INDIA — CERTAIN MEASURES RELATING TO SOLAR CELLS AND SOLAR MODULES

(DS456)

RESPONSES OF THE UNITED STATES TO WRITTEN QUESTIONS POSED BY THE PANEL FOLLOWING THE SECOND SUBSTANTIVE MEETING

May 18, 2015

TABLE OF REPORTS

SHORT TITLE	FULL CITATION
Canada – Renewable Energy / Feed-In Tariff Program ("Canada – FIT")	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, *Canada – Measures Relating to the Feed-In Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001

1 ARTICLE III:4 OF THE GATT 1994 & ARTICLE 2.1 OF THE TRIMS AGREEMENT

40. United States: The United States argues in paragraph 8 of its opening statement at the second meeting that, based on Article 2.2 of the of the TRIMs Agreement and the text of the chapeau of paragraph 1 of the Illustrative List, "there is no need for a separate showing that the measure at issue accords 'less favourable treatment' to imported products within the meaning of Article III:4". Does this mean that the TRIMs Illustrative List pertains only to "less favourable treatment", and not to other elements under Article III:4, such as "like products" and "laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use"? Is there a need for a separate showing and examination of the elements of Article III:4 other than "less favourable treatment"?

1. No. A measure that meets the elements described in paragraph 1(a) of the Illustrative List will also satisfy all of the elements of a national treatment breach under Article III:4 of the GATT 1994, including the "like products" and "laws, regulations and requirements affecting." elements. This understanding is confirmed by the Appellate Body's statement that "By 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 paragraph 4 of Article III of GATT 1994'." [1]

2. The *obligation* of national treatment provided for under Article III:4 is not limited to the element of no "less favorable treatment," but also includes the "like products" and "laws, regulations and requirements…" elements.[2] Specifically, Article III:4 requires Members to "accord[] [imported products] treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulation, and requirements affecting their internal sale, offering for sale, purchase transportation, distribution, or use."

3. The structure of the first sentence establishes that those TRIMs inconsistent with Artcile III:4 include two elements: they are mandatory or enforceable under domestic law, or must be

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[1] Appellate Body Reports, *Canada – FIT*, para. 5.24. (emphasis added); *See also* Panel Reports, *Canada – FIT*, para. 7.120 ("[w]here [] a measure has the characteristics that are described in Paragraph 1(a) of the Illustrative List, it follows from the clear language of this provision that it will be in violation of Article III:4 of the GATT 1994, and thereby also Article 2.1 of the TRIMs Agreement.")

[2] *See* Appellate Body Report, *Korea – Various Measures on Beef*, para. 133.

> Interpreting Article III:4, the Appellate Body in *Korea – Various Measures on Beef* explained the three elements of a national treatment breach in the following manner:
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> [i] that the imported and domestic products at issue are "like products";
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> [ii] that the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and
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> [iii] that the imported products are accorded "less favourable" treatment than that accorded to like domestic products.[2]

complied with to gain an advantage, and conditions related to purchase or use of domestic products. These elements therefore make out the elements of an Article III:4 claim. They afford less favorable treatment through domestic law requirements, or conditions to obtain an advantage, and they discriminate against any like imported products because of the conditions imposed on the basis of *domestic* origin. Accordingly, a measure covered by paragraph 1(a) of the Illustrative List – and thereby "inconsistent with the obligation of national treatment under Article III:4" – will also satisfy the "like products" and "laws, regulations and requirements" elements of Article III:4 (in addition to the "less favorable" treatment element). As such, there is no need for a separate examination of the elements under Article III:4.

2 ARTICLE III:8(a) OF THE GATT 1994

41. Both parties: What would be the legal relevance of characterizing solar cells and modules as an "input", integral or otherwise, for the purpose of the analysis under Article III:8(a)? If solar cells and modules are "integral inputs" for the generation of electricity, would it follow that the government is purchasing not only electricity, but also solar cells and modules?

4. The Appellate Body has observed that "[w]hat constitutes a competitive relationship between products may require a consideration of inputs and processes of production used to produce the product."[3] Therefore, characterizing an item as an "input" into a product purchased by a governmental agency is useful in the analysis under Article III:8(a) to the extent it informs a determination of whether the product being purchased is in a competitive relationship with the product being discriminated against. The United States understands this to mean that where product A and product B are comprised of similar inputs (or manufactured through similar processes), this *might* suggest that product A and product B are "like products" or in competitive relationship.

5. The United States, however, notes that India has not even attempted to argue that there is competitive relationship between the electricity it purchases and solar cells and modules subject to discrimination under the NSM Program. Nor has India disputed the United States' affirmative arguments that no such competitive relationship exists. As there is no dispute that solar cells and modules and electricity are *not* in a competitive relationship, the United States submits that a "consideration of inputs" is legally irrelevant to the Article III:8(a) analysis in the context of this dispute.

6. Furthermore, the United States understands the Appellate Body's reference to "inputs" to refer to products incorporated into the finished product, as opposed to products otherwise used in the process of production. We emphasize that, in this sense, solar cells and modules are not inputs into electricity, but rather equipment used to generate electricity. Thus, the analysis

[3] Appellate Body Reports, *Canada – FIT*, para. 5.63.

remains whether the product procured (electricity) and the product to which the discrimination applies (cells and modules) are in a competitive relationship.

7. Even if solar cells and modules could be considered inputs (integral or otherwise) for the generation of electricity, it does not follow that the Indian government is purchasing solar cells and modules by virtue of its purchase of electricity under the NSM Program. The United States understands India to argue that a government's purchase of a finished product (*e.g.*, electricity) amounts to the government's effective purchase of any integral inputs (*e.g.*, solar cells and modules) used in the manufacture of that product. India's argument on this score is without merit.

8. First, the idea that the Indian government is purchasing solar cells and modules is belied by facts not in dispute: the measures at issue require *solar power developers* (SPDs) to purchase and use solar cells and modules; India acknowledges that the SPDs retain custody of the cells and modules. Nor has India attempted to argue that it has any ownership interest in the cells and modules used by the SPDs. On these facts, the solar cells and modules cannot be considered to have been purchased by the Indian government for purposes of Article III:8(a).

9. Second, the facts of this case are easily distinguished from scenarios where a government's purchase of finished product *might* be understood to amount to the purchase of inputs used in the manufacture of the finished product. For example, a government might decide to limit its purchase of military uniforms to those uniforms made from cotton harvested from domestic sources. One could argue that this type of discrimination could be covered by Article III:8(a) under the theory that the government's purchase of the uniforms necessarily entails its purchase of the cotton (and any other inputs) physically incorporated into the uniform. The same theory might apply to a situation where a government limits it procurement of pens to pens filled with domestically manufactured ink. Again, one could argue that this discrimination could be covered because the government's purchase of pens, as finished products, necessarily results in the government's purchase of the incorporated ink to which the discrimination applies. In other words, the cotton and ink inputs could conceivably be considered among the "products purchased" within the meaning of Article III:8(a). Discrimination against those inputs could therefore conceivably be understood as permissible under Article III:8(a).

10. The same could not be said, however, for the industrial looms or sewing machines used to make the uniforms or equipment used to make the pens. In neither scenario does the government acquire the equipment used to weave the uniforms of manufacture the pens. Even if such equipment could characterized as an "integral" input to the manufacture of uniforms and pens, it is not the sort of input that the government "purchases" when it purchases finished goods. Similarly, even if solar cells and modules are considered integral inputs to the production of electricity, they are not the sort of inputs that India purchases by virtue of its purchase of the electricity generated by the use of those cells and modules.

42. Both parties: Please elaborate your views on the scope of the term "inputs" as used in paragraph 5.63 of the Appellate Body Reports in Canada – Feed-in Tariff Program / Renewable Energy, and in particular whether it is limited to physically detectable

objects or features of a finished product. Based on your views as to the scope of "inputs", what if anything in the generation process for electricity could be characterized as an "input"?

11. The Appellate Body uses the word "inputs" twice in paragraph 5.63, both times in the phrase "inputs and processes of production." This juxtaposition indicates that the Appellate Body understood inputs to be those products, such as raw materials, consumed in production of a finished product, as opposed to the "processes" and capital equipment used to make that product.

12. In this sense, we consider that only those items that are physically incorporated into a finished product purchased by the government could properly be viewed as "products purchased by a governmental agency" for purposes of Article III:8(a). By its terms, Article III:8(a) is concerned with products "purchased" (*i.e.*, "acquired"[4] by) a government. A government can only acquire an input to the extent it is physically incorporated into the finished product purchased. Conversely, if the vendor retains ownership and title to an item involved in the production process, the government cannot be considered to have "purchased" that item for purposes of Article III:8(a).

13. In the context of solar power electricity, sunlight (or light energy) could be characterized as an "input." Solar cells and modules convert light into electricity. Light energy is therefore arguably physically incorporated into solar power electricity.

14. The solar cells and modules, however, are not themselves physically incorporated into or consumed by the generated electricity. While capital equipment (solar panels, coal furnaces, wind turbines, etc.) obviously play a critical (or perhaps even "integral") role in producing electricity, they are not embedded in the finished product and, accordingly, are not "inputs" as described in the phrase "inputs and processes of production." To use the terms of Article III:8(a) of GATT 1994, the purchase of electricity does not entail the purchase of every factor of production involved in generating the electricity.

43. United States: Does the United States agree with India that the Appellate Body, at paragraph 5.63 of its Reports in Canada – Feed-in Tariff Program / Renewable Energy, left open the possibility that the scope of Article III:8(a) may extend to discrimination against products that are inputs used in respect of the product purchased, even where the input and the product purchased are not the same, and are not in a competitive relationship with one another?

[4] Appellate Body Reports, *Canada – FIT*, para. 5.59 ("We therefore understand the word 'procurement' to refer to the process pursuant to which the government acquires products.") The Appellate Body's reasoning could be read as suggesting that products "purchased" by the government may be a subset of products "acquired" by the government, but that is an issue the Panel need not address in this dispute.

15. The Appellate Body explicitly declined to address whether "Article III:8(a) may also extend to discrimination relating to inputs and processes of production used in respect of products purchased by way of procurement."[5] In any such situation, the terms of Article III:8(a) make clear that an input would only be covered if it fell within the scope of a "procurement by governmental agencies of a product purchased for governmental purposes."

16. The Appellate Body clarified that this would be the case if the product being purchased by the government and an input were in a competitive relationship. However, the Appellate Body did not address other scenarios, such as an input physically incorporated into a finished product, but not in a competitive relationship with that product. As United States has explained in its response to question 41 above, *even if* solar cells and modules are considered inputs in the generation of electricity, they are not the sort of inputs that are purchased when the government purchases the electricity generated by those cells and modules.

45. Both parties: With respect to the purchase of products "for governmental purposes" and a government's own use or consumption of such products, is it necessary that the products be specifically intended and destined for governmental recipients? Or is it sufficient that governmental entities simply receive and use such products, even if this is incidental and/or unverifiable?

17. The Appellate Body has observed that "the phrase 'products purchased for governmental purposes in Article III:8(a) refers to [1] what is consumed by government or [2] what is provided by government to recipients in the discharge of its public functions."[6] The United States understands the Panel's question to be whether a product can be considered "consumed by government" even if the product is not primarily intended or destined for governmental recipients (*i.e.*, government agencies), but that the question does not consider the second situation identified by the Appellate Body.

18. The definition of "purpose" includes "a thing to be done; an object to be attained, and intention, an aim."[7] Thus, the phrase "purchased for governmental purposes" in Article III:8(a) means that the act of purchasing must have a governmental objective, intention, or aim. In the context of consumption by the government, it is difficult to see how an incidental use by the government would meet this standard.

46. United States: Please provide your views on which of the purposes and/or functions identified by India at paragraphs 28-30 of its second written submission qualify as "governmental purposes" and/or "public functions" in light of the parameters set

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[5] *See* Appellate Body Reports, *Canada – FIT*, para. 5.63.

[6] Appellate Body Reports, *Canada – FIT*, para. 5.68.

[7] *New Short Oxford English Dictionary*, p. 2421 (1993).

forth at paragraph 5.68 of the Appellate Body Reports in Canada – Feed-in Tariff Program / Renewable Energy.

19. At paragraphs 28-30 of its second written submission, India suggests that ensuring the availability of "affordable and ecologically sustainable solar power" is a "governmental purpose" within the meaning of Article III:8(a). This mirrors India's assertion from its first written submission that "procurement of solar power…is an act pursuant to the government purposes of promoting ecologically sustainable growth while addressing India's energy security challenge."[8] In its response to questions from the Panel, India further clarified that "the specific function sought to be discharged is that that of ensuring sustainable solar power development and enabling affordable access to solar power."[9]

20. In none of its submissions, however, has India sufficiently explained why promoting sustainable development, solar power development, or affordable access to solar power should be understood as a "public functions" as opposed to an important "aims or objectives" of the Indian government. This is crucial omission by India, because as noted by the Appellate Body, "governmental agencies by their very nature pursue governmental aims or objectives."[10]

21. 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."[11]

22. The Appellate Body, however, has not identified what constitutes a "public function" for purposes demonstrating a "governmental purpose" within the meaning of Article III:8(a). Instead, the Appellate Body has reasoned that what amounts to a "public function" is to "be determined on a case by case basis."[12] The United States finds it instructive that the Appellate Body in *Canada – FIT* highlighted a scenario that the parties agreed to be a "public function" – and therefore a "governmental purpose" – within the meaning of Article III:8(a): namely, where "a public hospital purchases pharmaceuticals and provides them to patients."[13] The EU also agreed that a government's procurement of books "to be used by students at public schools" amounts to a "governmental purpose" within the meaning of Article III:8(a).

23. The United States observes that in both of these scenarios, the government retains some degree of regulatory control over the use of the products (*i.e.*, pharmaceuticals, books) provided

[8] India's First Written Submission, para. 143.

[9] India's Response to Panel Question No. 24(b), 3rd paragraph.

[10] Appellate Body Reports, *Canada – FIT*, para. 5.66.

[11] Appellate Body Reports, *Canada – FIT*, para. 5.66.

[12] Panel Report, *Canada –FIT*, para. 5.68.

[13] Appellate Body Reports, *Canada – FIT*, footnote 514.

to recipients. That is, the products are not provided to recipients to use at their discretion. In case of pharmaceuticals provided to patients at public hospitals, the government presumably administers the pharmaceuticals to patients pursuant to specific course of treatment prescribed by the hospital. In the case of books provided to students at public schools, the books are presumably provided pursuant to an academic curriculum established by the public school(s).

24. In contrast, the Indian government does not appear to exercise any control over the electricity sold to downstream commercial and retail consumers. Rather, the facts indicate that consumers are free to regulate their own use of electricity. That is, they can consume as much as they please and for whatever reasons they please. That fact the India does not regulate the downstream usage of solar power electricity, strongly suggests that India's procurement of electricity is not procurement for a "governmental purpose" within the meaning of Article III:8(a). As such, this provides another reason for the Panel to reject India's contention that it procurement of electricity is for a "governmental purpose" within the meaning of Article III:8(a).

47. Both parties: Can measures pursuing multiple aims fall within the scope of Article III:8(a) if only one or some of those aims qualify as being "for governmental purposes" and/or the discharge of "public functions"?

25. The United States does not understand the existence of other non-governmental purposes to *ipso facto* preclude the application of Article III:8(a) where a Member can establish that the procurement at issue is, in fact, directed towards or intended to carry out at least one legitimate governmental purpose. However, the United States also observes that where there are significant non-governmental motivations behind the procurement at issue, this might indicate that the procurement is not, in fact, directed towards the "governmental purpose" articulated by the Member invoking Article III:8(a).

48. Both parties: Please clarify the scope of the relevant transaction(s) for assessing "commercial resale" under Article III:8(a). In particular, does this comprise transactions at different stages from production to final retail sale of electricity (see, e.g. United States' first written submission, para. 15; India's first written submission, para. 152) and, if so, are all transactions at different stages equally relevant to the determination of "commercial resale"? Based on your response, please specify the relevant "buyer(s)" and "seller(s)" for conducting the analysis outlined in paragraph 5.71 in the Appellate Body Reports in Canada – Feed-in Tariff Program / Renewable Energy.

26. To reiterate, the product at issue is solar cells/modules. India is not purchasing (or reselling) solar cells or modules, so Article III:8(a) does not apply. Accordingly – similar to

Canada – FIT – the Panel need not address the issue of whether Indian government's purchase of electricity is "with a view to commercial resale".[14]

27. By its terms, Article III:8(a) is concerned with whether the government purchase at issue is undertaken with a "view to commercial resale." As such, *any and all resale transactions* envisaged by the government are relevant for assessing "commercial resale" within the meaning of Article III:8(a).

28. When NVVN and SECI procure the electricity from SPDs, they do so by providing funding or bundling to make sales of electricity to Discoms "viable."[15] That is, whether the electricity is viewed as procured by India, or India is simply viewed as contributing to a sale between SPDs and Discoms, the transaction occurs with the knowledge and intent that the Discoms will resell the electricity to downstream commercial and retail consumers.

29. Thus, the relevant transactions include *both* (1) NVVN/SECI's resale of electricity to Discoms; *and* (2) the Discoms further downstream resale of electricity to commercial and retail customers.

30. As such, the relevant buyers are: (1) the Discoms that purchase the electricity from NVVN/SECI and (2) the downstream household and commercial consumers that purchase the electricity from the Discoms. The relevant sellers are: (1) NVVN/SECI, with respect to their resale of electricity to the Discoms and (2) the Discoms, with respect to their further resale of electricity to downstream household and commercial consumers.

49. Both parties: With respect to "commercial resale", is it necessary that the transaction be entered into "at arm's length" by both the buyer and seller? Or is it sufficient that the transaction be entered into at arm's length for either the buyer or the seller?

31. The Appellate Body has not found that resale transaction must be at "arm's length" (with respect to either the buyer or seller) in order to be considered a "commercial resale" for purposes of Article III:8(a). Rather, the Appellate Body has simply observed that "profit orientation" is a general indication that "resale is at arm's length" and therefore commercial in nature. But the

[14] *See* Appellate Body Reports, *Canada – FIT*, para. 5.84 ("Our conclusion that the measures at issue are not covered by Article III:8(a) of the GATT 1994 is not premised on a finding that the Government of Ontario's procurement of electricity under the FIT Programme is undertaken "with a view to commercial resale". Rather, it is based on our finding that Article III:8(a) does not cover discriminatory treatment of the equipment used to generate the electricity that is procured by the Government of Ontario.")

[15] *See* India's Second Written Submission, para. 32 ("But for the bundling scheme and the VGF scheme being built into the process of procurement of solar power, the rate at which the power *would have been purchased by Discoms from SPDs* and *sold by Discoms to consumers* would have been significantly higher, thereby making it unviable for such sale to happen.")

Appellate Body also found that lack of a profit motive on the part of the seller does not mean that a transaction is not commercial in nature.[16]

50. United States: In the sale of electricity between NVVN/SECI and Discoms, please comment on "whether the transaction is oriented at generating a profit for the seller". See Appellate Body Reports, Canada – Feed-in Tariff Program / Renewable Energy, paragraph 5.71.

32. The United States does not argue that the sale of electricity is oriented at generating a profit for NVVN or SECI. But even if NVVN/SECI do not have a profit orientation, India has not disputed that "[m]any of the Discoms to which [NVVN and SECI] resell solar power are corporatized entities with a fiduciary duty to maximize profits or returns to the shareholders."[17] Nor has India disputed that Discoms have a profit orientation with respect to the resale of electricity purchased from NVVN and SECI under the NSM Program.

51. United States: With respect to the bundling and VGF schemes in Phase I (Batches 1 and 2) and Phase II (Batch 1), respectively:

a. Please comment on any points of factual disagreement in relation to India's description of the bundling and VGF mechanisms in its response to Panel Question No. 22, and in paragraphs 32-45 of its second written submission.

b. Does the United States contest India's assertion in paragraph 5 of its closing statement at the second meeting that "[t]hese schemes involved the government's dedicated contribution of its unallocated quota of thermal power (in Bundling), and funds from the National Clean Energy Fund in Viability Gap Funding (VGF), to enable the sale of solar power to discoms at a <u>significantly low cost</u>"?

33. The United States does not dispute any point of India's factual description of the bundling or VGF schemes. Nor does the United States dispute that the bundling and VGF schemes are geared towards enabling the sale of solar power to Discoms (and eventually consumers) at a lower cost.

34. The United States, however, does dispute India's suggestion that the bundling and VGF schemes rebut a conclusion that NVVN and SECI's procurement of electricity is undertaken with a view to commercial resale."[18] Specifically, India suggests the "neither NVVN nor SECI" "engage[] in commercial resale of the solar power procured" because the bundling and VGF schemes ensure that "the price of sale of solar power to Discoms was at a level that would enable

[16] *See* Appellate Body Reports, *Canada – FIT*, para. 5.71.

[17] *See* U.S. Opening Statement at the First Substantive Meeting of the Panel, para. 38.

[18] *See, e.g.*, India's First Written Submission, para. 160.

distribution to consumers at an affordable price."[19] India has further stated that absent the bundling and VGF schemes, it would have been "unviable for Discoms to purchase [the electricity], or for consumers to pay for the same."[20]

35. The United States observes that India's submissions on this score demonstrate – not refute – that SECI and NVVN's procurement of electricity is taken with a view towards commercial resale. Indeed, India's statements reflect an assessment that electricity procured by NVVN and SECI would be too expensive to compete with the "relatively cheaper"[21] coal-based electricity otherwise available on India's electricity market. The bundling and VGF schemes are therefore arguably necessary "to allow for the distribution of solar power at affordable prices, without which no market for the same would evolve."[22]

36. In essence, India's statements demonstrate that the bundling and VGF are designed to make the purchase and resale of electricity viable as a *commercial proposition* for Discoms. Accordingly, NVVN and SECI's procurement of electricity is clearly undertaken "with a view to commercial resale – that is, with the knowledge and intent that the electricity will compete on the market and therefore need to be competitively-priced to ensure that it is marketable to consumers. Therefore, even if NVVN and SECI are not engaged in commercial resale, their procurement of electricity is undertaken with a view to the "commercial resale" that Discoms will engage in with respect to the downstream sales to retail and commercial consumers.

54. United States: Please clarify the relevance of Exhibit US-36 and the United States' arguments at paragraph 38 of its opening statement at the first meeting in light of India's statement that "[a]s of now, all power sale agreements under Phase I and Phase II have been entered into only with public sector Discoms." India's second written submission, footnote 38.

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[19] India's First Written Submission, para. 160 ("Neither NVVN nor SECI therefore engaged in commercial resale of the solar power procured; rather through the bundling scheme implemented under Phase I (Batch I and Batch II), and VGF under Phase II (Batch I), the Government ensured that the price of sale of solar power to Discoms was at a level that would enable distribution to consumers at an affordable price.").

[20] India's Second Written Submission, para. 34 ("As explained by India, the intervention by the Government in designing the procurement programmes incorporating bundling and VGF, therefore, essentially ensured that the sale of solar power is not linked to the costs of generation of such power, since that would have essentially made it unviable for Discoms to purchase it, or for consumers to pay for the same.)

[21] *See* India's Second Written Submission, para. 39 ("It is therefore clear that the procurement by NVVN is for the purpose of bundling solar power with coal based power generated by NTPC. The bundling process is not a commercial resale, but is an enabling mechanism to allow for the distribution of solar power at affordable prices, without which no market for the same would evolve. The bundling process enables the cost of solar power to be reduced by the relatively cheaper coal generated power.")

[22] India's Second Written Submission, para. 39.

37. Exhibit US-36 demonstrates that that most of Discoms on India's electricity market are either wholly private or corporatized entities with a fiduciary duty to maximize profits or returns for shareholders. This suggests that the Discoms are properly viewed as "profit-oriented" actors that "seek to maximize [their] own interests."[23] While India states that all the Discoms to which NVVN/SECI sell electricity are "public sector Discoms,"[24] it has not argued that those Discoms lack a profit orientation. Nor has India disputed that such Discoms are "interest-maximizing" actors with a fiduciary duty to shareholders. As such, it makes sense to presume that when Discoms buy electricity from NVVN/SECI and resell that electricity to household and retail consumers, they do so with the aim of generating a profit. The Appellate Body has observed that "profit orientation" is indicative of a "commercial resale," (though it has also clarified that evidence of a profit motive in *not* a required element for establishing a "commercial resale" within the meaning of Article III:8(a)).[25]

38. Moreover, that fact that most Indian Discoms are either wholly private or corporatized demonstrates that India's electricity market is competitive, even if highly regulated. This means that when Discoms resell the electricity purchased from NVVN/SECI, they do so in competition with other Indian Discoms, including wholly private Discoms.

55. Both parties: With respect to the analysis in paragraphs 7.147-7.148 of the Panel Reports in Canada – Feed-in Tariff Program / Renewable Energy, please provide your views on relevant similarities to, or grounds for distinguishing, the sale of electricity under Phase I (Batches 1 and 2) and Phase II (Batch 1) in the context of "commercial resale" under Article III:8(a). In particular, please specify the analogous actors in the relevant transaction(s) as well as any parallels to bundling in Phase I (Batches 1 and 2) and VGF in Phase II.

39. The essential facts surrounding the sale of electricity under Ontario's FIT Programme and India's NSM Program are strikingly similar. Under Ontario's FIT Programme, "electricity [was] bought from generators [by the Government of Ontario] and sold to retail consumers through the same channels as all other electricity by Hydro One and LDCs [i.e., "local distribution companies] in competition with private sector electricity retailers."[26] Similarly, under the NSM Program, the electricity purchased by the Government of India is resold to retail and commercial consumers by distribution companies (*i.e.*, "Discoms") though India's national power grid.

[23] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff*, para 5.71.

[24] India's Second Written Submission, footnote 38.

[25] *See* Appellate Body Reports, *Canada – FIT*, para. 5.71.

[26] Panel Reports, *Canada – FIT*, para. 7.148.

40. Under the FIT Program, the Ontario Power Authority (OPA) entered into contracts with power generators for the purchase of electricity.[27] In that sense, the role of OPA is analogous to the respective roles of NVVN and SECI in Phases I and II of the NSM Program. As noted, under the NSM Program, NVVN and SECI enter into Power Purchase Agreements (PPAs) with solar power developers.

41. Under the FIT Program, the electricity purchased by OPA was injected onto Ontario's electricity grid "where is [was] pooled or co-mingled with electricity from other sources."[28] This pooled electricity was then sold to downstream consumers by distribution companies, including the provincially-owned Hydro One, municipal-level distributors (*i.e.*, LDCs), and private distributors.[29] Similarly, under the NSM Program, solar power developers deliver electricity to the power grid, where NVVN and SECI resell the electricity to Discoms, which further resell the electricity to downstream retail and commercial consumers. In Phase I (Batches 1 and 2) of the NSM, NVVN bundled the solar power with coal power[30] before reselling it to Discoms; this is analogous to Ontario's pooling of solar and wind power with electricity from other sources under the FIT Program. The FIT Programme did not have an analogous feature to India's VGF scheme under Phase II (Batch 1).

42. The panel in *Canada – FIT* found that Ontario's procurement of electricity was undertaken "with a view to commercial resale because" because the distribution companies that participated in the FIT Programme (1) sold electricity in competition with private sector licensed retailers of electricity; and (2) profited from the resale of electricity to downstream consumers.[31] For the same reasons, the Panel could find that India's procurement of electricity under the NSM is likewise "undertaken with a view to commercial resale."

43. The United States has already explained – and India has not disputed – that India's electricity market is competitive, as evidenced by the fact that most of India's Discoms are either wholly private or corporatized entities with a fiduciary duty to maximize profits or returns to shareholders. Thus, similar to *Canada – FIT*, the electricity sold by Discoms that participate in the NSM program is sold "in competition with private sector retailers of electricity."[32] The Panel in *Canada – FIT* suggested that this fact alone would be sufficient for establishing "commercial resale."[33] The United States further observes that India has not disputed that the Discoms that

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[27] *See* Panel Reports, *Canada – FIT*, para. 7.147.

[28] Canada's Second Written Submission, para. 68, Appellate Bod Reports, *Canada – FIT*, para. 68.

[29] *See* Panel Reports, *Canada – FIT*, para. 7.147.

[30] *See* India's First Written Submission, para. 157.

[31] *See* Panel Reports, *Canada – FIT*, para. 7.151.

[32] Panel Reports, *Canada – FIT*, para. 7.151

[33] *See* Panel Reports, *Canada – FIT*, para. 7.151.

participate in the NSM Program are profit-oriented actors; nor has India disputed that the Discoms' sales to downstream consumers generate profits for the Discoms.

3 ARTICLE XX(J) OF THE GATT 1994

56. With respect to whether the DCRs involve the "acquisition or distribution" of solar cells and modules:

b. United States: At paragraph 46 of its opening statement at the first meeting, and at paragraph 40 of its second written submission, the United States argues that the DCRs are, by India's own account, designed to increase domestic manufacturing and supply of solar cells and modules, not their "acquisition". Is it the United States' view that measures taken to increase domestic manufacturing and supply of products in short supply do not qualify as measures involving the "acquisition" and/or "distribution" of those products?

44. No. That is not the position of the United States. Article XX(j) calls for a three-step analysis: (1) whether a product is in general or local short supply; (2) whether the measure the Member seeks to defend is essential to the acquisition or distribution of that product; and (3) whether the proviso applies. Our discussion about whether domestic capacity is less than total domestic demand is related to the first inquiry – the existence of short supply.

45. We do not dispute that a local short supply exists if domestic production plus imports and minus exports is inadequate to meet domestic demand. Nor do we dispute that if such a situation exists, Article XX(j) might be available as a defense for measures inconsistent with Article III that were "essential" to acquire the product such as through increased production. But "short supply" requires an intersection of all of the elements of supply and demand.

46. Thus, a lack of domestic production is not by itself a cognizable "short supply" for purposes of Article XX(j). By its terms, Article XX(j) is concerned with "acquisition" of a product. Thus, where the facts indicate – as they do here – that a country is having no difficulty importing a product, that product cannot be said to be in "short supply" within the meaning of Article XX(j).

57. United States: Please explain the basis for the United States' view that Article XX(j) does not cover preventative or anticipatory measures taken to acquire or distribute products at risk of becoming in short supply. In addition, please explain how, under the United States' interpretation of Article XX(j), a situation in which consumers were unable to place orders for the future delivery of a particular product would nonetheless qualify as a situation of the product being "in" short supply.

47. Article XX(j) does not cover preventative or anticipatory measures because the text of the provision specifically refers to "products in short supply". Accordingly, the relevant question is whether, on a local or "general" level, consumers are able to obtain the volume of the product that they need, such that the product is "in short supply," and not whether it may be in short supply at some point in the future. We note in this regard that, where GATT 1994 and the

covered agreements provide for measures to address future events, they say so plainly, as in the threat of material injury and threat of serious injury provisions in the antidumping, subsidy, and safeguards disciplines.[34] The absence of such specificity in Article XX(j) indicates that it deals exclusively with current short supply situations.

48. As noted, this does not mean that Article XX(j) applies only as of the date when purchases must curtail their activities because of a shortage. If purchasers typically buy in advance, the facts might support the conclusion that the "supply" at any given time consists of products that sellers are able to promise for delivery. (This may be the case where products are customized to purchasers' needs, or there is otherwise a long lead time between order and delivery.) In such a market, if purchasers are unable to place orders for known future sales, that might, in the context of all the facts, demonstrate that the product is in short supply.

49. In that case, once it is established that a local or general short supply exists, the United States understands Article XX(j) to permit Members to implement measures essential to acquiring or distributing products in short supply.

50. This is in stark contrast to a situation where there is no existing short supply, but simply a fear – on part of the Member invoking Article XX(j) – that a short supply might occur at some point in the future. The fact that a Member is worried that future events might cause a short supply does not establish that the product is "in short supply" within the meaning of Article XX(j) or justify GATT-inconsistent measures to address a short supply that has not occurred, and may never occur.

58. United States: Please comment on the evidence and argumentation at paragraphs 92-100 of India's second written submission.

51. As an initial matter, the United States does not dispute that supply disruptions are a risk in international and local markets for solar cells and modules. That is true of all markets. The relevant question is whether the evidence and argumentation by India support a conclusion that solar cells and modules were "in short supply" at the time that India applied the DCRs. They do not

52. At paragraph 92 of its second written submission, India references the International Energy Agency's (IEA) Model of Short-Term Energy Security (MOSES) to highlight risks associated with "net import dependence on energy resources (such as crude oil, oil products, natural gas and coal)." But the MOSES evaluates only import reliance with respect to "primary energy resources," such as crude oil, oil products, natural gas, and coal. The IEA model does not

[34] *E.g.,* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"), Art. 3.7; Agreement on Subsidies and Countervailing Measures, Art. 15.7. *See also* Agreement on Safeguards, Art. 4.1(b).

consider – or even mention – import reliance with respect to to solar cells, modules, or any other renewable energy equipment.[35]

53. At paragraph 93 of its second written submission, India, citing a World Bank study, notes that there are risks associated with "dependence on foreign financing for Indian's solar power projects…arising from mismatches in currency flows…" But there is no requirement that India rely or foreign financing with respect to imports of solar cells and modules. That is, a reliance on imports does not necessarily imply a commensurate reliance on foreign debt financing. Indian banks could also provide financing to support imports of solar cells and modules. Indeed, the World Bank study cited by India notes that the "participation of domestic banks becomes even more critical for the success of the [NSM] program in the future."[36] Simply put, India can reduce its reliance on foreign debt financing (and avoid the risks associated therewith) by increasing lending by Indian banks to solar power developers – that is, without necessarily increasing domestic production and certainly without imposing DCRs. In addition, India's proposal to expand the domestic solar power industry poses the same risks, as India has explicitly stated that it seeks foreign financing for domestic solar cell and module producers.[37]

54. At paragraphs 94-98 of its second written submission, India notes certain "uncertainties" and "volatility" in the global solar PV industry. But India does not claim that its current ability to acquire and distribute solar cells and modules has been hindered by such "uncertainties" and "volatility". In any event, expanding domestic production can actually exacerbate market volatility because supply generated to feed the upswing can become uneconomical when the market goes into a downswing, and cause financial problems for established producers that might otherwise have been viable.

55. At paragraph 97 of its second written submission, India cites reports from Bloomberg Business that "the solar industry is facing a looming shortage of photovoltaic panels." But those reports appear to be overstated and are disputed. Indeed, PV Magazine (a leading trade journal within the solar energy sector) characterized such reports as a "false alarm."[38] Moreover, an analyst quoted prominently in the reports cited by India said the "impression given by the [Bloomberg reports] are wrong" and that "current projections don't indicate a supply shortage [in 2015]."[39]

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[35] *See* OECD/IEA, *Measuring Short-term Energy Security*, (2011), Exhibit IND-26, pp. 3-4. Indeed, the title of the IEA publication on the model is explicit on this point: "The IEA Model of Energy Security (MOSES): Primary energy sources and secondary fuels".

[36] *India*, United States Energy Information Administration, (June 26, 2014), Exhibit IND-9, p. 16.

[37] *See*, India's First Written Submission, para. 262.

[38] Edgar Meza, False alarm: No panel shortage coming, *PV Magazine* (August 27, 2014), Exhibit US-39

[39] Edgar Meza, False alarm: No panel shortage coming, *PV Magazine* (August 27, 2014), Exhibit US-39

56. Lastly, at paragraph 99 of its second written submission, India argues that it "cannot afford to wait for imports to be completely effected by supply side vulnerabilities." And at paragraph 100, India asserts that, "if remedial measures such as the DCRs measures are allowed only at the time when the international supply of solar cells and modules is affected, it would negate the purpose of the exception under Article XX(j), as India would not be capable of meeting its requirements without having the ability manufacture solar cells and modules." But as the United States has explained,[40] a finding that the DCRs at issue are not covered by Article XX(j), would not mean – as India seems to suggest[41] – that India is somehow precluded from taking other (WTO-consistent) steps to increase domestic production of solar cells and modules. There is simply no basis to India's suggestion that it would lose "the ability to manufacture solar cells and modules" just because it cannot impose discriminatory DCRs.

59. Both parties: Article XI:2(a) of the GATT 1994 allows Members to apply prohibitions or restrictions temporarily in order to "prevent or relieve" critical shortages of foodstuffs or other products essential to the exporting Member. At paragraph 327 of its Reports in China – Raw Materials, the Appellate Body stated that Article XI:2(a) provides a basis for measures adopted to alleviate or reduce an existing critical shortage, "as well as for preventive or anticipatory measures adopted to pre-empt an imminent critical shortage". If Article XX(j) covers measures essential to the acquisition or distribution of products at risk of being in general or local short supply, would this also be confined to preventive or anticipatory measures adopted to pre-empt an "imminent" shortage? Is this a more stringent standard than asking whether the risk can be "reasonably expected"? See Panel Question No. 30; India's second written submission, paragraph 91.

57. As the United States has explained, 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.[42] The United States has further explained that – contrary to India's suggestion – there is no basis for reading the "concept of risk" into Article XX(j).[43] That is, Article XX(j) does not justify *any* measures taken before a short supply has actually materialized, notwithstanding a Members' prediction that such a short supply is "imminent."

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[40] U.S. Opening Statement at the Second Substantive Meeting of the Panel, para 37.

[41] *See* India's Second Written Submission, para. 75 ("In determining that such DCR Measures are essential, India has made a sovereign assessment which is consistent with the policy space provided under Article XX. Any rejection of such an assessment would amount to abrogating the domestic policy space that Article XX provides to WTO Members.").

[42] *See*, U.S. Opening Statement at the Second Substantive Meeting of the Panel, para. 28.

[43] *See* U.S. Opening Statement at the Second Substantive Meeting of the Panel, para. 29.

Accordingly, the Panel need not address whether Article XX(j) is confined to measures adopted to pre-empt an 'imminent' shortage." Indeed, the fact that the purported shortage is "imminent" and not extant, would provide a basis for rejecting a Members' invocation of Article XX(j).

58. The United States also notes that Article XI:2(a), unlike Article XX(j), *explicitly* envisages preventative or anticipatory measures. Article XI:2(a) permits measures "applied to *prevent* or relieve critical shortages." That is, Article XI:2(a) explicitly permits *both* measures put in place *before* a critical shortage arises, as well as measures taken to address shortages that have already materialized. Article XX(j), however, applies only with respect to products that are *presently* "in short supply." As such, there is no basis for reading Article XX(j) to permit "preventive or anticipatory measures."

59. At any rate, a demonstration that a short supply is "imminent" is a more stringent standard than asking whether shortage can be "reasonably expected." The Oxford English Dictionary defines "imminent" to mean "impending" or "soon to happen."[44] This suggests that an "imminent" event is something will in fact happen; the event is beyond a mere possibility and its occurrence is close to certain. Where the covered agreements require that a harm be imminent, they typically explain further that the harm be "clearly foreseen" and not a matter of "conjecture or remote possibility.[45] An event that is "reasonably expected," on the other hand, is simply within the realm of possibility, and either may not occur, or may occur sometime in the unknown future. Accordingly, demonstrating that event is "imminent" requires an explanation of why the event in question is almost certainly going to occur in the immediate future, while a demonstration that an event is "reasonably expected" might simply require a showing that it would not be unreasonable to expect the event to occur at some point in the future.

60. Both parties: At the second meeting, both parties referred to Article XX(i) as potentially relevant context for interpreting the scope of Article XX(j). Please elaborate.

60. The United States notes that Article XX(i) permits Members to take measures "*necessary* to ensure essential quantities" of certain domestic material, while measures justified under Article XX(j) must be "*essential* to the acquisition of distribution of products in short supply." Based on the use of the term "essential" instead of "necessary", it is clear that measures justified under XX(j) must satisfy a more exacting standard than measures justified under Article XX(i). As the United States has explained, the term "essential to" suggests a higher level of indispensability than the term "necessary."[46] As a result, proving that a measure is "essential to" requires a party to meet a higher threshold than merely proving that a measure is "necessary."

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[44] *The New Short Oxford English Dictionary* (4th Edition).

[45] *E.g*, Anti-Dumping Agreement, Art. 3.7; Agreement on Subsidies and Countervailing Measures, Art. 15.7. *See also* Agreement on Safeguards, Art. 4.1(b).

[46] *See* U.S. Response to Panel Question No. 25(b), para. 35.

61. Both parties: At the second meeting, both parties accepted that the solar cells and manufacturing industry is "volatile" in nature. In what way(s) is the industry "volatile"? Please explain why the nature of the volatility in this industry does or does not make imports of solar cells and modules particularly subject to supply disruptions.

61. The United States accepts the proposition that the solar cell and modules manufacturing industry – like many other industries – is subject to certain ebbs and flow due to periodic changes in global demand. The United States, however, does not understand the solar cell and manufacturing industry to be exceptionally prone to volatility or disruptions in supply, such that an increase in demand would not be met by commensurate increase in supply to meet this demand.

63. United States: Is the Panel correct in understanding that the United States refers to the requirements in the proviso in the second part of Article XX(j) to support its interpretation of the terms "essential to the acquisition or distribution of products in general or local short supply", but does not argue that the DCRs are inconsistent with the requirements of the proviso (e.g. United States' Response to Panel Question No. 28, paragraphs 42-48)?

62. That is correct. The United States does not argue that the DCRs at issue deprive any Member of an equitable supply of solar cells and modules.

5 "ESSENTIAL" AND/OR "NECESSARY"

69. Both parties: For the purpose of the analysis of whether the measures are "essential" under Article XX(j) and/or "necessary" under Article XX(d):

a. Under Article XX(j), is the only relevant objective the acquisition and/or distribution of solar cells and modules?

63. Yes. By its terms, Article XX(j) covers only those measures that are "essential to the acquisition or distribution" of products in short supply. To the extent measures justified under Article XX(j) might achieve other objectives apart from acquiring or distributing products in short supply, those objectives are not cognizable for purposes of justifying a measure under Article XX(j).

b. Under Article XX(d), is the only relevant objective the prevention of actions that are not in compliance with one or more obligations in the laws and regulations identified by India?

64. Yes. As the United States has explained, Article XX(d) covers only those measures necessary for a government to enforce its laws *vis-à-vis* persons subject to its jurisdiction.[47] On this basis, the United States understands Article XX(d) to cover measures "necessary" to prevent noncompliance with its law and regulations. The United States observes that India has still failed to explain how the termination of the DCRs at issue would result in noncompliance with any law or regulation.

c. Does the Panel need to focus on the contribution that is made by the DCRs, and that would be made by alternative measures, to ensuring resilience against supply-side disruptions, i.e. ensuring that solar power developers have continuous access to affordable solar cells and modules?

65. At the outset, the United States reiterates that India has failed to establish that is experiencing a short supply of solar cells and modules. Because India has not met this basic factual predicate for invocation of Article XX(j), the Panel need not assess the contribution that alternative measures could make to ensuring India's resilience against supply-side disruptions.

66. Moreover, the United States has explained, Article XX(j) only justifies measures "essential" to acquire products "in short supply". That is, by its terms, Article XX(j) does not justify measures taken before a short supply comes into actual existence. Accordingly, measures geared towards ensuring resilience against supply-side disruptions that may occur in the *future* are outside the coverage of Article XX(j). To be clear, Article XX(j) certainly does not preclude India from taking steps to ensure its resilience against future shortages in supply, but simply precludes India from using GATT-inconsistent means to do so. Accordingly, the extent to which the DCRs, as opposed to alternative measures, contribute to India's resilience against future supply-side disruptions is a matter the Panel need not address for purpose of its Article XX(j) analysis.

67. Assuming arguendo that India were experiencing a bona fide short supply of cells and modules, Article XX(j) could be read to permit India to implement GATT-inconsistent measures that are "essential" to ensuring India's ability to acquire affordable solar cells and modules going forward. Under that scenario, it would be proper for the Panel to assess the contribution that the DCRs make to "ensuring resilience against supply-side disruptions" versus alternative GATT-consistent measures that might be equally or more likely to achieve such resilience. (But even in this context, India would still be required to withdraw any GATT-inconsistent measures "[once] the conditions giving rise to them have ceased to exist."[48]). The United States has already

[47] *See* U.S. Response to Panel Question No. 33, paras. 45-56; *See also* U.S. Second Written Submission, paras. 46-53.

[48] *See*, Article XX(j) of the GATT 1994:

[A measure shall be] essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, *and that any such measures, which are inconsistent with*

explained that India does, in fact, have reasonably available GATT-consistent alternatives to ensuring resilience against supply-side disruptions (*e.g.*, stockpiling). Accordingly, the DCRs at issue cannot be considered "essential" to ensuring such resilience for purposes of Article XX(j).

68. With respect to Article XX(d), the United States has explained that none of the instruments cited by India require the imposition of DCRs.[49] Some of the instruments do not appear to demand any compliance in a legal sense and others appear to *discourage* the use of discriminatory measures like domestic content requirements.[50] Nor has India explained how withdrawal of the DCRs would result in India's failure to "secure compliance" with any law or regulation. Therefore, the DCRs at issue cannot be viewed as necessary to "secure compliance" with the cited instruments within the meaning of Article XX(d). Accordingly, there is no need for the Panel to assess the contribution that alternative measures might make to India's ability to "secure compliance" with law or regulation for purposes of Article XX(d).

69. The United States has further explained that, as practical matter, India has reasonably available alternatives to pursue the sustainable development goals and commitments purportedly reflected in the instruments it cites.[51] As noted by the United States, increasing the use of solar power – while certainly laudable – is only one of many tools that a government can use to fight climate change and attain sustainable development. Promoting the domestic production of solar cells and modules (*i.e.*, resilience against future supply disruptions) is in turn one tool to promote solar power. And DCRs are again only one tool for promoting the domestic production of cells and modules. The DCRs at issue are thus are many steps removed from the commitments that India contends it must comply with, and in that sense, cannot be viewed as "necessary" to securing compliance with those commitments for purposes of XX(d).[52]

70. United States: At paragraph 42 of its second written submission, the United States advances arguments regarding the contribution of the DCRs to the relevant objective from the perspective of both the short term and the long term. In the United States'

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the other provisions of this Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. (emphasis added).

[49] *See generally*, U.S. Second Written Submission, paras. 54-67.

[50] *See* U.S. Second Written Submission, para. 57

[51] *See* Opening Statement of the United States at the Second Substantive Meeting of the Panel, para. 44 ("India also has at its disposal a plethora of other tools that would appear to keep India in good stead with its various international commitments, including, inter alia, more environmental regulation, promoting the development of other renewable energy sources (including geothermal, hydroelectric, and wind), 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).")

[52] *See* Opening Statement of the United States at the Second Substantive Meeting of the Panel, para. 43.

view, could a measure that makes only a long-term contribution to the acquisition of products in short supply be justified under Article XX(j)?

70. Article XX(j) covers measures "essential" to acquiring products in short supply. Thus, any measures covered by Article XX(j) must be "essential" to acquiring the product during the period the product is in short supply. Measures that would not enable a Member to acquire the product during the period of short supply – but only over the longer term – are not covered by Article XX(j). Consistent with this principle, if short supply was a long-term problem, then a long-term solution might fall within Article XX(j).

73. With regard to the existence of alternative measures:

a. United States: Does the United States consider that the measures identified by the European Union, including investing in research and development, granting subsidies to domestic producers, and incentivising domestic manufacturing through demand, are reasonably available alternatives for the purpose of Article XX(j) and/or Article XX(d) (European Union's third party submission, paragraphs 58 and 76; response to Panel Question No. 3 to third parties, paragraph 15)?

71. Yes. The United States does agree that these are reasonably available alternatives to India's DCR measures. Specifically, the United States shares the European Union's observation that India's claim that it cannot afford to grant direct subsidies to solar cell and modules manufactures is belied by the substantial payments that India is currently making to SPDs through feed-in-tariff and Viability Gap Funding schemes.[53] The United States also agrees that such funding could be deployed to support research and development.[54]

72. Moreover, as the United States has previously noted "direct inducements to manufacturers would tend to be *more* effective at promoting domestic production than DCRs that are targeted at solar power developers."[55]

73. The United States also notes that the Nation Solar Mission would likely stimulate significant expansion of domestic manufacturing for solar cells and modules, even *without* the DCRs at issue. The EU expressed a similar view as well.[56]

b. United States: How does the United States respond to India's argument that stockpiling is not a reasonably available alternative because stockpiled solar cells

[53] *See* European Union's third party submission, para. 76.

[54] *See* European Union's third party submission, para. 58.

[55] Second Written Submission of the United States, para. 74.

[56] *See* European Union's third party submission, para. 76.

and modules would become obsolete due to the rapidly advancing technology, and that the back sheets and laminating materials of solar modules degrade when stored (India's second written submission, paragraphs 76-79)?

74. As noted in our oral statement, finished solar modules are not in fact vulnerable to degradation if stored under proper conditions.[57] We have provided evidence that this is the case. Specifically, even if back sheets and laminates have a limited shelf life as stand-alone materials, once those components are processed into finished solar modules, they are no longer so vulnerable. Indeed, finished modules are typically sold with a warranty of 25 years, giving the promise that they will last 25 years in the full range of conditions experienced outdoors (subjected to sun, wind, rain, etc.). It stands to reason that, if stored properly, away from outdoor stresses, solar cells and modules will remain effective for use for 25 or more years. Therefore, degradation does not preclude reliance on stockpiling as a viable GATT-consistent alternative to the DCR measures at issue.

75. India also provides no support for the claim that solar cells and modules stockpiled in 2014 might become obsolete in two years.[58] The fact, supported by evidence, that producers warranty solar cells and modules for 25 years indicates that they do not become obsolete so quickly.

76. If by "obsolete" India refers to the likelihood that, with solar technology continuously improving, users would likely prefer new cells or modules to two-year-old models, that does not lessen the utility of a stockpile to alleviate market volatility. Rather, it would simply mean that, in the event of short supply, purchasers might need to accept less technologically advanced models. Short supply is exactly the time when such exigencies become acceptable to producers. In any event, the market currently supports solar cells and modules with varying levels of technology. There is no reason to believe that stockpiled cells would be uncompetitive with the latest models.

77. In any event, the stated goal of India's DCRs is to ensure a stable supply of cells or modules, not to provide the most technologically advanced cells or modules at any given time. And India has made no showing that DCRs contribute to the deployment of the most technologically advanced cells or modules.[59] Thus, the potential that stockpiled cells and modules will be less technologically advanced does not support India's contention that

[57] U.S. Opening Statement at the Second Substantive Meeting of the Panel, para. 35.

[58] *See* India's Second Written Submission, paras. 76-77.

[59] In fact, creating a market segment protected from import competition, which is what DCRs do, would *reduce* the incentive to innovate. Therefore, India's DCRs would likely *reduce* Indian SPDs' ability to use the latest technology.

"stockpiling of solar cells and modules is not a reasonably available alternative that India can consider."[60]

78. Finally, India exaggerates the threat of obsolescence. Intelligent stockpiling does not mean buying a supply and storing it indefinitely. India could maintain a rolling stockpile, periodically selling off older models and replacing them with more recent products.

74. United States: At paragraph 35 of its opening statement at the second meeting, the United States submits that India has several alternatives to the DCRs, such as the stockpiling of solar cells and modules "or simply eliminating the DCRs". At paragraph 36, the United States reiterates that "simply omitting the DCRs" would be a more effective way for India to obtain an adequate supply of electricity. Is the United States intending to say by this that, for the purpose of Article XX(j) and XX(d), the DCRs make no contribution to India's objective of ensuring an adequate supply of electricity?

79. The United States does not discern any contribution that the DCRs make to India's acquisition of solar cells and modules or electricity, for purposes or Article XX(j) or securing compliance with India's laws and regulations under Article XX(d).

80. Because India is not facing a short supply of solar cells and modules, the DCRs at issue cannot be understood to make any contribution to "acquiring [a] product in short supply" within the meaning of Article XX(j). In short, the DCRs cannot contribute to addressing a problem that does not exist.

81. The United States has also noted India's failure to explain how withdrawal of the DCRs would result in a failure to "secure compliance" with any Indian law or regulation for purposes of Article XX(d). To the extent Indian can secure compliance with its laws and regulations *without* imposing DCRs, it is clear that the DCRs do not contribute to India's compliance with those laws and regulations.

82. In addition, as a general matter, DCRs would tend to frustrate rather than advance the government interests that India has identified. DCRs reduce supply choices for SPDs that assume them. To the extent that DCRs add domestic capacity, they would exacerbate the effect of any downturns in the market.

[60] India's Second Written Submission, para. 79.