INDIA — CERTAIN MEASURES RELATING TO SOLAR CELLS AND SOLAR MODULES

(DS456)

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

June 5, 2015

U.S. SECOND WRITTEN SUBMISSION

I. INTRODUCTION

1. In its first written submission, the United States explained that the DCRs imposed under India's NSM are inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement because they accord less favourable treatment to imported solar cells and modules as compared to cells and modules manufactured in India. India's rebuttal submission, statements to the Panel, and responses to the Panel's questions have done nothing to call this conclusion into question.

2. India instead attempts to provide defenses under Articles III:8(a), XX(j) and XX(g) of the GATT 1994, but these arguments are unconvincing. India cannot use Article III:8(a) as defense because, as the United States has shown, the Government of India is not procuring solar cells and modules under the NSM Program, but electricity.

3. India's attempts to utilize Article XX also fall short. India's own arguments demonstrate that there is *no* general or local short supply of solar cells and modules in India. Even if there were such a short supply, India has failed to adequately explain why the DCRs at issue are "essential" to addressing its purported short supply of solar cells and modules.

4. India also contends that its DCRs are "necessary to secure compliance with a law or regulation" for purposes of GATT Article XX(d). India, however, has not identified any WTO-consistent law or regulation that requires the imposition of DCRs, much less demonstrated that DCRs at issue are in any way "necessary" to secure compliance with a law or regulation.

II. INDIA HAS RAISED NO VALID DEFENSE TO THE U.S. CLAIMS UNDER GATT 1994 AND THE TRIMS AGREEMENT

A. India Has Not Refuted the U.S. Claims that the DCRs at Issue Are Inconsistent with GATT 1994 Article III:4 and TRIMs Agreement Article 2.1

5. In its first written submission, the United States explained that the DCRs are inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. India has not advanced any meritorious rebuttal to these claims.

6. The Appellate Body has recognized that a measure that falls under paragraph 1(a) of the Illustrative List is *by definition* inconsistent with Article III:4 of the GATT 1994. Specifically, the Appellate Body in *Canada – FIT* observed that, "[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]'." Thus, the fact that the DCRs "qualify under the meaning of paragraph 1(a) of the Illustrative List" – as India concedes – provides a sufficient basis for the Panel to find that the DCRs are inconsistent with Article III:4 of GATT 1994 and Article 2.1 of the TRIMs Agreement.

7. India has also failed to refute the U.S. substantive argument that the DCRs operate to accord less favourable treatment to imported solar cells and modules within the meaning of Article III:4 of the GATT 1994. India argues that this is not the case because "the benefits or advantages relating to tariff or any other benefits" are not confined "to SPDs that use only domestically manufactured cells and modules." As noted by the United States, however, India's argument on this score is valid only with respect to the portion of solar power projects to which DCRs *do not apply*. For the share of projects reserved for developers that *are* required to use domestic cells or modules, there is necessarily "less favorable treatment" for imported cells or modules, as the NSM measures prohibit use of imported products for those projects.

8. With respect to the order of analysis of the two national treatment provisions, the United States believes that the Panel may properly begin its analysis under either the GATT 1994 or the TRIMs provision, and in both cases, will reach the same conclusion – that, for the reasons described above, India's measures breach its obligations. However, the United State believes that it may be more efficient for the Panel to begin its analysis under Article 2.1 of the TRIMs Agreement, before proceeding to review under Article III:4 of the GATT 1994. This is because as noted, measures that are inconsistent with Article 2.1 of the TRIMs Agreement are necessarily inconsistent with Article III:4 of the GATT 1994.

B. The NSM Program's Domestic Content Requirements Are Not Covered by the Government Procurement Derogation of Article III:8(a) of the GATT 1994

9. India cannot properly invoke the government procurement derogation under Article III:8(a) to justify the discriminatory DCRs at issue because India is procuring electricity under the NSM Program, whereas the products subject to discrimination are solar cells and modules. Nothing in the text of Article III:8(a) suggests the "products" subject to the derogation are different from the "product" being accorded less favorable treatment under Article III:4. The Appellate Body in *Canada – FIT* similarly found that Article III:8(a) applies only where the imported product "allegedly being discriminated against [is] in a competitive relationship with the product being purchased." The United States observes that India has essentially conceded that it is not procuring solar cells and modules under the NSM Program. Nor has India attempted to argue that the electricity it is purchasing is in a competitive relationship with imported solar cells and modules. On these facts alone, the Panel has a sufficient basis to reject India's invocation of Article III:8(a).

10. India asserts that "the derogation under Article III:8(a) is available" to cover the DCRs at issue because the "product being discriminated against [*i.e.*, solar cells and modules] is an integral input for the generation or production of the product that is finally purchased [*i.e.*, solar power]". To support this reasoning, India cites the Appellate Body statement in *Canada – FIT* that "[w]hat constitutes a competitive relationship between products may require consideration of inputs and processes of production used to produce the product."

11. The most straightforward rebuttal to this argument is that India has the facts wrong. Solar cells and modules are not inputs in the generation of electricity. They are *not* incorporated into or otherwise physically detectable in the electricity procured by the Indian government. Instead, solar cells and modules are more accurately characterized as capital goods – equipment

like a turbine or a generator. Therefore, contrary to India's assertions, when it buys solar electricity, it *does not* acquire the cells and modules. Rather, as it acknowledges, the cells and modules remain in the clear custody and ownership of the solar power developers. Therefore, the legal question of whether Article III:8(a) provides special a rule for "integral inputs" into products procured by the government is one that the Panel does not have to answer.

12. India further seeks to avoid the implications of the findings in *Canada – FIT* by highlighting certain mechanical distinctions between the DCRs at issue in that dispute and this dispute. As previously noted by the United States, the Appellate Body based its findings in *Canada – FIT* on the observation that the electricity purchased by the Government of Ontario did not compete with the solar and wind power equipment purchased by SPDs. The metrics used to determine the "Minimum Required Domestic Content Levels" under Ontario's FIT Programme were irrelevant to this conclusion. Therefore, India's detailing of minor differences between criteria used under FIT and the NSM does not detract from the applicability of the Appellate Body's findings to the facts of this dispute.

13. The panel and Appellate Body in *Canada – FIT* found that FIT Programme's "Minimum Domestic Content Level" was structured so as to "require[]" solar and wind power developers "to purchase or use a certain percentage of renewable energy generation equipment and components sourced in Ontario…." That was the critical fact underlying the finding. In this regard, the DCRs under the NSM are functionally identical – they require solar power developers to purchase or use domestically sourced renewable energy equipment.

14. India attempts to draw a further distinction between solar cells and modules – which it characterizes as "integral inputs" to the generation of solar power – and other types of equipment, which India refers to as merely "ancillary" (inverters, electrical wiring, etc.). India seems to suggest that the DCRs at issue in this dispute are legally permissible because they are limited to so-called "integral" generation equipment like solar cells and modules, *in contrast* to the DCRs in *Canada – FIT*, which also covered merely "ancillary" equipment like electrical wiring, inverters, mounting systems, etc.

15. The logical import of India's argument is that, had the Ontario Government limited its DCRs to solar cells and modules, the DCRs at issue in *Canada – FIT* would have been properly justified under Article III:8(a). The United States observes, however, that if India's distinction between "integral" and "ancillary" equipment was valid, the Appellate Body in *Canada – FIT* should have found that the DCRs pertaining the solar cells and modules were covered by Article III:8(a), while the DCRs pertaining to other "ancillary" equipment were not so justified. It did not do so.

16. For these reasons, the United States respectfully submits that there is no basis to find that the DCRs at issue in this dispute are covered by the government procurement derogation under Article III:8(a).

III. INDIA HAS FAILED TO MEET THE CONDITIONS FOR JUSTIFYING THE DCRS AT ISSUE UNDER PARAGRAPHS (j) OR (d) OF ARTICLE XX OF THE GATT 1994

A. India Has Not Demonstrated That It Meets the Prerequisites for Invoking Article XX(j) of the GATT 1994

17. India seeks to justify its DCRs under GATT Article XX(j), but it has failed to satisfy two of the criteria for that exception – that there is a product in "general or local short supply" and that India's WTO-inconsistent measures are essential to the acquisition or distribution of that product. Either of these failings is fatal to India's defense under this provision.

18. India has failed to demonstrate the existence of a short supply of solar cells and modules in India. In *China – Raw Materials*, the Appellate Body observed that, in the context of Article XX(j) of the GATT 1994, the words "general or local short supply," refers to a situation where a product is "available only in limited quantity" or "scarce. India, however, has not demonstrated that solar cells and modules are in short supply (*i.e.*, "scarce") either internationally *or* locally in India. Specifically, India acknowledges that there is an "adequate availability" of solar cells and modules on the international market, but has not explained why India is unable to avail itself of this supply through importation. Moreover, India's assertion that more than 90 percent of its solar PV installations rely on imported solar cells and modules suggests that it 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).

19. Even if India were experiencing a short supply of solar cells and modules, it has failed to establish that the DCRs at issue are "essential" to the acquisition and distribution of products that are in short supply. The Appellate Body has observed that the Oxford English Dictionary defines "essential" to mean "absolutely indispensable or necessary." Where a Member is able to acquire and distribute the product, as appears to be the case for solar cells and modules in India, it is difficult to envisage how a WTO-inconsistent measure to decrease the availability of that product domestically (by restricting project for which imports can be used) could be "essential" to the "acquisition" or "distribution" of that product. A measure that discriminates against imports would tend to exacerbate difficulties in the acquisition or distribution of a product in short supply by limiting the potential sources of "supply". Such measures would accordingly be antithetical, rather than "essential," to the objectives of Article XX(j). India has failed to demonstrate how the circumstances of its purported short supply situation could operate differently.

20. The United States also considers that, given the element of necessity embodied in the ordinary meaning of "essential," legal tests developed to evaluated whether measures were "necessary" within the meaning of other paragraphs of Article XX might inform the analysis under Article XX(j). The Appellate Body has found in that regard that such an analysis "involves a process of 'weighing and balancing' a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure."

21. The Panel need not identify exactly where this balance falls to resolve this dispute, because the balance of factors with regard to the NSM DCRs does not suggest that they are even "necessary," let alone "essential":

- **The objective.** The "objective" in question in a necessity analysis under Article XX of GATT 1994 is the objective protected under the clause that a Member seeks to invoke. With respect to Article XX(j), that objective would be the acquisition and distribution of solar cells and modules, assuming *arguendo* that they are in short supply. India has in particular expressed a desire "to ensure domestic resilience in addressing any supply side disruptions."

- **The importance of the objective.** The United States does not question that the acquisition and distribution of solar cells and modules to Indian SPDs, and ensuring domestic resilience against supply-side disruptions, are important.

- **Contribution of the measure to the objective.** The NSM DCRs do not appear to make much of a contribution to the objectives. In the short term, they would tend to exacerbate a short supply situation by limiting access to imported solar cells and modules for some solar power projects. In the long term, any capacity added in India would become part of the global market, and in a short supply situation would tend to serve the highest paying purchaser, which would not necessarily be in India.

- **Trade-restrictiveness of the measure.** For projects to which they apply, the DCRs impose a ban on imports, which is one of the most severe forms of trade restriction. While they do not apply to all projects funded through the NSM, they do cover a large proportion, and the NSM envisages a dramatic increase in India's solar power generation capacity. Therefore, even when viewed across the totality of Indian demand for solar cells and modules, the NSM DCRs appear to represent a substantial restriction on trade.

- **Reasonably available alternative measure.** There are two WTO-consistent alternatives. First, India could acquire a "reserve" of solar cells and modules by importing a surplus for the purpose of stockpiling, which it could then draw down in the event of a supply shock. Another option would be to secure dedicated import sources by entering into long-term contracts with foreign suppliers. Either of these measures would do at least as much as DCRs to address any short-supply situation that may arise in India and ensure resiliency in the face of supply shocks in a matter that is consistent with WTO-rules.

In light of these factors, the NSM DCRs are not "necessary" to achieve the objectives of Article XX(j), and certainly are not "essential."

B. India has Not Demonstrated that it Meets the Criteria to Invoke Article XX(d) of the GATT 1994

22. India also asserts that the DCRs at issue are measures "necessary ... to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement …" and therefore justifiable under Article XX(d) of the GATT 1994. The Appellate Body has found that "[a] Member who invokes Article XX(d) to justify a measure has the burden of

demonstrating that" the measure "is necessary to secure compliance" with a GATT-consistent law or regulation.

23. Article XX(d) does not apply to the DCRs at issue because Article XX(d) does not cover measures taken by a government to secure its *own* compliance with its own laws and regulations. Rather, Article XX(d), by its terms, covers only those measures necessary for a government to enforce its laws and regulations *vis-à-vis* persons subject to its jurisdiction, not measures taken to secure the government's own compliance with its laws and regulations. This interpretation is supported by the text of Article XX(d) itself, and is consistent with the interpretation of past panels and the Appellate Body, contrary to India's assertions.

24. As noted above, India cites several domestic and international legal instruments as requiring it to take certain actions to protect the environment or pursue a sustainable development strategy. The United States observes, however, that India does not argue that any of the cited instruments are enforced (much less enforceable) against its citizens or persons otherwise subject the jurisdiction of the Indian government. That is, India has not argued that the cited instruments constitute laws or regulations that persons under its jurisdiction must obey in order to comply with Indian law. Rather, India explicitly describes these instruments as containing legal obligations that apply to the Indian government *itself*.

25. Moreover, assuming, *arguendo* that Article XX(d) covered Indian laws and regulations that bind the Government of India *itself*, none of the instruments cited by India encourage, much less require, the imposition of DCRs for solar cells and modules. Indeed, several of the cited instruments read more as broad policy documents with non-binding or merely hortatory effect—that is, they do not appear to be laws or regulations that demand legal "compliance" within the meaning of Article XX(d). Thus, even if DCRs at issue are designed to pursue the sustainable development goals reflected in the cited instruments, this is still insufficient to demonstrate that the DCRs are necessary to "secure compliance" with the instruments themselves.

26. Even aside from India's failure to demonstrate that the cited instruments embody legal obligations with respect to DCRs with which India must comply, India has still failed to establish that the DCRs at issue are, in fact, "necessary" to secure such compliance within the meaning of Article XX(d). The thrust of India's argument in relation to Article XX(d), is that the DCRs at issue are necessary to "develop domestic manufacturing capacity" for solar cells and modules; a domestic manufacturing base for cells and modules, in turn, will equip India to comply with its various sustainable development commitments. Specifically, India argues that "The DCR Measures contribute to enforcing the sustainable development commitment undertaken by India, through its laws and regulations as discussed above. The Appellate Body has observed that "necessary" can mean anything from "indispensable" to simply "makes a contribution to." For purposes of Article XX(d), however, 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'." Accordingly, even if the Panel accepts India's assertion the DCRs at issue "contribute" to India's compliance with the cited instruments, this falls far short of demonstrating that the DCRs are "necessary" to secure such compliance within the meaning of Article XX(d).

27. The Appellate Body has also stated that determining whether a GATT-inconsistent measure is "necessary" under Article XX involves, *inter alia*, as assessment of whether there are "possible alternative [GATT-consistent] measures that may be reasonably available to the responding Member to achieve its desired objective." India appears to have at its disposal reasonably available WTO-consistent alternative measures. Indeed, India notes two possible alternatives in its first written submission: (1) maintaining no limitations on foreign direct investment in the solar technology sector; and (2) reducing import duties on equipment used to manufacture solar cells and modules. The former would appear to facilitate foreign producers of cells and modules in setting up manufacturing sites in India while the latter operates to effectively reduce the cost of manufacturing cells and modules in India. The United States observes that both of these alternative measures, as direct inducements to manufacturers, would tend to be *more* effective at promoting domestic production than DCRs that are targeted at solar power developers.

28. The United States therefore submits that the DCRs at issue are demonstrably not "necessary" within the meaning of Article XX(d)

U.S. OPENING ORAL STATEMENT AT THE SECOND PANEL MEETING

I. INTRODUCTION

29. As the United States has noted throughout this dispute, it supports the efforts of WTO Members to pursue environmental objectives, such as clean energy. In light of the submissions made by the parties to date, it has become even more apparent that the DCRs adopted by India that are at issue in this dispute are inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. Equally clear is that India's attempts to justify the DCRs under Article XX of the GATT 1994 are without merit.

II. THE DOMESTIC CONTENT REQUIREMENTS AT ISSUE ARE INCONSISTENT WITH ARTICLE III:4 OF THE GATT 1994 AND ARTICLE 2.1 OF THE TRIMS AGREEMENT

30. In its submissions, the United States has explained that the DCRs are inconsistent with India's national treatment obligations because they modify the conditions of competition in favor of cells and modules made in India to the detriment of imported cells and modules. Specifically, India's DCR measures operate to exclude imported solar cells and modules from certain projects under the NSM Program, while allowing the use of Indian cells and modules in *all* projects under the Program. In none of its submissions to date has India attempted to dispute this simple fact.

31. Rather than dispute the facts, India has sought to avoid a finding of a breach of the national treatment provisions at issue by arguing that the benefits under the NSM Program are "not confined" to SPDs that use Indian-manufactured cells and modules because some projects permit the use of imported cells and modules. But, this argument is relevant only to the portion of projects to which the DCRs *do not apply*. The United States is not challenging those projects, and India's compliance with the national treatment provisions with respect to *some* projects and products does not excuse its obligation to comply with national treatment with respect to *all* projects and products.

III. THE NSM PROGRAM'S DOMESTIC CONTENT REQUIREMENTS ARE NOT COVERED BY THE GOVERNMENT PROCUREMENT DEROGATION UNDER ARTICLE III:8(a) OF THE GATT 1994

32. The government procurement derogation under Article III:8(a) does not apply to the DCRs because India is procuring electricity under the NSM Program whereas the products facing discrimination are solar cells and modules. In *Canada – FIT*, the Appellate Body made clear that the government procurement derogation applies only where the imported product facing discrimination and the product purchased by the government are "like products" or in a competitive relationship.

33. India does not dispute that solar cells and modules are not "like products" with electricity. And in none of its submissions has India attempted to argue, much less established, that solar cells and modules and electricity are in a competitive relationship. These facts *alone* provide this Panel with a sufficient basis to reject India's invocation of Article III:8(a).

34. None of India's attempts to rebut this clear conclusion are persuasive. First, the Panel should reject India's theory that it is *effectively* procuring solar cells and modules through its purchase of the electricity generated by those cells and modules. Second, the United States has also explained why India cannot avoid the implications of the fact that it procures electricity but imposes discriminatory requirements on generating equipment, by emphasizing mechanical differences between the DCRs at issue in *Canada – FIT* and this dispute. Third, as a practical matter, the DCRs imposed under the India's NSM Progamme are functionally identical to the DCRs under Ontario's FIT Programme. Fourth, the United States has explained why India's more recent attempt to characterize solar cells and modules as "inputs" to the generation of solar power is misplaced and inaccurate. Solar cells and modules are not, in fact, inputs – integral or otherwise – in the generation of electricity.

35. Moreover, India has not established that any of the alleged procurement is not "with a view to commercial resale" because the electricity purchased under the NSM Program is resold to retail and commercial consumers over a competitive market for electricity. This understanding is consistent with the observation of the Panel in *Canada – FIT*, which found that electricity purchased under Ontario's FIT Programme was "introduced into commerce" because it was "resold to retail consumers through the [local distribution companies] in *competition with private-sector retailers*." As noted by the United States, many Indian electricity distribution companies (or Discoms) are highly corporatized entities with a fiduciary duty to maximize profits or returns for shareholders. A full one-quarter of Indian Discoms are wholly private concerns. This demonstrates that the electricity purchased under the NSM Program – just like the electricity purchased under Ontario's FIT Programme – is sold to consumers over a competitive electricity market and thereby introduced into commerce.

IV. INDIA HAS FAILED TO DEMONSTRATE THAT THE DCRS AT ISSUE ARE JUSTIFIED UNDER PARAGRAPHS (j) OR (d) OF ARTICLE XX OF THE GATT 1994

36. As the United States has noted, India has not demonstrated that solar cells and modules are "in short supply" either generally *or* locally in India within the meaning of Article XX(j) of the GATT 1994. Even though it concedes that it is having no difficulty acquiring solar cells and

modules at the current time, India argues that the DCRs are nonetheless justified because there is a *risk* that India could face supply shocks in the future. But Article XX(j), by its very terms, is applicable only with respect to products that are presently "in short supply" *not* products that might or could fall into short supply sometime in the future. Other text in Article XX(j) supports this plain reading. The reference to "general" and "local" gives two concrete areas or markets in which such current short supply should exist. And the condition that the measure "shall be discontinued as soon as the conditions *giving rise* to them *have ceased to exist*" reinforces that the short supply must *currently* exist.

37. In its second written submission, India argues that a Member's "lack of domestic manufacturing" with respect to certain products can constitute a "short supply" of that product for purposes of Article XX(j). This is the case – per India's reasoning – *even if* the product is available through importation. India's view of "products in general or local short supply" as referring to domestically produced products rests on a misunderstanding of Article XX(j). As the United States has observed, the term "products" in Article XX(j) is unqualified by origin, indicating that it addresses supply of that product without respect to origin. In contrast, the provisions of the GATT 1994 that address products of a particular origin identify that fact explicitly. Article XX(j) contains no such specification of the origin of the "products" that are in general or local short supply. Therefore, India's interpretation of this provision as relating to the acquisition or distribution of domestic products is in error.

38. Even if India were able to demonstrate that it was currently facing a bona fide short supply of solar cells and modules, it has still failed to demonstrate that the DCRs are "essential" within the meaning of Article XX(j). First, as practical matter, import restrictive measures like DCRs would tend to be antithetical to, rather than essential to alleviating a short supply, which is the sole objective of Article XX(j). Second, although the text of Article XX(j) and its use of the term "essential" suggest a higher threshold for invoking this provision as an affirmative defense than other Article XX subparagraphs that merely use the phrase "necessary," India has failed to establish that its measure meets even this lower threshold based on the weighing and balancing of factors that the Appellate Body has done in past disputes where the question at issue was the "necessity" of measures within the meaning of Article XX.

39. The United States has also explained that, at any rate, India has reasonably available alternatives to the DCRs, such as the stockpiling of solar cells and modules or simply eliminating the DCRs. India has also failed to explain why simply omitting the DCRs would undermine its ability to obtain an adequate supply of electricity, and in fact, as the United States has shown, this would likely be a much more effective way of doing so.

40. The United States has explained that Article XX(d) does not apply to the DCRs at issue because Article XX(d) does not cover measures taken by a government to secure its *own* compliance with its own laws and regulations. Moreover, the United States has shown that this interpretation is supported by the text of Article XX(d) itself, and is consistent with the interpretation of past panels and the Appellate Body, contrary to India's assertions.

41. India also has at its disposal other tools that would appear to keep India in compliance with its various international commitments, including, *inter alia*, more environmental regulation,

promoting the development of other renewable energy sources (including geothermal, hydroelectric, and wind), or promoting the consumption of energy from renewable energy sources on a non-discriminatory basis. These alternatives reveal that the DCRs at issue make only an indirect contribution (at most) to India's compliance with its commitments. As such, the DCRs, again, can hardly be considered "necessary" within the meaning of Article XX(d).