INDIA – CERTAIN MEASURES RELATING TO SOLAR CELLS AND SOLAR MODULES

(DS 456)

COMMENTS OF THE UNITED STATES ON RESPONSES OF INDIA TO THE QUESTIONS FROM THE PANEL

FOLLOWING THE SECOND MEETING

May 29, 2015

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

39. At paragraph 12 of its second written submission, India states that Article 2.2 and the Illustrative List of TRIMs "must be understood as clarifying to which TRIMs the general obligation in Article 2.1 applies". Is it India's view that Article 2.2 and the Illustrative List clarify the types of measures that, if found to be trade-related investment measures, are subject to the obligation in Article 2.1? If that is not India's view, then please clarify the purpose of Article 2.2 and the Illustrative List of TRIMs.

1. As the United States has explained,[1] Article 2.2 of the TRIMs Agreement and the text in the chapeau of paragraph 1 of the Illustrative List [2] *define* the measures described in paragraph 1 of the Illustrative List *as* inconsistent with Article III:4 of the GATT 1994.[3] This understanding is confirmed by the Appellate Body's statement that, "[b]y its terms, a measure that falls within the coverage of paragraph 1(a) of the Illustrative List is 'inconsistent with the *obligation* of national treatment provided for in paragraph 4 of Article III of GATT 1994'."[4] As the United States has further noted, the *obligation* of national treatment provided for under Article III:4, *includes* the three elements referenced in India's response to this question – the "less favorable treatment," "like products," and "laws, regulations and requirements…" elements.[5] As such, where a measure falls within the coverage of paragraph 1(a) of the Illustrative List – as India

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[1] *See* U.S. Response to Questions from the Panel Following the Second Meeting, paras. 1-3; *see also* U.S. Second Written Submission, para. 8, *and* U.S. Opening Statement at the Second Meeting, paras 6-11.

[2] TRIMs Article 2.2: "An illustrative list of TRIMs *that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994* and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement." (emphasis added).

[3] *See* U.S. Second Written Submission, para. 8; *See also* U.S Response to Panel Question No. 13(a), para. 25 and U.S. Opening Statement at the First Meeting of the Panel, para. 17.

[4] 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.")

[5] *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.[5]

concedes with respect to the DCRs at issue in this dispute[6] – that measure *necessarily* meets all of the elements of a national treatment claim under Article III:4.

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

41. 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?

2. India observes that, in *Canada – FIT*, the Appellate Body did not decide whether Article III:8(a) extends to discrimination against the inputs into a product purchased by a governmental agency.[7] It also notes the Appellate Body's finding that "the coverage of Article III:8 extends not only to products that are identical to the product that is purchased, but also to 'like' products," namely, those that are "directly competitive to or substitutable with the product purchased."[8] It asserts that this reasoning "left room"[9] for coverage under Article III:8(a) of products that are not in a competitive relationship with the product purchased.

3. India posits two ways to "approach the facts" in this dispute that, in its view, justify extending Article III:8(a) to cover solar cells and modules that SPDs use to produce electricity that they then sell to the government. However, neither approach satisfies the requirements of Article III:8(a).

4. The first approach is one that India has not advanced before—that when the government buys solar power it is effectively purchasing solar cells and modules because the "cost for the solar cells and modules" is incorporated into the tariff paid to SPDs by NVVN/SECI.[10] But the costs of making a product (*e.g.*, labor, capital, etc.) are *typically* reflected in the selling price of

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[6] *See* India's Second Written Submission, para. 8 ("India submits that the domestic content requirements at issue in this dispute would qualify under the meaning of paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement subject to the finding that they are held to be inconsistent with Article III:4 of the GATT, 1994."); *see also* India's Response to Panel Question No. 13(b) ("The domestic content requirements at issue in this dispute would qualify under the meaning of paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement to the extent that they are held to be inconsistent with Article III:4 of GATT, 1994.").

[7] India's Response to Panel Question 41, para. 5.

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

[9] India's Response to Panel Question 41, para. 6; *see also* India's Response to Panel Question 19, 2nd paragraph.

[10] *See* India's Response to Panel Question 41, para. 7, first bullet ("The tariff for the power purchased under the PPAs incorporates within it the cost for the solar cells and modules. India's purchase of electricity generated from solar cells and modules therefore constitutes an effective purchase of the cells and modules themselves.").

that product. The unremarkable fact that production costs are incorporated into purchase prices hardly means a consumer's purchase of a product "constitutes an effective purchase" of any capital equipment (or labor, or energy) involved in making the product. For example, the costs associated with acquiring, operating, and maintaining the machinery used to manufacture a car are incorporated into the price that a consumer pays for the car. It does not follow from this, however, that when consumer purchases a car, the consumer has effectively "purchased" the machinery used to manufacture the car. As such, even if the costs of solar cells and modules are incorporated into the tariff paid to SPDs by NVVN/SECI, this does not support a view that India is effectively purchasing the cells and modules for purposes of Article III:8(a).

5. Moreover, India fails to explain why the *other* costs associated with solar power projects (*e.g.*, physical plant, wiring, mounting systems, labor, etc.), and presumably covered by the tariff, are not also "effectively" purchased by the government. Indeed, the *Request for Selection* documents ask SPDs to submit bids reflecting costs of a solar power project *in total*, not just costs associated with the purchase and use of solar cells and modules in particular.[11] The United States does not understand India to argue that its purchase of electricity entails an "effective" purchase of *all* aspects of solar power project (*e.g.*, physical plant, wiring, mounting systems, labor), though that is the logical import of India's new argument.

6. The second approach that India advances is its long-time argument[12] that the government is effectively purchasing solar cells and modules because they are "integral" to the generation of solar power.[13] The United States has already explained why this argument is without merit.[14] Specifically, 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 and has not suggested that the government has any ownership interest in the cells and modules. [15] Therefore, the purchase of electricity by the government does not result in the "effective" purchase of the equipment used to generate it.

42. 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"?

7. As noted by the United States, the Appellate Body uses the word "inputs" twice in paragraph 5.63, both times in the phrase "inputs and processes of production." This

[11] *See, e.g.*, Request for Selection (RfS) Document for 750 MW Grid Connected Solar Photo Voltaic Projects Under JNNSM Phase II Batch-I, Section 6, Format 6.12(B) – Financial Proposal, Exhibit US-12.

[12] *See* India's First Written Submission, paras. 111-114.

[13] *See* India's Responses to Panel Question 41, para. 7, second bullet.

[14] *See, e.g.*, U.S. Second Written Submission, para. 20.

[15] *See* India's First Written Submission, para. 114.

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.

8. India has suggested the DCRs at issue in this dispute are legally permissible because they are limited to so-called "integral" generation equipment (*i.e.*, solar cells and modules), *in contrast* to the DCRs in *Canada – FIT*, which also covered so-called "ancillary" equipment like electrical wiring, inverters, mounting systems, etc.[16] The logical import of India's argument is that, had the Ontario Government limited its DCRs to just solar cells and modules, the DCRs at issue in *Canada – FIT* would have been properly justified under Article III:8(a).

9. But as the United States has explained,[17] if India's distinction between "integral" and "ancillary" equipment was valid, the Appellate Body in *Canada – FIT* should have found that the DCRs pertaining the solar cells and modules were covered by Article III:8(a), while the DCRs pertaining to other "ancillary" equipment were not so justified. It did not do so. Rather, as noted, the Appellate Body based its finding that Article III:8(a) did not apply to the DCRs at issue in *Canada – FIT* on the observation that electricity purchased by the Government of Ontario was not in a competitive relationship with the solar and wind power equipment subject to discrimination.[18] That is, the Appellate Body *did not* recognize some equipment (*i.e.*, solar cells and modules) as more (or less) integral than other types for purposes of generating solar power, or for purposes of its finding that DCRs at issue in *Canada – FIT* were "not covered by the derogation of Article III:8(a) of the GATT 1994."[19] Accordingly, the United States submits that, in the context of this dispute, there is no reason for the Panel to treat solar cells and modules as a special class of product, such that discrimination against imported cells and modules is permissible under Article III:8(a) even if the government is not purchasing solar cells and modules.

10. As the United States observed in its response to question 41,[20] even if Article III:8(a) can be understood to cover discrimination against inputs, Article III:8(a) would only apply to such discrimination if the government's purchase of a finished product necessarily entails the purchase of the input. The United States understands this to be the case where the input in question is physically incorporated into the finished product that the government ultimately purchases (*e.g.*, a government's purchase of uniforms arguably amounts to an effective purchase of the cotton "inputs" incorporated into the uniform). Where the input is not physically incorporated into the finished product, then the government's purchase of the finished product cannot be understood to entail an effective purchase of the input. Therefore, notwithstanding

[16] India's Response to Panel Question 19, 3rd paragraph.

[17] *See* U.S. Second Written Submission, paras. 30-32.

[18] *See* U.S. Second Written Submission, para. 21.

[19] Appellate Body Reports, *Canada – FIT*, para. 5.79.

[20] U.S. Responses to Questions from the Panel Following the Second Meeting, paras. 9-10.

India's suggestion the contrary[21], whether an input is physically incorporated in a finished product can be relevant to Panel's Article III:8(a) analysis, as this can inform a determination of whether the government purchases the input by virtue of its purchase of the finished product.

11. Contrary to India's suggestion, the panel's findings in *US – Superfund* do not support the proposition that Article III:8(a) could be interpreted to permit discrimination against inputs, much less the proposition that Article III:8(a) permits such discrimination *even if* the inputs are not physically incorporated into the finished product.

12. First, India omits that that dispute did not concern Article III:8(a). The United States, as the responding party, did raise not Article III:8(a) as a defense to the complainants' allegation that the measure at issue was inconsistent with Article III:2 of the GATT 1994. Accordingly, the *US – Superfund* panel did not offer *any* interpretation of Article III:8(a), much less a consideration of whether (and to what extent) Article III:8(a) permits discrimination against inputs.

13. Second, to the extent *US – Superfund* casts *any* light on the instant dispute, it tends to support the United States' view that an input is "effectively purchased" only if the input is physically incorporated into the finished product purchased by the government.[22] *US – Superfund* involved the imposition of a tax on certain "imported substances" (*i.e.*, certain chemical compounds and synthetic materials) *based on* the chemicals used to produce those substances.[23] That is, the "inputs" at issue in that dispute were the imported chemicals while the finished products at issue were the "imported substances *produced from* [those] chemicals."[24]

14. There was no real question that that chemicals at issue (such as ethylene[25]) were, in fact, incorporated into the imported substances (such as vinyl chloride[26]) at issue. Thus, contrary to India's suggestion, there is no significance to the fact that the panel "did not consider whether the chemicals needed to be physically incorporated in the final product … or whether they could

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[21] *See* India's Response to Panel Question 42, para. 13 ("In this context, solar cells and modules are clearly resources/ inputs that are integral to the generation of solar power, and their physical manifestation in the electricity so generated is not a relevant criterion for consideration.").

[22] *See* U.S. Responses to Questions from the Panel Following the Second Meeting, para. 14.

[23] GATT Panel Report, *United States- Taxes on Petroleum and Certain Imported Substances*, L/6175, para. 5.2.8. ("The tax is imposed on the imported substances because they are produced from chemicals subject to an excise tax in the United States and the tax rate is determined in principle in relation to the amount of these chemicals used and not in relation to the value of the imported substance.").

[24] GATT Panel Report, United States- Taxes on Petroleum and Certain Imported Substances, L/6175, para. 5.2.8. (emphasis added).

[25] *See* GATT Panel Report, *United States- Taxes on Petroleum and Certain Imported Substances*, L/6175, Annex 1 (Tax on Certain Chemicals).

[26] *See* GATT Panel Report, *United States- Taxes on Petroleum and Certain Imported Substances*, L/6175, Annex 2 (Tax on Certain Imported Substances).

be consumed without remaining traces in the production process."[27] India's citation of *US – Superfund* would only be relevant to the instant dispute had the measure at issue discriminated against imported substances based on the origin of the capital equipment used to produce or manufacture the substances (*e.g.*, mixers, centrifuges, etc.) and the panel found that such discrimination was somehow permissible.

15. At any rate, the panel found that U.S. tax measure to be consistent with the United States' national treatment obligations under Article III:2, because the tax on imported products was equal to "the tax borne by like domestic substances as a result of the tax on certain chemicals."[28] Crucially, the panel also found that tax on imported substances was structured so as to be equal to the tax that would have been due had the chemical inputs been sold separately.[29] That is, for example, the same level of taxation applied to a ton of the chemical ethylene, whether the ethylene was sold as a stand-alone chemical or sold as part of a finished chemical compound or synthetic material (*e.g.*, vinyl chloride). The panel's finding is consistent with the idea that when a consumer purchased the imported substance (*i.e.*, the finished product), the consumer was *effectively* purchasing the chemical inputs incorporated into the substance or otherwise consumed in the production of the substance.

16. In contrast, nothing in *US – Superfund* suggests that purchase of the imported substances should be understood to entail the effective purchase of the capital equipment used to produce or manufacture the imported substance. Likewise, nothing in *US – Superfund* lends support to India's argument that its purchase of electricity amounts to the effective purchase of the solar cells and modules used to produce that electricity. As the United States has noted India's purchase of electricity, at most, could be understood to entail an effective purchase of the light energy[30] consumed in the process of generating the electricity.

44. Is the Panel correct in its understanding that India's arguments do not concern "processes of production used in respect of products purchased by way of procurement",

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[27] India's Response to Panel Question 42, para. 12.

[28] GATT Panel Report, *United States- Taxes on Petroleum and Certain Imported Substances*, L/6175, para. 5.2.8.

[29] GATT Panel Report, *United States- Taxes on Petroleum and Certain Imported Substances*, L/6175, para. 2.5 ("The tax on certain imported substances equals in principle the amount of the tax which would have been imposed under the Superfund Act on the chemicals used as materials in the manufacture or production of the imported substance if these chemicals had been sold in the United States for use in the manufacture or production of the imported substance.").

[30] *See* U.S. Responses to Questions from the Panel Following the Second Meeting, paras. 12-13. ("A government can only acquire an input to the extent it is physically incorporated into the finished product purchased"…"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.").

but rather relate only to "inputs" of such products? See Appellate Body Reports, Canada – Feed-in Tariff Program / Renewable Energy, paragraph 5.63.

17. The United States has no comment on India's answer to this question.

45. 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?

18. As the United States has noted, the definition of "purpose" includes "a thing to be done; an object to be attained, and intention, an aim."[31] Thus, as a legal matter, 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.

19. In response to this question, India asserts that both the governmental consumption of a product and governmental provision of a product to recipients can serve government purposes, and that a case-by-case analysis is necessary. It then observes that the Indian government both consumes electricity and supplies it to private citizens. This is scarcely the case-by-case analysis that India concedes is necessary, and does not address the Panel's question as to whether incidental and/or unverifiable use by the government could constitute purchase for a governmental purpose.

47. 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"?

20. The United States does not understand the existence of other non-governmental purposes to 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.[32] However, 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).

21. In this regard, India has (still) not adequately explained or "clarified" why promoting sustainable development, solar power development, or affordable access to solar power – while all laudable goals – should be understood as "public functions" as opposed to important "aims or objectives" of the Indian government. As noted by the Appellate Body, "governmental agencies

[31] U.S. Response to Panel Question No. 45, para. 18.

[32] U.S. Responses to Questions from the Panel Following the Second Meeting, para. 25.

by their very nature pursue governmental aims or objectives."[33] 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."[34] India continues to simply assert these are "public functions" without spelling out why they should be classified as such for purposes of discerning a "governmental purpose" within the meaning of Article III:8(a).

48. 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.

22. As explained in the U.S. response to this question, 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). 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."[35] 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. 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. 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.

23. India's attempt to characterize the transactions outlined above as "one comprehensive transaction" cannot be reconciled with the facts of this dispute. There are, in fact, three transactions: (1) NVVN and SECI enter in Power Purchase Agreements to buy electricity from SPDs; (2) NVVN and SECI then enter into Power Sale Agreements to sell electricity to

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

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

[35] *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.").

Discoms; and (3) the Discoms then resell the electricity to downstream retail and commercial consumers. In no prior submission has India sought to characterize these transactions as a "single comprehensive" transaction, and the factual and documentary evidence do not support such an understanding. In each transaction, the purchaser is independent or the seller. The terms of the agreements are set at separate times. The ultimate purchasers never even know the source of the electricity they consume.

24. Contrary to India's suggestion, the United States does not argue that NVVN/SECI are profit-motivated actors. Nor has the United States argued that those entities themselves engage in the commercial resale of electricity. Rather, the United States has noted that the Discoms to which NVVN/SECI sell electricity *are* properly viewed as "profit-oriented" actors that "seek to maximize [their] own interests."[36] In none of its submissions has India has disputed this characterization. (Nor has India disputed that the CERC/SERC tariff rates are designed to ensure recovery of profits for the Discoms.)

25. Therefore, 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. In that sense, 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. Even if NVVN and SECI are not themselves engaged in commercial resale, their procurement of electricity is undertaken with a view to the "commercial resale" by Discoms to the downstream retail and commercial consumers.

49. 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?

26. As noted by the United States in response to this question, the Appellate Body has not found that a resale transaction must be at "arm's length" (with respect to either the buyer or seller) 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.[37]

27. The United States reiterates that whether NVVN and SECI are interest-maximizing or commercially orientated actors is not determinative of whether their procurement of electricity is taken with a view to commercial resale within the meaning of Article III:8(a). Rather, NVVN/SECI's procurement of electricity is taken "with a view to commercial resale" because such procurement occurs with the knowledge and intent that the Discoms will resell the electricity to downstream commercial and retail consumers.

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[36] U.S. Opening Statement at the First Meeting of the Panel, para. 38.

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

28. Moreover, the fact the NVVN and SECI take steps (*i.e.*, bundling, provision of VGF) to make electricity more affordable further demonstrates that their procurement of electricity is taken with a view towards commercial resale. As noted by the United States, India's implementation of the bundling and VGF schemes reflects the reality that electricity procured by NVVN/SECI would be too expensive to compete with the "relatively cheaper"[38] coal-based electricity otherwise available on India's electricity market. As such, the bundling and VGF scheme are designed to make the purchase and resale of electricity viable as a commercial proposition for Discoms.

52. In paragraph 42 of its second written submission, India describes the "trading margin" in the sale price of electricity from NVVN and SECI to Discoms as "a charge that compensates a trader in relation to risks inherent in the trading business such as default risk, late payment risk, contract dishonor risk and inflationary risk". Does the trading margin also entail the recovery of costs and/or generation of profits? In this regard, please clarify the reference in paragraph 9 of Exhibit IND-46 to "traders' requirements of meeting expenses incurred to mitigate risks, expenses incurred towards Operations & Maintenance and return on net worth".

29. Even if the trading margin imposed on NVVN/SECI does not allow for recovery of costs or profits, this would not refute a finding that NVVN/SECI's procurement is taken with a view to commercial resale. As the United States has explained, a finding that NVVN/SECI's procurement of electricity is with a view to commercial resale can be based on the fact that when NVVN and SECI purchase the electricity from SPDs, they do so with the knowledge and intent that Discoms will resell the electricity to downstream retail and commercial consumers.

53. With respect to the price at which electricity is sold under Phase I (Batches 1 and 2) and Phase II (Batch 1):

a. What is the relevance of the "CERC determined tariff for solar power" and/or "CERC generic levellized tariff for solar power" (see India's second written submission, paragraphs 40-41) for the price of electricity sold under PPAs, and for the price of electricity sold by Discoms to consumers?

30. The United States has no comment on India's response to this question.

b. Is the price at which electricity is sold by Discoms as fixed by the CERC/SERC based upon recovery of costs and/or generation of profits for the Discoms?

[38] *See* India's Second Written Submission, para. 36.

31. India has not denied that the CERC/SERC tariff is designed to allow for Discoms to recover a profit. Nor has India disputed that the Discoms are properly viewed as "profit-oriented" actors that "seek to maximize [their] own interests."[39]

c. Please provide any additional available information on the price at which Discoms sell electricity to consumers, as provided in paragraph 151 of India's first written submission.

32. India's response demonstrates that SECI and NVVN's procurement of electricity is taken with a view towards commercial resale. The United States reiterates that the bundling and VGF schemes – by "reduc[ing] the cost of power purchase for the Discoms"[40] – 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 (*i.e.*, "affordable to all consumers"[41]) to ensure that it is marketable to consumers. Therefore, even aside from NVVN and SECI's resale of electricity to commercial actors, 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.

55. 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.

33. India's responses does not specify the analogous actors in under Ontario's FIT Program and the NSM Program.

34. The United States has noted that, under the FIT Program, the Ontario Power Authority (OPA) entered into contracts with power generators for the purchase of electricity.[42] The role of OPA is therefore analogous to the role of NVVN and SECI in Phases I and II, respectively, of the NSM Program. The United State has further noted that, under the FIT Program, the electricity purchased by OPA was injected onto Ontario's electricity grid "where is [was] pooled

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

[40] *See* India's Response to Panel Question 53(c), para. 55.

[41] *See* India's Response to Panel Question 53(c), para. 55.

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

or co-mingled with electricity from other sources."[43] 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.[44] The role of the distribution companies in *Canada – FIT*, is therefore analogous to the role of the Indian Discoms that participate in the NSM Program.

35. India's suggestion that the FIT Programme *did not* involve a bundling scheme is inaccurate. The electricity purchased under the FIT Programme was "pooled or co-mingled with electricity from other sources."[45] This is thus similar to the NSM Program, under which NVVN/SECI bundled the solar power electricity with electricity generated from other sources (*e.g.*, coal). Thus, the bundling engaged by NVVN/SECI is a parallel feature to pooling scheme under Ontario's FIT Program, not a distinguishing feature between the two programmes.

36. India attempts to juxtapose the role of NVVN/SECI with the role of the local distribution companies under the FIT Program. Specifically, it notes that the distribution companies (*i.e.*, electricity retailers) in *Canada – FIT* "made returns from their electricity transmission and distribution activities"[46] while NVVN and SECI, in contrast, did not operate as "independent commercially driven trade companies."[47]

37. But as noted above, the local distribution companies under the FIT Programme are more analogous to the Discoms under the NSM Program. Moreover, India does not dispute that the Discoms that participate in the NSM Program "make returns" or otherwise generate profits from their downstream sales of electricity to commercial and retail consumers.

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:

a. Is the Panel correct in its understanding that India's view is that the DCRs involve the "acquisition of solar cells and modules by SPDs" (India's first written submission, paragraph 229), and not the "distribution" of solar cells and modules?

38. The United States understands India's position to be that the measures at issue involve *only* the "acquisition" of cells and modules, not the distribution of cells and modules.

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

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

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

[46] *See* India's Responses to Questions from the Panel Following the Second Meeting, para. 57.

[47] *See* India's Responses to Questions from the Panel Following the Second Meeting, para. 58.

59. 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.

39. India appears to agree that a demonstration that a short supply is "imminent" is a more stringent standard than asking whether shortage can be "reasonably expected." As the United States has noted, 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.[48] Accordingly, India's assertion that the purported short supply of cells and modules is "imminent" and not extant means that it cannot properly invoke Article XX(j).

60. 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.

40. India continues to misunderstand the U.S. observation with respect to the lack of a reference to origin in Article XX(j) versus other provisions of the GATT 1994. The United States does not argue that Article XX(j) "cannot be used to justify discrimination under Article III "because [it] does not specify origin related application."[49] Rather, the United States has observed that the conditions for application of Article XX(j) are not related to the origin of goods, whereas other provisions of GATT 1994 do have origin-related conditions. This fact does not limit the measures a Member may take once the underlying condition is met.

41. The United States acknowledges that under the right factual circumstances – that is, where a product is in actual short supply without regard to origin – Article XX(j) can properly justify measures essential to enabling a Member to acquire that product, even if such measures are otherwise inconsistent with Article III of the GATT 1994 or Article 2.1 of the TRIMs Agreement. But against a factual backdrop where India (1) acknowledges that there is an adequate international availability of solar cells and modules[50]; and (2) has demonstrated no

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

[49] *See* India's Response to Panel Question 60, para. 67; *See also* India's Second Written Submission, para. 59.

[50] India's First Written Submission, para. 233 ("In the context of the facts of this case, it is significant to note that internationally, there is adequate availability of solar cells and modules.").

difficulty in availing itself of this international supply, there is no basis for finding the existence of a "short supply" of solar cells and modules within the meaning of Article XX(j).

61. 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.

42. The evidence cited by India shows that supply and prices of solar cells and modules fluctuate, but not that they do so to an unusual or exceptional degree. India's observations about imports show only that the supply and demand also fluctuate. They indicate nothing about whether imports are "particularly subject to supply disruptions," that is, whether they are more "volatile" than domestic sources.

43. The only factors India cites as differentiating between imports and domestic supply are that it expects Chinese producers to focus on sales to Chinese consumers, and that Indian importers use foreign financing to fund purchases of imports.[51] With regard to Chinese producers, India has provided no evidence that Chinese exporters would forsake profitable sales to export customers to make less profitable sales to domestic customers. And, reliance on foreign financing has nothing to do with whether the solar industry is "volatile."[52] If India perceives current levels of foreign financing as "risky," it can take measures to increase lending by Indian banks to solar power developers.[53] In any event, India's proposal to expand the domestic solar power industry also poses a foreign currency risk, as India has explicitly stated that it seeks foreign financing for domestic solar cell and module producers.[54]

62. Please comment on Exhibit US-39, submitted by the United States at the second meeting.

44. India proffered two exhibits, IND-48 and -49, to support the conclusion that a global short supply of solar cells was "looming" or "imminent" as of August 2014[55]. The United States proffered US-39 (*i.e.*, *False alarm: No panel shortage coming*) [56] to demonstrate that predictions of a looming short supply were contested within the industry, also as of August 2014. India did

[51] India's Response to Panel Question 61, paras. 69-70.

[52] *See* India's Response to Panel Question 61, para. 70. ("India has also explained that its dependence on imports is also linked to foreign financing for India's solar projects, which is fraught with risks arising from mismatches in currency flows, as the revenues of the solar projects are all denominated in INR while overseas debt servicing is in foreign currency.")

[53] *See* India's Second Written Submission, para. 93.

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

[55] *See* India's Second Written Submission, paras. 97-98 ("From the evidence provided above, it is clear that there does exist a risk of short supply….").

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

not argue – and proffered no evidence to support – that there was an *existing or current* short supply in August 2014.

45. Moreover, India's *own* exhibits indicate any short supply is unlikely to affect the large-scale, grid-connected solar power projects[57] at issue in this dispute. Instead, off-grid, residential projects will likely take the brunt of any shortage. Specifically, an analyst quoted in IND-48 explains that in the event of a shortage "[l]arge-scale utility projects are going to be where the modules go" while any "push-outs would be on the residential side."[58] Similarly, IND-49 states that a shortage "could hinder the growing rooftop solar panel industry" as "scarce supplies often get routed to large-scale utility projects and leave the residential side with limited availability."[59] Moreover, an analyst quoted in IND-48 states that a shortage would *not* result in an increase in prices for solar cells and modules.[60] Therefore, even if a short supply were to occur, exhibits IND-48 and -49 demonstrate that SPDs participating in the NSM Program will nonetheless be able to acquire solar cells and modules from overseas suppliers. Simply put, exhibits IND-48 and -49 support the conclusion that the DCRs at issue would *not* be "essential" to *India's* acquisition of solar cells and modules, even if cells and modules should fall into short supply for certain other purchasers.

64. The PPAs between SPDs and the governmental agencies administering the batches at issue under the National Solar Mission remain in effect for a period of 25 years. At paragraph 29 of its opening statement at the second meeting, India indicates that the DCRs are restricted to the batches in question, and "therefore are by their very nature, temporary measures". Is it India's view that the domestic content requirements are "temporary measures" because they will remain in place for a defined period?

46. The fact that India's DCR measures are mandated to remain in place for a defined period confirms that the measures are not designed to meet the requirements of Article XX(j). The proviso of Article XX(j) provides that any measures taken under that provision "shall be discontinued as soon as the conditions giving rise to them have ceased to exist." That is, measures taken under Article XX(j) are permissible only as long as the conditions giving rise a

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[57] The DCRs at issue in this dispute all pertain to large-scale grid-connected projects, *not* residential or rooftop projects. *See*, Guidelines *for Selection of New Grid Connected Solar Power Projects*, MNRE (July 2010), (Exhibit US-5); *Guidelines for Selection of New Grid Connected Solar Power Projects, Batch II*, MNRE (August 2011), (Exhibit US-6); *Guidelines for Implementation of Scheme for Setting up of 750 MW Grid-connected Solar PV Power Projects under Batch-1, JNNSM*, MNRE (October 2013), (Exhibit US-7).

[58] Ehren Goossens, *Solar Boom Driving First Global Panel Shortage Since 2006*, Bloomberg Business (18th August, 2014), Exhibit IND-48.

[59] Laura Lorenzetti, *Solar panel shortage looms even as manufacturers invest in production*, Fortune (19th August, 2014), Exhibit IND-49.

[60] Ehren Goossens, *Solar Boom Driving First Global Panel Shortage Since 2006*, Bloomberg Business (18th August, 2014), Exhibit IND-48.

short supply remain in effect. That India's DCR measures are in place for a defined period of time demonstrates that they are not set to expire or be withdrawn once "conditions giving rise" to a short supply have ceased to exist, as required under Article XX(j). A fixed, 25-year period bears no relation to the alleged short-supply "conditions giving rise to" the measures.

65. *At paragraph 21 of its opening statement at the second meeting and elsewhere, India states that the measures seek to reduce the risks linked to "excessive dependence" on imports. The following question is aimed at clarifying what constitutes "excessive dependence", and at clarifying the level of domestic manufacturing India regards as sufficient to ensure domestic resilience and the security of supply. The National Solar Mission was established with the aim of generating 20,000 megawatts of solar power by 2022. India has informed the Panel that the overall target was subsequently increased from 20,000 megawatts to 100,000 megawatts. At paragraph 117 of its second written submission, India stated that under the JNNSM Mission Document, the expectation was laid out for domestic manufacturing capacity to be in the range of 4,000 to 5,000 megawatts of installed capacity by 2020. The Panel observes that this corresponds to about 20-25% of the original target of 20,000 megawatts. Given that the overall target was subsequently multiplied by five, from 20,000 to 100,000 megawatts, does that mean India now needs domestic manufacturing capacity also to be increased by a multiple of five, so as to be in the range of between 20,000 to 25,000 megawatts to ensure domestic resilience? Or is there no correlation between the overall target and the amount of domestic manufacturing capacity needed to avoid excessive dependence on imports?*

47. The United States reiterates[61] that 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, not the ability to manufacture a product. Thus, where the facts indicate – as they do in this dispute – that a country is able import a product, that product cannot be said to be in "short supply" within the meaning of Article XX(j).

48. The United States does 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.

49. Moreover, as previously noted by the United States, there must be some *objective* standard by which to assess whether the conditions giving rise to the short supply "have ceased to exist."[62] But, beyond asserting that the needed level of domestic production is a "qualitative assessment," India provides no indication of what factors indicate that domestic production is

[61] *See* U.S. Response to Panel Question 56(b), para. 46; *see, also* U.S. Response to Panel Question 69(a), para. 63.

[62] *See* U.S. Response to Panel Question 28(b), para. 47.

now too low, or might be used in the future to evaluate whether domestic production is high enough. In short, India advances no standard beyond its own criterion-free assessment that current production levels are too low. This approach would render Article XX(j) effectively self-judging, a result devoid of any legal support.

4. ARTICLE XX(d) OF THE GATT 1994

66. What are the actions that would not be in compliance with Indian laws or regulations that the DCRs prevent?

50. The United States observes that India has not provided a response to the Panel's question. That is, India has not explained how the DCRs at issue prevent non-compliance with any Indian law or regulation, or how withdrawal of the DCRs would result in non-compliance with any law or regulation. This is a crucial omission by India because if termination of the DCRs would not result in non-compliance with an Indian law or regulation, then the DCRs can hardly be viewed as "necessary" for purposes of Article XX(d).

51. At any rate, the United States has explained that Article XX(d) covers only those measures necessary for a government to enforce its laws and regulations vis-à-vis persons subject to its jurisdiction, not measures taken to secure a government's own compliance with its laws and regulations.[63] India, however, characterizes the instruments it cites as embodying legal obligations that apply to the India government itself. [64] Accordingly, India cannot properly invoke Article XX(d) in the context of this dispute.

52. India continues[65] to cite the Appellate Body Report in *Mexico – Taxes on Soft Drinks* as supporting the proposition that Article XX(d) covers measures taken to secure a government's *own* compliance with its laws and regulations.[66] But as already explained by the United States, the Appellate Body did not evaluate whether Article XX(d) covered measures taken to secure a government's *own* compliance with its own laws or regulations.[67] Therefore, contrary to India's suggestion, neither the findings of *Mexico – Taxes on Soft Drinks*, nor any other WTO dispute for that matter, support the proposition that Article XX(d) covers measures taken to secure a government's *own* compliance with its laws or regulations.

53. Moreover, none of the instruments cited by India require the imposition of DCRs, most of them do not appear to demand compliance in a legal sense, and others appear to *discourage* the

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[63] *See* U.S. Responses to Questions from the Panel Following the First Meeting, para. 45; *See also generally*, U.S. Second Written Submission, paras. 46-53.

[64] *See* U.S. Responses to Questions from the Panel Following the First Meeting, paras. 54-55.

[65] *See* India's Response to Panel Question No. 33.

[66] *See* India's Second Written Submission, para. 133.

[67] *See* U.S. Second Written Submission, para. 53.

use of discriminatory measures like domestic content requirements.[68] For this reason alone, the DCRs at issue cannot be viewed as necessary to "secure compliance" with the cited instruments.

67. In its response to Panel Question No. 34(c) and elsewhere, India refers to its sustainable development "obligations" in the plural. Does India refer to sustainable development "obligations" in the plural to signify that the concept of sustainable development is reflected in multiple instruments and provisions, or to signify that the concept of sustainable development encompasses multiple different obligations? If it is the latter, please clarify exactly what those "obligations" are that the DCRs secure compliance with.

54. The United States has no comment on India's response to this question.

68. What is the legal status of the National Climate Change Action Plan, the National Electricity Policy, and/or the National Electricity Plan under the domestic law of India? Are these "laws or regulations" within the meaning of Article XX(d)?

55. India has cited specific provisions the National Electricity Policy/Plan and the National Climate Change Action Plan as demanding "compliance" for purposes of Article XX(d).[69] As the United States has explained, however, none of those provisions contain *any* legal requirements or mandates, but read more as hortatory statements concerning India's need to promote sustainable development in general and renewable energy in particular.[70] Thus, irrespective of the legal status of these documents, India cannot rely on the provisions it cites to justify its invocation of Article XX(d).

5 "ESSENTIAL" AND/OR "NECESSARY"

69. 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?

56. There is no legal basis for India's statement that the DCRs at issue "need[] to be examined in the context of the overall objectives of energy security and ecological sustainable growth."[71] As the United States has explained, Article XX(j) covers only those measures that are "essential to the acquisition or distribution" of products in short supply. Thus, the only cognizable objectives for purposes of Article XX(j) are the acquisition or distribution of a product in short supply. To the extent measures justified under Article XX(j) might pursue other

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

[69] *See generally*, U.S. Second Written Submissions, paras. 61-67.

[70] *See generally*, U.S. Second Written Submission, paras. 61-67.

[71] India's Response to Panel Question 69(a), para. 88.

objectives (i.e., "ecological sustainable growth") 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?

57. The United States understands India to argue that it must implement DCRs "in order to secure compliance with a law." But if this is true, it must be equally true that withdrawal of the DCRs would result in non-compliance with some Indian law. As the United States has noted, however, India has in fact failed to explain how withdrawal of the DCRs would result in non-compliance with any law or regulation.[72]

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?

58. The United States generally refers the Panel to paragraphs 65-69 of the U.S. Response to Question 69(c) Following the Second Meeting.

59. As the United States has explained, Article XX(j) only justifies measures "essential" to acquire products "in short supply".[73] That is, by its terms, Article XX(j) does not justify measures taken before a short supply comes into actual existence. Measures geared towards ensuring resilience against supply-side disruptions that may occur in the *future* are outside the coverage of Article XX(j). 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.

60. With respect to Article XX(d), the United States has explained that none of the instruments cited by India require the imposition of DCRs, some of the instruments do not appear to demand any compliance in a legal sense and, others appear to discourage the use of

[72] *See* U.S. Responses to Questions from the Panel Following the Second Meeting, para. 64, *see also*, 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).")

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

discriminatory measures like domestic content requirements.[74] India has not 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).

71. At paragraph 42 of its second written submission, the United States argues that "[i]n the long term, any capacity added in India would become part of the global market, and in a short supply situation would tend to serve the highest paying purchaser, which would not necessarily be in India". At the second meeting, India stated that it has no plans to put any export restraints in place. In the absence of any export restraints, how would the DCRs ensure that solar power developers in India have continuous access to affordable solar cells and modules?

61. The United States observes that India's response to this question does not address how the DCRs ensure "continuous access to affordable solar cells and modules." In fact, the United States has noted, import restrictive measures like DCRs would tend to interfere with acquiring a product in purported short supply.[75]

72. Exhibit IND-9 indicates that India is dependent on imports for raw materials and consumables, such as wafer and polysilicon manufacturing (see pages 21 and 72-73). Does an increase in domestic manufacturing capacity of solar cells and modules contribute to reducing the risk of supply-side disruptions regardless of whether India remains dependent on imports for materials necessary to make those products?

62. The United States observes that India's willingness to rely on imports for sub-components of cells and modules is strikingly inconsistent with its stated concern with an overreliance on imports with respect to finished cells and modules.

73. With regard to the existence of alternative measures:

c. How does India respond to the United States' argument that India could "secure dedicated import sources by entering into long-term contracts with foreign suppliers", which would "do at least as much as DCRs to address any short-

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

[75] *See* Opening Statement of the United States at the First Substantive Meeting of the Panel, para. 45 ("As practical matter, it seems odd that a measure that discriminates against imports like DCRs could be viewed as "absolutely indispensable" to acquiring those same products in short supply. In most cases, such measures would tend to exacerbate the difficulties in acquiring that product. India has failed to demonstrate how the circumstances of its purported short supply could operate differently.).

supply situation that may arise in India and ensure resiliency in the face of supply shocks" in a WTO-consistent manner (United States' second written submission, paragraph 42)?

63. The concerns that India identifies with respect to long-term contracts – potential disruption in supply, fluctuating prices, and change in technology – are also presented by its proposal to expand its domestic industry. India has cited no reason to believe that domestic producers would be more likely than foreign suppliers to remain in business and up-to-date with technology.

64. India also asserts that long-term contracts are not a reasonable alternative because they are not currently a "standard market practice." However, India has cited nothing precluding it from innovating in the contractual mechanisms it uses to acquire solar cells and modules. Indeed, if volatility is as much a problem as India asserts, it would also be a concern for producers of solar cells and modules, and would motivate them to welcome long-term contracts. Therefore, long-term contracts remain an available alternative measures to attain India's stated objectives.