

India – Certain Measures Related to Solar Cells and Solar Modules

(AB-2016-3 / DS456)

**Opening Statement of the United States of America
at the Oral Hearing**

July 4, 2016

1. Good morning Mr. Chairman, and members of the Division. On behalf of the U.S. delegation, I would like to thank you, as well as the Secretariat staff assisting you, for your work on this appeal. The United States appreciates the opportunity to appear before you today.

2. The United States applauds and strongly supports India's efforts to promote the generation and use of solar power under the National Solar Mission (JNNSM). The United States looks forward to a continued partnership with India in the global fight against climate change.

3. The legal issue at the heart of this dispute – namely, the proper interpretation and application of the government procurement derogation of Article III:8(a) of the GATT 1994 – is not a difficult one in the context of this dispute. Article III:8(a), by its terms, introduces an exemption from the national treatment obligations that applies to a product when the government purchases that product for governmental purposes. The Appellate Body in a previous dispute found that Article III:8(a) permits a government to discriminate against an imported product only to the extent the product being discriminated against by the government and the product being purchased by that government are the same (or in a competitive relationship). Put another way, Article III:8(a) does not apply when a Member purchases one product, but seeks to discriminate against another, wholly different product.

4. This interpretation, which follows from the text of Article III:8(a), provides a straightforward result when applied to the facts of this dispute. Under the measures at issue in this dispute, India purchases electricity, but discriminates against imported solar cells and modules. Solar cells and modules and electricity are not the same products, nor are they in a

“competitive relationship.” Thus, the Panel properly rejected India’s attempt to justify its discriminatory local content requirements under Article III:8(a).

5. Before turning to the Appellate Body’s questions, the United States would briefly emphasize the legal importance of certain additional facts that are not in dispute between the parties.

6. First, India does not appeal the Panel’s finding that its measures contain domestic content requirements, and these are inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. The United States thus understands India to concede that its measures are inconsistent with its national treatment obligations under those provisions (subject to Article III:8(a)).

7. Second, India acknowledges that it does not purchase, acquire, or take title or custody of any solar cells and modules under the measures at issue in this dispute.¹ In other words, India essentially concedes that it does not “procure” solar cells and modules under its local content measures. This fact too is sufficient to compel a finding that India’s DCR measures are not covered by the government procurement derogation of Article III:8(a) of the GATT 1994.

8. Third, India has never even argued, much less demonstrated, that solar power developers are experiencing any difficulty acquiring solar cells and modules for use in projects under the NSM Program. This alone demonstrates that India’s local content requirements are not measures

¹ See, India’s First Written Submission, para. 114.

“essential to the acquisition of products in general or local short supply” within the meaning of Article XX(j) of the GATT 1994.

9. Fourth, India has not argued, much less established, that any Indian law or regulation requires or even encourages the use of a domestic content requirement for solar cells and modules. Nor has India argued that withdrawal of its DCR measures would cause India to breach any domestic law or international legal commitment. This too alone demonstrates that India has failed to show that its measures are “necessary to secure compliance” with any Indian law or regulation for purposes of Article XX(d) of the GATT 1994.

10. In the U.S. appellee submission, the United States has thoroughly explained why India’s arguments on appeal are without merit. Instead of using the time allotted to us this morning restating those points, the United States considers that it would be a better use of time to begin addressing your questions. Presiding Member, members of the Division, thank you for your attention.