch-I*, No.: SECI/JNNSM/SPV/P-2/B-1/RfS/102013 (November 29, 2013);

15. Solar Energy Corporation of India, *Amendments in the RfS Document of JNNSM Phase-II, Batch-I*, No.:SECI/JNNSM/SPV/P-2/B-1/RfS/102013 (January 9, 2014);

16. Solar Energy Corporation of India, *Clarifications on the queries raised by various stakeholders* (November 30, 2013);

17. Solar Energy Corporation of India, *Draft Standard Power Purchase Agreement for Procurement of___MW Solar Power on Long term Basis* (November 30, 2013);

18. Solar Energy Corporation of India, *Draft Standard Power Purchase Agreement for Procurement of___MW Solar Power on Long term Basis* (January 8, 2014); and

19. Power Purchase Agreements entered into under Phase II of the NSM, such as by National Thermal Power Company Vidyut Vyapar Nigam Limited or the Solar Energy Corporation of India, or successors in contract;

as well as any amendments, related measures, or implementing measures.

12. As demonstrated below, all of the measures for which the United States seeks legal findings in its first written submission – the domestic content requirements maintained through these instruments – are listed above, *i.e., in the U.S. Panel Request*.

13. In its first written submission, the United States first identifies measures containing the domestic content requirements in Section 3 (paragraphs 26-27) of the submission. These measures are listed below as they appear in Section 3 of the submission. The bracketed text indicates the corresponding number from the U.S. Panel Request.

- *Guidelines for Selection of New Grid Connected Solar Power Projects*, MNRE (July 2010) (US-5) **[U.S. Panel Request, no. 2]**

- *Guidelines for Selection of New Grid Connected Solar Power Projects, Batch II*, MNRE (August 24, 2011) (US-6**) [U.S. Panel Request, no. 3]**

- *Guidelines for Implementation of Scheme for Setting up of 750 MW Grid-Connected Solar PV Power Projects Under Batch-1, Jawaharlal Nehru National Solar Mission*, MNRE (October 2013) (US-7) **[U.S. Panel Request, no. 13]**

- *Request for Selection Document for New Grid Connected Solar Photo Voltaic Projects Under Phase 1 of JNNSM*, NTPC Vidyut Vyapar Nigam Limited (August 18, 2010) (US-15) [**U.S. Panel Request, no. 4]**

- *Request for Selection Document for New Grid Connected Solar Photo Voltaic Projects Under Phase 1, Batch II of JNNSM*, NTPC Vidyut Vyapar Nigam Limited (August 24, 2011) (US-17) [**U.S. Panel Request, no. 5]**

- *Request for Selection (RfS) Document for 750 MW Grid Connected Solar Photo Voltaic Projects under JNNSM Phase II Batch-I*, SECI (October 28,

2013) (US-12) **[U.S. Panel Request, no. 10]**

14. The measures through which India maintains domestic content requirements are also listed in the table following paragraph 25 of the U.S. first written submission. This table, titled "Key JNNSM Programme Measures," is reproduced below. Again, the bracketed text again indicates the corresponding number for each measure as listed in the U.S. panel request.

Key JNNSM Programme Measures	
Phase I (Batch 1)	*Guidelines for Selection of New Grid Connected Solar Power Projects*, MNRE (July 2010) (US-5) **[U.S. Panel Request, no. 2]** *Request for Selection Document for New Grid Connected Solar Photo Voltaic Projects Under Phase 1 of JNNSM*, NTPC Vidyut Vyapar Nigam Limited (August 18, 2010) (US-15) **[U.S. Panel Request, no. 4]** *Draft Standard Power Purchase Agreement for Procurement of __ MW Solar Power on Long Term Basis (Under New Projects Scheme)*, NTPC Vidyut Vyapar Nigam Limited (August 18, 2010) (US-16) **[U.S. Panel Request, no. 6]**
Phase I (Batch 2)	*Guidelines for Selection of New Grid Connected Solar Power Projects, Batch II*, MNRE (August 24, 2011) (US-6) **[U.S. Panel Request, no. 3]** *Request for Selection Document for New Grid Connected Solar Photo Voltaic Projects Under Phase 1, Batch II of JNNSM*, NTPC Vidyut Vyapar Nigam Limited (August 24, 2011) (US-17) **[U.S. Panel Request, no. 5]** *Draft Standard Power Purchase Agreement for Procurement of __ MW Solar Power on Long Term Basis (Under New Projects Scheme) (Second Batch)*, NTPC Vidyut Vyapar Nigam Limited (August 23, 2011) (US-18) **[U.S. Panel Request, no. 7]**
Phase II (Batch 1)	*Guidelines for Implementation of Scheme for Setting up of 750 MW Grid-Connected Solar PV Power Projects Under Batch-1, Jawaharlal Nehru National Solar Mission*, MNRE (October 2013) (US-7) **[U.S. Panel Request, no. 13]** *Request for Selection (RfS) Document for 750 MW Grid Connected Solar Photo Voltaic Projects under JNNSM Phase II Batch-I*, SECI (October 28, 2013) (US-12) **[U.S. Panel Request, no. 12]** *Draft Standard Power Purchase Agreement for Procurement of___MW Solar Power on Long Term Basis under JNNSM, Phase II, Batch 1 Scheme*, SECI (November 30, 2013) (US-19) **[U.S. Panel Request, no. 17]**

15. The United States again specifies the instruments through which the domestic content requirements are maintained in the "Legal Argument" section of its first written submission at

paragraphs 61-63, which is excerpted below. Once again, the bracketed text indicates the corresponding number from the U.S. Panel Request.[9]

> 61. At the outset, the Phase I and Phase II Guidelines make clear that the applicable domestic content requirements are "mandatory." Specifically:
>
> - The Phase I, Batch 1 Guidelines state: "For Solar PV Projects it will be *mandatory* for Projects based on crystalline silicon technology to use the modules manufactured in India…(emphasis added)" Section 2.5(D) **[U.S. Panel Request, no. 2]**
>
> - The Phase I, Batch 2 Guidelines state: "For Solar PV Projects to be selected in second batch during FY 2011-12, it will be *mandatory* for all the Projects to use cells and modules manufactured in India…(emphasis added)" Section 2.5(D) **[U.S. Panel Request, no. 3]**
>
> - The Phase II Guidelines state: "Under the DCR [*i.e.*, "domestic content requirement"], the solar cells and modules used in the power plant *must* both be made in India. (emphasis added)" Section 2.6(E) **[U.S. Panel Request, no. 13]**
>
> 62. An SPD that wishes to enter into a PPA indicates, through the submission of bid application pursuant to the RfS document, that it will comply with a variety of conditions, including the use of solar cells and modules of India origin, if selected. The Phase I and Phase II RfS documents – pursuant to which SPDs submit bid applications – also make clear that the applicable domestic content requirement provisions are mandatory. Specifically:
>
> - The Phase I (Batch 1) *RfS* document states: "For Solar PV Projects it will be *mandatory* for Projects based on crystalline silicon technology to use the modules manufactured in India…" Section 3(D) **[U.S. Panel Request, no. 4]**
>
> - The Phase I (Batch 2) *RfS* document states: "For Solar PV Projects to be selected in second batch during FY 2011-12, it will be *mandatory* for all the Projects to use cells and modules manufactured in India…" Section 3(D) **[U.S. Panel Request, no. 5]**
>
> - The Phase II (Batch 1) *RfS* document states: "For Projects to be implemented under Part-A (375 MW), both the solar cells and modules used in the Solar Power Projects *must* be made in India." Section 3(E) **[U.S. Panel Request, no. 12]**

[9] The original footnotes have been omitted from this excerpt from the U.S. First Written Submission.

> 63. Moreover, as noted above, when submitting a bid pursuant to the RfS documents, SPDs must "certify" that they will "specify their plan for meeting the requirement for domestic content" "within 180 days of signing of [a] PPA" under Phase I and within "210 days of signing of [a] PPA" under Phase II (Batch 1). By so certifying, SPDs also acknowledge that failure to provide such specification will be penalized by forfeiture of an earnest money deposit.

16. In sum, a simple review of the U.S. Panel Request and first written submission demonstrates that all of the legal instruments maintaining the domestic content requirements for which the United States seeks legal findings in its first written submission are clearly identified in the U.S. Panel Request. Accordingly, there is no merit to India's claim that the United States "through its written submissions [has] attempted to expand the scope and ambit of the terms of reference of the Panel…" As such, the United States respectfully submits that the India has presented no issue requiring adjudication by the Panel.

IV. The Panel Should Refrain from Determining in the Abstract Whether "Future" Instruments or Measures are Outside the Terms of Reference of this Dispute

17. India requests that the Panel "not consider the Draft Guidelines for Phase II, Batch II [as] part of its terms of reference"[10] because "inclusion of the Draft Guidelines would amount to consideration of future hypothetical measures."[11] India's essentially seeks a finding that Draft Guidelines for Phase II, Batch II[12] are outside the Panel's terms of reference because those Guidelines are not (yet) in force and therefore do not exist a legal matter.

18. As explained below, the United States is *not* asking the panel to render legal findings on the Draft Guidelines for Phase II, Batch II, or any other measures not yet in force. As such, India has not presented an issue – with respect to the Draft Guidelines for Phase II, Batch II – requiring adjudication by the Panel.

19. India also suggests that the Panel find that "any[] future measure…cannot be brought within the scope of the terms of reference of the Panel."[13] The Panel should refrain from making any such finding on "future" measures as such a finding would be made in the abstract and could not appropriately consider the relationship of any such measure with measures in existence and within the Panel's terms of reference.

A. The United States is Not Seeking Legal Findings on the Draft Guidelines for Phase II, Batch II, nor Any other Measure Not Yet in Force

20. For purpose of background, the U.S. First Written Submission notes that India's Ministry of New and Renewable Energy (MNRE) issued Draft Guidelines for Phase II, Batch II

[10] India's First Written Submission, para. 60.
[11] India's First Written Submission, para. 53.
[12] *Draft Guidelines for Selection of 3000 MW Grid-Connected Solar PV Power Projects under Batch-II Tranche-I State Specific Scheme*, MNRE (October 2014), p. 3 (US-8).
[13] India's First Written Submission, para. 53.

("Draft Guidelines") on October 14, 2014.[14] The U.S. First Written Submission (at paragraph 32) identifies the domestic content requirement provisions contained in the Draft Guidelines. The U.S. First Written Submission, however, also notes that the Guidelines are not yet finalized; accordingly, the United States deliberately excluded the Draft Guidelines from analysis in the Legal Argument section of its submission.

21. To clarify, the United States is *not* requesting that the panel render legal findings on the not-yet-finalized Guidelines for Phase II, Batch II, or any other measure not yet in existence. Because the United States is not asking the Panel to render legal findings on the Draft Guidelines for Phase II, Batch II (nor any other measures not in force) the United States respectfully submits that this element of India's preliminary ruling request presents no issue requiring a finding by the Panel.

B. The Panel Should Refrain from Making Findings in the Abstract on Whether Future Instruments or Measures Could Properly Fall Within the Terms of Reference of this Panel

22. As discussed above, the United States is not seeking legal findings on the Draft Guidelines for Phase II, Batch II or any other measure not yet in legal force. As explained below, however, future measures that come into force during the course of this dispute *could* – depending on the substance and character of those measures – properly fall within the terms of reference of the Panel. Therefore, the United States respectfully requests that the Panel not abstractly pre-judge whether future measures are within the terms of reference of this dispute. Such an evaluation by the Panel would only become relevant if India were to enact a measure in the course of this dispute and if the United States were to request legal findings on such a measure.

23. In addition to measures specified by title, the U.S. Panel Request also refers to "any amendments, related measures, or implementing measures." This phrase would capture any such instruments in existence when the panel was established of which the complaining party may not have been aware. In some circumstances, this phrase could also capture a future instrument.

24. WTO panels have previously held that a complainant may employ such language in a panel request to capture measures not yet in force on the date of the panel request but that do come into force during the course of a dispute; such measures *may* properly fall within a panel's terms of reference. One example might be where a legal instrument formally amends an existing instrument but in substance reiterates the content of the existing instrument such that the measure in substance continues to exist. As noted by the panel in *EC – IT Products*:

> While we do not consider that the mere incantation of the phrase "any amendments, or extensions and any related or implementing measures" in a panel request will permit Members to bring measures that were clearly not contemplated in the Panel request, it may be used to refer to measures not yet in force or concluded on the date of the panel request…that have the same essential effect as the measures that

[14] *See* U.S. First Written Submission, para. 12.

> were specifically identified. This is to prevent the possibility that the procedural requirements of WTO dispute settlement result in a situation where the measures could completely evade review.[15]

25. In *China – Raw Materials*, the complainants' panel requests identified certain measures in substance (*e.g.*, "subjects the exportation of [certain products] to quantitative restrictions such as quotas") and stated that "these Chinese measures are reflected in" numerous legal instruments specified by title.[16] The panel requests also referred to "any amendment or extensions; related measures; replacement measures; renewal measures; and implementing measures." The *China – Raw Materials* panel reasoned that "the Panel is entitled to examine measures that came into effect after [the Panel's establishment] if they are of the *same essence* as the original ones that formed the basis of the Panel's terms of reference."[17]

26. As noted, while measures that come into legal force after the establishment of a panel will often not be within the terms of reference of a panel, certain past panel reports have deemed such measures within the panel's terms of reference where the measures "have the same essential effect" or "are of the *same essence* as the original [measures] that formed the basis of the Panel's terms of reference." Of course, whether a particular measure has the "same essential effect" or is of the "same essence" as measures specified in a panel request is a judgment that can be rendered only *after* such measures are finalized and available for review by a panel. It is not an assessment that a panel can make in the abstract. Thus, India's categorical assertion that "any[] future measure…cannot be brought within the scope of the terms of reference of the Panel" is without foundation.

27. India justifies its request by, *inter alia*, arguing that the JNNSM Programme measures do not constitute 'amendments, related measures, or implementing measures' as characterised in in the United States request for establishment of a panel."[18] Indeed, India asserts that there is "no such thing as the JNSSM Programme."[19] Rather, India contends that the JNNSM is actually an assemblage of "independent, distinct and unique schemes and programs.[20] India further argues that the JNNSM Mission document does not define or mandate an single approach to achieving its vision and objectives" and therefore the measures at issue in this dispute do not constitute a "body or framework of law, or regulations, or amendments, relating measures, or implementing measures.[21]

28. To be clear, the U.S. First Written Submission defined the term "JNNSM Programme" as short-hand to refer to the Jawaharlal Nehru National Solar Mission,[22] the existence and aims of which India does not dispute. The United States acknowledges that the JNNSM is a broader initiative than the measures identified in the U.S. Panel Request and U.S. First Written Submission. The United States also understands that not all of the programmes initiated under

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[15] Panel Reports, *EC – IT Products*, para. 7.140.
[16] U.S. Panel Request, WT/DS394/7, at 2.
[17] Panel Reports, *China – Raw Materials*, para. 7.15.
[18] India's First Written Submission, para. 34.
[19] India's First Written Submission, para. 22.
[20] India's First Written Submission, para. 39.
[21] India's First Written Submission, para. 37.
[22] U.S. First Written Submission, para. 1.

the JNNSM involve bidding for projects or impose domestic content requirements. Accordingly, the United States did not launch a legal challenge against the entirety of the JNNSM, but the domestic content requirements maintained through specific JNNSM Programme measures that – as detailed above – are all identified in the U.S. Panel Request. To the extent that India adopts other measures under the rubric of the JNNSM unrelated to the challenged domestic content requirements, those measure are not covered by the U.S. Panel Request, and not within the terms of reference of this Panel.

29. The United States, however, takes exception to India's assertion that the JNNSM "schemes and programmes undertaken in a phased manner do not operate collectively or in relation to each other."[23] India further argues that:

> Other than the fact that they pertain to schemes and programmes for India's solar power development, they have nothing else in common, and cannot be characterized as part of a framework of subsidiary or closely related measures, or amendments, or implementing measures.[24]

30. The very fact that India is carrying out the JNNSM Programme in *phases* by itself demonstrates the existence of a coherent program of related measures. For example, JNNSM Programme measures for Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1) represent stages of the JNNSM Programme, and in that sense certainly "operate in relation to one another." By the same token, the draft Phase II (Batch 2) Guidelines, if and when finalized, could also constitute related or implementing JNNSM Programme measures, and thereby properly fall within the Panel's terms of reference.

C. The Panel Cannot Assess Whether Future JNNSM Programme Measures are Properly Within Its Terms of Reference Until India Promulgates Such Measures and the United States Requests that the Panel Examine Those Measures

31. At any rate, there is no need to adjudicate the question of whether future JNNSM Programme measures (or, if India prefers, JNNSM measures) relate to, amend, or implement instruments specified in the U.S. Panel Request unless India promulgates such measures and the United States requests that the Panel treat those new measure as within its terms of reference. If that happens, India and the United States can address whether the new measures amend, implement, or otherwise relate to the instruments specified in the U.S. Panel Request. With concrete measures in hand, the Panel would be able to assess whether they are properly within the Panel's terms of reference rather than address the issue in the abstract. At this point, however – in the absence of any actual new measure(s) to assess – it would be premature for the Panel find that "any[] future measure…cannot be brought within the scope of the terms of reference of the Panel." Therefore, the United States respectfully asks the Panel to refrain from making any finding in the abstract with respect to whether future JNNSM Programme measures could fall within the Panel's terms of reference.

[23] India's First Written Submission, para 40.
[24] India's First Written Submission, para 40.

32. To clarify, the United States is *not* asking the Panel for a prospective determination that any and all future JNNSM Programme measures are within its terms of reference. Rather, the United States is simply requesting that the Panel reserve judgment until the time, which may never arrive, that the issue is squarely before it. That will only occur if India promulgates a new measure and the United States asks the Panel to examine that *particular* measure. A broad prospective judgment that *any* future JNNSM Programme measures are outside the Panel's terms of reference would risk excluding the types of new measures that, as discussed in section IV.B, panels and the Appellate Body have found to be properly within a panel's terms of reference.

D. Waiting Until Adoption of an Actual Measure Would be Consistent with Principles of Due Process

33. As India correctly notes, the Appellate Body has stated that "terms of reference fulfil an important due process objective – they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case**.**"[25] India's due process rights would not be in any way compromised if the Panel were to refrain, as the United States requests, from making a prospective ruling that "any future measure" is outside the terms of reference of this dispute. Indeed, if India promulgates new measures and the United States seeks to have those measures deemed within the terms of reference of this dispute, India will have an opportunity, at that time, to explain why those particular measures are outside the Panel's terms of reference.

34. On the other hand, were the Panel to find now that "any[] future measure…cannot be brought within the scope of the terms of reference of the Panel," as requested by India, it is the procedural rights of the United States that could be prejudiced. For example, if hypothetically the Panel made such a finding, and on the following day, India promulgated new JNNSM Programme measures with domestic content requirements, the United States would be deprived the opportunity to explain how (if it so considered) those new measures should properly be characterized as "amendments, related measures, or implementing measures" to the legal instruments through which India maintains the domestic content requirements. This might contribute to a multiplicity of WTO litigation, even for instruments that maintain the substance of the measures challenged in this dispute.

35. For the foregoing reasons, the United States respectively requests that the Panel refrain from making any finding in the abstract that any future measures will be considered outside the Panel's terms of reference.

V. Conclusion

36. For the reasons explained in this submission, the United States respectfully requests that the Panel reject India's request for a preliminary ruling.

[25] India's First Written Submission, para. 19 (citing Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22).