INDIA — CERTAIN MEASURES RELATING TO SOLAR CELLS AND SOLAR MODULES

(DS456)

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION AND OPENING ORAL STATEMENT OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

March 4, 2014

EXECUTIVE SUMMARY OF U.S. FIRST WRITTEN SUBMISSION

I. INTRODUCTION

1. The stated aim of India's Jawaharlal Nehru National Solar Mission ("JNNSM") Programme is to promote the use of solar energy. This is a laudable goal that the United States and many other WTO Members share, and it is not this environmental objective that the United States challenges in this dispute. Rather, the United States challenges elements of India's program that discriminate against imported products.

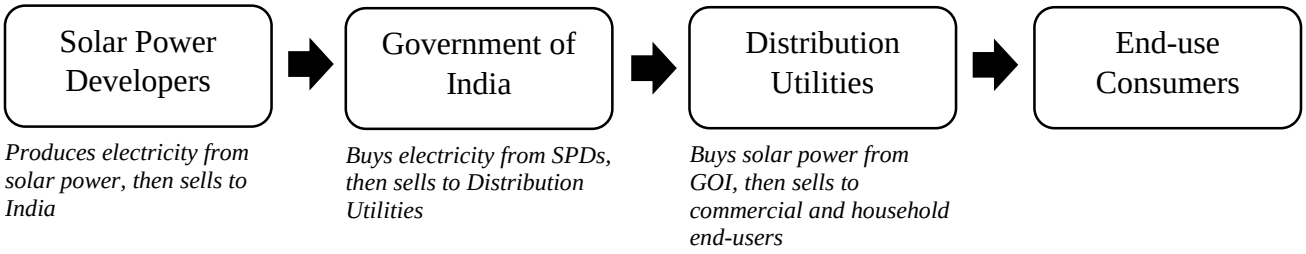
2. In particular, under the JNNSM Programme, India enters into power purchase agreements for electricity from solar power developers ("SPDs"). To enter into these contracts and receive other incentives, however, SPDs are required to use solar cells and modules made in India ("the domestic content requirement" or "DCR"). India's DCRs, therefore, accord less favorable treatment to imported solar cells and modules than to domestic solar cells and modules, as imported products are prevented from competing under the same conditions as domestically-produced cells and modules. As such, the JNNSM Programme measures, including individually executed contracts for solar power projects, are inconsistent with India's obligations under Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.

II. FACTUAL BACKGROUND

3. India established the JNNSM Programme in January 2010 with the stated goal "of establishing India as a global leader in solar energy, by creating the policy conditions for its diffusion across the country as quickly as possible." The JNNSM Programme attempts to achieve this aim by agreeing to purchase electricity from SPDs at long-term contractually guaranteed rates and providing other financial benefits to SPDs. Through the JNNSM Programme, India aims to generate 20,000 MW of grid-connected solar power capacity by 2022. To reach this goal, India is implementing the JNNSM Programme in three separate "phases."

4. Phase I had the goal of generating 1000 MW of solar power capacity by 2013. Phase I was divided into two batches: Batch 1 (FY 2010-2011) and Batch 2 (FY 2011-2012). Phase II, which is currently ongoing, began in October 2013 and is scheduled to close in 2019. To date, India has rolled out one batch under Phase II. During Phase II (Batch 1), India aims to generate 750 MW of solar power capacity. India aims to reach the 20,000 MW target by the end of Phase III, which is scheduled to run between 2017 and 2022. India has not issued any draft guidelines or detailed plans for Phase III.

5. Under each phase of the JNNSM Programme, India solicits and evaluates bid proposals from SPDs to set up "solar power generation projects." India selects certain developers and then enters into power purchase agreements ("PPAs") with those developers. Under a PPA, India agrees to purchase the electricity generated from the solar power project of a particular SPD at contractually-guaranteed long-term rates. India then sells the electricity to downstream "distribution utilities" for resale to commercial and household consumers. The basic flow of electricity generated under the JNNSM Programme is as follows:



6. In addition to meeting various financial and technical conditions, SPDs must agree to satisfy certain DCRs with respect to the solar cells and modules used to generate solar power in projects under the JNNSM Programme.

1. Key JNNSM Programme Administrative Entities

7. The Ministry of New and Renewable Energy ("MNRE") is responsible for administering the JNNSM Programme. NPTC Vidyut Vyapar Nigam Limited ("NVVN") was responsible for implementing the solar power project selection process under Phase I. NVVN also serves as the formal counterparty to SPDs in the PPAs (*i.e.*, the contracts) executed under Phase I. NVVN is a wholly owned subsidiary of the state-owned National Thermal Power Corporation ("NTPC"). For Phase II (Batch I), MNRE selected the Solar Energy Corporation of India ("SECI") to carry out the solar power project selection process and serve as the counterparty to SPDs in PPAs executed under Phase II (Batch I).

2. Operation of the JNNSM Programme

8. In operating the JNNSM Programme, India utilizes a series of instruments and documents (*i.e.*, JNNSM Programme measures) to set out relevant aspects of the Programme for each phase and batch, including the DCRs. Each of Phase I (Batch 1), Phase I (Batch 2) and Phase II (Batch 1) is governed by similar set of key documents. Specifically, the JNNSM Programme measures for each phase include: (1) a Guidelines document; (2) a request for selection ("RfS") document; (3) a model PPA; and (4) individually executed PPAs.

9. The Guidelines documents set out the requirements concerning solar power project eligibility, the bid submission process for SPDs, technical specifications, and contract issuance. The RfS document, essentially the application that SPDs use to submit bid proposals, sets out further details regarding the application process, standard terms and conditions applicable to solar power projects, and technical specifications. Again, each RfS document contains DCRs for each Phase and Batch. The model PPAs, which incorporate provisions of the Guidelines and RfS documents by reference, are used to execute individual PPAs with SPDs. The model PPAs, which form the basis for each executed PPA, incorporate DCRs.

10. As noted, the JNNSM Programme establishes DCRs under Phase I (Batch 1), Phase I (Batch II), and Phase II (Batch I) for SPDs entering into certain power purchase agreements. Each of the Guidelines documents states that SPDs' participation in the JNNSM Programme is strictly conditioned on their compliance with the applicable DCRs.

- 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…" Section 2.5(D)

- 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…" Section 2.5(D)

- 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." Section 2.6(E)

11. The DCRs are restated verbatim in each of the RfS documents. Moreover, as part of bid applications submitted pursuant to the RfS documents, SPDs were obligated to furnish a "specific plan" for meeting the applicable DCRs "within 180 days of signing a PPA" under Phase I and within "210 days of signing a PPA" under Phase II (Batch 1).

12. In order for an SPD to be selected to participate in the JNNSM Programme, to enter into a PPA, and to receive the guaranteed, long-term rates under the JNNSM Programme, they must comply with the DCRs of Phase I (Batch 1), Phase I (Batch 2) and Phase II (Batch 1). The following table summarizes the DCRs for each phase.

JNNSM PROGRAMME DOMESTIC CONTENT REQUIREMENTS		
	Domestic Content Required	***Exempt from Domestic Content Requirements***
PHASE I (BATCH 1)	▪ crystalline silicon solar modules	▪ thin-film solar modules ▪ solar cells
PHASE I (BATCH 2)	▪ crystalline silicon solar modules ▪ solar cells	▪ thin-film solar modules
PHASE II	▪ *crystalline silicon solar modules* ▪ *thin-film solar modules* ▪ *solar cells*	*(NO Exemptions from Domestic Content Requirement under Phase II)*

13. As noted, to have the possibility or advantage of entering into a PPA under the program, a solar power developer must comply with the requisite domestic content requirements. In addition, under a PPA entered under both Phases I and II, India (through NVVN and SECI, respectively) purchases the electricity generated by SPDs at contractually guaranteed long-term tariff rates. These contracts (*i.e.*, the PPAs) remain in effect for a term of 25 years.

3. Individually Executed JNNSM Programme Power Purchase Agreements

14. The measures at issue in this dispute also include the DCRs under the JNNSM Programme incorporated in individually executed PPAs. NVVN has entered into 36 PPAs with SPDs under Phase I (Batch 1) and 27 PPAs under Phase I (Batch 2). In addition, SECI has issued Letters of Intent to enter into PPAs with 47 SPDs under Phase II (Batch 1). As noted above, each PPA is executed based on a model PPA that incorporates DCRs from the Guidelines and RfS for that Phase and Batch. Each PPA thus incorporates DCRs.

III. LEGAL ARGUMENT

A. The Domestic Content Requirements in the JNNSM Programme Are Inconsistent with India's National Treatment Obligation Under Article III:4 of the GATT 1994

15. The DCRs under the JNNSM Programme measures are inconsistent with India's national treatment obligations under Article III:4 of the GATT 1994, because, *inter alia*, the DCRs operate to accord "less favourable" treatment to imported solar cells and modules than that accorded to cells and modules of Indian origin. India cannot justify these DCRs by invocation of the "government procurement" exception under Article III:8(a) of the GATT 1994.

16. The DCRs under the JNNSM Programme measures are inconsistent with India's national treatment obligations under Article III:4 of the GATT 1994, because (i) imported and domestic solar cells and modules are "like products"; (ii) they impose "requirements" on SPDs "affecting" the "internal" "sale," "purchase," or "use" of solar cell and modules; and (iii) they accord imported solar cells and modules treatment less favorable than to "like products" of Indian origin.

17. Solar cells and modules manufactured domestically in India and those imported from the United States are "like products" within the meaning of Article III:4 of the GATT 1994. Apart from country of origin, the JNNSM Programme measures make no further distinction between imported and domestic solar cells and modules. Previous reports have found this to be a sufficient basis to conclude that imported and domestic products are like.

18. Like the measures at issue in those disputes, none of the JNNSM Programme measures note any difference between solar cells and modules made in India as compared with imported solar cells and modules. Indeed, in the JNNSM Programme's DCR provisions, the only distinguishing criterion is between those cells and modules "made in India" or "manufactured in India" versus cells and modules "sourced from any country." Furthermore, in its submissions, India does not dispute that imported solar cells and modules made in India are "like products" within the meaning of Article III:4 of the GATT 1994. Accordingly, the Panel in this dispute should find that solar cells and modules at issue in this case are "like products within the meaning of Article III:4 of the GATT 1994.

19. The domestic content provisions of the JNNSM Programme measures are "requirements" that "affect" the "internal" "sale", "purchase," or "use" of solar cells and modules in India within the meaning of Article III:4 of the GATT 1994.

20. As the panel noted in *India – Autos*:

> GATT jurisprudence . . . suggests two distinct situations which would satisfy the term "requirement" in Article III:4:
>
> (i) obligations which an enterprise is "legally bound to carry out";
>
> (ii) those which an enterprise voluntarily accepts in order to obtain an advantage from the government.

21. The JNNSM Programme's domestic content provisions are "requirements" because, under those provisions, an SPD selected to participate in the program and entering into a PPA will voluntarily accept an obligation to use solar cells and modules manufactured in India. Having entered into the PPA, the solar power developer is legally bound, by contract, to carry out that commitment.

22. Specifically, the Phase I and Phase II Guidelines make clear that the applicable DCRs 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)
- 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)
- 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)

23. The Phase I and Phase II RfS documents – pursuant to which SPDs submit bid applications – also make clear that the applicable DCR 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)
- 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)

- 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)

24. 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.

25. Thus, the domestic content provisions are properly viewed as "requirements" because SPDs submit their bid(s) with full knowledge that participation in the JNNSM Programme is conditioned on compliance with the domestic content provisions.

26. The DCRs affect the internal sale, purchase, and use of solar cells and modules because those requirements modify the conditions of competition between solar cells and modules manufactured in India and those imported.

27. The term "affecting" assists in defining the types of measures that must conform to the obligation not to accord "less favourable treatment" to like imported products as set out in GATT 1994 Article III:4. The Appellate Body and panels have found the term "affecting" to mean having "an effect on", encompassing measures that modify the conditions of competition between domestic and imported goods in the market. The Appellate Body, in particular, noted that the term "affecting" in GATT 1994 Article III:4 has "a broad scope of application", and that it operated to connect identified types of government action (*i.e.*, "laws, regulations and requirements") with specific transactions, activities and uses relating to products in the marketplace (*e.g.*, "sale", "purchase", or "use"). Further, the Appellate Body and panels have found measures that "create an incentive" for domestic over imported goods to "affect", *inter alia*, the internal "use", "purchase" or "sale" of those goods.

28. Per the terms of JNNSM Programme measures at issues in this dispute, a SPD satisfies the applicable DCRs by *purchasing* and *using* solar cells and modules made in India. The sale, purchase, or use of the equipment should be considered "internal" because the requirements apply inside the customs territory of India and not at the border. The JNNSM Programme measures are therefore properly viewed as measures "affecting" the "internal sale.…purchase… or use" of solar cells and modules within the meaning of GATT 1994 Article III:4.

29. The Appellate Body in *Korea – Various Measures on Beef* determined that "[a]ccording 'treatment no less favourable' means . . . according conditions of competition no less favourable to the imported product than to the like domestic product." Thus, the focus of this analysis in this dispute is whether the JNNSM Programme measures *modify the conditions of competition* in the relevant market to the *detriment* of imported products.

30. The DCRs under the JNNSM Programme measures accord less favorable treatment to imported solar cells and modules than that accorded to like products of Indian origin by incentivizing the use of Indian-manufactured solar cells and modules, versus imported cells and

modules, and thus modify the conditions of competition in favor of Indian-manufactured cells and modules to the detriment of imported equipment.

31. As explained above, under the JNNSM Programme, India will enter into PPAs with selected solar power developers contingent on their agreement to use domestically-produced solar cells and modules. A solar power developer that opts to use imported solar cells and/or modules is not eligible to participate in such portion of the program subject to the DCRs. Thus, such a developer may not enter into a PPA under the program without undertaking the domestic use commitment.

32. Because the JNNSM Programme requires that a SPD use solar cells and modules of Indian origin in order to enter into a PPA under that part of the program subject to DCRs, the program thus creates an incentive for SPDs to purchase solar cells and modules made in India. In *India – Autos*, the panel found that "the very nature of [an] indigenization requirement generates an incentive to purchase and use domestic products and hence creates a disincentive to use like imported products", and that it was "more than likely to have some effect on manufacturers' choices as to the origin of parts and components to be used in manufacturing automotive vehicles", as the manufacturers would "need to take into account the requirement to use a certain proportion of products of domestic origin." Under these circumstances, the panel found that the DCRs at issue clearly modified the conditions of competition of domestic and imported parts and components in the Indian market in favor of domestic products.

33. Similarly, the DCRs of the JNNSM Programme clearly modify the conditions of competition between domestic and imported solar cells and modules in the Indian market in favor of domestic equipment. Because the JNNSM Programme has altered the conditions of competition in favor of Indian-produced solar cells and modules to the detriment of such equipment produced in the United States and elsewhere, it thereby accords imported equipment less favorable treatment than it accords to like products of Indian origin.

34. Moreover, where the DCRs apply the use of imported cells and/or modules is prohibited. Barring foreign products from some sales opportunities available to domestic suppliers clearly modifies the conditions of competition to the detriment of imported products.

B. The JNNSM Programme's domestic content requirements for solar cells and modules cannot be justified by the "government procurement" exception under GATT 1994 Article III:8(a) because the Indian government does not procure solar cells and modules through the JNNSM Programme.

35. GATT 1994 Article III:8(a) provides an exemption from the national treatment obligation in Article III:4. The DCRs at issue in this dispute, however, fail to qualify for this exemption because India acquires *electricity* under the PPAs whereas the products which are subject to requirements affecting their sale, purchase, or use are *solar cells and modules*. These products – electricity versus solar cells and modules – are not the same nor in a competitive relationship. Put differently, while India procures electricity under the JNNSM Programme through PPAs, it does not procure solar cells or modules. Thus, Article III:8(a) cannot serve to exempt a requirement that discriminates against imported solar cells or modules.

36. This understanding of the exemption under Article III:8(a) was reached by the Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program*, which found that for purposes of GATT 1994 Article III:8(a), the imported product being discriminated against must be in a competitive relationship with the domestic product being purchased by the government.

37. Like the measures at issue in *Canada – Renewable Energy / Feed-In Tariff Program*, under India's JNNSM Programme, "the product being procured [by India] is electricity, whereas the product discriminated against for reason of its origin is generation equipment," *i.e.*, solar cells and modules. Neither solar cells nor solar modules are in a competitive relationship with electricity. Accordingly, the discrimination relating to solar cells and modules under the JNNSM Programme is not covered by the derogation of Article III:8(a) of GATT 1994.

IV. CONCLUSION

38. For the reasons stated above, the United States requests that the Panel make the following findings:

- the DCRs 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 DCRs contained in the JNNSM Programme measures, including both Phase I and Phase II and individually executed PPAs for solar power projects, constitute 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.

39. Accordingly, the United States respectfully requests the Panel to recommend that India bring the DCRs under the JNNSM Programme measures, including both Phase I and Phase II and individually executed PPAs for solar power projects, into conformity with the GATT 1994 and the TRIMs Agreement, pursuant to Article 19.1 of the DSU.

EXECUTIVE SUMMARY OF U.S. OPENING ORAL STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

I. The DCRs under Phases I and II of the NSM Program Are Inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of TRIMs agreement.

40. The DCRs at issue fall squarely within the types of measures included in paragraph 1(a) of the Annex to the TRIMs Agreement, and are therefore inconsistent with Article 2.1 of the TRIMs Agreement. That is, (i) imported solar cells and modules made in India are "like products" within the meaning of Article III:4 of the GATT 1994; (ii) the DCRs are "requirements" that "affect" the "internal" purchase or "use" of solar cells and modules in India; or (iii) the DCRs are "trade-related investment measures" within the meaning of the TRIMs Agreement. These facts – none of which India disputes – by themselves, establish an inconsistency with Article 2.1 of the TRIMs Agreement *as well as* Article III:4 of the GATT 1994. As stated by the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff*, "[b]y its terms, a measure that falls within the coverage of paragraph 1(a) of the Illustrative List is 'inconsistent with the obligation of national treatment provided for in [Article III:4 of the GATT 1994]."

41. The United States notes India's specific argument that the DCRs do not accord less favorable treatment to imported solar cells and modules because the NSM Program does not "confine the benefits or advantages relating to tariff or any other benefits, to SPDs that use only domestically manufactured cells and modules." But this statement (which appears to envision erroneously that the only "benefits" or "advantages" are the rates under signed contracts) applies only to *some* of the SPD projects under the NSM – the portion to which DCRs do not apply. It does not change the fact that, for the share of projects reserved to those developers who purchase and use domestic products, there is less favorable treatment for imported products, as the *use of imported cells and/or modules is prohibited*. Under Article III, compliance with national treatment for some transactions does not excuse a Member from its obligation to comply with national treatment for other transactions.

42. The Appellate Body has made clear that where a measure "modifies *the conditions of competition* to the detriment of imported products" that measure operates to accord less favorable treatment to imported products within the meaning of Article III:4. Even as described by India, the NSM Program operates so that *some* SPD contracts prohibit the use of imported solar cells and modules – that is, only some of them allow the use of imported solar equipment. Barring foreign products from some sales opportunities available to domestic suppliers clearly modifies the conditions of competition to the detriment of imported products.

43. Thus, even putting aside the Illustrative List of the TRIMs Annex, under which India's DCRs are *necessarily* inconsistent with Article III:4 of the GATT 1994, as well as Article 2.1 of the TRIMs Agreement, the facts of this dispute also demonstrate that the DCRs do operate to "modify the conditions of competition to the detriment" of imported solar cells and modules and thereby accord less favorable treatment to imported products within the meaning of Article III:4 of the GATT 1994.

II. The DCRs at Issue Are Not Covered by Government Procurement Derogation under Article III:8(a) of the GATT 1994

44. The Appellate Body has found that Article III:8(a) of the GATT 1994 derogates from Article III only where the imported product being discriminated against is in a competitive relationship with the product being purchased. In *Canada – Renewable Energy / Canada – Feed-in Tariff*, the Appellate Body found that the government procurement was unavailable to Canada because the product being procured by the government was electricity, whereas the product discriminated against for reason of its origin was generation equipment. The Appellate noted that the those two products were not in a competitive relationship and, accordingly, found that the discrimination relating to generation equipment was not covered by Article III:8(a) of the GATT 1994.

45. Similar to the facts of *Canada – Renewable Energy / Canada – Feed-in Tariff*, the Indian government is not purchasing solar cells and modules under the NSM Program, but rather the *electricity* generated through the use of those cells and modules. Therefore, following the logic clearly articulated by the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff*, the Article III:8(a) government procurement provision does not apply to the facts of *this* dispute. Simply put, Article III:8(a) does not permit India to purchase electricity but discriminate against imported solar cells and modules.

46. India acknowledges that the Indian government is *not* purchasing solar cells and modules under the NSM Program and makes no attempt to argue that solar cells or modules are in a competitive relationship with electricity. Rather, India asserts that because solar cells and modules are "integral to the generation of solar power [they] cannot be treated as distinct from the generation of solar power." On that basis, India posits that the Indian government is *effectively* procuring the cells and modules because it is "buy[ing] solar power [i.e., the electricity] generated from such cells and modules."

47. India's line of reasoning, however, has already been rejected by the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff*. In that dispute, the panel had observed the generation equipment at issue "[was] needed and used" to produce the electricity, and therefore there [was] a 'close relationship' between the products affected by the domestic content requirement (generation equipment) and the product procured (electricity)." When reviewing the findings on appeal, however, the Appellate Body declared that the "connection" between the DCRs and electricity was insufficient to bring the DCRs within the purview of Article III:8(a). As noted, the Appellate Body concluded that the government procurement derogation *did not* cover the DCRs at issue in *Canada – Renewable Energy / Canada – Feed-in Tariff* because the government was procuring *electricity*, whereas the products being discriminated against were imported solar and wind power generation equipment. It found there was no competitive relationship between solar power (or wind power) equipment purchased by developers and the electricity purchased by the government.

48. Likewise, because the Indian government is not procuring solar cells and modules under the NSM Program, the DCRs pertaining to those cells and modules fall outside the coverage of Article III:8(a). India has not even tried to demonstrate that solar cells and modules and

electricity are in a competitive relationship. Accordingly, any suggestion that DCRs under the NSM Program are properly viewed as "laws, regulations or requirements governing procurement" within the meaning of Article III:8(a) cannot be squared with the Appellate Body's analysis of that provision.

49. India also seeks to avoid the implications of the Appellate Body findings in *Canada – Renewable Energy / Canada – Feed-in Tariff* by highlighting certain mechanical distinctions between the DCRs at issue in that dispute and this one. But the differences it cites are inconsequential. The Appellate Body based its findings in *Canada – Renewable Energy / Canada – Feed-in Tariff* on the observation that the electricity purchased by the Government of Ontario did not compete with the solar and wind power generation equipment purchased by power developers. The metrics used to determine the "Minimum Required Domestic Content Levels" under Ontario's FIT Programme were irrelevant to this conclusion. Therefore, the minor differences identified by India do not detract from the applicability of the Appellate Body's findings to the facts of this dispute.

50. India has also failed to demonstrate that any alleged procurement is "for governmental purposes" within the meaning of Article III:8(a). The Appellate Body has identified two ways for evaluating whether a product is procured for a "governmental purpose" within the meaning of Article III:8(a). Specifically, the Appellate Body has stated that "the phrase 'products purchased for governmental purposes' refers to (i) what is consumed [or used] by the government; or (ii) "what is provided by government to recipients in the discharge of its public functions." It is clear from the facts of this dispute that the Indian government is not itself consuming or using the electricity it procures from SPDs through the NSM Program, and India has not argued to the contrary. And India also has not demonstrated that the government is providing electricity to recipients in the discharge the Indian government's public functions.

51. The Appellate Body has clarified that the mere assertion of "governmental aims or objectives" *does not* amount to a "governmental purpose" within the meaning of Article III:8(a). India asserts that its "procurement of solar power…is an act pursuant to the government purpose of promoting ecologically sustainable growth while addressing India's energy security challenge." In its submission, however, India has not explained why promoting sustainable development should be understood as a "public function" as opposed to an important "aim or objective" of the Indian government. This is another crucial omission by India: as noted by the Appellate Body, "governmental agencies *by their very nature* pursue governmental aims or objectives." As such, "the additional reference to 'governmental' in relation to 'purposes' *must* go beyond simply requiring some governmental aim or objective with respect to purchases by governmental agencies." Therefore, India has not demonstrated that its procurement of solar power is for a governmental purpose within the meaning of Article III:8(a).

52. Another reason that the Panel may conclude that India cannot avail itself of the derogation in Article III:8(a) is that any alleged procurement *is* "with a view to commercial resale" within the meaning of Article III:8(a). The Appellate Body has explained that an inquiry into whether a transaction is with a view to "commercial resale" for purposes of Article III:8(a) "must be assessed having regard to the entire transaction." With respect to a buyer, the

Appellate Body has stated that "commercial resale" is evident where "the buyer seeks to maximize his or her own interest."

53. The United States observes that many of the distribution companies (or DISCOMs) to which India resells solar power are corporatized entities with a fiduciary duty to maximize profits or returns for shareholder. Indeed, one-quarter of Indian DISCOMs are wholly-private concerns. Thus, the DISCOMs are properly viewed as "buyer[s] seek[ing] to maximize [their] own interests." And on that basis, India's sale of the solar power (procured from SPDs) to such entities is properly viewed as "commercial resale" within the meaning of Article III:8(a). For this reason as well, India cannot avail itself of the derogation in Article III:8(a).

III. India Has Failed to Demonstrate that the DCRs at Issue Are "Essential" to Addressing a Short Supply of Solar Cells and Modules within the Meaning of Article XX(j)

54. India argues that the DCRs at issue are justified under Article XX(j) of the GATT 1994. Article XX(j) allows a Member to take measures that are "essential to the acquisition or distribution of products in general or local short supply." India, however, has not demonstrated that there is a short supply of solar cells and modules in India. Indeed, India acknowledges that there is an "adequate availability" of solar cells and modules on the international market, but does not bother to explain why India is unable to avail itself of this supply. Moreover, India complains that more than 90 percent of its solar PV installations rely on imported solar cells and modules – suggesting that India is experiencing an abundance of solar power generation products, not a "scarcity" or "limited quantity." In short, India has failed to establish the factual predicate for invocation of Article XX(j).

55. Moreover, India's view of "products in general or local short supply" as referring to domestic products rests on a misunderstanding of Article XX(j). This provision is not concerned with the supply of products of a particular origin, but rather the supply of that product in general or local situations without respect to origin. The term "products" in Article XX(j) is unqualified by origin while other provisions of the GATT 1994, which are addressed to products of a particular origin identify those products explicitly. Therefore, India's interpretation of this provision as relating to a short supply of domestic products is in error.

56. India has not demonstrated how DCRs could be "essential" to "the acquisition" of those products. The Appellate Body has observed that the Oxford English Dictionary defines "essential" to mean "absolutely indispensable or necessary." Therefore, for purposes of Article of XX(j), India would need to establish that the DCRs are "absolutely indispensable or necessary" to acquiring solar cells and modules purportedly in short supply. It has not done so.

57. Lastly, India appears to be not so much concerned with its ability to acquire solar cells and modules than with the apparent dearth of Indian-manufactured solar cells and modules. Specifically, India argues that the DCRs are designed to "incentivize domestic manufacturing of cells and modules" and are therefore "essential" to addressing the apparent shortage of Indian-produced cells and modules. In other words, by India's own acknowledgment, it views the

DCRs as "essential" to encourage local supply (production) and not essential to "the acquisition" of solar cells or modules.

IV. India Has Failed to Demonstrate that the DCRs at Issue Are Necessary to Secure Compliance with Laws or Regulations Not Inconsistent with the GATT 1994 within the Meaning of Article XX(d)

58. India argues that the DCRs at issue are measures "necessary to secure compliance with laws or regulations [not] inconsistent with the provisions of [GATT 1994] …" for purposes of Article XX(d). The Appellate Body has found that "[a] Member who invokes Article XX(d) as a justification has the burden of demonstrating that" the measure at issue "is necessary to secure compliance."

59. First, many of the instruments cited by India appear to be broad policy documents with non-binding or merely hortatory effect. That is, they do not appear to be laws or regulations with which India must "comply" within the meaning of Article XX(d). Previous GATT panels have reasoned that "to comply" means "to enforce obligations" not "to ensure the attainment of the objectives of laws and regulations." Thus, even if the DCRs are designed to pursue the sustainable development goals reflected in the cited instruments, that is still insufficient to demonstrate that the DCRs are necessary to "secure compliance" with the instruments themselves. On this fact alone, India has failed to demonstrate that the DCRs are necessary to comply with any law or regulation for purposes of Article XX(d).

60. Second, India has also failed to demonstrate that the DCRs at issue are "necessary" to comply with the obligations contained in any allegedly binding instruments. India argues that its DCRs are "necessary" – for purposes of Article XX(d) – because "[t]he DCR Measures contribute to enforcing the sustainable development commitments undertaken by India, through its laws and regulations." The Appellate Body has observed that, as a general matter, "necessary" can mean anything from "indispensable" to simply "makes a contribution to." But for purposes of Article XX(d), the Appellate Body has made clear that a "necessary measure is…located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'."

61. Finally, the United State observes that several of the instruments cited by India are international instruments, not domestic Indian laws or regulations. India has not sufficiently demonstrated that those instruments have been incorporated into India's domestic legal system. As India states in its submission, in India "rules of international law are [automatically] accommodated into domestic law" only if "they do not run into conflict with laws enacted by Parliament."