INDIA — CERTAIN MEASURES RELATING TO SOLAR CELLS AND SOLAR MODULES

(DS456)

RESPONSES OF THE UNITED STATES TO WRITTEN QUESTIONS POSED BY THE PANEL AND INDIA

February 20, 2015

TABLE OF REPORTS

SHORT TITLE	FULL CITATION
Argentina – Footwear Safeguards (AB)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000
Canada – Renewable Energy / Feed-In Tariff Program ("Canada – FIT") (AB)	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
China – Publications and Audiovisual Products (Panel)	Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr. 1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R
China – Rare Earths (Panel)	Panel Reports, *China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R, WT/DS431/R/Add.1, WT/DS432/R, WT/DS432/R/Add.1, WT/DS433/R, WT/DS433/R/Add.1, adopted 2 September 2014
China – Raw Materials (AB)	Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R, adopted 2 September 2014
EEC – Parts and Components (GATT)	GATT Panel Report, *European Economic Community – Regulation on Imports of Parts and Components*, L/6657, adopted 16 May 1990
India – Autos (Panel)	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr. 1, adopted 5 April 2002
Korea – Various Measures on Beef (AB)	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
US – Countervailing and Anti-Dumping Measures (China) (Panel)	Panel Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/R, adopted 22 July 2014
US – Shrimp (Thailand) (Panel)	Panel Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/R, adopted 1 August 2008, as modified by Appellate Body Report

1. This submission consolidates the U.S. responses to the written questions from the Panel and India. Responses to questions posed by the Panel are first provided before responses to the questions posed by India.

GENERAL QUESTIONS

1. What is the status of the Guidelines documents? In light of paragraphs 61-63 of the United States' first written submission, is the Panel correct in its understanding that the Guidelines for Phase I (Batches 1 and 2) and Phase II (Batch 1) mandate compliance with the domestic content requirements specified therein (and repeated in the Request for Selection documents), and do not leave any discretion as to whether such requirements will be imposed or followed?

2. The Guidelines documents are properly viewed as rules promulgated by India's Ministry of New and Renewable Energy (MNRE), which are then implemented through the Request for Selection (RfS) documents issued by NTPC Vidyut Vyapar Nigam Limited (NVVN) and the Solar Energy Corporation of India (SECI).[1] By their very terms, the Guidelines and RfS documents do not leave any discretion as to whether the domestic content requirements (DCRs) will be imposed or followed. This is clear from the text of each of the Guidelines, which state as follows:

- Phase I, Batch 1 Guidelines: "For Solar PV Projects it will be mandatory for Projects based on crystalline silicon technology to use the modules manufactured in India…" Section 2.5(D) (Exhibit US-5)

- Phase I, Batch 2 Guidelines: "For Solar PV Projects to be selected in second batch during FY 2011-12, it will be mandatory for all the Projects to use cells and modules manufactured in India…" Section 2.5(D) (Exhibit US-6)

- Phase II Guidelines: "Under the DCR ["domestic content requirement"], the solar cells and modules used in the power plant must both be made in India." Section 2.6I (Exhibit US-7)

The mandatory (*i.e.*, non-discretionary) nature of the DCRs is further confirmed by the repetition of the DCR provisions in the corresponding RfS documents for Phase I (Batch I), Phase I (Batch II), and Phase II (Batch I), which state as follows:

- Phase I (Batch 1) *RfS* document: "For Solar PV Projects it will be mandatory for Projects based on crystalline silicon technology to use the modules manufactured in India." Section 3(D) (Exhibit US-15)

- Phase I (Batch 2) *RfS* document: "For Solar PV Projects to be selected in second batch during FY 2011-12, it will be mandatory for all the Projects to use cells and modules manufactured in India." Section 3(D) (Exhibit US-17)

[1] *See, e.g.*, paragraph 1.12 of the RfS document for Phase II (Batch 1), issued by SECI, which provides "MNRE has already issued the guidelines for implementation of said scheme and has uploaded the guidelines on the MNRE's website, www.mnre.gov.in. This Request for Selection document (hereinafter called RfS) has been prepared in line with the guidelines issued by MNRE." (Exhibit US-12).

- Phase II (Batch 1) *RfS* document: "For Projects to be implemented under Part-A (375 MW), both the solar cells and modules used in the Solar Power Projects must be made in India." Section 3(E) (Exhibit US-12)

(a) United States: If this understanding is correct, could the United States explain whether and if so why it is necessary to make findings with respect to the individually executed PPAs under Phase I (Batches 1 and 2) and Phase II (Batch 1)?

3. The United States has requested in its panel request and first written submission that the Panel make findings with respect to the domestic content requirements in individually executed Power Purchase Agreements (PPAs) because – as detailed in the U.S. response to Panel Question No. 11 below – the DCRs are incorporated into the PPAs for Phase I (Batches 1 and 2) and Phase II (Batch 1). Making findings and recommendations in relation to the DCRs in these PPAs would clarify the scope of India's implementation obligations and assist the parties in achieving a positive solution to the dispute.

2. Are NVVN and SECI properly characterized as "government agencies" whose actions are attributable to India?

4. It is proper to characterize NVVN and SECI as "government agencies" whose actions under the JNNSM Program – including the imposition of DCRs – are attributable to the Government of India. More generally, NVVN and SECI are acting for India when they implement the DCRs India has determined to require as part of Phases I and II of the JNNSM. That is, NVVN and SECI impose DCRs through the RfS and individually executed PPAs to carry out India's requirements under the Guidelines issued by MNRE. Because the DCRs in the Guidelines, RfS, and PPAs are required by India, they are measures attributable to India.

5. The RfS documents make explicit that NVVN and SECI are acting on behalf of and on the instructions of the Government of India:

- Paragraph 1.7 of the RfS document for Phase I (Batch 1) states: "[The] Ministry of New and Renewable Energy has issued guidelines for selection of new grid connect power projects of PV and Thermal …*These guidelines shall form the basis for the selection of new projects under 1st batch of JNNSM. The RfS document has been prepared in line with these guidelines*. (emphasis added)

- Paragraph 1.7 of the RfS document for Phase I (Batch 2) states: "[The] Ministry of New and Renewable Energy has issued guidelines for selection of new grid connect power projects of PV …*These guidelines ha[ve] formed the basis for selection of new projects under Second Batch and the RfS document has been prepared in line with these guidelines*. (emphasis added)

- Paragraph 1.12 of the RfS document for Phase II (Batch 1) states: "MNRE has already issued the guidelines for implementation of said scheme and has uploaded the guidelines on the MNRE's website, www.mnre.gov.in. *This*

> *Request for Selection document (hereinafter called RfS) has been prepared in line with the guidelines issued by MNRE."* (emphasis added)

6. To the extent the Panel's question refers to the term "governmental agencies" in GATT 1994 Article III:8(a), NVVN and SECI are governmental agencies within the meaning of that provision. Beyond India's assertion and acceptance that this is so[2], the Appellate Body has observed that the ordinary meaning of the term "governmental agencies" in its context, and in light of the object and purpose of the GATT 1994, may be understood as an "entities acting for or on behalf of government."[3] The United States agrees with the Appellate Body's understanding on this score and notes that NVVN and SECI satisfy this understanding because (1) the Government of India designated NVVN and SECI as "implementing agencies" for the JNNSM Program and (2) NVVN and SECI are responsible for enforcing the DCRs, a typical governmental action.

7. There is no dispute that the Government of India designated NVVN and SECI to implement Phase I (Batch 1 and 2) and Phase II (Batch 1), respectively. Specifically, the following facts are not contested by India or the United States:

- The Government of India designated NVVN and SECI to implement Phase I (Batch I and II), and Phase II (Batch I), respectively.[4]
- The Government of India designated NVVN as the "nodal agency"[5] for entering into PPAs with solar power developers (SPDs) for purchase of solar power under Phase I (Batch 1) and Phase I (Batch 2).
- The Government of India designated SECI as the entity responsible for the selection of SPDs and implementation of Phase II (Batch I).[6]

8. Nor India does India dispute that NVVN and SECI are responsible for enforcing the DCRs under Phase I (Batch 1 and 2) and Phase II (Batch 1). As stated at paragraph 131 of its first written submission:

9. In their capacities as the implementing agencies, [NVVN and SECI]…ensur[e] solar power that is partially generated from *domestically manufactured solar cells and modules* is procured to meet the overall objective of ensuring stable supply of energy and contributing towards energy security.[7]For these reasons, the actions of NVVN and SECI are attributable to

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[2] *See* India's First Written Submission, para. 127 ("NVVN and SECI are the governmental agencies designated by the Government of India to implement Phase I (Batch 1 and 2), and Phase II (Batch 1) respectively…").

[3] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff ("Canada – FIT")*, para. 5.60.

[4] *See* India's First Written Submission, para. 127.

[5] *Implementation of first phase of National Solar Mission – Issue of Presidential Directives – reg*, Ministry of Power, (22nd December, 2009) (Exhibit IND-13).

[6] *See* India's First Written Submission, para. 130.

[7] India's First Written Submission, para. 131.

the Government of India and, further, NVVN and SECI would be "governmental agencies" within the meaning of Article III:8(a).

3. At paragraph 40 of its first written submission, the United States indicates that SECI has issued letters of intent to enter into PPAs with 47 SPDs under Phase II (Batch 1). Were these letters of intent legally binding, such that they were equivalent to entering into a PPA?

10. Based on the solicitation letters, it appears that they are legally binding. The RfS document for Phase II (Batch 1) specifies only one circumstance that would permit SECI to revoke a letter of intent to enter into a PPA with an SPD. Specifically, paragraph 3.18(b) of the RfS document provides:

> If the Bidder/ Member in a Bidding Consortium conceals any material information or makes a wrong statement or misrepresents facts or makes a misleading statement in its response to RfS, in any manner whatsoever, SECI reserves the right to reject such response to RfS and/or cancel the Letter of Intent.

Thus, apart from misrepresentation on part of an SPD, the RfS document does not specify any other circumstance that would entitle SECI to cancel an issued letter of intent. This strongly suggests that the letters of intent are legally binding commitments by SECI to enter into PPAs with SPDs.

11. At any rate, SECI has confirmed that it has, in fact, entered in PPAs with the SPDs selected under Phase II (Batch 1). Specifically, paragraph 1.3 of the Draft Guidelines for Phase II (Batch 2)[8] states "Power Purchase Agreements (PPAs) with the successful bidders/ developers have since been signed in March 2014."

4. At footnotes 51 and 52 of its first written submission, India quotes language from some of the Guidelines documents for certain batches stating that they had no bearing on projects already selected under previous batches. Is the Panel therefore correct in its understanding that the PPAs entered into under a particular batch incorporated the domestic content requirements applicable to the batch in question, and that the scope of the domestic content requirements applicable to a particular project do not evolve or change over time as the scope of domestic content requirements evolves and changes for subsequent batches?

12. It is the understanding of the United States that PPAs entered into under one batch incorporate only the DCRs specified in the Guidelines and RfS documents that pertain to that particular batch. It is also the understanding of the United States that the scope of the DCRs applicable to a particular project do not evolve or change over time as the scope of DCRs evolve and changes for subsequent batches.

[8] *Draft Guidelines for Selection of 3000 MW Grid-Connected Solar PV Power Projects under Batch-II Tranche-I State Specific Scheme* ("*Draft Guidelines*") (Exhibit US-8).

13. That is, solar power projects selected under Phase I (Batch 1) are only bound by the DCRs specified in the Guidelines and RfS documents for Phase I (Batch 1); projects selected under Phase I (Batch 2) are subject only to the DCRs as specified in the Guidelines and RfS documents for Phase I (Batch 2); and projects selected under Phase II (Batch 1) are subject only to the DCRs as specified in the Guidelines and RfS documents for Phase II (Batch I).

10. At paragraph 15 of its first written submission, the United States indicates that "[u]nder a PPA, India agrees to purchase the electricity generated from the solar power project of a particular SPD at contractually-guaranteed long-term rates." The accompanying footnote, US-10, appears to be a contract between SECI and a distribution utility, not a contract between SECI and an SPD. Please clarify.

14. The United States appreciates the opportunity to clarify this issue. Footnote 12 of the U.S. First Written Submission should have cited Exhibit US-19, rather than Exhibit US-10.

11. At paragraph 41 of its first written submission, the United States asserts that "each PPA is executed based on a model PPA that incorporates domestic content requirements from the Guidelines and RfS for that Phase and Batch." Please specify the provision(s), in each of the model PPAs, that incorporate the domestic content requirements at issue.

15. As noted, the Guidelines and RfS documents specify the applicable DCRs for each batch. In the RfS documents, the DCRs are explicitly categorized as "Qualification Requirements"[9] for SPDs that submit bids to set up solar power projects under the JNNSM Program. Specific provisions of the model PPAs make clear that SPDs are bound by the Qualifications Requirements set forth in the RfS document, including the applicable domestic content requirements.

16. For example, the model PPA for Phase II (Batch 1) makes clear that the SPD referenced in the model PPA has been selected pursuant to the requirements of Phase II (Batch 1) RfS document, specifically providing that:

> The SPD [referenced in the model PPA] has been declared as a successful bidder against RfS No. SECI/JNNSM/SPV/P-2/B-1/RfS/102013 dated 28th October 2013 issued by SECI and have been issued a Letter of Intent (LOI) … for the development of a Solar Power Project, generation and sale of solar power under the above Mission.[10]

The model PPA for Phase II (Batch 1) further provides that "SECI shall have the right to terminate [the] Agreement" [11] if an SPD fails to "specify their plan for meeting the requirement for domestic requirement (if applicable)."[12]

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[9] *See* Solar Energy Corporation of India, *Request for Selection (RfS) Document for 750 MW Grid Connected Solar Photovoltaic Projects Under JNNSM Phase II Batch-I* (October 28, 2013) (Exhibit US-12), Section 3.7 (Qualification Requirements).

[10] *Solar Energy Corporation of India, Draft Standard Power Purchase Agreement for Procurement of___MW Solar Power on Long term* Basis (November 30, 2013), p. 3. Para. (B) (Exhibit US-19).

[11] Exhibit US-19, para. 3.2.1

17. The model PPAs for Phase I (Batch 1) and Phase I (Batch 2) also make clear that the SPDs referenced in the model PPA have been selected pursuant to the requirements contained in the RfS documents which, as noted in response to Panel Question No. 1, include domestic content requirements. Specifically, the model PPA for Phase I (Batch 1) and Phase I (Batch 2) both provide that:

> The SPD, after meeting the eligibility requirements has been selected by NVVN for the development of Solar Power Project, generation and sale of solar power under the above Mission[13] [14]

12. Please clarify whether and to what extent there is any disagreement between the parties, based on their first written submissions, on the coverage of the domestic content requirements under the relevant batches of the National Solar Mission. Based on its description of the scope of the domestic content requirements at paragraphs 26-33 and 37 (distinguishing "open" and "DCR" tranches) and the description of the domestic content requirements contained in the Guidelines and Request for Selection documents submitted by the United States, the Panel does not understand the United States to argue that the domestic content requirements at issue extended to all types of cells, assembled modules, or projects under Phase I (Batch 1 and 2) and Phase II (Batch 1). If that is correct, please clarify the following statements:

18. There does not appear to be any disagreement between the parties with respect to the scope and coverage of the applicable domestic content requirements under Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1).

19. With respect to Phase I (Batch 1 and 2), the Panel correctly notes that the United States *does not* argue that the DCRs extended to *all* types of cells and modules under those batches.[15] Specifically, under Phase I (Batch 1), the DCR covered only *crystalline silicon solar modules*; thin-film modules and all types of solar cells were exempt from the DCR. Under Phase I (Batch 2), the DCR continued to cover *crystalline silicon solar modules,* and was extended to cover *solar cells and modules of all types*; thin-film modules, however, remained exempt from the DCR.

20. With respect to Phase II (Batch 1), however, it *is* the position of the United States that the applicable DRCs do, in fact, cover *all types* of cells and modules, but not all projects. Under Phase II (Batch 1), MNRE allocated 750 MW for solar power projects. The allocation was split into two separate 375 MW tranches: (i) a "DCR" tranche, which was subject to domestic content requirements; and (ii) an "Open" tranche, which was exempt from domestic

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[12] Exhibit US-19, 3.1(g).

[13] National Thermal Power Company Vidyut Vyapar Nigam Limited Draft Standard *Power Purchase Agreement for Procurement of __ MW Solar Power on Long Term Basis* (August 2010), p. 3, para. (B) (Exhibit US-16).

[14] National Thermal Power Company Vidyut Vyapar Nigam Limited, *Draft Standard Power Purchase Agreement for Procurement of __ MW Solar Power on Long Term Basis (Second Batch)* (August 2011), p. 3, para. (B) (Exhibit US-18).

[15] *See* U.S. First Written Submission, paras. 30-31.

content requirements. SPDs were permitted to submit bids for solar projects under both the DCR and Open tranches. Solar power projects set up under the DCR tranche were subject to DCRs for solar cells and modules of all types (including thin-film modules, which had been exempt from the DCRs under Phase I). For projects set up under the "Open" tranche, developers were free to use either imported or domestically manufactured cells or modules. Thus, cells and modules made in India could be used across the entire 750MW allocation under Phase II (Batch 1), whereas imported solar cells and modules were eligible for use only within the 375 MW "Open" tranche.[16]

(a) at paragraph 3 of the US first written submission that "[t]o enter into these contracts and receive other incentives, however, SPDs are required to use solar cells and modules made in India";

21. The statement at paragraph 3 of the U.S. First Written Submission is intended to broadly convey that the measures at issue in this dispute are DCRs that pertain to solar cells and modules. As noted above, the United States understands that the particular scope and coverage of the DCR requirements differ among the phases and batches.

(b) at paragraph 41 of the US first written submission that "each PPA incorporated domestic content requirements";

22. The United States refers the Panel to its response to Panel Question No. 11.

(c) in the table following paragraph 33 , "(<u>NO Exemptions</u> from Domestic Content Requirement under Phase II)".

23. As noted above, under Phase II (Batch 1), MNRE split a 750 MW allocation into <u>two</u> separate 375 MW tranches: a "DCR" tranche and an "Open" (or non-DCR) tranche. SPDs that set up solar power projects under the DCR tranche were subject to DCRs for solar cells and modules of *all* types, including thin-film modules. Therefore, as indicated in the table following paragraph 33 of the U.S. first written submission, there were no exemptions to the applicable DCR under Phase II (Batch 1), in contrast to Phase I (Batches 1 and 2), which allowed certain exceptions to the DCRs (*e.g.*, the DCR did not apply to thin-film modules under Phase I (Batch 2)). To be clear, the U.S. challenge to DCRs in Phase II (Batch 1) is directed to the DCRs contained in the DCR tranche as the Open tranche does not contain DCRs.

ARTICLE III:4 OF THE GATT 1994 AND ARTICLE 2.1 OF THE TRIMs AGREEMENT

13. With regard to paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement:

(a) Please explain whether the analysis of the measure at issue should begin under Article III:4 of the GATT 1994 instead of proceeding, as the panel in Canada – Renewable Energy / Feed-In Tariff Program did, with an analysis

[16] *See* U.S. First Written Submission, para. 37.

based on the terms of paragraph 1(a) of the Illustrative List. In this regard, do the parties agree with the view expressed by the European Union, at paragraph 24 of its third-party written submission, that the latter is the more specific provision?

24. The United States agrees that paragraph 1(a) of the Illustrative List of the TRIMs Annex may be viewed as a more specific provision than Article III:4 of the GATT 1994, which could argue in favor of beginning the analysis with this provision. Further, when confronted with a similar situation in *Canada – FIT*, the Appellate Body also began its analysis with the Illustrative List. The United States also observes, however, that the focus of the U.S. claim is not principally on the DCRs as a trade-related investment measure, which would render the TRIMs Agreement "more specific", and the United States is also comfortable with an alternative approach that begins with Article III of the GATT 1994. In particular, the United States is of the view that the Panel may properly begin its analysis under *either* provision because either approach would lead to a finding that the DCRs at issue are inconsistent with both Article 2.1 of the TRIMs Agreement and Article III:4 of GATT 1994.

25. The United States does note, however, that it may be more efficient to begin the analysis under the TRIMs Agreement in this dispute. India has not disputed that the DCRs at issue are trade-related investment measures within the meaning of the TRIMs Agreement. As recognized by the Appellate Body in *Canada – FIT*, "[b]y its very 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.]"[17]

26. Accordingly, where a panel finds that a measure falls within paragraph 1(a) of the Illustrative List, it necessarily follows that the measure is also inconsistent with Article III:4 of the GATT 1994; the panel need not engage in any further analysis to establish the measure's inconsistency with Article III:4. Thus, if the Panel were to find that the DCRs at issue in this dispute are covered by paragraph 1(a) of the Illustrative List, it would obviate the need for the Panel to conduct additional analysis for purposes of establishing that the DCRs are also inconsistent with India's obligations under Article III:4 of the GATT 1994. (The reverse is not true – if the Panel concludes that these measures are inconsistent with Article III:4 of the GATT 1994, it would need to perform further analysis to evaluate whether that measure was also consistent with Article 2.1 of the TRIMs Agreement.) Whichever agreement is examined first, the United States requests findings and recommendations under both agreements.

(b) Please elaborate your views on whether the domestic content requirements at issue in this dispute "require the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production" within the meaning of paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement. In this regard, please comment on the view expressed by the European Union, at paragraph 28 of its third-party written submission,

[17] Appellate Body Reports, *Canada – FIT*, para. 5.24.

that "[e]ven if the DCRs cover only one portion of the market, they would still be requirements with which compliance is mandatory in order to have access to an advantage in respect of that portion of the market".

27. The DCRs at issue in this dispute explicitly "require the purchase or use by an enterprise of products of domestic origin" within the meaning of paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement. The very terms of the Guidelines and RfS documents makes clear that, under the applicable DCR provisions, SPDs (*i.e.*, "enterprises") are required to "use" solar cells and/or modules of domestic origin. Namely:

- the Phase I, Batch 1 Guidelines state: "For Solar PV Projects it will be mandatory for Projects based on crystalline silicon technology to *use* the modules manufactured in India…" Section 2.5(D) (US-5)

- the Phase I, Batch 2 Guidelines state: "For Solar PV Projects to be selected in second batch during FY 2011-12, it will be mandatory for all the Projects to *use* cells and modules manufactured in India…" Section 2.5(D) (US-6)

- the Phase II Guidelines state: "Under the DCR [i.e., "domestic content requirement"], the solar cells and modules *used* in the power plant must both be made in India." Section 2.6(E) (US-7)

The DCR provisions are restated verbatim in each of the RfS documents:

- the Phase I (Batch 1) *RfS* document states: "For Solar PV Projects it will be *mandatory* for Projects based on crystalline silicon technology to use the modules manufactured in India…(emphasis added)" Section 3(D) (US-15)

- the Phase I (Batch 2) *RfS* document states: "For Solar PV Projects to be selected in second batch during FY 2011-12, it will be *mandatory* for all the Projects to use cells and modules manufactured in India…(emphasis added)" Section 3(D) (US-17)

- the Phase II (Batch 1) *RfS* document states: "For Projects to be implemented under Part-A (375 MW), both the solar cells and modules used in the Solar Power Projects *must* be made in India (emphasis added)." Section 3(E) (US-12)

28. The United States understands the EU statement at paragraph 28 of its third-party submission as recognizing that the DCRs under Phase I (Batch 1) and Phase 1 (Batch 2) did not cover *all* solar cells and modules, but rather specified certain types of cells and modules to which the DCR applied and other types that were exempt from the DCR. (The U.S. response to Panel Question No. 11 specifies which cells and modules were subject to DCRs in each phase and batch.)

29. The United States understands the thrust of the EU argument to be that, where the DCRs apply, SPDs must comply with them in order to receive an advantage or benefit, *i.e.*, a PPA with NVVN or SECI. For example, SPDs that set up projects based on crystalline silicon technology under Phase I (Batch 1), must "use modules manufactured in India" in order to qualify for a PPA with NVVN. The SPDs that use thin-film modules are exempt

from the DCR, but that does not negate the fact that compliance with the DCR was mandatory for those SPDs that opted to use crystalline silicon modules.

30. The EU statement also appears to be responsive to India's argument that the DCRs do not accord less favorable treatment to imported solar cells and modules because the NSM Program does not "confine the benefits or advantages relating to tariff or any other benefits, to SPDs that use only domestically manufactured cells and modules."[18] But, as previously noted by the United States,[19] India's argument is valid only with respect to *some* SPD projects – namely the portion of 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 versions of those cells or modules (as the use of those imported versions is prohibited). Under Article III of the GATT 1994, compliance with national treatment for *some* products does not excuse a Member from its obligation to comply with national treatment with respect to *all* products.

17. With regard to paragraph 72 of the United States' first written submission, is it the United States' view that any "indigenization requirement" necessarily modifies the conditions of competition in favour of domestic products, and thereby accords less favourable treatment within the meaning of Article III:4 of the GATT 1994?

31. By "indigenization requirement", the United States understands the Panel to refer to a requirement that can only be satisfied through the purchase or use of products of domestic origin, similar to the measure at issues in *India – Autos.*[20] The United States agrees with the observation of the panel in *India – Autos*, "that the very nature of [an] indigenization requirement generates an incentive to purchase and use domestic products and hence creates a disincentive to use like imported products" and that "[s]uch a requirement clearly modifies the conditions of competition of domestic and imported [products] in favour of domestic products"[21] within the meaning of Article III:4 of the GATT 1994.[22]

18. Please specify the "advantages" at issue for the purposes of applying paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement.

32. The advantages[23] available to SPDs for purposes of paragraph 1(a) are the ability to bid for and enter into Power Purchase Agreements (PPAs) with NVVN and SECI to develop

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[18] India's First Written Submission, para. 89.

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

[20] *See* Panel Report, *India – Autos*, para. 7.201. ("Car manufacturers are required to purchase a certain amount of parts and components that are of Indian origin for the simple reason that this is the only way to meet the indigenization requirement.")

[21] Panel Report, *India – Autos*, paras 7.201 -7.202.

[22] *See* Panel Report, *India –Autos*, para. 4.204 ("The Panel thus finds the "indigenization" condition, as contained in Public Notice No. 60 and in the MOUs entered into thereunder, is in violation of Article III:4 of GATT 1994 as at the date of it establishment.")

[23] *See* India's First Written Submission, para. 92: "Once SPDs are selected based on the technical and financial criteria of the bid process, PPAs are entered into by NVVN in Phase I (Batch I and Batch II) and SECI in Phase II (Batch I). These criteria, and *the advantages resulting from the selection, such as guaranteed long-*

solar power projects.[24] In addition to this fundamental advantage to SPDs conforming to the DCRs, under these PPAs, as India recognizes, NVVN and SECI agree to purchase electricity from SPDs at guaranteed tariff rates for a term of 25 years. In addition, under Phase II (Batch 1), SPDs are provided with a "capital grant" of up to 30 percent of their total product costs or 25 million Rupees/MW (whichever is lower).[25]

ARTICLE XX(j) OF THE GATT 1994

25. Article XX(j) of the GATT 1994 contains a general exception for measures "essential to the acquisition or distribution of products in general or local short supply", subject to certain conditions.

(a) What is the meaning of "products in general or local short supply" in the context of Article XX(j) of the GATT 1994?

33. 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."[26] Consistent with this interpretation, the terms "general or local" reflect that a product can be in short supply in the international market, without necessarily being in short supply in any particular country. The converse is also true: a product that is generally available on the international market, could possibly be in short supply in a particular country or locality.[27]

34. The United States observes that India has not demonstrated that solar cells and modules are in short supply (*i.e.*, "scarce") either internationally or locally in India. Specifically, the United States notes that India acknowledges that there is an "adequate availability"[28] 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 complains that more than 90 percent of its solar PV installations rely on imported solar cells and modules[29] – suggesting that India is experiencing an abundance of solar power generation products, not a "scarcity" or "limited quantity." In short, India has failed to establish the factual predicate for invocation of Article XX(j).

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term tariffs in Phase I (Batch I and Batch II), and guaranteed long-term tariffs as well as VGF support in Phase II (Batch I), are available for all SPDs…" (emphasis added).

[24] *See Guidelines for Selection of New Grid Connected Solar Power Projects*, p. 7 (Exhibit US-5).

[25] *See Guidelines for Implementation of Scheme for Setting up of 750 MW Grid-Connected Solar PV Power Projects Under Batch-1, JNNSM*, Section 1.3 – Mechanism of Viability Gap Funding (Exhibit US-7).

[26] Appellate Body Reports, *China – Raw Materials*, para. 325.

[27] *See* 3EPCT/A/SR.40(2), p. 15 ("It was stated during the course of the discussion at Geneva in 1947 that the phrase "general or local short supply" was "understood to include cases where a product, although in international short supply, was not necessarily in short supply in all markets throughout the world. It was not used in the sense that every country importing a commodity was in short supply otherwise it would not be importing it.")

[28] India's First Written Submission, para. 233.

[29] India's First Written Submission, para. 236.

(b) Is the term "essential to" in the context of Article XX(j) synonymous with the term "necessary to" in the context of Article XX(a), XX(b) and XX(d) of the GATT 1994?

35. No. Based on the ordinary meaning of these terms and past Appellate Body reports interpreting them, it is clear that the term "essential to" suggests a higher level of indispensability than the term "necessary." 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."

36. The Appellate Body has observed that the Oxford English Dictionary defines "essential" to mean "absolutely indispensable or necessary."[30] In contrast, the Appellate Body has found that the term "necessary" exists along a continuum; its meaning can range from "indispensable" to simply "making a contribution to." [31] It is clear that being "necessary" is less than being "absolutely necessary", and thus less than being "essential."

37. To put this in context, it follows that an "essential measure," within the meaning of Article XX(j), is a measure that is "absolutely indispensable" or "absolutely necessary" to a country's ability to acquire the product at issue. Where a country is otherwise able to acquire the product at issue, a WTO-inconsistent measure to increase the availability of that product is not "essential" for purposes of Article XX(j). On the other hand, for purposes of Articles XX(a), XX(b), or XX(d) "a measure does not need to be 'indispensable', but should constitute something more than strictly making a contribution to."[32]

26. What is the relevance of the product in question being domestically manufactured or imported with regard to "short supply" under Article XX(j)?

38. By its very terms, Article XX(j) is concerned with whether a Member has the capability to *acquire* the product in purported short supply. Thus, where the facts demonstrate that a country is able to acquire the product at issue through importation, there is no basis for the invocation of Article XX(j). As noted above, India has not demonstrated that it is experiencing any difficulty acquiring solar cells and modules through importation.

39. Moreover, 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). 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. For example, Article III:4 speaks of "products of the territory of any contracting party" and "like products of *national* origin"; Article II:1(b) refers to "products of territories of other contracting parties"; Article II:1(c) refers to "products of territories entitled under Article I to receive preferential treatment upon importation"; and Article XX(i) speaks of "restrictions on exports of *domestic* materials." Article XX(j) contains no such specification of the origin of the "products" that are in general

[30] Appellate Body Reports, *China – Raw Materials*, para. 326.

[31] Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

[32] Panel Report, *US – Shrimp (Thailand)*, para. 7.188.

or local short supply. Therefore, India's interpretation of this provision as relating to a short supply of *domestic* products is in error.

27. Does Article XI:2(a), or any other provision of the GATT 1994, provide relevant interpretive context for Article XX(j)? As an interpretive matter, is Article XX(j) is concerned with whether the product in short supply is "essential" to the Member concerned, as in Article XI:2(a)?

40. Article XX(j) is not concerned with whether the product at issue is essential, but rather, whether the *measure* at issue is "essential." Read in tandem with the chapeau of Article XX, Article XX(j) provides in relevant part

> [N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of *measures* . . . *essential* to the acquisition or distribution of products in general or local short supply[.]

41. It is therefore clear that term "essential" modifies the term "measure" as used in Article XX(j). Accordingly, for purposes of Article XX(j), what must be shown to be "essential" is the measure at issue, *not* the product at issue.

28. With regard to the proviso of Article XX(j)

(a) What are your views on the meaning of an "equitable share of the international supply of" products in the proviso of Article XX(j)?

42. The proviso of Article XX(j) embodies the principle that measures taken pursuant to Article XX(j) should not cause significant distortions to the international supply of the product in question. This interpretation is consistent with that taken by past panels and the Appellate Body, as well as the 1950 Report of the Working Party on "The Use of Quantitative Restrictions for Protective and Other Commercial Purposes". For example, the panel in *China – Rare Earths* explained that:

> [The proviso of Article XX(j)] seems to us to reflect a general principle that, in the case of restrictions on trade, Members' access to goods and materials should reflect as closely as possible the situation that would prevail in the absence of these restrictions. Articles XI:2, XIII, XXVIII, and XX(j) of the GATT 1994 together suggest that the overarching goal or concern of WTO rules in this area is to reduce distortion in trade flows caused by such restrictions and ensure that Members maintain their relative position vis-à-vis each other with respect to their market shares and access to goods and materials.[33]

43. In addition, the 1950 Report of the Working Party on "The Use of Quantitative Restrictions for Protective and Other Commercial Purposes" noted:

[33] Panel Reports, *China – Rare Earths*, para. 7.359.

> [I]f a contracting party divert[s] an *excessive* share of its own supply to individual countries (which may or may not be contracting parties) this may well defeat the principle that all contracting parties are entitled to an equitable share of the international supply of such a product.[34]

44. The proviso of Article XX(j), however, should not be interpreted to mean that Members are entitled to any particular share of international supply. As observed by the panel in *China – Rare Earths*:

> Article XX(j) provides that where a product is in short supply, measures for the acquisition and distribution of the product should ensure that all Members have access to an *"equitable share*" of the product. *There is no requirement for any equal or strictly non-discriminatory allocation.*[35]

(b) How do you understand the phrase "shall be discontinued as soon as the conditions giving rise to them have ceased to exist" in the proviso of Article XX(j)?

45. The United States understands this phrase to mean that Article XX(j) justifies maintenance of a WTO-inconsistent measure only while the underlying condition of short supply exists, and no longer. It is noteworthy that this phrase takes the form of an obligation – "shall be discontinued," and that it has a temporal element – it becomes applicable "as soon as" the triggering event (the condition of short supply has "ceased to exist") occurs.

46. The context of the Article XX provide further guidance. All of the exceptions are contingent on certain conditions and, by extension, could be invoked only as long as those conditions remained in existence. However, only paragraph (j) contains an obligation to remove the WTO-inconsistent measure, and a timeframe in which to do so. This context gives the "shall be discontinued" phrase in Article XX(j) particular immediacy, and emphasizes that the exception affords only a temporary protection.

47. This understanding is consistent with the accepted view that Article XX(j) was drafted to handle "severe shortages caused by war and other emergencies"[36] – that is, situations that are, by definition, temporally limited with defined beginnings and endings. In addition, the standard is objective. This suggests that there must be some objective standard by which to assess whether the conditions giving rise to the short supply "have ceased to exist."

(c) Is there any subsequent practice among WTO Members, as evidenced through WTO notifications or otherwise, that establishes their agreement on the interpretation and application of the proviso?

48. The United States is not aware of "subsequent practice" of all WTO Members establishing their agreement within the meaning of Article 31(3)(b) of the Vienna Convention

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[34] GATT/CP.4/33 (Sales No. GATT/1950-3).

[35] Panel Reports, *China – Rare Earths*, para. 7.359. (emphasis added)

[36] Panel Reports, *China – Rare Earths*, para. 7.359.

but notes the Report of the Working Party and other persuasive readings of the proviso referred to in its responses to 28(a) and (b) above.

32. Does the United States agree that the scope of Article XX(j) is not limited to post wartime shortages or natural disasters?

49. Article XX(j) was drafted to address shortages that existed during the aftermath of the Second World War. As such, Members originally intended that the need for Article (j) would be limited to the post-war period. As noted by the GATT Preparatory Committee:

> The Preparatory Committee agreed that during a post-war transitional period it should be permissible to use [quantitative] restrictions to achieve the equitable distribution of products in short supply…as a result of the war, and the orderly liquidation of temporary surpluses of government-owned stocks and of industries, which were set up owing to the exigencies of war, but which it would be uneconomic to maintain in normal times. … all these exceptions would be limited to a specified post-war transitional period, which might, however, be subject to some extension in particular cases.[37]

50. After assessing the continued necessity for Article XX(j) in the 1960s, however, Members finally decided to retain the provision so as to "enable contracting parties to meet emergency situations which may arise in the future."[38] It therefore appears that that scope of Article XX(j) is not limited to post-wartime shortages or natural disasters. However, the CONTRACTING PARTIES' description of the "situations" covered by Article XX(j) as an "emergency" further confirms that the shortage in question must have a degree of urgency.[39]

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[37] EPCT/C.II/54/Rev.1, 59 (London Report), p. 11, para. III.C.1(b).

[38] BISD 9S/17. "When the need for paragraph (j) was reviewed at the Sixteenth Session in 1960, the CONTRACTING PARTIES noted "that the contracting parties have resorted to the provisions of this sub-paragraph in a relatively limited number of cases and that it is generally recognized that it would be appropriate to retain such provisions to enable contracting parties *to meet emergency situations which may arise in the future*." It was decided to retain the paragraph and to review the matter again in 1965. At the Twenty-second Session in 1965, the CONTRACTING PARTIES decided that paragraph (j) "should be retained for the time being" and to review the need for it again in 1970. At the Twenty-sixth Session in 1970, the CONTRACTING PARTIES adopted a recommendation of the Council that paragraph (j) be retained with no provision for further review." (emphasis added)

[39] Although it dealt with a different provision, the Appellate Body's reasoning in *Argentina – Footwear Safeguards*, para. 93 is instructive:

> The words "emergency action" also appear in Article 11.1(a) of the *Agreement on Safeguards*. We note once again, that Article XIX:1(a) requires that a product be imported "*in such increased quantities* and *under such conditions* as to *cause or threaten serious injury* to domestic producers". (emphasis added) Clearly, this is not the language of ordinary events in routine commerce. In our view, the text of Article XIX:1(a) of the GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, "emergency actions."

ARTICLE XX(d) OF THE GATT 1994

33. Does Article XX(d) of the GATT 1994 cover measures taken by a government to secure its own compliance with its laws and regulations?

45. By its terms, Article XX(d) appears to cover 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.

46. This understanding is consistent with the view of the panel in *EEC – Parts and Components*. In that dispute, the panel observed that:

> The examples of the laws and regulations indicated in Article XX(d), [40] namely 'those relating to customs *enforcement*, the *enforcement* of monopolies …, the protection of patents … and the *prevention* of deceptive practices'…suggest[s] that Article XX(d) covers *only* measures designed to prevent actions that would be illegal under the laws or regulations.[41]

51. On that basis, the GATT panel found that "Article XX(d) covers only measures related to the *enforcement* of obligations under laws or regulations consistent with the General Agreement."[42]

52. The panel in *US – Countervailing and Anti-Dumping Measures (China)* also noted the Oxford English Dictionary (OED) definition of "enforce" in the context of Article X:2 of the GATT 1994.[43] Specifically, the OED defines "enforce" to mean:

> *Compel* the occurrence or performance of"; "*impose* (a course of action) *on a person*"; "*Compel* the observance of (a law, rule, practice, etc.); support (a demand, claim, etc.) *by force*.[44]

53. Terms such as "compel," "impose," and "by force" strongly suggest that the actor doing the enforcing is *distinct from* the object(s) subject to enforcement. It therefore follows that "law and regulations" within the meaning of Article XX(d) encompasses only those laws and regulations that a government enforces *against* persons or entities subject to the government's jurisdiction. Per this understanding, Article XX(d) can only justify measures necessary for a government to secure *others'* compliance with its laws, *not* measures taken to secure the government's own compliance with its laws and regulations.

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[40] Article XX(d) of the GATT 1994 provides in relevant part:

…necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, *including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices*; (emphasis added)

[41] GATT Panel Report, *EEC – Parts and Components*, para. 5.16.

[42] GATT Panel Report, *EEC – Parts and Components*, para. 5.18.

[43] *See* Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.105.

[44] *The New Shorter Oxford English Dictionary* (1993), p. 820. (emphasis added)

54. India cites several domestic and international legal instruments as requiring India to take certain actions to protect the environment or pursue a sustainable development strategy.[45] The United States observes, however, that India does not argue that the cited instruments are enforced (or 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*.

55. For example, at paragraph 240 of its first written submission, India "respectfully submits that developing and maintaining the DCR measures is integral to *its* compliance with both domestic and international law obligations." (emphasis added). At paragraph 255, India argues that, "[t]he DCR Measures have been designed to secure compliance with *India's obligations* under its law[s] and regulations." (emphasis added). And at paragraph 260, India characterizes the DCR measures as "enforcing the sustainable development commitment undertaken *by India*, through its laws and regulations…" (emphasis added).

56. Thus, for the reasons noted above, the DCRs at issue in this dispute are not covered by Article XX(d) of the GATT 1994.

37. Please elaborate on the alternative measures that you contend are reasonably available to India under Articles XX (d) and (j).

57. The Appellate Body has 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."[46] In its submissions relating to Article XX(j), India claims that it "does not have within its disposal any alternative measure that could potentially be as effective as DCR is achieving the objective of incentivizing local

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[45] *See* India's First Written Submission, para. 240

> "… India's domestic law obligations are those embodied in:
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> - Electricity Act, read with the National Electricity Policy, the Environment Protection Act, and the National Climate Change Action Plan;
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> and the international law obligations are those embodied in various international instruments, including, but not limited to:
>
> - The Preamble to the Marrakesh Agreement Establishing the WTO ("WTO Agreement");
> - United Nations Framework Convention on Climate Change;
> - Rio Declaration on Environment and Development, adopted by the United Nations General Assembly in 1992; and
> - Rio+20 Document: The Future We Want, adopted by the United Nations General Assembly in 2012."

[46] *E.g.*, Appellate Body Report, *China – Publications and Audiovisual Products*, para. 239.

manufacturing of solar cells and modules."[47] Similarly, in its submissions relating the Article XX(d), India asserts that it "does not have any reasonably available alternatives to achieve its objective of building a domestic manufacturing base for solar cells and modules…"[48]

58. In considering whether any reasonably available alternatives exist, it is important to note that India's stated goal – promoting domestic production – is not a cognizable "objective" for purposes of Articles XX(d) and XX(j). Rather, the objective under Article XX(d) is "securing compliance" with a law or regulation and the objective under Article XX(j) is "the acquisition" of a product in short supply. As a result, the relevant question in this dispute is not whether there is a WTO-consistent alternative that also promotes domestic supply, but whether there is one that would allow it to "secure compliance" with laws or regulations within the meaning of XX(d) or "acquire" solar cells and modules within the meaning of XX(j).

59. If promoting domestic production were a legitimate objective for purposes of Article XX, Members could justify *any* GATT-inconsistent measure by arguing that the measure was necessary to achieve a preferred level of domestic production or market share for domestic producers. Moreover, for reasons noted above, Articles XX(d) and XX(j) are inapplicable to the facts of this dispute.[49] Accordingly, the Panel need not ultimately address whether there are reasonably available alternatives to the DCRs at issue.

60. Even aside from these bases to find that India has not demonstrated that either Article XX(d) or Article XX(j) is available to serve as an exception in this dispute, India's argument also fails because India does have at its disposal reasonably available WTO-consistent alternative measures to promote the domestic production of solar cells. 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.[50] 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.

61. India also cites promoting domestic production as crucial to ensuring a "sustained supply" of solar cells and modules "in the event of a disruption in imports."[51] India characterizes its efforts as similar to other countries' efforts to maintain a strategic reserve of petroleum.[52] The United States observes, however, that India could acquire a "reserve" of

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[47] India's First Written Submission, para. 236.

[48] India's First Written Submission, para. 262.

[49] *See* U.S. responses to Panel Questions Nos. 25 and 33.

[50] *See* U.S. responses to Panel Questions Nos. 25 and 33.

[51] India's First Written Submission, para. 261.

[52] *See* India's First Written Submission, paras. 196-197.

solar cells and modules by importing a surplus of cells and modules for the purpose of stockpiling; the reserve could them be drawn down in the event of supply shock. The United States does not dispute India's statement that solar power "cannot be stockpiled and stored in the same manner as fossils fuels."[53] But India's concern is with the availability of capital equipment (solar cells and modules) rather than inputs (the sun). India never even asserts that *solar cells and modules* cannot be stored or stockpiled.

62. In sum, the United States contends that India could just as effectively pursue its objective of promoting domestic production and protecting against supply shocks in the availability of solar cells and modules without imposing the DCRs at issue, and by instead adopting one of the alternatives identified in its submission and in response to this question.

[53] India's First Written Submission, para. 201.

QUESTIONS POSED BY INDIA TO THE UNITED STATES

Article XX(j)

1. The US' argument is that there is no relationship between short supply and production or manufacture of a product, and that short supply cannot exist when a product can be imported.

a. Is US' argument then that Article XX(j) applies only in relation to export restraints?

b. If not, what in US' view are situations of short supply that may necessitate import restrictions under Article XX(j)?

63. The U.S. position is expressed, *inter alia*, in response to Panel Question No. 28, above. By its very terms, Article XX(j) is concerned with whether a Member has the capability to *acquire* the product in purported short supply. Accordingly, Article XX(j), would not sanction the use of GATT-inconsistent measures where a country is able to import the product purportedly in short supply.

64. India has not demonstrated that it is experiencing any difficulty acquiring solar cells and modules through importation. Specifically, the United States observes that India has not demonstrated that solar cells and modules are in short supply internationally or locally in India. Indeed, India acknowledges that there is an "adequate availability"[54] 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 complains that more than 90 percent of its solar PV installations rely on imported solar cells and modules[55] – suggesting that India is experiencing an abundance of solar power generation products, not a short supply.

2. Article XX(j) uses the terms "local or general short supply," and not have been "international short supply." In U.S.' opinion, what are the situations when a product available in the international market is in short supply in the local market?

65. The United States considers that a breakdown of local supply chains, or of transnational means of distribution, could lead to a short supply of a product in a particular region or locality, even as the same product is generally available on the international market. The situations that might precipitate such a breakdown are obviously myriad, but emergency situations such as war or natural disasters come most immediately to mind. Indeed, as the United States notes in response to Panel Question No. 32, Article XX(j) was drafted to address shortages that existed during the aftermath of the Second World War. As such, Members originally intended that the need for Article XX(j) would be limited to the post-war period.[56] After assessing the continued necessity for Article XX(j) in the 1960s, Members

[54] India's First Written Submission, para. 233.

[55] India's First Written Submission, para. 236.

[56] *See* EPCT/C.II/54/Rev.1, 59 (London Report), p. 11, para. III.C.1(b).

decided to retain the provision so as to "enable contracting parties to meet emergency situations which may arise in the future."[57]

[57] BISD 9S/17. "When the need for paragraph (j) was reviewed at the Sixteenth Session in 1960, the CONTRACTING PARTIES noted "that the contracting parties have resorted to the provisions of this sub-paragraph in a relatively limited number of cases and that it is generally recognized that it would be appropriate to retain such provisions to enable contracting parties *to meet emergency situations which may arise in the future*." It was decided to retain the paragraph and to review the matter again in 1965. At the Twenty-second Session in 1965, the CONTRACTING PARTIES decided that paragraph (j) "should be retained for the time being" and to review the need for it again in 1970. At the Twenty-sixth Session in 1970, the CONTRACTING PARTIES adopted a recommendation of the Council that paragraph (j) be retained with no provision for further review." (emphasis added)